

**CONFIRMATION HEARINGS ON FEDERAL
APPOINTMENTS**

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SIXTH CONGRESS
SECOND SESSION
ON
CONFIRMATION OF APPOINTEES TO THE FEDERAL JUDICIARY

—————
FEBRUARY 22, MARCH 23, APRIL 27, AND MAY 10, 2000
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Part 2

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Serial No. J-106-33

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Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

73-031 CC

WASHINGTON : 2001

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**NOMINATIONS OF RANDOLPH D. MOSS (AS-
SISTANT ATTORNEY GENERAL) DEPART-
MENT OF JUSTICE; JULIO M. FUENTES AND
JAMES D. WHITTEMORE (U.S. DISTRICT
JUDGES)**

TUESDAY, FEBRUARY 22, 2000

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

The committee met, pursuant to notice, at 3:24 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter, Leahy, and Torricelli.

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

The CHAIRMAN. I apologize for being late here, but I was in a very important top-secret intelligence meeting, and I just couldn't finish up on time. But it was very important that I did what I was supposed to do there.

Today the committee is holding its first nominations hearing of the second session of the 106th Congress. We will hear from two judicial nominees—one circuit court nominee and one district court nominee—and one Justice Department nominee.

We will have three panels. The first panel will consist of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of Justice Department nominee Mr. Randolph Moss, and the third panel will consist of the two judicial nominees, Judge Julio Fuentes and Judge James Whittemore.

Now, before we turn to the panels, if the ranking member—well, excuse me. When the ranking member comes in, I will be happy to have him make any comments he cares to make.

Now, if the sponsors of the nominees will take their seats at the witness table, we will begin, and I apologize to you. It is just one of those very important intelligence meetings that I just couldn't leave at the time, so I apologize to you, Senator Mack. We will turn to you.

**STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM
THE STATE OF FLORIDA**

Senator MACK. Mr. Chairman and members of the committee, I am delighted to be here today to recommend James Whittemore for

confirmation, but before I discuss the distinguished career of Judge Whittemore, I would like to thank this committee once again for its responsiveness to the needs of the Florida judiciary. At this moment the State of Florida has seven vacancies in its Federal judicial system. Both Senator Graham and I are eager to work with the committee this session to confirm qualified candidates to fill these vacancies and ease the pressure on Florida courts.

At the present time, six of the seven vacant judgeships are in the Middle District of Florida, and, Mr. Chairman, it is an honor for me to recommend Judge James Whittemore for confirmation to serve in the Middle District.

Since 1990, Judge Whittemore has served as a circuit court judge for the Thirteenth Judicial Circuit in Hillsborough County, FL. Prior to becoming a circuit court judge, Judge Whittemore spent 12 years on the other side of the bench as a Federal public defender and as an attorney with his own civil and criminal practice.

Recently, Judge Whittemore was recognized for his impressive legal service. In 1998, Judge Whittemore was awarded the Outstanding Jurist Award by the Hillsborough County Bar Association Young Lawyers Division, and in 1999, he was again awarded the Outstanding Jurist of 1999, but this time the award came from the Florida Bar Association Young Lawyers Division.

The Florida Bar stated Whittemore had—and this is a quote now—“a reputation of excellence in judicial decisionmaking and exemplary commitment to the education and development of young lawyers in the Thirteenth Judicial Circuit and statewide.”

In addition to his career achievements, Judge Whittemore has taken time out of his busy schedule to give back to the legal community by serving on the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases and as chair of the Florida Bar Grievance Committee and as president of the William Glenn Terrell Inn of Court.

I have examined Judge Whittemore’s qualifications and find him to be a highly qualified nominee. As a result of his extensive experience in the courtroom, it is my belief that Judge Whittemore is well prepared to handle the challenges of a Federal district court judge. I believe that he is a candidate that both the Judiciary Committee and the full Senate should be proud to confirm.

And, again, Mr. Chairman, I express to you my appreciation for your and this committee’s sensitivity to the needs of the State of Florida.

The CHAIRMAN. Well, thank you, Senator Mack. We appreciate your coming, and sorry you had to wait for me. I certainly appreciate your good statement, and I am sure Judge Whittemore does as well.

Senator MACK. And I am sure that—Senator Graham was here a little bit earlier. He had some folks waiting in his office, and I am sure he will be back to make a statement.

The CHAIRMAN. If he isn’t, we will certainly put his statement in the record. Thanks so much.

Senator Torricelli.

**STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY**

Senator TORRICELLI. Mr. Chairman, I was going to make remarks with regard to both Mr. Moss and Judge Fuentes, if that was appropriate. I know Senator Sarbanes had hoped to be here with regard to Mr. Moss' nomination but was detained, so both speaking on behalf of myself and Senator Sarbanes, I wanted to make some comments with regard to his nomination.

Mr. Chairman, on November 9 of last year, the President nominated Randolph Moss to serve as Assistant Attorney General for the Office of Legal Counsel. Mr. Moss has served in the Office of Legal Counsel since February 1996—since March 1996 as Deputy Assistant Attorney General and since July 1998 as Acting Assistant Attorney General.

While at the Office of Legal Counsel, Mr. Moss has personally and in a supervisory capacity provided advice within the executive branch on a broad range of complex questions of constitutional and statutory law, issued formal legal opinions, reviewed Executive orders and attorney general orders for form and legality, and resolved interagency legal disputes.

From December 1989 until joining the Department of Justice, Mr. Moss practiced law at Wilmer, Cutler and Pickering. The principal areas of his practice included administrative law, complex civil litigation, antitrust and constitutional law. Mr. Moss became a partner of the firm in January 1994.

Mr. Moss graduated summa cum laude with departmental honors in philosophy from Hamilton College in Clinton, NY. He was elected Phi Beta Kappa, served as president of the Root-Jessup Public Affairs Council, and received the Patterson Prize for excellence in philosophy. He then entered Yale Law School, where he served as editor of the Yale Law Journal and as a Coker fellow-in-instruction. After graduating from Yale, Mr. Moss received a John M. Olin research fellowship and spent 3 months examining the history and theory of the common law forms of action at the Yale Law School Center for Studies in Law, Economics and Public Policy.

Subsequently, Mr. Moss served as a law clerk for then-U.S. District Judge Pierre Leval from December 1986 to December 1987, and for U.S. Supreme Court Justice John Paul Stevens from February 1988 to September 1989.

Mr. Moss was born in Springfield, OH, and currently lives in Bethesda, MD. He is married and has two children, ages 3 and 6.

Chairman, I am very proud to help introduce him to the committee today, again, not only for myself but for Senator Sarbanes, and I look forward to his continuing service in the Department of Justice in an outstanding career. I know the President is proud of this nomination, as I am sure are Mr. Holder and Ms. Reno.

The CHAIRMAN. Thank you, Senator Torricelli.

We will turn to the ranking member now.

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

Senator LEAHY. Mr. Chairman, I am delighted we are having this hearing. It is historic, the first one of this century—unless you

count the century as next year. But for those who are counting it for this year, it is the first one. I have looked forward to this hearing. I am very grateful, Mr. Chairman, you announced it back on February 10 at our first committee business meeting of the year.

We have an outstanding group of nominees before us, including the Federal judicial nominees and the nominee to head the Office of Legal Counsel at the Department of Justice.

What Senator Torricelli said was absolutely right. I have a long statement, but I know you want to get to the people here, and I will put my statement in the record.

I would hope, even though it is an election year, that we could move forward on some of these nominations. There are too many still pending. We do have a lot of areas where we need to have judicial vacancies filled. There are some places where judicial crises have been declared. And once these people have been nominated, they ought to know whether they are going to go forward or whether they are going to be held in limbo. So I would hope that the nominees before us today will go forward. I hope that they will be confirmed by this committee and by the Senate.

In any event, Mr. Chairman, I thank you for holding the hearing, and I will put my whole statement in the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

This afternoon the Judiciary Committee holds its first confirmation hearing for judicial nominees this year and the first confirmation hearing this century. I have looked forward to this hearing for some time and was grateful when the Chairman announced it back on February 10 at our first Committee business meeting of the year. We have an outstanding group of nominees who are with us today, including federal judicial nominees and the nominee to head the Office of Legal Counsel at the Department of Justice.

In spite of our efforts in 1998 in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are, again, topping 75 and the vacancies gap is, again, moving in the wrong direction. We have more federal judicial vacancies extending longer and affecting more people.

As the Chairman has noted in his comments on the constitutional responsibility of this Committee and the Senate to act upon judicial nominations sent to us by the President, our "primary interest must be what is best for the country and the Judicial Branch." Chairman Hatch has noted that "we cannot afford to lose sight of the fact that for each nomination statistic, there is a man or woman whose career has been placed on hold and whose reputation may suffer unwarranted and unintended detriment if we do not perform our duty." I have often said that if this were up to Senator Hatch and me to work out, we could make a good deal of progress very quickly.

The country is now faced with 78 current vacancies and we know of seven more on the horizon. Earlier this month the Judicial Conference renewed its request that Congress authorize an additional 59 judgeships and convert 10 existing temporary judgeships to permanent positions. Taken together these figures provide a truer picture of the vacancies that plague the federal courts around the country. There are only 24 weeks left in session this year for the Senate for hearings, Committee consideration and Senate consideration, debate and votes on these nominees and those that continue to be received. To date, the only actions taken by the Senate have been overwhelming votes in favor of two of the seven nominees held over from last year.

Two years ago, Chief Justice William Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." Bureaucratic imperatives driven by the pressures of a burgeoning workload seem to be replacing the judicial deliberation needed for the fair administration of justice. That is not the way to continue the high quality of decision-making for which our federal courts are admired or to engender confidence in our justice system.

Especially troubling is the circuit emergency that was declared four months ago by the Chief Judge of the Court of Appeals for the Fifth Circuit. I recall when the Second Circuit had such an emergency. Along with the other Senators representing States from the Circuit, I worked hard to fill the five vacancies then plaguing my Circuit. The situation in the Fifth Circuit is not one that we should tolerate either. I wish that the Senate had confronted it by expediting consideration of the nominations of Enrique Moreno and Alston Johnson last year.

The Senate is back to a pace of confirming one judge a month. That is not acceptable, does not serve the interests of justice and does not fulfil our constitutional responsibilities. For the last several years I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

Judge Julio Fuentes is one such nominee. By all accounts, he is a qualified nominee with judicial experience in New Jersey. He has the support of his home state Senators. Still, his hearing has been delayed a year. I will work to try to have the Senate vote upon this nomination without further delay this year. I look forward to the Committee expeditiously completing its consideration of all the nominations included in today's hearing.

During Republican control of the Senate, it has taken more than four years to get to a Senate vote on the nomination of Judge Richard Paez to the Ninth Circuit. It took almost a year and one-half to finally get a vote on the nominations of Judge Sonia Sotomayor to the Second Circuit, a nominee reportedly held up because some feared that she might be nominated to the Supreme Court. Jorge Rangel was never accorded a hearing and Enrique Moreno awaits his.

What progress we started making in 1998 has been lost, and the Senate is again failing even to keep up with normal attrition. Far from closing the vacancies gap, the number of current vacancies has grown by more than 50 percent from when Congress recessed in 1998.

I have challenged the Senate to regain the pace it met in 1998 when the Committee held 13 hearings and the Senate confirmed 65 judges. That would still be one fewer than the number of judges confirmed by a Democratic Senate majority in the last year of the Bush administration in 1992. In fact, in the last two years of the Bush administration, a Democratic Senate majority with a Republican President confirmed 124 judges. We now have a Democratic President with a Republican-controlled Senate, and it would take 90 confirmations this year for the Senate to equal that total.

Progress in the reduction of judicial vacancies was reversed in 1996, the last Presidential election year, when Congress adjourned leaving 64 vacancies, and in 1997, when Congress adjourned leaving 80 vacancies. No one was happier than I that the Senate was able to make some head way in 1998 toward reducing the vacancies. I have praised Senator Hatch for his effort. Unfortunately, vacancies are now back up to 78 and a vacancy rate of over 9 percent for all federal courts and almost 15 percent for the courts of appeals.

There is a myth that judges are not traditionally confirmed in Presidential election years. That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed 42 Reagan nominees, and, 66 in 1992 when a Democratic majority in the Senate confirmed 66 Bush nominees. The 17 confirmations in 1996 were an anomaly that should not be repeated. That has led to years of slower and lower confirmations and heavy backlogs in many federal courts.

Qualified nominees like Judge Julio Fuentes, Judge Richard Paez and Marsha Berzon deserve to be treated with dignity and dispatch—not delayed for years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. All of this despite the fact that, by all objective accounts—including the recent studies cited in this week's *National Journal*—the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

Our independent federal judiciary sets us apart from virtually all others in the world. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence.

We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

I look forward to Senate action on the long-delayed nominations of Judge Richard Paez, Marsha Berzon and Tim Dyk. I continue to urge the Senate to meet our responsibilities to all nominees, including women and minorities, and look forward to prompt and favorable action on the nominations of Judge Julio Fuentes to the Third Circuit, Judge James Wynn, Jr. to the Fourth Circuit, Enrique Moreno to the Fifth Circuit, and Kathleen McCree Lewis to the Sixth Circuit.

Working together the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts around the country. I urge all Senators to join us to make the federal administration of justice a top priority for the Senate this year.

The CHAIRMAN. Well, thank you, Senator.

Senator Graham, I apologize for being so late to get here today. I was in the Intelligence Committee and had to finish up what I was doing there. We will turn to you at this time.

**STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM
THE STATE OF FLORIDA**

Senator GRAHAM. Thank you very much, Mr. Chairman, Senator Leahy, Senator Torricelli. I appreciate this opportunity with my colleague, Senator Mack, to present an outstanding nominee for the Middle District of Florida, Federal district judge.

Mr. Chairman, I want, before proceeding, to thank you for scheduling this hearing and for this committee's thorough review of the judicial nomination. We are particularly appreciative that Judge Whittemore is on your first panel of confirmation hearings.

Before I proceed with some comments on Judge Whittemore, let me just take a moment about the Middle District of Florida. Senator Leahy just used the term "crisis" to describe some of our judicial circuits. I believe that is an appropriate term to describe the Middle District of Florida, one of the highest-caseload-per-judge districts in the Nation.

This committee recognized that crisis in 1999 when it authorized four additional positions for the Middle District of Florida. Senator Mack and I hope that we will soon be before you with recommendations and Presidential nominees for those newly created positions. The position that we are here today for is a vacancy among the current numbers of the Middle District of Florida. And so as you have been so understanding in the past, I would urge your continued appreciation of the severity of the caseload in the Middle District of Florida through the early attention to this nomination.

I am very pleased with those introductory remarks to introduce the nominee for the Middle District of Florida, the Honorable James David Whittemore. Mr. Chairman, with your permission, I would like to recognize and introduce members of Judge Whittemore's family who have traveled from Florida to be here today.

The judge's wife is Kay Whittemore. Kay, would you please stand? Incidentally, Kay is a practicing pharmacist, so maybe with some of our focus of attention on prescription medication, she might be of assistance in that as well.

The CHAIRMAN. Good to have you here.

Senator GRAHAM. She and the judge have been married for 22 years, and they are the parents of three children. Two of those children are with us today: Chris, who is a sophomore at King High School in Tampa, which happens to be the same high school that

Judge Whittemore attended a generation ago; and their 8-year-old daughter Kelly.

Jason, who is a freshman at the University of Florida, could not be here today because he is taking examinations.

We are also pleased to be joined by Judge Whittemore's brothers, Kent and Don, if they would please stand.

And last, but not least, we are honored to have Judge Whittemore's parents, James and Dorothy Whittemore, who are also with us today.

For Senator Thurmond's benefit, I would point out that Mr. and Mrs. Whittemore brought their son into the world in Walterboro, SC, so he is distinguished both in his qualifications as well as his roots, if you would pass that on to Senator Thurmond.

The CHAIRMAN. I will. I am not going to ask him where he stands on the flag, though. [Laughter.]

Senator GRAHAM. No comment.

The CHAIRMAN. Maybe I will.

Senator GRAHAM. Mr. Chairman, this nominee is an experienced, a respected jurist, who has been on the bench for a decade, and as a trial lawyer in our State court system prior to that. He was recommended by the nonpolitical screening committee comprised of a cross-section of lawyers and laypersons. Senator Mack and I offer our bipartisan support for this nomination and urge prompt review by this committee.

Judge Whittemore has excellent qualifications for service on the Federal bench: Solid education, decades of experience in the legal profession as a private practitioner, assistant public defender, and trial judge, and with the respect of his profession and the community.

Judge Whittemore received his law degree from Stetson University College of Law and his undergraduate degree from the University of Florida. Since 1990, Judge Whittemore has been a circuit court judge in Florida's Thirteenth Circuit in Hillsborough County, of which Tampa is the county seat.

Mr. Chairman, Judge Whittemore was just named Florida's Outstanding Jurist for 1999 by the Florida Bar's Young Lawyers Division in recognition of his commitment to the education of young lawyers.

For all those who believe that recognition by our peers is indeed a high form of flattery, I would point out that Judge Whittemore was nominated for this award by one of his judicial colleagues.

I note that Judge Whittemore has achieved something that at times is elusive for politicians: The editorial support of his hometown newspaper. I respectfully request that I be permitted to include in the record an editorial from the Tampa Tribune of June 19, 1999, entitled "A Judge Who Deserves a Promotion."

The CHAIRMAN. Without objection.

[The editorial follows:]



A judge who deserves a promotion

Speaking of the Bar convention, one of Hillsborough County's best judges will receive a well-deserved award there. Circuit Judge James Whittemore has been named the state's outstanding judge by the Bar's Young Lawyers Division.

Whittemore was nominated for his "reputation of excellence in judicial decision making and exemplary commitment to the education and development of young lawyers." He deserves the honor. He is a judge who should be on a higher court.

But recently his name was not one of six forwarded by the circuit's Judicial Nominating

Commission to Gov. Bush, who filled a seat on the appellate bench. This failure on the part of the commission is a good example of why proponents of judicial elections continue to garner support. The nominating commissions, made up of people who know the applicants, are supposed to be apolitical. They are not.

Fortunately, the federal judicial nominating commission takes its job more seriously, and Whittemore is one of the individuals who will be interviewed for selection as a U.S. trial judge. That's the job of a lifetime.

Senator GRAHAM. Senator Mack and I concur and thank you for your consideration of this nomination. Mr. Chairman, this nomination will fill a vacancy in one of the biggest, busiest judicial circuits in the country. We look forward to continuing to assist this committee in any way we can to complete the review of this worthy nominee.

The CHAIRMAN. Thank you, Senator Graham. We appreciate it.

We will turn to Senator Lautenberg now. I think it is great praise that you and Senator Mack have been here for Judge Whittemore. I think that will go a long way towards moving this through. So we appreciate you being here, and we also appreciate Senators Lautenberg and Torricelli as well.

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

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I am grateful to you for giving us the opportunity to speak in support of an outstanding judicial nominee, Judge Julio Fuentes. He is here with his family, and it is a privilege to be able to present someone to the committee who has such outstanding credentials. Because not only does Judge Fuentes have the professional capacity, Mr. Chairman, the experience that he brings to this job, but he also has a personal story of what America is all about. He sets a wonderful, wonderful example for those who look at our society and see that you can make progress if you have the ability and are willing to expend the effort.

But, Mr. Chairman, I want to take a moment to thank you personally. We have had many private discussions. I consider us good friends, and I commend you for your hard work in moving nominees to New Jersey's Federal courts through this committee and for supporting our nominees on the Senate floor.

The CHAIRMAN. Thank you.

Senator LAUTENBERG. You were instrumental in helping in so many ways, Mr. Chairman, for instance, the confirmation of Mary Ann Trump Barry to the third circuit and Faith Hochberg and Joel Pisano to the district court for New Jersey.

When Judge Fuentes is confirmed—and I am hopeful and confident that he will be—all of New Jersey's seats in the Federal judiciary will have been filled. That is a wonderful thing for us because of the enormous backlog. And it is extremely important that our judiciary be at full strength, and I am sure all members of the committee are aware of this, Mr. Chairman.

The CHAIRMAN. That is a tribute to you and Senator Torricelli, it seems to me.

Senator LAUTENBERG. Well, I thank you, Mr. Chairman. We have worked hard and have presented, I think, excellent candidates for the court.

Our courts can't fulfill their constitutional responsibility to dispense justice fairly and efficiently if there aren't enough judges to hear the cases. So, again, I thank you for your help and for your support of our nominees to the Federal bench. And today the committee has before it an exceptional nominee from New Jersey, Judge Fuentes.

In many ways, as I noted earlier, his life demonstrates the promise of America, the idea that anyone committed to getting an education and working hard can build a distinguished career. Judge Fuentes was not born to wealth or privilege. He was raised by a single parent. His mother worked hard as a nurse. But he pursued his education diligently, earning a college degree while serving his country in the Army's special forces.

Eventually, he earned not only a law degree, but also two master's degrees. And after completing law school, Judge Fuentes began building a successful legal practice, honing his skills as an associate with a New Jersey law firm in Jersey City. He later established his own firm, and he handled a wide range of criminal and civil matters.

In 1978, he was appointed to a judgeship on the Newark Municipal Court, where he served until his appointment to the New Jersey Superior Court in 1987. And as a superior court judge, he presided over criminal cases and a wide range of civil disputes, including product liability, environmental suits, and property claims. He has ruled on a number of Federal and State constitutional issues.

In addition to his courtroom duties, Judge Fuentes has helped address important issues facing the New Jersey courts. He served on two New Jersey Supreme Court task forces, one on drugs in the courts and the other on minorities in the legal system. And he has also volunteered his time to help members of the community. He has mentored many Latino youths, and he has received several awards for his public service.

Because of his dedication and commitment to others, Judge Fuentes is held in exceptionally high esteem by his judicial colleagues, the lawyers who appear before him, as well as the people in New Jersey. And those who know him well describe him as bright and dedicated and even-tempered, but he is also a man with humility. And I hope I have not embarrassed him with these remarks.

In short, I am confident that Judge Fuentes' depth of experience, legal knowledge, compassion, and temperament will make him an exceptional Federal judge. And I thank you, Mr. Chairman, once again for your fairness in dealing with us and giving Judge Fuentes this hearing. And I hope that you and all the members of the committee will support his nomination.

The CHAIRMAN. Well, thank you so much, Senator Lautenberg. It is high praise for both you and Senator Torricelli to be strongly behind Judge Fuentes, and we will look forward to his hearing in just a few minutes. Thank you for being here. We appreciate it.

Well, we are pleased to have with us today Mr. Randolph D. Moss, of Maryland, who has been nominated for and currently is acting as the Assistant United States Attorney General for the Office of Legal Counsel.

Mr. Moss, if you will come to the witness table, raise your right hand, I will swear you in. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MOSS. I do.

The CHAIRMAN. Thank you. Do you have a statement you would care to make, Mr. Moss?

STATEMENT OF RANDOLPH D. MOSS, OF MARYLAND, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. MOSS. I do. Thank you, Mr. Chairman.

The CHAIRMAN. Please introduce your family, too.

Mr. MOSS. Thank you, Mr. Chairman. I have with me today my wife, Elizabeth Collery, with my son, William, in her lap. William's highlight of the day, if not of the entire month, was getting a chance to visit with the Capitol Police before the hearing.

The CHAIRMAN. I see. He looks like he had an interesting visit there. He is sound asleep. [Laughter.]

Mr. MOSS. He has the patch, which I am sure he will carry around for some time.

This is my daughter, Emily Moss.

The CHAIRMAN. Emily, you are bright and wide awake, I tell you.

Mr. MOSS. I also have my parents, Howard Moss and Adrienne Moss.

The CHAIRMAN. Happy to welcome you here.

Mr. MOSS. My brother, Eric Moss, and his wife, Maddy.

The CHAIRMAN. Good to have you with us.

Mr. MOSS. My brother-in-law, Donald Berger, and my niece, Natalie Berger, and nephew, Jack Berger.

Mr. MOSS. My sister is with the youngest in that family at a conference in Florida today and couldn't be here.

In addition, my mother-in-law is here, Helen Collery, who is in from New York.

The CHAIRMAN. Welcome.

Mr. MOSS. And my father's brother, Robert Moss, is in from Massachusetts as well.

The CHAIRMAN. We are happy to welcome all of you here, and we look forward to hearing your testimony at this time.

Mr. MOSS. Thank you, Mr. Chairman, Senator Torricelli. I am deeply honored to appear before you today as the nominee to be the Assistant Attorney General for the Office of Legal Counsel. I would like to first thank you, Mr. Chairman, and the committee for holding this hearing to consider my nomination. I would also like to thank the President for nominating me and the Attorney General for her support, and I would like to express my gratitude to my family for their unfailing encouragement and devotion.

Mr. Chairman, when the first Congress established the Office of the Attorney General in 1789, it assigned to that office two duties: To represent the interests of the United States in litigation before the Supreme Court, and to provide legal advice within the executive branch.

In recent times, the responsibility to provide legal advice within the executive branch has been performed on a day-to-day basis by the Office of Legal Counsel. It is the charge of this small office of fewer than 25 lawyers to assist the Attorney General in performing her legal duty to provide to the President and the heads of the executive branch agencies advice and opinions on questions of law.

The former Assistant Attorneys General for the Office of Legal Counsel have included many public servants of great distinction. Indeed, it is humbling to me to be nominated to serve as the head of an office that has been led in the past by such distinguished law-

yers as Chief Justice William Rehnquist, Justice Antonin Scalia, and former Attorneys General Nicholas Katzenbach and William Barr.

They and the other distinguished attorneys who have headed the Office of Legal Counsel have established and maintained an esteemed tradition of providing candid, objective legal advice without regard for politics or policy. They have established and maintained a tradition of favoring the long-term interests of the United States, of the executive branch, and, most importantly, the Constitution over the immediate interests of the day. And they have established and maintained a tradition of excellence epitomized by thorough, careful, and balanced legal reasoning.

These traditions are profoundly important to Government. As Attorney General Griffin Bell observed over 20 years ago, "In this complex society, the need for sound legal advice in advance of Government action has become particularly acute."

That observation is, if anything, even more true today, which is why it is essential to our system that the Office of Legal Counsel approach the law with no less reverence than the courts, that we do our best each and every day to interpret and apply the law fairly and correctly, and that we carefully distinguish between the best view of the law and what might merely be a colorable legal argument.

I can assure you that, if confirmed by the Senate, I will do everything in my power to continue the esteemed tradition of the Office of Legal Counsel, to apply the law faithfully and fairly, and provide advice that I believe embodies the very best view of the law.

Mr. Chairman, it has been my privilege to have spent the past 4 years in the Office of Legal Counsel. I cannot imagine a job that affords any greater personal and professional satisfaction. That satisfaction comes from working with a remarkable group of talented and committed lawyers who share a common respect for the law and our legal institutions and an unwavering dedication to getting the answer right.

There have been times when the job has been extremely demanding, but in the end of even the hardest day, there has always been the reward of knowing that you have done your absolute best to do the right thing.

I am particularly honored to be before this committee today because I believe the Office of Legal Counsel stands for a devotion and fidelity to the law, and I can think of no higher calling for a lawyer.

I thank you for holding this hearing, and I would be happy to answer any questions the committee may have.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Well, thank you, Mr. Moss. You know, the Office of Legal Counsel assists the Attorney General in carrying out her responsibility to give advice and opinion upon questions of law when required to do so by the President of the United States, a statutory duty that the Department has had since the enactment of the first Judiciary Act of 1789.

As part of the executive branch, OLC serves the President, but functioning as outside counsel, it is the obligation of the office to

give the President detached, objective advice even if what turns out to be the best legal answer is not what the President was hoping to hear.

Now, since you have been Acting Assistant Attorney General, have you insulated your office from the political pressures of the White House?

Mr. MOSS. I believe so, Mr. Chairman. I believe that it is the highest calling of the Office of Legal Counsel. If we do one thing, that one thing has to be ensuring that our judgments are made simply on the best view of the law. They are not made for any political reason and they are not made simply to achieve a policy goal that people want to achieve, but because we think it is the best view. And that has been the tradition of the Office of Legal Counsel for many, many years, and if confirmed by the Senate, what I would hope most is that people would look back and conclude that I continued that tradition as well.

The CHAIRMAN. What do you consider to be the proper balance between offering legal advice to the Attorney General, that is, stating what you believe the law to be, and advancing a particular policy position to the Attorney General?

Mr. MOSS. Well, I think in the end our ultimate responsibility, our responsibility to the country, to the Constitution, and to the Attorney General, is to provide what we think is the best view of the law. I think that is what the Office of Legal Counsel exists for, and I think that is why we are there.

I think there are times in which we will look at a difficult legal question and we will come to the conclusion that a proposed approach to a policy objective simply is not legally available based on our best interpretation of the law. And when that happens, we do and should say, No, you can't do it that way.

I do think, however, as lawyers for the Government, we have an obligation, if asked, to think about whether there is a legally permissible way of achieving a policy goal.

The CHAIRMAN. Mr. Moss, let us assume for a moment that you advised the President that a proposed course of conduct would be unconstitutional. What would you do if the President disregarded your advice and proceeded with the type of conduct which you had finally advised him would be unconstitutional? What would you do?

Mr. MOSS. Well, if I were to conclude that the President was simply ignoring legal advice and acting in a fashion that I believed was unconstitutional where we advised that something shouldn't take place, I think the proper course would be for me to resign.

I think there are occasions in which lawyers in good faith can disagree over a legal question, and I don't want to foreclose the possibility that either the Attorney General or the President, who has the ultimate responsibility, could reach a different legal conclusion.

If they did reach a different legal conclusion and were not simply ignoring our advice, I think I then would have to examine and consider whether that different legal conclusion represented a lack of faith in my ability to do my job, and if I reached that conclusion, I would, I think, have to resign as well.

The CHAIRMAN. The Supreme Court through a process of so-called selective incorporation has applied most if not all of the pro-

visions of the Bill of Rights against the States. Thus, for instance, the first amendment, which originally was intended to apply only to the Federal Government, has been applied to the States, as you know.

The second amendment, however, which protects the rights of law-abiding citizens to own firearms in this country, has not.

Now, do you believe that the second amendment ought to be applied to the States?

Mr. MOSS. Mr. Chairman, that is not a question that I have carefully researched or analyzed. Someone did recently tell me that they thought that there was evidence in the debates surrounding the ratification of the civil rights amendments, that there was an intent to, in fact, incorporate and apply the second amendment to the States. But I have not independently examined that question.

The CHAIRMAN. Well, if most of the other provisions of the Bill of Rights apply to the States, it seems natural to ask why shouldn't the second amendment?

Let me see if I can put it a different way. On what principled basis would it be appropriate to apply almost all of the other provisions of the Bill of Rights against the States but not the second amendment?

Mr. MOSS. Mr. Chairman, as I sit here today, I cannot articulate such a rationale, and I have no reason to believe that there is such a rationale. I just simply am saying that it—I think any legal question I am reluctant to answer without having carefully studied it.

The CHAIRMAN. Fair enough. When you were in law school, you authored a student note which criticized the Reagan administration's practice of obtaining consent decrees in school desegregation cases. In the note, you contend that the Reagan Justice Department, by obtaining consent decrees in desegregation cases, which you argue precluded participation in the suit by affected parents and students, the Reagan administration by obtaining these consent decrees purposefully sought "weaker" remedies for constitutional violations by school districts than were "legally obtainable."

In the note, you contend that the consent-decree settlements obtained by the Reagan Justice Department were "weak" because they did not "set integrative goals mandating that the school districts achieve specific levels of desegregation."

Now, for the sake of the record, what did you mean by "integrative goals mandating * * * specific levels of desegregation"? Did you mean quotas? Is there a difference between goals and quotas? And if so, please tell me.

Mr. MOSS. Mr. Chairman, I did not intend to suggest either a goal or a quota. In fact, in the note, one of the things I discuss is the fact that the Supreme Court has never been—certainly at the time I wrote the note had not been particularly clear in defining what the ultimate goal of desegregation is. What I said and I thought the best articulation of what the goal is, is that at the end of the day, where there has been a history of de jure segregation, of purposeful segregation, the goal at the end of the day is to ensure that you no longer have a white school and a black school but you just have schools. I didn't intend to suggest that that was in any means addressed to quotas or goals or anything of the sort but,

rather, just to achieving the eradication of racial discrimination in the school system.

The CHAIRMAN. OK; let me ask you a couple of questions about an office within the Justice Department, the Office of the Pardon Attorney. As you know, the Office of the Pardon Attorney was created by Congress and is funded by Congress. In general, Congress has authority to provide some guidance to the agencies it funds about how the money is spent, and I think you would agree that there is some level of guidance that Congress can constitutionally exercise in relation to the pardon attorney.

My question to you really is this: If Congress has the authority to provide guidance and exercise oversight as to how funds are spent, where is the line between congressional guidance and oversight of the pardon attorney on the one hand and then unconstitutional intrusion into the affairs of the executive branch on the other hand?

Mr. MOSS. Mr. Chairman, that is a very difficult question. It is a question on which actually I know members of the staff in the Office of Legal Counsel have been working and consulting with your staff.

What I would say is that the Office of the Pardon Attorney stands in a fairly unique position in the executive branch because it is one of the very few offices that discharges what is purely a Presidential prerogative. The Framers did not give many exclusive prerogatives to the President. There is the appointment prerogative, the prerogative to receive Ambassadors, for example, and the pardon power is one of the few enumerated powers. And in that respect, it is my belief that Congress cannot regulate the pardon attorney to the extent the pardon attorney is acting on the President's behalf in exercising that exclusive authority.

I do believe, however, Mr. Chairman, that you are quite correct in observing that it is the Congress that funds the Office of the Pardon Attorney and that there is some role for the Congress in ensuring that those funds are used in an appropriate fashion and for Congress to make judgments regarding how best to fund that office.

The CHAIRMAN. OK; well, thank you.

Senator Torricelli, do you have any questions?

QUESTIONING BY SENATOR TORRICELLI

Senator TORRICELLI. Mr. Moss, I only want to return to try to help you with the second amendment question.

Mr. MOSS. Thank you.

Senator TORRICELLI. Since the second amendment is the only part of the Bill of Rights that does not restrict Federal power over the people but seems to restrict Federal power over the States, it seems to me somewhat unique. By Court interpretation, the Supreme Court, the second amendment's sole purpose seems to be to assure the rights of the State government to a well-ordered militia. Therefore, it would make no sense by selective incorporation to hold that amendment as applying to the States. It would be the regulation of the State by the State. Its only application would be in governing the relationship between the Federal Government and the State government.

I am not going to ask you to comment on that or expand upon it because I would like to see you get confirmed today. [Laughter.]

But I think for future reference, I think that is a helpful guide on the uniqueness of the second amendment.

The CHAIRMAN. Don't pay too much attention to that. [Laughter.] We have heard that before.

Mr. MOSS. I know when to maintain my silence.

Senator TORRICELLI. This is a good chance to use the fifth amendment. [Laughter.]

Mr. Moss, there is this question now about the use of the death penalty by States and the Federal Government, and I have heard the Attorney General has raised this question. Given the use of DNA evidence of late, even some of us who have been strong supporters of the death penalty through the years have to admit to some concern.

Governor Ryan of Illinois noted I think seven cases in Illinois of people on death row who were found by DNA evidence to have been innocent.

Give me your reaction to the current Federal death penalty statutes as written to the degree that you believe they require a level of review, of proof, of fairness in the incorporation of evidence under Justice Department procedures to assure that the Federal Government is not going to find itself in the position of the State of Illinois with regard to innocent people and possible execution.

Mr. MOSS. Senator Torricelli, I don't regard myself to be an expert on the Federal death penalty. We are very rarely questioned—or questions are very rarely sent to the Office of Legal Counsel regarding the death penalty, although it does happen on rare occasion.

It is my sense, though, without having gone back to review the Federal statutes recently, that they were crafted in a thoughtful and careful way and that the Congress in crafting those statutes was concerned about ensuring the fairness of the process, ensuring that there was appropriate counsel, appropriately skilled counsel to represent individuals in death penalty cases, and that to assure that the Federal death penalty system was as fair a one as it could be.

Senator TORRICELLI. Do you believe today that under Federal procedures: No. 1, access to competent counsel on a timely basis is sufficiently assured; and, No. 2, the ability to present scientific evidence of the best kind now available is also assured. Do the problems that we are witnessing in State government do not concern you with respect to the Federal death penalty?

Mr. MOSS. Senator Torricelli, I think that I may be violating my own rule that I set forth to the chairman a moment ago in that I think that I need to be careful about opining on any legal question without studying it. And I have not gone back and looked at the Federal death penalty statutes. I would be happy to go back and look at that, and I am confident that that is the sort of thing that others in the Department of Justice—

Senator TORRICELLI. When the Attorney General reaches her judgment, as she recently announced, about her own confidence in the Federal death penalty, is she simply then getting advice from members of her own personal staff?

Mr. MOSS. Senator Torricelli, it is my understanding that there is one—there is an advisory committee within the Justice Department on the death penalty that is staffed from various offices. It is my understanding that the Deputy Attorney General's Office is involved in the administration of the death penalty, and that the Criminal Division is also involved in that process. And the Office of Legal Counsel is not on a day-to-day basis involved in those processes, although we would be available to answer a discrete legal question if presented to us.

Senator TORRICELLI. Mr. Chairman, I have no further questions.

The CHAIRMAN. Well, thank you. Just one other question on the pardon attorney. Can Congress require the pardon attorney to notify the victims when the President grants clemency or the President intends to grant clemency?

Mr. MOSS. I think, Mr. Chairman, that after the President has made a decision to grant clemency, that my concern and the concern that the Office of Legal Counsel in the Justice Department has articulated, it is substantially reduced, the concern about interfering with that executive prerogative—

The CHAIRMAN. If you say you can't, why not? Because Congress passed the Victims' Rights Act, which requires notification of victims. That is constitutional, isn't it?

Mr. MOSS. Mr. Chairman, I actually do believe that—I don't believe that the pardon power would preclude the Congress from passing a law that required notification to victims after the President had made a decision to grant clemency. I think there may be some questions in some discrete areas regarding the source of the power of the Congress to do so. But, in general, I think that if someone is about to be released from prison, that Congress could require that the victim of the crime that that individual committed be notified that that person is about to be released from prison.

The CHAIRMAN. OK; well, thank you. I have looked at your record, and it is a very fine record. And let's see what we can do to move you along.

I appreciate your appearing here today, and I appreciate having your family with you, and these two children, they have been pretty good kids, is all I can say. [Laughter.]

That is great.

Mr. MOSS. I think so as well. Thank you.

The CHAIRMAN. Thanks so much. Appreciate it.

[The biographical information follows:]

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I. BIOGRAPHICAL INFORMATION (PUBLIC)**1. Full name (include any former names used.)**

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 Raymond Daniel Moss (until 1977)

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

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 Work: U.S. Department of Justice
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 Washington, D.C. 20530

3. Date and place of birth.

April 27, 1961
 Springfield, Ohio

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

Married: Elizabeth Dorsey Coltery
 Occupation: Attorney
 Employer: U.S. Department of Justice
 610 D Street, N.W.
 Washington, D.C. 20530

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

College: Hamilton College
 Clinton, New York
 (September 1979 - May 1983)
 AB Degree (awarded May 1983)

Law School: Yale Law School
 New Haven, CT
 (September 1983 - June 1986)
 JD Degree (awarded June 1986)

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

U.S. Department of Justice
Acting Assistant Attorney General (July 1998 to present)
Deputy Assistant Attorney General (March 1996 to July 1998)
Special Counsel to the Attorney General (February 1996 to March 1996)

Wilmer, Cutler & Pickering
Partner (January 1994 to February 1996)
Associate (December 1989 to December 1993)

Justice John Paul Stevens, Associate Justice, U.S. Supreme Court
Law Clerk (February 1988 to September 1989)

Judge Pierre N. Leval, U.S. District Court Judge, Southern District of New York
Law Clerk (December 1986 to December 1987)

Yale Law School Center for Studies in Law, Economics and Public Policy
John M. Olin Fellow (September 1986 to November 1986)

Arnold & Porter
Summer Associate (Summer 1985)

Miller & Chevalier
Summer Associate (Summer 1984)

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

Yale Law School Center for Studies in Law, Economics and Public Policy
John M. Olin Fellow

Yale Law School
Coker Fellow
Editor, Yale Law Journal

Hamilton College
Phi Beta Kappa
Summa Cum Laude
Departmental Honors in Philosophy
Patterson Prize for excellence in Philosophy

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 the District of Columbia (present)
American Bar Association (former)

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.

Bar Association of the District of Columbia
WETA
Discovery Creek Children's Museum
Mohican Hills Swimming Pool
Brookmont Civic League (constitution and by-laws attached)

I am unaware of any lobbying activity engaged in by these 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 Court of Appeals (May 1987)
United States District Court, Southern District of New York (July 1988)
District of Columbia Court of Appeals (March 1989)
United States District Court, District of Columbia (August 1990)
United States Court of Appeals, Ninth Circuit (March 1992)
United States Court of Appeals, Tenth Circuit (August 1993)
United States District Court, Maryland (January 1994)
United States Supreme Court (February 1994)
United States Court of Appeals, Fifth Circuit (September 1994)

12. **Public 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.

Panel Discussion on the 1998 Supreme Court Term, Senate Judiciary Staff, July 30, 1999 (notes attached)

Testimony Concerning S. 1214, The Federalism Accountability Act of 1999, Committee on Governmental Affairs, United States Senate, July 14, 1999 (attached)

Testimony Concerning S.J. Res. 14, A Proposed Flag Desecration Constitutional Amendment, Committee on the Judiciary, United States Senate, April 20, 1999 (attached)

Testimony Concerning S. 1668, Whistleblower Protections for Classified Disclosures, Permanent Select Committee on Intelligence, United States House of Representatives, May 20, 1998 (attached)

Testimony Concerning the Constitutionality of Proposed Limitations on the Tobacco Industry, Committee on the Judiciary, United States Senate (with David W. Ogden, Counselor to the Attorney General), May 13, 1998 (attached)

Testimony Concerning Whistleblower Protections for Classified Disclosures, Select Committee on Intelligence, United States Senate, February 11, 1998 (attached)

Note, Participation and Department of Justice School Desegregation Consent Decrees, 95 Yale Law Journal 1811 (1986) (attached)

Letter to the Editor, New York Times (November 2, 1986) (regarding oral argument in McCleskey v. Kemp) (attached)

Why the United States Has Failed to Evolve: An Analysis of Current Western Interest Intermediation Systems, 6 Hamilton Social Science Review 24 (1983) (attached)

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

I am in good health. My last physical examination occurred on December 16, 1996.

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

Special Assistant to the Attorney General, Office of Legal Counsel, U.S. Department of

Justice (February 1996 to March 1996) (appointed)

Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (March 1996 to July 1998) (appointed)

Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (July 1998 to present) (appointed)

15. **Legal Career:**

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

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

Law Clerk for the Honorable Pierre N. Leval, U.S. District Court Judge, Southern District of New York (December 1986 to December 1987)

Law Clerk for the Honorable John Paul Stevens, Associate Justice, U.S. Supreme Court (February 1988 to September 1989)

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;

After completing my clerkship with Justice Stevens, I joined the law firm of Wilmer, Cutler & Pickering (2445 M Street, N.W., Washington, D.C. 20037). I worked as an associate with the firm from December 1989 to December 1993. In January 1994, I became a partner in the firm. In February 1996, I left Wilmer, Cutler & Pickering to join the Office of Legal Counsel at the Department of Justice (950 Pennsylvania Avenue, N.W., Washington, D.C. 20530). From February to March 1996, I served as a Special Assistant to the Attorney General in the Office of Legal Counsel. In March 1996, I became a Deputy Assistant Attorney General in the Office of Legal Counsel, and, in July 1998, I became the Acting Assistant Attorney General for the Office of Legal Counsel.

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.

During the period I worked at Wilmer, Cutler & Pickering (December 1989 to February 1996), I was a general litigator with a wide range of clients and types of cases. The client to which I devoted the most time was the Trans-Alaska Pipeline Liability Fund, a non-profit corporate entity established by act of Congress to pay up to \$100 million in claims for damages resulting from defined oil spills. I also did substantial work for Capital Cities/ABC, Inc., ARA Living Centers, and a number of other corporations, non-profits, and individuals. Principal areas of my practice, while at Wilmer, Cutler & Pickering, included administrative law, complex civil litigation, antitrust, and constitutional law.

Since joining the Office of Legal Counsel at the Department of Justice in February 1996, the focus of my practice has changed. While at the Office of Legal Counsel, I have provided advice – and supervised others in providing advice – within the Executive Branch on a broad range of statutory and constitutional questions. Our clients include the Attorney General and various Department of Justice components, the Counsel to the President, and the General Counsels of the Executive Branch. Principal areas of my practice, while at the Office of Legal Counsel, have included constitutional law, administrative law, national security, and immigration.

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

While at Wilmer, Cutler & Pickering, I appeared in court occasionally, typically in federal court, although in state court on rare occasion. I also appeared before an administrative tribunal and in a private arbitration. The vast majority of my cases, and all of my court appearances, were in civil matters.

2. What percentage of these appearances was in:

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

I estimate that sixty percent of my appearances were in federal court, twenty percent before administrative tribunals, and twenty percent in state court.

3. What percentage of your litigation was:

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

All of my court appearances, and more than ninety percent of my overall litigation responsibilities, were in civil 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.

I tried one case to judgment, as associate counsel, before an administrative tribunal, and tried another to judgment, as associate counsel, in a binding arbitration. I have never tried a case to verdict or judgment before a court or jury.

5. What percentage of these trials was:

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

Neither the administrative dispute nor the binding arbitration that I tried involved the use of a jury.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the document 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. In the Matter of the Complaint of American Trading Transportation Co., Inc., No. 90-2619 (C.D. Cal.); Slaven v. BP America, Inc., No. 90-0722 (C.D. Cal.); State Fish Company, Inc. v. BP America, Inc., No. 91-0344 (C.D. Cal.); United States v. The Steam Tanker American Trader, No. 91-3363 (C.D. Cal.); California ex rel. Department of Fish and Game v. Trans-Alaska Pipeline Liability Fund, No. 92-0837 (C.D. Cal.). These consolidated cases arose from an oil spill from the S/T AMERICAN TRADER off the coast of Huntington Beach, California in 1990. Wilmer, Cutler & Pickering represented the Trans-Alaska Pipeline Liability Fund ("Fund"), a non-profit corporate entity established by act of Congress to pay up to \$100 million in claims for damages resulting for defined oil spills, in the litigation. The litigation involved claims for damages and clean-up costs by the United States, the State of California, and various local entities; claims for damages by fisherman and fish processors; and claims for damages by a class of businesses and individuals. In addition,

the case involved various crossclaims and counterclaims among the defendants, including the ship and shipowner, the owner of the oil, the owner of the mooring where the spill occurred, and the owner of the piloting service.

Early in the litigation, the Fund filed a motion to dismiss on the ground that the oil spill was not covered by the Trans-Alaska Pipeline Liability Act. The district court denied that motion, Holfield v. BP America, Inc., 786 F. Supp. 840, 847 (C.D. Cal. 1991), and later certified the question for interlocutory appeal. On interlocutory appeal, the Ninth Circuit upheld the district court's decision. Slaven v. BP America, Inc., 973 F.2d 1468 (9th Cir. 1992). Other reported decisions include Slaven v. American Trading Transportation Company, Inc., 146 F.3d 1066 (9th Cir. 1998); Slaven v. BP America, Inc., 958 F. Supp. 1472 (C.D. Cal. 1997); and Slaven v. BP America, Inc., 786 F. Supp. 853 (1992).

I participated extensively in the litigation. I argued several motions in the district court, including Slaven v. BP America, Inc., 786 F. Supp. 853 (1992); argued Slaven v. BP America, Inc., 973 F.2d 1468 (9th Cir. 1992) in the Court of Appeals; prepared numerous briefs; conducted a binding arbitration regarding reimbursement of cleanup costs paid by the vessel owner on behalf of the Fund; took discovery on liability and class certification; and conducted settlement negotiations with various plaintiffs and defendants.

The Fund has now settled all claims against it and all claims that it had against others.

- a. I worked on this matter from 1991 until I left Wilmer, Cutler & Pickering in February 1996.
- b. These cases were litigated before the Honorable Robert J. Kelleher, United States District Judge for the Central District of California. Judges Tang, Schroeder, and Beezer, of the U.S. Court of Appeals for the Ninth Circuit, heard and decided the Trans-Alaska Pipeline Liability Act coverage appeal.
- c. Other counsel:

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Counsel for Golden West Refining Company

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Counsel for the United States of America

Howard D. Sacks
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Counsel for Salvatore Russo, et al.

Co-counsel:

Francis J. MacLaughlin
White & Case
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Los Angeles, CA 90071
(213) 620-7725

2. In re the Exxon Valdez, No. A89-095 (D. Alaska); In re Joint Briefing of Issues on Appeal from the Trans-Alaska Pipeline Liability Fund, No. T92-1000 (D. Alaska); Trans-Alaska Pipeline Liability Fund v. Exxon Shipping Co., No. A94-462 (D. Alaska). These cases arose from the EXXON VALDEZ oil spill in Prince William Sound, Alaska in March 1989. Wilmer, Cutler & Pickering represented the Trans-Alaska Pipeline Liability Fund ("Fund"), a non-profit corporate entity established by act of Congress to pay up to \$100 million in claims for damages resulting from defined oil spills, in the litigation. In light of the

massive number of claims resulting from the oil spill, the district court urged claimants to file administrative claims with the Fund, which would then be subject to appeal to the district court. The Fund retained John J. Gibbons, the former Chief Judge of the U.S. Court of Appeals for the Third Circuit, to evaluate and pass upon each claim, and retained experts, adjusters, and counsel to assist in this process. Judge Gibbons, with the assistance of Wilmer, Cutler & Pickering, reviewed more than 29,000 claims and issued decisions with respect to each claim. Approximately 3,300 claims were appealed to the district court, and a smaller number of claims were appealed to the court of appeals for the Ninth Circuit, see In re Joint Briefing of Issues on Appeal from the Trans-Alaska Pipeline Liability Fund, 51 F.3d 280 (9th Cir. 1995); Adkins v. Trans-Alaska Pipeline Liability Fund, 101 F.3d 86 (9th Cir. 1996). One of the most significant issues decided by the district court on appeal was the compensability of remote claims for damages -- i.e. claims for economic loss where the injured party's property was not touched by the oil. Issues addressed by the Court of Appeals included the compensability of claims for loss of recreational use of public resources, for non-economic losses (i.e. cultural or psychic) resulting from the inability to engage in a subsistence way of life, and for remote damages. Id. See also Benefiel v. Exxon Corporation, 959 F.2d 805 (9th Cir. 1992) (addressing remote claims). All claims against the Fund relating to the EXXON VALDEZ spill have now been either finally adjudicated or settled.

In addition to adjudicating claims against the Fund, and defending its determinations on appeal, the Fund brought suit against Exxon and Exxon Shipping for reimbursement, principally on a subrogation theory, for amounts paid by the Fund to claimants, as well as related costs. Exxon and Exxon Shipping moved for summary judgment with respect to a number of the Fund's claims, and, following the district court's decision on that motion, the Fund and Exxon and Exxon Shipping entered into a settlement.

My principal participation in this matter involved briefing issues on appeal to the district court and court of appeals, pursuing the Fund's claims against Exxon and Exxon Shipping, and negotiating a settlement with Exxon and Exxon Shipping.

- a. I worked on this matter from 1992 through 1995.
- b. Although some of the EXXON VALDEZ claims were litigated in state court, litigation involving claims against and by the Fund was limited to federal court. The federal cases were before the Honorable Russell Holland, Chief Judge of the United States District Court for the District of Alaska. Judges Pregerson, Kozinski, and Leavy, of the U.S. Court of Appeals for the Ninth Circuit, heard and decided the appeal in In re Joint Briefing of Issues on Appeal from the Trans-Alaska Pipeline Liability Fund, 51 F.3d 280 (9th Cir. 1995). Judges Kozinski, Leavy and Schwarzer, of the United States Court of Appeals for the Ninth Circuit, heard and decided the appeal in Adkins v. Trans-Alaska Pipeline Liability Fund, 101 F.3d 86 (9th Cir. 1996).

c. Other counsel:

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Counsel for Claimants Who Disputed Fund Adjudications:

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The names, addresses and telephone numbers of all claimants' counsel is attached hereto.

3. In the Matter of College Football Association and Capital Cities/ABC, Inc., Docket No. 9242, Federal Trade Commission. This was an administrative action commenced by the Federal Trade Commission against the College Football Association, Capital Cities/ABC, Inc. and ESPN, alleging that the respondents engaged in an unreasonable restraint of trade in the marketing of college football telecasts and telecast rights. Wilmer, Cutler & Pickering represented Capital Cities/ABC, Inc. and ESPN in the proceeding. After several months of litigation, the Administrative Law Judge dismissed the case on the ground that the Federal Trade Commission lacks jurisdiction over non-profit entities, that the College Football Association is a non-profit entity, and that this jurisdictional limitation should not be circumvented by seeking to enjoin Capital Cities/ABC, Inc. and ESPN from maintaining their contractual arrangement with the College Football Association. See Initial Decision and Order, In the Matter of College Football Association and Capital Cities/ABC, Inc., Docket No. 9242 (July 29, 1991). That decision was upheld on appeal by the full Commission. See In the Matter of College Football Association and Capital Cities/ABC, Inc., 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 16, 1994). Although the action against Capital Cities/ABC, Inc. was dismissed without prejudice to bring a subsequent action, the Commission did not do so.

I participated in the drafting of motions, including the motion to dismiss and/or for summary judgment, the discovery process, witness interviews, the preparation of trial strategy, and drafting of the appeal brief.

- c. Most of my work on this matter was in 1990 and 1991.
- d. The matter was initially litigated before James P. Timony, Administrative Law Judge, Federal Trade Commission. It was decided on appeal by the full Commission (Chairman Steiger and Commissioners Azcuenaga, Owen, Starek, and Yao).
- e. Other counsel:

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Counsel for the College Football Association

4. Pappas v. Prime Ticket Network, No. CV-F-92-5589. In this case, a local television broadcast station brought suit against the Pacific-10 Conference, Capital Cities/ABC Inc., ESPN, Prime Ticket Network, and others alleging that the time period exclusivity provisions in certain college football telecast agreements precluded the local station from televising certain Fresno State University football games. The local telecaster alleged claims under Sections 1 and 2 of the Sherman Act, California antitrust law, and California tort law. Wilmer, Cutler & Pickering represented Capital Cities/ABC, Inc. and ESPN in the case. Heller, Ehrman, White & McAuliffe, a California law firm, also represented Capital Cities/ABC, Inc. and took principal responsibility for handling the case as it approached trial. ESPN was voluntarily dismissed from the case. Capital Cities/ABC, Inc. settled with the plaintiff prior to trial.

My participation in the case involved drafting various substantive motions, answering the complaint, preparing discovery requests, and engaging in settlement discussions.

- a. My work on this matter occurred in 1992 through 1995.
- b. The case was before the Honorable Oliver Wanger, United States District Judge for the Eastern District of California.
- c. Other counsel:

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5. SPCF ILC Inc. v. Visa U.S.A., Inc., 36 F.3d 958 (10th Cir. 1994). This was an appeal from a judgment against Visa U.S.A. for violating Section 1 of the Sherman Act. Wilmer, Cutler & Pickering filed an amicus brief on behalf of the American Bankers Association, Independent Bankers Association of America, Colorado Bankers Association, Community Bankers Association of Kansas, Community Bankers Association of Oklahoma, Independent Bankers of Colorado, Independent Community Bankers of New Mexico, New Mexico Bankers Association, Kansas Bankers Association, Utah Bankers Association, Wyoming Bankers Association, and Citibank Corporation in support of Visa. Visa is a joint venture with approximately 6000 members, which individually issue Visa credit cards. Sears, a competitor issuing its own credit card, the Discover Card, sought to become a member of Visa. Visa, however, rejected Sears' applications, and promulgated a by-law precluding Sears and the owners of other competitive cards from joining Visa. Sears then brought suit under the Sherman Act, and the jury entered judgment in its favor.

On appeal, the Court of Appeals for the Tenth Circuit reversed the district court's denial of Visa's motion for judgment notwithstanding the verdict. The court held that Visa's actions were reasonable given the absence of evidence that price was raised, output decreased, or that Sears could not develop a new card without Visa.

My participation in the litigation involved drafting the banks' amicus brief in support of Visa.

- a. My work on this matter occurred in 1993.
- b. The case was heard and decided on appeal by Judges Moore, Seth and Daugherty, of the U.S. Court of Appeals for the Tenth Circuit.
- c. Other counsel:

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6. Joyce Riley v. St. Luke's Episcopal Hospital, 1999 WL 1034213 (Nov. 15, 1999). In this case, the district court held that qui tam relators lack Article III standing to seek relief under the False Claims Act, 31 U.S.C. § 3729 et seq. See 982 F. Supp. 1261 (S.D. Tex. 1997). After the district court ruled, the United States intervened in the litigation as an appellant in order to defend the constitutionality of the statute. The Court of Appeals for the Fifth Circuit affirmed the judgment, but on the alternative ground that the qui tam provision violates the take care clause of the Constitution and the constitutional doctrine of separation of powers. Simultaneously, the Court of Appeals ordered that the case be reheard en banc. 1999 WL 1034216 (Nov. 15, 1999).

I became involved in the litigation after the panel decision of the Court of Appeals and, working with attorneys in the Civil Division, helped craft the brief for the United States on rehearing en banc, which defends the constitutionality of the qui tam provisions of the False Claims Act.

- a. My work on this matter began in November 1999 and is ongoing.
- b. The case was litigated at the district court level before the Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas. Judges Smith, DeMoss, and Stewart, of the U.S. Court of Appeals for the Fifth Circuit, heard and decided the case on appeal. Judge DeMoss filed a concurring opinion and Judge Stewart dissented. All Judges of the Court of Appeals, with the exception of Judge King, who was recused, ordered rehearing en banc.
- b. Other counsel:

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7. Koog v. United States, 79 F.3d 452 (5th Cir. 1996); Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), rev'd, 521 U.S. 898 (1997); Frank v. United States, 78 F.3d 815 (2d Cir.

1996), vacated, 521 U.S. 1114 (1997). These cases involved challenges to the constitutionality of the interim provisions of the Brady Handgun Violence Protection Act, and, in particular, to the requirement that local Chief Law Enforcement Officers perform background checks on individuals seeking to purchase handguns. Wilmer, Cutler & Pickering represented Handgun Control, Inc., the Center to Prevent Handgun Violence, the Federal Law Enforcement Officers' Association, the Fraternal Order of Police, the International Association of Chiefs of Police, the Major Cities Chiefs, the National Association of Police Organizations, the National Organization of Black Law Enforcement Executives, the National Troopers' Coalition, and the Police Executive Research Forum. These groups appeared as amici curiae in support of the United States, and argued that the interim provisions were constitutional. In Koog v. United States, 79 F.3d 452 (5th Cir. 1996), the Court of Appeals for the Fifth Circuit held that the interim provisions impermissibly commandeered state officials to assist in the enforcement of federal law, and thus violated the Tenth Amendment to the Constitution. In Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), rev'd, 521 U.S. 898 (1997), and Frank v. United States, 78 F.3d 815 (2d Cir. 1996), vacated, 521 U.S. 1114 (1997), the Courts of Appeals for the Ninth and Second Circuits, respectively, upheld the interim provisions against constitutional challenge. The Supreme Court granted certiorari in the Mack case, held that the interim provisions impermissibly commandeered state officials to implement federal law, and reversed the Ninth Circuit's judgment. See Printz v. United States, 521 U.S. 898 (1997).

My participation in the litigation consisted of drafting amicus briefs supporting the constitutionality of the interim provisions. I had left Wilmer, Cutler & Pickering by the time the case reached the Supreme Court, and thus did not participate in briefing the case before the Supreme Court.

- a. My work on these cases occurred in 1994 and 1995.
- b. Koog v. United States, 79 F.3d 452 (5th Cir. 1996), was heard and decided by Judges Jolly, Benavides and Duplantier of the Court of Appeals for the Fifth Circuit; Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), was heard and decided by Judges Choy, Canby and Fernandez of the Court of Appeals for the Ninth Circuit, with Judge Fernandez concurring in part and dissenting in part; and Frank v. United States, 78 F.3d 815 (2d Cir. 1996), was heard and decided by Judges Cardamone, Miner and Calabresi of the Court of Appeals for the Second Circuit, with Judge Miner concurring based on standing.

c. Other counsel:

Koog v. United States, 79 F.3d 452 (5th Cir. 1996):

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8. Young Adjustment Company v. Dart Group Corporation, PJM-93-2421 (D. Md.). In this case, Young Adjustment Company sought to recover from the Dart Group an amount allegedly due on a contract for services. Wilmer, Cutler & Pickering represented the Dart Group, and its subsidiary, Trak Auto Corporation, in the case. In April 1992, fifteen Trak Auto Corporation stores located in Los Angeles, California, were looted, burned, or destroyed in riots that followed the verdict in the Rodney King case. The Dart Group asked Young Adjustment to represent Dart in pursuing insurance claims for its Los Angeles losses. The Dart Group was not satisfied with the services provided, and eventually terminated its relationship with Young Adjustment. Young Adjustment sued for an amount that it claimed was still due for its services. After discovery was taken, the Dart Group moved for summary judgment on the ground that Young Adjustment was not licensed in California and that, accordingly, the alleged contract was illegal and unenforceable. In response, Young Adjustment argued that, under the dormant commerce clause of the United States Constitution, they could not be required to be licensed in every state in which they practice. The Dart Group responded that the dormant commerce clause does not preclude multiple-state licensing requirements and that, in any event, Congress had authorized the states to legislate in a manner that might limit interstate commerce in the insurance industry. The district court denied the motion for summary judgment, and the case subsequently settled.

My role in the case involved answering the complaint, taking and providing discovery, drafting and arguing motions, and engaging in settlement discussions.

- a. I worked on the case in 1993 and 1994.
- b. The case was litigated before the Honorable Peter J. Messitte, United States District Judge for the District of Maryland.
- c. Other counsel:

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9. Ethicon, Inc. v. Food and Drug Administration, 762 F. Supp. 382 (D.D.C. 1991). In this case, Ethicon, Inc. challenged an administrative decision of the Food and Drug Administration (FDA) to reclassify a generic class of absorbable surgical sutures from Class III to Class II under the Medical Device Amendments. Wilmer, Cutler & Pickering represented Ethicon in the case. Ethicon argued that the FDA improperly characterized the generic class of devices at issue, that it disregarded evidence that the devices at issue did not satisfy the "essentially identical" standard, and that it improperly relied on the Section 360k premarket notification process. FDA and the manufacturer of the generic sutures defended the FDA's reclassification decision. Ethicon initially sought a preliminary injunction or temporary restraining order preventing the manufacturer of the generic suture from marketing its product. The district court denied that motion. See Ethicon, Inc. v. Food and Drug Administration, 1991 WL 29897 (D.D.C. Feb. 20, 1991). Subsequently, the district court granted summary judgment in favor of the defendants, concluding that the FDA acted within its discretion in reclassifying the absorbable surgical sutures and acted in accordance with procedural requirements. Ethicon, Inc. v. Food and Drug Administration, 762 F. Supp. 382 (D.D.C. 1991). No appeal was taken.

My work on the case included drafting the complaint, a motion for a preliminary injunction or temporary restraining order, supporting affidavits, and a motion for summary judgment.

- a. I worked on the case in 1990 and 1991.
- b. The case was litigated before the Honorable Joyce Hens Green, United States District Judge for the District of the District of Columbia.
- c. Other counsel:

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10. In the Matter of 1989 Cable Royalty Distribution Proceedings, No. 91-2-89CD, Copyright Royalty Tribunal. Under Section 111 of the Copyright Act, cable operators who retransmitted works from broadcast television were required to pay a royalty fee for use of the work, and the Copyright Royalty Tribunal was authorized to distribute the pool of cable royalty fees among the eligible copyright owners. In this proceeding, the Copyright Royalty Tribunal was required to make a percentage allocation of the pool of royalty payments among various categories of copyright owners. Wilmer, Cutler & Pickering represented the class of Public Television copyright owners in the proceeding. After receiving written submissions, hearing live testimony and cross-examination, and receiving post-trial submissions, the Tribunal made the required allocation. The Public Television copyright owners were awarded a four percent share. In the Matter of 1989 Cable Royalty Distribution Proceedings, 57 Fed. Reg. 15286 (April 27, 1992).

I participated in interviewing witnesses, preparing our client's direct case, which included declarations and supporting material, and in the examination of witnesses at the proceeding.

- a. I worked on the matter briefly in 1990, substantially in 1991, and briefly in 1992.
- b. The proceeding was litigated before the Copyright Royalty Tribunal (Cindy Daub, Chairman).
- c. Other counsel:

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

While in private practice, many of my significant legal activities involved the litigation discussed above. However, I also provided advice in a number of matters that were not litigated or in which I did not personally handle the litigation. This advice often involved questions of constitutional law. I provided advice, for example, on First Amendment issues raised by a court's decision to bar or limit contact with members of a putative class action; on First Amendment issues raised in a private suit brought against a television network; on

whether enactment of the Motor Voter Act exceeded Congress's authority under Article I of the Constitution; and on whether members of a federal agency were appointed in conformity with the appointments clause of the Constitution.

Since joining the Department of Justice, I have provided legal advice on many significant issues. For the past sixteen months, I have supervised an office that, among other functions, provides legal advice to the Attorney General, the Counsel to the President, and Executive Branch agencies; renders formal legal opinions; resolves interagency legal disputes; and reviews Executive Orders and Attorney General Orders for form and legality. In this capacity, and previously as a Deputy Assistant Attorney General in the Office of Legal Counsel, I have provided legal advice on a range of issues. I have addressed a broad variety of questions of constitutional law, some in well explored areas of constitutional law – such as the appointments clause, the President's foreign affairs authority, the constitutional allocation of power between the State and Federal governments, the First Amendment, and Article III – and others in less well explored areas of law, such as the recommendations clause, the bankruptcy and tax uniformity clauses, and the emoluments clause. I have also addressed numerous questions of statutory interpretation, such as questions under the Administrative Procedure Act, the Immigration and Nationality Act, and the National Security Act, as well as questions of regulatory interpretation. These matters range from technical questions of appropriations law – such as which appropriation should be used to pay a particular judgment – to urgent questions of legal authority – such as whether a law enforcement agency has authority to engage in an imminent operation.

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. I note, however, that upon withdrawing from Wilmer, Cutler & Pickering, I received a return of capital and withdrawal/retirement payments. I received a final lump sum payment in 1998. In addition, I continue to have money invested in the firm's 401k plan, although the firm no longer makes any contribution to the plan on my behalf.

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 fully comply with all ethics laws and procedures. In particular, if I have any question regarding an ethics matter, I will consult with the Department of Justice ethics officials, including the Deputy Designated Agency Ethics Official for the Office of Legal Counsel, and will follow their advice. Among other things, I will seek advice from the Department's ethics officials whenever I have any concern that a matter in the Office might possibly affect companies in which I have investments, might relate to a matter on which I worked in private practice, or might possibly affect my prior law firm.

3. **Do you have any promises, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.**

No.

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

See attached.

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

See attached.

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

I served as a volunteer (including as the coordinator for the 4th congressional district of Connecticut and Yale University) on Senator Gary Hart's 1984 presidential campaign.

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have volunteered my time to help with the upkeep of my children's preschool (a few hours every year); I have served as the representative from the Office of Legal Counsel for the Combined Federal Campaign (several hours each year); I have served as a tutor at a D.C. middle school for one or two semesters (est. an hour or two a week); and, while in private practice, I provided in excess of 800 hours of pro bono legal services, including assistance to the D.C. Bar Foundation (approx. 100 hours) and an indigent Virginia death row inmate (approx. 400 hours).

2. **Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

While in college, I was a member of a male-only fraternity (1980-83).

CONSTITUTION AND BY-LAWS OF THE CIVIC LEAGUE
OF
BROOKMONT AND VICINITY
INCORPORATED

MONTGOMERY COUNTY, MARYLAND, MARCH 1988

CONSTITUTION

ARTICLE I

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| SECTION 1
Name & Object | This Association shall be known as the Civic League of Brookmont and Vicinity, Incorporated. Its object shall be to promote general welfare, to improve the conditions within its jurisdiction and to foster benevolent and educational activities. |
| SECTION 2
Area | The area of Brookmont & Vicinity is described on the map titled "Boundaries for Brookmont & Vicinity, 1988" on deposit with the League Secretary. |
| SECTION 3
Membership | Eligibility for membership shall consist of residence or property ownership in the area. Persons may become members of the League by payment of annual dues. |
| SECTION 4 | Membership dues shall be set at the discretion of the Board of Directors, with the approval of a majority of those present at the regular September meeting. Dues shall be paid on a "per household" basis and fall due in June for the ensuing year. |

ARTICLE II

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| SECTION 1
Treasury and Status | The Treasury shall be continually maintained at a minimum of \$100.00 either through special assessment or additional dues. Decision in this matter shall rest with the Board of Directors. |
| SECTION 2
Expenditures | Expenditures of up to \$100.00 may be authorized at the discretion of the Treasurer. Expenditures above \$100.00 but less than \$300.00 must have the additional approval of the President or, in his absence, the Vice-President. Expenditures greater than \$300.00 must be duly authorized and approved at a regular meeting. In cases of emergency, approval by the Board of Directors will constitute authority for expenditure. |
| SECTION 3
Disbandment | If, for any reason, the League shall disband, or disrupt in any manner, the entire amount of monies in the Treasury and any other monies accruing from the sale of properties owned by the League, shall be placed in trust to accrue |

to the benefit of a succeeding non-profit incorporated organization with the approval of a majority of a minimum of ten Brookmont resident owners or leaseholders constituting such organization.

SECTION 4
Length of
Membership

Length of membership shall be defined as one year.

ARTICLE III

SECTION 1
Amendments to
Constitution
and By-Laws

Amendments to the Constitution and By-Laws of this League may be made at any time, provided that: (1) such amendments are presented in writing at two consecutive regular meetings of the League (2), 10 days notice of the meetings is given to all members, (3) the amendments are approved by a two-thirds majority of those members present at the second meeting and signed by ten (1) members in good standing.

ARTICLE IV

SECTION 1
Quorum

Ten members constitute a quorum in order to transact business pertaining to the League.

SECTION 2
Parliamentary
Procedure

All questions involving parliamentary procedure, shall be referred to "Roberts Rules of Order." This manual shall be on file with the Secretary.

ARTICLE V

SECTION 1
Officers

Officers of the League shall consist of a President, Vice-President, Secretary, and Treasurer. Officers will be elected annually at the regular June meeting.

SECTION 2
Provisions of
the Board of
Directors

The Board of Directors shall consist of the incumbent President, the Vice-President, retiring President; and six (6) other elected members, in good standing. Elections to the Board shall be held at the regular June meeting. The Board of Directors may be increased or decreased at any election to a number other than nine but no more than fifteen (15) nor less than five (5). A quorum for transaction of business by the Board of Directors shall be five (5). The Board shall elect its own Chairman and meet as frequently as business requires.

SECTION 3
Term of Board
of Directors
Office

The terms of office for the elected members of the Board of Directors shall be 2 years and at least 3 members shall be elected for such a term every year.

BY-LAWS

ARTICLE I

- SECTION 1 Meetings The regular meetings shall be held on the third Tuesdays of the months of March, June, September and November. Special meetings may be called at the discretion of the President or the Board of Directors given seven days public notice.
- SECTION 2 Attendance of Officers of Officers If an officer is absent three consecutive times from a regular meeting of the League without sufficient reason and notification to the President, the office may be declared vacant by the Board of Directors.
- SECTION 3 Attendance of Board Members If a board member is absent three consecutive times from a regular meeting of the Board of Directors without sufficient reason and notification to the Board Chairman, the seat may be declared vacant by the Board of Directors.
- SECTION 4 Appointment to Fill Vacancy The President shall appoint a member to fill any vacancy which occurs among the League officers. Such appointment shall obtain until the next annual meeting.

ARTICLE II

- SECTION 1 Balloting for Officers All officers shall be elected from a slate selected by the Nominating committee by a recorded majority of the members present at the June meeting through a show of hands.

ARTICLE III

- SECTION 1 Duties of President Duties of the President shall be to preside at all meetings, sign checks drawn on the League account except as provided in Article III, Section 4, below, call special meetings, and make all appointments and shall be required to submit an annual budget for majority approval at the regular September meeting. The President shall act as a member of the Board of Directors, and may be elected as its chairman.
- SECTION 2 Duties of the Vice-President The Vice-President shall, in the absence of the President perform all constitutional duties of same. The Vice President shall be Honorary member of all Committees and act as a member of the Board of Directors.
- SECTION 3 Duties of the Secretary The Secretary shall keep an accurate record of all League proceedings. Maintain all files, correspondence and secretarial records of the League, execute all documents and such other duties pertaining to the office of Secretary as the League may direct.

SECTION 4
Duties of
Treasurer

The duties of the Treasurer shall be to take care of all monies of the League, pay by check, obtain the signature on checks of the President or, in his absence the Vice-President thereon and countersign same, except for checks of \$100.00 or less which may be signed by the treasurer alone. The Treasurer shall submit to the secretary and present a written report of the financial status of the league at each regularly scheduled meeting. Further, the Treasurer shall compile a list of paid members in good standing on an annual basis. Such list is to be submitted to the League Secretary at the regular September meeting

SECTION 5
Duties of
Membership
Committee

The Block Captains shall constitute the Membership Committee. The duties of the Membership Committee shall be to conduct at least one membership drive each year and to maintain, in conjunction with the League Treasurer, a roster of members in good standing.

SECTION 6
Duties of
the Board of
Directors

The duties of the Board of Directors shall consist of the following: Plan activities and policies of the League; maintain any League property; authorize emergency expenditures; assist the President in ensuring the adequate maintenance of public services and public safety measures; and in planning the regular meeting agendas. It shall act as a governing body in the event of discontinuance or interruption of regular League meetings.

ARTICLE IV

SECTION 1
Committees

The President, at his discretion, or at the direction of the League, shall appoint such committees as are deemed necessary for discharging the work of the League. Specifically, each March prior to the regular March meeting he shall appoint a Nominating committee to prepare the slate of officers and directors for election at the regular June meeting. Further, the following committees shall stand in perpetuity: Land Use, Membership, Transportation and Roads, Environment, and Recreation. The charter of responsibilities of each permanent committee shall be brought current each year and placed on file with the League Secretary at the regular September meeting. The President shall also appoint delegates and alternates to the Civic Federation of Montgomery County and the Potomac Valley League of Montgomery County and a representative to the Fire Board of this district covering the territory of the League.

ARTICLE V

SECTION 1
Order of
Business

1. Reading of Minutes of the previous meeting
2. Report of Treasurer
3. Report of Committees
4. Report on Correspondence
5. Old Business
6. New Business
7. Good of the League
8. Adjournment

COUNSEL → for individuals who filed claims w/ TAPLF as a result of Exxon Valdez oil spill.

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Firm Name Name Addr 1 Addr 2 City State Zip Phone1	Maloney, Dennis P. MALONEY, DENNIS P. 405 WEST 38TH AVENUE SUITE 200 ANCHORAGE AK 99516 (907) 561-6900
Firm Name Name Addr 1 Addr 2 City State Zip Phone1	McIntosh, Mary H., Attorney MCINTOSH, MARY H. 404 SOUTH FIRST, PO BOX 2243 Mount Vernon WA 98273 (206) 424-4216

Firm Name	Mike Patterson
Name	PATTERSON, MIKE
Addr 1	814 WEST 2ND AVENUE
Addr 2	SUITE 100
City	ANCHORAGE
State	AK
Zip	99501
Phone1	(907) 276-2197
Firm Name	Mikkelberg, Boez, Wells & Fryer
Name	BLANCHARD, ALICE
Addr 1	1001 FOURTH AVENUE PLAZA
Addr 2	SUITE 3600
City	Seattle
State	WA
Zip	98154
Phone1	(206) 623-9860
Firm Name	Chee, Morrish & Riniker
Name	
Addr 1	701 Fifth Avenue
Addr 2	
City	Seattle
State	WA
Zip	98104
Phone1	
Firm Name	Oppenheim, Harris & Faquin
Name	BRUCKNER, W. JOSEPH
Addr 1	100 WASHINGTON AVE. S.
Addr 2	
City	MINNEAPOLIS
State	MN
Zip	55401
Phone1	(612) 338-6900

Firm Name	PRD-SE
Name	
Addr 1	
Addr 2	
City	
State	
Zip	
Phone1	
Firm Name	Paul J. Nangle & Associates
Name	WANGLE, PAUL J.
Addr 1	Kery Building
Addr 2	101 CHRISTENSEN DRIVE
City	ANCHORAGE
State	AK
Zip	99501
Phone1	(907) 274-8865
Firm Name	Paul L. Davis & Associates
Name	Paul L. Davis, Esq.
Addr 1	510 L Street
Addr 2	Suite 270
City	Anchorage
State	AK
Zip	99501
Phone1	(907) 278-5000
Firm Name	Peterson, A. Lee
Name	A. Lee Peterson, P.C.
Addr 1	1115 West Fitzwiesed
Addr 2	Suite 204
City	Anchorage
State	AK
Zip	99503
Phone1	(907) 278-8330

Firm Name	Philip Paul Weidner & Associates					
Name	WEIDNER, PHILIP PAUL					
Addr 1	390 L STREET					
Addr 2	SUITE 200					
City	ANCHORAGE					
State	AK					
Zip	99501					
Phone1	(907) 277-7000					
Firm Name	Papa & Katcher					
Name	POPE, DOUGLAS					
Addr 1	411 W. First Avenue					
Addr 2	Suite 200					
City	Anchorage					
State	AK					
Zip	99501					
Phone1	(907) 272-8577					
Firm Name	Rehbock, Robert					
Name	REHBOCK, ROBERT					
Addr 1	801 W. 5TH AVENUE					
Addr 2	SUITE 530					
City	ANCHORAGE					
State	AK					
Zip	99501					
Phone1	(907) 279-9132					
Firm Name	Richard A. Jameson & Associates					
Name	Richard A. Jameson, Esq.					
Addr 1	530 L Street					
Addr 2	Suite 502					
City	Anchorage					
State	AK					
Zip	99501					
Phone1	(907) 272-8877					

Firm Name	Richard D. Eilers, Attorney at Law
Name	ELLIMERS, RICHARD D.
Addr 1	PO BOX 484
Addr 2	
City	King Salmon
State	AK
Zip	99513
Phone1	(907) 246-6196
Firm Name	Radel, Williams, Burt, & Waldenlaw
Name	LOWERY, JOHN D
Addr 1	1001 FOURTH AVENUE PLAZA
Addr 2	SUITE 400
City	SEATTLE
State	WA
Zip	98154
Phone1	(206) 624-8600
Firm Name	Roberts, Goodbar & Shapiro, P.S.
Name	SHAPIRO, ANTHONY D.
Addr 1	1801 One Union Square
Addr 2	600 University Street
City	Seattle
State	WA
Zip	98101-3112
Phone1	(206) 225-1600
Firm Name	Reff, Elaine L.
Name	Elaine L. Reff, Esq.
Addr 1	74668 Dean Road, K33
Addr 2	
City	Rainier
State	OR
Zip	97046
Phone1	(503) 556-1921

Firm Name	Russell Pritchett, Attorney at Law
Name	PRITCHETT, RUSSELL
Addr 1	670 DEMOCRAT STREET
Addr 2	
City	BELINGHAM
State	WA
Zip	98228
Phone1	(206) 647-1238
Firm Name	Saranta, Terry J.
Name	SARANTA, TERRY J.
Addr 1	Addison Power Supply, Inc.
Addr 2	311 Kenwood St
City	Burbank
State	CA
Zip	91505
Phone1	
Firm Name	Satterberg, William R. Jr.
Name	SATTERBERG, WILLIAM R. JR.
Addr 1	799 FOURTH AVENUE
Addr 2	
City	FAIRBANKS
State	AK
Zip	99701
Phone1	
Firm Name	Schroeter, Goldmark & Benoit
Name	Jared Rice, Mike Willey
Addr 1	600 CENTRAL BUILDING
Addr 2	910 THIRD AVENUE
City	SEATTLE
State	WA
Zip	98104
Phone1	(206) 922-8000

Firm Name	Gilenshush, Steve
Name	SHAMBUK, STEVE J.
Addr 1	601 WEST FIFTH
Addr 2	SUITE 510
City	Anchorage
State	AK
Zip	99501
Phone1	(907) 274-8841
Firm Name	Sonesky, Chambers, Sachse, Miller, Merson & Closter
Name	Richard A. Frazil
Addr 1	800 West Fifth Avenue
Addr 2	Suite 700
City	Anchorage
State	AK
Zip	99501-2029
Phone1	(907) 256-6377
Firm Name	Squires & Farrell, P. S.
Name	SQUIRES, LYNN B.
Addr 1	1825 4TH
Addr 2	SUITE 1500
City	SEATTLE
State	WA
Zip	98101
Phone1	(206) 292-1234
Firm Name	Shepovich, Kennedy & Stepyoch, P.C.
Name	C.R. Kennedy, Esq.
Addr 1	733 W 4th Avenue
Addr 2	Suite 401
City	Anchorage
State	AK
Zip	99501
Phone1	(907) 279-8332

Firm Name	Shoeler, Paul Law Offices				
Name	QUIGLEY, MARK A.				
Addr 1	2833 ROCKEFELLER				
Addr 2					
City	EVERETT				
State	WA				
Zip	98201				
Phone1	(206) 339-1323				
Firm Name	Terasi & Johnson, P.C.				
Name	TARASHI, LOUIS M., JR.				
Addr 1	510 THIRD AVENUE				
Addr 2					
City	PITTSBURGH				
State	PA				
Zip	15210				
Phone1	(412) 361-7135				
Firm Name	Theodore M. Roseblume & Associates				
Name	ROSEBLUME, THEODORE M.				
Addr 1	275B Columbia Center				
Addr 2	701 FIFTH AVENUE, SUITE 3220				
City	Seattle				
State	WA				
Zip	98104-7987				
Phone1	(206) 928-7111				
Firm Name	Tilley, Craig				
Name	Asst. Atty., State of Alaska				
Addr 1	State of Alaska, Dept. of Law				
Addr 2	1031 W. 4th/Ave., Suite 200				
City	Anchorage				
State	AK				
Zip	99501				
Phone1	(907) 269-5100				

Firm Name	Tagman & Clark
Name	RAY, CHARLES W., JR.
Addr 1	711 H STREET
Addr 2	SUITE 500
City	ANCHORAGE
State	AK
Zip	99501-3442
Phone1	(907) 272-7989
Firm Name	Tull, Charles E.
Name	Charles E. Tull, Esq.
Addr 1	620 W. 3rd Avenue
Addr 2	
City	Anchorage
State	AK
Zip	99501
Phone1	(907) 272-5549
Firm Name	Wade & deYoung
Name	WATT'S, GRANT
Addr 1	4841 B STREET/AGC BUILDING, Second Floor
Addr 2	SUITE 200
City	ANCHORAGE
State	AK
Zip	99503
Phone1	(907) 561-4222
Firm Name	Walsh, Warner, Costello, Thompson
Name	MCGAREY, TIMOTHY
Addr 1	123 THIRD AVENUE, SOUTH
Addr 2	
City	Seattle
State	WA
Zip	98104
Phone1	(206) 622-5311

Firm Name	Wickwire, Thomas R.
Name	WICKWIRE, THOMAS R.
Addr 1	3750 UNIVERSITY AVENUE SOUTH
Addr 2	
City	Fairbanks
State	AK
Zip	99709
Phone1	(907) 474-0589
Firm Name	William G. Royce, Attorney at Law
Name	William G. Royce, Esq.
Addr 1	Resolution Plaza
Addr 2	1029 W. 3rd Avenue, Suite 510
City	Anchorage
State	AK
Zip	99501
Phone1	(907) 279-8665
Firm Name	Williams, Kestner & Gibbs
Name	KOESTNER, WILLIAMS
Addr 1	2000 Skyline Tower
Addr 2	0960 N.E. 4th Street
City	Bellevue
State	WA
Zip	98004
Phone1	(206) 462-4700
Firm Name	Winer & Associates
Name	WINNER, RUSSELL
Addr 1	900 WEST 5TH AVENUE
Addr 2	SUFFE 700
City	ANCHORAGE
State	AK
Zip	99501-2028
Phone1	(907) 277-5022

Firm Name	Young, deVries, & O'Connell, PC
Name	Karl L. Balluff
Addr 1	1191 Second Avenue
Addr 2	Suite 1901
City	Seattle
State	WA
Zip	98101-2533
Phone1	(206) 224-8818



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

November 16, 1999

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

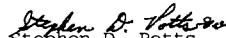
Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Randolph D. Moss, who has been nominated by President Clinton for the position of Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice.

We have reviewed the report and have also obtained advice from the Department of Justice concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe that Mr. Moss is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,


Stephen D. Potts
Director

Enclosure

bcc: Department of Justice

Executive Branch Personnel Public Financial Disclosure Report

Date of Appointment, Reassignment, Election or Nomination (Month, Day, Year)		Reporting Status (Check appropriate box)		Termination Date (If applicable)		Agency Use Only	
		<input checked="" type="checkbox"/> Incumbent by Report <input type="checkbox"/> Incumbent by Request <input type="checkbox"/> New Entrant, Nominee or Candidate				NOV 12 1999	
Reporting Individual's Name		Last Name and Middle Initial		Department or Agency (If Applicable)		OFFICE USE ONLY	
MOSS		RANDOLPH D.		U.S. DEPARTMENT OF JUSTICE		NOV 12 1999	
Position for Which Filing		Title of Position		Telephone No. (Include Area Code)		Fee for Late Filing	
ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL		ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL		202-514-2051		Any individual who is required to file this report and does so more than 30 days after the date the report is due shall be subject to a \$500 fee. If the report is filed more than 60 days after the last day of the filing extension period, the fee shall be subject to a \$700 fee.	
Location of Present Office (or Previous Office)		Address (Number, Street, City, State, and ZIP Code)		Telephone No. (Include Area Code)		Reporting Periods	
950 PENNSYLVANIA AVENUE, N.W.		950 PENNSYLVANIA AVENUE, N.W.		202-514-2051		Incumbents: The reporting period is the preceding calendar year except: Part II of Schedule C and Part I of Schedule D. For all other filers, the reporting period is the calendar year up to the date you file. Part II of Schedule D is not applicable.	
Washington, D.C. 20530		WASHINGTON, D.C. 20530				Termination Filers: The reporting period begins at the end of the period covered by your previous filing and continues through the end of the reporting period of Schedule D is not applicable.	
Acting Assistant Attorney General for the Office of Legal Counsel (July 1998 - Present)		Do You Intend to Create a Qualified Divorced Trust?		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Nominees, New Entrants and Candidates for President and Vice President:	
Senate Judiciary Committee		Senate Judiciary Committee				Schedule A: The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value of assets and liabilities must be reported within 31 days of the date of filing.	
Classification		Signature of Reporting Individual		Date (Month, Day, Year)		Schedule B: Not applicable.	
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.		<i>Randolph D. Moss</i>		Oct. 4, 1999		Schedule C, Part I (Liabilities): The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.	
Other Review (If desired by agency)		Signature of Other Reviewer		Date (Month, Day, Year)		Schedule C, Part II (Agreements or Arrangements): Show any agreements or arrangements as of the date of filing.	
		<i>Max Sooda</i>		11/12/99		Schedule D: The reporting period is the preceding calendar year and the current calendar year up to the date of filing.	
Agency Ethics Officer's Opinion		Signature of (Appointed Agency Ethics Officer/Reviewing Official)		Date (Month, Day, Year)			
On the basis of information contained in this report, I conclude that the filer is in compliance with the requirements of the law (subject to any comments in the box below).		<i>Janis G. Smith</i>		11/2/99			
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)			
		<i>Stephen D. Pitt</i>		11-16-99			
Comments of Reviewing Official (If additional space is required, use the reverse side of this sheet)							

527810-00-000
5 CFR Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name

RANDOLPH D. MOSS

Page Number

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SCHEDULE A

Assets and Income

Valuation of Assets at close of reporting period

Income: type and amount. If "None or less than \$201" is checked, no other entry is needed in Block C for that item.

BLOCK A	BLOCK B										BLOCK C																		
	None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Funds	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Actual Amount Only if "Other" specified	Date (Mo., Day, Yr.) Only if Honorary		
Identify each asset held by you, your spouse, or dependent children for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period. Identify each asset or source of income held by you, your spouse, or dependent children which generated over \$200 in income during the reporting period. None <input type="checkbox"/>																													
Examples Central Address Common Dow Jones & Smith Investment Fund Kempston Equity Fund IFA: Heartland 500 Index Fund																													
VANGUARD INDEX 500																													
VANGUARD PRIME PORTFOLIO																													
FIRST UNION BANK ACCT																													
CITIBANK BANK ACCT																													
CITIBANK CD																													
IBM COMMON																													

1975 Edition. Use the latest editions. Prior to 1975, cannot be used.

FD-278 (Rev. 6-25-64)
U.S. Office of Governmental Ethics

Reporting Individual's Name

SCHEDULE A continued

Page Number

4

Block A	Block B		Block C																	
	Assets and Income	Valuation of Assets	Income: Type																	
Identify each asset held for the production of income and its fair market value exceeding \$1,000 at the close of the reporting period. Identify each asset or source of income which generated over \$200 in income during the reporting period.	Amount											Date (Mo., Day, Yr.) Only if Honorary								
	None (or less than \$1,000)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	None (or less than \$200)	Other (Specify Type)	Dividends		Rent and Royalties	Interest	Capital Gains	Exceptional Investment Fund	Excepted Trust	Qualified Trust	Actual Amount Only if Other specified	
1 CHARTWELL RE CORP. COMMON	X																			
2 MILNER, CUTLER & PICKERING LANDRY SEAFOOD REST. COMMON																				
3 LONDON PACIFIC GROUP COMMON																				
4 SCOTTISH ANNUITY & LIFE COMMON																				
5 BAYCORP HOLDING LTD. Common																				
6 BURLINGTON NORTHERN SANTA FE CORP. COMMON																				
7 Virginia Industrial Company The Virginia Industrial Company Alexandria, VA																				
8 Alexandria, VA																				
9 Alexandria, VA																				

1971 Edition. Use the Check, Editions Prior to 1971. Omit the Check.
determine DISBURSEMENT TO TELEPHONE CONSULTATION w/ D.D. on 11/5/79

WD

Do not complete Schedule B if you are a new entrant, nominee, Vice Presidential or Presidential Candidate

SE 278 (Rev. 9-80)
 U.S. Office of Government Ethics

Respecting Individual's Name
RANDOLPH D. MOSS

Price Number
5

SCHEDULE B

Part I: Transactions
 Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" box if the instrument is made pursuant to a certificate of divestiture from OGE.

Transaction (Type, City)	Date (Mo., Day, Yr.)	Amount of Transaction (C)			
		Purchase	Sale	Exchange	Other
	2021				

Part II: Gifts, Reimbursements, and Travel Expenses
 For you, your spouse and dependent children, report the source, a brief description, and the value of (1) gifts (such as single item, transportation, lodging, food, entertainment, services, etc.); (2) travel-related cash reimbursements received from one source totaling \$250 or more. For conflict analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. Exclude anything given to you by the U.S. Government; given to your agency in connection with your official duties; given to you by your spouse or dependent child totally independent of their relationship with you; or hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth \$100 or less. See instructions for other exclusions.

Source (Name and Address)	Brief Description	Value
Examples: Nat'l Assn. of Book Collectors, NY Frank Jones, San Francisco, CA	Admission ticket, hotel room & meals incident to national conference 8/13/90 (personal activity unrelated to duty)	2400
	Leather briefcase (personal friend)	\$100
NOMINEE - NOT APPLICABLE		

None Value

1981 Edition, Con. Re. Univ.4. Editions Prior to 1981 Cannot Be Used.

5010 (Rev. 6-84)
U.S. Office of Government Ethics

SCHEDULE C

Reporting Individual's Name: RANDOLPH D. NOSS Page Number: 6

Part I: Liabilities
Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent child. Exclude a mortgage on your personal residence unless it is noted out; loans secured by automobiles, household furniture or appliances, and other personal property are included. See instructions for reporting charge accounts.

1	Debt Incurred	Type of Liability	Interest Rate	Term of Debt	Charge of Amount or Value (1)					
					\$10,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000
1	NONE	Mortgage on real property, Parkway Promissory note	18%	25 Yrs. on demand						
2										
3										
4										
5										

Part II: Agreements or Arrangements
Report your agreements or arrangements for:
(1) future employment; (2) leave of absence; and (3) future employment. See instructions for reporting the reporting of negotiations for any of these arrangements or benefits.
None

1	Status and Terms of any Agreement or Arrangement	Date
1	PURSUANT TO RETIREMENT/WITHDRAWAL PLAN, RECEIVED FIXED PAYMENTS. FINAL LUMP SUM PAID IN 1993	7/85
2	SALARY INDEMNIFIED BY THE S. BANK	2/94
3		
4		
5		
6		

194. Edition: Oct. Rev. Used. Edition: Prior to 1991. Change In Use. *detention made by...*

SE 278 (Rev. 6/84)
5-5763 Post 1084
U.S. Office of Government Ethics

Reporting Individual's Name

RANDOLPH D. NOSS

Page Number

SCHEDULE D

7

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Example	Full Name of the Corporation, Firm, Partnership, or Other Business Enterprise, Non-Profit Organization, or Educational Institution	Position Held	From (Mo., Yr.)	To (Mo., Yr.)	TE (PAC-702)
1	LAND TRUST FOR THE BENEFIT OF VERA F. MORSE (PROPERTY IN ALEXANDRIA & HERNDON, VA)	TRUSTEE	7/95		PRESENT
2					
3					
4					
5					
6					

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Example	Source (Name and Address)	Legal Services	Legal Services in connection with university participation	Brief Description of Duties
1	NONE			
2				
3				
4				
5				
6				

101 Edition Gov. De. Uncl. Editions Prior to 1991. Consent to Use.

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	46	00	Notes payable to banks—secured		01
U.S. Government securities—add schedule			Notes payable to banks—unsecured		00
Listed securities—add schedule *	616	30	Notes payable to relatives		00
Unlisted securities—add schedule			Notes payable to others		00
Accounts and notes receivable:			Accounts and bills due	est 3	00
Due from relatives and friends		0	Unpaid income tax		00
Due from others		0	Other unpaid tax and interest		00
Doubtful		0	Real estate mortgages payable—add schedule	383	471
Real estate owned—add schedule	est. 650	00	Chattel mortgages and other liens payable		00
Real estate mortgages receivable		0	Other debts—itemize:		00
Autos and other personal property	est. 60	00			
Cash value—life insurance		0			
Other assets—itemize:		0			
			Total liabilities	386	471
			Net worth	985	833
Total assets	1,372	805	Total liabilities and net worth	1,372	805
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? (private capacity)		No
Legal Claims		0	Have you ever taken bankruptcy?		No
Provision for Federal Income Tax		0			
Other special debt		0			

* Stocks and funds

Estimated Stock and Fund Holdings

Stock and Funds	Approximate Value
Aetna, Inc. Common	\$7,000
Baycorp Holding Ltd. Common	\$ 38,000
Dow Chemical Corporation Common	\$ 9,200
Exxon Corp. Common	\$ 33,000
Gannett Co. Common	\$ 15,200
IBM Common	\$ 17,600
Landry Seafood Restaurants Common	(sold)
London Pacific Group Common	\$ 11,800
Scottish Annuity & Life	\$ 8,000
Source Capital Common	\$ 8,100
Burlington Northern Santa Fe Corp. Common	\$ 4,000
Texaco Common	\$ 325
Newmont Mining Common	\$ 730
Fairfax Holding Contingent Rights	\$ 650
Vanguard Prime Money Market Fund	\$ 10,100
Vanguard Index 500 Fund	\$107,000
Schwab Federally Tax Exempt Money Fund	\$ 70,600
Schwab Money Fund	\$ 23,600
Dodge & Cox Fund (401k)	\$ 112,400
Value Line Fund (spouse 401k)	\$ 18,000
Federal Thrift Savings Plan	\$ 49,900
Federal Thrift Savings Plan (spouse)	\$ 50,900
ESG Re Limited	\$ 9,700
Redwood Trust Inc. REIT	\$ 10,500
Total	\$ 616,305

Estimated Cash and Bank Deposits

Cash and Bank Deposits	Approximate Value
Citibank	\$ 28,000
Citibank CD	\$ 8,000
First Union Bank	\$ 10,000
Total	\$ 46,000

Home

GE Capital Mortgage Service P.O. Box 7999 Philadelphia, PA 19101 (30 yr. mortgage/approx. 24 yrs. remaining)	\$ 383,471.60 (remaining principal due)
Value of Property	\$ 650,000.00 (est. resale value)

The CHAIRMAN. Well, we will now ask Judge Julio Fuentes of New Jersey, who has been nominated to be circuit judge in the U.S. Court of Appeals for the Third Circuit, and Judge James D. Whittemore of Florida, who has been nominated to be a district judge in the U.S. District Court for the Middle District of Florida, to please come forward and take your seats. You are over here, Judge Fuentes; Judge Whittemore, right there.

If you would, raise your right hands. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge FUENTES. I do.

Judge WHITTEMORE. I do.

Senator TORRICELLI. Mr. Chairman, could I use this occasion to address a question of Judge Fuentes' nomination and perhaps introduce him to the committee?

The CHAIRMAN. Sure.

**STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY**

Senator TORRICELLI. Mr. Chairman, I want to welcome Judge Whittemore and Judge Fuentes to the committee today, and particularly note with great pride the nomination of Judge Fuentes for the Third Circuit Court of Appeals.

Mr. Chairman, there are many things about Judge Fuentes' nomination that should be noted today: first, I note with considerable pride that he would be the first person of Hispanic descent to serve on the Third Circuit Court of Appeals, which is a source of great pride to the growing population in New Jersey of people of Puerto Rican, Colombian, Dominican, and Cuban descent. The entire community feels an enormous pride at this great personal achievement, and also the achievement of an entire community.

I should also note, Mr. Chairman, that the other thing historic about Judge Fuentes' nomination is he also served the briefest tenure in history on the District Court of New Jersey. Originally, Judge Fuentes was my nomination for the district court, and upon his interview by White House officials, they were so impressed with him that they told me that, indeed, they could not nominate him for the district court, but they were very pleased to nominate him for the court of appeals. He had less than a day on the district court as the President's nominee. And that is a considerable testament to his abilities and his career.

I should note, Mr. Chairman, too, that he is joined by his family: his wife, Olma; his daughters, Karina and Olma, who are here with him today; and a third daughter, Lilly, who I understand, Judge Fuentes, is not able to be with you today. I know what this must mean to his family as well.

Mr. Chairman, let me note simply about Judge Fuentes' career, if I could. From his days in law school to his current tenure on the Superior Court of New Jersey, Judge Fuentes has developed a reputation as a very accomplished member of the bar. He began his career at the State University of New York in Buffalo. He should have gone to Rutgers in New Jersey, but this single lapse of judgment has not precluded his nomination today. He was in legal practice, in private practice, for 7 years where he practiced both

civil and criminal law, while also serving as a part-time judge in Newark's Municipal Court.

In 1981, he assumed the bench as a full-time municipal judge where he remained until 1987 when he was promoted to the New Jersey Superior Court. He has now served 13 years on the State Superior Court where he has genuinely received a tremendous reputation among members of the bar.

I would like, Mr. Chairman, to add in the record, with your permission, letters from Governor Whitman in support of Judge Fuentes' nomination, letters by Carlos Ortiz and Dewar Bradshaw from the Hispanic National Bar Association in support of his nomination, and from the New Jersey State Bar as well. With your permission, I would enter these in the record.

The CHAIRMAN. Without objection, we will put them in the record.

[The letters were not available at presstime.]

Senator TORRICELLI. Mr. Chairman, then let me simply say that you have been very helpful to me in moving forward nominees for the district and appellate court, but in none of those instances have I felt any more pride than I do today with Judge Fuentes. I am very grateful for you moving this nomination. Indeed, with Judge Fuentes' nomination, each of the nominations in New Jersey that we have brought forward, you will have now moved toward confirmation, and for that I am very personally grateful.

Judge Fuentes, I am very proud to have been part of this achievement in your life and very grateful for your willingness to serve the people of our country.

Judge FUENTES. Thank you, Senator Torricelli.

The CHAIRMAN. Well, thank you, Senator Torricelli. That is great praise, and I have a lot of respect for Senator Torricelli.

Would either of you care to make a short statement to the committee? We will start with you first, Judge Fuentes, if you care to, and then to you, Judge Whittemore.

**TESTIMONY OF JULIO M. FUENTES, OF NEW JERSEY, TO BE
U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT**

Judge FUENTES. Mr. Chairman, first I would like to thank you for giving me the opportunity to appear before this committee. It certainly is an honor and a pleasure for me and my family.

I would like to thank—

The CHAIRMAN. It is an honor for us to have you here, your family as well.

Judge FUENTES. Thank you, sir. I would like to thank Senator Torricelli and Senator Lautenberg for their gracious introductory remarks. I am particularly grateful to Senator Torricelli for presenting my nomination to the President.

The Senator has introduced my family. I would like to mention them again. I am very proud of my family and very grateful that they are here. I want to thank my wife, Olma, who has given me tremendous support throughout our marriage. She is present. And my two daughters, Olma and Karina, who are here from college, and I greatly appreciate their support.

The CHAIRMAN. Glad to have all of you here.

Judge FUENTES. Lilly is unfortunately not able to come. She is married to a serviceman and is residing in North Carolina and could not be present today, but I have her support and I want to thank her as well.

I would like to also mention that there are members of the National and the New Jersey Hispanic Bar Association who are present. I want to recognize Carlos Ortiz, who is present here today. I would like to also recognize Ramon De la Cruz and Maritza Berdote Byrne, who is here as well.

Finally, Mr. Chairman, I would like to thank your staff and I would like to thank the staffs of Senator Leahy and Senator Torricelli for all the courtesies that they have shown throughout this process.

Thank you, Senator.

The CHAIRMAN. Thank you so much, Judge.

Judge Whittemore.

**TESTIMONY OF JAMES D. WHITTEMORE, OF FLORIDA, TO BE
U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA**

Judge WHITTEMORE. Mr. Chairman, I would like to thank you and members of the committee for this opportunity. It is indeed a pleasure and an honor to testify before you here today.

I would also like to thank the President for his confidence in nominating me for this prestigious judicial position, as well as acknowledge and thank Senators Graham and Mack for their diligent and cooperative efforts on behalf of not only myself but the other nominees in the Middle District of Florida. And my family as well I thank, my wife of 22 years as of Friday night. Thank you.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. That is great. Glad to have you and your family here.

Let me start with you, Judge Fuentes. You have worked as a judge for the last 22 years, serving first as a municipal judge for 9 years and then for the last 13 years as a superior court judge. For a portion of that time, you served in your court's Criminal Division, and I am sure you noticed the expansion of Federal crimes that has occurred during your 22 years as a judge.

Now, the Supreme Court has noticed and has issued several federalism decisions in the past few years that have recognized that Congress has overreached in some instances and emphasized that State institutions have the power to govern State transactions and activities.

In your view, how will the recent federalism decisions of the U.S. Supreme Court impact the work of the Federal courts, including the Third Circuit Court of Appeals? And do you believe or view this as a positive development or a negative one?

Judge FUENTES. I would have to say it is a positive development in this sense, Mr. Chairman: The concept of federalism is a recognition that States and their institutions ought to be permitted to make their decisions, that is, to function separately in separate ways. This recognition I believe is what makes our Nation strong.

I think that the National Government fares better when States are indeed allowed to perform their functions separately.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Judge Whittemore, you have been a State court judge in Florida for 13 years and have spent some time in your career working as a Federal public defender, as I understand it. Presumably, then, you have had some experience with the sentencing of criminals to terms of imprisonment. Prisons and jails are usually governed by laws passed by legislative bodies that can consider financial restraints, the problems of recidivism, and the benefits of long or short sentences.

Now, prisons and jails usually are administered by executive branch officials who have expertise in running the day-to-day operations of an incarceration facility. In your view, do the district court judges have the expertise to make rules for and to administer prisons? And wouldn't it be consistent with article III, the role of the Federal judge to do so?

Judge WHITTEMORE. Mr. Chairman, in my 10 years as a State court judge, of course, we exercise our jurisdiction and authority based on the laws promulgated by the State legislature. In those 10 years of experience and in perhaps my years as a defense attorney, judges are understood to follow the law, not make it. And those sentencing guidelines and the running of those prisons and facilities and the establishment of sentencing guidelines are a prerogative of the legislative branch. And it would be my purpose, if I am fortunate enough to be confirmed, to follow those laws.

Florida has a set of sentencing guidelines which has been in effect for quite some time now, and State judges are given some leeway, but it is a statute which is intended to present some uniformity. And that is the extent of the judge's responsibility in terms of sentencing.

The CHAIRMAN. Thank you. Let me turn to Senator Specter at this point.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Judge Fuentes, I have attended the hearing especially because you are up for nomination for the Court of Appeals for the Third Circuit, and so far Senator Torricelli and I have been able to maintain that long, unguarded border, western New Jersey and eastern Pennsylvania. But I wanted to hear your testimony.

And on a serious vein, do you think that your experience in the State courts will be a significant plus for service on the Court of Appeals for the Third Circuit?

Judge FUENTES. Thank you, Senator Specter. I, as you know, have been in the State court system for over 20 years. I have handled every kind of case, from the simplest traffic offense to the most complex criminal and civil matter. I have that breadth of experience in addition to which I work very hard and I am very dedicated, and if privileged to serve on the third circuit, I would bring that same hard work and dedication.

I have no illusions about how difficult this job is. I think it is going to be very, very difficult. But it is a challenge that I am pre-

pared, I believe, to meet and, of course, again, a privilege to serve on the court. I will take advantage of every course that is offered through the Federal Judicial Center to aid me in doing this job better.

Senator SPECTER. In the Federal Court of Appeals, you are going to be facing very, very different issues. You are going to be facing Securities Act cases. You are going to be facing antitrust cases. You are going to be facing very complex litigation. But I do believe if you approach it with diligence and hard work, your background will stand you in good stead. You are going to be up with the tough taskmaster in Chief Judge Becker. He has an undermanned court—underpersonned court. He has some women on the court as well. And it is a very prestigious court, and it has got a tremendous volume of very high-powered litigation. But Senator Torricelli speaks of you very highly, and I know of your record. But I just wanted to come down and participate briefly in the hearing.

Judge Whittemore, I am glad to see you nominated. We are U.S. Senators as well as Senators from specific States, and I have reviewed your resume, and I have no specific questions.

Thank you very much, Mr. Chairman.

Judge WHITTEMORE. Thank you, Senator Specter.

The CHAIRMAN. Thank you, Senator Specter. I appreciate that.

Let me just ask a few other questions before we finish today. The Founding Fathers—and I will just ask both of you to answer this question. The Founding Fathers believed that the separation of powers in a government was critical to protecting the liberty of the people. Thus, they separated the legislative, executive, and judicial branches and the powers into three different branches of government, the legislative power being the power to balance moral, economic, and political considerations and make law, the judicial power being the power only to interpret laws made by Congress and by the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or to rebalance the competing moral, economic, and political considerations?

Judge FUENTES. I believe, Mr. Chairman, that a judge is required to accept the balance that is struck by the U.S. Constitution and Congress. A judge's responsibility is to interpret the laws, not to legislate from the bench.

The CHAIRMAN. How about you, Judge?

Judge WHITTEMORE. Mr. Chairman, I would echo those comments in recognition of the separation of powers doctrine the Founders intended to apply, and that is the strength of our Union.

The CHAIRMAN. All right. Under what circumstances do you believe it appropriate for the Federal court to declare a statute enacted by Congress unconstitutional?

Judge FUENTES. It is a very rare occasion, Mr. Chairman. Rarely will a Federal court declare a statute unconstitutional. A judge is required to apply all existing precedent to the issue that is presented. Only in the clearest and most compelling circumstance would a judge declare a statute of the Congress unconstitutional because we have to be mindful that the Congress represents the will of the people. That is entitled to great respect and deference.

The CHAIRMAN. Judge Whittemore.

Judge WHITTEMORE. Such a statute would come clothed with the presumption of constitutionality, and that is the starting mark. And if the language of that statute is clear, there would be no occasion to declare it unconstitutional. Precedent from case law teaches us as judges and as lawyers that there are constitutional challenges to many enactments of Congress and the various State legislatures. And when those issues are presented to judges, we are duty-bound to apply that analysis, depending on the particular statute. But it starts with the presumption of constitutionality as an expression of the will of the people.

The CHAIRMAN. OK, now, the Supreme Court precedents are binding on all lower courts, and the circuit courts of appeals precedents are binding on the district courts within that particular circuit.

Now, are both of you committed to following the precedents of the higher courts and following them faithfully and giving them the full force and effect, even if you personally disagree with those precedents? Judge Fuentes?

Judge FUENTES. I am committed and bound to following the precedent of the U.S. Supreme Court and the precedents of my circuit, yes.

Judge WHITTEMORE. Mr. Chairman, I likewise am committed to following the precedent of the eleventh circuit in my case, or if the Supreme Court has spoken, we are committed to following that precedent. And there is no room for a judge to assume a personal agenda if a higher court has spoken.

The CHAIRMAN. All right. Now, please state in detail your best independent legal judgment on the lawfulness under the Equal Protection Clause of the 14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions—that is, hiring, promotions, layoffs—college admissions and scholarships awards, and the awarding of Government contracts.

Judge FUENTES. Mr. Chairman, according to the U.S. Supreme Court in the case of *Adarand v. Peña*, race-based and gender-based classifications must be subjected to the strict scrutiny standard of review. Classifications involving race and gender can only be sustained if they are narrowly tailored to respond to a compelling State interest. And if I am privileged to serve on the Court of Appeals, that is the ruling that I will uphold.

Judge WHITTEMORE. Likewise, Mr. Chairman, I am familiar with the *Adarand* decision and the cases that are not only pending but have been decided based on gender restrictions. The strict scrutiny standard is the applicable standard to apply in any racial preference legislation, and the standard, as discussed by Judge Fuentes, is the correct standard and I agree with him and would follow it.

The CHAIRMAN. Do either of you have any legal or moral beliefs which would inhibit you or prevent you from carrying out—from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge FUENTES. Mr. Chairman, the U.S. Supreme Court has spoken clearly on the subject. There is no constitutional bar to the im-

position of the death penalty, and if I am privileged to serve, I will uphold that law.

Judge WHITEMORE. Likewise, Mr. Chairman, I have nothing in my personal or professional background that would prevent me from following the law as promulgated by Congress and the precedents of the U.S. Supreme Court in that regard, imposing the death penalty.

The CHAIRMAN. Thank you.

Senator Torricelli, do you have any other questions.

Senator TORRICELLI. Mr. Chairman, I don't have any questions, but maybe just a comment in wishing both Judge Whittemore and Judge Fuentes well and a successful career on the bench.

Mr. Chairman, I have noted recently that the architect of American independence and our Nation's Constitution, Thomas Jefferson, upon becoming President attempted to eliminate the court of appeals as being superfluous. We no longer recognize it as such. It is a very important part of our system of justice.

And I leave you with this simple observation: We count on you to be part of the system of justice to defend the American people from those who would victimize them, those on the streets, those who would steal or rob or hurt them, but also to protect them sometimes from the excesses of their own Government. As a Democrat, I sometimes have a different philosophy on this issue. But I believe that, like many of my Republican colleagues, the judiciary is an important bulwark against the excesses of Government.

You are in the Government, but you are not of the Government. Your independence is the most critical aspect of your service in the judiciary. I trust the smallest, poorest, and most powerless of citizen standing before you will always be treated as the equal of the best financed and arrogant bureaucrat of the Federal Government seeking to impose his or her will on an individual citizen. We count on you for that.

You know we expect you to protect citizens from each other. Sometimes your more important duty is to protect the citizen from their own government. And I hope and trust you will both remember that through your long service in the judiciary.

Mr. Chairman, thank you very much, and thank you for holding this hearing.

The CHAIRMAN. Thank you. I happen to believe that being a Federal judge is one of the highest callings in the world. It is a sacred calling because I believe that the courts have probably saved this Constitution more than any other branch of government. Congress has a tendency to kick it down the drain. As you can see, from time to time, it is the courts that have to pull it back and make sure that it continues. So what you are doing is extremely important.

As a member of the Third Circuit Court of Appeals myself, I have a lot of respect for that court and naturally feel that you will make an excellent addition to that court. And I intend to support both of your nominations, and I hope we can get them through in this very difficult political year. But I think we will be able to. You are both very good men, and I just wish you the best. Make us proud when you get there and remember what you said here today because I will be watching.

Judge FUENTES. Thank you, Mr. Chairman.

Judge WHITEMORE. Thank you.

The CHAIRMAN. OK; well, we are delighted to have you both here. We commend you and your families for being the good people that you are and setting the good example that you have and doing the things in your life and times that have qualified you to be in these positions.

Like I say, I have a great deal of respect for the Federal judiciary, and we just wish you both the best. And we will move these nominations as quickly as I can.

Judge FUENTES. Thank you, Mr. Chairman.

Judge WHITEMORE. Thank you very much.

The CHAIRMAN. Good to see you.

[The biographical information of Judge Fuentes follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Julio M. Fuentes

(Until about 1970 I used the nickname "Nel,"
which is derived from Manuel, my middle name.)

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

(H) North Caldwell, NJ (O) Robert Wilentz Justice Complex
212 Washington Street, 8th Fl.
Newark, NJ 07101

3. Date and place of birth.

February 16, 1946, Humacao, Puerto Rico

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

Married August 5, 1977 to Olma Young.
Spouse is a homemaker.

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

J.D. S.U.N.Y. at Buffalo 1972-1975
(Law degree awarded June 1975)

M.A. Rutgers 1987-1993
(Graduate program pursued evenings.
Degree in Liberal Studies awarded June 1993)

M.A. New York University 1971-1972
 (Thesis requirement completed in June 1982.
 Degree in Latin American Studies awarded
 October 1982)

B.A. So. Illinois University 1964-66; 1969-71
 (Degree awarded June 1971)

Also in 1968, while in military service, I took two extension courses offered by Florida State University in the Canal Zone. Additionally, I took courses at Ocean County College, Toms River, NJ, in the summers of 1969 and 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.

A. Career Employment

1987-Present	Judge, New Jersey Superior Court
1981-1987	Judge, Newark Municipal Court
1978-1981	Municipal Judge (part time basis)
1977-1981	Fuentes, Plant & Velazquez 220 Newark Avenue, Jersey City, NJ (Partner)
1975-1977	Miller, Hochman, Meyerson & Schaeffer 955 West Side Avenue, Jersey City, NJ (Associate)

B. Law School Employment

- Appx. 1973-1975 Erie County Bar Association Pretrial Program
- Appx. 1972 Carlisi, Carlisi & Trafalski, Buffalo, NY
(Clerk)

C. Other

- 1982-1985 U.S. Selective Service System, Draft Board 30. Chairman 1982.
- 1979-1985 Partner, then sole owner of a commercial building in Newark, NJ, with three (3) tenants.
- 1971-1972 Hill, Rivkin, Warburton, McGowan & Carey
Fulton Street, New York, NY
(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.

US Army 1966-1969
First Lieutenant, SN [REDACTED]
Honorable Discharge - April 1969

Upon discharge from active duty, I remained an officer in the U.S. Army Reserves until approximately 1972 when I completed my reserve obligation. In the service I was awarded a Parachute Badge, Ranger Tab and a National Defense Service Medal.

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

Grand Marshall, Puerto Rican Statewide Parade of New Jersey (1981); City of Newark resolutions for public service (1986 and 1987); Essex County Hispanic Law Enforcement Society, Outstanding Hispanic Citizen Award, (1986); University of Medicine & Dentistry of New Jersey community service award (1991).

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
New Jersey Bar Association
Essex County Bar Association
Hudson County Bar Association
New Jersey Hispanic Bar Association
National Hispanic Bar Association
New Jersey Supreme Court Task Force on
Minority Concerns (1986).
New Jersey Supreme Court Task Force on
Drugs in the Courts (1990).

No offices held in any of these associations.

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.

Newark Lions Club 1981-Present

To my knowledge, the Lions club does not lobby before 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.

1975-Present	New Jersey Supreme Court
1975-Present	United States District Court for the District of New Jersey
1981-Present	United States Supreme 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.

In response to this question, I am supplying the following

1. Copy of article entitled "Lawyers, Litigation and Culture" 151 New Jersey Lawyer 46 (1994)
2. Copy of article entitled "Maintain the Civil Division Momentum" Essex County Bar Chronicle (October 1997)

I wish to add, in regard to reports, that I served as a member of a court appointed Task Force that issued a report to the New Jersey Supreme Court in 1991 on the subject of drugs and the courts, and in 1992 on the issue of minorities and the legal system.

3. Report of the New Jersey Supreme Court Task Force on Minority Concerns (1986)
4. Report of the New Jersey Supreme Court Task force on Drugs in the Courts (1990)

Additionally, in 1983, I wrote and developed an informational video arraignment designed to permit monitor viewing of an arraignment in the Newark Municipal Court. The tapes were shown daily for about 10 years.

5. Video Tape Arraignment for the Newark Municipal Court Disorderly Persons Offenses.

6. Video Tape Arraignment for the Newark Municipal Court, Indictable Offenses.

7. Press Report regarding video tape arraignment project.

In regard to speeches, I have made a number of presentations over the years but none involving constitutional law or legal policy. While I do not have copies of speeches that I have delivered, I do recall that I have given certain speeches. For example:

- In 1990 I spoke to law students at Seton Hall University on the qualifications for the position of judicial clerk.
- In 1990 I spoke before the North Ward Cultural and Educational Center in Newark, New Jersey, on the importance of education.
- In 1996 I spoke before my daughter's high school Spanish honor society.
- In a 1997 county bar seminar, I spoke as a panel member on the subject of the Civil Practice Rules.
- In March 1999 I spoke before the Essex County Bar Association, General Equity Committee, on the subject of Orders to Show Cause and new filing procedures in the Chancery Division.

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

Excellent. My last physical exam was in October 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.

1978-1987. Judge, Newark Municipal Court. This is an appointed position. From 1978 to 1981, all positions in the court were part-time. In 1981 the position was converted to a full-time position. This is a court of limited jurisdiction. The Municipal Court addresses cases involving ordinance violations, traffic and disorderly persons offenses.

1987-Present. Judge, New Jersey Superior Court. Appointed

1987-1990 Family Division

This Division addresses all matrimonial actions, claims for divorce, equitable distribution of property, support, custody and visitation. Juvenile delinquency matters are also presented in this Division.

1990-1993 Criminal Division

This Division hears all proceedings involving indictable offenses, including initial appearance, jury trial, sentencing and post conviction relief.

1993-1997 Civil Division

All actions involving money damages in excess of \$10,000 are presented in the Civil Division, including negligence, contract, property and insurance claims.

1997-Present General Equity

Claims which are equitable in nature are presented in this Division. These include requests for specific performance, claims for temporary and permanent injunctive relief, shareholder derivative actions and mortgage foreclosures.

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) Citation for the ten most significant opinions written.

1. Canty v. Ever-last Supply Co., 296 N.J. Super. 68, 685 A.2d 1365 (Law Div. 1996)
2. Essex Fells v. Kessler Inst., 289 N.J. Super. 329, 673 A.2d 856 (Law Div. 1995)
3. Sabatino v. Saint Aloysius, 280 N.J. Super. 185, 654 A.2d 1033 (Law Div. 1994); 288 N.J. Super. 233, 672 A.2d 217 (App. Div. 1996)
4. UMC/Stamford, Inc. v. Allianz Underwater Ins. Co., 276 N.J. Super. 52, 647 A.2d 182 (Law Div. 1994)
5. State v. Samuels, 253 N.J. Super. 335, 601 A.2d 784 (Law Div. 1991)
6. Solid Waste Transfer & Recycling, Inc. v. Recycling & Salvage Corp., ESX-C-137-93 (Ch. Div. June 29, 1998)
7. Nachtigall v. New Jersey Turnpike Authority, ESX-L-3627-97 (Law Div. April 21, 1997)
8. Blakey v. Continental Airlines, Inc., ESX-L-15323-95 (Law Div. April 3, 1997)

9. Bell Atlantic Network Services, Inc. v. P.M. Video Corp., ESX-L-6602-91 (Law Div. December 5, 1996)

10. Bell Atlantic Network Services, Inc. v. P.M. Video Corp., ESX-L-6602-91 (Law Div. January 19, 1996)

- (2) A short summary of and citations for all appellate opinions where my decision was reversed or where my judgment was affirmed with criticism.

PUBLISHED OPINIONS

1. Green v. General Motors Corp., 310 N.J. Super. 507, 542 709 A.2d 205 (App. Div. 1998).

In this product liability action, the Appellate Division reversed a jury's \$13 million award for future medical care and remanded the case to the trial court for a supplemental hearing to determine present value of medical expenses "based on a fair market return on a balanced portfolio of prudent investments and a reasonable estimate of medical expense inflationary costs."

2. Cromartie v. Carteret Savings & Loan, 277 N.J. Super. 88, 649 A.2d 76 (App. Div. 1994).

In this matter, a jury awarded the plaintiffs loss of rent and property damage due to a fire that damaged their rental property. The Appellate Court reversed on the issue of damages, holding that the trial evidence did not support an award for lost income and increased costs of home replacement.

3. State of New Jersey in the Interest of B.G., C.A. and P.A., 247 N.J. Super. 403, 589 A.2d 637 (App. Div. 1991).

This case involved a number of juveniles charged with sexually assaulting a victim they knew was mentally defective. I determined probable cause existed for all charges except those involving force or coercion. The Appellate Court ruled that regardless of evidence that the seventeen year-old, mentally retarded victim voluntarily participated in sexual activity, and though at times she denied coercion, probable cause existed, on the basis of hearsay evidence alone, to establish that the accused juveniles had used force or coercion and that they knew that the victim was mentally retarded.

4. McKinney v. East Orange Municipal Corp., 284 N.J. Super. 639, 666 A.2d 191 (App. Div. 1995).

In a § 1983 Civil Rights action, the Appellate Division ruled that plaintiff's expert on police procedure should have been permitted to testify because most jurors have no personal knowledge of how police should conduct themselves in regard to the premises and the occupants during a "no-knock" entry.

UNPUBLISHED OPINIONS

5. Patterson v. Curry, A-3231-93T5 (App. Div. July 14, 1995).

Instructions were given to the jury that if a verdict was not reached, they would have to return the following week. Additionally, a

juror under a time constraint was allowed to answer four of the six questions posed to the jury and was then released. The Appellate Court ruled that these actions constituted undue stress on a jury to return a verdict and were therefore error.

6. Lai v. Bende, A-639-93T1 (App. Div. March 24, 1995).

After proofs were completed at trial, all claims were dismissed except breach of contract and tortious interference with contractual relations. According to the Appellate Court, as a matter of law, these claims too should have been dismissed as the proofs before the jury did not establish either of these claims.

7. Brown v. Kelling, A-3862-93T5 (App. Div. January 6, 1995).

In this case, the Appellate Court determined that dismissal of a case with prejudice more than a year and a half after it had been dismissed without prejudice was too drastic a remedy, where the advocate alone should have been sanctioned.

8. Ramco, Inc. v. Boerer, A-2558-93T5 (App. Div. October 19, 1994).

Building a house approximately eight feet to the west of the planned location was not trivial or insubstantial but instead constituted a failure to construct the house "substantially in accordance" with the contract.

- (3) Citations for opinions on federal or state constitutional issues.

1. Sabatino v. Saint Aloysius, 280 N.J. Super. 185, 654 A.2d 1033 (Law Div. 1994), aff'd, 288 N.J. Super. 233, 672 A.2d 217 (App. Div. 1996).

First Amendment requires that the court abstain from ruling upon a Catholic school's decision not to hire a lay school principal.

2. Blakey v. Continental Airlines, Inc., ESX-L-15323-95 (Law Div. April 3, 1997).

In this matter, Tammy Blakey, a female airline pilot, residing in the State of Washington, brought an action in New Jersey against Continental Airlines and several of its male pilots for defamation and sexual harassment based on statements the defendants posted on an e-mail service. In granting the defendants' motions for dismissal, I determined that the court may not constitutionally assert jurisdiction over the non-resident pilots solely based on electronic contacts with the forum. Thus, an e-mail posting of a libelous statement in the forum state alone was insufficient to satisfy constitutional due process.

3. Essex Fells v. Kessler Inst., 289 N.J. Super. 329, 673 A.2d 856 (Law Div. 1995).

Although a government entity may take or condemn private property where it is essential for public use, when the decision to condemn is made, as in this case, in bad faith, it should be set aside.

4. Bell Atlantic v. P.M. Video, 146 N.J. Law Journal 1038.

In this matter, I reduced a \$25 million punitive damage award to \$3.125 million because, among other reasons, in the case of BMW of N.A., Inc. v. Gore, 116 S.Ct. 1589 (1996), the United States Supreme Court found that grossly excessive punitive damages may amount to a violation of a company's right to due process.

5. Deacon Kadel Allen v. Reverend W. Temple Richie, App. Div. A-6331-97T1F (1998)

In this case, nineteen (19) members of the Union Baptist Church organized themselves into a committee and commenced an action against the church and its pastor. As a result, the church membership met and expelled all nineteen plaintiffs. In April 1998, I signed an Order restraining the expulsion pending a hearing. In June 1998, I determined that the court would be impermissibly intruding into the parties' religious affairs contrary to the First Amendment if I retained jurisdiction over the expulsion issue. Thus, I dismissed those claims. In an unpublished opinion, the Appellate Division affirmed the dismissal.

6. Solid Waste Transfer & Recycling, Inc. v. Recycling & Salvage Corp., et al., C-137-93. Decided July 1998.

In this action, the plaintiff sued defendant for damages based on the defendant's failure to comply with New Jersey's solid waste flow regulations. Thereafter, in Atlantic Coast Demolition & Recycling, Inc., v. Board of Chosen Freeholders, 112 F.3d 652 (3d Cir.

1997), the Third Circuit Court of Appeals held that New Jersey's solid waste flow regulations were an unconstitutional burden on interstate commerce. Based on this ruling, I dismissed plaintiff's complaint for damages because the Circuit Court's holding must be applied retroactively and this means that the state's waste flow regulations must be treated as if they were not in effect during the period for which plaintiff sought damages.

While not directly responsive to this question, I should add that I have often ruled from the bench without written opinion on constitutional issues presented in the course of a motion or trial. For example, in 1985, I found a member of the Socialist Worker's party guilty of violating a municipal ordinance which regulated the distribution of literature on public sidewalks. I determined that the ordinance properly regulated, but did not bar free speech. In 1994 I decided Rachmiel v. CBS. In this matter, CBS News aired undercover video tapes of a New Jersey attorney implicated in filing allegedly false personal injury claims. The attorney, contemplating a defamation suit against CBS, filed a pre-suit application for disclosure of CBS's outtakes. In a bench ruling, I denied the application because the State's Shield law protected CBS against disclosure and because the attorney could not present a threshold showing of libelous intent. However, I ordered that CBS preserve all outtakes of its program in the event future litigation warranted disclosure. And, in a 1997 case implicating the right to petition the government, Citizens for Government Change v. West Orange, I ordered from the bench that, despite technical flaws, a change-of-government referendum should be placed on the general ballot and before a

maximum number of voters rather than a special election which has a lower turnout and would cost tens of thousands of dollars.

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.

U.S. Selective Service System, Draft Board 30
1982-85. Chairman 1982

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;

1987- Present	Judge, New Jersey Superior Court
1981-1987	Judge, Newark Municipal Court
1978-1981	Municipal Judge (part time basis)
1975-1977	Miller, Hochman, Meyerson & Schaeffer 955 West Side Avenue Jersey City, NJ
1977-1981	Fuentes, Plant & Velazquez 220 Newark Avenue Jersey City, NJ

- 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 to 1981, I was involved in the general practice of law. My cases were mostly in the areas of personal injury, criminal law and real estate. I also handled some commercial litigation. My court appearances during the initial years were very frequent. I appeared as defense counsel in several state prosecutions and in two significant federal criminal prosecutions: U.S. v. Neyra and U.S. v. Cannon. In 1981, I accepted a position as a full-time judge.

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

My former clients were typically Jersey City and Hudson County, New Jersey,

residents with legal problems in real estate, personal injury and criminal law. A large number of my clients came from the nearby Hispanic area of Jersey City.

- 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 1975 to 1977, as an associate in a general practice firm, I appeared in all state tribunals, including municipal court, superior court and workers compensation court, on almost a daily basis. I handled trials, motions and settlement conferences. I also appeared in federal court on motions, case management conferences and trials. The frequency of my court appearances diminished when I left my first employment to establish a law firm. Also, beginning in 1978, I served as a part-time municipal judge, resulting in less frequent court appearances. I continued in the general practice of law, appearing in court approximately once a week, until becoming a full time judge in 1981.

2. What percentage of these appearances was in:
- (a) federal courts; 15%
 - (b) state courts of record; 85%
 - (c) other courts. None
3. What percentage of your litigation was:
- (a) civil; 70%
 - (b) criminal. 30%

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 approximately 12 cases to verdict. I was sole counsel on behalf of the criminal defendant or the civil plaintiff in each case. The exceptions were in the cases of U.S. v. Neyra and U.S. v. Cannon, in which I was co-counsel with other attorneys.

5. What percentage of these trials was:
- | | |
|---------------|-----|
| (a) jury; | 75% |
| (b) non-jury. | 25% |

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.

Unfortunately, because I have not been a practicing attorney for the past seventeen years, I have limited files for cases that I handled for that period.

With the exception of one case, I do not believe that any of my former litigated matters resulted in a published opinion. Hence, I can only present details on seven matters that I have reconstructed, mostly from court dockets, for these purposes.

1. U.S. v. Cannon (Dkt No. 77-00048-06) - This was a six week drug possession, distribution and conspiracy case tried before U.S. District Court Judge Herbert J. Stern in 1977. Judge Stern is now in private practice at 75 Livingston Ave., Roseland, NJ, (973) 535-1900. I appeared as sole counsel for co-conspirator Morris Lever. The significance of the case was the scope of the conspiracy, which involved thirteen (13) defendants and included illegal acts done in various states and in Mexico. At trial, the U.S. Attorney presented evidence to establish that the heroin was imported from Mexico, then transported to California, Michigan and New Jersey. The proofs included credit card statements for gas purchases and a substantial number of hours of wiretaps. My client, Morris Lever, disclaimed knowledge of any conspiracy. He presented evidence to attempt to show that his lifestyle was inconsistent with the allegations. He was eventually found guilty along with several other defendants. An appeal was taken to the Third Circuit Court of Appeals by a different attorney, but the conviction was affirmed.

Terrance P. Flynn appeared for the U.S. Attorney. He is now a judge in Essex County.

Terrance P. Flynn, J.S.C.
N.J. Superior Court
212 Washington Street
Newark, NJ 07101
(973) 693-6746

The current addresses and phone numbers of counsel for the co-defendants are as follows:

(Defendant Stephanie Gurley)
Henry W. Jaeger, Assistant Prosecutor
Administration Building
Elizabeth, NJ 07207
(908) 527-4500

(Defendant George Neil Brown)
Thomas J. Herten, Esq.
25 Main Street
Hackensack, NJ 07601
(201) 342-6000

(Defendant Daryl F. Walls)
Richard L. Slavitt, Esq.
1719A Route 10 East
Parsippany, NJ 07054
(973) 898-1199

(Defendant Bernard Cannon)
Lawrence Dubin, Esq.
401 Broadway
New York, NY 10013
(212) 431-9380

(Defendant Lafrance Jordan)
Jeffrey Simms, Esq.
443 Northfield Avenue
West Orange, NJ 07052
(973) 731-5454

(Defendant Roderick Von Reed)
Marc S. Friedman, Esq.
7 Becker Farm Road
Roseland, NJ 07068
(973) 992-1990

(Defendant Milford Reed)
Larry J. McClure, Esq.
210 River Street
Hackensack, NJ 07601

(201) 489-3555

(Defendant John Craig, Sr.)
Godfrey J. Dillard, Esq.
535 Griswold Street
2518 Buhl Bldg.
Detroit, MI 48207
(313) 963-3135

(Defendant James A. Meredith)
Elliot S. Hall, Esq.
2440 Buhl Bldg.
Detroit, MI 48226
(313) 396-2923

I have been unable to locate the current address and phone number of the other attorneys for the co-defendants in this case. However, I am listing their names and last known address as follows:

(Defendant Leroy Cannon, Jr.)
Edward F. Bell, Esq.
840 Buhl Bldg.
Detroit, MI 48226
(no phone number available)

(Defendant Sandra Denise Martin)
George E. Pollard, Esq.
55 Hudson Street
Hackensack, NJ 07601
(no phone number available)

(Defendant Loretta Cannon)
Hubert Johnson
(Disbarred)

(Defendant Darrel Calhoun)
Thomas W. Greelish, Esq.
(Deceased)

2. U.S. v. Neyra (Dkt No. 76-181-2) - This one week drug conspiracy case was tried in 1977 before Judge Clarkson Fisher, U.S. District Court for the District of New Jersey, now deceased. I appeared as sole counsel for Mr. Neyra, a Colombian accused of importing drugs from Colombia to New York via California and New Jersey. Mr. Frederick Lewis represented co-defendant, Julio Orejuela. At trial, the government's case alleged that Neyra and co-defendant Julio Orejuela used skin diving equipment to retrieve a package dropped by airplane into the San Francisco Bay. Thereafter, defendants boarded a commercial flight for Newark with a suitcase. When the suitcase arrived in Newark, it was opened by airport officials because it lacked identification tags. Inside, officials found skindiving gear and a substantial amount of cocaine. After claiming the suitcase, my client and the co-defendant were arrested exiting the airport with the suitcase and what was alleged to be the keys to the suitcase in their pockets. The defendants denied ownership and claimed they picked up the wrong suitcase. Defendants also sought to establish a similarity of key types among various luggage manufacturers. At the conclusion of the trial, both defendants were convicted of various drug offenses. My co-counsel in this case was:

Frederick Lewis, Esq.
7 Dey Street
New York, NY 10007
(212) 227-3900

Terrance P. Flynn, presented the case for the U.S. Attorney's office.

Terrance P. Flynn, J.S.C.
N.J. Superior Court
212 Washington Street

Newark, NJ 07101
(973) 693-6746

3. Consolidated Freightways & Chimento *

I handled all litigation aspects of this matter, on behalf of the plaintiffs, from 1975 to late 1977 before Magistrate Serena Perretti of the U.S. District Court in Newark. Perretti is now a Superior Court Judge in Essex County. In this case, plaintiffs claimed a violation of their Collective Bargaining Agreement based on defendant's decision to transfer a job site from Hudson County to Staten Island. The significance of this matter concerned the number of plaintiffs, approximately 15, and the difficult discovery and damages issues involved. Plaintiffs had to prove that the transfer was a violation of the Agreement as opposed to the appropriate exercise of management discretion. Additionally, each plaintiff had to establish his own damages based on what he would have earned but for the job site transfer. I handled virtually all pretrial discovery, motions and conferences before the Magistrate. I left the firm before the case was tried. The file was taken over by:

John Schwartz, Esq.
955 West Side Avenue
Jersey City, NJ
(201) 333-9000.

Mr. Seymour Margulies of Jersey City represented defendants.

Seymour Margulies, Esq.
15 Exchange Place
Jersey City, NJ 07302
(O) (201) 333-0400
(H) XXXXXXXXXXXX

*The docket number is not available because

neither I nor my former law firm kept the file of this case.

4. State v. Lewin - (163 N.J. Super. 439 (App. Div. 1978)). In this case, my client, Gregory Lewin, was arrested and charged with driving under the influence of alcohol following an accident in which his vehicle struck two pedestrians. Before Lewin was given any Miranda warnings, he made statements to police concerning his consumption of alcohol. Subsequent to his statements, one of the pedestrians died. As a result, Lewin was charged with death by auto and convicted by a jury in Superior Court. I represented Mr. Lewin as sole counsel, only on the appeal before the Appellate Division of the Superior Court in 1978. I argued that statements Lewin made after his accident but before the pedestrian died should not have been admitted against him at trial because they were made in violation of Miranda v. Arizona, 384 U.S. 436. The New Jersey Appellate Division, in an opinion by Judge Allcorn, affirmed the conviction. The matter was decided on the briefs submitted.

Appellate counsel for the State:

Susan W. Sciacca, Esq.
Justice Center
10 Main Street
Hackensack, NJ 07601
(201) 646-2300

5. Lateano v. Forbes - In this civil action filed in the Superior Court, Hudson County, I represented plaintiff, Thomas Lateano, on a complaint for malicious prosecution and defamation. The case was tried before Judge Geoffrey Gaulkin, now retired, and a jury in

1977. Mr. Charles DeFazio, who is no longer in the practice of law, represented the defendant. His present whereabouts are unknown. In or about May 1973, the defendant Forbes filed a criminal complaint against Lateano, then Commissioner of Public Works for the Township of North Bergen. The complaint alleged that my client had stolen and misappropriated public funds. In October 1974, a Hudson County grand jury refused to indict my client. As a result, Lateano filed the civil action. I represented Lateano for the first time in his civil claim against Forbes. The central issues, when Forbes filed the civil action, concerned the question of malice in filing the criminal complaint and the damage to Lateano's good name and business. The case was declared a mistrial because the jury could not agree upon a verdict. Lateano chose not to pursue a second trial. My recollection of this case is based on notes of the opening statement I delivered at trial.

6. State v. Dawson - (Dkt No. D75P2010) - In this 1976 criminal action, I represented the defendant Ellen Dawson who was charged with assorted theft offenses relating to her employment as a payroll supervisor for Berkey Photo, Inc. The trial took approximately one week in the Superior Court of New Jersey, Passaic County, before Judge Louis Schwartz, now deceased. The primary obstacle for the defense was that an indicted co-conspirator pled guilty and was called to testify against my client. As defense counsel, I sought to demonstrate that the co-conspirator's testimony was presented in exchange for favorable prosecutorial treatment at her sentencing. My client was found guilty. My recollection of this case is based on a folder I recently found containing opening statements. I have obtained the docket sheet for this case, but it does not

contain the name of the prosecutor.

7. In 1977, before a jury, I represented plaintiffs John and Mildred Walker who claimed they were sold food unfit for human consumption at defendant's restaurant. Plaintiffs claimed that immediately after consuming the food on July 9, 1976, they felt nauseous and lost time from work. Immediately after consuming the food, plaintiffs called police and the local board of health. Unfortunately, my clients did not seek medical treatment until 30 days after the event. After a two day jury trial, the complaint was dismissed. Details of this case are also reconstructed from notes of my opening statement and, therefore, I have no further information I can provide.

I am unable to reconstruct or sufficiently detail additional cases in response to this question. Please note, however, that from 1975 to 1981 I was involved in a substantial amount of real estate work representing either buyers or sellers in residential and commercial transactions. I also represented clients in the sale or purchase of small businesses. I appeared very frequently in court during this period, addressing civil motions, workers compensation claims and various family court matters such as complaints for divorce, custody, visitation, and support. My daily office work included depositions, brief writing and client interviews.

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 legal career has been almost entirely in the judiciary. My litigation experience is limited to the years 1975 to 1981 and is outlined in response to No. 17 and 18, above.

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 a vested interest in a judicial pension that matures on March 1, 2006. Specifically, I would receive 22.5% of my current salary or \$25,875 per year. The current value of my deferred life insurance benefit is \$28,750.

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.

Any potential conflict of interest is best resolved by recusal or disqualification. However, I know of no category of litigation which would present a conflict. In any case, I intend to follow the Code of Judicial Conduct in resolving all such matters.

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

No

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

See financial disclosure report, AO-10, attached.

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

See attached financial 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-19
Rev. 1/98

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1997**

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial) Fuentes, Julio M.		2. Court or Organization U.S. Circuit Court, Third Circuit		3. Date of Report 03/08/1999	
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Circuit Judge - Nominee		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>03/08/99</u> Initial ___ Annual ___ Final ___		6. Reporting Period 01/01/1997 to 02/26/1999	
7. Chambers or Office Address Robert J. Wilentz Justice Complex 212 Washington Street Newark, New Jersey 07101		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 checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
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 1999	State of New Jersey judicial pension deferred until 2007
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 1997	State of New Jersey Judicial Salary	\$ 115,000
2 1998	State of New Jersey Judicial Salary	\$ 115,000
3 1998	Seller Financed Mortgage	\$ 4,000
4 1999	State of New Jersey Judicial Salary	\$ 119,166
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Fuentes, Julio M.	03/08/1999

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 23-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Massachusetts Education Finance Auth.	College Loans	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 Fuentes, Julio M.	Date of Report 03/08/1999
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VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets (including trust assets) <i>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse "(DC)" for ownership by dependent child. 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)	(2)	(1)	(2)	If not exempt from disclosure				
	Amt. Code1 (A-H)	Type (e.g., div, rent or int.)	Value Code2 (J-P)	Value Method Code1 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(3) 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.)									
1 General Electric Interest		A							
2 Plus									
3 State of NJ Pension		G							
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									

1	Income/Gain Codes: A=\$1,000 or less (See Col. B1, E4)	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 Hz=More than \$5,000,000	E=\$15,001-\$50,000
2	Value Codes: J=\$15,000 or less (See Col. C1, D3)	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: Q=Appraisal (See Col. C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Puentes, Julio M.	Date of Report 03/08/1999
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Fuentes, Julio M.	03/08/1999

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

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Date March 8, 1999

JULIO M. FUENTES

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, § 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

NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	3,200	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	58,500
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	225,270
Real estate owned—add schedule	365,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable	34,500	Other debts—itemize:	
Autos and other personal property	22,500		
Cash value—life insurance	28,750		
Other assets—itemize:			
PERSONAL EFFECTS	60,000		
		Total Liabilities	283,770
		Net Worth	230,160
Total Assets	513,950*	Total Liabilities and net worth	513,950
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner 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		

*This figure does not include the vested interest I have in a State judicial pension. In the year 2006, that pension will be worth \$25,875 per year.

SCHEDULE
REAL ESTATE MORTGAGE

Mortgagors: Julio M. Fuentes
Olma D. Fuentes

Mortgage: GE Capital Mortgage Services
401 Market Street
Philadelphia, PA 19101

Current Principal
Balance: \$225,289.09

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In 1988, I organized a group of community members to paint the exterior of a local library which had fallen in disrepair. The work, which took about three weeks to complete, was reported in the local press and the National Lions Club magazine. In 1991, I organized a food drive collecting over 5,000 cans of food for the Boy Scouts National Program. This project took about four weeks. This service was also reported in the National Lions Club magazine.

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?

During my first two years of college, 1964-66, I belonged to a fraternity (Phi Kappa Tau) whose membership was entirely male. Also, I have belonged to the Newark Lions Club since 1981. From 1981 to approximately 1987, the club restricted membership to males. Since 1987, the club has been fully integrated. Other than these two organizations and for the limited periods described, I have not belonged to any

organization that discriminates 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).

I was interviewed by a judicial screening committee for a United States District Court position. I am not aware of their recommendation because their work was confidential. Initially I was interviewed by a panel of three committee members. A few weeks later I was interviewed before the entire committee. Thereafter, I was interviewed by United States Senator Robert G. Torricelli. Ultimately, I was informed that the White House was interested in considering me for a Circuit Court position. In addition, I have been interviewed by the White House Counsel's Office, the FBI, the New Jersey and National Hispanic Bar Associations 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

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;

A judge should endeavor to resolve a dispute, not a large social dilemma.
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition for far-reaching orders extending to broad classes of individuals;

Judicial orders should focus on the dispute and the litigants in a given case, not on individuals or issues unconnected with the suit.
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

The imposition of affirmative duties upon government is ordinarily best left to legislative and executive bodies.
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

Traditional standing and ripeness requirements should not be relaxed especially for the purpose of addressing issues not before the court.
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight

responsibilities.

The judiciary works best resolving litigated conflicts rather than administering other institutions.

[The biographical information of Judge Whittemore follows:]

BIOGRAPHICAL INFORMATION (PUBLIC)

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

James David Whittemore

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

(Residence): Temple Terrace, Florida
(Office): 419 N. Pierce Street, Room 314
Tampa, Florida 33602

3. Date and Place of Birth:

August 29, 1952
Walterboro, South 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 - February 18, 1978
Martha Kathryn Whittemore (Walford)
Pharmacist
Cigna Healthcare of Florida, Inc.
Tampa, Florida

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

B.S.B.A. with Honors - University of Florida 1974
September 1970 - June 1974
Juris Doctor - Stetson University College of Law 1977
February 1975 - May 1977
Hillsborough Community College - Tampa, Florida
June 1971 (one course)

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 (Full-time)

1978-1981 Federal Public Defender's Office
(Assistant Federal Public Defender)
1981-1982 Whittemore & Seybold, P.A.
(Associate)

1982-1987 Whittemore & Campbell, P.A.
(Associate)
1987-1990 James D. Whittemore, Attorney at Law, P.A.
(Sole practitioner)
1990 - present State of Florida, Thirteenth Judicial Circuit, Hillsborough County, Florida
(Circuit Judge)

EMPLOYMENT (Part-time)

1974 Bay Area Contractors (B.A.C. of Florida, Inc.)
(Installer)
1976-1977 NORD Bar Review
(Sales Associate)
1974-1977 George W. Stone Realtors, Inc.
(Sales Associate)
1976-1977 Kent G. Whittemore, Attorney at Law
(Law Clerk)
1977 Bauer, Morlan & Wells, P.A.
(Associate/Law Clerk)
1981-1982 Temple Terrace Realty, Inc.
(Manager, Broker-Salesperson)
1981-1983 Bert Rodgers Schools of Real Estate
(Instructor)

OTHER ACTIVITIES

1981-1990 Florida Association of Criminal Defense Lawyers
(Director 1986-1987)(Board of Directors 1989-1990)
1988-1989 Hillsborough County Criminal Defense Lawyers Association
(Vice President 1988)(President 1989)
1991-present William Glenn Terrell Inn of Court
(President 1993-1994)

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.

B.S.B.A. with Honors - 1974 - University of Florida
AV rated - Martindale Hubbell
Hillsborough County Bar Association - Young Lawyers Division
"1997-1998 Outstanding Jurist Award"
The Florida Bar - Young Lawyers Division
"1998-1999 Outstanding Jurist Award"

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.**

Hillsborough County Bar Association Peer Review Committee
 (Member 1998-present)
 Hillsborough County Bar Association Long Range Planning Committee
 (Member and Co-chair 1998)
 Association of Trial Lawyers of America:
 (Judicial Member 1998-present)
 (Regular Member 1981-1990)
 William Glenn Terrell Inn of Court
 (Member 1991- present)(President 1993-1994)
 Florida Bar Association
 (1977-present)
 Florida Association of Criminal Defense Lawyers
 (Member 1981-1990)(Director 1986-1987)(Board of Directors 1989-1990)
 Hillsborough County Criminal Defense Lawyers Association
 (Vice-President 1988; President 1989)
 Pinellas County Criminal Defense Lawyers Association
 (1981-1990)
 Certified Court Approved Arbitrator; United States District Court, Middle District of Florida
 (1985-1989)
 Certified Court Arbitrator; Thirteenth Judicial Circuit, Hillsborough County, Florida
 (1989)
 Florida Bar Association; Federal Practice Committee
 (Member 1982-1989)
 Florida Supreme Court Committee on Standard Jury Instructions - Civil Cases
 (Member 1996 - present)
 Florida Bar Grievance Committee 13A
 (Member 1987-1989; Chair 1989)
 Circuit Judges Conference
 (1990-present)
 Jury Management Committee Thirteenth Judicial Circuit
 (1995-present - Chairman)

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

None.

Please list all other organizations to which you belong.

Temple Terrace Golf and Country Club, Inc. (By-laws attached) (ATTACHMENT #1)
 Sigma Chi Fraternity
 St. Catherine's Episcopal Church, Temple Terrace, FL
 Gator Boosters, Inc. (University of Florida booster organization)
 President's Council (University of Florida)
 Ducks Unlimited
 Wild Turkey Federation
 Florida State Golf Association, Inc.

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

Florida Supreme Court - 1977
United States District Court, Middle District of Florida - 1977
U.S. Court of Appeals, 5th Circuit - 1978
U.S. Court of Appeals, 11th Circuit - 1981
U.S. Supreme Court - 1985

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

Domestic Violence - A Continuing Epidemic (ATTACHMENT #2)
Next Door News - April 1996

Ethical Pitfalls - Retainers? Refundable or Not? (ATTACHMENT #3)
Florida Defender - Winter 1990 / Vol. 2, No. 1

Speech Notes - Speech at induction of City Council Members, City of Temple Terrace, Florida; approx. June 1995 (ATTACHMENT #4)

Subcommittee Drafts of Jury Instructions - Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases - (ATTACHMENT #30)

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

Excellent. Date of last physical examination: April, 1999.

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 to the Circuit Court, Thirteenth Judicial Circuit, Hillsborough County, Florida, by (then) Florida Governor Bob Martinez on February 1, 1990 and was re-elected without opposition in 1990 and 1996. Florida Circuit Courts have jurisdiction of appeals from County Courts, exclusive original jurisdiction in all actions at law in which the amount in controversy exceeds \$15,000.00, probate proceedings, settlement of estates of decedents and minors, all cases in equity, including all cases relating to juveniles, all felonies

and all misdemeanors arising out of the same circumstances as a felony which is also charged, all cases involving the legality of any tax assessment or toll, actions in ejectment and all actions involving title or boundary or right of possession to real property. Circuit Courts may also issue injunctions, writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus and have the authority of direct review of administrative action prescribed by general law.

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:

- a. *William Poe v. Pam Iorio, Supervisor of Elections, (ATTACHMENT #5)*
No. 01-96-5537 (Fla. 13th Cir. Ct. August 26, 1996)
Order Denying Complaint for Injunctive Relief
- b. *Hillsborough County Republican Executive Committee v. Robert Butterworth, Attorney General; et al., (ATTACHMENT #6)*
No. 01-98-2855 (Fla. 13th Cir. Ct. June 29, 1998)
Order Declaring Section 105.09, Florida Statutes, Unconstitutional
- c. *Paylick v. Paylick, 697 So. 2d 157 (Fla. 2d DCA 1996)*
- d. *Margaret Simmons v. Cal Henderson; Sheriff of Hillsborough County*
6 Fla. L. Weekly Supp. 88 (Fla. 13th Cir. Ct. 1998)
- e. *City of Tampa v. Arcop, Inc.; et al. (ATTACHMENT #7)*
No. 01-91-8378 (Fla. 13th Cir. Ct. June 23, 1993)
Order Granting Thornton-Tomasetti, P.C.'s and Lev Zetlin Associates, Inc.'s Motions to Dismiss Plaintiff's Third Amended Complaint
- f. *Mimi Fisheries Co. Nigeria, LTD v. Ringhaver Equipment Co.*
No. 01-89-12375 (Fla. 13th Cir. Ct. August 23, 1993)
Order Granting Defendants' Renewed Motion for Directed Verdict
(ATTACHMENT #8)
- g. *James A. Duplass v. The Board of Regents of the State University System*
No. 01-96-3950 (Fla. 13th Cir. Ct. July 16, 1998)
Order Granting Plaintiff's Motion for Summary Judgment
(ATTACHMENT #9)

- h. American Properties, LTD. v. City of Plant City
No. 01-89-25745-East (Fla 13th Cir. Ct. May 5, 1992)
Findings and Conclusions (ATTACHMENT #10)
- i. Thomas P. O'Rear v. James W. Grimes (ATTACHMENT #11)
No. 01-93-352 (Fla. 13th Cir. Ct. January 17, 1995)
Order Granting Defendant's Motion for Summary Judgment
- j. Seabreeze by the Bay, Inc. v. Tampa Port Authority; et al.
No. 01-96-2171 (Fla. 13th Cir. Ct. July 14, 1998)
Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Partial Summary Judgment
(ATTACHMENT #12)

(2) Reversals:

Genesis 12, etc. v. Swindle; et al., 583 So. 2d 435 (Fla. 2d DCA 1991)

Order Granting Summary Judgment in Favor of Plaintiffs on contract action was reversed, the Court finding that a question of fact "as to when payment was due under the contract" existed which was determinative of whether the statute of limitations had run. (ATTACHMENT #13)

Brown v. Dykes, 601 So. 2d 568 (Fla. 2d DCA 1992) (ATTACHMENT #14)

In review of a paternity action brought by the father, the appellate court affirmed five issues raised by appellant-mother, while remanding to "provide the court with the opportunity to make further inquiry" regarding what surname the child of unmarried parents should take after the court has determined paternity. The appellate court reversed the trial court's denial of attorney's fees to the father under a statute which authorized imposition of attorney's fees only against the father and remanded to the trial court to address the merits of the father's motion for attorney's fees.

Driggers Concrete Inc., etc. v. The Citizens and Southern National Bank of Florida Case No. 92-01339; Order dated January 28, 1993

In an unpublished order, the appellate court quashed the trial court's Order cancelling judicial sale in a foreclosure action. The trial court had scheduled the foreclosure sale pursuant to the final judgment but had cancelled the sale when the property owner challenged the trial court's jurisdiction, as an appeal of the final judgment had been filed. In quashing, the appellate court found the trial court to have had jurisdiction to schedule the sale. The final judgment was ultimately affirmed. [630 So. 2d 1108 (Fla. 2d DCA 1993) (table)].

(ATTACHMENT #15)

Leniz v. Leniz, 626 So. 2d 1066 (Fla. 2d DCA 1993) (ATTACHMENT #16)

In a marital dissolution case, the appellate court reversed on one of four issues raised. The appellate court found error in the trial court having imputed to the appellant "an in kind contribution of \$100.00 per month from her boyfriend", finding no evidence in the record supporting that finding.

Professional Telephone Answering Service, Inc. v. Groce; et al., 632 So. 2d 609 (Fla. 2d DCA 1993)
(ATTACHMENT #17)

Appellate court reversed and remanded with instructions to reinstate an employer's affirmative defense of worker's compensation immunity in a case in which the employee was an alleged victim of a workplace sexual assault by a third party. The appellate court found that whether or not the sexual assault in this case was a risk inherent in the nature of the work remained a question to be determined by the fact finder.

Jones v. The Upjohn Company, 661 So. 2d 356 (Fla. 2d DCA 1995)

The appellate court reversed an order dismissing this products liability action with prejudice. Jones, who was convicted of two counts of first degree murder, alleged that Upjohn, the manufacturer of the sedative Halcion could be held liable on theories of negligence and strict liability for its alleged falsification of test results to obtain FDA approval and its failure to provide adequate warnings of Halcion's side effects which Jones alleged caused him to commit murder. The appellate court reversed the trial court's holding that Jones' suit was barred by the doctrine of collateral estoppel based upon his prior criminal proceedings, concluding that since Upjohn was not a party to the criminal proceeding, "the criminal and civil cases lack a mutuality of parties".

(ATTACHMENT #18)

Anheuser-Busch, Inc. v. Lopez; et al., 665 So. 2d 222 (Fla. 2d DCA 1995)

In a personal injury case, the plaintiff sought to discover information regarding other individuals upon whom Frank Kriz, M.D., the defendant's independent medical examiner, had performed independent medical examinations. The appellate court determined that the "names" or other "identifying information" of those individuals upon whom Dr. Kriz had conducted independent medical examinations were not discoverable, as the names of "nonparty patients" were not shown to be relevant.

(ATTACHMENT #19)

Morsani; etc. v. Major League Baseball; et al., 663 So. 2d 653 (Fla. 2d DCA 1995)

Appellate court reversed an order of dismissal which found that the defendants were not capable of tortious interference with Morsani's contractual attempts to acquire a major league franchise since Major League Baseball reserved the right to approve any new owner and could not have tortiously interfered with its own contractual right. Finding that the qualified privilege to interfere with a business relationship carried with it "the obligation to employ means that are not improper", the appellate court found that the allegations of the use of threats, intimidation and conspiratorial conduct fell outside the context of the proper exercise of Major League Baseball's approval rights and therefore stated a cause of action for tortious interference with advantageous contractual and business relationships. The appellate court also found that the Commerce Clause did not bar application of the Florida antitrust laws to interstate professional sports leagues and that the antitrust exemption for baseball extended only to the reserve system. (The underlying order was entered by my predecessor judge, an order I declined to revisit.)

(ATTACHMENT #20)

Boroff, et al. v. The Bic Corporation, 718 So. 2d 348 (Fla. 2d DCA 1998)

Appellate court reversed a final judgment of garnishment on funds an attorney held in his trust account on behalf of clients who had settled a personal injury action. The appellate court found that although the trial court had properly recognized the attorney's retaining lien, it was error to limit the amount of the lien to the amount owed to the attorney as attorney's fees as opposed to advanced costs and expenses.

(ATTACHMENT #21)

Campoamor, et al. v. Brandon Pest Control, Inc.; et al., 721 So. 2d 333 (Fla. 2d DCA 1998)

The appellate court reversed a defense jury verdict, holding that a demonstrative video tape was improperly admitted into evidence and allowed to be replayed by the jury during its deliberations. The subject video tape depicted the defendant demonstrating his extermination equipment, the location of drilling holes and the method of injection of pesticide. Computer produced animations depicting the drilling and injection process were interspersed on the tape. The appellate court found the video tape to be "patently deceptive and prejudicial in light of the entirety of conflicting evidence". (ATTACHMENT #22)

Newbern v. American Plasticraft, Inc.; et al., 721 So. 2d 351 (Fla. 2d DCA 1998)

In affirming in part and reversing in part, the appellate court found it was error to permit parole evidence to link a subsequent "profits agreement" to a purchase agreement which was unambiguous, a ruling made by my predecessor judge which I declined to revisit. This case involved complicated real property transactions between the parties beginning in 1979 and was referenced as a "very difficult case for the two trial judges" by the appellate court. In a companion case, *Shepard; et al. v. American Plasticraft, Inc.*, 23 Fla. L. Weekly D2508 (Fla. 2d DCA November 13, 1998), the appellate court found that Plaintiffs, Shepard and Skemp had been denied due process by the trial court finding that they were severally liable for monies due under the purchase agreement, since they were not named as parties in the pertinent contractual counts of the complaint. In the complaint, they had been named as parties in an accounting count. The cause was remanded for the trial court to allow the Plaintiff to amend its complaint to add Shepard and Skemp to all pertinent counts of the complaint, after which a new trial is to be conducted to determine Shepard and Skemp's liability to the Plaintiff for payments due under the purchase agreement. (ATTACHMENT #23)

Morsani v. Major League Baseball; et al., 24 Fla. L. Weekly D847 (Fla. 2d DCA March 31, 1999), Certiorari pending, Florida Supreme Court.

The appellate court held that the trial court incorrectly held that equitable estoppel was not a viable defense to the statute of limitations. The appealed order granted summary judgment in favor of the defendants, finding that Florida Statute 95.051 did not provide equitable estoppel as a tolling mechanism of the running of the statute of limitations, relying on a Florida Supreme Court decision, *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997). In the underlying case, plaintiff conceded that the statute of limitations had run on the claim made in Count I of the complaint but contended that the doctrine of equitable estoppel precluded application of the statute of limitations. In reversing, the appellate court found that the doctrine of equitable estoppel survived *Sullivan* and found error in the dismissal of Count I. In its decision, the Court stated "we must acknowledge that a strict reading of *Sullivan*, as applied by the trial court, would require affirmance". The Court concluded, however, that the Supreme Court did not intend *Sullivan* to be so narrowly construed as to eliminate the doctrines of equitable estoppel and waiver. The defendants filed a petition for certiorari review with the Florida Supreme Court, which remains pending. (ATTACHMENT #24)

Donohoe v. Starmed Staffing, Inc., 24 Fla. L. Weekly D1282 (Fla. 2d DCA May 28, 1999)

In this case, a former employer filed an action against a former employee for violation of an employment agreement. The order appealed from denied the former employer's motion for attorney's fees and costs, which was based upon an offer of judgment the former employer had served on the former employee. The appellate court found that the trial court "abused its discretion in determining that the offer of judgment was not made in good faith". In the underlying order, the trial court had determined that due to the procedural manner in which the offer of judgment had been made, the offerer had not made the offer in good faith. (ATTACHMENT #25)

(3) Significant Opinions on Federal or State Constitutional issues:

1. William Poe v. Pam Iorio, Supervisor of Elections,
No. 01-96-5537 (Fla. 13th Cir. Ct. August 26, 1996)
Order Denying Complaint for Injunctive Relief
(ATTACHMENT #5)
 2. Hillsborough County Republican Executive Committee v. Robert Butterworth,
Attorney General, et al., (ATTACHMENT #6)
No. 01-98-2855 (Fla. 13th Cir. Ct. June 29, 1998)
Order Declaring Section 105.09, Florida Statutes, Unconstitutional
 3. Reginald White v. Frank T. Johnson, (ATTACHMENT #26)
No. 01-92-8809 (Fla. 13th Cir. Ct. August 11, 1997)
Order Denying Plaintiff's Motion for Order Transporting Inmate
Affirmed by unpublished opinion (ATTACHMENT #26)
 4. John Ford Kursch, etc. v. Unified Construction Trades Board,
No. 01-95-7527 (Fla. 13th Cir. Ct. July 11, 1996)
Order Denying Petition for Certiorari (ATTACHMENT #27)
 5. Advanced Orthopedic Institute v. Bankers Insurance Company,
No. 01-94-1931 (Fla. 13th Cir. Ct. June 30, 1995)
Opinion filed in appellate capacity - Review of County Court Order
Granting Bankers Insurance Company's Motion to Compel
(ATTACHMENT #28)
 6. Edwin Ford (PRI) v. Care Unit of Florida, No. 01-93-3138
(Fla. 13th Cir. Ct. April 18, 1995) (ATTACHMENT #29)
Order Denying Plaintiff's Motion Attacking Constitutionality of
Florida Statute 768.21(8) (1993)
 7. Morsani v. Major League Baseball, No. 01-92-9631
(Fla. 13th Cir. Ct. March 9, 1998) (ATTACHMENT #24)
Order of Partial Summary Judgment
24 Fla. L. Weekly D847 (Fla. 2d DCA March 31, 1999); certiorari
pending, Florida 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.

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 have never clerked for a judge.

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

April, 1987 - January 31, 1990: Sole Practitioner
James D. Whittemore, Attorney at Law, P.A.
701 and 707 N. Franklin Street
Tampa, Florida 33602

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;**

1976 - 1977: Law clerk
Kent G. Whittemore, Attorney at Law
11 42nd Street N., Suite 104
St. Petersburg, Florida 33701

August, 1977 - December, 1977: Law clerk/Associate
Bauer, Morlan & Wells, P.A.
560 1st Avenue North
St. Petersburg, Florida 33756

January, 1978 - April, 1981: Assistant Federal Public Defender
Office of Federal Public Defender
U.S. Courthouse and Post Office Building
600 N. Florida Ave. (now) 501 Polk St.
Tampa, Florida 33602

May, 1981 - March, 1982: Associate
Whittemore & Seybold, P.A.
412 E. Madison Street
Tampa, Florida 33602

1981 - 1983: Instructor
Bert Rodgers Schools of Real Estate, Inc.
5969 Cattleridge Blvd.
Sarasota, Florida 34232

April, 1982 - April, 1987: Associate
Whittemore & Campbell, P.A.
201 N. Franklin St.
Tampa, Florida 33602
One Beach Drive, Suite 205
St. Petersburg, Florida 33701

April, 1987 - January 31, 1990: Sole Practitioner
James D. Whittemore, Attorney at Law, P.A.
701 and 707 N. Franklin St., Tampa, Florida

February 1, 1990 - present: Circuit Court Judge
Thirteenth Judicial Circuit, In and For Hillsborough County, Florida
419 N. Pierce Street, Room #314
Tampa, Florida 33601

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?

During the first two months I was licensed, I did general research and handled misdemeanor and traffic matters as an associate. During that time I was pursuing full-time employment and in January 1978 was hired as one of the first two Assistant Federal Public Defenders in the new office of the Federal Public Defender in Tampa. Robert W. Knight (now deceased) was the Federal Public Defender. During the next three years, I was assigned to represent indigent defendants charged with federal offenses from arrest through either plea or trial and appeal, as well as state prisoners who had filed petitions for writ of habeas corpus seeking relief pursuant to 28 U.S.C. s. 2254. My representation of clients included grand jury matters, removal proceedings and all aspects of federal criminal proceedings. While an Assistant, I tried numerous jury trials and argued numerous appeals. I appeared before the U.S. Courts of Appeals for the Fifth and Eleventh Circuits and argued the first *en banc* sitting of the newly created Eleventh Circuit Court of Appeals (then the Fifth Circuit, Division "B").

After leaving the office in April, 1981, I associated with my brother's firm and opened a Tampa office. I continued to represent indigent federal defendants as court appointed counsel and began to establish my own civil and criminal practice. Over the next nine years, I regularly represented clients in federal criminal trial and appellate matters and also represented a large percentage of general civil and criminal clients in state trial and appellate courts. My litigation practice included construction clients (contractors and owners), as well as general commercial clients. I tried two domestic cases but did not otherwise practice in that area.

After Whittemore & Campbell, P.A. formed in 1982, I had the opportunity to practice in the First Amendment area, representing a local ABC television affiliate and several of its reporters in areas of access, privilege and federal grand jury appearances. My practice continued to focus on litigation in state and federal courts with an emphasis on federal criminal work. As court appointed counsel representing a state prisoner in a habeas corpus

matter, I successfully appealed the District Court's denial of his Petition for Writ of Habeas Corpus to the Eleventh Circuit Court of Appeals and successfully argued the case to the United States Supreme Court in 1985. The Court, in what some predicted would be the first case to create an "exception" to the Miranda rule, unanimously affirmed the Eleventh Circuit's opinion.

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

My client base consisted of individuals, small corporations and a variety of large national corporations. The majority of my practice was litigation oriented with a healthy mix of real estate and business work. I served as an arbitrator in federal court and was engaged by parties to a civil action in state court to arbitrate a complicated residential construction dispute. My ruling resolved the case. On a regular basis, I was retained by out-of-state counsel to appear in federal court on behalf of their clients as local counsel. Until my appointment to the bench, I continued to regularly represent clients in federal criminal matters.

- 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 courts 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.

While practicing I appeared in state and federal trial and appellate courts regularly. The one client I appeared in court for most often was Snap On Tools, Inc., for whom I did collection work throughout central Florida. During my three years with the Federal Public Defender, 100% of my appearances were in federal court. I estimate that, over the next nine years of private practice, I appeared in federal court 40% of the time and in state court 60%. On occasion I appeared before zoning boards, the Temple Terrace City Council and the Hillsborough County Commission. On at least two occasions, I appeared before state professional licensure boards on behalf of professionals facing disciplinary action.

After entering private practice, approximately 40% of my practice was criminal and 60% civil. I estimate I have tried 35 to 45 cases to verdict or judgment and argued approximately 15 to 20 appeals, all except one as either sole counsel or lead counsel. On one appeal, multiple appellants sought reversals of their federal criminal convictions under the criminal anti-trust statutes. We successfully obtained new trials. My original client had been acquitted and I was retained to represent three of the convicted defendants on appeal.

Approximately one third (18) of the cases I tried to verdict or judgment were jury trials (all criminal).

8. **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. Louie L. Wainwright v. David Wayne Greenfield, 106 S.Ct. 634 (1986) #84-1480; review of David Wayne Greenfield v. Louie L. Wainwright, 741 F.2d 329 (11th Cir. 1984).

During 1979-1980, while an Assistant Federal Public Defender, I was appointed to represent this state prisoner on his 28 U.S.C. s. 2254 post conviction petition for writ of habeas corpus. In late 1980 or early 1981, the U.S. District Judge, William Castagna, denied relief. I initiated an appeal to the Eleventh Circuit Court of Appeals. I was appointed to continue my representation after entering private practice in April, 1981. On appeal, the Eleventh Circuit reversed. The State of Florida petitioned for and obtained review before the United States Supreme Court. In an unanimous decision, the Court affirmed the Eleventh Circuit's reversal. The issues involved the propriety of using a criminal defendant's post-Miranda warning silence to rebut an insanity defense. After his re-trial, Greenfield was again convicted in Sarasota County. I did not participate in that trial. The State of Florida was represented by Ms. Ann Garrison Paschall, then an Assistant Attorney General. Current address & phone number: U.S. Labor Dept/Solicitor's Office, 61 Forsyth St., Room 7110, Atlanta, GA 30303 (404) 562-2057.

2. United States of America v. Joseph Paul Franklin, U.S. District Court, Middle District of Florida at Tampa. Circa 1978/1979. Judge William Terrell Hodges, presiding.

Franklin was arrested in Lakeland on a warrant charging him with escape from a Kentucky jail where he was being held on bank robbery charges. He was suspected in the shooting of noted civil rights activist Vernon Jordan and in the racially motivated shooting of two people in Utah. I was assigned to represent him and appeared before Judge Hodges during the removal hearing. Franklin's arrest and court proceedings attracted a substantial amount of media and public interest. Of significance, notwithstanding the despicable nature of his alleged offenses and racial and ethnic prejudices, he was afforded his constitutionally protected representation through my services and the removal proceedings went smoothly, with a successful removal of Franklin to Kentucky, Utah and eventually Ohio where I understand he was convicted of the offenses he was suspected of having committed, including the shooting of Mr. Jordan. I believe my ability to represent one as loathsome as Franklin was of particular significance to our criminal justice system and the orderly administration of justice, consistent with due process protections. The government was represented by U.S. Attorney Gary Betz, 2002 N. Lois Ave., Suite 520, Tampa, FL 33607-2366 (813) 871-7255, Assistant U.S. Attorneys Lynn Cole, One Tampa City Center, 201 N. Franklin St., Suite 2556, Tampa, FL 33602-5815 (813) 223-7009 and Lee Atkinson, 2655 McCormick Dr., P.O. Box 5124, Clearwater, FL 33758-5124 (727)799-2882.

3. United States of America v. Richard Butta, U.S. District Court, Judge William Terrell Hodges, presiding; Circa May 1978.

Butta was charged with passing counterfeit bills in a mall store. The Secret Service had traced the bills to a friend of Butta's in New York. Significantly, this was the first jury trial of the newly created Federal Public Defender. I defended Butta at trial and he was acquitted after a fifteen minute deliberation by the jury. The government was represented by Assistant U.S. Attorney Gary Tackas, One Urban Centre, 4830 W. Kennedy Blvd., Suite 147, Tampa, FL 33609-2564 (813) 286-4100.

4. State of Florida v. Robert S. Grant, et al., #87-4613 Division E, 13th Judicial Circuit, Judge F. Dennis Alvarez, presiding.

My court appointed client, Robert S. Grant was charged, together with his wife and four other individuals in a 48-count information alleging 47 counts of grand theft and one count of conspiracy to commit grand theft. After a nine-day trial between January 9, 1989 and January 20, 1989, F. Dennis Alvarez, Circuit Judge, presiding, thirty-five of the forty-eight counts were dismissed on the defendants' motions for judgment of acquittal. Grant was acquitted on seven counts and convicted on five felony counts and one misdemeanor count. He was ultimately placed on probation. This was the first case in which the State of Florida had charged defendants with grand theft arising from the diversion of human corneal tissue from the intended recipient. The novel legal issue was whether human tissue could be the subject of grand theft, given that the Florida Supreme Court had held

that even next of kin had no "property right" in a body, only a limited right to possession for burial purposes. The counts under which the defendant was convicted actually alleged theft of fees which would have been generated to the intended recipient for services rendered in transferring the corneal tissue to physicians in hospitals who would transplant them. The case was considered a "test" case as to whether the growing organ transplant industry could rely on the criminal theft statutes to protect business interests. Counsel included:

Judy S. Hoyer, Esq. 4830 W. Kennedy Blvd., Suite 147, Tampa, FL 33609-2517 (813) 286-4100; Allen P. Allweiss, Esq. 111 2nd Ave. N.E., Suite 620 St. Petersburg, FL 33701 (727)827-4944; Marc L. Lubet, Esq. 209 E. Ridgewood St., Orlando, FL 32801-1926 (407)841-9336; Paul E. Firmani, Esq. Public Defender's Office, 7530 Little Rd., Rm 201, New Port Richey, FL 34654-5598 (727)847-8155;

5. State of Florida v. Terry Cole, Case #89-2101-CRC- Div. "B" Thirteenth Judicial Circuit, Judge Edward Ward, presiding.

My client, Terry Cole, the former news director for Channel 10, WTSP TV in Tampa, was arrested and charged with theft of information contained in a competitor station's computer banks. The case attracted substantial national media attention because it involved an ABC affiliate station attempting to obtain a competitive advantage over a rival network's station by "hacking" into the competitor's computer. The theft statutes had not been utilized to prosecute an individual under these circumstances. The defendant was a highly respected news director who was considered a maverick within the industry. He had never been arrested before and was facing the potential of a prison sentence if convicted. After extensive negotiations lasting several months under the intense scrutiny of the local and national media, the defendant entered a no contest plea in late 1990 and was placed on probation. Representing the State of Florida was Chief Assistant State Attorney Chris Hoyer, One Urban Centre, 4830 W. Kennedy Blvd., Suite 147, Tampa, FL 33609-2564, (813) 286-4100.

6. United States of America v. Mervyn H. Cross, #84-192-CR-T-17, United States District Court, Judge Elizabeth Kovachevich, presiding. Trial began February 4, 1986 and the verdict was returned on April 4, 1986.

At the request of Judge Kovachevich, I accepted an appointment to serve as "stand by" counsel to Cross, an inmate of the State of Florida who had organized and perpetrated a child pornography ring from within Avon Park Correctional Institute. He was charged with 19 counts of production of and interstate mailing of child pornography. The case attracted substantial media and public attention, given that Cross was able to perpetrate his child pornography ring while serving a sentence in a state institution. Described as "manipulative" by Judge Kovachevich at his sentencing, Cross was sentenced to 19 consecutive five-year terms after his conviction. I was appointed as "stand-by" counsel, as Cross had invoked his right to represent himself during the trial pursuant to Earetta v. California, 422 U.S. 806 (1975). The Court and government were concerned that Cross would be disruptive, given his manipulative tendencies, high intelligence and nature of his conduct. The trial lasted eight weeks and involved over 6000 discovery documents. Representing the government was Fran Carpini, Assistant U.S. Attorney (deceased). Representing a co-defendant at trial was Joseph M. Diaz, Esq. 220 E. Madison, Suite 1140, Tampa, FL 33602-4827 (813)227-7777.

7. United State of America v. Ernst Ludwig Wolfgang Forbrich, #84-49CRT8, United States District Court, Judge Ben Krentzman, (deceased), presiding. (Circa 1986)

Forbrich was charged in a two-count indictment with espionage. The case had been described as one involving "national security". Based in part upon this representation, Judge Krentzman entered an order denying the press access to a video tape which was introduced into evidence and played to the jury during Forbrich's criminal trial. Representing Channel 10, WTSP, I joined with attorneys representing Gaylord Broadcasting Company (Channel 13) and Tampa Television, Inc. (Channel 8) in appealing Judge Krentzman's order on an expedited basis to the Eleventh Circuit Court of Appeals. The appeal successfully resulted in a remand order after which Judge Krentzman again denied access to the video tape. That order was again appealed. During the interim, however, Forbrich was convicted and the video tape became part of the appellate record open to the public. Accordingly, the media parties voluntarily dismissed their appeal as moot. Representing the government was George Tragos, Assistant U.S. Attorney, 600 Cleveland Street, Suite 700, Clearwater, FL 33755-4158 (727)441-9030; Gregg D. Thomas, Esq. Holland & Knight LLP, 400 N. Ashley Drive, Suite 2300, Tampa, FL 33601 (813)227-8500 represented Gaylord Broadcasting Company and Gregory G. Jones, Esq., Tampa Theatre Building, 707 N. Franklin St., Suite 801, Tampa, FL 33602-4430 (813)229-2100 represented Tampa Television, Inc.

8. George Weidner v. Louie L. Wainwright, United States District Court, Tampa (Circa 1980) Judge William Terrell Hodges, presiding.

As an Assistant Federal Public Defender, during 1980 and 1981, I represented this state prisoner on his Petition for Writ of Habeas Corpus. He had been convicted in state court of manslaughter and was serving a substantial prison sentence which I believe was 15 years. He contended that his attorney in the state criminal trial did not adequately investigate his theory of self defense and failed to interview and call known witnesses to testify in his state trial. After an evidentiary hearing in which I presented these witnesses, the United States Magistrate recommended to the District Judge that the petition be granted. The District Court granted the petition, resulting in the potential for a new trial in state court. Approximately eight years had passed since his conviction, however, and the State Attorney's office in Hillsborough County declined to prosecute, resulting in Weidner's release from prison. The State's interest was represented by the State Attorney General's office in Tampa, 2002 N. Lois Ave., Suite 700, Tampa, Florida.(813)873-4739.

9. United States of America v. Donald Esposito, et al. United State District Court, Middle District of Florida, Tampa, Judge William J. Castagna, presiding; Case #84-40-CR-T-15

Donald Esposito and 13 co-defendants were indicted for violating the Sherman Anti-Trust Act, 15 U.S.C. §1, by conspiring to fix prices and allocate customers in the garbage business in Pinellas County, Florida. Esposito retained me

to represent him. After a two week trial in the Spring of 1984, he was acquitted. Eight of the individual defendants and two corporate defendants were found guilty. This was the first criminal anti-trust case tried in Tampa.

Esposito had retired to Florida, purchased a garbage truck and developed a small route in Pinellas County, Florida. In the late 1970's, Pinellas County was attempting to franchise the refuse collection business within the county and several of the smaller garbage haulers began discussing their common business concerns. Several of the defendants had claimed to have connections to organized crime. Esposito had no prior criminal arrests but met at the infamous "King's Court" in New Port Richey, Florida with the other garbage company owners during 1979 to discuss the perceived threat to their independence by the county's attempt to franchise. Unbeknownst to them, the "King's Court" was an undercover FBI sting operation of (now) national acclaim. The result of these various meetings was the indictment of fourteen individuals and corporations for violation of the Federal antitrust statutes. Most of the meetings were videotaped. Esposito had no connections to organized crime and his involvement in the alleged conspiracy was peripheral. The essence of our defense was his "mere presence" during the meetings and his unblemished character. Among his character witnesses was a former police chief who had known Esposito for a number of years. After his acquittal, I was retained by three of the convicted defendants to represent them on their appeal. (See number 10 below)

The government was represented by Assistant U.S. Attorney was David H. Runyan, Esq. 100 2nd Ave. S., Suite 704-S, St. Petersburg, Florida 33701 (727/892-6001). Attorneys appearing were: Wayne J. Boyer, Esq., (for Signorile), P.O. Box 10655, Clearwater, Florida 33757 (727/733-2154), Ronnie G. Crider, Esq. (for DeVito and Suncoast Disposal), 1550 S. Highland Ave., Suite C, Clearwater, Florida 33756 (727/446-4800), Robert Fraser, Esq., (for Agostino), P.O. Box 3470, Brandon, Florida (813/653-3800), Ronald Cacciatore, Esq. for Kerrigan), 100 N. Tampa Street, Suite 2835, Tampa, Florida 33602-5837 (813/223-4831), Ky M. Koch, Esq. (for Fowler and Imperial Carting), 200 N. Garden Ave., Suite A, Clearwater, FL 33755-4120, Larry C. Hoffman, Esq., (for DiNardi), 1172 Brownell Street, Suite E, Clearwater, Florida 33756-5707 (727/461-5230), Kerry H. Brown, Esq. (for Fitapelli), 307 S. Fielding Ave., Tampa, FL 33606-2224 (813) 258 4232 and Carolyn House, Esq., (now Carolyn House-Stewart), (for Acquafredda) 400 N. Tampa St., Suite 2300 Tampa, FL 33602 (813)273-4246.

10. *United States of America v. Joseph "Jo Jo" Fitapelli, et al.*, 786 F.2d 1461 (11th Cir. 1986)

This was an appeal taken by ten defendants who had been convicted of violating the Sherman Anti-Trust Act, 15 U.S.C. § 1, by conspiring to fix prices and allocate customers in the garbage business in Pinellas County, Florida. The case was argued before Chief Judge Godbold, Circuit Judge Tjoflat and Senior Circuit Judge Simpson. In the trial leading to the convictions, I had represented Donald Esposito, who was acquitted. (See number 9 above). Defendants Thomas Kerrigan, Donald Fowler and Imperial Carting Associates, Inc. retained me to represent them on appeal. Our brief was served in November, 1984 and the case was argued to the court in late

1985 or early 1986. The convictions were reversed, the Court finding that the indictment did not allege jurisdiction under the Sherman Act under the “flow theory” and it was therefore error for the trial court to have instructed the jury on a theory of jurisdiction which had not been charged by the grand jury. The Court also found there was insufficient evidence of jurisdiction to establish the flow-of-commerce theory. The Court found, however, that there was sufficient evidence of jurisdiction under the “effect theory” and that the Fifth Amendment prohibition against double jeopardy would not bar a second trial. After the reversal, Kerrigan, Fowler and Imperial Carting were convicted. The individuals were placed on probation and the defendants were fined.

Counsel for the appeal: The government was represented by Assistant U.S. Attorney David H. Runyan, Esq., 100 2nd Ave. S., Suite 704-S, St. Petersburg, Florida 33701 (727/892-6001), John J. Powers, III, Esq., (current address and phone unknown) Edward T. Hand, Esq., U.S. Department of Justice. (current address and phone unknown); Wayne J. Boyer, Esq., (for Signorile) P.O. Box 10655, Clearwater, Florida 33757 (727/733-2154), Leonard J. Mankin, Esq., 28050 U.S. Hwy 19 N., Suite 100, Clearwater, Florida 33761-2600, Ronnie G. Crider, Esq. (for DeVito and Suncoast Disposal) 1550 S. Highland Ave., Suite C, Clearwater, Florida 33756 (727/446-4800), Alan K. Smith, Esq., (current address and phone unknown), Robert Fraser, Esq.(for Agostino) P.O. Box 3470, Brandon, Florida (813/653-3800), Larry C. Hoffman, Esq., (for DiNardi) 1172 Brownell Street, Suite E, Clearwater, Florida 33756-5707 (727/461-5230), Kerry H. Brown, Esq. (for Fitapelli) 307 S. Fielding Ave., Tampa, FL 33606-2224 (813) 258 4232 and Carolyn House, Esq., (now Carolyn House-Stewart), (for Acquafredda) 400 N. Tampa St., Suite 2300 Tampa, FL 33602 (813)273-4246.

Members of Legal Community who have had recent contact with applicant as a judge:

- | | |
|--|---|
| 1. C. Steven Yerrid, Esq.
101 E. Kennedy Blvd., Suite 2160
Tampa, FL 33602-5179
(813)222-8222. | 5. William Hahn, Esq.
2701 North Rocky Point Drive, Suite 410
P.O. Box 21919
Tampa, FL 33607
(813) 281-9700 |
| 2. Timothy F. Prugh, Esq.
Alexander Building
1009 W. Platt Street
Tampa, FL 33606-2115
(813) 251-3548 | 6. Thomas M. Gonzalez, Esq.
109 N. Brush Street, Suite 200
P.O. Box 639
Tampa, FL 33601-0639
(813) 273-0550 |
| 3. Timon V. Sullivan, Esq.
100 N. Tampa Street, Suite 2900
P.O. Box 1006
Tampa, FL 33601-1006
(813) 223-5111 | 7. Edward O. Savitz, Esq.
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| 4. Clifford L. Somers, Esq.
3242 Henderson Blvd., Suite 301
Tampa, FL 33609-2938
(813) 872-7322 | 8. S. Cary Gaylord, Esq.
777 S. Harbour Island Blvd., Suite 900
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(813) 229-8811 |

- | | | | |
|-----|---|-----|---|
| 9. | Diana L. Fuller, Esq.
101 E. Kennedy Blvd., Suite 1800
P.O. Box 3288
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(813) 221-7171 | 11. | Laura E. Prather, Esq.
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P.O. Box 1102
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(813) 223-7474 |
| 10. | Emeline C. Acton, Esq.
601 E. Kennedy Blvd., 27th Floor
P.O. Box 1110
Tampa, FL 33601-1110
(813) 272-5670 | 12. | Eurich Z. Griffin, Esq.
1112 E. Kennedy Blvd.
P.O. Box 172297
Tampa, FL 33672-0297
(813) 229-9300 |

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).**

Chair, Florida Bar Grievance Committee 13A:

In the mid-1980's, I became involved in local bar activities. At the suggestion and recommendation of either Tom Gonzalez or Bill Sizemore, both of whom served as President of the Hillsborough County Bar Association, I was assigned to Florida Bar Grievance Committee 13A. Eventually, I became chair of the committee. The committee's function was to investigate complaints made against attorneys within its jurisdiction and to determine whether probable cause to believe the responding attorney was guilty of misconduct justifying disciplinary action. Without question, the three years I served on that committee contributed significantly to my legal and judicial career. As an attorney, it gave me invaluable insight to the importance of communicating with clients and subscribing to high ethical behavior in all aspects of life. Those three years contributed significantly to my judicial decision making and perspective. To this day, I encourage young lawyers to serve on a grievance committee as it is one of the most significant legal activities a lawyer can be involved in.

Florida Supreme Court Standard Jury Instruction Committee in Civil Cases.

My appointment by the Supreme Court to this committee in January 1996, was due in part to the recommendation of Benjamin Hill, III, Esq. and Bill Blews, Esq., both past presidents of the Florida Bar who agreed to be references on my application. The importance of the committee's work is underscored by the Florida Supreme Court's Standard (Civil) Jury Instructions manual which is utilized by every Florida judge and attorney involved in civil jury trials throughout the state. The committee authors proposed standard jury instructions for publication and comment prior to submission to the Florida Supreme Court for approval. The committee consists of plaintiff and defense lawyers, appellate lawyers, trial judges, appellate judges and a member of the Florida Supreme Court. The Florida Supreme Court, by resolution adopted in 1962, established the Committee "as an auxiliary arm of this Court . . . for the study and development of a program for standard jury

instructions". "It has been the Committee's purpose not to merely reproduce in terms of Florida law the work of others but rather to improve upon their work and, where possible, to innovate for the more effective administration of justice in the trial of jury cases." (The Supreme Court Committee on Standard Jury Instructions, Introduction, April 1967)

Arbitration:

In 1985, the Honorable Daniel Gallagher, based upon the parties' stipulation, appointed me as the sole arbitrator in a complicated and hotly contested residential construction case. In the case of *Henderson Homes v. John A. and Rosemarie A. Magliano*, #85-18528 - Division East, 13th Judicial Circuit, Hillsborough County, Florida, I presided over a four-day arbitration involving testimony and documentary evidence. The arbitration hearing took place on June 25, 26, 27 and July 2, 1986. My Report, Findings and Conclusions of Arbitrator was rendered August 6, 1986 and was confirmed by the presiding judge. This one arbitration proceeding gave me the confidence to consider myself a qualified judicial applicant and accordingly, is one of the most significant legal activities I pursued as an attorney.

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Whittamore, James D.		2. Court or Organization	3. Date of Report 10/20/1999
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)		5. Report Type (check type) X Nomination, Date / / Initial Annual Final	6. Reporting Period 01/01/1998 to 10/20/1999
7. Chambers or Office Address 419 North Pierce Street Room 314 Tampa, Florida 33602		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 _____	
<i>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>			

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Custodian (For DC)	FW Pathfinders Treasury and Growth Stock
2 Custodian (For DC)	FW Pathfinders Treasury and Growth Stock
3	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1	State of Florida Retirement; vested as of 2/1/1998; no control
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	CIGNA Healthcare of Florida, Inc. (S)	
2 1998	State of Florida; salary	\$ 111,590.00
3 1999	State of Florida; salary (through September 30, 1999)	\$ 85,375.00
4		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Whittemore, James D.	10/20/1999

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input type="checkbox"/>	NONE	
1	EXEMPT	EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE		
1	EXEMPT	EXEMPT	
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE		
1	Equitable Life	Loan against cash value of life insurance policy	K
2	Shell Mastercard	Credit Card (J)	J
3	SouthTrust Bank of Florida, N.A.	Promissory Note (J)	J
4	NationsBank	Automobile Lease	J
5	Bank One	Credit Card	J
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 Whittenora, James D.	Date of Report 10/20/1999
	<i>(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)</i>	

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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 Code (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type Code (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 Custodian (For DC) - PW Pathfinders Treasury and Growth	A	Dividend	J	T	EXEMPT				
2 Custodian (For DC) - PW Pathfinders Treas. & Growth	A	Dividend	J	T	EXEMPT				
3 Bay Gulf Federal Credit Union (IRA)	A	Dividend	J	T	EXEMPT				
4 Dean Witter Spectrum Tech. (IRA)		None	J	T	EXEMPT				
5 Bay Gulf Federal Credit Union (IRA) (S)	A	Dividend	J	T	EXEMPT				
6 George Putnam Fund of Boston (IRA)	A	Dividend	J	T	EXEMPT				
7 Merck & Co. Common Stock (IRA)	A	Dividend	J	T	EXEMPT				
8 AMGEN, Inc. Common Stock (IRA)		None	K	T	EXEMPT				
9 Cardinal Health, Inc. Common Stock (IRA)	A	Dividend	J	T	EXEMPT				
10 George Putnam Fund of Boston (IRA) (S)	A	Dividend	J	T	EXEMPT				
11 Merck & Co. Common Stock (IRA) (S)	A	Dividend	J	T	EXEMPT				
12 CIGNA Corporation 401(K) (S)	D	Dividend	L	T	EXEMPT				
13 CIGNA Corporation Pension Plan (S)		None	K	T	EXEMPT				
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 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$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 Whittemore, James D.	Date of Report 10/20/1999
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Whittenore, James D.	10/20/1999

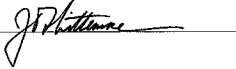
IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 10/20/99

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	\$9	217 .00	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	\$291	116 .97
Real estate owned—add schedule	\$300	000 .00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property	\$52	595 .00	Life Insurance loan	\$17	889 .69
Cash value—life insurance	\$22	229 .09	Credit Cards	\$34	374 .13
Other assets—itemize:					
IRA's	\$71	866 .50			
401 (k) (s)	\$58	017 .16			
Custodial Accounts	\$4	871 .47	Total Liabilities	\$356	800 .77
Pensions (vested) (s)	\$45	488 .55	Net Worth	\$207	484 .00
Total Assets	\$564	284 .77	Total Liabilities and net worth	\$564	284 .77
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor			Are any assets pledged? (Add schedule.)	Real only	property
On leases or contracts (Automobiles)	\$13	419 .98	Are you defendant in any suits or legal actions?	No.	
Legal Claims			Have you ever taken bankruptcy?	No.	
Provision for Federal Income Tax					
Other special debt					

SCHEDULE**ASSETS**

Real estate owned: residence		\$300,000.00
Autos and other personal property:		
1996 Ford Explorer:	\$15,000.00	
Boat, motor, trailer:	\$ 2,000.00	
Furnishings:	\$ 9,795.00	
Computers/appliances:	\$ 8,550.00	
Jewelry/silver:	\$ 5,500.00	
Miscellaneous household:	\$11,750.00	
		\$ 52,595.00

LIABILITIES

Real Estate Mortgages payable:		
SouthTrust Mortgage Corp.:	\$222,843.35	
SouthTrust Bank:	\$ 68,273.62	

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 any arrangements you have made to be compensated in the future for any financial or business interest.**

State of Florida retirement benefits; eligible for full retirement after eight years of creditable service and upon reaching age 62 or after thirty years of creditable service regardless of age.

- 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.**

Disclosure to party litigants is an essential aspect of resolving potential conflicts of interest, whether disqualification is mandated or not. Any potential conflicts of interest will be resolved after disclosure to the parties in a given proceeding, in accordance with 28 U.S.C. § 455, Disqualification of justice, judge or magistrate.

In order to determine areas of concern regarding potential conflicts of interest, my office will maintain copies of all financial disclosure forms submitted, a listing of my creditors and civic and business interests, and those of my spouse.

My office will notify the clerk's office that I have two brothers who may not appear before me, and the identity of their respective law firms.

I am not aware of any categories of litigation which are likely to present potential conflicts of interest other than cases in which either of my brothers appears as counsel of record and cases in which I, my spouse or minor child have a financial interest in the subject matter in controversy or in a party to a proceeding, such as a creditor, mortgagee, or my spouse's employer.

- 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.)**

Please See Form AO-10

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 1978, my brother, Kent Whittemore, ran unsuccessfully for the Florida House of Representatives. I distributed campaign brochures in Pinellas County, Florida on two occasions.

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 an attorney in private practice, I was heavily involved in bar-related activities on a volunteer basis. Between 1981 and 1990, I estimate I spent ten to fifteen hours per month on these bar-related activities. For example, I served three years on a Florida Bar Grievance Committee which met monthly for not less than half a day. Many sessions lasted a full day. I spoke at the Hillsborough County Bar Association Continuing Legal Education Committee & Trial Lawyers Section seminar titled "Pitfalls and Survival of a Bar Grievance" in 1989. I was active in the Hillsborough County Bar Association, served on several Florida Bar committees and was actively involved in the formation of the Hillsborough County Criminal Defense Lawyers Association and its affiliation with the Florida Association of Criminal Defense Lawyers. I served on the Board of Directors of the Florida Association of Criminal Defense Lawyers and as Vice President and President of the Hillsborough County Criminal Defense Lawyers Association. Each of these activities required attendance at monthly meetings.

During all of my years in private practice, I accepted court-appointments to represent indigent criminal defendants in state and federal courts, including state juvenile court and federal appellate courts.

After being appointed to the judiciary, I became committed to participating in seminars and bar-related committees. For example, in 1994, 1995 and 1999, I participated in day long seminars sponsored by the Young Lawyers Division of the Hillsborough County Bar Association. In 1993, twice in 1995 and in 1996, I participated in the Florida Bar Basic Commercial Litigation seminar which was presented and videotaped in different locations within the state. From 1994 through 1997, I spoke at the Florida Bar's "Bridge the Gap" seminar for young lawyers. As an attorney, I also participated in the "Bridge the Gap" seminar. From 1994 through 1998, I have volunteered to serve as a judge for the Robert Orseck Memorial Moot Court Competition, sponsored by the Young Lawyer's Division of the Florida Bar. Law students from law schools within the state of Florida participate in appellate moot court competitions during the Florida Bar's annual conference. My participation included participating in oral arguments, grading and critiquing the student competitors and ranking each team's advocacy.

In addition to those seminars, I participated in a Florida Bar, Eminent Domain Section's seminar in 1994, a Florida Conference of Circuit Court Judge's Panel presentation by the Media Law Committee of the Florida Bar in 1994, spoke at a Personal Injury and Insurance Bad Faith Litigation in 1994 sponsored by the South Texas College of Law and recently spoke at a seminar on auto negligence cases sponsored by the Academy of Florida Trial Lawyers.

Recently I served as co-chair of the Hillsborough County Bar Association Judicial Bar Relations Committee incident to the Hillsborough County Bar Association's Long

Range Planning Committee. I currently serve as chairman of the Thirteenth Judicial Circuit's Jury Management Committee and have served on the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases since 1996. Currently, I serve on the Hillsborough County Bar Association's Peer Review Committee, which provides a non-adversarial forum to members of the Hillsborough County Bar Association for addressing personal and professional issues which arise among members of the bar association and/or encountered by the bench and bar.

I am currently a member of the William Glenn Terrell Inn of Court and have served as President and Past Counselor to that inn. The Inn of Court organizations throughout the country provide mentoring for the benefit of law students and young lawyers and subscribe to high standards of civility, professionalism and ethics in the practice of law. Our Inn meets monthly and within each Inn, pupillage groups present programs involving current legal and ethical issues.

As judges are not able to provide legal advice or services to the public, I attempt to fulfill my responsibilities analogous to those under Canon 2 by participating in educational and training seminars for members of the bar, particularly young lawyers, and participating in bar-related activities where the presence and participation of the judiciary encourages involvement of members by the bar.

My community involvement has included three years of coaching youth soccer, regularly serving as an usher at church and volunteering time on church maintenance projects, participating in "teach-in's" at middle schools on Law Day, participating in a "Camp Court" mock trial at a local elementary school and volunteering work hours at a Hillsborough County operated stable incident to my daughter's therapeutic horseback riding.

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

I do not currently belong to any organization which discriminates in its membership requirements or policies. I have been a senior voting member of the Temple Terrace Golf and Country Club since 1978, a gift from my spouse. It does not currently discriminate in its membership requirements either in practice or through formal or informal policies. There are no gender restrictions on tee times, except that the Temple Terrace Women's Golf Association is given preferential tee times on Tuesdays beginning at 9:00 A.M. There are no separate grill or eating facilities.

In the past, based upon gender tee time restrictions and gender restrictions on senior voting membership status, it can be said that this organization discriminated in its formal membership requirements and practical implementation of membership policies. However, while serving as counsel for the corporation and after becoming a judge, I actively encouraged the elimination of all aspects of discrimination in the formal and informal membership requirements and policies. The by-laws and membership rules were amended to eliminate gender restrictions on senior voting membership classifications and its current senior voting membership includes both genders.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?**

Yes.

If so, did it recommend your nomination?

Yes.

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).

A vacancy in the United States District Court in the Middle District of Florida first came to my attention when I saw an advertisement in the Florida Bar News, announcing that Judge William Terrell Hodges had taken senior status as of May 1, 1999 and the Federal Judicial Nominating Commission was accepting applications for appointment to fill that vacancy. Pursuant to the instructions, I requested a copy of the application from the Chair of the Federal Judicial Nominating Commission. Copies of the application were submitted to all 39 members of the Federal Judicial Nominating Commission of Florida. On June 16, 1999 the Middle District Conference faxed to each applicant an interview schedule, listing those applicants who would be interviewed on June 23, 1999. The interviews were conducted in Tampa and I was the eleventh of twelve applicants to be interviewed.

On the evening of June 23, 1999, I received a fax advising me of my nomination by the members of the Middle District Conference of the Federal Judicial Nominating Commission and which set forth a tentative interview schedule with Senator Bob Graham in Orlando the following Saturday.

The following day, Senator Graham's aide telephoned my office, confirming the time and location for the interview on Saturday, June 26, 1999. The interview with Senator Graham lasted approximately 35 minutes. It was informal but very businesslike. Senator Graham was gracious, insightful and appropriately probing in his comments and questions concerning the appointment process, my interest in being nominated for the vacancy and those personal attributes not necessarily reflected in the application.

On Friday, June 23, 1999 Senator Graham requested my consent to submit my name to President Clinton for nomination to the vacancy on the United States District Court, Middle District of Florida. That conversation took place at approximately 10:15 a.m. and at approximately 4:30 p.m., I received a telephone call from White House Staff Counsel confirming that the White House had received Senator Graham's letter recommending me for the nomination. I was overnighted questionnaires from the Attorney General's Office, the American Bar Association and the Senate Judiciary Committee as well as National Security forms to be completed incident to the background investigation.

Drafts of the Attorney General, American Bar Association and National Security (FBI) questionnaires were submitted to the Office of Policy Development, Department of Justice on August 12, 1999. On August 18, 1999, I was interviewed in Washington, D.C. by that office. A courtesy copy of my American Bar Association questionnaire was furnished to the White House Staff Counsel's office.

The original Form 86 - National Security questionnaire was provided to the Office of Policy Development, Department of Justice on August 19, 1999.

On September 2, 1999, a representative of the American Bar Association Standing Committee on Federal Judiciary interviewed me in Tampa on behalf of the American Bar Association. On September 7, 1999, two agents of the Federal Bureau of Investigation interviewed me in my office in Tampa.

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 or 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 a trial judge is to follow the law, not make it. A judge’s personal beliefs can have no bearing whatsoever on the judge’s decision making. On those occasions when a judge is called upon to interpret the application of a constitutional principle or law to specific facts presented in a given case, the judge must do so consistent with the concept of limited jurisdiction embodied in Article III, Section 2, Clause 1 and the Doctrine of Separation of Powers. By subscribing to these limitations on the authority of the judicial branch, popular and academic criticism of judicial activism should be minimized.

As I understand the role of the federal judiciary, it should decide only those cases presenting questions concerning the Constitution or federal laws and those cases or controversies Congress determines to be appropriate for federal consideration such as diversity cases. Standing to initiate litigation in the federal courts is dependent on the “case or controversy” requirement of Article III, Section 2 and congressional act.

Our courts should not be called upon to monitor the administrative function of government. This limited jurisdiction promotes the concept of separation of powers and allows the three branches of government to function concurrently but independently of each other. Consistent with these principles, judges should exercise judicial restraint and decide only those issues raised by a party who claims to have suffered an individualized injury in fact. Thus, the concepts of limited jurisdiction, separation of powers and standing define the modern role of our federal judiciary.

The CHAIRMAN. With that, we will recess until further notice.
[Whereupon, at 4:28 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF RANDOLPH D. MOSS TO QUESTIONS FROM SENATOR SMITH

Question 1. In your role as Assistant Attorney General, Office of Legal Counsel, what would you advise as the proper role for the Justice Department to take in mandating integrative goals for school districts to achieve specific levels of desegregation?

Answer 1. The Office of Legal Counsel (OLC) exercises authority delegated to it by the Attorney General to give legal advice within the executive branch. OLC's responsibilities do not extend to setting enforcement policy. I have had no occasion in my employment at OLC to consider the extent to which integrative goals must be satisfied in order to desegregate a school district. If called upon for my legal advice regarding how to remedy racial segregation within a school district, however, I would follow the law as established by the courts. I have stressed in the past that "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case." Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 Yale L. J. 1811, 1826 (1986) (quoting *Green v. County School Bd.*, 391 U.S. 430, 439 (1968)). Rather, each individual case will raise unique circumstances, requiring remedial flexibility. *Id.* at 1826–27. As the Supreme Court has recognized, however, in each case in which it is necessary to remedy a history of purposeful school segregation, the ultimate goal should be to dismantle the prior dual school system "root and branch," and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green*, 391 U.S. at 438, 442.

Question 2. Is desegregation still a problem in school districts and, if so, what cases are you currently working on with the Justice Department that impact the issue of school desegregation?

Answer 2. Other components of the Department, and not OLC, set enforcement policy and litigate cases implicating school desegregation. I am not familiar with the details of the situation in any particular school district. I understand, however, that the Department, through its Civil Rights Division, currently participates as plaintiff, intervener, or amicus curiae in many school desegregation cases. Although OLC is not involved in desegregation litigation, it is possible that advice provided by the Office outside the context of litigation might indirectly affect such litigation.

Question 3. In your role as Acting Assistant Attorney General, what are your current responsibilities and, if you are working on any cases currently, what are they?

Answer 3. As Acting Assistant Attorney General for OLC, I provide advice—and I supervise attorneys in the Office in providing advice—within the executive branch on a broad range of statutory and constitutional questions. The specific responsibilities of OLC that I supervise include: preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to various government agencies; assisting the Attorney General in the performance of her functions as legal adviser to the President; reviewing and approving for form and legality all Executive orders and proclamations and all Attorney General orders; advising the Attorney General in connection with her review of decisions of the Board of Immigration Appeals; and consulting with the Director of the Office of Government Ethics regarding the development of policies, rules, regulations, procedures and forms relating to ethics and conflicts of interest, as required by section 402 of the Ethics in Government Act of 1978.

The responsibilities of OLC generally do not extend to the conduct of litigation, although the Office does, when requested, provide legal advice that may relate to a matter in litigation and on occasion offers views to the litigation components regarding ongoing litigation. Responsibility for handling the litigation, however, generally remains with the litigating component. Indeed, during my time at the Justice Department, I have been "on brief" in only one case, *Riley v. St. Luke's Episcopal Hospital*, No. 97–20948 (5th Cir. en banc). In that case, the Department has inter-

vened to defend the constitutionality of the qui tam provisions of the False Claims Act. The case is currently pending before the Court of Appeals for the Fifth Circuit.

Question 4. You wrote a letter to the editor of the New York Times in 1986 analyzing the issues surrounding *McCleskey v. Kemp* in which you concluded that “[the Court should be] quite sure that the degree of moral outrage felt by those involved in the legal process is not influenced by race before upholding the Georgia death penalty [law].” In light of your writings in 1986, did you believe the death penalty was Constitutional under either the Equal Protection Clause or the Eighth Amendment?

Answer 4. My 1986 letter to the editor on *McCleskey* focused on the issue of how the Supreme Court, in its equal protection analysis, should view the State of Georgia’s argument that there is a qualitative difference between crimes committed against white victims and crimes committed against black victims, and that the former are more likely to provoke the community’s “moral outrage.” The letter reflected my concern about the State’s argument on this point. I believed that this particular rationale provides a dangerous basis for concluding that the death penalty is constitutional. In upholding the imposition of the death penalty in *McCleskey* against Eighth Amendment and equal protection challenges, the Supreme Court did not rely on the State of Georgia’s argument on this issue. I fully accept the Court’s conclusion that the imposition of the death penalty is not unconstitutional and would provide advice consistent with that conclusion.

Question 5. Do you believe the death penalty is currently Constitutional under either the Equal Protection Clause or the Eighth Amendment?

Answer 5. The Supreme Court has repeatedly upheld the constitutionality of the death penalty. In particular, the Court has held that imposition of the death penalty comports with the Eighth Amendment so long as the government establishes rational criteria to narrow the sentencer’s judgment as to whether the death penalty should be imposed and permits the sentencer’s consideration of any relevant mitigating evidence that could cause it to decline to impose the penalty. Similarly, the Court has rejected an equal protection challenge to the administration of the death penalty. I fully accept the Court’s decisions on the constitutionality of the death penalty and would provide advice consistent with those decisions.

Question 6. Do you have any moral beliefs that would disqualify you from advising the Justice Department to seek the death penalty?

Answer 6. My moral beliefs would not disqualify me from advising the Justice Department on death penalty issues. I should note, however, that OLC currently has no role in reviewing or advising whether the Department should seek the death penalty in any particular case.

Question 7. You testified before Congress on April 20, 1999, against the proposed Flag Desecration Constitutional Amendment. How do you feel about the issue of a Constitutional prohibition on Flag desecration?

Answer 7. As I indicated in my April 20, 1999, testimony before the Senate Judiciary Committee, I wholeheartedly agree with Chairman Hatch’s observation that:

The American flag represents, in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American Flag.

However, I do not support a constitutional amendment that would empower Congress to prohibit the physical desecration of the American flag. First, given the unique status of the American flag, and its widely shared reverence, there has been no outbreak of flag burning since the time the Supreme Court decided *Texas v. Johnson* and *United States v. Eichman*. Second, such an amendment would run counter to James Madison’s admonition that amendments to the Constitution should be reserved for “great and extraordinary occasions.” Third, such an amendment would constitute the first time in our nation’s history in which one of the individual liberties protected by the Bill of Rights would be limited, and would risk undermining the public’s confidence that the Bill of Rights is permanent and enduring. Finally, such an amendment could create a legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees.

RESPONSE OF RANDOLPH D. MOSS TO A QUESTION FROM SENATOR GRASSLEY

Question 1. In testimony before the Intelligence Committee, you indicated that you believed it would be unconstitutional to allow government employees to commu-

nicate evidence of government misconduct to Congress without prior approval from the Executive branch if that evidence consisted of classified information. Please elaborate on this by describing all circumstances in which you believe that Congress cannot authorize government whistleblowers to communicate with Congress without prior approval of the Executive branch.

Answer 1. I strongly support the view that government whistleblowers should be able to communicate evidence of government misconduct to Congress without prior approval of the executive branch and believe that the Constitution does not, in general, preclude or limit such disclosures. My testimony in 1998 before the Senate and House Intelligence Committees—which reflected the established position of the Department of Justice, as set forth in a 1989 Supreme Court brief—focused on a narrow exception to this general rule: that approval is necessary where disclosure of information could unduly compromise the President’s ability to perform his constitutionally assigned duties. This testimony addressed classified national security and foreign affairs information, the field in which there is by far the greatest potential for such a compromise. Consistent with the Department of Justice’s long-standing position on the need to avoid compromising the integrity of open criminal investigations, I also suggested that the legislation then pending before the House of Representatives appropriately recognized the need to protect vital law enforcement information. In contrast to this sort of particularly sensitive information, disclosure of the vast majority of executive branch information would not unduly interfere with the President’s ability to discharge his constitutional duties and thus would not raise the constitutional concern raised in my testimony.

Even with respect to the most sensitive information, I would anticipate that the circumstances in which the executive branch could appropriately limit or prevent disclosure would be extremely rare. Moreover, even in those extremely rare cases in which there might exist a basis for limiting or preventing such a disclosure, the whistleblower may not be precluded from contacting Congress about alleged misconduct in a manner that avoids disclosure of the most sensitive information. This will allow the Congress to raise with the executive branch the allegation of misconduct and the failure to permit complete disclosure, and would permit Congress to insist upon and obtain an accommodation of its need for information relating to alleged executive branch misconduct. Finally, I firmly believe that a disclosure may never be limited or prevented for the purpose of avoiding embarrassment or hiding misconduct.

RESPONSES OF JULIO M. FUENTES TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. Any nominee for a federal judgeship should answer questions on any subject relevant to the nominee’s qualifications and fitness for office. However, pursuant to ethical restrictions that apply to sitting judges and judicial nominees, the nominee should abstain from pre-judging an issue or rendering an advisory opinion in a constitutional issue that may come before the court.

Question 2. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)), the Supreme Court held that the government interest in preserving life must be balanced against a mother’s right of privacy and access to abortion which may not be unduly burdened. Do you believe the “right to privacy” includes the right to take away the life of an unborn child?

Answer 2. As a judge, I am bound by governing precedent. Thus, if confirmed, I am compelled to follow *Casey*, in which the Supreme Court held that some restrictions on abortion are permitted before the point of viability if those restrictions do not impose an undue burden. In *Casey*, the Supreme Court also recognized the governmental interest in preserving life. If confirmed, I will faithfully follow the Supreme Court’s decision in *Casey*.

Question 3. Do you agree with the legal analysis of the holding of the Supreme Court in *Roe v. Wade*. (410 U.S. 113 (1973)) that a woman has the right to terminate a pregnancy before fetal viability?

Answer 3. The holding of the Court in *Roe v. Wade*, as refined by *Casey*, remains binding precedent. In *Casey*, the Supreme Court held that some restrictions on abortion are permitted before the point of viability as long as they do not impose an undue burden. If confirmed, I will faithfully apply the binding precedent in *Casey*.

Question 4. I understand the Supreme Court's rulings on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 4. Because of ethical restrictions that apply to sitting judges and judicial nominees, I believe I should abstain from asserting a personal view on a matter that may actually be presented to me for review. I state unequivocally that if I were presented with a case involving abortion, I would decide the case on the basis of the facts and evidence presented and I would apply binding Supreme Court precedent.

Question 5. Do you have any personal, moral or religious reservations about the death penalty?

Answer 5. I have no personal, moral or religious reservations that would prevent me from upholding the constitutionality of the death penalty. In *Gregg v. Georgia*, the Supreme Court held the death penalty to be constitutional. If confirmed, I will faithfully apply the binding precedent in *Gregg*.

Question 6. Do you believe that the death penalty is Constitutional?

Answer 6. In *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of the death penalty. If confirmed, I will faithfully follow the Supreme Court's decision in *Gregg*.

Question 7. Do you believe that the Second Amendment to the Constitution of the United States protects an individual to keep and bear arms?

Answer 7. The Second Amendment states: "(a) well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," I am aware of no Supreme Court case that implicates the issue raised by your question other than *U.S. v. Miller*, (307 U.S. 174(1939)). If confirmed, I will look to the text of the Amendment as well as binding Supreme Court precedent in regards to the Second Amendment.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. As a member of the Supreme Court, I would be very respectful of the doctrine of stare decisis and I would be very cautious about overruling a precedent of the Supreme Court. In *Casey*, the Court offered guidelines concerning when to overrule precedent; the Court should look to "whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principals of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." If I were a Supreme Court Justice, I would consider overruling precedent of the Court only under these stated circumstances.

Question 9. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 9. A statute enacted by Congress represents the will of the people and is entitled to a presumption of constitutionality. In determining the validity of an act, legislative intent is often discerned from the plain meaning of the statute. If the language is ambiguous, I would then look to precedent of both the Supreme Court and my Circuit. Thereafter, legislative history, which includes Committee Reports and the testimony of elected officials, may be considered. However, when considering legislative history, the court should proceed with caution because the statements of one legislator do not necessarily represent the intent of the Legislature.

RESPONSES OF JAMES WHITTEMORE TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. A nominee who is a sitting judge may be prohibited by applicable judicial canons from answering questions which may be perceived as predicting how that judge would rule on a matter pending before that judge or which may be presented to that judge. While a judicial nominee may not ethically be able to directly answer a question about a Constitutional issue, the nominee may discuss the language of the Constitution and relevant Supreme Court precedent, as well as indicate the nominee's general familiarity with the Constitutional issues, if any, applicable to the question.

Question 2. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 2. As I understand it, while the Supreme Court has recognized that a state has a substantial interest in protecting potential human life throughout pregnancy, the Supreme Court has held that governmental regulations restricting the right to terminate pregnancy prior to fetal viability may not impose an undue burden on a woman's right to make fundamental reproductive decisions. If I am fortunate to be confirmed as a federal district court judge, I will follow Supreme Court precedent.

Question 3. Do you agree with the legal analysis of the holding of the Supreme Court in *Roe v. Wade*, (410 U.S. 113 (1973)) that a woman has the right to terminate a pregnancy before fetal viability?

Answer 3. As a sitting state judge and a nominee for the federal judiciary, I am committed to following Supreme Court precedent, including *Roe v. Wade* as modified by *Planned Parenthood v. Casey*, and as a trial judge, I do not have the prerogative to disagree with the Supreme Court's legal analysis.

Question 4. I understand the Supreme Court's rulings on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 4. This question involves very serious considerations regarding the medical and legal concept of viability, as well as one's religious and moral beliefs. I am duty bound to follow Supreme Court precedent involving these issues. I have no personal beliefs which would prevent me from following any Supreme Court decisions in this regard.

Question 5. Do you have any personal, moral or religious reservations about the death penalty?

Answer 5. I have no personal, moral or religious reservations about the death penalty, and if I were fortunate to be confirmed as a District Court Judge, I would follow applicable Supreme Court precedent.

Question 6. Do you believe that the death penalty is Constitutional?

Answer 6. The Supreme Court has found the death penalty to be Constitutional, based in part on the language contained in the fifth Amendment. If I were fortunate to be confirmed, I would follow applicable Supreme Court precedent.

Question 7. Do you believe that the Second Amendment to the Constitution of the United States protect an individual right to keep and bear arms?

Answer 7. The Supreme Court has in *United States v. Miller*, 307 U.S. 174 (1939), discussed the historic duty of citizens to bear arms in readiness to preserve a well regulated militia. Its opinion recognized regulatory provisions "touching the right to keep and bear arms" but did not expressly address the question posed above. I have no personal beliefs which would prevent me from following any precedent on this issue.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. The doctrine of stare decisis is an important component of judicial restraint. In numerous cases, the Supreme Court has set forth the very narrow circumstances under which it may overrule its own precedent. If I were a Supreme Court Justice, I would follow those standards.

Question 9. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 9. If a case requires the construction of statutory language, the analysis begins with the plain language of the statute which is the best expression of the will of the people. In applying or further construing applicable statutory language in a given case, a judge should next turn to a consideration of analogous case precedent from the Supreme Court or the Circuit Courts. In this process, particularly with regard to terms used in a statute but not defined within the statute, it can be helpful to review the testimony and debate leading to the passage of the act to ascertain the legislative intent. Since transcriptions of legislative debate are not always complete or accurate, a judge should be cautious in considering testimony and debate.

NOMINATIONS OF RICHARD TALLMAN (U.S. CIRCUIT JUDGE); JOHN ANTOON, II, MARIANNE O. BATTANI, AND DAVID M. LAWSON (U.S. DISTRICT JUDGES)

THURSDAY, MARCH 23, 2000

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

The committee met, pursuant to notice, at 3:22 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond presiding.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The committee will come to order. Today, we are conducting the eighth judicial nominations hearing of the 106th Congress. I welcome the distinguished members of the Senate who are present to introduce particular nominees and I welcome the nominees and their families.

Judicial nominations hearings are among the most important duties of this committee. A Federal judgeship is not only a position of great power, it is also one of great responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner. After opening statements, I would like for the members who are present to introduce their nominees. They will constitute the first panel. The second panel will consist of these nominees: Richard Tallman, of Washington, to be U.S. Circuit Judge for the Ninth Circuit of Appeals; Judge John Antoon, of Florida, to be U.S. District Judge for the Middle District of Florida; Marianne Battani, of Michigan, to be U.S. District Judge for the Eastern District of Michigan; and David Lawson, of Michigan, to be U.S. District Judge for the Eastern District of Michigan.

I would like to include in the record a statement from Senator Leahy.

[The prepared statement of Senator Leahy follows:]

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

This afternoon the Judiciary Committee holds only its second confirmation hearing for judicial nominees this year. I thank the Chairman for proceeding today with the four outstanding nominees who appear before us: Richard Tallman, nominated to the Ninth Circuit Court of Appeals; Judge John Antoon II, nominated to the District Court in the Middle District of Florida; Judge Marianne Battani, nominated to the District Court in the Eastern District of Michigan; and David Lawson, also nominated to the District Court in the Eastern District of Michigan.

There are currently 76 vacancies on the federal courts across the country, and there are eight more on the horizon. Had Congress authorized the additional judgeships that the Judicial Conference has proposed over the past several years, judicial vacancies would currently number over 130.

The Senate has, at long last, acted on some of the nominees from years past. Just two weeks ago today the Senate confirmed Judge Richard Paez and Marsha Berzon to the Ninth Circuit. Judge Paez was first nominated over four years ago; Ms. Berzon over two years ago. The debate took up three days on the Senate floor and required us to end filibusters against these nominees with cloture votes. We then had to turn back a motion to postpone indefinitely consideration of the Paez nomination, a motion without precedent in Senate history with regards to a judicial nomination on which cloture had been invoked. Still, to date the Senate has only confirmed seven judges all year, and six were nominations carried over on the Senate Executive Calendar from last session and that could have been acted on last year.

Unfortunately, the Senate has not built upon the progress we had made filling judicial vacancies following the Chief Justice's remarks in his 1997 report on the state of the federal judiciary. Last year, faced with 100 federal judicial vacancies, the Senate confirmed only 34 new judges. I have challenged this Committee and the full Senate to return to the pace we met in 1998 when we held 13 confirmation hearings and confirmed 65 judges. That approximates the pace in 1992, when a Democratic majority in the Senate acted to confirm 66 judges during President Bush's final year in office.

There is a myth that judges are not traditionally confirmed in Presidential election years. That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed Reagan nominees and, as I have noted, 66 in 1992 when a Democratic majority in the Senate confirmed 66 Bush nominees. Our federal judiciary cannot afford another unproductive election year session like 1996 when a Republican majority in the Senate confirmed only 17 judges. These 17 confirmations in 1996 were an anomaly that should not be repeated. Since then we have had years of slower and lower confirmations and heavy backlogs in many federal courts.

By this time in 1992, the Committee had held 4 confirmation hearings for judicial nominees and 19 judges had been confirmed. By this date in 1994, the Committee had held 4 hearings, and 15 judges had been confirmed. By this time in 1998, the Committee had held 3 hearings and 12 judges had been confirmed. By comparison, we remain leagues behind that pace.

The vacancies on the courts of appeals around the country are particularly acute. The Ninth Circuit continues to be plagued by multiple vacancies. I am glad to see Mr. Tallman included in this hearing. We should also be making progress on the nominations of Barry Goode, Judge Johnnie B. Rawlinson and James E. Duffy, Jr. Representing the State of Vermont, I am acutely aware that there is no one on the Ninth Circuit from the State of Hawaii. I know that federal law requires that "there be at least one circuit judge in regular active service appointed from the residents of each state in that circuit," 28 U.S.C. 44(c), and would like to see us proceed to confirm each of these outstanding nominees.

The Fifth Circuit continues to labor under a circuit emergency declared last year by its Chief Judge. We should be moving the nominations of Alston Johnson and Enrique Moreno to that Circuit to help it meet its responsibilities.

This week I received a copy of a letter from the Chief Judge of the Sixth Circuit concerning the multiple vacancies plaguing that Circuit. Chief Judge Merritt was disturbed by a report that this Committee would not be moving any nominees for the Sixth Circuit this year. He wrote:

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five percent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them.

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 this way. The remaining judges on a court should not be

treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating in deciding more than 550 cases a year—a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the Senate “advise” as to judicial nomination, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

Judge Merritt, I hear your plea. I, too, urge the Committee and the Senate to go to work on the nominations of Helene White, Kathleen McCree Lewis, and Kent Marcus to the Sixth Circuit.

Working together the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts across the country. I look forward to hearing from these outstanding nominees today and urge all Senators to join us to make the federal administration of justice a top priority for the Judiciary Committee and for the Senate this year.

Senator THURMOND. Senator Murray, do you want to introduce a nominee?

Senator MURRAY. Senator Gorton, the senior Senator, should go first. That would be appreciated.

Senator THURMOND. Do you want him to go first?

Senator MURRAY. Yes.

Senator THURMOND. That suits me. Go ahead.

**STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM
THE STATE OF WASHINGTON**

Senator GORTON. Thank you. Mr. Chairman, it is with great pleasure that Senator Murray and I appear before you to recommend for the Ninth Circuit Court of Appeals Mr. Richard Tallman of Seattle. Senator Murray and I have developed a relationship that I think is as constructive or more constructive than any in the U.S. Senate in putting together a bipartisan committee to make selections to submit to us for a final choice. The result has been, in my opinion, a series of highly qualified men and women of fine legal standing, generally speaking, non-controversial in nature, for these positions.

In addition to the personal relationship that Senator Murray and I have created, we have a highly constructive arrangement between the two of us on the one hand and the White House and its appointments on the other, and it is through that system that we bring Mr. Tallman before you here today.

His name was submitted to the two of us, ironically, in an earlier competition for a District Court judgeship and another person was picked. The opportunity, however, that arose for the Ninth Circuit Court of Appeals, to choose the other of two very highly qualified candidates, was a joy and a delight to me and I am sure to Senator Murray, as well.

I do not believe that he was an individual who was known personally to either of us before this procedure began, but he is a trib-

ute to the quality of that process. He has broad bipartisan support in the State of Washington and its legal community, from the Attorney General of the State, my successor, who is a Democrat, two former U.S. Attorneys for Western Washington, the Federal public defender from Western Washington, the President of the Ninth Circuit District Judges Association, and the Federal Bar Association in the Western District of Washington.

For an extended period of time, he was a partner in one of Seattle's largest law firms, Bogle and Gates, but recently, he has been a principal in a small firm that specializes in white collar criminal defense. He has been an Assistant U.S. Attorney for the Western District of Washington and has been a special assistant city attorney, deputy prosecuting attorney, and Special Assistant Attorney General from the State of Washington. He has taught and lectured extensively to groups of lawyers and non-lawyers on a wide range of legal topics.

His civic career has been equally noteworthy, he has participated in many bar associations and has himself worked on the selection of judges for State court positions. He is an Executive Board member of the Chief Seattle Council of the Boy Scouts of America, and I guess I note he is the third recent judicial nominee from our State who has participated extensively with either the Boy Scouts or with the Girl Scouts, though I do not think that either Senator Murray or I require this as an absolute prerequisite for selection.

I could not recommend a candidate to you more unreservedly. He will be a fine addition to the Federal bench and I hope that the Judiciary Committee will be able to act both promptly and favorably on his nomination.

Senator THURMOND. Senator Murray.

**STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM
THE STATE OF WASHINGTON**

Senator MURRAY. Thank you very much, Mr. Chairman. It really is my pleasure to be here with Senator Gorton today to introduce Dick Tallman, who is a distinguished lawyer and a former U.S. attorney to this committee, and I am pleased to recommend him and urge the Senate confirm him as a Circuit Judge for the Ninth Circuit. I also want to take a moment to recognize his wife, Cynthia, who is here with him today and is an outstanding member of the community, as well.

Mr. Chairman, it is a delight to again be here with Senator Gorton as we have worked through the process of making sure that we fill our judicial nominees in a manner that is best for our State and our country and I thank him for his continued work with me to put forward, I think, some of the best nominees that this Senate has confirmed over the last several years. So I appreciate his work and we are delighted to be here together today to present Dick Tallman to you.

Both Senator Gorton and I assisted the President in choosing him and he possesses strong support from a diverse group of attorneys and community leaders at home in Washington State.

As Senator Gorton said, Dick Tallman began his legal career as a law clerk for U.S. District Judge Morell Sharp in Seattle. He then moved on to work successfully as an attorney for the Justice

Department, and in 1980, he rose to become Assistant U.S. Attorney for the Western District of Washington. After 3 years as Assistant U.S. Attorney, he went on to an admirable career in private practice, specializing in complex commercial litigation. He also spends his spare time supporting a number of civic activities and teaching law, as Senator Gorton mentioned.

Outside of his many professional credentials that have been presented to you, I have had the opportunity to meet and talk with him many times and I just want to share with my colleagues how impressed I have been with his professionalism and his decency.

It is my pleasure to introduce to this committee a great lawyer who I believe will make an exceptional Federal judge and I urge this committee to approve his nomination and I hope we have a confirmation on the floor of the Senate as soon as possible. Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you very much.

Senator Levin.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, thank you for convening this hearing. It was a real privilege to recommend to the President two nominees who went through a very long screening process of a cross-section of people back in the State of Michigan who were recommended from about 60 applicants, six finalists from whom these two were chosen and were recommended by me to the President of the United States. It is a real honor to be here with Spence Abraham, my colleague from Michigan, today to present the two nominees to this committee.

The first is Marianne Battani, who is a circuit court judge now in Michigan. She has been a circuit court judge since about 1982 and before that was a judge in the common pleas court in the District Court in Michigan. She is known for her judicial demeanor, and I asked her if she would mind if I read a very brief letter that she received not too long ago from someone who was in her courtroom, because I think it represents everything that she is and what we really want in a judge, and it is very brief.

This is what this person wrote to her. "I was a witness in your courtroom last week. While I have not appeared in a lot of courts, I have been exposed to a few. I was struck by a different atmosphere in your court compared to the others I have been in. I have had a hard time finding the precise description, but warm, inviting, caring, concerned, and involved are a few of the terms that come to mind. Your manner quickly put me at ease. I had the sense that you were there to help all of us get this process along, not as a referee to just make sure the rules were followed. It was a refreshing experience. It raised my respect for the judiciary a notch or two. Thanks for what you do."

She is accompanied here today by her daughter, Amanda, by her mother, Zelinda, and by her sister, Susan, and she comes extraordinarily well recommended. The Metropolitan Detroit Bar Association recommended her as outstanding and Lawyers Weekly in Michigan said that she is one of Michigan's most respected jurists.

Our other nominee is David Lawson, and he is a true superstar as a litigator, as a teacher. He has had 20 years on the faculty of the Michigan Judicial Institute, where he teaches judges and teaches lawyers things like procedure and evidence, and in his private practice, he has had an extraordinary amount of experience in the courts of the State of Michigan and the Federal courts.

Some of the comments which I received when I was considering these nominees about David Lawson are as follows. "He stands at the top of the class academically, professionally, ethically, and personally." Another comment, "He demonstrates the kind of even and balanced temperament which one would seek and hope for in a judge, a willingness to listen, a passion for justice, and a sense of compassion for those engaged in the system." Another comment, "Very knowledgeable in the law, an expert in the rules of evidence." Another comment, "Demonstrates the highest level of integrity and ethics."

David Lawson is here with his family and a number of friends, as well, and I will not introduce them all but just a few: His wife, Janet, who also on her own is professionally the head of volunteer services for United Way, their sons—

Senator THURMOND. Would you like for any of them to stand or not?

Senator LEVIN. That would be very nice. Thank you very much.

Senator THURMOND. Call the names and let them stand.

Senator LEVIN. Why do we not have the Lawson family all stand, and then I will go back to the Battanis. Thank you, Mr. Chairman. If the Lawson family, David, with your wife, Janet, would stand, their three sons, Daniel, Ryan, and Kyle, and their daughter-in-law, Lisa, and Dorothy Lawson, David's mother, is here. Unfortunately, his dad, Jim, could not be here due to illness. They have about nine or ten more family members. Perhaps you could all stand up now at one time and just show the kind of support this nominee has here, Mr. Chairman.

By comparison, Judge Battani's group is a lot smaller, and I hope that you will not read too much into that, Mr. Chairman. I am wondering, Judge Battani, if you and your daughter and your mother and your sister might also stand.

Thank you, and thank you very much Mr. Chairman.

Senator THURMOND. It is quality rather than quantity. [Laughter.]

Senator Abraham.

**STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR
FROM THE STATE OF MICHIGAN**

Senator ABRAHAM. Thank you very much, Mr. Chairman. Let me just add to what Senator Levin has already said. We are very pleased today to jointly present these two nominees to the committee. I also want to publicly acknowledge Senator Levin's approach to the process. I think in his selection of these two individuals to recommend to the White House, he not only observed, I think, the appropriate and highest level of scrutiny in terms of the committee that made recommendations in its efforts, but also the involvement and consultative relationship with our office and with me and I appreciate that very much, Senator.

I am very happy to join him in introducing Judge Battani and Mr. Lawson and their family members who are here today. I think it is a privilege to be part of this process because I think they are both highly qualified individuals who the President has nominated to serve as judges to the U.S. District Court for the Eastern District of Michigan.

Judge Battani, as you have heard, is from Michigan. She was born in Detroit. I believe she has lived her entire life in Michigan. After receiving her bachelor's degree from the University of Detroit, she went on to excel at the Detroit College of Law. After law school, she worked as an associate attorney for a small general practice firm and then started her own practice. For the next 7 years, she mainly practiced family law and custody and support issues.

Then in 1981, she was appointed to the common pleas court for the City of Detroit by Governor Miliken, a Republican governor. That court has jurisdiction over civil cases with damages estimated to be under \$10,000. Since 1982, she has served as a judge on the Wayne County Circuit Court, our trial court, the highest trial court.

Lawyers I have talked to, whether they have won or lost before her, have uniformly praised Judge Battani's excellent preparation as well as her craftsman-like approach to her job. These are not the easiest qualities to demonstrate on a court such as this one which has such a high volume of cases, but she has demonstrated it.

She has also demonstrated her skills as an administrator. Her work on the development of the individual docket system in the Wayne County Circuit Court reduced the median time for trial from 43 months to 28 months. Only 2 percent of the cases in the entire court exceed the 2-year American Bar Association time standard. In my judgment, Mr. Chairman, that is an extraordinary achievement and one that definitely deserves this committee's favorable attention.

Finally, despite the press of judicial business and family commitments, Judge Battani has also been an active member of the State bar, as well as a number of community organizations with particular focus on work with domestic violence victims and disadvantaged children. She also serves on the board of the Detroit College of Law at Michigan State University and other organizations like it.

For those reasons, I am delighted to be here today with Judge Battani and to thank the chairman and the committee for holding this hearing for her nomination so promptly. We appreciate that.

David Lawson was also born in Detroit and spent most of his life in Michigan. Mr. Lawson graduated magna cum laude from the University of Notre Dame, which I think we can let slide. I went to Michigan State, Mr. Chairman. There are some occasional rivalries there. He then went on to the Wayne State University Law School. He was first in his class, which I think we can also let slide. I will not mention my class rank in law school here today. But in law school, he clerked for the Honorable John N. O'Brien in the Michigan Circuit Court. After graduating from law school, he clerked for the Honorable James L. Ryan, who was then on the

Michigan Supreme Court and is now on the Sixth Circuit Court of Appeals.

For the next 8 years, Mr. Lawson was an associate attorney in a general practice firm. He concentrated initially on criminal defense law and evolved over the years to include civil defense and plaintiff trial and appellate litigation, with an emphasis on medical malpractice and professional negligence. During this time, he also served 2 years as Special Assistant Attorney General, as a special prosecutor for the Oakland County one-man grand jury.

From 1985 to 1994, he was a partner in a Detroit firm. He specialized there in civil and criminal defense cases and commercial litigation. From 1991 to 1993, he also served as Special Livingston County Prosecuting Attorney. Since 1994, he has been a member of the Clark Hill law firm, specializing again in litigation. He has written numerous practice-related law review articles as well as course materials for seminars.

He, too, has been an active member of the community. For years, he has coached youth soccer, baseball, and basketball teams. He has volunteered at local shelters and helped raise money for the Coalition on Temporary Shelters. He is currently serving as a member of the Board of Directors of the Oakland County, Michigan Bar Association and the Criminal Defense Attorneys of Michigan.

Mr. Lawson's wide range of legal experience and knowledge gives him, in my view, a unique perspective of the law and these are the qualities we need in our judges. I am proud of his work, as I am of Judge Battani's, and for all of these reasons, I am delighted to be here today to present Judge Battani and Mr. Lawson to the committee and to urge the committee to move swiftly in consideration of their nominations.

I just want to conclude by saying this, that I have a group of lawyers in Michigan who advise me on nominations and all of their reviews of both Judge Battani and Mr. Lawson were uniformly positive. This, Mr. Chairman, is a rare occurrence and I think it speaks for itself. So I very much appreciate the time today, the speed with which the hearing has been set, and I hope a quick and speedy conclusion to the consideration of these nominations by the full committee. Mr. Chairman, thank you.

Senator THURMOND. Thank you very much.

Senator Graham.

**STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM
THE STATE OF FLORIDA**

Senator GRAHAM. Thank you very much, Mr. Chairman. It is a great honor to have these judicial nominees heard by the Judiciary Committee under your chairmanship. You have for many decades been associated with the work of this Judiciary Committee and have had the opportunity to personally participate in the selection of a large percentage of the current Federal judiciary, and I know that these nominees will be very appreciative of the historic significance of having you chair their confirmation hearing.

Senator Mack and I also want to thank you, Mr. Chairman, and also to Chairman Hatch for the prompt and expeditious treatment that you have accorded the thorough review of Honorable John Antoon. Judge Antoon has been nominated by the President for a

vacancy in the Middle District of Florida. Senator Mack unfortunately could not be with us this afternoon and has asked me on his behalf, with your permission, to submit into the record his statement supporting Judge Antoon's nomination.

Senator THURMOND. Without objection.

[The prepared statement of Senator Mack follows:]

PREPARED STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Mr. Chairman and members of the Committee, I am delighted to be here today to recommend John Antoon for confirmation. But before I discuss the distinguished career of John Antoon, I would like to thank this Committee for its responsiveness to the needs of the Florida judiciary. At this moment, the State of Florida has seven vacancies in its federal judicial system. Both Senator Graham and I are eager to work with the Committee this session to confirm qualified candidates to fill these vacancies and ease the pressure on Florida's courts.

At the present time, six of the seven vacant judgeship positions are in the Middle District of Florida. It is an honor to recommend Judge Antoon for confirmation to serve in the Middle District. Since 1995, Judge Antoon has served as an appellate court judge for the Florida's Fifth District Court of Appeal. Prior to sitting as an appellate court judge, Judge Antoon served 10 years as a trial court judge. In addition, Judge Antoon has also spent 14 years on the other side of the bench, as an assistant city attorney, a public defender, and as an attorney with his own civil and criminal practice. Finally, it should also be noted that Judge Antoon has assisted the United States military by serving in the Army Reserve for six years.

In addition to his career achievements, Judge Antoon has taken time out of his busy schedule to give back to the community by serving on the Board of Directors of the Brevard Legal Society and on the Board of Directors for the Haven, which is a shelter care facility for dependent children.

Florida Today, a local Florida paper, has twice written articles about the excellent credentials of Judge Antoon. A December 3, 1999, article stated that "the Senate Judicial Committee should waste no time in confirming Antoon for the federal judgeship." A March 4, 2000, editorial stated "[t]hose who know him say John Antoon is one of the finest people they've ever know. They also say he is one of the finest judges who has sat on the bench * * * A big job, but Antoon, who has cemented a reputation as a peerless juror, is the right person for it."

I have carefully examined Judge Antoon's qualifications and find him to be a highly qualified nominee. I am confident that, if confirmed, Judge Antoon will bring to the federal bench an outstanding background which will serve to maintain the integrity of our legal system and provide justice for those who come before him.

Senator GRAHAM. Mr. Chairman, I am honored to introduce to the committee not only an outstanding jurist from Florida, but also a jurist with a very large and supporting family, and some of those family members are with him today. First, if I could ask Judge John Antoon if you would please stand, Judge. The Judge is joined by his wife, Nancy, and their vivacious 3½-year-old daughter, Molly. Molly is so vivacious she is outside. And the Judge's mother, Ms. Elva Antoon, the Judge's brother, David, who is a pilot with United Airlines from Dayton, OH, and his daughter, Emily, also join Judge Antoon. Thank you very much.

Mr. Chairman, as I stated, Judge Antoon would fill a vacancy in the U.S. Middle District of Florida. This vacancy was created when Judge G. Kendall Sharp took senior status, effective January 1. As you know, the Middle District of Florida is one of the busiest districts in the Federal system in terms of the number and complexity of its cases. Therefore, I again am particularly appreciative that you have expedited the consideration of Judge Antoon to fill this vacancy.

The process that we have used is as we have in the past. An independent, nonpartisan screening committee interviewed the can-

didates for this vacancy, and I commend Judge Antoon to your attention.

Mr. Chairman, I know that you have admonished the presenters to brevity, so I would like to ask that the full statement which I have be included in the record and I would like to summarize it for your attention.

It is illustrative of the regard in which Judge Antoon is held in Florida that it was difficult for him to be with us today. The reason for that difficulty is that he has been participating as one of the prime professors in the school which is conducted by the Florida judiciary for new judges. The fact that he was selected to be one of the professors for new judges is an indication of the extremely high regard in which he is held by members of the judiciary and the bar in Florida.

Summarizing his long and distinguished career, the Judge served 10 years as a circuit court judge, until 1995, when he was elevated to Florida's Fifth District Court of Appeals, the interim appellate body in our State. He is a graduate of Florida Southern College in Lakeland. He earned his law degree from Florida State University in 1971. He is a man who has continued his commitment to education, having received a Master's of Science from the Florida Institute of Technology in 1993.

Mr. Chairman, as an indication of his strong community support, I would like to ask for inclusion in the record an editorial from the Florida Today newspaper of March 4 of this year commending Judge Antoon and urging his prompt confirmation.

Senator THURMOND. Without objection, so ordered.

Senator GRAHAM. Mr. Chairman, Senator Mack and I are of the view that prospective judges benefit from a variety of experiences and we submit that Judge Antoon meets that standard. He is prepared to be an outstanding member of the Federal judiciary. He will bring credit to the President who has nominated him and to this Senate, which we hope will soon confirm him.

Again, Senator Mack and I express our thanks for your consideration. We look forward to continuing to work with this committee towards our shared goal of a qualified judiciary for America. Thank you.

Senator THURMOND. Thank you very much.

[The prepared statement and information of Senator Graham follow:]

PREPARED STATEMENT OF SENATOR BOB GRAHAM

Mr. Chairman, and members of the Committee, Senator Mack and I thank you for scheduling this hearing and for the Committee's prompt and thorough review of The Honorable John Antoon (Ann-Tone) of the Middle District of Florida.

Judge Antoon is joined by members of his family: His wife, Nancy, their three-and-a-half year old daughter, Molly. The judge's mother, Elva Antoon (Ann-Tone), and brother, David, a pilot with United Airlines, from Dayton, Ohio, and his daughter, Emily.

Our colleague, Senator Mack, could not be with us this afternoon. On his behalf, I respectfully ask the Chair for permission to submit into the record his statement supporting this nomination. Thank you.

Mr. Chairman, I am honored to introduce to the Committee an outstanding jurist from Florida: The Honorable John Antoon II.

Judge Antoon would fill a vacancy created when U.S. District Court Judge G. Kendall Sharp of Orlando took senior status, effective January 1.

An independent, non-partisan screening committee interviewed candidates and commended Judge Antoon to my attention.

Judge Antoon is one of the most experienced and respected jurists in our State.

On a personal note, I would point out that Judge Antoon had to scramble to get to Washington this week, in part because he was in Tallahassee, Florida, which does not have the best airline connections.

Judge Antoon is not based in Tallahassee, but the reason for his visit to Tallahassee reflects his standing in the legal profession and the judiciary.

Mr. Chairman, the reason Judge Antoon was in Tallahassee was to teach new judges about the profession of serving as a Judge.

Judge Antoon is held in such high regard by his profession that he is called upon as a mentor, teacher, and leader of our future judges.

After serving 10 years as a trial judge in our state court system, Judge Antoon was elevated—in 1995—to Florida’s 5th District Court of Appeals, based in Daytona Beach.

After graduating from Florida Southern College in 1968, John Antoon earned his law degree from Florida State University in 1971. (Florida State has gone on to win two national football championships since then).

A man who values education greatly, Judge Antoon earned a Masters of Science from the Florida Institute of Technology in 1993.

Please note that he has also earned editorial support.

Florida Today, alluding to the many challenges facing the growing Middle District, states with confidence: “A big job, but Antoon, who has cemented a reputation as a peerless juror, is the right person for it.”

I’d respectfully request that this Florida Today editorial entitled “Senate: Approve Antoon.” be included in the record.

Mr. Chairman, we share the view that prospective judges benefit from varied experiences, and I submit that Judge Antoon’s background meets that standard. He is a veteran, having served in the United States Army.

He has worked as an assistant public defender and served as a member of the Board of Directors of the Legal Aid Society.

He is a skilled teacher with experience at a variety of colleges, and, as I mentioned earlier, a trainer for new judges.

Mr. Chairman, this nominee is qualified to serve our Nation as a federal judge, and I respectfully request your thorough and prompt review so he can begin that service as soon as possible.

Again, Senator Mack and I express our thanks for your consideration, and we look forward to continuing to work with this Committee toward our mutual goal of a qualified judiciary. Thank you.

opinions

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March 4, 2000

Senate: Approve Antoon

A FLORIDA TODAY editorial

Those who know him say John Antoon is one of the finest people they've ever known. They also say he is one of the finest judges who has sat on the bench.

No wonder then that Antoon's career trajectory continues to gain altitude: He is being considered for a lifetime appointment to the U.S. District Court for the Middle District of Florida. The district stretches from Fernandina Beach to Naples and has the second busiest caseoad in the nation.

A big job, but Antoon, who has cemented a reputation as a peerless juror, is the right person for it.

Longtime residents may remember Antoon from his Satellite High School days in the 1960s. From Satellite he went to Florida State University, earning his law degree in 1971. His first job on the bench was as a Brevard circuit judge in 1985. Ten years later, former Gov. Lawton Chiles appointed Antoon to the Fifth District Court of Appeal. And last year a judicial nominating commission sent the names of Antoon and three others to Sen. Bob Graham, who chose to forward Antoon's name to president Clinton for consideration to the federal post.

Now, President Clinton has sent Antoon's name to the Senate, where the Senate Judiciary Committee must recommend him before the full body votes yea or nay.

If the past is prelude, then Antoon should get thumbs up from the Senate.

"John's service here was without equal," said Brevard's Chief Judge Preston Silvermail.

As would be his service to the federal bench.

We urge the Senate to approve Antoon as a U.S. District judge without delay.

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Senator THURMOND. I ask that each nominee stand at the witness table and raise your right hand and I will administer the oath. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. TALLMAN. I do.

Judge ANTOON. I do.

Judge BATTANI. I do.

Mr. LAWSON. I do.

Senator THURMOND. Thank you. If any of you have any opening statements or would like to introduce any family or friends who are with you today, please feel free to do so at this time.

**TESTIMONY OF RICHARD TALLMAN, OF WASHINGTON, TO BE
U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

Mr. TALLMAN. Thank you, Mr. Chairman. I would like to introduce my wife, Cynthia Tallman, if she would stand. I would also like to introduce Robin Taub, who practiced law with me in Seattle, and two of my former partners from the firm of Saltzman and Stevens who practiced with me at Bogle and Gates, Gary Stevens and Ruth Tiger.

Senator THURMOND. Thank you very much.

Mr. TALLMAN. Mr. Chairman, I regret that my mother, Jean Tallman, could not be with us today, but I know she is here in spirit. Thank you.

[The biographical information and questionnaire of Mr. Tallman follows:]

United States Senate
Committee on the Judiciary

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. Biographical Information (Public)

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

Richard Charles ("Dick") Tallman

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

Office: TALLMAN & SEVERIN LLP Home: Seattle, WA
1011 Western Avenue, Suite 803
Seattle, WA 98104-1040

3. Date and Place of Birth:

March 3, 1953; Oakland, California

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

Married on November 14, 1981: Spouse's name: Cynthia Ostolaza Tallman

Spouse's occupation: Police Homicide Detective Sergeant

Spouse's business address: Det. Sgt. Cynthia O. Tallman #4194
Seattle Police Department
Homicide & Assault Unit
610 Third Avenue, Unit 715
Seattle, WA 98104-1886

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

University of Santa Clara Santa Clara, California	August 1971- June 1975	B.S.C. <i>Summa Cum Laude</i> (granted 6/8/75)
College/University	Dates of Attendance	Degree
Northwestern University School of Law, Chicago, Illinois	August 1975- June 1978	Juris Doctor (granted 6/17/78)
College/University	Dates of Attendance	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.

Tallman & Severin LLP {Current Employer}	Feb. 1999 – Present: Founding Partner
Office of the Attorney General State of Washington Seattle, WA	1998 – 1999: Special Assistant Attorney General
Chief Seattle Council Boy Scouts of America Seattle, WA	1998 – Present: Executive Board Member
Office of the City Attorney Seattle, WA	1990 – 1991: Special Assistant City Attorney
Bogle & Gates, P.L.L.C. Seattle, WA	1990 – Feb. 1999: Member & Chair of White Collar Criminal Defense Practice Group
Seattle-King County Crimestoppers, Inc. Seattle, WA	1989 – 1999: Outside General Counsel
Schweppe, Krug & Tausend, P.S. Seattle, WA	1987 – 1989: Partner

Schweppe, Krug & Tausend, P.S. Seattle, WA	1983 – 1986: Associate
Edmonds Community College Foundation Board Lynnwood, WA	1988 – 1992: Chairman 1984 – 1988: Director
Office of the Prosecuting Attorney King County, Washington Seattle, WA	1982 – 1983: Special Deputy Prosecuting Attorney
Office of the United States Attorney Western District of Washington Seattle, WA	1980 – 1983: Assistant United States Attorney
United States Department of Justice Criminal Division, General Litigation & Legal Advice Section Washington, D.C.	1979 – 1980: Trial Attorney
Chambers of Hon. Morell E. Sharp United States District Judge Western District of Washington Seattle, WA	1978 – 1979: Law Clerk
McCutcheon, Doyle, Brown & Enersen San Francisco, CA	June – Aug. 1977: Summer Associate
Prof. Fred E. Inbau, Nw. Univ. School of Law & Americans for Effective Law Enforcement Chicago, IL	June – Aug. 1976: Research Assistant
Mendocino County Sheriffs Office Ukiah, CA	June – Aug. 1975: Administrative Intern

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

No.

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

1999: James E. West Fellow, Chief Seattle Council, Boy Scouts of America,

National Endowment Award.

1997: Robert W. Graham *Pro Bono* Public Service Award (Bogle & Gates, P.L.L.C.).

1982: Outstanding Service Award, Drug Enforcement Administration.

1977 – 1978: Executive Editor, *Northwestern University Law Review*.

Listed in *Who's Who in American Law*.

Listed in *Who's Who in the West*.

Beta Gamma Sigma Honor Society.

Eagle Scout with Silver Palm.

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 (Member, Criminal Justice & Litigation Sections).

Appointed by Washington Judicial Council to Expungement Rule Study Committee (1988).

Appointed by Washington Supreme Court to Committee on Funding Appellate Counsel in Death Penalty Cases (1994).

Association of Washington Business Task Force Drafting State Environmental Crimes Legislation (Member, 1994-95).

Federal Bar Association of Western Washington: President (1995); Vice-President (1994); Trustee (1992-93); Chair, Local Rules Committee (1984).

King County Bar Association: Former Chair of Judiciary & Courts Committee (1985); Member, Judicial Evaluation & Information Committee (1984, 1989); Member, Courthouse Security Task Force (1991); Member, Bench-Bar Relations Committee (1990-94); Advisor, Law Explorer Post (1984-85).

National Association of Criminal Defense Lawyers (Life Member).

Ninth Circuit Historical Society.

Ninth Circuit Judicial Conference Lawyer Representatives from Western Washington (Delegation Chair, 1996-1997).

Organized *pro tem* judge panel for King County Superior Court and training for interested attorneys (1988-89).

State Bar of California.

U.S. Magistrate-Judge Selection Panel for Western District of Washington: Chair for Judge David E. Wilson's position (1992).

Washington Association of Criminal Defense Lawyers.

Washington State Bar Association: Member, Judicial Recommendation (1991-93) & Legislation (1985-88) Committees.

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:

American Bar Association
King County Bar Association
National Association of Criminal Defense Lawyers
State Bar of California
Washington Association of Criminal Defense Lawyers
Washington State Bar Association

All Other Organizations to Which I Belong:

Chief Seattle Council, Boy Scouts of America (Executive Board Member)
Episcopal Church of the Ascension (Seattle)
Ninth Circuit Historical Society
Rainier Club (Seattle)
Washington Athletic Club (Seattle)

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.

07/26/99	United States Court of Federal Claims
06/05/98	United States District Court for the Eastern District of Washington
10/20/97	United States Supreme Court
08/07/89	United States District Court for the District of Hawaii

07/10/79	United States District Court for the Western District of Washington
05/16/79	Washington Supreme Court
05/15/79	United States Court of Appeals for the Ninth Circuit
04/25/79	United States District Court for the Northern District of California
12/15/78	California Supreme 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.**

Exhibit 1: Tallman, R., "Legal Update 1998," Training Materials for National Park Rangers (Bogle & Gates, P.L.L.C. 1998).

Exhibit 2: Davis, C., Armstrong, S., Hershey, K., Tallman, R., and Hammerly, M., "Courthouse Security Task Force Report" (Seattle-King County Bar Association 1991).

Exhibit 3: "Secrets of the Grand Jury—A Former U.S. Attorney Tells How to Receive a Summons and Still Get Sleep at Night," *Washington Criminal Defense*, pp. 4-7 (Washington Defender Association and the Washington Association of Criminal Defense Lawyers, 1988).

Exhibit 4: "Representing Yourself in Superior Court: The 'Pro Se' Handbook," (Seattle-King County Bar Association and the Legal Foundation of Washington 1988). I do not recall which portions I edited. At least 14 attorneys and judges either contributed parts or edited parts of the booklet.

Exhibit 5: Book Review, 12 *The Prosecutor* 48 (National District Attorneys Association, 1976); 4 *J. Police Sci. & Admin.* 367 (1976) (reviewing R. Sulnick, *Civil Litigation and the Police*).

Exhibit 6: Copies of all speeches I could locate. I have no recollection of any other speeches I have given on constitutional law or legal policy for which a copy of the speech still exists.

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

Excellent health. Last physical examination: July 18, 1999.

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 for the ten most significant opinions you have written:**

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.

1979 – 1980: Trial Attorney, United States Department of Justice, Criminal Division (appointed through the Attorney General's Honor's Program).

1980 – 1983: Assistant United States Attorney, Western District of Washington, Seattle (appointed by the Attorney General of the United States).

1982 – 1983: Cross-deputized as a Special Deputy Prosecuting Attorney for King County, Washington (appointed by King County Prosecutor Norm Maleng to serve on state-federal drug prosecution team).

1990 – 1991: Special Assistant City Attorney for Seattle, Washington (appointed by City Attorney Mark Sidran to handle *pro bono* drug abatement actions).

1998 – 1999: Special Assistant Attorney General (appointed by Washington Attorney General Christine Gregoire to conduct an internal investigation and to represent the University of Washington Medical Center in an EPA investigation over waste disposal practices involving plaster casting materials).

I have held an appointment as Notary Public for approximately 15 years.

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;

1979 – 1980: Law Clerk to the Honorable Morell E. Sharp (now deceased),
United States District Judge, Western District of Washington.

2. Whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

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;

Tallman & Severin LLP 1011 Western Ave., Suite 803 Seattle, WA 98104-1040	Feb. 1999 – Present: Founding partner
Office of the Attorney General State of Washington Seattle, WA	1998 – 1999: Special Assistant Attorney General
Office of the City Attorney Seattle, WA	1990 – 1991: Special Assistant City Attorney
Bogle & Gates, P.L.L.C. 2 Union Square #4700 601 Union St. Seattle, WA 98101-2346	1990 – Feb. 1999: Member & Head of White Collar Criminal Defense Practice Group
Seattle-King Co. Crimestoppers, Inc. Seattle, WA	1989 – 1999: Outside General Counsel
Schweppe, Krug & Tausend, P.S. 1011 Western Ave., Suite 800 Seattle, WA 98104	1987 – 1989: Partner
Schweppe, Krug & Tausend, P.S. 1011 Western Ave., Suite 800 Seattle, WA 98104	1983 – 1986: Associate
Office of the Prosecuting Attorney King County, Washington Seattle, WA	1982 – 1983: Special Deputy Prosecuting Attorney
Office of the United States Attorney Western District of Washington 800 Fifth Avenue, Suite 3600	1980 – 1983: Assistant United States Attorney

Seattle, WA 98104

United States Department of Justice 1979 – 1980: Trial Attorney
Criminal Division, General Litigation
and Legal Advice Section
Federal Triangle Building
9th & Pennsylvania Ave.
Washington, D.C.

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 served as a Department of Justice trial attorney and then as an assistant United States attorney for four years before becoming a private attorney in 1983. Although I switched sides, I have practiced in the same general fields of federal criminal and civil litigation during my twenty-one years in legal practice. During my years of government service, and in the intervening years of private practice, I have tried 32 cases to conclusion ranging from one-day traffic cases to complex multi-party criminal and civil trials. As recently as March 1999, I tried with co-counsel an international civil fraud case before the American Arbitration Association, which took three weeks to try. As my practice has matured, I have found there to be fewer matters that actually go to trial and more that are resolved by mediation or negotiated settlement. This is a result of the fact that most of my business clients have too much at stake to risk the uncertainties of a trial, whether it be personal liberty, business reputation, or substantial financial assets. Twenty-five of the 32 trials were criminal matters. My civil trial experience includes antitrust, breach of contract, construction, a real estate dispute, and civil RICO/fraud cases.

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

I typically represent individuals, small businesses, corporations, public institutions (cities, hospitals, and universities), or their officers, employees, or directors in connection with federal criminal investigations. These investigations are conducted by federal prosecutors located in districts throughout the United States or at the Department of Justice in Washington, D.C. These prosecutors are assisted by various investigative agencies (for example, the F.B.I., E.P.A., I.R.S., inspectors general, or special task forces in areas such as healthcare, program, or defense procurement fraud). Other cases involve alleged crimes in areas such as the environment, defense contracts, customs/export fraud, counterfeit aerospace parts, maritime crimes, timber and resource-related regulatory offenses, workplace safety, securities fraud or insider trading, and health care fraud. In addition, I handle a variety of civil

lawsuits arising from business activities of my clients, including either the plaintiff's or the defense side of these cases (usually in federal court). Typically, these cases involve commercial civil and administrative litigation including contract disputes, regulatory violations, shareholder derivative lawsuits, civil False Claims Act (*qui tam*) cases, Medicare and Medicaid health care billing disputes, civil racketeering (RICO) cases, antitrust, suspension and debarment matters. I also conduct internal investigations to uncover wrongdoing by employees.

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 my practice has matured, fewer of my cases now actually go to trial. I have only occasionally appeared in court over the last five years and then usually in connection with an occasional civil trial. The bulk of my work during this period was in defending clients in pre-indictment or pre-filing investigations by federal authorities usually during the pendency of federal grand jury proceedings.

As recounted in response to question 10(a) above, my appearances in court were much more frequent earlier in my legal career, particularly during my service as a federal prosecutor.

Earlier in my career, most of my trials were tried to juries in federal court. As an assistant United States attorney I handled the federal appeals from all of my criminal trials where an appeal was filed. Early in my private practice with the Schweppe firm, I regularly wrote appellate briefs for senior partners such as Fred Tausend and Mary Ellen Krug that were filed in the Ninth Circuit and Washington Courts of Appeals and the Washington Supreme Court. Fewer of my cases actually go to trial now and most are resolved by global settlements or by convincing the prosecutors in the pre-indictment stage not to charge my clients.

As an assistant United States attorney from 1980 – 1983, I tried approximately six cases per year as sole counsel. In that three-year period I handled all but three or four of my cases alone.

2. What percentage of these appearances was in:

(a) federal courts: 90 %

(b) state courts: 10%

(c) other courts: 0%

3. What percentage of your litigation was:

(d) Jury: 90%

(e) non-jury: 10%

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

During my years of government service, and in the intervening years of private practice, I have tried 32 cases to conclusion ranging from one-day traffic cases to complex multi-party civil fraud trials. As recently as this year, I tried with co-counsel an international civil fraud case that took three weeks to try. I was sole counsel in approximately 18 of the cases; chief counsel in about 8; and associate counsel in approximately 6 cases.

5. What percentage of these trials was:

(f) Jury: 90%

(g) 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.

Case No. 1

- a. **Case Title and Citation:** *Laureen M. Davis & Zachary A. Davis, her minor son, Petitioners, v. United States of America; Director, Bureau of Justice Assistance, United States Department of Justice, Office of Justice Programs, Respondents*, No. 97-71255, 169 F.3d 1196 (9th Cir. 1999), transferred to United States Court of Federal Claims, No. 99-CV-471.

- b. Summary of the Case: The widow of a murdered Seattle police officer killed by a fleeing felon while eluding another police officer seeks death benefits under the Public Safety Officers' Benefits Act. The United States Department of Justice twice denied the claim on grounds that the deceased officer, though still on duty, was commuting home from work at the time of his death and was not killed "in the line of duty."
- c. Significance of the Case: The case resolves a conflict in the circuits by reversing prior Ninth Circuit authority which had held that such claims may be reviewed by the court of appeals. The panel ordered the case transferred to the United States Court of Federal Claims where the case is still pending. Still to be resolved is whether the Department of Justice erred in denying the claim where substantial evidence existed to establish to the satisfaction of local and state pension officials that Officer Davis' death was "'duty-related' . . . as a proximate result of the performance of his duties as an active duty police officer"
- d. Client Represented: The widow, Mrs. Lauren M. Davis, and her minor child, Zachary, petitioners/appellants.
- e. Nature of Participation: I assumed lead counsel responsibility for the two-day administrative evidentiary hearing conducted August 15-16, 1996, and appellate representation of the clients. I was assisted by an associate who performed legal research and by my former partner who edited my briefs.
- f. Disposition of the Case: The appellate court agreed with the Department's argument that the Court of Federal Claims, not the Court of Appeals, has sole jurisdiction to review decisions denying benefits under the Public Safety Officers' Benefits Act. The case will now be decided on the merits in the Court of Federal Claims.
- g. Trial Period: The evidentiary hearing establishing the record on appeal was conducted before an administrative law judge in Seattle from August 15-16, 1996.
- h. Trial Court and Judge: DOJ Bureau of Justice Assistance Hearing Officer Cheryl A. Crawford.
- i. Co-Counsel:
- Ron Schaps, Esq.
 {Former Partner}
 Northwest Waste Industries, Inc.
 54 S. Dawson St.
 Seattle, WA 98134
 (206) 763-2700

Rita Heimes Logan, Esq.
 {Former Associate}
 Verrill & Dana
 P.O. Box 586
 Portland, ME 04112-0586
 (207) 772-2300, Ext. 4014

Individual Counsel for Other Party:

Daniel Kaplan, Esq.
 Kathleen Moriarty Mueller, Esq.
 Civil Division, Room 9132
 U.S. Department of Justice
 601 "D" Street, N.W.
 Washington, D.C. 20530-0001
 (202) 514-5083
 Attorneys for the United States

Case No. 2

- a. Case Title and Citation: *NMB Air Operations Corporation, a Nevada corporation; and NMB Singapore Limited, a Singapore corporation; and Minebea Co. Limited, a Japanese corporation, Plaintiffs, v. John McEvoy; International Aircraft Services, Inc.; Ray Allen, and Donald Hyde Townshend III, Defendants; International Aircraft Services; and John McEvoy, Third-Party Plaintiffs, v. Sabena Airlines, S.A., a Belgian corporation, Third-Party Defendant*, No. C95-1620D (W.D. Wash.), aff'd mem., No. 97-35962 (9th Cir., Sept. 16, 1999).
- b. Summary of the Case: Sabena Airlines sold a DC-10 cargo freighter and associated spare parts including a spare engine to NMB and Minebea. John McEvoy brokered the deal through his company in Seattle, IAS. A civil RICO action was filed against the broker and two NMB employees, Townshend and Allen, after the purchaser discovered that McEvoy had diverted the spares package (including the engine) to himself by paying commercial bribes to Townshend and Allen. The conspirators had also resold the same parts to NMB for maintenance and upkeep. A third-party claim was filed by McEvoy against Sabena for selling a defective engine.
- c. Significance of the Case: This was a major civil fraud case brought under the Racketeer Influenced and Corrupt Organizations Act involving multinational parties and witnesses from all over the world.
- d. Client Represented: Sabena Airlines, the Belgian national carrier.

- e. Nature of Participation: Along with my partner, Linda C. Severin, I represented Sabena Airlines in the case. We shared responsibility for extensive pre-trial discovery, summary judgment motions, severance motions, and trial preparation of Sabena's witnesses. I periodically attended the six-week jury trial to prepare witnesses for testimony and to argue evidentiary motions relating to Sabena's role in the case.
- f. Disposition of the Case: The jury found in favor of the Plaintiffs and the trial court entered judgment against Defendants in the amount of \$7 million. Sabena was severed from the trial of the civil RICO action shortly before trial commenced. The judgment and various pre-trial rulings were affirmed on appeal to the Ninth Circuit.
- g. Trial Period: July 8 to August 19, 1997.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Chief Judge Carolyn R. Dimmick.
- i. Individual Counsel for Other Parties:

Counsel for Plaintiffs NMB, NMB Singapore and Minebea:

James L. Magee, Esq.
Sharon Rosse Fowler, Esq.
Graham & Dunn, PC
1420 Fifth Avenue
33rd Floor
Seattle, WA 98101-2390
(206) 624-8300

Counsel for Defendants/Third-Party Plaintiffs IAS and John McEvoy:

David Adler, Esq.
1001 Fourth Avenue Plaza
Suite 3200
Seattle, WA 98154
(206) 343-5991

Counsel for Defendant Ray Allen:

John W. Lundin, Esq.
710 Cherry St.
Seattle, WA 98104
(206) 623-8346

Co-Counsel for Third-Party Defendant Sabena:

David Brodsky, Esq.
 Cleary, Gottlieb, Steen & Hamilton
 One Liberty Plaza
 New York, NY 10006
 (212) 225-2910

Linda C. Severin, Esq.
 Tallman & Severin LLP
 1011 Western Ave., Suite 803
 Seattle, WA 98104-1040
 (206) 621-2690

Case No. 3

- a. Case Title and Citation: *Satya V. and Shakuntala W. Vasudeva, d/b/a 7-Eleven #2307-19042; Michael and Saba Belay, d/b/a 7-Eleven #2307-27390; and The Southland Corporation, d/b/a 7-Eleven #2307-23240*, No. C96-1252Z, 3 F. Supp.2d 1138 (W.D. Wash. 1998), pending appeal, No. 98-35719 (9th Cir.).
- b. Summary of the Case: Southland Corporation and two immigrant franchisees of 7-Eleven Stores brought a constitutional challenge to the penalty scheme imposed on convenience store owners under the Food Stamp Act for violations of Agriculture Department regulations by individual store employees who trafficked in food stamps for their own benefit without the knowledge of their employers.
- c. Significance of the Case: This issue affects retail store owners nationwide who are caught in undercover “sting” operations where government agents enter the stores to offer to purchase prohibited items with food stamps and then offer to sell food stamps to obliging clerks for cash. The case challenges the regulatory penalties imposed on innocent owners for identical violations by employees which vary based solely on the store’s redemption volume and unfairly discriminates against storeowners in poorer neighborhoods who redeem a higher number of food stamps and, therefore, pay higher civil penalties.
- d. Client Represented: Plaintiff-appellants Vasudeva, Belay, and The Southland Corporation who owned or operated the convenience stores fined by the Department of Agriculture.
- e. Nature of Participation: I gathered the initial facts in support of the administrative record and was lead counsel with other lawyers in my former firm in briefing the constitutional challenge in both the district court and on appeal.
- f. Disposition of the Case: The district court rejected the constitutional challenge and ruled in favor of the government on cross-motions for summary judgment. The case has been fully briefed and is now pending on appeal.

- g. Trial Period: Not applicable.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; the Hon. Thomas S. Zilly, Judge.
- i. Co-Counsel:

David A. Zapolsky, Esq.
{Former Partner}
Dorsey & Whitney
1420 Fifth Ave., Suite 400
Seattle, WA 98101
(206) 903-8864

Individual Counsel for Other Party:

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Assistant United States Attorney
Western District of Washington
3600 Seafirst Fifth Avenue Plaza
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Case No. 4

- a. Case Title and Citation: *United States v. Francis L. Miller, Terry J. Baker, Daniel A. Roberts, Joachim W. "John" Schmiedtke, J. Brian Kelly, Ronald R. Jensen, James D. Hubbard, Robert A. Nelson, Steven W. Tanoue, Jeffrey A. Brooks, Mark R. Siemons, Jay Clifford, Peter Njardvik, Sr., Frederick Karl Peterson, Northern Trawlers, Inc., a Washington State Corporation, Arctic Alaska Seafoods, Inc., a Washington State Corporation, and Arctic Alaska Fisheries Corporation, a Washington State Corporation*, Nos. CR94-217D, CR94-543D, CR94-544D, CR94-545D (W.D. Wash.).
- b. Summary of the Case: Criminal indictments were returned following the deaths by drowning of nine crewmen aboard the factory trawler ALEUTIAN ENTERPRISE after it capsized and sank in March 1990 in the Bering Sea. Fourteen individual defendants and three corporate defendants were charged with a variety of federal crimes including manslaughter on the High Seas, sending unseaworthy vessels to sea, making false statements to the Coast Guard in connection with minimum sea time required for maritime licensing, etc.
- c. Significance of the Case: This was a major workplace safety case brought by federal authorities against corporate officers and employees who own or operate commercial fishing vessels and at-sea factory processors. Prosecution followed a lengthy Marine Board of Inquiry by the Coast Guard and the

NTSB that found inadequate attention to life safety training and improper outfitting of oceangoing fishing vessels. The prosecution had a significant impact on the commercial fishing industry by emphasizing potential personal criminal liability for inadequate attention to safety practices and poor training of personnel.

- d. Client Represented: Fleet safety director Jeffrey A. Brooks, co-defendant.
- e. Nature of Participation: I was lead counsel for the defense of Mr. Brooks and, since I was then a member of Bogle & Gates, we had primary responsibility for all maritime law issues and computerization of documentary and testimonial evidence in the litigation. I supervised other lawyers from my firm in directing witness interviews, legal research, and in coordinating the extensive motions practice on behalf of the joint defense effort.
- f. Disposition of the Case: Chairman Francis L. Miller was acquitted on all counts following a six-week jury trial. Other defendants were either dismissed or pled guilty to reduced charges before trial. My client, initially charged with multiple felony counts, including nine counts of manslaughter on the High Seas, ultimately pled guilty on April 28, 1995, to a single misdemeanor count of aiding & abetting the sending to sea of an unseaworthy vessel. He received a sentence of unsupervised probation when sentenced on January 19, 1996.
- g. Trial Period: Extensive pre-trial motions practice and defense factual preparation consumed two years from 1994-1996. Defendant Miller's trial ran from June 22, 1995, to August 3, 1995.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Chief Judge Carolyn R. Dimmick.
- i. Co-Counsel:

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Attorney for Defendant J. Brian Kelly:

James L. Vonasch, Esq.
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(206) 682-1016

Case No. 5

- a. Case Title and Citation: *Sportmart, Inc., Plaintiff, v. Payless Drug Stores Northwest, Inc.; Kmart Corporation; Lynnwood Square; John Burkheimer Trust; Robert Burkheimer; Francis Burkheimer; and Robert Samuel, Defendants*, No. C93-1603R (W.D. Wash.).
- b. Summary of the Case: Suit by plaintiff retail sporting goods company to enforce a commercial lease against a competing claim of entitlement to the same space by competitor defendants claiming to hold a superior lease signed by the same landlord.
- c. Significance of the Case: The case involved an unresolved legal issue under Washington law. The issue was whether physical delivery by the landlord to the tenant of the fully signed lease agreement was required to create a binding contract where the landlord counter-signed the contract but placed it in a drawer on direction of the competitor who desired to lease the same space. The action was intended to exclude the original tenant from occupying a desirable retail location in a shopping mall.
- d. Client Represented: Plaintiff Sportmart, Inc.
- e. Nature of Participation: I was lead counsel with my former partner, Josh Preece, in all phases of pre-trial discovery and trial.
- f. Disposition of the Case: Following a three-day trial to the bench, the trial court entered a finding on April 22, 1994, in favor of the plaintiff enforcing the earlier signed lease. Based upon that ruling, the case settled shortly after trial.
- g. Trial Period: April 20 - 22, 1994.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Hon. Barbara Jacobs Rothstein, Judge.
- i. Co-Counsel:

Josh Preece, Esq.
{Former Partner}
Corr Cronin
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Individual Counsel for Other Parties:

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Case No. 6

- a. Case Title and Citation: *United States v. John Townsend, Shiv Mukkar Mohan, and David Whyte*, Nos. 89-30228, 89-30229, and 89-31231, 987 F.2d 989 (9th Cir. 1990).
- b. Summary of the Case: Foreign nationals who resided abroad but were arrested in the United States were charged with conspiracy to defraud the United States through unlicensed exportation of high technology computers listed as "Military Critical Technology." They appealed pre-trial detention orders denying them bail.
- c. Significance of the Case: The defense argued before the trial and appellate courts that where the Commerce Department had later permitted transfers abroad of the technology involved in the case, defendants were entitled to reasonable bail pending trial.
- d. Client Represented: Defendant David Whyte, a Canadian computer company salesman.
- e. Nature of Participation: I was co-counsel with C. James Frush at the bail review hearing and on appeal. We shared responsibility for preparing and cross-examining witnesses and jointly wrote the legal briefs on appeal.

- f. Disposition of the Case: The court held that under existing Ninth Circuit authority the government need only show by a preponderance of the evidence that the defendants posed a risk of flight under the Bail Reform Act of 1984. It found the evidence sufficient to continue detaining them without bail.
- g. Trial Period: Unable to supply exact dates of two-day bail hearing in August 1989 because the file is under seal by order of the district court for reasons of national security.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Hon. Carolyn R. Dimmick, Judge.
- i. Co-Counsel:

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Case No. 7

- a. Case Title and Citation: *Seattle Totems Hockey Club, Inc.; Vincent H.D. Abbey; and Eldred W. Barnes, Plaintiffs, v. The National Hockey League; Northwest Sports Enterprises, Ltd.; Vancouver Hockey Club, Ltd.; Frank A. Griffiths; William J. Hughes, et al., Defendants. Northwest Sports Enterprises, Ltd., Counterclaim Plaintiffs, vs. Vincent H.D. Abbey and Eldred W. Barnes, Counterclaim Defendants*, No. C75-804V (W.D. Wash.), aff'd, 783 F.2d 1347, 1986-1 Trade Cases 66,968 (9th Cir. 1986).
- b. Summary of the Case: Private plaintiffs brought an antitrust action against the NHL and its member teams alleging a Sherman Act conspiracy to exclude plaintiffs from competing in professional hockey after the NHL denied an expansion franchise sought by plaintiffs in Seattle. One of the member teams, owners of the Vancouver Canucks hockey team, brought a counterclaim against the plaintiffs to recover monies advanced to pay for operation of a minor league farm team in Seattle.
- c. Significance of the Case: The antitrust case focused upon whether a cause of action is stated under the Sherman Act when a competitor is denied entry into an alleged monopoly or anticompetitive enterprise. The breach of contract action addressed defenses under Washington law to enforcement of an otherwise valid claim for money owed when the lender was allegedly engaged in anti-competitive activities that harmed the borrower by making performance of the agreement impossible.
- d. Client Represented: Northwest Sports Enterprises, Ltd.; Vancouver Hockey Club, Ltd.; Frank A. Griffiths; and William J. Hughes.
- e. Nature of Participation: I was the senior associate who participated in pre-trial discovery and witness preparation of the counterclaim breach of contract action and as co-counsel at trial with my senior partner, Fredric C. Tausend. I also researched and wrote the briefs on appeal for the counterclaim portion of the case. Mr. Tausend edited the briefs and argued the appeal.
- f. Disposition of the Case: On October 19, 1983, the district court entered a directed verdict in favor of the counterclaim plaintiffs after severing the breach of contract action from the main antitrust case. The court thereafter tried the antitrust issues and entered judgment in favor of all defendants, dismissing the case. The judgments entered December 19, 1983, and January 12, 1984, were affirmed on appeal as to liability rulings although the case was remanded for an additur increasing the amount of the judgment on the counterclaim.

- g. Trial Period: October 11 - 19, 1983 (on the counterclaim);
November 7 - December 19, 1983 (on the antitrust claims).
- h. Trial Court and Judge: United States District Court for the Western District
of Washington; Hon. Donald S. Voorhees (now deceased), Judge.
- i. Co-Counsel:

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Individual Counsel for Other Parties:

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Case No. 8

- a. Case Title and Citation: *Seattle Mariners, Plaintiff, v. King County and Seattle Seahawks, Defendants*, No. 84-2-00154-5 (Kittitas Co. Superior Court).
- b. Summary of the Case: Professional baseball owners sued the county that operates the professional sports facility in Seattle in a dispute with the professional football team over who had priority to scheduling rights in the Kingdome if the baseball team played well enough to earn a spot in the playoffs.
- c. Significance of the Case: The case garnered significant public attention because it pitted baseball fans against football fans with public officials caught in the middle.
- d. Client Represented: Seattle Mariners baseball team.
- e. Nature of Participation: I was the senior associate who participated in pre-trial discovery depositions with my senior partner, Fredric C. Tausend. I also researched and wrote the briefs in support of the team's motion for summary judgment. Mr. Tausend edited the briefs and argued the motion.
- f. Disposition of the Case: The Superior Court entered summary judgment in favor of Defendants holding that professional baseball did not have priority in scheduling ball games in the Kingdome during the playoffs when dates might conflict with professional football dates previously scheduled there. The case was settled after summary judgment was entered.
- g. Trial Period: Not applicable.
- h. Trial Court and Judge: Kittitas County Superior Court; Hon. W.R. Cole (now deceased), Judge.

i. Co-Counsel:

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Case No. 9

- a. Case Title and Citation: *United States v. William Thomas Ray; David Wayne Scoggin; Andrio Lee Crow; Ronald H. Smith; Jonathon Palmer; Terry William Morrison; Brett Lawrence Fosnaugh; Richard Walter Law, Jr.; Ricky Wayne Maxwell; and Grady Lee Robison*, No. CR82-1BJR (W.D. Wash.), aff'd, 731 F.2d 1361, 15 Fed. R. Evid. Serv. 1106 (9th Cir. 1984).
- b. Summary of the Case: Defendant Ray was charged with engaging in a continuing criminal enterprise (CCE) responsible for bringing large amounts of cocaine into the Pacific Northwest and being a dangerous special offender. His co-defendants were charged with conspiracy and distribution of cocaine.
- c. Significance of the Case: Mr. Ray was responsible for obtaining and distributing throughout the Pacific Northwest more than 100 kilograms of

cocaine over a three-year period. This was the first prosecution in this district under the CCE statute, 21 U.S.C. § 848(a)(1). The case included significant motions practice and an interlocutory appeal after the district court entered a pre-trial restraining order freezing all of defendant Ray's assets that prevented him from engaging counsel of his choice.

- d. Client Represented: United States of America.
- e. Nature of Participation: I was lead counsel during the grand jury investigation, at trial, and on appeal. My co-counsel at trial was Assistant United States Attorney Sally R. Gustafson.
- f. Disposition of the Case: Ray was convicted following a jury trial and sentenced to seventeen years in prison without parole. The jury also entered a special verdict of criminal forfeiture of five pieces of his Florida real estate purchased with the proceeds of defendant's drug sales. The Ninth Circuit affirmed the entry of the restraining order and rejected his Sixth Amendment argument. His conviction was affirmed on appeal. Other defendants pled guilty or were convicted after trial to a jury. The conviction of one defendant, Scoggin, was reversed on appeal.
- g. Trial Period: May 18 – June 3, 1982.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Hon. Barbara Jacobs Rothstein, Judge.

i. Co-Counsel:

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 {Former Assistant United States Attorney}
 Senior Assistant Attorney General
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Case No. 10

- a. Case Title and Citation: *United States v. William Dennis Dunne & Lawrence Charles Bailey, a/k/a Larry Jones, a/k/a Jeffrey Pierce, a/k/a Larry Wayne Gerhardt Giddings*, No. CR80-145V (W.D. Wash.), aff'd mem., Nos. 80-1656 and 80-1661 (9th Cir., March 8, 1982).
- b. Summary of the Case: Defendants were charged with multiple counts of armed bank robberies, explosives and firearms violations, and with conspiracy to rescue a federal prisoner who was temporarily freed from custody with eight other felons while awaiting sentencing for the murder of a Customs officer at the Canadian border.
- c. Significance of the Case: The jailbreak orchestrated by the defendants led to a bloody shootout with police in October 1979. One escapee was killed, two were wounded, and a Seattle police officer was shot during multiple gunfights through the downtown area of Seattle. The bank robberies and explosives violations were committed to fund the scheme to free their companion from custody.
- d. Client Represented: United States of America.
- e. Nature of Participation: I was co-counsel during the grand jury investigation and co-chaired the jury trial with A.U.S.A. J. Ronald Sim. After Mr. Sim left the U.S. Attorney's Office, I briefed and argued the case on appeal.
- f. Disposition of the Case: Defendants were convicted on September 9, 1980, and sentenced to consecutive prison sentences of 75 years. The convictions were affirmed on appeal.
- g. Trial Period: August 18 – September 5, 1980.
- h. Trial Court and Judge: United States District Court for the Western District of Washington; Hon. Donald S. Voorhees (now deceased), Judge.
- i. Co-Counsel:

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- 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.)

Some of my more significant legal activities never proceeded to litigation. A number of my cases involved lengthy civil discovery or internal investigations following audits or criminal investigations of clients that resulted in global settlements resolving criminal, civil, and administrative issues negotiated prior to any indictments or trials. Examples include:

United States v. Sundstrand Data Control, Inc., No. CR88-303M (W.D. Wash., October 19, 1988). Along with lawyers from all over the country who had other clients in the case, my former partner, Ron Sim, and I represented an aerospace firm in a lengthy federal grand jury investigation by the Defense Procurement Fraud Unit of the Department of Justice. The investigation culminated in a settlement prior to the return of any indictments that was one of the largest defense procurement cases in United States history at that time.

Orear/Schwandt v. Grow Group, et al., 59 Wash.App. 249, 796 P.2d 759 (1990). I defended a paint manufacturer in a toxic tort action brought by marine shipyard painters claiming sensitization to epoxies and permanent neurological damage resulting from prolonged exposure to marine paints and solvents. The case was important to all Puget Sound shipyard workers who may have been exposed to the same marine paints. A mediated settlement was obtained.

United States v. Sheryl & Pierre Pinonnault (W.D. Wash. 1991). My client, Guinness Peat Aviation, plc, acquired an aerospace parts distributor in Seattle from its former owners, Mr. & Mrs. Pinonnault. After the acquisition closed, I was engaged to oversee a comprehensive internal investigation when a former employee reported to GPA that the Pinonnaults had been selling Hercules C-130/L-100 aircraft parts to a Belgian repair station for installation aboard a Libyan troop transport in violation of federal law and regulations. The results of my investigation were disclosed to the Department of Commerce and the United States Customs Service and led to federal criminal charges against the Pinonnaults. They were convicted on pleas of guilty and sentenced to federal prison terms. My client then brought a collateral civil-RICO action to recoup the purchase price from the sellers. The case was settled before trial and GPA recovered a substantial portion of what it had paid to buy the company.

University of Washington Medical Center Criminal Environmental Investigation (W.D. Wash. 1998). I have been appointed as a Special Assistant Attorney General to represent the University of Washington in response to an EPA and federal grand jury investigation that has been reported in the Seattle news media. I also conducted an internal investigation of the medical center's waste disposal practices at the direction of the Board of Regents of the University of Washington.

In addition, I have been heavily involved in bar activities. I have served as president of the local federal bar association and as chair of the lawyer delegates to the Ninth Circuit Judicial Conference. I have also been active on committees for local, state and federal bar associations in selection of judges in Washington, bench-bar relations, legislation, continuing legal education, and, through law explorer posts, helping women and minority high school students interested in learning more about legal careers. Finally, I have devoted substantial time to *pro bono* legal activities to help those in need of legal assistance who could not afford the services of a lawyer.

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.**

To be negotiated with my partner upon nomination by the President. I would assume we will work out an arrangement whereby she will make a lump sum payment to me prior to my assuming judicial office for my share of accounts receivable and work in progress. Alternatively, we might sell the accounts receivable to a bank so I can obtain a lump sum payment of a portion of the receivable. I hope not to be receiving any monies in the future from prior business activities after assuming office. We would presumably divide fixed assets (computers, office furniture, etc.) with each taking half of the existing business assets.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in 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 nominated and confirmed as a United States Circuit Judge, I will recuse myself from hearing cases involving an entity in which I have had a financial interest in accordance with the guidelines for judges set forth in the Code of Judicial Conduct. I understand from conversations with current circuit judges that it is quite common for judges to recuse themselves from individual cases by simply trading cases with another judge for whom there is no conflict or the appearance of any impropriety or perceived conflict in handling the particular case.

Upon assuming judicial office, my current law firm partnership will be dissolved and I will try to terminate all remaining financial interest in the current partnership prior to taking office. For an appropriate period of time, I will recuse myself from hearing any cases involving major clients of my former law firms.

I resigned from Bogle & Gates on February 12, 1999, and the firm ceased the active practice of law effective March 31, 1999. I recently signed a settlement agreement that releases me from any liability to my former partners for unfunded pension plan liability to retired members and related

beneficiaries. The settlement terminates any remaining liabilities as between the former partners of the firm. In return, I have relinquished any claim for return of my capital interests. Bogle & Gates has purchased adequate malpractice "tail coverage" from the American Lawyers Assurance Society ("ALAS") to protect former members from any future claim or lawsuit that might be filed against the firm for past conduct of its partners/members. Tallman & Severin LLP has purchased similar insurance from Westport Insurance Corporation.

I would recuse myself from hearing any cases involving these organizations in conformance with the guidelines of the Code of Judicial Conduct and after consultation with my fellow judges. In general, I am familiar with and will comply with the requirements of 28 U.S.C. § 455 regulating when United States Judges should disqualify themselves from hearing particular cases.

- 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 (Form A.O. 10(w)).

- 5. Please complete the attached financial net worth statement in detail.**

See Statement attached as Exhibit 7.

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

Yes. I have served as a Table Captain for individual fundraising events for the following campaigns:

Norm Maleng (R) for King County Prosecuting Attorney (1994 & 1998)

Norm Maleng (R) for Governor (1995 & 1996)

Anthony Lowe (R) for Insurance Commissioner (1996)

I have engaged in telephone solicitations to raise money on occasion for political or judicial candidates:

John Miller (R) for Congress (approx. 1986)

Bill Fligeltaub (non-partisan) for King County Superior Court Judge (1995 & 1996)

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Tallman, Richard C.		2. Court or Organization Ninth Circuit Court of Appeals	3. Date of Report 10/20/1999
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Circuit Judge Nominee		5. Report Type (check type) X Nomination, Date 10/20/1999 ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1998 to 10/20/1999
7. Chambers or Office Address Tallman & Severin LLP 1011 Western Ave., Suite 803 Seattle, WA 98104-1040		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 _____	
<i>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>			

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Partner	Tallman & Severin LLP
2 Member	Bogle & Gates, P.L.L.C.
3 Executive Board Member	Chief Seattle Council, Boy Scouts of America

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1999	Tallman & Severin LLP 401(k) Plan with former law firm, control over only my portion
2 1999	Tallman & Severin LLP, payout of interest in former law firm and compensation for legal services rendered before becoming a judge
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 1997	Bogle & Gates, P.L.L.C., Partnership Income	\$ 206,572.00
2 1998	Bogle & Gates, P.L.L.C., partnership income	\$ 207,755.00
3 1999	Tallman & Severin LLP, partnership income	\$ 54,000.00
4 1997	Seattle Police Department (S)	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Tallman, Richard C.	Date of Report 10/20/1999
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IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	None		
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
 0=\$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 Tallman, Richard C.	Date of Report 10/20/1999
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS-- income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse. "(S)" for separate ownership by spouse. "(DC)" for ownership by dependent child. 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 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)
NONE (No reportable income, assets, or transactions.)									
1 Tallman & Severin LLP 401(k) Plan A.I.M. Mutual Funds (J)		None	O	T	Exempt				
2 Procyte Corp. common stock (J)		None	J	T	Exempt				
3 City of Sea. Def. Comp. Plan Fidelity Invest. Mut. Funds (J)		None	M	T	Exempt				
4 Washington State Law Enf. Off. Retirement Plan (J)		None	M	U	Exempt				
5 Union Bank of California, Sea., checking & savings accts (J)	A	Interest	J	T	Exempt				
6 Seattle City Credit Union savings account (J)	A	Interest	J	T	Exempt				
7 Washington Mutual Bank, Sea., checking & savings accts (J)	A	Interest	J	T	Exempt				
8 Bogle & Gates, P.L.L.C., Seattle 1998 (J)	B	Interest	J	T	Exempt				
9 Bogle & Gates, P.L.L.C., Seattle 1998 (J)	A	Dividend	J	T	Exempt				
10 IRA Distribution 1998 (J)	D	Distribut ion	J	T	Exempt				
11 Bogle & Gates, P.L.L.C., Seattle 1999 (J)	A	Dividend	J	T	Exempt				
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 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$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=Assessr T=Cash/Market (Col. C2) U=Book Value V=Other W=Estimated									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tallman, Richard C.	10/20/1999

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Tallman, Richard C.	Date of Report 10/20/1999
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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	Trustee	Tallman & Severin LLP 401(k) Plan

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	1998	Seattle Police Department (S) \$	0.00
6	1999	Seattle Police Department (S) \$	0.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tallman, Richard C.	10/20/1999

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 Richard C. Tallman Date 10/20/99

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

NET WORTH

Richard C. and Cynthia O. Tallman

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	22,010	Notes payable to banks—secured	0
U.S. Government securities—add schedule	0	Notes payable to banks—unsecured	0
Listed securities—add schedule	599,593	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		Unpaid income tax	0
Due from others		Other unpaid tax and interest	3,503
Doubtful		Real estate mortgages payable—add schedule	438,600
Real estate owned—add schedule	70,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts—itemize:	0
Autom and other personal property	80,500		
Cash value—life insurance	10,734		
Other assets—itemize:			
Cynthia's state retirement	112,503		
Richard's office equipment	11,202		
Richard's law firm cap. acct	10,000	Total Liabilities	442,103
		Net Worth	1,074,439
Total Assets	1,516,542	Total Liabilities and net worth	1,516,542
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	none	Are any assets pledged? (Add schedule.)	No
On leases or contracts	none	Are you defendant in any suits or legal actions?	yes, see schedule
Legal Claims	none	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	9,500		
Other special debt	none		

**SCHEDULE TO FINANCIAL STATEMENT
RICHARD C. & CYNTHIA O. TALLMAN**

A.	Listed Securities	
	1. Tallman & Severin LLP 401(k) Plan consisting of various mutual funds invested with A.I.M. Funds (value as of Sept. 30, 1999)	\$486,465
	2. Procyte Corp., 360 shares @ .75 (6/25/99 price)	225
	3. City of Seattle Deferred Compensation Plan invested with Fidelity Investments (value as of June 30, 1999)	212,903
B.	Real Estate Owned	
	1. Residence real property located at 2606 Perkins Lane West Seattle, Washington Tax Assessed Value (determined by Board of Equalization Hearing as of July 21, 1999)	570,000
C.	Other Assets	
	1. State of Washington Law Enforcement Officers Retirement Plan (value as of December 31, 1998)	112,503
D.	Real Estate Mortgages Payable	
	1. Washington Mutual Bank (first mortgage)	404,681
	2. Union Bank of California (second mortgage)	33,919
E.	Statement re Defendant in a Lawsuit	

I have been named as a nominal defendant in one lawsuit against my former law partnership, Bogle & Gates, along with all of my other partners in an action accusing one of them of legal malpractice in connection with his handling of a federal tax matter in which I had no involvement. *Anderson v. John Holinrake, Bogle & Gates, et al.*, No. 99-2-05698-1 (King County Superior Court), Seattle, Washington. The matter is fully covered by my former law firm's malpractice insurance policy issued by the American Lawyers' Assurance Society.

III. General (Public)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Throughout my career in private practice, I have devoted a significant amount of *pro bono* legal assistance to persons of limited means. This work has included:

Representing the widow and young son of a slain Seattle police officer in a death benefit claim under the federal Public Safety Officers' Benefits Act that is still in litigation in the federal courts.

Assisting a couple in the adoption of two Native American children with special medical problems;

Counseling an Indian Health Service physician who was the subject of a Montana Medicaid fraud investigation;

Serving *pro se* litigants unable to afford their own counsel through local bar association/court committees by editing handbooks designed to aid unrepresented persons in understanding complicated procedural rules to permit them to represent themselves in court proceedings;

As Federal Bar Association President for the Western District of Washington, I advocated financial support to establish a fund administered by the Federal Public Defender for paying expenses of indigent clients that are not covered by Criminal Justice Act public defense funds. I also convinced the Federal Bar Association board of trustees to establish a small fund for paying litigation costs incurred by lawyers who volunteer to serve on the court-supervised federal *pro bono* civil rights panel to ensure that these cases would be fully heard on their merits. The lawyers are not compensated unless the court awards statutory attorney's fees in meritorious cases. There was no other source of funds to pay out-of-pocket costs incurred in the representation of indigent civil clients;

Aiding crime victims through volunteer legal representation of the Seattle-King County Crimestoppers;

Representing on occasion victims of crimes at sentencing proceedings to make sure that the interests of the victims and their families were fully protected;

Serving *pro bono* as a Special Assistant City Attorney for Seattle in bringing civil drug abatement actions to rid low income housing projects of drug dealers;

Organizing two separate Law Explorer Posts for Seattle high school students interested in legal careers (one several years ago through the Seattle-King County Bar Association and one in the fall of 1997 jointly sponsored by Bogle & Gates, the King County Prosecuting Attorney's Office, and the King County Public Defender's Office). Membership in both groups has been predominantly minority high school students and women;

In 1996-97, organizing a group of 24 Bogle & Gates attorneys to participate in the Seattle Police Department's "Options, Choices, Consequences" Program in which attorneys and physicians speak in local middle school classrooms to deter students from participating in high risk activities likely to lead to crimes of violence;

Organizing a modest family trust to annually benefit Hispanic students at Edmonds Community College in the name of my wife's family (her maiden name is "Ostolaza");

Assisting *pro bono* the Mt. Rainier & Olympic Fund (a conservation group working to improve national park lands) on an embezzlement investigation;

Assisting *pro bono* Food Lifeline in negotiating the receipt of \$600,000 worth of foodstuffs from a food distribution business ordered to make restitution to a community food bank as part of a federal misdemeanor conviction; and

Finally, on several occasions lecturing in inner city high schools on business law and criminal law issues.

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

I have not 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 have participated.)

Yes. In October 1998, I was one of three finalists selected by a bipartisan Merit Selection Committee appointed by Senators Slade Gorton (R-Wash.) and Patty Murray (D-Wash.) for recommendation to the President for appointment as a United States District Judge for the Western District of Washington. The Senators ultimately recommended, and the President nominated, King County Superior Court Judge Marsha Pechman.

The President had previously nominated Washington Supreme Court Justice Barbara Durham for the position of United States Circuit Judge on the Ninth Circuit Court of Appeals. Prior to Senate confirmation, Justice Durham withdrew her name from further consideration. Senators Gorton and Murray then recommended three finalists for this position. I was selected from the prior list of qualified candidates and included as one of the three finalists recommended to the President for nomination as a United States Circuit Judge.

Senators Gorton and Murray personally interviewed me for the district court position on December 29, 1998, in Seattle. They jointly recommended me to the President for the circuit court position in July 1999. On August 10, 1999, I was interviewed by representatives of the United States Department of Justice and the Office of Counsel to the President in Washington, D.C., for the circuit court position. I also provided information and was subsequently interviewed by representatives of the Federal Bureau of Investigation and the American Bar Association Standing Committee on the Federal Judiciary for the required background investigations.

The President nominated me for the position of United States Circuit Judge for the Ninth Circuit in October 1999.

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 you 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 with the 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 framers of the Constitution were careful to establish three co-equal and independent branches of government. In establishing a system of checks and balances as a means to best govern the nation, the Constitution recognizes the need for a separation of powers between each branch. The careful and disciplined exercise of that power is essential to the framework of good government intended by the founders of the Republic.

Courts are not legislatures. Only if a matter before the court is an actual case or controversy brought by parties with proper standing to assert an

issue that is ripe for adjudication, are judges authorized to decide the matter. Any judicial decision is necessarily constrained by the dictates of the Constitution, applicable statutes, and procedural rules. Courts must respect the fact that, if a case presents a problem for which a state or federal governmental solution is appropriate, the matter is properly left for legislative or executive consideration.

The judicial power granted by Article III is intended to redress only injuries sustained by the parties to the action or to protect those parties from harm. Federal courts are courts of limited jurisdiction as prescribed by the Constitution and the statutes defining the appropriate role of the "inferior courts." Doctrines of standing and ripeness exist to ensure that federal courts do not improperly intrude on the province of the executive and legislative branches or issue unnecessary advisory opinions.

The requirements of a good appellate judge, to which I expect to adhere if confirmed, include: an abiding sense of judicial integrity; close adherence to the Constitution, laws, and rules of procedure; recognition of the right of all litigants to equal treatment before the law; appropriate deference to legislative enactments and discretionary actions of the executive branch; and adherence to precedent.

EXHIBITS TO SENATE JUDICIARY COMMITTEE FORM

Richard C. Tallman

Ninth Circuit Nominee

Section I. Biographical Information (Public)

Exhibit 1: Tallman, R., "Legal Update 1998," Training Materials for National Park Rangers (Bogle & Gates, P.L.L.C. 1998).

Exhibit 2: Davis, C., Armstrong, S., Hershey, K., Tallman, R., and Hammerly, M., "Courthouse Security Task Force Report" (Seattle-King County Bar Association 1991).

Exhibit 3: "Secrets of the Grand Jury—A Former U.S. Attorney Tells How to Receive a Summons and Still Get Sleep at Night," *Washington Criminal Defense*, pp. 4-7 (Washington Defender Association and the Washington Association of Criminal Defense Lawyers, 1988).

Exhibit 4: "Representing Yourself in Superior Court: The 'Pro Se' Handbook," (Seattle-King County Bar Association and the Legal Foundation of Washington 1988). I do not recall which portions I edited. At least 14 attorneys and judges either contributed parts or edited parts of the booklet.

Exhibit 5: Book Review, 12 *The Prosecutor* 48 (National District Attorneys Association, 1976); 4 *J. Police Sci. & Admin.* 367 (1976) (reviewing R. Sulnick, *Civil Litigation and the Police*).

Exhibit 6: Copies of all speeches I could locate. I have no recollection of any other speeches I have given on constitutional law or legal policy for which a copy of the speech still exists.

Exhibit 7: Financial Net Worth Statement of Richard C. and Cynthia O. Tallman.

RICHARD CHARLES TALLMAN

Birth: Mar. 3, 1953 Oakland, CA
 Legal Residence: Washington
 Marital Status: Married Cynthia Ostolaza Tallman
 0 children
 Education: 1971-1975 University of Santa Clara
 B.S.C degree, *summa cum laude*
 1975-1978 Northwestern University School
 of Law
 J.D. degree
 Bar: 1978 California
 1979 Washington
 Experience 1978-1979 The Hon. Morell E. Sharp
 U.S. District Court for the
 Western District of
 Washington
 Law Clerk
 1979-1980 U.S. Department of Justice,
 Criminal Division, General
 Litigation & Legal Advice
 Section
 Trial Attorney
 1980-1983 Office of the United States
 Attorney for the Western
 District of Washington
 Assistant United States Attorney
 1983-1989 Schweppe, Krug & Tausend, P.S.
 Associate and Partner
 1990-1999 Bogle & Gates, P.L.L.C.
 Member and Head of White Collar
 Criminal Defense Practice
 Group
 1999-Pres. Tallman & Severin LLP
 Founding Partner
 Office: Tallman & Severin LLP
 1011 Western Avenue, Suite 803
 Seattle, WA 98104-1040

To be United States Circuit Judge for the Ninth Circuit

LIST OF FAMILY AND FRIENDS INTRODUCED AT JUDICIARY COMM. HEARING
NOMINEE RICHARD C. TALLMAN

DATE OF HEARING 3/23/00

1. CYNTHIA O. TALLMAN (WIFE)
2. GARY STEVENS
3. ROBIN TAUB
4. JEAN TALLMAN (MOTHER; NOT PRESENT TODAY)
5. RUTH TIGER
6. SCHWEPPE, KRUG & TAUSEND, P.C.
7. BOGLE & GATES, P.L.L.C.
- 8.
- 9.
- 10.
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**TESTIMONY OF JOHN ANTOON, II, OF FLORIDA, TO BE U.S.
DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA**

Judge ANTOON. Mr. Chairman, I want to thank you for having this hearing today. I want to publicly thank Senators Graham and Mack for the courtesy and support they have given me and my family through this process. I especially want to thank Senator Graham's staff, who has helped us with a very tired 3½-year-old who left Florida very early this morning. I also want to publicly thank my family for the support they have shown me and thank those who are here for making the trip. Thank you, sir.

[The biographical information and questionnaire of Judge Antoon follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. FULL NAME (INCLUDE ANY FORMER NAMES USED).

John Antoon II No. **XXXXXXXXXX**

2. ADDRESS: LIST CURRENT PLACE OF RESIDENCE AND OFFICE ADDRESS(ES).

Home: 317 Riverside Drive, Ormond Beach, Florida 32176

Office: 300 South Beach Street, Daytona Beach, Florida 32114

3. DATE AND PLACE OF BIRTH.

May 16, 1946; Bakersfield, CA.

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 Nancy Cecelia Antoon; maiden name Nancy Cecelia Wise. She is not employed outside the home.

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

Florida Southern College, Lakeland, Florida: 1964-1968; Bachelor of Arts (1968).

Brevard Community College: 1965; one semester course.

Emory University, College of Law, Atlanta, Georgia: 1968-1969 (transferred).

Florida State University, College of Law, Tallahassee, Florida: 1969 to 1971; Juris Doctor (1971).

Florida Institute of Technology, Melbourne, Florida: 1972 to 1993; Masters of Science (1993).

University of Virginia, College of Law, Charlottesville, Virginia: 1999 to present; Masters Program for Judges (anticipated 2001).

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

Summer 1968: Sales - World Book Encyclopedia, Field Enterprises;
Substitute Teacher - Satellite High School;
Investigator - L. W. Barnard, Esq.;
Ticket taker - TWA Airlines.

Summer 1969: Buyer - National Aeronautical Space Agency

1/70 - 6/71: Residence Hall Counselor - Florida State University

9/70 - 6/71: Florida State University - Honor Court Defender/Justice

6/71 - 12/71: Research Clerk - L. W. Barnard, Esq.

12/71 - 2/72: Associate - Gleason, Walker, Pearson, and Shreve, P.A.

1971 -1976: Assistant City Attorney - City of Cocoa, Fla.

1/72 - 2/72: Instructor - Brevard Community College

2/72 - 4/72: 1st Lieutenant - United States Army, Fort Benjamin Harrison, Indiana

4/72 - 5/73: Associate - Gleason, Walker, Pearson, and Shreve, P.A.

5/73 - 5/74: Partner - Shreve, Antoon, and Clifton

1973 -1976: Part-time assistant public defender - Eighteenth Judicial Circuit, State of Florida.

2/74 - 1/77: Board of Directors - Legal Aid Society

1974 -1976: Partner - Antoon and Clifton, P.A.

1976 -1985: Partner - Stromire, Westman, Lintz, Baugh, McKinley, and Antoon, P.A.

- 1977 - 1984 Board of Directors, Brevard County Bar Association - 1977-1984; treasurer - 1979-1980; secretary - 1980-1981; president-elect - 1982-1983; president - 1983-1984.
- 1985 -1995: Circuit Judge, State of Florida
- 1986 - 1989 Board of Directors - The Haven, Melbourne, Fla.
- 7/94 - 6/99 Board of Directors, District Vice President - Florida State University Alumni Association
- 1/98 - 5/99 Board of Directors - Florida Institute of Technology Alumni Assoc.
- 1995 - present: Appellate Judge, District Court of Appeal, State of Florida

From 1972 until approximately 1989, I also taught as an adjunct faculty member at: Brevard Community College (1972), Florida Institute of Technology (1972-1989), The American Institute of Banking (1973), Rollins College (1986-1989), and the University of Central Florida (1979).

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

Yes. From 1968 to 1974, I served in the U.S. Army Reserves and was active duty for training from February to April 1972. I attained the rank of captain and received an honorable discharge. My service number was XXXXXXXXXX.

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

All of my education was paid for through scholarships, grants or fellowships, and federally funded loans, as well as through part-time jobs.

- Psi Chi: Honorary psychology fraternity.
- Pi Gamma Mu: Honorary social studies fraternity.
- Omicron Delta Kappa: Honorary leadership fraternity.
- Gold Key: Honorary leadership fraternity.
- President's Award: For highest grade point average of ROTC underclassmen.
- Fellowship: Masters degree program at Florida Institute of Technology.

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: 1971 - present

Brevard County Bar Association: 1971 - present

1980 - 1981: Secretary-Treasurer

1981 - 1982: Vice-president

1982 - 1983: President

Volusia County Bar Association: 1996 - present

American Bar Association: my membership has been sporadic since 1971; I am not presently an active member.

Florida Conference of Circuit Judges: 1985 - 1995

1993 - 1994: Secretary-Treasurer

1994 - 1995: Chair-elect

1993 - 1995: Criminal Law Section

Administrative Section

Chair - Compensation Committee

Florida Conference of District Court of Appeal Judges: 1995 - present

1999 - present: President

1998 - 1999: President-elect

1998 - 1999: Chair - Education Committee

1996 - 1999: Legislative Committee

1996 - 1997: Education Committee

Vassar B. Carlton American Inn of Court: 1990 - present

1993 - 1995: President

Volie B. Williams American Inn of Court: 1995 - 1997

Brevard County Legal Aid Society: during 1980's; Board Member

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.

To my knowledge, the Florida Conference of District Court of Appeal Judges and The Florida Bar are the only organizations I belong to which engage in lobbying.

Other organizations I belong to are: East Coast Flyrodders
 Sam's Club

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

Florida Supreme Court - November 19, 1971.

United States District Court (Middle District of Florida) - May 22, 1973.

United States Circuit Court of Appeals, Fifth Circuit - May 29, 1973.

United States Supreme Court - April 14, 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.

Committee/Commission Reports:

Judicial Management Council, Committee on Communication and Public Information, Chair, John Antoon II:

Florida Statewide Public Opinion Survey: Executive Summary, July 23, 1996.

Florida Statewide Public Opinion Survey: Staff Report, July 23, 1996.

A Plan for Public Outreach for Florida's State Courts System, November 26, 1995.

Governor's Task Force On Domestic Violence:

Second Report of Governor's Task Force on Domestic Violence, July 31, 1995.

Judicial Council Steering Committee:

Report of the Judicial Council Steering Committee, January 27, 1995.

Florida Courts Education Council:

Report and Recommendation of the Florida Courts Education Council's Special Committee on Evaluation and Administration of Existing Judicial Education Programs, March 8, 1991.

Education Outlines:

Disclosure, Disqualification, and Ex parte Communications, 1994, 1995, 1996, 1997, 1998, & 1999.

Ethics Hypotheticals and Answers, March 1998, 1999, & 2000

Articles:

Antoon, John, "Brevard Citizens Endure Worst Courthouse in State." *Florida Today*, June 4, 1991.

In the 1980s, I wrote a letter to the *Florida Today* newspaper in Melbourne. It was an article criticizing coverage it gave to a state college team. The newspaper published the letter, but I do not have a copy and have been unable to locate one.

Speeches:

Prior to 1992 my files are incomplete. I gave many speeches of which I have no record:

Juvenile Justice:	1/7/92	Children's Services Council
	2/27/92	League of Women Voters
	6/9/92	Commission on Status of Children
	1/19/93	Children's Coalition-Govt. Center
Courthouse:	10/6/92	County Commission Meeting
	10/26/92	County Commission Meeting
	Unknown	Chamber of Commerces in several locales.
	2/18/93	T.V. Appearance/Cablevision
	3/2/93	County Commission-Govt. Center
	3/7/95	County Commission-Govt. Center

Public Awareness & Enhancement of Judicial System:

1/16/92	Youth Leadership Council at Jail
5/16/92	Mt. Moriah Baptist Church
5/29/92	Space Coast Risk Management
6/30/92	Youth Leadership Council at Jail
7/14/92	Harris Management Club

8/8/92	Crime Awareness (Black Community in Melbourne)
8/18/92	Eau Gallie Rotary
9/18/92	Palm Bay Rotary
10/23/92	Seroptimist Club
3/20/93	Panel-Rollins College Town Hall
4/19/93	Law Class-Fla. Inst. Of Tech.
5/7/93	Career Day-Ascension Cath. School
6/17/93	Youth Leadership Council at Jail
10/14/93	Rotary Club-Insights into Criminal System at Melbourne (Rialto)
3/16/94	Divine Mercy Women's Grp.-Merritt Island
3/26/94	Mock Trial-Rockledge High School
8/6/94	Natl. Lights Out Night - Melbourne
11/16/94	Economic Crime Unit-Melbourne P.D.
12/8/94	Inst. Of Legal & Professional Careers
12/9/94	Southwest Junior High-Palm Bay
12/12/94	Police Academy-Melbourne
3/20/95	University Park Elem.-Melbourne
2/8/97	Internet Forum, Rollins College
10/27/97	League of Women Voters
4/24/98	Women's Symposium
9/23/98	Harris Corporation Symposium on Professionalism

Guardianship Seminar:

2/29/92	Brevard County
5/16/92	Brevard County
3/06/93	Brevard County
3/04/95	Brevard County

Guardian Ad Litem:	5/13/92	Brevard Co. Bar Assoc.
	6/6/92	GAL Seminar

Brevard Co. Legal Secretaries' Seminar: 9/19/92

Florida Legal Assistants Association-Ethics: 4/7/97

Brevard County Bar Association:

2/10/93	Pro Bono
10/13/93	Ethics
10/12/94	Ethics
3/8/95	State of Judiciary-Brevard

County Judges' Conference:

7/92	Panelist. Subject: Handling High Profile Cases
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Domestic Violence:	8/11/92 10/21/94 2/7/95 3/9/95	Coalition for Hungry & Homeless - Domestic Violence Statute & Need for Womens' Shelters Domestic Violence Conference- Melbourne (Rialto) Panel-Florida Coalition Against Domestic Violence - Orlando Court TV-Law Related Education Association
Inns of Court:	4/10/96 6/26/96	Vassar B. Carlton Inn of Court-Ethics Volie B. Williams Inn of Court
Speeches on the Constitution:		
	9/27/87	I was a panel member of a town forum entitled, "The U.S. Constitution: The Next 200 Years."
	1/18/91	I was a panel member at a program discussing the United States Constitution at Brevard Community College in Titusville, Florida.

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

Excellent. May 1999.

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

Circuit Judge: 1985 -1995. Elected; Florida state trial court of general jurisdiction.

Appellate Judge: 1995 - present. Appointed; Florida state district court of appeal of general jurisdiction. However, this court does not hear death penalty cases or lawyer/judge disciplinary cases.

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

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

WESH Television Inc. v. Freeman, 691 So. 2d 532 (Fla. 5th DCA 1997).
State v. Morales, 718 So. 2d 272 (Fla. 5th DCA 1998).
Nicolai v. Baldwin, 715 So. 2d 1161 (Fla. 5th DCA 1998).
Dove v. McCormick, 698 So. 2d 585 (Fla. 5th DCA 1997).

Ong v. Mike Guido Properties, 668 So. 2d 708 (Fla. 5th DCA 1996).
Moreno Const., Inc., v. Clancy & Theys Const. Co., 722 So. 2d 976 (Fla. 5th DCA 1999).
Toyota Tsusho America, Inc., v. Crittenden, 732 So. 2d 472 (Fla. 5th DCA 1999).
Sartori v. Dept. of Revenue, 714 So. 2d 1136 (Fla. 5th DCA 1998).
Franklin v. State, 718 So. 2d 902 (Fla. 5th DCA 1998).
Somma v. Metra Electronics Corp., 727 So. 2d 302 (Fla. 5th DCA 1999).

(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;

As a trial judge I presided over more than 1,000 cases per year. As an appellate judge I participated in more than 1,200 dispositions including approximately 300 opinions I have written. Based on a Westlaw search, the following cases were reversed or reversed in part during the fifteen years I have been on the bench:

Fifth District Court of Appeal

Cooper v. State, 672 So. 2d 638 (Fla. 5th DCA 1996).
Defendant pleaded guilty to battery on law enforcement officer and was sentenced to community control. Upon second violation of community control, he was resentenced to 24 months of community control. The court held resentencing defendant to 24 months of community control, without any credit for previous time spent in that capacity, exceeded statutory maximum of two years of community control available for any one offense.

Jordan v. State, 664 So. 2d 272 (Fla. 5th DCA 1995).
Defendant charged with possession of crack cocaine moved to suppress the crack cocaine. Motion was denied based on "plain feel" doctrine. Defendant entered plea of nolo contendere, and subsequently appealed his conviction. The court held that the "plain feel" doctrine requires specific expert testimony as to arresting officer's tactile experience with particular contraband in question.

Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995).
In this case, writing for a three-judge panel, I affirmed the trial court's entry of a sentence enhancement for the possession of a firearm. In that case, the defendant had been convicted of cocaine trafficking, possession of marijuana with intent to sell, and carrying a concealed firearm. The sentencing guidelines at issue provide that "[p]ossession of a firearm . . . during the commission [of] a crime will result in additional sentence points." FLA. R. CRIM. P. 3.702(d)(12)(1994).

In an unrelated case, White v. State, 714 So. 2d 440 (Fla. 1998), the Supreme Court of Florida found that this sentencing enhancement could not be imposed where the possession of a firearm was an essential element of the crime for which the defendant was being sentenced, and the defendant had not committed any other substantive offenses. The Court, however, favorably discussed my opinion in Gardner, noting that the application of the sentencing enhancement in Mr. Gardner's case "would be consistent with the Galloway court's interpretation" and that "Galloway was correct in its analysis that the enhancement probably was intended to apply only to substantive crimes not including firearm possession as an essential element." 714 So. 2d at 443 (citing Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996)).

Despite this favorable discussion, Westlaw has indicated that other courts have construed White as reversing my decision in Gardner. See e.g., Freeman v. State, 717 So. 2d 105, 107 (Fla. 5th DCA 1998).

Vivona v. State, 654 So. 2d 677 (Fla. 5th DCA 1995).

The state conceded that the record in this case is unclear as to whether the trial court relied on an original scoresheet which was subsequently corrected in order to comply with the negotiated plea. Based on the corrected scoresheet, the sentence imposed for the violation of probation exceeded the one-cell sentencing guideline bump.

Young v. State, 629 So. 2d 1116 (Fla. 5th DCA 1994).

Johnny C. Young, Sr., appealed the summary denial of his motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Because Young's motion was not included in the record on appeal and could not be located by the clerk below, the state conceded that the motion had been inadvertently misplaced not due to the fault of Young. Order vacated; cause remanded.

Jeft v. State, 605 So. 2d 926 (Fla. 5th DCA 1992).

Defendant was convicted on charges of sexual battery and lewd and lascivious assault on a child. The court, on rehearing en banc, held that psychotherapist privilege was waived by statute concerning child abuse communications, and thus defendant was entitled to question psychotherapist and psychologist concerning communications with alleged child victims.

Dept. of Health and Rehabilitative Services v. Coskey, 599 So. 2d 153 (Fla. 5th DCA 1992).

In a dependency case, Judge Clarence T. Johnson and I awarded fees to counsel appointed to represent interests of children, and Department of Health and Rehabilitative Services (HRS) appealed. The court held that: (1) neither county nor HRS was responsible for fees of appointed attorney, and (2) there was no valid reason for appointment of counsel.

Dept. of Health And Rehabilitative Services v. Thompson, 599 So. 2d 219 (Fla. 5th DCA 1992).

The Department of Health and Rehabilitative Services (HRS) appealed the assessment against HRS of attorney's fees awarded to counsel appointed by the court to represent the child in a dependency proceeding initiated by HRS under chapter 39, part III, Florida Statutes (1989). Reversed and remanded to the trial court to consider payment of attorney's fees by the parents of the dependent child or from available funds, if any, of the guardian ad litem program.

Dept. of Health And Rehabilitative Services v. J.T.H., 595 So. 2d 211 (Fla. 5th DCA 1992).

Juvenile was committed to long-term, in-patient, residential treatment facility by J. Emory Cross, Senior Judge, and me. Department of Health and Rehabilitative Services appealed. The court, 586 So. 2d 516, affirmed and remanded for clarification. On appeal after remand, the Court held that Circuit Court had no power to commit juvenile without adjudicating juvenile to be delinquent.

State v. Calloway, 589 So. 2d 326 (Fla. 5th DCA 1991).

Defendant, who was arrested for violation of ordinance prohibiting loitering for purpose of engaging in drug-related activity, moved to suppress evidence on ground that ordinance was unconstitutional. I found ordinance unconstitutional because it was overbroad and vague, and I granted motion to suppress. The court held that: (1) order which merely declared ordinance unconstitutional was not appealable order; (2) order granting motion to suppress was appealable; (3) fact that ordinance was subsequently determined to be unconstitutional did not undermine lawfulness of arrest made in good faith reliance on presumptively valid ordinance; and (4) on remand, trial court was required to consider whether probable cause existed to believe defendant's conduct at time of his arrest violated loitering ordinance after full evidentiary hearing.

Rowan v. Department of Health and Rehabilitative Services, 588 So. 2d 1018 (Fla. 5th DCA 1991).

Parents appealed from final finding their children dependent. The court held that hearsay statements allegedly made by children were improperly admitted.

Avery v. Department of Health and Rehabilitative Services, 586 So. 2d 1350 (Fla. 5th DCA 1991).

Appellant Donna Avery appealed a final order adjudicating her three minor children dependent because the children were abandoned, abused, or neglected. Appellant contended that the trial court erred in adjudicating the children dependent because the state failed to prove by a preponderance of the evidence that the children were abandoned, abused, or neglected and that the children's physical, mental, or emotional health was significantly impaired. The appellate court agreed and reversed the dependency order.

G.E.C. v. State, 586 So. 2d 1338 (Fla. 5th DCA 1991).

Juvenile was found delinquent and placed on community control for offenses of burglary of a conveyance and grand theft. The court held that police officers lacked probable cause to arrest juvenile for loitering and prowling or any other offense after they stopped his vehicle for traffic infraction.

Flowers v. State, 586 So. 2d 1058 (Fla. 1991).

Defendant was convicted for offenses committed while on probation, and he appealed his sentence. The court, 567 So. 2d 1055, affirmed and certified question. The Supreme Court held that in calculating points for offenses committed while under legal constraint, a multiplier should not be used.

Love v. State, 586 So. 2d 1055 (Fla. 1991).

Second defendant appealed from conviction entered by the Circuit Court. The court, 570 So. 2d 1014, affirmed. A third defendant appealed from a conviction entered by the circuit court in St. Johns County. The court, 571 So. 2d 507, affirmed. Consolidated petitions sought review. The Supreme Court held that uniform sentencing guidelines do not require that "legal constraint" points be assessed for each offense committed while under legal constraint. Decisions quashed and cases remanded.

State v. Larrinaga, 569 So. 2d 911 (Fla. 5th DCA 1990).

Defendant was charged with aggravated child abuse, child abuse, and aggravated assault, lewd and lascivious assault upon a child, and sexual battery. I dismissed some counts for the State's destruction of videotapes of interviews with the alleged victims which contained exclusively exonerating statements. State appealed.

State v. Carrs, 568 So. 2d 120 (Fla. 5th DCA 1990).

State appealed from order suppressing evidence in criminal prosecution. The court held that initial stop of defendant's vehicle was justified by officer's reasonable suspicion that he was driving with expired license, even though it would have been better if officer had run computer check before stop.

State v. Spella, 567 So. 2d 1051 (Fla. 5th DCA 1990).

Following sentencing on plea of guilty to possession of firearm in commission of felony and two counts of attempted second-degree murder with a firearm, defendant filed motion to correct illegal sentence on grounds of double jeopardy. I vacated sentence for firearm conviction, and State appealed. The court held that: (1) double jeopardy claim was not cognizable by motion to correct illegal sentence, and (2) firearm conviction did not violate prohibition against double jeopardy.

State v. Flonory, 566 So. 2d 310 (Fla. 5th DCA 1990).

Following jury verdict finding defendant guilty of second-degree murder, I granted motion for new trial, and State appealed. The court held that there was probable cause for defendant's arrest.

Moakley v. State, 547 So. 2d 1246 (Fla. 5th DCA 1989).

Defendant was convicted of aggravated child abuse, and he appealed. The Court held that the evidence was insufficient to sustain the conviction.

Holmes v. State, 547 So. 2d 695 (Fla. 5th DCA 1989).

Defendant was convicted of four counts of sale of cocaine, paired with four counts of possession of cocaine, and four counts of possession of cocaine with intent to sell and deliver, and he appealed. The court held that: (1) defendant could not be convicted of both sale of cocaine and possession of the same cocaine with intent to sell and deliver, where offenses were committed prior to July 1, 1988, and (2) costs could not be awarded as condition of probation without notice to defendant and an opportunity to be heard.

State v. Hartung, 543 So. 2d 236 (Fla. 5th DCA 1989).

I dismissed informations, and the State appealed. The court held that State attorney or designated assistant who signs information charging a felony offense need not personally administer oath and hear testimony of material witnesses on which charges are based.

Richardson v. State, 523 So. 2d 746 (Fla. 5th DCA 1988).

Defendant was convicted of robbery with weapon and assault, and appealed. The court held that defendant could not be convicted of both robbery with weapon and assault.

State v. Gomez, 508 So. 2d 784 (Fla. 5th DCA 1987).

State appealed from order dismissing two counts in information charging defendant with unlawfully carrying a concealed firearm and a concealed weapon. The court held that: (1) sheathed knife found within closed console between front seats of car which defendant was driving was not "readily accessible for immediate use" within meaning of statute prescribing carrying of concealed weapon, but (2) firearm found underneath car seat was a concealed firearm "readily accessible for immediate use" although police officer had to spend a few seconds to grasp the gun reaching from the back under the front seat.

Delifus v. State, 507 So. 2d 753 (Fla. 5th DCA 1987).

Defendant was convicted and placed on probation. The court held that imposition of costs as condition of probation was improper absent showing indigent defendant was given notice and opportunity to object.

Livingston v. State, 497 So. 2d 998 (Fla. 5th DCA 1986).

The appellate court found no merit in defendant's contention that he was entitled to discharge under the speedy trial rule, Fla.R.Crim.P. 3.191(a), so his conviction was affirmed. That portion of the sentence imposing community service in lieu of \$200 court costs on the indigent defendant was reversed because the crime for which he was convicted was committed prior to the effective date of section 27.3455, Florida Statutes (1985).

Wilson v. State, 490 So. 2d 1360 (Fla. 5th DCA 1986)

Defendant was convicted of robbery with firearm. The court held that four of six reasons given for upward departure from sentencing guidelines were invalid, requiring remand for resentencing.

State v. Weir, 488 So. 2d 557 (Fla. 5th DCA 1986)

Defendant was accused of forging a credit card invoice. I dismissed the forgery charge and state appealed. The court held that: (1) state was not precluded from charging defendant under forgery statute even if credit card statute was also applicable, and (2) defendant waived technical defect in charging document when she pled to the information.

State v. Clayton, 478 So. 2d 436 (Fla. 5th DCA 1985)

Minor defendant, charged with various counts of burglary and theft, moved to suppress statements made to police admitting involvement in burglary. I granted the motion, and State appealed. The court held that State's failure to get written waiver of counsel did not render statements per se inadmissible.

Florida Supreme Court

Decisions of Florida's district courts of appeal are usually final. However, the Florida Supreme Court has discretionary jurisdiction over a number of matters. The following decisions, which I wrote, were disapproved in subsequent state supreme court opinions:

Allstate Insur. Co. v. Jun, 712 So. 2d 415 (Fla. 5th DCA 1998), disapproved of by Blish v. Atlanta Cas. Co., 736 So. 2d 1151 (Fla. 1999).

The Florida Supreme Court disapproved of this and other district court of appeals' opinions regarding what conduct constitutes "arising out of the maintenance or use of a motor vehicle" for purposes of determining entitlement to personal injury protection benefits.

Ferenc v. State, 697 So. 2d 1262 (Fla. 5th DCA 1997), disapproved of by Hall v. State, 2000 WL 44045 (Fla. Jan. 20, 2000).

The Florida Supreme Court disapproved of directions from this court to the Florida Department of Corrections to forfeit an inmate's gain time as a result of the inmate

filing a frivolous appeal. I had written an opinion stating that such forfeiture was a possible sanction.

City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996), disapproved of by Hastings v. Demming, 694 So. 2d 718 (Fla. 1997).

This court dismissed an appeal from the trial court's order denying summary judgment because the appeal was not timely and the denial of a proposed jury instruction was not an appealable order. The Florida Supreme Court determined that this opinion and opinions from the fourth district were in conflict with an opinion from the first district and approved the opinion from the first district.

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.

Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997).

The defendant appealed arguing among other things that a trial court's decision whether to withhold adjudication of guilt in a violation of the state constitution as an improper legislative delegation of power. I wrote the opinion rejecting this argument.

Brevard County v. Florida Power & Light Co., 693 So. 2d 77 (Fla. 5th DCA 1997).

I wrote an opinion striking down a county ordinance as a violation of the federal and state constitutions because it unreasonably impaired private right to contract.

Royle v. Florida Hospital-East Orlando, 679 So. 2d 1209 (Fla. 5th DCA 1996).

I wrote opinion rejecting argument that statute requiring expert opinion by plaintiff in medical malpractice action violates right to access to court under state constitution.

Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995).

The defendant argued that section 921.001(5) of the Florida Statutes (sentencing guideline statute) requiring sentence in excess of statutory maximum sentence for crime was unconstitutional under due process clauses of federal and state constitutions. I wrote the opinion rejecting this argument.

State v. Calloway, 589 So. 2d 326 (Fla. 5th DCA 1991).

Defendant, who was arrested for violation of ordinance prohibiting loitering for purpose of engaging in drug-related activity, moved to suppress evidence on ground that ordinance was unconstitutional. I found ordinance unconstitutional because it was overbroad and vague, and I granted motion to suppress. State appealed. The court held that: (1) order which merely declared ordinance unconstitutional was not appealable order; (2) order granting motion to suppress was appealable; (3) fact

that ordinance was subsequently determined to be unconstitutional did not undermine lawfulness of arrest made in good faith reliance on presumptively valid ordinance; and (4) on remand, trial court was required to consider whether probable cause existed to believe defendant's conduct at time of his arrest violated loitering ordinance after full evidentiary hearing. The decision was reversed.

In the Interest of F.A.A., a Child, Brevard County Case No. 90-1958-CJ-A-DEL. As a trial judge, I held a municipal curfew statute unconstitutional under the Florida constitution's right of privacy clause.

Coble v. Brevard School Board, Brevard County Case No. CA-87-007627. As a trial judge, I ruled that the due process clause of the federal constitution required that a high school senior was entitled to a hearing before being denied the right to attend his graduation ceremony for disciplinary reasons.

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 for Cocoa, Florida (1971-1976). This work included prosecuting in the municipal court which I did in 1972 and I believe in 1971.

Part-time Assistant Public Defender (1973-1976).

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, court, and the dates of the period you were a clerk;**

I never clerked for 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;

In late 1971 and early 1972, I worked for Gleason, Walker, Pearson, and Shreve, P.A., 150 North Magnolia, Merritt Island, Florida 32952. I was an associate.

From 1971 to 1976, I was Assistant City Attorney for the city of Cocoa, Florida, on a part-time basis.

From 1972 to 1974, I worked with Shreve, Antoon, and Clifton, 150 Magnolia St., Merritt Island, Florida 32952. I was a partner.

From 1974 to 1976, I worked with Antoon and Clifton, P.A. - 317 Riveredge Blvd., Cocoa, Florida 32922. I was a partner.

While with Antoon and Clifton, for approximately three years I worked for Franklin Kelly, Public Defender, Titusville Florida 32976. I was part-time public defender.

From 1976 to 1985, I worked with Stromire, Westman, Lintz, Baugh, McKinley, and Antoon, P.A., 1970 Michigan Avenue, Cocoa, Florida 32922. I was a partner.

From January 1985 until August 1995, I worked as a trial judge for the State of Florida in the Eighteenth Judicial Circuit, 50 South Nieman Avenue, Melbourne, Florida 32901.

From August 1995 to the present, I have worked as an appellate judge for the State of Florida as a District Court of Appeal Judge, at 300 South Beach Street, Daytona Beach, Florida 32114.

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 1971 until 1976, I engaged in a general practice including civil, municipal, and criminal law. From 1976 until I became a circuit judge, I was engaged only in the area of civil law.

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

My typical clients were people who had family problems, needed a simple will, or had been injured. I handled many domestic relations cases but did not specialize in that area of 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.**

I made frequent court appearances throughout my career as a lawyer.

2. **What percentage of these appearances was in:**

- (a) federal courts: 1%
 (b) state courts of record: 98%
 (c) other courts: 1%

3. **What percentage of your litigation was:**

Prior to 1976:

- (a) civil: 50%
 (b) criminal: 50%

Between 1976 and 1985:

- (a) civil: 100%
 (b) criminal: 0%

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

I tried hundreds of cases to verdict or judgment including domestic relations cases. I was sole counsel except on rare occasions.

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 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 have been a judge since January 1985, and my law office files were destroyed many years ago. It is not possible to accurately and completely respond to this question. My practice was a typical small town practice. The last nine years of my practice I worked with an A-V rated firm and did general litigation. The following is a list of activities that I believe typifies the variety of my work as a lawyer:

1) Nelson v. Nelson, Case No. 72-1028-CA-01-B, 18th Judicial Circuit, Brevard County, State of Florida: a domestic relations case heard before the Honorable Tom Waddell in September 1975. I was sole counsel. Opposing counsel was Hubert C. Normile, 1499 South Harbor City Boulevard, Melbourne, Florida 32901-3245; telephone (407) 674-1720.

I represented Stan Nelson, who was awarded custody of two of his children after a third died in the custody of Mrs. Nelson. It was significant because the two children have had a good upbringing and education. Their health needs have been met, and they are now successful adults.

2) Faenza v. Faenza, Case No. 75-2644, 18th Judicial Circuit, Brevard County, State of Florida: a divorce case tried in late 1974. The trial judge was Richard Mulhew. I was sole counsel and opposing counsel was Kenneth Studstill, 503 S. Palm Avenue, Titusville, Florida 32796; telephone (407) 269-0666.

It is a significant case because my client, Ms. Faenza, was mentally ill. It was a long-term marriage and she was entitled to and was awarded alimony.

3) State of Florida v. Willie Mae Glasco, 18th Judicial Circuit, Brevard County, State of Florida. I was sole counsel and James Woodson was the trial judge. I do not recall for certain but I believe opposing counsel was Charles Kessell, 3000 N. Atlantic Avenue, Suite 106, Cocoa Beach, Florida 32932; telephone (407) 783-1850. I have searched the clerk's office for records of this case, but found none.

This case was not tried but settled the morning of trial. It is significant because my client, who was the victim of an attack and retaliated, was charged with second degree murder. She pled to a lesser charge and received probation.

4) Gellert v. Gellert, Case No. 1640, 18th Judicial Circuit, Brevard County, State of Florida. Judge Tom Waddell presided over the nonjury trial in November 1976. I was sole counsel. Opposing counsel was James Dressler, 110 Dixie Lane, Cocoa Beach, Florida 32931; telephone (407) 783-2714.

This was a divorce-custody case in which I represented the wife, Charlotte P. Gellert, in an action regarding her marriage to Daniel G. Gellert. This case was significant because it was protracted and because of collateral litigation, including the husband's defamation action against Eastern Airlines.

5) In re Seaboard Loan Co., Case No. 77-655-ORL-BK-M, heard before Judge George L. Proctor, Bankruptcy Judge in the Middle District, in 1977. I was lead counsel, but do not recall name of opposing counsel. The case was not reported.

At a hearing to determine whether the judge would accept the proposed reorganization plan, I was a principal advocate against such acceptance. The Court ruled in favor of my client Samuel Goldberg. The case was significant because Mr. Goldberg, a retired milkman from New York City, had invested a substantial portion of his life savings, and he recovered his entire investment.

6) Ruzena Blahova v. Elizabeth A. Anderson, et al., Case No. 81-5095-CA-A, 18th Judicial Circuit, Brevard County, State of Florida, January 1981. Attorneys John Bussey, 105 East Robinson Street, Orlando, Florida 32853-1086, telephone (407) 423-7287; and Thomas Kane, 1329 Bedford Drive, Suite #1, Melbourne, Florida 32940-1975, telephone (407) 254-2280, represented defendants. I was sole counsel for the plaintiff. The judge was the Honorable Roger Dykes.

This was an action against the defendant for negligence. The plaintiffs, Vilem Blaha and Ruzena Blahova, were an elderly Czechoslovakian couple visiting their son, a scientist in Brevard County, when the car they were riding in was sideswiped. The plaintiffs were both injured. During treatment it was discovered that Mr. Blaha had serious heart disease requiring surgery. The significance is that Mr. Blaha received treatment for his illness which was not available in Czechoslovakia, thus, saving his life. The case was settled prior to trial.

7) Philpot, Knappenberger and O'Hern v. Cape Canaveral Hospital, heard before the medical staff serving as a fact-finding board at Cape Canaveral Hospital, approximately 1982. I do not recall the exact date of these proceedings. I was sole counsel. Opposing counsel was Walter Rose, Post Office Box 321255, Cocoa Beach, Florida 32932-1255; telephone (407) 784-0147.

This case involved an effort to obtain courtesy staff privileges for board-certified pediatricians. It was significant because of the excellence of these physicians, who continue to practice in this area and are the physicians for the Children's Protection Team and Children's Medical Services Unit for Brevard County. My clients were successful before this board.

8) Brevard Mental Health Center and Hospital, CON #2809, DOAH #H84-0332 (contested by First Hospital Corporation), date: 1983-1984, opposing counsel were attorneys for State of Florida Health, Planning and Development Office: Claire A. Duchemin, 1350 N. Gadsden Street, Suite 52, Tallahassee, FL 32303, telephone (850) 425-2855; and Eric Tilton, 204 S. Monroe Street, Suite 200, Tallahassee, Florida 32301, telephone (850) 425-2466. During a portion of the proceedings I had co-counsel retained by the hospital, but I do not recall his name. State administrative hearings were heard before Hearing Officers Arnold Pollard and Donald Alexander.

This case involved a hearing on a certificate of need application. It was significant because it was resolved favorably to my client, Brevard Mental Health Center and Hospital, which continued to provide in-patient care for adult psychiatric patients, including indigent patients. It is also significant because Children's Psychiatric Care was allowed to open a facility for children with psychiatric problems. Both facilities continue to operate.

In addition, I tried many domestic, civil and criminal cases to verdict, but have no recollection of the details requested in this question. I traveled to the venue (18th Judicial Circuit, Brevard County, State of Florida) where I worked as a lawyer, but discovered the cases were not indexed by name of 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).**

As a judge I presided over many high profile criminal cases including over twenty homicide cases.

Also, I have participated as an instructor for judicial education throughout my judicial career. I have taught at the National Judges College, the Florida Judges College, the College for Advanced Judicial Studies, the Florida Conference of County Judges, and the Florida Conference of Circuit Judges. I have taught in the areas of criminal, juvenile, family, employment, and appellate law, but my primary emphasis has been in the area of professionalism and judicial ethics.

Additionally, I have been active in bar activities and was president of the Brevard County Bar Association and the Vassar B. Carlton Inn of Court. I also served as secretary/treasurer and chair-elect of the Florida Conference of Circuit Judges, and president-elect and president of the Florida Conference of District Court of Appeal Judges. While a circuit judge, I chaired the compensation committee and served on the education, criminal law, administrative sections, as well as the executive committee. As an appellate judge, I served the conference as a member of the legislative and education committee and was chair of the education committee.

As a trial judge, I was twice elected chief judge and am presently chief judge of the Fifth District Court of Appeal. I also serve as this court's *ad hoc* member of the Florida Judicial Qualifications Committee.

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.**
 - a) State of Florida Deferred Income - I have made no arrangements regarding this account (\$185,918.86). I become eligible to withdraw these proceeds upon termination of employment with the state, but do not plan to do so.
 - b) State of Florida Retirement Plan - I become eligible to withdraw these benefits at age 55 and intend to do so at that time.

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

I have no foreseeable conflict of interest, but would follow the applicable judicial canons.

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 form (AO-10).

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

Please see attached 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.

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	\$ 41,547.08	Notes payable to banks - secured	-0-
U.S. Government securities - add schedule	-0-	Notes payable to banks - unsecured	-0-
Listed securities - See Schedule 1	270,851.68	Notes payable to relatives	-0-
Unlisted securities	-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 tax and interest	-0-
Doubtful	-0-	Real estate mortgage payable - See Schedule 3	201,750.83
Real estate owned - See Schedule 2	467,500.00	Chattel mortgages and other liens payable - See Schedule 4	7,578.99
Real estate mortgages receivable	-0-	Other debts: itemize	-0-
Autos and other personal property -	67,500.00		
Cash value - life insurance	-0-		
Other assets - itemize:	-0-		
		Total Liabilities	\$209,329.82
		Net Worth	\$638,068.94
Total Assets	\$847,398.76	Total Liabilities and Net Worth	\$847,398.76
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-		

SCHEDULE 1 - Listed Securities**(a) IRA-Waterhouse:**

Baron Asset Fund	5,345.07
Fidelity Equity Income Fund	5,248.21
Fidelity Mt. Vernon Street Trust	8,357.32
Harris Associates Investment Trust - Oakmark Fund	4,146.31
Janus Fund	5,440.04
Janus Investment Worldwide Fund	8,701.63
Marsico Focus Fund	5,673.09
Selected American Shares, Inc.	6,014.94
Vanguard Index Trust 500 Portfolio	6,818.47

Approximate Total: **\$ 55,745.08**

(b) State Deferred Compensation-Washington Mutual Bank:

Fidelity Contra Fund	17%
Fidelity Magellan Fund	17%
Fidelity Puritan Fund	17%
Janus Worldwide Fund	16%
American Century Fund	16%
Vanguard Growth Index	17%

Approximate Total: **\$ 58,828.28**

(c) State of Florida Deferred Compensation-T. Rowe Price:

Capital Appreciation Fund	9,450.53
Equity Income Fund	23,370.77
Growth & Income Fund	19,454.65
Growth Stock Fund	13,512.81
GNMA Fund	5,494.30
International Bond Fund	5,915.50
International Stock Fund	17,552.56
New America Growth Fund	8,859.17
New Horizons Fund	16,660.28
New Income Fund	6,059.09
Spectrum Income Fund	760.58

Total as of last statement: **\$127,090.24**

(d) Charles Schwab:

Oakmark Fund-Harris Associates Investment Trust	3,930.26
Sogen International Trust	4,872.66
Strong Advantage Fund	4,459.66
Templeton Foreign Fund-Class A	6,786.22
American Century Ultra Fund	6,654.12

Approximate Total: **\$ 26,702.92**

(e) The American Fund - Education IRA:

The New Economy Fund	173.86
New Perspective Fund	170.05
Washington Mutual Fund	153.10

Approximate Total: **\$ 497.01**

(f) The American Fund - ROTC IRA:

The New Economy Fund	695.48
New Perspective Fund	680.16
Washington Mutual Investors Fund	612.51

Approximate Total: **\$ 1,988.15**

SCHEDULE 2 - Real Estate Owned

Residence:	Ormond Beach, Florida 32176	\$ 300,000
Lot:	Melbourne Shores, Florida 32951	\$ 160,000
30 Acres:	Hancock County, Tennessee (½ interest) (½ interest owned by my cousin Ronald Surgener)	\$ 7,500

SCHEDULE 3 - Real Estate Mortgages Payable

(a)	Crestar Mortgage Corporation Post Office Box 26149 Richmond, VA 23260	(residence)	\$ 175,451.67
(b)	Virginia Seledyn 33400 Young Street Winter Park, FL 32792	(Melbourne Shores lot)	\$ 26,299.16

SCHEDULE 4 - Chattel Mortgages and Other Liens Payable

Spacecoast Credit Union (automobile) Post Office Box 26149 Richmond, VA 23260	\$ 7,578.99
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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 the time devoted to each.**

I served on the Board of Directors of the Brevard Legal Aid Society and frequently was assigned cases in which I represented indigent clients. I also served on the Board of Directors of The Haven, a shelter care facility for dependent children. Additionally, through my career I have frequently spoken at schools, elementary through college, regarding the American judicial system. As a trial judge, I worked with volunteer groups, such as the guardian ad litem, legal assistants, Inns of Court, and other community groups to improve Florida's legal system and the public's perception of it. I also served on the Governor's Task Force on Domestic Violence.

Additionally, I have made it a practice throughout my career to speak to schools and civic groups regarding courts and our judicial system.

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

I do not presently belong to any organization that discriminates on the basis of race, sex, or religion. However, in the 1970s, I belonged to the Palm Bay Rotary Club, the Merritt Island Seratoma Club, and the Merritt Island Jaycee Club, all of which limited membership to men.

- 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 which recommended me and three others. I applied to the commission on October 1, 1999, pursuant to its instruction. The commission selected me for an interview which occurred the same month. I then interviewed with Senator Bob Graham.

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 questions? 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.**

Under the Constitution, federal judges may rule only upon controversies brought before them, recognizing that federal courts are courts of limited jurisdiction. Judges should not rule on matters not properly before them or engage in rendering advisory opinions. Additionally, judges should not hear cases in which the parties seeking relief do not have standing or cases in which the issues are not ripe for adjudication.

Judges are sworn to uphold the Constitution, and the principle of separation of powers is an integral part of the Constitution. Judges must clearly distinguish their role from the roles of the legislative and executive branches. In deciding

controversies properly before them, judges must strive to give effect to laws passed by Congress and must follow legal precedent. Judges must not reach out to address issues not properly before them or not necessary for resolution of the cases at hand.

JOHN ANTOON II

Birth:	May 16, 1946	Bakersfield, California
Legal Residence:	Florida	
Marital Status:	Married	Nancy C. Wise One child
Education:	1964 - 1968	Florida Southern College B.A. degree, 1968
	1968 - 1969	Emory University College of Law
	1969 - 1971	Florida State University College of Law J.D. degree, 1971
	1972 - 1993	Florida Institute of Technology M.S. degree, 1993
Bar:	1971	Florida
Experience:	1971 - 1972	Gleason, Walker, Pearson, and Shreve Associate
	1971 - 1972	City of Cocoa Prosecutor
	1972 - 1974	Shreve, Antoon, and Clifton Partner
	1972 - 1976 (part-time)	Eighteenth Judicial Circuit Assistant Public Defender
	1974 - 1976	Antoon and Clifton, P.A. Partner
	1976 - 1984	Stromire, Westman, Lintz, Baugh, McKinley, and Antoon, P.A. Partner
	1985 - 1995	Eighteenth Judicial Circuit Circuit Judge
	1995 - present	Fifth District Court of Appeal Judge
Office:	300 South Beach Street Daytona Beach, Florida 32114	

To be United States District Judge for the Middle District of Florida

LIST OF FAMILY AND FRIENDS INTRODUCED AT JUDICIARY COMM. HEARING

NOMINEE JOHN ANTOON

DATE OF HEARING 3/23/00

1. NANCY C. ANTOON - WIFE
2. MOLLY WISE ANTOON - DAUGHTER
3. ELVA A. ANTOON - MOTHER
4. COL. DAVID F. ANTOON - BROTHER
5. EMILY ANTOON - NIECE
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**TESTIMONY OF MARIANNE O. BATTANI, OF MICHIGAN, TO BE
U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF
MICHIGAN**

Judge BATTANI. Senator, I would like to thank you for holding these hearings for us today, and I also would like to thank the two Senators from Michigan, Senator Carl Levin and Senator Spencer Abraham, who have been most supportive to me.

In addition to my mother, my daughter, and my sister whom you have met here today, I would like to recognize my two other sisters, Linda Powell and Bonnie Gray, who were unable to be here with me. Thank you.

[The biographical information and questionnaire of Judge Battani follows:]

Marianne O. Battani

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name: (include any former names used).
Marianne Olga Battani
2. Address: List current place of residence and office address(es).
Residence: Grosse Pointe Woods, Michigan 48236
Office: 1421 City-County Building
Detroit, Michigan 48226
(313) 224-2491
3. Date and place of birth:
Date: May 18, 1944
Place: Detroit, Michigan
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Single.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
University of Detroit, 1962-1966, Bachelor of Arts in Mathematics, *cum laude*, 1966.
Detroit College of Law, 1968-1972, Juris Doctor, *cum laude*, 1972.
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
1966-1972 International Business Machines Company, systems engineer
1971-1972 Wayne County Circuit Court, tipstaff in Docket Reduction Program
1972-1974 Law Offices of Donald E. Gratrix, associate attorney
1974-1981 Law Office of Marianne O. Battani, sole practitioner
1981 Common Pleas Court for the City of Detroit, Judge

Marianne O. Battani

1981-1982 36th District Court for the City of Detroit, Judge
 1982-1999 Wayne County Circuit Court, 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.

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.

Honorary LL.D. from the Detroit College of Law at Michigan State University, 1994
 John C. Bills Scholarship Award, Detroit College of Law, 1971-72
 Dean's List for Academic Achievement, Detroit College of Law, 1968-72

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 Michigan, 1972 to present
 Representative Assembly, 1978-1979
 Board of Commissioners, 1978-1984
 Chair, Commissioners' Legislative Committee, 1983
 Chair, Senior Justice Committee (now Section), 1988-1990
 Michigan State Bar Foundation, life member, since 1984
 Women Lawyers Association of Michigan, 1972-1999, President, 1976
 Detroit Bar Association, 1972-1999
 Michigan Judges Association, 1982-1999
 State Bar of Michigan Task Force on the Racial/Ethnic and Gender Issues in the Courts and Legal Profession, 1997-1998
 Wayne County Judges Association, 1983-1999
 Inn of Court, University of Detroit Mercy, 1995-1998
 Michigan Council on Family and Divorce Mediation, Board of Directors, 1995-1998
 Italian American Bar Association, 1980-1999, treasurer, 1999-2000
 National Association of Women Judges, 1990-1992
 Wayne County Circuit Court, chief judge *pro tem*, 1984-1992
 Wayne County Circuit Court Docket Development Committee, 1985-90
 Michigan Supreme Court Task Force on Gender Issues in the Courts, 1987-1989
 American Bar Association, 1983-1986
 Wayne County Neighborhood Legal Services, Board of Directors, 1977-1980

Marianne O. Battani

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 which, to my knowledge, is active in lobbying.

Other organizations to which I belong include:

Judicial Tenure Commission, 1991-1999, chair, 1999
 Detroit College of Law at Michigan State University, trustee, 1984-1999,
 secretary, 1992-1999
 Detroit College of Law Alumni Association, 1972-1999
 American Civil Liberties Union, 1998 and a few other years since 1980

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 for the Eastern District of Michigan, May 1972
 Michigan Supreme Court, Michigan Court of Appeals, Michigan Circuit Courts,
 Michigan District Courts, Michigan Municipal Courts, Court of Claims,
 May 1972.

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.

Domestic Violence: Need We Do More?, 4 Detroit College of Law Review 1045 (1983)
Judicial Opinions from the Bench in Contested Custody Cases, Colleague, V2, #1, January
 1989
Letter to the Editor, The Detroit Free Press, February 23, 1999

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. I have hypertension which is controlled with medication. The date of my last examination was May 17, 1999.

Marianne O. Battani

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.

In January 1981, I was appointed to the Common Pleas Court for the City of Detroit by Governor William G. Milliken. That Court had jurisdiction for civil cases where damages were estimated to be under \$10,000. With court reorganization in September 1981, it became the 36th District Court for the City of Detroit.

From September 1981, to December 1982, I sat in the 36th District Court. Jurisdiction included civil cases where damages were estimated to be under \$10,000, criminal misdemeanors and felony examinations.

In December 1982, I was appointed by Governor Milliken to the Wayne County Circuit Court bench. The Circuit Court has jurisdiction over criminal felonies, domestic relations, and civil suits with damages over \$25,000 (raised from \$10,000 in January, 1998). I was reelected to the Wayne County Circuit Court in 1984, 1986, 1992, and 1998.

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

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

I generally do not write opinions, but usually render my decisions orally from the bench. The following, however, are the ten most significant opinions I have written.

1. Downriver Plaza Group v. City of Southgate, unpublished opinion, decided April 19, 1990 (Docket No. 89-903741-CZ), rev'd, 195 Mich. App. 192, 489 N.W.2d 178 (1992), rev'd, 444 Mich. 656, 513 N.W.2d 807 (1994).
2. Electro-Wire Products, Inc. v. General Instrument Corp., unpublished opinion, decided March 4, 1994 (Docket No. 92-211098-CZ); aff'd, unpublished opinion, decided July 26, 1996 (Docket No. 175594), leave denied, 454 Mich. 914, 564 N.W.2d 894 (1997).
3. Travelers Ins. Co. v. Detroit Edison Co., unpublished opinion, decided August 1, 1997 (Docket No. 95-530625-CZ).
4. City of Detroit v. Peter Adamo, unpublished opinion, decided March 5, 1998 (Docket No. 96-638479-CE); aff'd, ___ Mich. App., ___ N.W.2d ___ (1999).
5. Charles E. Williams v. Auto Club Ins. Ass'n, unpublished opinion, decided April 8, 1998 (Docket No. 96-647965-NI).
6. The Estate of Mary Angela Preston v. Sinai Hosp., unpublished opinion, decided June 12, 1998 (Docket No. 96-642951-NH).
7. Wayne County Prosecutor v. Dep't of Corrections, unpublished opinion, decided November 24, 1998 (Docket No. 98-813465-PC).
8. Tamara Taylor v. Gate Pharmaceuticals, unpublished opinion, decided November 24, 1998 (Docket No. 97-731636-NP).

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9. A. Doe v. Armour Pharmaceutical, unpublished opinion, decided March 8, 1999 (Docket No. 98-811556-NO).
10. TCG Detroit v. City of Dearborn, unpublished opinion, decided March 8, 1999 (Docket No. 98-803937-CK).

- (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;

In the past 18 years, I have reached decisions in approximately 2,000 cases. The following is a list of all cases of which I am aware where my decision was reversed, or reversed in part. The list does not include cases that were reversed in the Court of Appeals and subsequently reversed by the Supreme Court, thus affirming my decision.

Gus Taylor v. Wyeth Lab., Inc., 139 Mich. App. 389, 362 N.W.2d 293 (1985).
Directed verdict for manufacturer of oral contraceptive granted. Reversed by the Court of Appeals on issue of adequacy of warning and proximate cause.

Clarence Stinnett v. Tool Chem. Co., 161 Mich. App. 467, 411 N.W.2d 740 (1987).
Manufacturers' motion for summary disposition denied. Employee brought products liability action against the manufacturers of products he claimed to have been exposed to during his employment. The Court of Appeals reversed the holding on the basis of the statute of limitation. It held the employee knew during the statutory period that he had a lung problem due to chemicals he had been exposed to at work.

In re Estate of Michael D. Powell v. Theodore Monolidis, 160 Mich. App. 704, 408 N.W.2d 525 (1987), leave to appeal denied, 429 Mich. 889, 416 N.W.2d 315 (1987).

My decision is affirmed in this case, but it is listed as affirmed in part, reversed in part because it is a consolidated appeal with a Probate Court action involving the same parties and issue. The Probate Court was reversed.

Henry Simpson v. TNT Canada, Inc., unpublished per curiam opinion of the Court of Appeals, decided June 9, 1988 (Docket No. 96479).

Defendants appealed from a jury verdict awarding plaintiff work loss benefits. The Court of Appeals reversed, holding that the jury could not draw a legitimate inference from the evidence presented and it was error for plaintiff to testify at trial about matters for which he had claimed a privilege in response to interrogatories.

Kathleen Flenner v. City of Livonia, unpublished per curiam opinion of the Court of Appeals, decided March 10, 1989 (Docket Nos. 94034 and 100483).

Defendant's motion for summary disposition denied on the grounds that the City was not plaintiff's employer and the action was not barred by the exclusive remedy provision of the

Marianne O. Bettani

Worker's Disability Compensation Act. The Court of Appeals reversed, holding that the City's payment of wages qualified the City as an employer for purposes of the WDCA only.

Allstate Ins. Co. v. Melton Motors, Inc., unpublished memorandum opinion of the Court of Appeals, decided June 16, 1989 (Docket No. 102421).

On rehearing, the Court of Appeals reversed the trial court's grant of summary disposition on plaintiff's negligence claim and affirmed the grant of summary disposition on all other claims.

Nanette Hunter v. Wayne-Westland Educ. Ass'n, unpublished per curiam opinion of the Court of Appeals, decided June 27, 1989 (Docket No. 105669).

After a bench trial, the trial court ruled that defendant breached its duty of fair representation to plaintiff, denied plaintiff's request for damages for statutory violations and ruled that defendant did not violate plaintiff's constitutional rights. The Court of Appeals affirmed in part and reversed in part, holding that the trial court was barred by the doctrine of res judicata from determining the issue of whether defendant breached its duty of fair representation.

Bell & Hudson, P.C. v. Buhl Realty Co., 185 Mich. App. 714, 462 N.W.2d 851 (1990).

Motion for partial summary disposition denied. Court of Appeals reversed holding that family relationship was insufficient to impose a duty on defendant to protect the general public from his brother, nor could a duty be imposed because of defendant's voluntary attempt to warn victims.

Catherine Simmons v. Henry Ford Hosp., unpublished per curiam opinion of the Court of Appeals, decided January 25, 1990 (Docket No. 110778).

Defendant's motion for summary disposition granted on plaintiff's claim of handicap discrimination against defendant hospital. The Court of Appeals reversed holding that there was a genuine issue of material fact as to whether plaintiff's disability would have prevented her from performing the duties of scheduling coordinator.

Edna Miller v. Lafayette Towers, unpublished per curiam opinion of the Court of Appeals, decided February 23, 1990 (Docket No. 112110).

Motion for default judgment granted subsequent to defendant's failure to timely answer. Default affirmed by the Court of Appeals, but remanded to allow for hearing on amount of damages.

Chope Union Paper Co. v. Cy Aaron Publications Co., unpublished per curiam opinion of the Court of Appeals, decided March 9, 1990 (Docket No. 115233).

Defendant appealed from an order denying its motion to set aside a default judgment. The Court of Appeals reversed, holding that the default was prematurely entered and the default judgment was void.

William N. Coleman v. Michigan Employment Security Comm'n, unpublished per curiam opinion of the Court of Appeals, decided March 21, 1990 (Docket No. 117120).

Marianne O. Battani

Defendant appealed from the circuit court's order reversing the Michigan Employment Security Commission's determination that plaintiff was ineligible to receive unemployment benefits because he voluntarily left work. The Court of Appeals reversed, holding that plaintiff's employment options presented reasonable alternatives and, therefore, made plaintiff's decision to quit a voluntary one.

Lee A. Lambert v. Donald Shiffman, unpublished per curiam opinion of the Court of Appeals, decided May 1, 1990 (Docket No. 112853).

Plaintiffs appealed from an order granting defendant's motion for change of venue and a subsequent order granting defendant's motion for summary disposition. The Court of Appeals reversed, holding that venue was proper in Wayne County and that there were genuine issues of material fact in both plaintiff's legal malpractice claim and underlying medical malpractice claim.

Diversified Imaging Supply Co. v. Chrysler Corp., unpublished per curiam opinion of the Court of Appeals, decided August 8, 1990 (Docket No. 117380).

Plaintiff sued defendant asserting claims for account stated and quantum meruit arising out of the sale of computer diskettes. Defendant filed a counterclaim for innocent misrepresentation, fraud and mistake of account. Plaintiff's motion for partial summary disposition on the account stated claim was granted and defendant's motion for summary disposition on its misrepresentation claim was denied. Defendant's motion for summary disposition on plaintiff's quantum meruit claim was granted. The Court of Appeals reversed in part, holding that defendant was entitled to summary disposition on its misrepresentation claim and that plaintiff's claim for quantum meruit should not have been dismissed.

Edward H. Schultz v. Richard K. Stoler, D.O., unpublished per curiam opinion of the Court of Appeals, decided November 14, 1990 (Docket No. 113148).

Motion for summary disposition granted to defendant on the theory that Michigan does not recognize the "lost chance" theory of recovery in medical malpractice cases. The Court of Appeals held the appeal in abeyance pending release of a Michigan Supreme Court opinion. Upon release of that opinion, the Court of Appeals reversed the trial court and remanded for reconsideration under Falcon v. Memorial Hospital.

Carol Gudewicz v. Matt's Catering, Inc., 188 Mich. App. 639, 470 N.W.2d 654 (1991).

Defendant's motion for attorney fees was denied in this slip and fall case after a jury determined the damages to be less than the company's settlement offer. The Court of Appeals reversed and remanded, holding that the company's counteroffer was timely where made within 21 days after plaintiff's offer to stipulate to the entry of judgment, even though the counteroffer was made only 17 days before trial.

Joseph M. Dudzinski v. Diane O. Dudzinski, unpublished per curiam opinion of the Court of Appeals, decided August 15, 1991 (Docket No. 133254).

In this divorce action plaintiff appealed the trial court's award of custody to defendant and the

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division of the marital property. The defendant appealed the trial court's denial of attorney fees, admission of tape recorded conversations and award of child support. The Court of Appeals affirmed in part and reversed the order of child support, holding that it was based on an erroneous evaluation of plaintiff's income and did not include expenses for the minor child's psychological therapy.

Xerox Corp. v. Michael Barry, unpublished per curiam opinion of the Court of Appeals, decided December 23, 1991 (Docket No. 116589).

Plaintiff brought a claim and delivery action against defendant. Prior to submission of proofs to the jury, the trial court held that plaintiff had waived the issue of the alleged invalidity of a limitation of warranties provision contained in the contract by failing to raise it earlier. The court ordered plaintiff not to mention the provision in closing arguments. The Court of Appeals reversed, holding that it was error to hold that plaintiff had waived the issue.

Jeffrey Lada v. Michael Cholack, unpublished per curiam opinion of the Court of Appeals, decided July 8, 1992 (Docket No. 128757).

Plaintiff brought a slip and fall action against defendant and the jury returned a verdict of no cause of action. Plaintiff appealed several rulings of the trial court. The Court of Appeals affirmed in part and reversed in part, holding that the court erred in refusing to allow a witness to testify and erroneously allowed defense counsel to impeach a witness on a collateral matter.

Linda Sandin v. City of Detroit, unpublished per curiam opinion of the Court of Appeals, decided July 23, 1992 (Docket No. 132595).

Defendant appealed from an order denying its motion to set aside a default and default judgment. The Court of Appeals reversed, holding that service of process had been improper and defendant was not estopped from so asserting.

Brenda Walker v. Auto Club Ins. Ass'n, unpublished per curiam opinion of the Court of Appeals, decided December 15, 1992 (Docket No. 133560).

Defendant appealed from an order of the trial court granting plaintiff a declaratory judgment against defendant. The Court of Appeals reversed, holding that the language of the insurance contract at issue was clear and unambiguous and did not include the automobile involved in the accident.

Mark J. Johnson v. Central Wayne Co. Sanitation Auth., unpublished per curiam opinion of the Court of Appeals, decided March 4, 1993 (Docket No. 133544).

Plaintiff fell through a hole in a construction site and sued his employer in tort. Defendant's motion for summary disposition denied. Reversed by Court of Appeals holding that the facts did not establish an intentional tort and the action is barred by the Worker's Compensation Act.

Phillip Barkley v. City of Detroit, 204 Mich. App. 194, 514 N.W.2d 242 (1994).

City police officers being sued in tort sought a declaration that the city was obligated to pay for

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independent counsel pending arbitration of the city counsel's refusal to provide representation. The trial court held that a conflict of interest required the city to provide independent counsel. The Court of Appeals affirmed in part and reversed in part, holding that a conflict of interest precluded the city law department from representing the officers in the underlying tort suit while at the same time representing the city in an arbitration proceeding challenging the city counsel's refusal to provide representation to employees.

Craig Deshen Shorter v. Comprehensive Health Servs. Inc., unpublished per curiam opinion of the Court of Appeals, decided January 5, 1994 (Docket No. 134068).

Dismissed case for failure to comply with discovery, failure to appear at two motion hearings, failure to serve, and failure to prosecute. The Court of Appeals reversed, holding that it was an abuse of discretion in dismissing the action.

Lois Jones v. Total Petroleum Inc., unpublished per curiam opinion of the Court of Appeals, decided February 24, 1994 (Docket No. 151016).

Summary disposition granted for defendant who sold Plaintiff an allegedly defective product. The Court of Appeals reversed, holding that reasonable minds could differ on whether the alleged defect could have been readily ascertainable.

Dennis Barbre v. City of Detroit, unpublished memorandum opinion of the Court of Appeals, decided April 22, 1994 (Docket Nos. 154163, 162110).

Plaintiff sued defendant asserting violations of the Elliott-Larsen Civil Rights Act. The trial court granted defendant's motion for summary disposition. The Court of Appeals affirmed in part and reversed in part, holding 1) that the trial court had properly granted summary disposition on plaintiff's race discrimination claim, and 2) that the trial court had abused its discretion by not allowing plaintiff to amend his original complaint.

Leonard Miles v. TGI Friday's, Inc., unpublished per curiam opinion of the Court of Appeals, decided April 28, 1994 (Docket No. 144208).

Court dismissed all claims against two of the defendants who were employees of the third defendant, on Plaintiff's action asserting claims of racial discrimination, etc. The jury returned a verdict of no cause on plaintiff's race claim against the employer. Affirmed in part and reversed in part, the Court of Appeals holding that employees could be held individually liable under the Civil Rights Act.

Stuart H. Brickner, P.C. v. Michigan Bell Tele. Co., unpublished memorandum opinion of the Court of Appeals, decided June 14, 1994 (Docket No. 158957).

Granted summary disposition on Plaintiff's suit against Michigan Bell asserting that defendant and its agents made misrepresentations concerning Yellow Pages advertising. Court of Appeals reversed holding that there was a factual question.

Charles Cross v. City of Detroit, unpublished per curiam opinion of the Court of Appeals, decided December 27, 1994 (Docket No. 158470).

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Plaintiff appealed from order affirming defendant's refusal to permit an adult entertainment establishment within the applicable zoning area. The Court of Appeals reversed, holding that defendant board of zoning appeals had not met the minimum standards of due process.

Paul and Irene Gracey v. Wayne County Clerk, 213 Mich. App. 412, 540 N.W.2d 710 (1995).

Plaintiff appealed summary disposition for all county defendants on basis of governmental immunity. Unsuccessful judicial candidate and wife brought suit against county clerk and others seeking tort damages for allegedly giving false information concerning wife's involvement in election process. The Court of Appeals held that: (1) county clerk could be held liable for disseminating false information; (2) bare allegation that elections director requested police investigation was not sufficient to establish gross negligence exception to defense of governmental immunity; (3) gross negligence exception to governmental immunity did not apply to governmental agency such as board of canvassers; and (4) county could not be held vicariously liable. Affirmed in part, vacated in part, and remanded.

Comerica Bank v. Michigan Nat'l Bank, 211 Mich. App. 534, 536 N.W.2d 298 (1995).

Granted summary judgment for plaintiff on suit against bank for failure to seek proper endorsement on check on strict liability theory. The Court of Appeals reversed holding (1) the drawee bank could avoid strict liability for breach of presentment warranty by showing that the intended payee received the proceeds of check, and (2) defendant established that the intended payee received the proceeds of check.

Better Way Construction Co. v. City of Detroit, unpublished per curiam opinion of the Court of Appeals, decided January 23, 1995 (Docket No. 161902).

Summary disposition for the city granted on Plaintiff's action for negligence, unjust enrichment, fraud, and breach of contract. The Court of Appeals affirmed in part, reversed in part and remanded, holding that the trial court erred in granting summary disposition as there were material questions of fact with regard to whether defendant city committed promissory fraud and silent fraud.

George Stadtmiller v. Production Spring Corp., unpublished per curiam opinion of the Court of Appeals, decided February 16, 1995 (Docket No. 163971).

Summary disposition granted for defendants on Plaintiff's suit for commissions and fees. The Court of Appeals reversed, holding that the court impermissibly engaged in factual findings and resolved a material factual dispute in defendants favor and that plaintiff had raised sufficient evidence to show a material factual dispute.

Xerox Corp. v. Michael Barry, unpublished per curiam opinion of the Court of Appeals, decided May 23, 1995 (Docket No. 157697).

Plaintiff brought a claim and delivery action against defendant. On appeal after a jury verdict, the Court of Appeals reversed in part and remanded. On remand, the trial court granted plaintiff's motion for summary disposition. The Court of Appeals held that defendant had stated a claim which should go to the jury.

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Albert Ackerman v. Johnson & Johnson Orthopaedics, Inc., unpublished per curiam opinion of the Court of Appeals, decided June 16, 1995 (Docket No. 169279).

Summary disposition granted to defendants on the ground that plaintiff's claims were preempted by the Federal Food, Drug and Cosmetic Act. The Court of Appeals reversed and remanded for an evidentiary hearing on the classification of the medical device in question.

Alpha and Omega Care, Inc. v. Michigan Dep't of Mental Health, unpublished per curiam opinion of the Court of Appeals, decided June 9, 1995 (Docket Nos. 153486 and 167611).

Summary disposition granted to defendant on basis that action belonged in the Court of Claims. The Court of Appeals held that an appeal under the RJA does not afford an appellant the right to an evidentiary hearing before filing an appeal in circuit court. The court of Claims was affirmed and the circuit reversed and remanded.

State Farm Fire & Casualty Co. v. Jeff S. Rapp, unpublished per curiam opinion of the Court of Appeals, decided June 16, 1995 (Docket No. 162902).

Summary disposition to plaintiff granted on its claim that it was not required to indemnify defendant. Court of Appeals reversed and remanded, holding that the wrong test was used to determine whether co-defendant was employee.

Nancy Blair v. Checker Cab Co., 219 Mich. App. 667, 558 N.W.2d 439 (1996).

Summary judgment for defendant granted on several counts. Plaintiff's action challenged her expulsion from membership in defendant's nonprofit corporation of taxicab owners for allegedly soliciting drivers of other corporation members. The Court of Appeals reversed in part and remanded, holding that the lessor had stated a cause of action under the Michigan Antitrust Reform Act.

Ethel Listanski v. Canton Twp., 452 Mich. 678, 551 N.W.2d 98 (1996).

Granted summary disposition for the defendant on the ground of governmental immunity on sidewalk slip and fall. In a consolidated appeal of three pending actions, the Court of Appeals at 206 Mich. App. 356, 523 N.W.2d 229, (1994) affirmed. The Supreme Court reversed, holding that a township has jurisdiction over public sidewalks located along county roads.

People of the State of Michigan v. Ronald Finley, unpublished memorandum opinion of the Court of Appeals, decided March 18, 1997 (Docket No. 199871).

The Court of Appeals reversed and remanded a finding that Michigan Statute MCL 740.234e; MSA 287.431(4) is unconstitutional for vagueness on finding that the term "brandish" is not ascertainable, as applied to the facts.

National Window Cleaning v. Michigan Mutual Ins. Co., 454 Mich. 854, 558 N.W.2d 729 (1997); Court of Appeals, decided April 25, 1997 (Docket No. 201268). Summary disposition granted to defendant. Supreme Court remanded to the Court of Appeals for reconsideration in light of Travis v. Dreis & Krump Manufacturing Co., 453 Mich. 149, 551 N.W.2d 132 (1996).

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Court of Appeals remanded to the trial court. An employee of plaintiff fell to his death and his estate sued plaintiff on the basis of an intentional tort exclusion to WDCA. The Court of Appeals remanded to the trial court to determine whether under the terms of the insurance contract - separate from the terms of the exclusive remedy of the WDCA - the defendant had a duty to indemnify.

Antonia Berry v. Brass Craft Manuf'g., unpublished per curiam opinion of the Court of Appeals, decided August 5, 1997 (Docket No. 195374).

Granted summary disposition for defendants and dismissed plaintiff's products liability claim. The Court of Appeals affirmed in part, reversed in part and remanded, holding that the grant of summary disposition was premature.

Bancorp Group, Inc. v. Kurt J. Meister., unpublished per curiam opinion of the Court of Appeals, decided January 20, 1998 (Docket No. 174566).

Granted defendants motion to set aside judgment and ordered new trial on certain issues after plaintiff received a jury verdict on his legal malpractice claim. The Court of Appeals affirmed in part and reversed in part, holding that collateral estoppel did not bar presentation at trial of certain statements made by defendants.

Jesse Lee Coddington v. Gerald M. Lorence, P.C., unpublished per curiam opinion of the Court of Appeals, decided April 21, 1998 (Docket No. 191608).

Summary disposition granted for defendant on all counts. Plaintiff retained defendant to handle his criminal appeal and alleges claims of fraud, misrepresentation and legal malpractice. The Court of Appeals affirmed the grant of summary disposition and remanded for a determination of sanctions.

Musa Abdur-Rahmann v. Hutzel Hosp., unpublished per curiam opinion of the Court of Appeals, decided January 8, 1999 (Docket No. 201127).

Granted summary disposition for hospital on basis that suit was for medical malpractice. The Court of Appeals affirmed in part and reversed in part, holding that plaintiff's claim sounded in ordinary negligence and was not barred by the two-year medical malpractice statute of limitation.

State Farm Fire & Casualty Ins. Co. v. Pitney Bowes Mgt. Servs. Inc., unpublished memorandum opinion of the Court of Appeals, decided April 2, 1999 (Docket No. 205164).

Summary disposition granted for successor corporation of a manufacturer who was sued for products liability. Court of Appeals reversed in part and remanded, holding the UCC does not immunize secured creditors and third party purchasers from otherwise assuming liability pursuant to the ordinary principles of successor liability.

People of the State of Michigan v. Michael Anthony Thompson. unpublished per curiam opinion of the Court of Appeals, decided April 23, 1999 (Docket No. 205081).

Motion for new trial granted. Court of Appeals reversed, holding that the defendant had not

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shown good cause for failure to raise the grounds for his motion on appeal or in a prior motion and actual prejudice pursuant to Court Rule.

(3) The following cases have significant constitutional issues:

National Advertising Co. v. Michigan State Transp. Comm'n., unpublished decision of the Wayne County Circuit Court, Marianne O. Battani, J., decided February 12, 1986 (Docket No. 84-435818-AA).

The court upheld the constitutionality of the Highway Beautification Program Act, 1966 PA 333 in this appeal from District Court. Appellant asserted the Act was violative of the single object limitation in the Michigan Constitution, 1963, Article 4, § 24. The court held that the Act had a primary object and any other objects aptly served to facilitate the primary object of the Act. Also, the court found that the statute was not void for vagueness and thus not violative of the 14th Amendment to the United States Constitution. The court found the Act to be sufficiently clear so as to afford the public notice of its provisions. Also, the Act did not violate the First Amendment, as commercial speech is subject to less protection and the act itself was a reasonable regulation that did not significantly impair appellant's First Amendment rights.

The Estate of Mary Angela Preston v. Sinai Hosp., unpublished decision of the Wayne County Circuit Court, Marianne O. Battani, J., decided June 12, 1998 (Docket No. 96-642951-NH).

The trial court considered the constitutionality of the section of Michigan's medical malpractice statute, MCL 600.1483, which mandates a cap on noneconomic damages in medical malpractice cases. The court determined that the section: 1) violates the Michigan Constitution 1963, Art 1, § 14, right to a jury trial; and, 2) violates plaintiffs' rights to equal protection and due process under the 14th Amendment to the US Constitution. Upon applying the strict scrutiny test, the court found that no compelling state interest was identified and there was no showing that the caps are precisely tailored to serve this interest. Upon applying the rational basis test, the court found that the statute was violative of equal protection because of the "extreme and essential arbitrariness" of the statute.

Wayne County Prosecutor v. Dep't of Corrections., unpublished decision of the Wayne County Circuit Court, Marianne O. Battani, J., decided November 24, 1998 (Docket No. 98-813465-PC).

The trial court considered the constitutionality of the parole guidelines statute, MCL 791.233e, and severability of §§ 45 and 46 of the Administrative Procedures Act. The court held that §§ 45 and 46 of the APA may be severed and the remaining portion of the statute may be enforced. The court further found that MCL 791.233e is not an unconstitutional delegation of legislative power. The court further found that the statute does not violate Michigan Constitution 1963, Article 3, § 2, the separation of powers clause.

Tamara Taylor v. Gate Pharmaceuticals., unpublished decision of the Wayne County Circuit Court, Marianne O. Battani, J., decided November 24, 1998 (Docket No. 97-731636-NP).

The trial court considered the constitutionality of MCL 600.2946(5), which provides that no drug manufacturer or seller will have tort liability if the drug in question has been approved by the

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FDA. The court found that the statute is an unconstitutional delegation of legislative authority to the FDA in violation of the Michigan Constitution 1963, Article 3, § 3, holding that the statute makes the decision of the FDA as to the safety and fitness of a particular drug binding on Michigan courts. The court further found that the statute did not burden plaintiff's right of access to the courts because the statute does not address the court's ability to review the merits of a drug related products liability claim and does not erect a procedural barrier that would otherwise preclude a plaintiff from having a court review the merits of a case. Finally, the court found that the statute does not violate plaintiffs' rights to equal protection and due process.

TCG Detroit v. City of Dearborn, unpublished decision of the Wayne County Circuit Court, Marianne O. Battani, J., decided March 8, 1999 (Docket No. 98-803937-CK).

The trial court considered the constitutionality of the Michigan Telecommunications Act, MCL 484.2251-2254. The court found that the statute does not violate Michigan Constitution 1963, Article 7, § 29, which provides that reasonable control of highways, streets, alleys, and public places is reserved to local units of government.

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;
 2. whether you practiced alone, and if so, the addresses and dates;
 3. the dates, name 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 in 1972, I did not clerk.

I worked for the Law Offices of Donald E. Gratrix, at 1617 Penobscot Building in Detroit, Michigan 48226. I was an associate attorney in this general practice firm of three attorneys. The firm is now located at 3280 Penobscot Building, Detroit, Michigan 48226.

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From 1974 until 1981, I was a sole practitioner. I shared office space with attorney Beverly Clark at 946 Penobscot Building, Detroit, Michigan 48226. We then moved within the same building to 1862 Penobscot Building. In 1980, we moved to 515 East Larned, Detroit 48226. Beverly J. Clark now has her office at 440 E. Congress, Detroit, Michigan 48226. At all times we maintained our individual practices.

In January, 1981, I left the practice of law and have continuously been a judge since that date.

- 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 1972 until fall of 1974, I was an associate in a general practice law firm doing family law, criminal defense assignments, automobile negligence litigation, and probate.

From 1974 until I took the bench in 1981, my practice consisted primarily of family law with a limited amount of criminal assignments and other miscellaneous matters. I primarily handled divorces, custody and support matters.

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

In my specialty of family law, my typical divorce client was a middle-class employed person with modest assets. Most frequently the client worked in the automobile industry and a modest house and pension were the only assets of value. The typical criminal client I represented was indigent and I was assigned by a Court to handle the defense.

- 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 on motions and evidentiary hearings, but infrequently for trials.

2. What percentage of these appearances was in:

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- (a) federal courts - (I tried one criminal case in district court.)
- (b) state courts of record - 99%
- (c) other courts - 1%

3. What percentage of your litigation was:

- (a) civil - 75%
- (b) criminal - 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.

I tried approximately 15 cases to verdict and I was the sole counsel.

5. What percentage of these trials was:

- (a) jury - 33%
- (b) non-jury - 67%

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 names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Although each of the cases I handled was significant to the parties involved, none were of particular legal significance. As indicated, the litigated cases were mostly small divorce cases in which the issue was child custody or distribution of limited assets. Since I became a judge in 1981, I have not represented any parties for nearly two decades. I do not have a recollection of client names, with the exceptions listed below, and I no longer have any client files. However, I do have some recollection of two cases, which are listed below. I am also providing a list of attorneys who are familiar with my work either as a judge or an attorney.

- 1) Flaherty v. Smith, 87 Mich. App. 561 (1978). I tried this case in

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1976 before visiting Wayne County Circuit Judge Christopher C. Brown. I represented the stepfather of the seven-year old child of his deceased wife. He had not adopted the child and the maternal grandmother sought custody. At trial, the Judge refused to interview the child to determine if he was able to express a preference about who he wanted to live with, and the court granted custody to the grandmother. I appealed, and the Michigan Court of Appeals reversed and remanded the case to a different judge, finding that it was a clear legal error for the court to refuse to interview the child. On remand, custody was awarded to the child's stepfather. My opposing counsel on both trial and appeal was Edward F. Bell, who is deceased.

2. I also recall one federal criminal case I handled in the mid-seventies, but I do not recall the name of the defendant or the facts. It was a jury trial before the Honorable Cornelia Kennedy, now in the Court of Appeals for the Sixth Circuit, 744 Federal Building, Detroit, Michigan 48226, (313) 234-5240. The attorney for the co-defendant was Barry Howard, now an Oakland County Circuit Judge at 1200 N. Telegraph, Pontiac, Michigan 48341, (248) 858-5284.

The following is a list of attorneys who are familiar with my work either as a judge or an attorney.

David Fink	31700 Middlebelt #150 Farmington Hills, MI 48334	(248) 851-4111
George Bashara, Jr.	500 Woodward Ave. #3500 Detroit, MI 48226	(313) 965-8513
Carole Chiamp	3610 Cadillac Tower Detroit, MI 48226	(313) 961-5660
Richard Kaufman	31700 Middlebelt #150 Farmington Hills, MI 48334	(248) 851-4111
Janet M. Tooley	2300 First National Bldg. Detroit, MI 48226	(313) 961-7363
John E. Scott	500 Woodward Ave. #4000 Detroit, MI 48226	(313) 223-3622
Adam Shakoor	615 Griswold Ste. 1800 Detroit, MI 48226	(313) 961-2720

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Thomas Lenga	500 Woodward Ave. #3500 Detroit, MI 48226	(313) 965-8666
Katherine Barnhart	36800 Woodward, #239 Bloomfield Hills, MI 48304	(248) 645-5900
Mark Sherbow	1200 N. Telegraph Road Annex II Pontiac, MI 48341	(810) 975-4447
Carol McNeilage	27200 Lahser #200 P.O. Box 2207 Southfield, MI 48037-2207	(248) 358-5180
Philip Reed	150 W Jefferson Detroit, MI 48226	(313) 237-5651
Peter Waldmeir	150 W Jefferson #2500 Detroit, MI 48226	313) 963-6420
Kathleen Bogas	1000 Farmer Detroit, MI 48226	(313) 496-9400
Lambro Niforos	640 Temple, 8 th Floor Detroit, MI 48201	(313) 833-2428
Carol Holmes	1301 W. Long Lake Rd. #250 Troy, MI 48098	(248) 641-3845
Barry Waldman	1000 Farmer Detroit, MI 48226	(313) 965-3465

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

The most significant legal activity I pursued was the development of the Individual Docket System in the Wayne County Circuit Court. My participation was as chief judge *pro tem* and member of the development committee. At the beginning of the project in 1985 the Court averaged 49,500 filings per year and the median time to trial was 43 months. There were approximately 17,000 pending cases which exceeded the two year American Bar Association time standard. We decided to convert from a hybrid central docketing system to a pure individual docket to be phased in over a five year period. I was one of the first judges to implement the system. By 1991, the docket was reduced to 1300 cases over the

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standard and the median time to trial in a civil case was 28 months. Today only 2% of the cases in the entire court exceed the standards. We have gained national recognition for our excellent docketing system.

The success of the project was a significant factor in my participation in the development of a course at the National Judicial College entitled "Effective Caseload Management." I team taught the course from 1992 to 1997. We taught judges and administrators from across the nation the principles of good case management.

I also consider my participation in the committee that developed the original Michigan Child Support Guidelines to be a very significant activity. Preliminarily, the committee was educated about principles of economics and the costs and needs of families. After much discussion, debate, citizen input, and consultation with mathematicians, we developed a grid for support which employs factors such as the income of each party, the number of children, and medical provisions. After ten years of use, the Guidelines have proven to be an excellent -although not perfect- method of determining and standardizing child support.

Another significant legal activity for me was my Supreme Court appointment to the Gender Bias Task Force in 1987 and the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and Legal Profession in 1998. The first project involved public hearings, consultant input, development of questionnaires for litigants, judges, and staff, interviews, and analysis. The output of the first Task Force was a report which outlined the areas of concerns to the bench, the bar and the public. It included numerous recommendations for change within our legal system. The second Task Force was a follow-up to ascertain which of the recommendations were implemented in the intervening ten years. I helped write the portion of both reports on family law.

Since 1992, I have been a member, currently the Chair, of the Judicial Tenure Commission and I consider this a very significant legal activity. The Commission has the function of investigating all grievances filed against state judges in Michigan. After investigation, the matter may be dismissed or, among other things, proceed to a formal hearing. If it is found that the judge has committed misconduct, the Commission recommends a sanction to the Michigan Supreme Court.

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II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I do not have any such financial arrangements except for the Deferred Compensation 401(k) and 457 Plans that I have through the State of Michigan and the defined benefit pension plans from the State and the County of Wayne for my state judicial services.

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

I do not expect any conflict of interest during my initial service as I have been on the bench for 19 years. If any of my financial holdings should, however, present a conflict in a particular case, I would immediately disclose this and divest myself of that asset. I would follow the guidelines and Code of Judicial Conduct.

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

No.

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

I am attaching the Financial Disclosure Form required by the Ethics in Government Act of 1978.

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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.

I was a candidate for judge in campaigns for the Wayne County Circuit Court in 1980, 1984, 1986, 1992, and 1998, and for the 36th District Court in 1982.

I have not been involved in any other political campaigns.

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NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. (As of 7/30/99)

ASSETS				LIABILITIES			
Cash on hand and in banks:				Notes payable to bank-secured			00
National Bank of Detroit	5	679	00				
Public Service Credit Union	1	760	00				
U.S. Government Securities			00	Notes to banks unsecured			00
Fidelity Ultra Service Account:							
Fidelity Cash Reserves	4	128	00				
Fidelity Fund	7	879	00				
Fidelity Puritan	6	940	00				
Listed securities-add schedule			00	Notes payable to relatives			00
Unlisted securities-add schedule			00	Notes payable to others			00
Accounts and notes receivable:			00	Accounts and bills due		900	00
Due from relatives and friends				Unpaid income tax			00
Due from others				Other unpaid tax and interest			00
Doubtful				Real estate mortgages payable-add schedule	121	513	00
Real estate owned-add schedule (market value of residence)	350	000	00	Chattel mortgages and other liens payable			00
Real estate mortgages receivable			00	Other debts-itemize:			
Autos			00	Home Equity Loan	24	500	00
Furniture, clothing, jewelry(est)	20	000	00				
Cash value-life insurance Mass Mutual	5	000	00				
Fidelity IRA brokerage account Schedule attached	106	769	00				
State 457 Deferred Comp Schedule attached	189	109	00				
State 401(K) Deferred Comp Schedule attached	63	137	00				
				Total liabilities	146	913	00
				Net Worth	613	488	00
Total Assets	760	401	00	Total liabilities and net worth	760	401	00

Marianne O. Battani

Assets of Minor Amanda Battani:				Liabilities of Minor Amanda Battani:			
American Century Select Fund UGMA	15	403	00	None			00
Walt Disney Stock, 49 shares	1	350	00				00
Total Assets of Minor Child	16	753	00	Total Liabilities and Net Worth of Minor Child	16	753	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			00	Are any assets pledged? (Add schedule)	No		
On leases or contracts			00	Are you defendant in any suits or legal actions?	No		
Legal Claims			00	Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax			00				
Other special debt			00				

Marianne O. Battani

Schedule of Holdings within Accounts

ACCOUNT	VALUE
Fidelity IRA Account	
Euro Disney Stock	\$656
Euro Disney Bonds	\$6
US Treas Secs	\$10,501
Fidelity Contrafund	\$39,713
Fidelity Equity Income II Fund	\$5,793
Fidelity Fund	\$5,852
Fidelity Magellan Fund	\$15,650
Fidelity Puritan Fund	\$5,848
Janus Fund	\$22,729
Fidelity Cash Reserves	\$21
Total	\$106,769
Deferred Compensation 457	
State Street Stable Value Fund	\$8,463
State Street S & P 500 Index Fund	\$44,439
State Street S & P Mid-Cap Fund	\$41,391
State Street Russell 2000 Fund	\$16,691
State Street Daily EAFE Fund	\$2,391
Aggressive Asset Allocation Fund	\$12,439
Dodge & Cox Stock Fund	\$3,364
Fidelity Magellan Fund	\$27,054
Putnam Voyager A Fund	\$1,897
PBHG Emerging Growth Fund	\$19,298
SSgA Small Cap Fund	\$1,685
Euro Pacific Growth Fund	\$2,596

Marianne O. Battani

Templeton Foreign I Fund	\$7,401	
Total		\$189,109

Deferred Compensation 401k

State Street S & P 500 Index Fund	\$15,267	
State Street S & P Mid-Cap Fund	\$10,522	
State Street Russell 2000 Fund	\$8,758	
State Street Daily EAFE Fund	\$1,497	
Moderate Asset Allocation Fund	\$6,099	
Aggressive Asset Allocation Fund	\$5,040	
Dodge & Cox Stock Fund	\$2,087	
Fidelity Magellan Fund	\$2,356	
PBHG Emerging Growth Fund	\$1,213	
SSgA Small Cap Fund	\$1,150	
Euro Pacific Growth Fund	\$1,614	
Templeton Foreign I Fund	\$7,534	
Total		\$63,137

Marianne O. Battani

Real Estate Schedule

Residence: Grosse Pointe Woods

Market Value:		\$350,000.00
Primary Mortgage Balance	\$121,513.00	
Home Equity Loan	<u>\$ 24,500.00</u>	
Total Debt		<u>\$146,013.00</u>
Net Equity		\$203,987.00

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Battani, Marianne O.		2. Court or Organization U.S. District Court-Eastern MI	3. Date of Report 08/05/1999
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Nominee, District Court Judge		5. Report Type (check type) X Nomination, Date 08/05/1999 Initial Annual Final	6. Reporting Period 01/01/1998 to 07/30/1999
7. Chambers or Office Address Wayne County Circuit Court 1421 City-County Building Detroit, Michigan 48226		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 _____	
<i>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>			

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Secretary/Trustee	Detroit College of Law at Michigan State University
2 Instructor, Motion Practice oral argument	Cooley Law School
3 Chair	Judicial Tenure Commission

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1982	State of Michigan Defined Benefit Pension
2 1982	County of Wayne Defined Benefit Pension
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 1997	Cooley Law School, compensation	\$ 900.00
2 1998	Cooley Law School, compensation	\$ 900.00
3 03/99	Cooley Law School, compensation	\$ 300.00
4 1997	Wayne County Circuit Court, gross wages	\$ 109,257.00

FINANCIAL DISCLOSURE REPORT Name of Person Reporting: Buttani, Marianne O. Date of Report: 08/05/1999

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
1	NONE exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
1	NONE exempt		
2			
3			

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
1	Bank of America	Home Equity Loan	K
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

Name of Person Reporting _____ Date of Report _____
 Battalio, Marianne V. 2/27/1999

FINANCIAL DISCLOSURE REPORT

SECTION HEADING. (Indicate part of report)
 Information continued from Parts I through VI, inclusive.
 PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	1998	Wayne County Circuit Court, gross wages	\$ 109,257.00
6	01/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
7	02/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
8	03/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
9	04/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
10	05/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
11	06/99	Wayne County Circuit Court, gross wages	\$ 9,545.00
12	07/99	Wayne County Circuit Court, gross wages	\$ 9,545.00

FINANCIAL DISCLOSURE REPORT Date of Report

VII. Page 1 INVESTMENTS and TRUSTS-- income, value, transactions (Includes those of spouse and dependent children. See pp 36-54 of Instructions.)

A Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <i>Place "(N)" 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 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 National Bank of Detroit	A	Interest	J	T	exempt				
2 Public Service Credit Union	A	Interest	J	T	exempt				
3 Fidelity Ultra Service Account:									
4 Fidelity Puritan	C	Dividend	J	T	exempt				
5 Fidelity Cash Reserves	A	Dividend	J	T	exempt				
6 Fidelity Fund	A	Dividend	J	T	exempt				
7 Fidelity IRA Account:									
8 Euro Disney stock		None	J	T	exempt				
9 Euro Disney bonds		None	J	T	exempt				
10 US Treas Secs		None	J	T	exempt				
11 Fidelity Contrafund		None	K	T	exempt				
12 Fidelity Equity Income II		None	J	T	exempt				
13 Fidelity Fund		None	J	T	exempt				
14 Fidelity Magellan Fund		None	K	T	exempt				
15 Fidelity Puritan		None	J	T	exempt				
16 Janus Fund		None	K	T	exempt				
17 Walt Disney Stock (DC)		None	J	T	exempt				

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting
Pattani, Marianne D.

Date of Report
08/05/2013

VII. Page 2 INVESTMENTS and TRUSTS-- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-34 of instructions.)*

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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.)									
18 American Century Select (DC)	B	Dividend	K	T					exempt
19 Deferred Compensation 457:									
20 State Street Stable Value		None	J	T					exempt
21 State Street S&P		None	K	T					exempt
22 State Street S&P Mid Cap		None	K	T					exempt
23 State Street Russell 2000		None	K	T					exempt
24 State Street Daily EAFE		None	J	T					exempt
25 Aggressive Asset Allocation		None	J	T					exempt
26 Dodge & Cox Stock Fund		None	J	T					exempt
27 Fidelity Magellan Fund		None	K	T					exempt
28 Putnam Voyager A Fund		None	J	T					exempt
29 PBHG Emerging Growth Fund		None	K	T					exempt
30 SSgA Small Cap Fund		None	J	T					exempt
31 Euro Pacific Growth Fund		None	J	T					exempt
32 Templeton Foreign Fund		None	J	T					exempt
33 Deferred Compensation 401K:									
34 State Stree S&P 500 Index		None	K	T					exempt
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 H2=\$5,000,001 or more E=\$15,001-\$50,000									
2 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 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000									
3 Val Mth Codes: 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: *Battani, Marianne* Date of Report: *12/31/99*

VII. Page 3 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions)*

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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) Claim Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
35 State Street S&P Mid Cap		None	J	T	exempt				
36 State Street Russell 2000		None	J	T	exempt				
37 State Street Daily EAFE		None	J	T	exempt				
38 Moderate Asset Allocation		None	J	T	exempt				
39 Aggressive Asset Allocation		None	J	T	exempt				
40 Dodge & Cox Stock Fund		None	J	T	exempt				
41 Fidelity Magellan Fund		None None	J	T	exempt				
42 PBHG Emerging Growth Fund		None None	J	T	exempt				
43 SSgA Small Cap		None	J	T	exempt				
44 Euro Pacific Growth Fund		None	J	T	exempt				
45 Templeton Foreign I Funds		None	J	T	exempt				
46									
47									
48									
49									
50									
51									

1 Ino/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 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 U=Book Value R=Cost (real estate only) V=Other S=Assessment W=Estimated T=Cash/Market (Col. C2)

Name of person reporting
FINANCIAL DISCLOSURE REPORT *Barbara M. Magistrate, Jr.*

Date of Report
08/25/1999

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

Name of Person Reporting Date of Report
FINANCIAL DISCLOSURE REPORT (FD-278) (Rev. 1-1-77)

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 Melvin C. Betten Date 8-05-99

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 as a pro bono lawyer prior to taking the bench in 1981, providing free legal counseling and no-cost divorces to indigent clients, as part of a program with the Detroit Bar Association. I averaged 2-3 hours per week on this activity. Approximately from 1978 to 1983, I became involved in a program for victims of domestic violence called Women-in-Transition. I spent about eight hours per week working with the group and helped establish a shelter for abused women and children.

I was founding chairperson of the new state bar Senior Justice Committee, which dealt with problems of the elderly in 1988. It has now become a section of the Bar. I spent many hours setting up the committee in the beginning and then leveled off to approximately four hours per month, 1988-1990.

As detailed in the answer to Section I, Question 19, I participated in the Gender Bias Task Force of the Michigan Supreme Court in 1987-1989, averaging 10 hours per month and also participated in the State Bar of Michigan Task Force in 1997-98 on which I spent approximately 50-60 hours.

As also detailed in the answer to Section I, Question 19 I participated in the development of the Child Support Guidelines in Michigan in 1987-1988 on which I spent approximately 175-200 hours.

I participate in student education programs by having young students into my court for either observation or participation in mini-trials averaging 10 hours per year.

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

I do not currently belong to such an association, nor have I in the past.

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

Marianne O. Battani

participated).

There is a Merit Selection Committee in Michigan which was formed by Senator Carl Levin for the purpose of making recommendations to him for the vacancies. In my situation, the Committee was to submit six names for consideration to fill two vacancies. I submitted my name after reading about the Committee in the Legal News. I received and completed a Merit Selection Questionnaire for the Committee's consideration. I was then scheduled for an interview before a subcommittee of approximately 15 attorneys and lay persons of diverse backgrounds. During the interview I was asked many penetrating questions about my background and my court procedures, but no one asked me any questions about how I would rule on a particular issue. I felt it was a very deliberative and thoughtful group.

It is my understanding that after the interviews were completed, the committee as a whole met and voted on the six names to be submitted. The day after the vote, I was notified by the Senator's office that my name was one of the six submitted and a personal interview was scheduled with the Senator. That interview took almost an hour and the Senator asked various questions about my background and the law. After approximately six weeks, his office scheduled another personal meeting at which time the Senator told me of his decision.

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, they have not.

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

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

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

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

Marianne O. Battan

- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

"Judicial activism," I believe, occurs when a judge disregards the role of the judiciary in our society. Judges should be ever mindful that their duty is to decide concrete controversies that come before them. In exercising that duty, the judge should rely on and apply the rule of law as formulated by the legislature or established *stare decisis*. The judge should not interpret the law to give effect to his or her own will, but rather the will of the legislature.

The judicial function is to determine the law in the controversy before the court. It is generally a task limited to a finite set of facts. The parties are before the court seeking resolution of their dispute and the jurist is to determine that resolution by applying the law to the facts presented.

Judges should dismiss cases that do not meet the jurisdictional requirements, including standing and ripeness. It is clearly not up to a court to expand its jurisdiction. Nor is it up to a court to expand its function to include administration and oversight activities. While a court may, for example, issue an injunction requiring a party to do or not do some activity, it must be cautious to grant only the relief necessary to resolve the grievance. Enforcement of such an order will then be limited to the narrow scope of the specific relief. Federal courts are courts of limited jurisdiction and must adhere to the limits in Article III of the Constitution and to the federal statutes.

In summary, I believe that the role of the courts is to decide cases according to the Constitution and established case law.

MARIANNE O. BATTANI

Birth: May 18, 1944 Detroit, Michigan

Legal Residence: Michigan

Marital Status: Single One child

Education: 1962 - 1966 University of Detroit
B.A. degree, *cum laude*

1968 - 1972 Detroit College of Law
J.D. degree, *cum laude*

Bar: 1972 Michigan

Experience: 1972 - 1974 Law Offices of Donald E. Gratrix
Associate Attorney

1974 - 1981 Law Office of Marianne O. Battani

1981 Common Pleas Court
City of Detroit
Judge

1981 - 1982 36th District Court
City of Detroit
Judge

1981 - present Wayne County Circuit Court
Judge

Office: 1421 City-County Building
Detroit, Michigan 48226

To be United States District Judge for the Eastern District of Michigan

LIST OF FAMILY AND FRIENDS INTRODUCED AT JUDICIARY COMM. HEARING

NOMINEE MARIANNE G. BATTANIDATE OF HEARING

1. MRS ZELINDA BATTANI, MOTHER
2. AMANDA BATTANI, DAUGHTER
3. MRS SUSAN KARWACKI, SISTER
4. MRS LINDA POWELL, SISTER } BOTH UNABLE
5. MRS BONNIE GRAY, SISTER } TO BE PRESENT
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.
- 16.
- 17.
- 18.
- 19.
- 20.
- 21.
- 22.
- 23.

**TESTIMONY OF DAVID M. LAWSON, OF MICHIGAN, TO BE U.S.
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN**

Mr. LAWSON. Mr. Chairman, thank you for chairing this meeting. It is an honor to be here. Likewise, I would like to thank Senator Levin and Senator Abraham for the support that they have shown. I would also like to acknowledge my family and friends that have traveled here at great expense to themselves to be supportive and it is a pleasure to be here.

[The biographical information and questionnaire of Mr. Lawson follows:]

UNITED STATES SENATE
Judiciary Committee

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**
David Michael Lawson

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

(Office) Clark Hill, P.L.C. 255 S. Woodward Ave., Third Floor Birmingham, Michigan 48009	(Residences) Troy, Michigan Pigeon (Caseville Township), Michigan
---	---

3. **Date and place of birth.**
January 11, 1951, Detroit, Michigan

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 Janet (Custance) Lawson on October 27, 1972. Ms. Lawson is the Director of Volunteer Services, United Way Community Services

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

Undergraduate:	Began September, 1969
	Graduated December, 1972
University of Notre Dame	Magna Cum Laude,
South Bend, Indiana	B.A., English
Law School:	Began September, 1973
	Graduated July, 1976
Wayne State University	Magna Cum Laude
Detroit, Michigan	Juris Doctor

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

1/73 - 6/75	Honorable John N. O'Brien Oakland County, Michigan Circuit Court	Law Clerk
6/75 - 3/76	C. Hugh Dohaney Oakland County, Michigan Treasurer	Investment Officer
3/76 - 4/77	Honorable James L. Ryan Michigan Supreme Court Lansing, Michigan	Law Clerk
4/77 - 5/85	Lawson & Lawson, P.C. Southfield, Michigan	Attorney -- General Practice/Litigation
5/85 - 4/94	Lizza, Mulcahy, Casey, and Lawson, P.C. Detroit, Michigan	Attorney/Partner -- Civil and criminal Defense and Commercial Litigation
4/94 - Present	Clark Hill P.L.C. (formerly Hill Lewis, P.C.)	Attorney/Member -- Civil and criminal Defense and Commercial Litigation
6/89 - Present	Criminal Defense Attorneys of Michigan	Member Board of Directors
7/95 - Present	Oakland County, Michigan Bar Association	Member of Board of Directors
9/97 - Present	Christian Brothers Institute of Michigan Brother Rice High School Bloomfield Hills, Michigan	Member of Board of Directors 9/98 - Current Vice-Chairperson of the 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.

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.

Undergraduate:	Graduated December, 1972
University of Notre Dame	Magna Cum Laude,
South Bend, Indiana	B.A., English
Law School:	Graduated 7/76
Wayne State University	Magna Cum Laude
Detroit, Michigan	Rank in Class:
	1st of 46
	Member -- Wayne Law Review

Awards:

Bronze Key Award for high academic achievement, year 1973-1974.

American Jurisprudence Award in Civil Procedure.

Bronze Key for high academic achievement, year 1974-1975.

Gold Key for high academic achievement, year 1975-1976.

West Publishing Company Book Award for highest scholastic average in class, 1975.

American Jurisprudence Award in Criminal Procedure.

West Publishing Company Book Award for highest scholastic average in class, 1976.

1995 *Thomas M. Cooley Law Review* Distinguished Brief Award, 1994-95 Michigan Supreme Court term.

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 the State Bar of Michigan, admitted to practice November 26, 1976.

Member of faculty of Michigan Judicial Institute.

Elected member of Michigan State Bar Representative Assembly for the Sixth Circuit, 1979-1986; 1998-present.

Member of State Bar Committee on Civil Procedure (Chairperson 1995 to 1997).

Past member of Supreme Court Committee on Rules of Criminal Procedure.

Past member of State Bar Committee on Revision of Criminal Procedure.

Past member of State Bar Committee on Standard Criminal Jury Instructions.

Member of the Michigan State Bar Task Force on Appellate Courts.

Member of the American Bar Association.

Member of the Oakland County Bar Association (Board of Directors 1995 to present).

Member of the Federal Bar Association.

Member of the Criminal Defense Attorneys of Michigan (Board of Directors 1989 to present).

Past chairman of Court of Appeals liaison committee for the Oakland County Bar Association.

Past chairman of the Circuit Court liaison committee of the Oakland County Bar Association.

Fellow, Oakland Bar Adams-Pratt Foundation.

Master of the Bench, American Inns of Court, Oakland County Chapter.

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.**

Cousteau Society, approximately 1986 - current

People for the American Way, 1991 - 1994

Amnesty International, approximately 1990 - current

Aircraft Owners and Pilots Association, 1994 - current

Past parish counsel president, Shrine of the Little Flower Catholic Church, Royal Oak, Michigan, 1985 - 1986

Past parish counsel president, St. Thomas More Catholic Church, Troy, Michigan, 1994 - 1995

University of Notre Dame Detroit Alumni Club, 1973 - current

Brother Rice High School Alumni Association, 1969 - current

Michigan Supreme Court Historical Society, 1996 - current

Beachwood Recreation Association (Private neighborhood swim and tennis club), 1993 - current

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 Michigan (all Michigan state courts), admitted to practice November 26, 1976.
 United States District Court, Eastern District of Michigan, September 22, 1977.
 United States Court of Appeals for Sixth Circuit, March 5, 1981.
 United States Court of Appeals for Eleventh Circuit, November 11, 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.

Lawson, David M., *Civil Procedure--Requirements regarding Utilization of Standard Jury Instructions*, Wayne Law Review, 22:3 (March 1976).

Lawson, David M., *Criminal Procedure--New Standards and Procedures for Accepting Guilty Pleas*, Wayne Law Review, 22:5 (September, 1976).

Nussbaumer, John R., and Lawson, David M., "Criminal Discovery," *Discovery Practice, A Guide for Michigan Lawyers* (Institute of Continuing Legal Education, 1986).

Lawson, David M., "Evidentiary Privileges," *Laches* (Oakland County Bar Ass'n, August, 1987).

Lawson, David M., "When Does the Appeal Begin?" *Laches* (Oakland County Bar Ass'n, July, 1988).

Lawson, David M., *Evidence, 1988 Annual Survey of Michigan Law*, Wayne Law Review, 35:2 (Winter, 1989).

Lawson, David M., "Attacks on the Character of the Accused: Rule 404(b)," *Criminal Defense Newsletter* 21:2 (November, 1997).

Lawson, David M., *Evidence, 1997 Annual Survey of Michigan Law*, Wayne Law Review, 44:2B (Summer, 1998).

Lawson, David M., *Evidence, 1998 Annual Survey of Michigan Law*, Wayne Law Review, ___:___ (Summer, 1999).

I have been involved extensively in continuing legal and judicial education and have written

and presented course materials at the following seminars:

Michigan 24th Annual Judicial Conference, "Michigan Rules of Evidence -- Confidential Communications," Sept. 1979, Lansing, Michigan.

Michigan Judicial Institute Evidence Residence Seminar, "Hearsay and Cross-Examination," May, 1981, Lansing, Michigan.

Michigan Judicial Institute New Judges Seminar, "Evidence," November, 1981, Lansing, Michigan.

Oakland County Bar Ass'n Educational Series, "Appellate Practice Seminar," Jan., 1982, Southfield, Michigan.

Michigan Judicial Institute Evidence II Seminar, "Hearsay and Character Evidence," September, 1982, Lansing, Michigan.

Oakland County Bar Ass'n Educational Series, "Criminal Law -- Appeals," October, 1982, Bloomfield Hills, Michigan.

Michigan Judicial Institute Evidence Residence Seminar, "Cross-examination and Impeachment," June, 1983, East Lansing, Michigan.

Michigan Judicial Institute Regional Judicial Seminars, "Privilege Pitfalls" Four Presentations, Feb. - May, 1984.

Michigan Judicial Institute Evidence Residence Seminar, "Hearsay and Relevance," May, 1984, Flint, Michigan.

Michigan Judicial Institute New Judges Seminar, "Evidence," January, 1985, Lansing, Michigan.

Michigan Judicial Institute Evidence Residence Seminar, "Impeachment and Collateral Evidence; Admissions," May, 1985, Lansing, Michigan.

Michigan Judicial Institute Regional Judicial Seminars, "New Michigan Court Rules -- Introductory Seminars," Six Presentations, Feb. - Aug., 1985.

Michigan Judicial Institute Evidence Residence Seminar, "Fundamentals of Evidence; Relevancy and its Limits," March, 1986, Lansing, Michigan.

Michigan Judicial Institute New Judges Seminar, "Evidence; Criminal Pretrial and Motions Procedure," Jan., 1987, Lansing, Michigan.

ICLE, "Michigan Appellate Practice: Making the System Work for You," Regional Presentation, 1987, Southfield, Michigan.

ICLE, "Introducing Evidence in Court," Two Presentations. 1988.

Michigan Judicial Institute Evidence Residence Seminar, "Expert and Opinion Testimony; Hearsay and its Exceptions," June, 1988, Lansing, Michigan.

Wayne County Clinical Advocacy Program, "Character and Impeachment Evidence," Fall, 1988, Detroit, Michigan.

Michigan Judicial Institute, Introductory Seminars, "New Rules of Criminal Procedure," Five Presentations, May - July, 1989.

Ingham County Bar Association, "The New Michigan Rules of Criminal Procedure," (with Judge Peter Houk and Barbara Levine, Esq.) September 5, 1989, Lansing, Michigan.

Detroit Bar Association, "The New Michigan Rules of Criminal Procedure," (with Timothy Baughman, Esq.) September 14, 1989, Detroit, Michigan.

Wayne County Clinical Advocacy Program, "The New Michigan Rules of Criminal Procedure," (with Justice Patricia Boyle) October 6, 1989, Detroit, Michigan.

Criminal Defense Attorneys of Michigan, "The New Michigan Rules of Criminal Procedure -- A Defense Perspective," November 3-4, 1989, Traverse City, Michigan.

Michigan Judicial Institute Regional Judicial Seminars, "Scientific, Opinion and Syndrome Evidence Issues." Four Presentations, January -June, 1990

Michigan Judicial Institute Regional Judicial Seminars, "Michigan Rules of Evidence -- Something Old, Something New, Something Borrowed . . ." (Recent Amendments), Four Presentations, January - June, 1991

Criminal Defense Attorneys of Michigan, "The Michigan Rules of Criminal Procedure -- Current Status," April 3-4, 1992, Southfield, Michigan.

Oakland County Bar Ass'n Educational Series, "Recent Changes in the Michigan Rules of Evidence," May, 1992, Bloomfield Township, Michigan.

Michigan Judicial Institute New Judges Seminar, "Evidence," January, 1993, Lansing, Michigan.

Michigan Judicial Institute Evidence Residence Seminar, "The Reliability of Scientific Evidence and the Role of the Judge," September 21-23, 1993, Lansing, Michigan.

Criminal Defense Attorneys of Michigan, "Evidence Topics -- The Character of the Accused," November 5-6, 1993, Traverse City, Michigan.

Michigan Defender Training Institute, "Insanity, Involuntary Intoxication, and Other Mental Capacity Defenses," March 11-12, 1994, Bay City, Michigan.

American Bar Association, Appellate Judges Conference, Appellate Judges Seminar Series, "The Law Relating to Scientific Evidence -- The Gatekeeper's Tools" July 24-28, 1994, Sun Valley, Idaho.

Criminal Defense Attorneys of Michigan, "Character, Similar Act and Rehabilitation Evidence," May 12, 1995, Southfield, Michigan.

Five State Judicial Conference, Education Series, "The Law Relating to Scientific Evidence," July 18-21, 1995, Rapid City, South Dakota.

National Association of Judicial Educators, "The Value of Continuing Judicial Education," October 11, 1995, Dearborn, Michigan.

Genesee County Friend of the Court Seminar Series, "Selected Topics in Evidence for Hearing Referees," April 26, 1996, Flint, Michigan.

Oakland County Circuit Bench Last Thursday Seminar Series, "The Law of Contempt," May 24, 1996, Oakland County Circuit Court, Pontiac, Michigan.

American Bar Association, Appellate Judges Conference, Appellate Judges Seminar Series, "The Law Relating to Scientific Evidence -- The Gatekeeper's Tools" July 21-24, 1996, Jackson Hole, Wyoming.

Oakland County Friend of the Court Seminar Series, "Selected Topics in Evidence for Hearing Referees," October 4, 1996, Pontiac, Michigan.

ICLE, "Evidentiary Foundations and Objections," Two Presentations, December, 1996.

Michigan Judicial Institute New Judges Seminar, "Evidence," January, 1997, Lansing, Michigan.

Michigan Judicial Institute Evidence Residence Seminar, "Cross-examination and Impeachment," February 18, 1997, Lansing, Michigan.

State Bar of Michigan, Family Law Section, "Evidence Issues in Divorce Cases," February 27, 1997, Bloomfield Hills, Michigan.

Criminal Defense Attorneys of Michigan, "Attacks on the Character of the Accused: Rule 404(b)," November 7, 1997, Traverse City, Michigan.

S.E.A.K. Inc., Seventh Annual National Expert Witness and Litigation Seminar, "Examination and Impeachment of Expert Witnesses, June 18-19, 1998, Hyannis, Massachusetts.

Criminal Defense Attorneys of Michigan, "Recent Developments in the Law of Evidence," November 7, 1998, Traverse City, Michigan.

Michigan Judicial Institute New Judges Seminar, "Evidence," January, 1999, Lansing, Michigan.

Michigan Judicial Institute Regional Judicial Seminars, "Michigan Rules of Evidence -- Recent Developments," Three Presentations, March - June, 1999

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

Excellent. I had a physical examination by my internist on February 4, 1999. I had a check-up by my cardiologist on February 23, 1999. I had my annual stress test on March 3, 1999. I also had an airman's physical to renew a second class medical certificate on March 19, 1999.

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;

1/73 - 6/75 (while in law school)	Honorable John N. O'Brien Oakland County, Michigan Circuit Court	Law Clerk
3/76 - 4/77	Honorable James L. Ryan Michigan Supreme Court Lansing, Michigan	Law Clerk

2. whether you practiced alone, and if so, the address 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;

4/94 - Present	Clark Hill P.L.C. 255 S. Old Woodward Ave. Third Floor Birmingham, MI 48009	Attorney/Member -- Civil and criminal Defense and Commercial Litigation
5/85 - 3/94	Lizza, Mulcahy, Casey, and Lawson, P.C. Detroit, Michigan (no longer operating)	Attorney/Partner -- Civil and criminal Defense and Commercial Litigation

4/77 - 4/85 Lawson & Lawson, P.C. Attorney --
 Southfield, Michigan General Practice/Litigation
 (no longer operating)

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

For the first five years after 1977, the primary concentration of my practice was criminal defense law, both trials and appeals, in state and federal court. My practice evolved over the years to include civil defense and plaintiff trial and appellate litigation with emphasis in medical malpractice and professional negligence, product liability, and general negligence. It also includes commercial transactions and litigation.

From June, 1978 to 1980, I served as Special Assistant Attorney General as a Special Prosecutor for Oakland County One-man Grand Jury.

From December 4, 1991 to March 30, 1993, I served as Special Livingston County Prosecuting Attorney, as part of my practice of law.

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

My current area of "specialization" is litigation. My clients include insurance companies and their insureds, automobile dealerships, criminal defendants, large and small corporations, lawyers, physicians and individuals.

- 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.

2. **What percentage of these appearances was in:**

- | | |
|-----------------------------|-------------------|
| (a) federal courts; | approximately 25% |
| (b) state courts of record; | approximately 70% |
| (c) other courts. | approximately 5% |

3. What percentage of your litigation was:

- | | |
|---------------|-----|
| (a) civil; | 80% |
| (b) criminal. | 20% |

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

I try approximately four to eight cases per year to verdict or judgment. I usually appear either alone or as lead 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 part 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:

- the date of representation;
- the name of the court and 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.

- Lincoln Mut. Cas. Co. v. Lectron Products, Inc.* U.S. District Court E. D. Mich. and U.S. Court of Appeals, 970 F.2d 206 (6th Cir. 1992). I represented the plaintiff insurance company which brought suit for reimbursement of benefits paid under the Michigan No-Fault Insurance Act in this case. Under a Michigan statute, no-fault insurance benefits should have been secondary to any other health benefits to which a covered person would have been entitled. The suit was originally filed by my then-partner, James H. Mulcahy, in the Wayne County, Michigan Circuit Court. I took over the case when the defendant removed the matter to the United States District Court for the Eastern District of Michigan, where it was assigned to the Honorable Gerald E. Rosen. Judge Rosen granted summary judgment of dismissal in favor of the defendant, which was an ERISA-regulated health benefits plan, in 1991. I filed an appeal in the United States Court of Appeals for the Sixth Circuit, which reversed and remanded the case to the district court. The opinion is reported at 970 F.2d 206 (6th

Cir. 1992), and was decided on July 29, 1992. After remand, the case was dismissed again on summary judgment by the district court, subsequently appealed, and ultimately settled. The case is significant because of the holding that, although ERISA preempts state law regulating the competing interests of an insurance company and an ERISA-regulated health benefit plan, once it is determined that state law does not govern the federal common law must be used to resolve the competing and inconsistent coordination of benefits clauses that are contained in two arguably-applicable contracts. I represented Lincoln Mutual Casualty Company, the plaintiff, in the district court and on appeal.

The defendant was represented by Margaret A. Lynch and Michael V. Kell, currently located at 300 East Maple, Suite 200, Birmingham, Michigan 48009, (248) 647-2333.

2. *Pantke v. Michigan Bell Telephone Company, et al.* Oakland County Circuit Court case number 92-430921-NI. I represented Michigan Bell Telephone Company and Genesee Underground Construction Company, defendants in this wrongful death case in which the plaintiff's decedent was killed in an automobile accident while making a left turn onto a through highway from a "T" intersection. The plaintiff's decedent's vehicle was hit by a car traveling at night at a high rate of speed with no headlights, while fleeing from the police. The telephone company had been excavating on the corner of the intersection, and the plaintiff claimed that the mound of dirt resulting from the excavation interfered with the vision of the motorists attempting to turn left onto the through highway. The plaintiff also claimed that the pursuing police officer was at fault in causing the accident. The case was tried to a jury in the Oakland County Circuit Court for 4-1/2 weeks, and the jury returned a verdict in favor of the defendants. The case is significant because it involved complex trial and pretrial litigation dealing with a wide variety of evidentiary topics including limitations and qualifications of expert witnesses; the admissibility of evidence of hedonic damages; expert testimony relating to physics, optics and accident reconstruction; and the use of computer-generated video graphics. I represented Michigan Bell Telephone Company and Genesee Underground Construction Company, two of the defendants in the case. The trial occurred in October and November, 1996.

The trial judge was Oakland County Circuit Court Judge John J. McDonald. The plaintiff was represented by G. Reynolds Sims, 1520 North Woodward, Suite 205, Bloomfield Hills, Michigan 48304, (248) 646-9740. The co-defendant (police department) was represented by James I. DeGrazia, 4111 Andover Road, Suite 300E, Bloomfield Hills, Michigan 48302, (248) 433-2000.

3. *People v. John Caulley.* Oakland County, Michigan Circuit Court and Michigan Court of Appeals, 197 Mich. App. 177, 494 N.W.2d 853 (1992), *lv. den.*, 442 Mich 885 (1993). The defendant in this case was charged in the Oakland County Circuit Court with first-degree murder in the shooting death of his wife. He interposed the defense

of insanity and claimed that his mental illness was exacerbated by the unanticipated side effects of the prescription drug, Halcion. He was convicted at his first trial when another lawyer represented him. I then represented Mr. Caulley in an appeal of his conviction of first-degree murder to the Michigan Court of Appeals, which reversed the conviction. I wrote the brief and conducted the oral argument. The Court held that the jury must be instructed on the defense of involuntary intoxication, which does not disqualify a criminal defendant from asserting the defense of insanity. The case was remanded for a new trial. I represented Mr. Caulley at the retrial, in which he was found not guilty by reason of insanity. The case was significant from an appellate standpoint because it developed the law pertaining to involuntary intoxication which can be a defense to both general and specific intent crimes. From a trial practice standpoint, the case is significant because the retrial involved a complex factual presentation dealing with the federal drug approval process, chemical and organic questions of cause and effect, and mental illness issues. It required the presentation of testimony by experts from across the United States and Europe. I represented the defendant on appeal and during the second trial as his sole counsel.

The Michigan Court of Appeals issued its opinion on December 7, 1992. The Court of Appeals judges were the Hon. David Sawyer, Michael Connor and A. G. Best, II. Opposing counsel in the Court of Appeals was Robert C. Williams, who is currently with the Oakland County Prosecutor's Office, 1200 North Telegraph Road, Pontiac, Michigan 48341, (248) 858-5230. The retrial was conducted in October, 1993 in the Oakland County Circuit Court. The judge was the Honorable Edward Sosnick. The prosecuting attorney was Charles H. Spiekerman, III, whose current address is 28 North Saginaw, Suite 1400, Pontiac, Michigan 48342, (248) 334-4544.

4. *Transamerica Ins. Co. of Michigan v. Safeco Ins. Co.* Oakland County, Michigan Circuit Court and Michigan Court of Appeals, 189 Mich. App. 55, 472 N.W.2d 5 (1991). This case involved a coverage dispute between two insurance companies, both of which issued policies to a company that installed urea-formaldehyde foam insulation. The insulation, after it was injected into the walls of residential homes, purportedly released gases that had a potentially adverse affect on those who inhaled it. As a result, a number of home owners sued the installer alleging personal injury and property damage. Safeco Insurance Company and Transamerica Insurance Company each had issued insurance policies in favor of the installer covering different periods of time. Transamerica initially defended the actions against the installer and incurred both indemnity and defense costs. Transamerica then filed a declaratory judgment action in the Oakland County Circuit Court contending that Safeco and other insurance carriers should be obliged for a pro-rata share of the liability and defenses costs paid by Transamerica on behalf of the installer. The parties filed cross-motions for summary judgment in the trial court, which granted the defendant's motion and dismissed the action. Transamerica appealed, and the Court of Appeals affirmed the trial court's decision which identified the applicable coverage periods under the

respective insurance policies, but remanded for further factual development. The case was decided on May 6, 1991. The case is significant because it decided a question of first impression in Michigan jurisprudence on the event which “triggered” coverage of an insurance policy in cases where a third party claimed exposure to a toxic substance. I represented the defendant, Safeco Insurance Company, in the trial court along with my then-partner, James H. Mulcahy. I represented Safeco Insurance Company in the Court of Appeals as the primary attorney on appeal.

The plaintiff was represented by Michael L. Updike, who is currently located at 30903 Northwestern Hwy., P.O. Box 3040, Farmington Hills, Michigan 48333-3040, (248) 851-9500. The trial judge was the Honorable David F. Breck of the Oakland County Circuit Court. The Court of Appeals panel consisted of the Honorable John H. Shepherd (now deceased), David H. Sawyer, and Gary R. McDonald.

5. *People v. Lonnie Waits*, Michigan Supreme Court, 417 Mich. 523, 339 N.W.2d 440 (1983). I represented a defendant in the case which involved an appeal to the Michigan Supreme Court concerning the appellate jurisdiction of the Michigan courts to review the length and severity of criminal sentences that were within statutory limits. The case is significant because it expanded the appellate jurisdiction of Michigan courts and overruled *Cummins v. People*, 42 Mich. 142; 3 N.W. 305 (1879), a precedent that was more than 100 years old. The decision in this case provided the impetus for a review of state sentencing practices, and ultimately the development of sentencing guidelines in the Michigan courts. The appeal consisted of the consolidation of three separate criminal cases. I represented Lonnie J. Waits, one of the criminal defendants. The case was decided by the Michigan Supreme Court on October 24, 1983 in a unanimous opinion written by the Honorable Michael F. Cavanagh.

The Genesee County prosecuting attorney was Donald A. Kuebler, whose current address is Genesee County Prosecutor’s Office, Appellate Division, 100 Courthouse, Flint, Michigan 48502, (810) 257-3248. The co-defendant was represented by F. Martin Tieber, whose current address is State Appellate Defender’s Office, 200 Washington Square North, Suite 340, Lansing, Michigan 48913-0001, (517) 334-8069.

6. *In the Matter of Scott Oster, D.O.* Michigan Department of Commerce, Bureau of Occupation and Professional Regulation, 1995-96. This case involved a complaint by the Department of Commerce, Bureau of Occupation and Professional Regulation, to the Disciplinary Subcommittee of the Board of Osteopathic Medicine alleging that Dr. Oster intentionally injected potassium chloride into a terminal patient in order to end her life. Dr. Oster denied that he had injected a lethal substance into the patient, and alleged that the patient’s death was the natural result of her pathology, which consisted of a cerebral aneurysm and atherosclerotic heart disease. After a lengthy hearing, Dr.

Oster was found innocent of all wrongdoing in a detailed written opinion by the Administrative Law Judge. The case is significant because it involved complex medical issues relating to brain death, medical ethics in the context of a physician's required response in resuscitating a terminal patient, and complicated medical issues relating to neurology, cardiology, electrophysiology and pathology. I represented Dr. Oster as trial counsel along with Kenneth R. Mogill and David L. Rogers. Trial occurred during several dates in September, October, November and December, 1995 and January, 1996.

The Administrative Law Judge was Edward F. Rodgers, located in Lansing, Michigan, who decided the case by a written opinion. The State was represented by Assistant Attorneys General Merry Rosenberg, and Phillip I. Frame, 525 West Ottawa Street, Suite 620, Lansing, Michigan 48913, (517) 373-1146. Co-counsel for Dr. Oster were Kenneth R. Mogill, One Kennedy Square Building, Suite 1930, 719 Griswold, Detroit, Michigan 48226, (313) 962-7210 and David L. Rogers, 1400 Woodward Avenue, Suite 101, Bloomfield Hills, Michigan 48304, (248) 642-4585.

7. *United States v. Ronald Ebens*. U.S. District Court E. D. Mich. and U.S. Court of Appeals, 800 F.2d 1422 (6th Cir. 1986). This case involved a notorious incident in which the defendant committed a homicide and was later charged under a federal criminal statute with violating the civil rights of Vincent Chin, a United States citizen of Chinese descent. Before I began representing Mr. Ebens, he pleaded guilty to manslaughter in the Wayne County Circuit Court and was sentenced to probation and given a fine. The perceived lenity of the penalty caused a public outrage, generated massive publicity, and ultimately resulted in a federal prosecution. The case was originally tried in the United States District Court for the Eastern District of Michigan in 1984, and Mr. Ebens was convicted, although his co-defendant, Michael Nitz, was acquitted. The conviction was appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the conviction on September 11, 1986 and remanded for a new trial. The second trial occurred in 1987 before the Eastern District of Michigan trial judge sitting in Cincinnati, Ohio, to where venue of the trial was changed. That trial resulted in an acquittal. The case was significant at both the trial and appellate levels because of the legal issues that were generated by the massive publicity, and because of the multiple evidentiary, constitutional (double jeopardy) and trial practice issues. The case was also complex and difficult due to the volatility and sensitivity of the underlying factual issues involving race, violence and discrimination. I represented Ronald Ebens along with co-counsel, Frank D. Eaman during the first and second federal trials and on appeal. The work was shared equally, including dividing our argument in the court of appeals.

The government was represented by Theodore Merritt, who at the time was employed by the United States Department of Justice, Civil Rights Division, and who, at last report, was working for the United States Attorney's office in Boston,

Massachusetts. The government was represented at the second trial by Floyd Clardy, who was also employed at the time by the Civil Rights Division, United States Department of Justice. My co-counsel on the case, with whom the tasks were equally divided at both trial and appeal, is Frank D. Eaman, 20480 Vernier, Harper Woods, Michigan 48225, (313) 882-1100. At the first trial, the co-defendant, Michael Nitz, was represented by Miriam L. Siefer. Chief Federal Defender, 2255 Penobscot Building, Detroit, Michigan 48226, (313) 961-4150 and Kenneth R. Sasse, Deputy Federal Defender, 653 S. Saginaw Street, Suite 105, Flint, Michigan 48502, (810) 232-3600. The trial judge for both the first and second trial was the Honorable Anna Diggs Taylor. The appellate judges in the Sixth Circuit Court of Appeals were the Hon. Albert J. Engel, Cornelia G. Kennedy, and H. Ted Milburn.

8. *Bruce Munsey v. National Steel Corporation*, U.S. District Court Eastern District of Michigan, Case No. 94-74814. I represented National Steel Corporation in this matter in which the plaintiff filed suit claiming injury resulting from an industrial accident that occurred at a steel production facility in Wayne County, Michigan. Plaintiff originally filed his case in the Wayne County Circuit Court, and we removed this matter to the United States District Court for the Eastern District of Michigan. The plaintiff, an employee of R & M Trucking Company, claimed that he was climbing into the back of his dump truck to loosen some coal which had frozen in the nose of the trailer. He alleged that as he was climbing over the edge of the dump truck, a front end loader driven by a National Steel employee collided with the truck, knocking the plaintiff into the bed where he sustained head, neck and back injuries. The defendant contended that there was no collision at all, but that the plaintiff fell into his truck because he lost his grip on a ladder which had become slippery due to freezing rain and other precipitation. I also filed a third-party complaint on behalf of National Steel against R & M Trucking based upon a contractual indemnity theory. The case went to trial before the Honorable Bernard A. Friedman in the United States District Court for the Eastern District of Michigan for approximately eight days in June, 1998. The jury returned a verdict in favor of the defendant. I then filed a motion on behalf of the defendant against R & M Trucking Company, the third-party defendant, and recovered the litigation costs pursuant to the indemnity contract. The case is significant because it involved an extensive and detailed investigation concerning the accident and its reconstruction, and involved interesting evidentiary issues, aerial photography, and extensive historical factual investigation concerning the plaintiff and his personal history.

The plaintiff was represented by Robert L. Blamer, who is currently located at 33900 Schoolcraft, Livonia, Michigan 48150, (313) 261-2400. The third-party defendant was represented by John Hayes, who is currently located at 600 S. Adams Road, Birmingham, MI 48009-6827, (248) 433-1414.

9. *United States v. Puglisi*. U.S. Court of Appeals for the Eleventh Circuit, 723 F.2d 779 (11th Cir. 1984). This case involved the appeal of the defendant's conviction for possession of a controlled substance within intent to distribute. The defendant was convicted following a bench trial in the United States District Court for the Northern District of Georgia, after the denial of his motion to suppress evidence which was based on the grounds of an illegal search and seizure. The defendant was arrested in April, 1982 at the Atlanta airport after he disembarked from a flight and while awaiting departure on a connecting flight. The defendant was selected for questioning by a Drug Enforcement Administration agent based upon a profile, and following questioning the defendant's bags were seized and segregated to a wait arrival of a drug detection dog. After some delay, the dog arrived and alerted to the bags which were then seized by the agent, taken to the courthouse, and searched after a search warrant was obtained. The United States Court of Appeals for the Eleventh Circuit reversed the conviction because it found that seizure and retention of the luggage for a period in excess of two hours while waiting for the drug detection dog to arrive transformed a limited seizure into an unlimited one and was unreasonable under the Fourth Amendment. The case was significant because it further developed the law relating to airport searches and seizures of passenger's luggage under standards set forth in *United States v. Place*, 462 U.S. 696 (1983), which was decided during the intervening period between the defendant's trial and appeal. The Court of Appeals decision was made on January 23, 1984.

The Court of Appeals panel consisted of Judges Tjoflat, Vance and Clark. Opposing counsel was Julie Carnes, then an Assistant United States Attorney in Atlanta, Georgia, and currently a United States District Judge for the Northern District of Georgia, 75 Spring Street, Atlanta, Ga. 30303, (404) 331-3736. I represented the defendant on appeal only.

10. *Bertrand v. Alan Ford, Inc.* Michigan Supreme Court, 449 Mich. 606, 537 N.W.2d 185 (1995). This was a premises liability case in which the plaintiff, Flora Bertrand, was injured when she stepped off a curb located inside a service department at an automobile dealership. Ms. Bertrand and her husband had brought their vehicle in for service, and were instructed to wait in the customer lounge. When the vehicle was ready, Ms. Bertrand was required to exit through a doorway, walk over a curb, and then walk back up the curb to the cashier window. When Ms. Bertrand went through the doorway, other customers were passing through the doorway as well, allegedly preventing Ms. Bertrand from having a clear view of the obstruction which she was required to traverse on her way to the cashier window. She fell and broke her hip. Ms. Bertrand brought suit in the Oakland County Circuit Court against the automobile dealership on a premises liability theory. The defendant filed a motion for summary judgment in the trial court based upon the theory that a land owner had no duty to warn a business invitee of a hazard which was "open and obvious." The trial court granted the motion. Ms. Bertrand appealed to the Michigan Court of Appeals, which entered

an order of peremptory reversal. The defendant then applied for leave to appeal, which was granted by the Michigan Supreme Court. The Michigan Supreme Court ultimately affirmed the decision of the Court of Appeals on August 15, 1995 and remanded the case to the trial court, where it was eventually settled. The case is significant because it developed and modified the law of premises liability with respect to business invitees and the "open and obvious" doctrine. It also clarified the distinction between the duty to warn, and the duty to inspect and eliminate hazards which is incumbent upon land owners *vis-a-vis* business invitees. I represented the plaintiff, Flora Bertrand, in the Court of Appeals and the Michigan Supreme Court, in which I wrote the brief and conducted the oral argument.

The plaintiff was represented in the trial court by David F. Girard, who is currently located at 1700 North Woodward, Suite 250, Bloomfield Hills, Michigan 48304-2249, (248) 540-3363. The defendant was represented in the trial court by John W. Bell, who is now deceased, and in the Court of Appeals and Supreme Court by Robert G. Waddell, who is currently located at 200 East Long Lake Road, Suite 110, Bloomfield Hills, Michigan 48304-2361, (248) 645-9400. The case was decided by the Michigan Supreme Court and the majority opinion was written by the Honorable Michael J. Cavanagh.

19. **Legal Associations:** 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 was a member of the Michigan Supreme Court Committee which drafted the Rules of Criminal Procedure that are used in the state courts of Michigan. I also served on the Michigan Standard Criminal Jury Instruction Committee. I have served for several years on the Michigan State Bar Standing Committee on Civil Procedure and was the chair from 1995 through 1997. The Committee reviews court rules which govern civil cases in Michigan courts, comments on proposed changes, makes recommendations for proposed changes, and makes recommendations on proposed legislation that impacts practice and procedure in Michigan courts.

I have been involved in a variety of Bar activities on both the state and local levels, and have been a member of the Board of Directors for the Oakland County Bar Association from 1995 through the present date. I have served on a variety of committees as well.

I have been involved extensively in continuing legal and judicial education and have written and presented course materials the seminars listed in response to question 12, above.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

- 1. List sources, amounts and dates of at 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 will sever my association with my law firm. I anticipate that I will receive my capital contribution within ninety days thereafter. I have also accrued benefits under the Clark Hill P.L.C. Basic Pension Plan, a tax qualified defined benefit pension plan. Benefits under this plan are generally payable at plan normal or early retirement age, although there are circumstances under which, depending on my status at separation from service with Clark Hill P.L.C., and spousal consent, I may be able to elect a lump sum distribution. I also am a participant in the Clark Hill P.L.C. Salary Deferral Plan, a tax qualified defined contribution plan (401(k)), and upon separation from service I may, but do not have to, elect a lump sum distribution of my account balance. I also participate in the Hill Lewis, P.C. Salary Deferral Plan a tax qualified defined contribution plan (401(k)), and upon separation from service I may, but do not have to, elect a lump sum distribution of my account balance. However, the Hill Lewis plan is being phased into the Clark Hill plan and the funds should all be transferred within the next ten months.

- 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 disclose potential conflicts of interest to litigants, and recuse myself in accordance with the applicable statutes, Code of Judicial Conduct and ethical interpretations. I will divest myself of any interest in my law firm (other than the retirement plans) and, for the prescribed period of time after appointment, recuse myself from cases in which a former member of the firm represents a party. I do not anticipate any other category of litigation will present a problem.

- 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.**

Although I have no present agreements or commitments, it is likely that I will pursue a teaching position as an adjunct faculty member at a Michigan law school.

- 4. List sources and amounts of at all income received during the calendar year preceding your nomination and for the current calendar year, including at 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 Form AO-10

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

See attached statement.

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

I participated in raising money for the unsuccessful campaign by Larry Owen in 1998 for the Democratic nomination for governor in Michigan.

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Lawson, David M.	2. Court or Organization U.S. District Court, E.D. Mich	3. Date of Report August 5, 1999
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - active	5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date <u>August 5, 1999</u> Initial Annual Final	6. Reporting Period January 1, 1998 to August 5, 1999
7. Chambers or Office Address 225 South Old Woodward Avenue Third Floor Sirmingham, MI 48009	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	Director	Oakland County Bar Association
2	Director	Brother Rice High School
3	Trustee	Janes P. Lawson Irrevocable Trust

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

	DATE	PARTIES AND TERMS
<input type="checkbox"/>	NONE (No reportable agreements)	
1	1999	Clark Hill P.L.C. Basic Pension Plan
2	1999	Clark Hill P.L.C. Salary Deferral Plan (401(k))
3	1999	Hill Lewis, P.C. Salary Deferral Plan (401(k))

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

	DATE	SOURCE AND TYPE	GROSS INCOME (years, not spouse's)
<input type="checkbox"/>	NONE (No reportable non-investment income)		
1	1997	Clark Hill P.L.C. -- law partnership distribution	\$ 134,496.00
2	1998	Clark Hill P.L.C. -- law partnership distribution	\$ 192,255.00
3	1999	Clark Hill P.L.C. -- partnership draws	\$ 75,000.00
4	1997	United Way Community Services (S) - wages	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Lawson, David M.	August 5, 1993

V. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1		
2		
3		
4		
5		
6		
7		

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/>	NONE (No such reportable gifts.)		
1			
2			
3			

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	New England Securities	Margin account balance	L
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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Lawson, David M.	Date of Report August 5, 1999
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(Includes those of spouse and dependent children. See pp. 36-34 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS-- income, value, transactions

A. Description of Assets <small>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.</small>	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 Detroit Edison Co. common stock	B	Dividend	J	T					
2 Boston Capital Fund Series DD	A	Interest	J	T					
3 Walt Disney Company common stock	A	Dividend	J	T					
4 New England Growth Fund Class A	E	Dividend	L	T					
5 New England Value Fund Class A	C	Dividend	K	T					
6 New England Growth Opportunities Fund	D	Dividend	X	T					
7 Certificates of Accrual Treasury Series X	A	None	J	T					
8 CNL Income Fund XIV Ltd.	A	Dividend	J	T					
9 Wells Real Estate Investment Fund VI	A	Dividend	J	T					
10 AIM Constellation Fund	A	Dividend	X	T					
11 Bond Fund of America	B	Dividend	K	T					
12 Evergreen Aggressive Growth Fund	C	Dividend	K	T					
13 Associates First Capital Corp CI-A	A	Dividend	J	T					
14 New England Star Worldwide Fund	A	None	X	T					
15 Washington Mutual Investors Fund	B	Dividend	K	T					
16 AT&T common stock	A	Dividend	J	T					
17 Ford Motor Company common stock	A	Dividend	J	T					

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
 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H=\$1,000,001-\$5,000,000 H2=\$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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Lawson, David M.	Date of Report August 5, 1999
	<i>(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)</i>	

VII Page 2 INVESTMENTS and TRUSTS— income, value, transactions

A Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(D)" 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)									
18 Lucent Technologies common stock	A	Dividend	J	T					
19 NCH Energy Corp. common stock	A	Dividend	J	T					
20 New Economy Fund	A	Dividend	J	T					
21 New Perspective Fund	A	Dividend	J	T					
22 T. Rowe Price International stock Fund	A	Dividend	K	T					
23 Fidelity VIP Overseas Fund	A	None	J	T					
24 Oppenheimer VA Global Securities	A	None	J	T					
25 ISI Total Return Treasury Fund (F7)	B	Dividend	J	T					
26 Invesco Industrial Income Fund (Custodian)	B	Dividend	L	T					
27 Invesco Industrial Income Fund	A	Dividend	J	T					
28 Kemper Money Market Fund	A	Interest	J	T					
29 NCR Corp common stock	A	Distribut- ion	J	T					
30									
31									
32									
33									
34									
1 Inco/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 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$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, D1) 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
	Lowson, David M.	August 5, 1995

III. ADDITIONAL INFORMATION OR EXPLANATIONS.*(Indicate part of report)*

Clark Hill P.L.C. is a limited professional liability company. Upon departure from the firm, I will receive my capital contribution within 90 days and will have no further interest in the income of the firm.

I have accrued benefits in the Clark Hill P.L.C. Basic Pension Plan, a tax qualified defined benefit pension plan. Benefits under this plan are generally payable at plan normal or early retirement age, although there are circumstances under which, depending on my status at separation from service with Clark Hill P.L.C., and spousal consent, I may be able to elect a lump sum distribution.

I have accrued benefits in the Clark Hill P.L.C. Salary Deferral Plan, a tax qualified defined contribution (401(k)) plan.

I have accrued benefits in the Hill Lewis, P.C. Salary Deferral Plan, a tax qualified defined contribution (401(k)) plan.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Lawson, David M.	August 5, 1999

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	Custodian	Daniel Lawson INVESCO Account
5	Custodian	Ryan Lawson INVESCO account
6	Custodian	Kyle Lawson INVESCO Account
7	Custodian	Kathryn Dixon INVESCO Account
8	Custodian	Matthew Dixon INVESCO Account
9	Custodian	Jamie Lawson INVESCO Account
10	Custodian	Jacob Lawson INVESCO Account
11	Custodian	Aaron Lawson INVESCO Account

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	1998	United Way Community Services (S) Wages \$	0.00
6	1998	Kalamazoo College (DC) -- wages \$	0.00
7	1998	National Conference on Community and Justice (DC) -- wages \$	0.00
8	1998	Michigan Technological University (DC) -- wages \$	0.00
9	1998	United States Coast Guard (DC) -- wages \$	0.00
10	1997	Kalamazoo College (DC) wages \$	0.00
11	1997	Michigan Technological University (DC) -- wages \$	0.00
12	1999	United Way Community Services (S) -- wages \$	0.00


FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Lawson, David M.	August 5, 1999

CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 August 5, 1999

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. 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

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	16,500	Notes payable to banks-secured	-0-
U.S. Government securities-add schedule <i>Schedule A</i>	20,480	Notes payable to banks-unsecured	55,668
Listed securities-add schedule <i>Schedule B</i>	467,847	Notes payable to relatives	130,000
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 tax and interest	-0-
Doubtful	-0-	Real estate mortgages payable-add schedule <i>Schedule D</i>	240,192
Real estate owned-add schedule <i>Schedule C</i>	550,000	Chattel mortgages and other liens payable	11,682
Real estate mortgages receivable	-0-	Other debts-itemize:	
Autos and other personal property	72,000		
Cash value-life insurance	-0-		
Other assets -itemize:			
<i>Clark Hill capital account</i>	43,100		
		Total liabilities	365,542
		Net Worth	\$804,385
Total Assets	\$1,169,927	Total liabilities and net worth	\$1,169,927
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		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	45,000		
Other special debt	-		

UNITED STATES SENATE
Judiciary Committee

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

Schedules

Schedule A -- Government securities

I have the following investments held by the David Lawson IRA:
Certificates of Accrual Treasury Series X 15,000 units \$ 11,085

The following investments are held by the Janet Lawson IRA:
Certificates of Accrual Treasury Series X 5,000 units 3,695

My children have the following Series EE U.S. Savings Bonds
Daniel 1,700
Ryan 1,900
Kyle 2,100

The following investments are held by my son, Daniel Lawson:
ISI Total Return U.S. Treasury Fund 1,075

The following investments are held by my son, Ryan Lawson:
ISI Total Return U.S. Treasury Fund 1,286

The following investments are held by my son, Kyle Lawson:
ISI Total Return U.S. Treasury Fund 2,977

Schedule B -- Listed securities

Detroit Edison Company common stock	285 shares	11,614
Boston Capital Fund Series 30	1,000 units	10,000
Walt Disney Company	120 shares	3,810
New England Growth Fund Class A	7877.905 shares	90,517
New England Value Fund Class A	2997.157 shares	30,031
New England Growth and Income Fund	1686.679 shares	30,141

I have the following investments held by the David Lawson IRA:
CNL Income Fund XIV Ltd. 500 units 5,240

357

Wells Real Estate Fund VI	500 units	5,000
AIM Constellation Fund	1,306.4670 shares	39,351
Bond Fund of America	921.1660 shares	12,390
Evergreen Aggressive Growth Fund	1,596.9060 shares	41,727
New England Growth Fund A	2,326.8810 shares	26,829
New England Star Worldwide Fund A	1,421.6400 shares	24,310
Washington Mutual Investors Fund	731.7080 shares	24,029
Associates First Capital Corp Cl-A	104.000 shares	4,680
AT&T common	100 shares	7,981
Ford Motor Company common	200 shares	11,337
Lucent Technologies common	64 shares	6,912
MCN Energy Corp common	400 shares	6,425

The following investments are held by the Janet Lawson IRA:

Bond Fund of America	376.5870 shares	5,065
New Economy Fund	240.7730 shares	5,706
New Perspective Fund	238.4070 shares	5,798

The following investment is held in my Clark Hill 401(k) plan by the T. Rowe Price Company:

International Stock Fund	1,829.154 shares	29,836
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The following investment is held in my Hill Lewis Salary Deferred (401(k)) Plan:

Fidelity VIP Overseas Fund	201.04013 shares	4,182
Oppenheimer VA Global Securities	258.92326 shares	4,823

The following investments are held by my son, Daniel Lawson:

Invesco Industrial Income Fund	457.741 shares	7,054
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The following investments are held by my son, Ryan Lawson:

Invesco Industrial Income Fund	364.688 shares	5,620
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The following investments are held by my son, Kyle Lawson:

Invesco Industrial Income Fund	372.542 shares	5,741
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Schedule C -- real estate

Home at Troy, MI	\$300,000
Home at Pigeon (Caseville Township), MI	250,000
Disney Vacation Club Property	12,000

Schedule D -- real estate mortgages

Home mortgage balance at Troy, Michigan owed to First Federal of Michigan	240,192
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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.**

Early in my career, I spent a great amount of time representing indigent criminal defendants and was paid very small amounts far below reasonable rates. I represented Jane Thurston, a public defender, *pro bono*, who was charged with contempt by the Michigan Court of Appeals in 1996. Her conviction was reversed by the Michigan Supreme Court in 1997. I participated in South Oakland Shelter program during various years from 1986 through 1997. I serve as a volunteer board member of Brother Rice High School. I participated in fund-raising activity for Coalition on Temporary Shelter (COTS) and the Michigan Humane Society. I coached youth basketball in the Troy Parks and Recreation league from approximately 1986 through 1996. I coached youth soccer in the Troy Youth Soccer League from approximately 1996 through 1998. I participated in Annual Detroit "Paint the Town" weekend in 1998, which is a program in the City of Detroit to paint houses belonging to the elderly, infirm or economically disadvantaged.

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?**

No.

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

Yes. I wrote a letter in October, 1998 to Senator Carl Levin asking him to consider me as a nominee. Senator Levin forwarded the names of all those who expressed interest to Robert Segar, Esquire, an attorney who agreed to chair a citizens merit selection committee. The committee issued a press release announcing its work and setting deadlines to submit formal applications. I submitted a formal application to the committee. The committee consisted of 42 members who, I assume, were appointed by Senator Levin. The committee divided itself into three subcommittees, each of which conducted background investigations and personal

interviews on a portion of the 59 applicants who filed formal applications. The entire committee then met to consider the recommendations of the three subcommittees, and selected six finalists, of which I was one, to recommend to Senator Levin. Senator Levin then conducted personal interviews with each of the six finalists, and then chose two individuals (I was one of them) to recommend to the President to fill the two vacancies. Since then, I have also been interviewed by employees of the Department of Justice and the Federal Bureau of Investigation and a representative of 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.

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 United States District Judge must always be mindful of the extent and limits of his/her authority. Federal district judges are governed first and foremost by the United States Constitution and the laws enacted pursuant thereto. In addition to Acts

of Congress, trial judges are governed by the rules of the Supreme Court and decisional law from that court and the applicable Circuit Court of Appeals.

Inherent in the Constitution are the twin concepts of federalism and the separation of powers. Judicial activism has the potential to corrupt the balance crafted by the framers between the power and authority of federal and state governments, and the separate branches of the federal government. When the judiciary arrogates to itself the legislative or executive functions, it destroys the balance of authority among the three branches of government and jeopardizes the principle of majority rule that is essential to representative government.

DAVID M. LAWSON

Birth:	January 11, 1951	Detroit, Michigan
Legal Residence:	Michigan	
Marital Status:	Married	Janet L. Lawson Three children
Education:	1969 - 1972	University of Notre Dame B.A. degree
	1973 - 1976	Wayne State University J.D. degree, magna cum laude
Bar:	1976	Michigan
Experience:	1976 - 1977	Law Clerk to the Hon. James Ryan Michigan Supreme Court
	1977 - 1985	Lawson & Lawson, P.C. Partner
	1978 - 1980	Oakland County One-Man Grand Jury Special Assistant Attorney General And Special Prosecutor
	1985 - 1994	Lizza, Mulcahy, Casey and Lawson Partner
	1991 - 1993	Special Livingston County Prosecuting Attorney
	1994 - present	Clark Hill P.L.C. Member
Office:	255 S. Woodward Avenue, Third Floor Birmingham, Michigan 48009	

To be United States District Judge for the Eastern District of Michigan

LIST OF FAMILY AND FRIENDS INTRODUCED AT JUDICIARY COMM. HEARING

NOMINEE DAVID MICHAEL LAWSONDATE OF HEARING March 23, 2000

1. Janet Lawson - spouse
2. Daniel Lawson - son
3. Lisa Lawson - daughter-in-law
4. Ryan Lawson - son
5. Kyle Lawson - son
6. Dorothy Lawson - mother
7. James Lawson - father (absent due to illness)
8. Mary Dixon - sister
9. Kathryn Dixon - Niece
10. Matthew Dixon - ~~Niece~~ Nephew
11. Douglas Denton - friend
12. Gretchen Denton - friend
13. Ellen Burns - step-sister-in-law
14. Laura Kerby - friend
15. Kerry Kerby - friend
16. Elin Warr - friend
- 17.
- 18.
- 19.
- 20.
- 21.
- 22.
- 23.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Mr. Tallman, in our tripartite system of government, the Congress under the Constitution makes the law. The President as the chief executive enforces the law. The judiciary interprets the law. Some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Mr. TALLMAN. Mr. Chairman, I agree with your characterization of the separation of powers. I believe that judges should abide by their constitutional obligation to interpret, not make law.

Senator THURMOND. I am glad you agree with me.

Mr. TALLMAN. Yes, sir.

Senator THURMOND. Mr. Tallman, there has been much controversy about judges overturning the will of the people through voter initiatives in California, such as Proposition 209. Should judges show deference to the voters when reviewing the constitutionality of voter initiatives?

Mr. TALLMAN. Mr. Chairman, I believe that the courts have an obligation to give the same deference to voter initiatives as we are obligated to do to statutes enacted by Congress, and that is that they are presumed to be valid unless shown to be against the Constitution.

Senator THURMOND. Mr. Lawson, you have considerable experience in criminal defense work and you are a member of the Board of Directors for the Criminal Defense Attorneys of Michigan. Can you assure us that as a judge you can be fair and impartial in criminal matters that come before your court?

Mr. LAWSON. Mr. Chairman, yes, sir, I can assure the committee and the Senate that that would be the case. I think I am well aware of the difference and the critical distinction between a role of advocacy and that of the role of a judge and I look forward to embracing that role.

Senator THURMOND. Judge Battani, in 1998 in the case of *Estate of Mary Angela Preston v. Sinai Hospital*, you held that a Michigan statute capping pain and suffering damages in medical malpractice cases was unconstitutional under the Michigan Constitution and under the U.S. Constitution. Please explain your reasoning in that case.

Judge BATTANI. Yes, Senator, I would be glad to explain my reasoning. In the case of *Preston v. Sinai Hospital*, I dealt with this very difficult issue, and as I have in thousands of other cases in the last 20 years, I had made every effort to look at judicial precedent in making my determination. In fact, we start with the assumption that the statute is constitutional. Then in looking for precedent, I find that in the State of Michigan under State law, under State law and State Constitution, the right to jury trial is presumed a fundamental right, and our court has held that this fundamental right extends to damages. So in analyzing a fundamental right such as this, I was, under precedence, required to use the strict scrutiny rule, and as you know, the strict scrutiny rule is a very rigorous rule for a statute to undergo.

I also looked at other jurisdictions' precedents because Michigan had no appellate holding in this area, and I found that in our

neighboring State of Illinois, their highest court found that caps on non-economic damages could not apply. And in using that precedence, along with the precedence in the State of Michigan, I very reluctantly held that portion of the statute unconstitutional. I did, in working with the attorneys, resolve the matter and it was settled and my opinion was never appealed.

Senator THURMOND. Judge Battani, in that case, *Mary Angela Preston v. Sinai Hospital*, you reasoned that limiting the size of awards for pain and suffering in medical malpractice cases was unconstitutional. Could your reasoning in this case be applied to strike down other statutes that limit damages, such as workers' compensation laws?

Judge BATTANI. No, Senator. My reasoning has to be applied on an individual case basis. On each law, a judge is obligated to look at the precedence and apply that precedence and to look at even other jurisdictions' law. So I do not see that as happening.

Senator THURMOND. Judge Antoon, sometimes the legislature fails to act on various public policy matters. What role, if any, do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Judge ANTOON. Mr. Chairman, I do not believe that it is the role of a trial judge to set policy or to legislate from the bench. I believe that the role of the judge is to decide cases, those cases which are properly before the court.

Senator THURMOND. Now I have questions for all the nominees. I will ask the question and then start with you and go down the line. Do any of you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Mr. TALLMAN. Senator, I do not.

Judge ANTOON. Mr. Chairman, I have dealt with the death penalty in the past and I have no—there is nothing in my background that would interfere with my ability to fairly apply the law.

Judge BATTANI. Senator, I have no objections.

Mr. LAWSON. Likewise, Senator, I have no objections.

Senator THURMOND. The next question, what is your view on mandatory minimum criminal sentences and would you have any reluctance to impose them as a judge?

Mr. TALLMAN. Senator, the Congress made it clear that it was seeking to achieve consistency in sentencing. The Supreme Court has upheld the sentencing guidelines and I will follow them.

Judge ANTOON. I have followed the Florida sentencing guidelines for a long time. I believe that my rulings have been consistent with those guidelines, and they include mandatory minimum sentencing. I would follow those guidelines. I think that is a prerogative of Congress, to establish guidelines, and it is an obligation of the court to follow them.

Judge BATTANI. Senator, as a State judge, I have followed sentencing guidelines, and our sentencing guidelines where they include mandatory minimums, I have followed this and I have no difficulty with this.

Mr. LAWSON. Mr. Chairman, mandatory minimum sentences are ordained by Congress, and as such, it is the duty of the trial judge to follow that prescription and I would do so.

Senator THURMOND. As you know, the sentencing of criminal defendants in Federal court is conducted under the Federal sentencing guidelines. Some argue that the guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal sentencing guidelines and their application?

Mr. TALLMAN. Senator, as I have previously stated, the Supreme Court has determined they are constitutional and I would be obligated to abide by them.

Judge ANTOON. Mr. Chairman, as was stated earlier, I think by Mr. Lawson, the sentencing guidelines are the prerogative of Congress and it is the obligation of judges to apply them.

Judge BATTANI. Mr. Chairman, my answer would be the same as the other two. It is the obligation of the Congress to make these rules and I have no difficulty following them, just as I have followed the Michigan sentencing guidelines for many years now.

Mr. LAWSON. Mr. Chairman, I agree with my colleagues on the panel and I would abide by the sentencing guidelines.

Senator THURMOND. It is my view that judges should have judicial temperament. The more power an individual has, the more courteous he or she should be. Probably no one in our society has more power over the lives of individuals than a Federal judge, so it is especially important that someone in this role be courteous and civil. Do you agree?

Mr. TALLMAN. Absolutely, Senator.

Judge ANTOON. I strongly agree, Mr. Chairman.

Judge BATTANI. I strongly agree, also, sir.

Mr. LAWSON. Likewise, Mr. Chairman, I believe judicial temperament is an essential quality for a member of the trial bench.

Senator THURMOND. Now this question. What do you believe was the most significant Supreme Court decision in the past 30 years and why?

Mr. TALLMAN. Mr. Chairman, I would have to say that in the field that I practice in, primarily criminal law, it would have to be either *Miranda v. Arizona* or *Gideon v. Wainwright*, which *Gideon*, of course, gave the accused the right to appointed counsel in serious criminal cases to ensure that their sixth amendment rights were respected.

Judge ANTOON. I would agree, Mr. Chairman, that those are significant cases. I also believe that the *Daubert* decision involving the trial court's obligation with regard to evidentiary issues is extremely significant.

Judge BATTANI. Mr. Chairman, I would agree that the cases cited are very significant. As a trial judge, I find that the *Daubert* case has been probably the most significant to me as it establishes the gatekeeping function of the judge.

Mr. LAWSON. Likewise, Mr. Chairman, in my role of teaching judges in the Michigan Judicial Institute, particularly in the field of evidence, we have found that the *Daubert* and the *Kuhmo Tire v. Carmichael* cases dealing with the province of the court in dealing with experts and filtering evidence which is valid and excluding

junk science evidence are significant cases in promoting civil litigation.

Senator THURMOND. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific measures do you intend to implement to encourage the speediest resolution of your cases?

Mr. TALLMAN. Senator, I will work hard. I will try to employ alternative dispute resolution mechanisms. The Ninth Circuit actually has a trial project involving a settlement commissioner and we have been able to settle about ten percent of our cases on appeal that way.

Judge ANTOON. Mr. Chairman, I have not had experience in the Federal system as a judge, but I understand that in the Middle District of Florida, there is a fairly aggressive arbitration and mediation program that is working. In addition to that, my experience in the trial court at the State level led me to believe that the best way of docket control is a hands-on approach by the trial court, establishing a firm trial date and affording the attorneys set times to resolve undisputed motions leading up to the trial.

Judge BATTANI. Mr. Chairman, I would implement the same trial docket management concepts that I have implemented in Wayne County Circuit Court and that I also teach at the National Judicial College. I find that, first and foremost, the judge controls the docket, and when one sets a trial date, there has to be a certainty of that trial date. I would plan to follow that practice. It has reduced Wayne County backlog from 17,000 cases over standard to a little over 200, and I would hope it would work in the Federal system, also.

Mr. LAWSON. Likewise, Mr. Chairman, Judge Battani's record is very impressive and I think that to follow her method would be an excellent step.

Senator THURMOND. I would like to thank all the nominees for being here today. I ask that any follow-up questions be submitted to the committee by close of business on Monday. Thank you.

Mr. TALLMAN. Thank you, Mr. Chairman.

Judge ANTOON. Thank you, Mr. Chairman.

Judge BATTANI. Thank you, Mr. Chairman.

Mr. LAWSON. Thank you, Mr. Chairman.

Senator THURMOND. The committee is adjourned.

[Whereupon, at 4:02 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF RICHARD C. TALLMAN TO QUESTIONS FROM SENATOR BOB SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a constitutional issue, should that individual be confirmed?

Answer. The qualifications of a nominee should be determined on the basis of all of the information available to the Senate and its Members. With respect to constitutional issues, a candidate for judicial office is ethically restrained from stating what he or she might do in the future in addressing a particular constitutional issue.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The Constitution requires the “advice and consent” of the Senate and hearings are one way to assist the Senate in evaluating the President’s nominees by serving as a public forum to examine the qualifications of a nominee and his or her suitability for holding judicial office.

Question 3. What questions are legitimate to ask a candidate without the candidate prejudicing himself or herself?

Answer. I believe that each Senator may decide whatever questions he or she wishes to pose to each candidate. Examples of appropriate questions certainly include those contained in the Senate Judiciary Committee’s Questionnaire for Judicial Nominees respecting education, judicial temperament, experience, integrity, and anything in a candidate’s background or financial affairs that might identify a potential for conflict of interest, susceptibility to blackmail, or lack of impartiality.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. A Senator may ask any question he or she wishes. Judicial nominees are limited by judicial ethical considerations from answering any question in a manner that would call for an “advisory opinion” as the courts have defined it or that in effect ask a nominee to suggest how he or she would rule on an issue that could foreseeably require his or her attention in a future case or controversy after confirmation.

Question 5. If a U.S. District Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or herself?

Answer. No. Judges are obligated by the Constitution as members of an independent branch of government to follow Supreme Court precedent despite any personal opinions they may hold to the contrary on a particular issue.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393?

Answer. It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and the supporting legal authorities that were applicable at that time. I note that the Thirteenth Amendment to the Constitution effectively overturned the *Dred Scott* decision when the amendment was ratified in 1865.

Question 7. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The Thirteenth Amendment superseded this case.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

Answer. Yes, had I been a United States Circuit Judge serving at that time.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer. It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and supporting legal authorities that were applicable at that time. I note that the *Plessy* is no longer good law. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), repudiated the holding in *Plessy*.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. It is my understanding that *Plessy v. Ferguson* has in effect been overruled by the Supreme Court in *Brown v. Board of Education* 347 U.S. 483 (1954), and by the subsequent enactment of the Civil Rights Act of 1964. Accordingly, that precedent should not be treated as good law by courts today.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education* 347 U.S. 483 (1954)?

Answer. It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and the supporting legal authorities that were applicable at that time. I note that *Brown v. Board of Education* 347 U.S. 483 (1954), remains good law to this day.

Question 12. In *Brown v. Board of Education* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. As previously noted, *Brown v. Board of Education* remains good law today. If confirmed, I will be obligated to follow Supreme Court precedent.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer. It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and the supporting legal authorities that were applicable at that time. I note that the Supreme Court has since modified *Roe v. Wade*, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. If I am confirmed as a United States Circuit Judge, I will be obligated to follow Supreme Court precedent despite any personal opinions I may hold. I note that *Roe v. Wade*, has since been modified by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I hold no personal views that would prevent me from doing my judicial duty to follow the precedent set down by the Supreme Court in *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), if applicable to the facts in some future case or controversy.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The legislatures of many states, and the Congress in its considered judgment, have determined the need for a death penalty and when it should be administered. The Supreme Court has held that, properly administered, the death penalty does not violate the Eighth Amendment prohibition on "cruel and unusual" punishment. I hold no personal views that would prevent me from following the precedent established by the Supreme Court.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. I hold no personal views that would prevent me from following the plain language of the Second Amendment and the precedent established by the Supreme Court in such cases as *United States v. Miller*, 307 U.S. 174 (1939).

Question 18. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government Interest in preserving life must be balanced against a mother's right to privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. If I am fortunate enough to be confirmed as a United States Circuit Judge, I will be obligated to follow Supreme Court precedent despite any personal opinions I may hold. I hold no personal views that would prevent me from doing my judicial duty to follow the Supreme Court precedent in this area.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue. Do you personally believe that an unborn child is a human being?

Answer. I hold no personal views that would prevent me from following Supreme Court precedent in this area.

Question 20. Do you believe that the death penalty is Constitutional?

Answer. The Supreme Court has held that it is. I will follow the Supreme Court's ruling.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. The principle of *stare decisis* is important to the orderly development of the law. The decision by any court to overrule precedent should be done only after careful consideration of the record on appeal, the briefing and arguments of counsel, and a thorough review of applicable authority from prior decisions. Predictability and consistency in judicial interpretations is necessary to insure orderly resolution of legal problems and in ordering one's personal and business affairs. Courts should be very careful before changing established legal precedent in recognition of the detrimental reliance accorded the prior ruling. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and numerous other cases, the Supreme Court has noted the "prudential and pragmatic" circumstances under which a court should overrule prior precedent. The *Casey* factors are set forth at 505 U.S. 854-55.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to the passage of an act? And what weight do you give legislative intent?

Answer. I will follow the principles of statutory construction as enunciated by the Supreme Court. Acts of the legislature are presumed constitutional. If a question of statutory interpretation is presented, the reviewing court should first examine the plain language of the statute and apply the words actually used if they are not ambiguous. The court should also look to its own legal precedent or that of other jurisdiction interpreting analogous laws. Determination of legislative intent is very difficult and courts should proceed cautiously in this area. In the rare case when the constitutional issue cannot be avoided, and a court finds it necessary to engage in statutory interpretation, it may attempt to discern legislative intent by examining hearing testimony, legislative committee reports, and the record of floor debates that attended passage of the law. Courts should be careful before placing too much weight on whatever legislative materials are available since they may reflect only the views of certain legislators and may not be truly reflective of the actual intent of the legislature when enacting the challenged law.

RESPONSES OF JOHN ANTOON II TO QUESTIONS FROM SENATOR BOB SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional Issue, should that individual be confirmed?

Answer. A federal judicial nominee should try to fully answer all questions asked by Senators. However, judges and judicial candidates are obligated not to prejudge issues or issue advisory opinions. In addition, a sitting state judge is precluded from taking positions on an issue which might come before the judge.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. I believe the purpose of a confirmation hearing is for the Senate to inquire regarding the nominee's qualifications and commitment to follow the Constitution of the United States, the laws enacted by Congress, and precedent.

Question 3. What questions are legitimate to ask a candidate without the candidate prejudicing himself or herself?

Answer. Questions regarding a nominee's qualifications and commitment to following the Constitution of the United States, the laws enacted by Congress, and precedent of the Supreme Court of the United States are legitimate.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. A Senator may ask any question he or she wishes, but a judge is obligated not to prejudge issues or issue advisory opinions. I do not believe a nominee should be required to take a position as to how the nominee might rule on an issue if confirmed, because doing so would be prejudging an issue that may come before the nominee if confirmed.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the judge may refuse to apply that precedent to the case before him or her?

Answer. U.S. District Court Judges and U.S. Court of Appeals Judges are bound to follow United States Supreme Court precedent unless and until overruled by the Supreme Court or modified by legislation.

Question 6. If you were a Supreme Court Justice in 1858, what you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856)?

Answer. I do not have the benefit of the arguments, briefs and discussions at conference in the *Dred Scott* case; therefore, I do not know how I would have ruled. However, as a Justice, I would have endeavored to follow precedent.

Question 7. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The Thirteenth and Fourteenth Amendments displaced the *Dred Scott* decisions; thus, that opinion no longer has precedential value.

Question 8. If you were a judge in 1857, would you have been bound by the Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) (1856)?

Answer. In 1857, lower court judges were bound to follow the *Dred Scott* decision.

Question 9. If you were a Supreme Court U.S. District Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 183 U.S. 639 (1896)?

Answer. I do not have the benefit of the arguments, briefs and discussions at conference in the *Plessy v. Ferguson* case; therefore, I do not know how I would have ruled. However, as a Justice, I would have endeavored to follow precedent.

Question 10. In *Plessy v. Ferguson* 163 U.S. 639 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The decision in *Plessy v. Ferguson* has been overruled by *Brown v. Board of Education* and is no longer valid precedent.

Question 11. If you were a Supreme Court Justice in 1854, what would you have held in *Brown v. Board of Education* 347 U.S. 483 (1954)?

Answer. I do not have the benefit of the arguments, briefs and discussions at conference in the *Brown v. Board of Education* case; therefore I do not know how I would have ruled. However, as a Justice, I would have endeavored to follow precedent.

Question 12. In *Brown v. Board of Education* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even through the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. *Brown v. Board of Education* has not been reversed and remains valid precedent, and therefore must be followed by federal courts.

Question 13. If you were a Supreme Court Justice in 1875, what would you have held in *Roe v. Wade* 410 U.S. 113 (1973)?

Answer. I do not have the benefit of the arguments, briefs and discussions at conference in the *Roe v. Wade* case; therefore, I do not know how I would have ruled. However, as a justice, I would have endeavored to follow precedent.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Renquist dissent in that case.

Answer. Lower court judges are required to follow the majority opinion of the Supreme Court regardless of how well reasoned the dissents may be.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I have no views that would prohibit me from carrying out the responsibilities of a federal district judge in following the Constitution and laws enacted by Congress in this area or any other area of law.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. As a state court judge I have rejected constitutional challenges to the death penalty. I hold no views that would prohibit me from following the law in death penalty cases or in any other area of law.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. I hold no view that would interfere with the responsibility of a federal district judge to rule in accordance with the rights guaranteed by the Second Amendment.

Question 18. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. I possess no views regarding the right described in *Planned Parenthood v. Casey* which would interfere with my obligation to follow the Constitution, the laws of Congress and precedent of the United States Supreme Court.

Question 19. Again, I understand the state of the law on the Supreme Court's Interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue. Do you personally believe that an unborn child is a human being?

Answer. I possess no views regarding this issue which would preclude me from following the Constitution, the laws of Congress, and precedent of the United States Supreme Court.

Question 20. Do you believe that the death penalty is Constitutional?

Answer. Yes, I hold no view that would prevent me from following the precedent of the Supreme Court on this issue or any other issue. The Supreme Court has held that the death penalty is constitutional and the Constitution contemplates the penalty of death.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. The Supreme Court has indicated that in re-examining a prior holding, it looks to whether the precedent defies practical workability, whether overruling the precedent would cause special hardship due to reliance on the precedent, and whether the facts or related law have so changed as to have deprived the rule of significant application or justification. If I were a Justice of the Supreme Court, I would follow its precedent on this issue.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. It is my view that a judge should apply the plain meaning of the text in interpreting a statute. In the rare instances in which the meaning is not clear from the text, a judge should apply established rules of statutory interpretation, including cautious examination of the legislative history, understanding that a floor debate or report may reflect the view of only a few legislators, and that the best evidence of legislative intent is the language contained in the statute.

Question 23. In the case of *Coble v. Brevard School Board*, Brevard County Case No. CA-007627 (1987), you ruled that under the Due Process Clause of the Four-

teenth Amendment of the U.S. Constitution, that a high school senior was entitled to hearing before being denied right to attend graduation ceremony for disciplinary reasons. What were the facts and what was the process due to the high school student that lead you to find that his/her constitutional rights were violated?

Answer. I do not have detailed recollection of this case in which I entered a ruling thirteen years ago. Because the case was not appealed, there is no appellate opinion containing facts. All I have is the order which does not contain specific findings of fact. It is not unusual for our records to contain the order only and not the findings of fact.

To the best of my recollection, a school principal suspended a student for a time beyond his scheduled high school graduation. I do not have a record as to the conduct upon which the suspension was based. I ruled that the student was entitled to minimal due process prior to being banned from his graduation ceremony. I believed that this was consistent with state precedent as I always endeavor to follow precedent.

RESPONSES OF MARIANNE O. BATTANI TO QUESTIONS FROM SENATOR BOB SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer. A nominee for a federal judgeship should attempt to answer all of a Senator’s questions, including questions about the Constitution. The nominee, however, should recognize that there are certain questions which he or she may not answer. For instance, the nominee may be bound by the Code of Judicial Conduct and may not express any opinion on a matter that may come before the nominee if confirmed. As a sitting judge in Michigan, I am bound by the Michigan Code of Judicial Conduct which prohibits me from expressing opinions on pending or impending matters.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The purpose of the United States Senate in holding hearings is to question the nominee and to be fully informed about the nominee in order to properly exercise its duty of “advice and consent” under Article II, Section 2 of the Constitution.

Question 3. What questions are legitimate to ask a candidate without the candidate prejudicing himself or herself?

Answer. Questions about the nominee’s background, education, temperament, non-pending judicial decisions, associations and activities are the types of questions that a candidate can legitimately answer without prejudicing himself or herself. Such questions solicit information which, I believe, is necessary and helpful to review the candidate’s qualifications for a federal judgeship.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. I believe a Senator may ask any question he or she deems necessary to exercise the duty of “advice and consent.” There are questions, however, which a nominee may not answer. For instance, the nominee may be bound by the Code of Judicial Conduct and may not express any opinion on a matter that may come before the nominee if confirmed.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No, a judge is bound to follow Supreme Court precedent. The judge may not substitute his or her own opinion for that of the precedent.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer. I cannot say what my opinion would have been in the *Dred Scott* case without having had the benefit of the briefs and arguments of the parties and the deliberations of the Justices. I would follow the Constitution and as a Supreme Court Justice I would consider the relevant precedent.

Question 7. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The *Dred Scott* decision was overruled by the Thirteenth Amendment to the United States Constitution abolishing slavery and that decision is no longer of any precedential value.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer. Yes, as a trial judge I would have been bound by my oath to follow the binding precedent of the *Dred Scott* case. A court may not substitute its opinion, if any, for binding precedent.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer. I cannot say what my opinion would have been in the *Plessy v. Ferguson* case without having had the benefit of the briefs and arguments of the parties and the deliberations of the Justices. In a challenge to this Louisiana statute as with any statute, a Justice is obligated to start with the presumption that the legislation is Constitutional. I would follow precedent and the Supreme Court rules with respect to its own precedent.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The "separate but equal" holding of *Plessy v. Ferguson* was overruled by the case of *Brown v. Board of Education*, 347 U.S. 483 (1954), and should not be used for precedential value by a Court.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483, (1954)?

Answer. I cannot say what my opinion would have been in the *Brown v. Board of Education* case without having had the benefit of the briefs and arguments of the parties and the deliberations of the Justices. I would follow the Constitution and as a Supreme Court Justice I would consider the relevant precedent.

Question 12. In *Brown v. Board of Education*, 347 U.S. 382, (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. *Brown v. Board of Education*, 347 U.S. 483, (1954) is binding precedent and the appellate and trial courts are bound to follow it. A court may not substitute its opinion, if any, for binding precedent.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer. I cannot say what my opinion would have been in the *Roe v. Wade* case without having had the benefit of the briefs and arguments of the parties and the deliberations of the Justices. In a challenge to this Texas statute as with any statute, a Justice is obligated to start with the presumption that the legislation is Constitutional. I would follow any relevant precedent.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rhenquist dissent in that case?

Answer. A judge must follow the *Roe v. Wade* majority holding, as modified by the *Planned Parenthood v. Casey* case and any other relevant precedent, in performing his or her judicial duties.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I have always strived to follow precedent in the past 20 years as a State judge, and in this area, as with any area of the law, I cannot substitute my own beliefs, if any, for that of binding precedent.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The Supreme Court has held that capital punishment is Constitutional and the Constitution contemplates capital punishment, and I will follow the law.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. In this area, as in all others, I am obligated to follow the precedent and cannot substitute my own beliefs, if any, for precedent.

Question 18. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. I am bound to follow the holding of the *Planned Parenthood v. Casey* case on the issue of right to privacy. As with any precedent, I cannot substitute my own beliefs, if any, for that of binding precedent.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. Senator, I can assure you that I would never substitute any personal opinion for that of established precedent.

Question 20. Do you believe that the death penalty is Constitutional?

Answer. Yes, the Supreme Court of the United States has determined that the death penalty is Constitutional.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court Justice, I would only vote to overrule a precedent under the conditions summarized by the Supreme Court in *Planned Parenthood v. Casey*, whether the rule of law has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. I do consider legislative intent in the sense that I presume the legislature's intent is expressed in the plain meaning of the text. I also would look at the debate for limited purposes. For instance, the debate might indicate whether a particular issue was considered and deliberately not included in the legislation. I would consider testimony only with great caution, because it would indicate only the opinion of the one witness and not the entire legislature.

Question 23. In the case of the *Estate of Mary Angela Preston v. Sinai Hospital*, Case No. 96-642951-NH (June 12, 1998) concerned the constitutionality of a Michigan tort reform statute that capped non-economic damages in medical malpractice cases, you found that the statute violated the Fourteenth Amendment to the U.S. Constitution. How was the statute in question extreme and arbitrary?

Answer. In the *Estate of Mary Preston v. Sinai Hospital* case, I started with the presumption that the provision of the statute on caps for non-economic damages in medical malpractice cases was constitutional. I then looked to see if there was any precedent to support the Constitutionality of the legislation. I found that my State had precedent which established that under the Michigan Constitution a jury trial is a fundamental right, including the right to a determination of damages. As a fundamental right I was bound to apply the strict scrutiny test, which is a very rigorous test for any legislation to pass. I also looked to other jurisdictions for analogous cases. In our neighboring State of Illinois, the Supreme Court held that the State statute placing caps on non-economic damages was unconstitutional. Using Michigan precedent and the Illinois Supreme Court decision, I reluctantly held that the caps did not apply in this case.

After making my finding under the Michigan Constitution, I did address by dicta the Fourteenth Amendment under the United States Constitution. In doing so I adopted the findings of the Illinois Supreme Court case, *Best v. Taylor Machine Works*, 689 N.E. 2d 1057 (1997), which addressed the arbitrariness of the cap limitation. It ruled in summary that the cap on non-economic damages was arbitrary because it: (1) arbitrarily distinguished between slightly and severely injured individuals, (2) arbitrarily distinguished between individuals with identical injuries, and (3) it arbitrarily distinguished between types of injuries.

A settlement of this matter was worked out and any my opinion was never published or appealed.

RESPONSES OF DAVID M. LAWSON TO QUESTIONS FROM SENATOR BOB SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer. A nominee should respond, within the bounds of propriety to all questions posed by Senators for the purpose of assessing the nominee’s qualifications to be a judge. Canon 3(A)(6) of the Code of Judicial Conduct for United States Judges states that “[a] judge should avoid public comment on the merits of a pending or impending action * * *” Likewise, a candidate should avoid commenting on matters which that candidate may be called upon to decide if confirmed. Otherwise, litigants may be required to present a matter to a judge who has evidenced a predisposition on that issue, and the fairness and impartiality of the process may be damaged.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The purpose of Senate hearings on nominees for federal judicial appointments is to allow Senators to learn about the qualifications of nominees so that the Senate may exercise its advise and consent prerogative.

Question 3. What questions are legitimate to ask a candidate without the candidate prejudicing himself or herself?

Answer. Legitimate questions include those touching upon the nominee’s legal experience, skill, temperament, willingness to follow precedent, fidelity to the judicial process and constitutional limitations on the authority of the judicial branch, integrity and potential financial conflict of interest.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. Questions which are inappropriate include those which require the nominee to state in advance how a nominee may rule on a given issue.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No. If a Supreme Court precedent is applicable, it must be followed by the lower courts.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer. I do not know how I personally would have ruled had I been a Supreme Court Justice at that time without the benefit of the briefs and arguments of counsel.

Question 7. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The *Dred Scott* decision should not be followed by courts today because it was abrogated by the Thirteenth Amendment.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer. Yes.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer. I do not know how I would have ruled personally without the benefit of the briefs and arguments by counsel.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide “equal but separate accommodations” for black and white passengers, imposing criminal penalties for violations by railway officials. How should precedent be treated by the Courts?

Answer. *Plessy v. Ferguson* should not be followed by courts today because it was overruled by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer. I do not know how I personally would have ruled had I been a Supreme Court Justice at that time, but I agree that the Supreme Court exercised its authority and that precedent must be followed by the lower courts.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The lower courts must follow the precedent established in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer. I do not know how I personally would have ruled in that case, but I agree that the Supreme Court exercised its authority and that precedent must be followed by the lower courts.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except where necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Renquist dissent in that case?

Answer. The legal reasoning in *Roe v. Wade* has been modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which must be applied unless overruled or modified by the Supreme Court or Constitutional Amendment.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I have no personal view on the issue of abortion that would interfere with me following the established precedent.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. I have no personal view on this issue that would interfere with me following the established precedent. The Supreme Court has determined that the death penalty is constitutional in decisions that must be applied by the lower federal courts as a matter of precedent.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. I have no personal view on this issue that would interfere with me analyzing an issue under the Second Amendment. I am not certain that there is clear precedent from the Supreme Court which defines the contours of the Second Amendment. The Constitution must be applied by looking to the plain meaning of the language of any challenged legislation and the Constitution as informed by decisions of the Supreme Court and the applicable circuit court of appeals.

Question 18. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. As a district judge I would be obliged to follow the precedent established in *Planned Parenthood v. Casey* which includes a recognition of a right to privacy which must be balanced in the manner prescribed by the Supreme Court.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. I believe that it is inappropriate to share my personal belief on this issue because the question may be presented for decision to the federal courts. Lower federal courts are then bound to follow applicable precedent.

Question 20. Do you believe that the death penalty is Constitutional?

Answer. The Supreme Court has held that the death penalty is constitutional in *Proffitt v. Florida*, 428 U.S. 242 (1976), and the applicable precedent must be followed.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. In *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) the Supreme Court identified some factors which may be considered when it is asked to overrule precedent. The factors include “whether the rule has proven to be intolerable simply in defying practical workability,” “whether the rule is subject to a kind of reliance that would lend a special hardship to be consequences of overruling and add inequity to the cost of repudiation,” “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” and “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” However, district judges have no business “overruling” Supreme Court precedent. District judges must apply the law as stated in the Constitution, the laws and rules enacted by Congress, and the decisional law of the Supreme Court and the applicable court of appeals.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. Judges must look first to the plain language of a statute which must be applied as written irrespective of legislative history. If the language is ambiguous, there are well-established rules of statutory construction that are then applied, including the rule that all words in a statute be given meaning. Legislative intent may be considered thereafter if the conventional rules of construction fail to resolve the ambiguity, but courts must be mindful of the possibility that the sources of legislative history may not contain the views of all the elected representatives who voted on the legislation.

Question 23. From 1991 to 1994 you were a member of the group, People for the American Way. What activities did you perform as a member of the group, including but not limited to attending speeches, rallies, or lobbying? Also, what specific platform of People for the American Way caused you to join the group?

Answer. I made minimal financial contributions to the organization, People for the American Way, in the amount required for membership between 1991 and 1994. I did no fund raising or lobbying nor did I attend any speeches or rallies. I do not recall exactly the reason I sent in contributions.

Question 24. Do you subscribe to the following statement of People for the American Way: “We defend the fundamental constitutional principle of the separation of church and state in dozens of venues and at all levels of government, often when the Religious Right has attempted to set the definition of religious liberty in the United States and to move government into roles properly occupied by clergy and house of worship.”

Answer. Since I have not been a member of People for the American Way for six years, I am not familiar with the organization’s present activities or the positions it currently takes. Consequently, I am not able to comment on its level of activity and cannot subscribe to its characterization of its own work.

NOMINATIONS OF KENT J. DAWSON, NICHOLAS G. GARAUFIS, PHYLLIS J. HAMILTON, ROGER L. HUNT, AND GERARD E. LYNCH (U.S. DISTRICT JUDGES); DONNIE R. MARSHALL TO BE ADMINISTRATOR, U.S. DRUG ENFORCEMENT ADMINISTRATION

THURSDAY, APRIL 27, 2000

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

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond and Schumer.

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

The CHAIRMAN. Today the committee is holding its third nominations hearing of the second session of the 106th Congress. We will hear from five judicial nominees, each of whom has been nominated to be a U.S. district court judge, and one Justice Department nominee who has been nominated to be Administrator of the Drug Enforcement Administration.

We will have three panels this afternoon. The first panel will consist of the sponsors of the nominees, who will give brief statements on behalf of their nominees. The second panel will consist of the judicial nominees: Kent J. Dawson, who has been nominated to the U.S. District Court for the District of Nevada; Nicholas G. Garaufis, who has been nominated to the U.S. District Court for the Eastern District of New York; Phyllis J. Hamilton, who has been nominated to the U.S. District Court for the Northern District of California; Roger L. Hunt, who has been nominated to the U.S. District Court for the District of Nevada; and Gerard E. Lynch, who has been nominated to the U.S. District Court for the Southern District of New York. The third panel will consist of the Justice Department nominee, Donnie R. Marshall.

So I welcome all of you here today. Senator Thurmond will be chairing today's hearing because I have an Intelligence Committee meeting that I have to attend shortly. However, due to the continuing escalation of the amount of illicit drugs flooding into our country each year and the sharp increase in drug use among our youth, I want to make a brief statement regarding Mr. Marshall's

nomination to be Administrator of the Drug Enforcement Administration.

I have some questions that I will ask of Mr. Marshall in writing. I will submit them for the record and ask him to respond in writing.

Mr. Marshall's nomination provides a timely opportunity to assess this administration's anti-drug efforts over the last 8 years. My comments are not meant as criticism of you, Mr. Marshall. After all, you took the helm of the DEA only recently. Nor should my comments be viewed as a criticism of your predecessor. I hope, however, that my comments and the questions that I have submitted can provide guidance in shaping your policies for the American people.

In preparation for today's hearing, I have reviewed the administration's National Drug Control Strategy Annual Report for 2000 which we recently received from the Office of National Drug Control Policy. The news from the report is not comforting. Teen drug use remains unacceptably high. For instance, use among eighth graders since the last year of the Bush administration has increased 129 percent for marijuana and 80 percent for cocaine and 100 percent for both crack and heroin. The administration seems to boast that teen drug use appears to be "leveling off" since 1997, but is leveling off at such high rates something about which we should be proud?

The fact is the epidemic of illegal drug use in this country remains our most urgent priority. In addition to the statistics I just mentioned, other recent studies and reports show equally dire findings. The use by teens of so-called "designer drugs," such as ecstasy and GHB, is soaring. Between 1998 and 1999, for example, use of ecstasy among 12th graders increased by 56 percent, and use among 10th graders increased by 33 percent.

In fact, last month, the DEA seized 32 kilos of ecstasy in Provo, UT, which represents several hundred thousand pills with a street value of over \$2 million. And from the hearing I chaired on methamphetamine, it appears as though that insidious and destructive drug has begun to sweep across this country.

Finally, cocaine production in Colombia continues to rise, and illegal drugs continue to pour into this country from Mexico. The picture is not encouraging.

Why do we find ourselves in this situation? It is especially frustrating when one considers that from 1979 to 1992, the last year of the Bush administration, we had made significant progress in curbing drug use. For example, between 1985 and 1992, there was a reduction of almost 80 percent in cocaine use. To help determine how we got to where we are today, I reviewed the transcripts of hearings we have held on drug policy over the past 8 years. Three factors immediately present themselves: first, an abject failure of Presidential leadership; second, an ill-advised shift away from interdiction efforts; and, third, a treatment program with a misplaced focus on chronic, hard-core users.

When President Clinton was campaigning for office in 1992, he stated that drug abuse was a national problem that "requires a tough national response." Yet I cannot recall the last time I heard President Clinton speak out about drug use.

Equally troubling is what we learned from your predecessor, Thomas Constantine. He told us that the President had not deigned one time to meet with him to discuss drug enforcement policy. And Mr. Constantine was the head of the DEA for 5 years.

Many of us also recall that President Clinton upon taking office in 1993 immediately slashed the staff of the ONDCP by 80 percent and selected as the Surgeon General an individual who publicly advocated legalizing drugs.

We would all agree that this President is a master politician with a talent for using the bully pulpit of his office. How unfortunate that he has not chosen to use his gifts to steer our Nation's youth away from drugs.

Now, one of the cornerstones of the successful drug strategies of the Reagan and Bush administrations was the aggressive assault on the supply side of the national and international drug market. As my colleague Senator Feinstein has commented in the past, the "real Federal role is interdiction," and we have to go after the big fish of the trafficking world.

Inexplicably, this administration has paid too little attention to interdiction efforts. Indeed, early in his tenure, President Clinton submitted budget requests that routinely cut positions from the DEA, the FBI, and the Department of Justice. And throughout the past 8 years, the administration has diminished the important role played by the Department of Defense in our international interdiction efforts.

For example, since 1992, the number of military flight hours and ship days dedicated to detecting and monitoring illicit drug shipments has declined 68 percent and 62 percent, respectively. The President attempts to justify this change in strategy by arguing that we should shift our focus to "source countries," such as Colombia and Mexico.

Well, as of today, drug production in Colombia is up, and the country verges on chaos, and Mexico's ability to break the hold of its powerful drug cartels is increasingly in doubt. Not surprisingly, one can see falling street prices and increasing purity of drugs such as cocaine and heroin. With drugs increasingly readily available on our streets, it becomes ever more difficult to shield our youth from this temptation. And as I have said in the past, I am afraid the administration's so-called "controlled shift" policy has become a policy of reckless abdication.

Finally, as I have heard for the past 8 years, while our drug policy must include a treatment and prevention component, the administration errs by devoting the lion's share of treatment resources to chronic, hardcore users. Studies suggest that, given the current state of medical knowledge, many of such users may simply be impervious to treatment. Wouldn't we be wiser to devote the bulk of our resources to more effective and achievable goals, such as preventing young people from ever experimenting with drugs and treating casual users before they become chronic, hard-core users?

At the same time, we can continue to explore promising new medical research that may unlock the door to treating those trapped in a world of addiction.

Now, Mr. Marshall, the picture I have painted is not pretty, and I know, given your life's work in narcotics enforcement, that you share my concerns, as did your predecessor, Thomas Constantine. It is my hope that you can prevail on the President over the next several months to join us in our effort to rid our Nation of this scourge.

Speaking in 1992 at the Democratic National Convention, President Clinton made the following statement: "President Bush hasn't fought a real war on drugs. I will." After 8 years, we are still waiting.

[The questions of Senator Hatch are located in the appendix.]

The CHAIRMAN. So I felt like I had to make those comments, and I can't be here for the rest of the hearing because of other commitments. But I am very grateful to have Senator Thurmond, the former chairman of this committee and, of course, our lead Senator in the United States Senate, who is willing to conduct these hearings. I welcome all of you, judgeship nominees and, of course, our new DEA Administrator, and we welcome all of you Senators who are here to speak for these judgeship nominees.

Senator if you will take my place, I would appreciate it.

**STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA**

Senator THURMOND [presiding]. Today, we are conducting the ninth judicial nominations hearing of the 106th Congress. I welcome the distinguished Members of the Senate who are present to introduce particular nominees, and I welcome the nominees and their families.

Judicial nominations hearings are among the most important duties of this committee. A Federal judgeship is not only a position of great power, it is also one of the great responsibilities to the people of this Nation and to the Constitution.

After the judicial nominees, we will consider the nomination of Mr. Donnie Marshall to be Administrator of the Drug Enforcement Administration. I am especially pleased to have him with us today.

I wish to proceed in the following manner: After opening statements, I would like for the members who are present to introduce their nominees. They will constitute the first panel.

The second panel will consist of the following nominees: Kent Dawson to be a district judge for the District of Nevada; Nicholas Garaufis to be a district judge for the Eastern District of New York; Phyllis Hamilton to be a district judge for the Northern District of California; Roger Hunt to be a district judge for the District of Nevada; and Gerard Lynch to be a district judge for the Southern District of New York.

The third panel will consist of Mr. Donnie Marshall to be Administrator of the Drug Enforcement Administration.

Now, panel one, Senator Dianne Feinstein—is she going to be here?

Senator REID. She is on the floor, Mr. Chairman.

Senator THURMOND. Senator Charles Schumer, is he here?

Senator MOYNIHAN. I will speak for him, sir.

Senator THURMOND. As I call your name, just come forward and have a seat. Senator Daniel Patrick Moynihan, Senator Harry Reid, Senator Richard Bryan, Senator Kay Bailey Hutchison.

Senator Moynihan, we will be glad to hear from you.

**STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S.
SENATOR FROM THE STATE OF NEW YORK**

Senator MOYNIHAN. Well, thank you, Mr. President. It is an honor to appear before you, sir, and I—

Senator THURMOND. I might add, you are a very distinguished member of this body.

Senator MOYNIHAN. That is why you are our President.

Senator THURMOND. Tell your folks back home I said that. [Laughter.]

Senator MOYNIHAN. Sir, I have the honor to introduce two candidates, if Senator Schumer is not available for the second. The first is Nicholas Garaufis, who is nominated for appointment to the U.S. District Court for the Eastern District of New York.

Mr. Garaufis, Nicholas George Garaufis, obviously a Hellene, as you might say, comes to us from Queens in New York. He is a graduate of Columbia College and Columbia University School of Law, where he was the cofounder and managing editor of the Columbia Journal of Environmental Law. He has an outstanding professional record both in public service and private service. I would simply point out most importantly, sir, for the past 5 years he has been the managing attorney counsel to the Federal Aviation Agency. He has handled a large staff of lawyers and related professionals and done so with distinction, brought honor to a difficult—I mean brought credibility to a difficult set of problems at a difficult time. He has served as a member of the Judiciary Committee of the Association of the Bar of the City of New York for over a decade.

Now, sir, I will take the liberty also of introducing to you Mr. Gerard Lynch, who is a nominee for the United States District Court for the Southern District of New York. Professor Lynch, as I will take the liberty of calling him, graduated summa cum laude from Columbia College, received his law degree from Columbia Law School, where he now teaches. He has been a particularly widely known criminal law expert, published numerous articles and textbooks in this field, particularly is well known as an authority on Federal racketeering laws. He has worked as a prosecutor for the Southern District of New York and as counsel for various investigations of possible government corruption. He is just the sort of person we need on the Southern District, and I commend him to you, sir, and thank you for your courtesy in allowing me to speak for my distinguished colleague, Senator Schumer.

Senator THURMOND. Senator, we would be glad to hear from you.

**STATEMENT OF HON. HARRY REID, A U.S. SENATOR FROM THE
STATE OF NEVADA**

Senator REID. Thank you very much, Mr. President Pro Tem.

Mr. Chairman, I take the responsibility of recommending candidates of the President very seriously, especially in light of the fact that the Federal bench in Nevada continues to be the most

overburdened district court in the entire country. There are a lot of reasons for that. One is that we have been for the past 14 years the most rapidly growing State in the Nation. Las Vegas, Clark County, has been one of the fastest growing counties in the entire country for these many years. Also, the Federal Government owns 87 percent of the land in the State of Nevada. This creates a lot of problems in the Federal court system.

The State of Nevada has 95,000 square miles that the Federal Government controls, either through the Bureau of Land Management, Fish and Wildlife Service, Forest Service, and many other Government entities, including the U.S. military.

This large Federal presence in Nevada, together with the fact that we have millions and millions and millions of tourists that come to Nevada every year—and these two judges will be in the Las Vegas area, and it is even more pronounced there with the tourists that come to that part of the State. We have lots of problems dealing with different types of crime.

Mr. Chairman, the large Federal presence in Nevada, as I have indicated, creates a huge burden on district court, especially this Las Vegas court. In Nevada, we have district judges who sit in Reno and 500 miles away in Las Vegas. Both of these judges will be in the Las Vegas area.

In addition to what I have outlined, Mr. Chairman, Nevada is also the home to several very important military installations. This also creates litigation and the need of courts to be involved in many different ways.

This explosion of population, the heavy Federal presence, as an example, I say, Mr. Chairman, that Nevada has the highest per capita presence of FBI agents of any place in the United States. There is just a lot of work that needs to be done in the court system.

Now, the State of Nevada, under the leadership of Chief Judge Howard McKibben, who was selected by Senator Laxalt when he was here, and United States Attorney Katherine Landruth have done an outstanding job of working on all the many problems with the lack of resources they have. But it has been extremely tough.

According to the FBI, as an example, Mr. Chairman, its criminal apprehension team, which is charged with tracking and apprehending fugitives, has arrested nearly 3,000 fugitives in Nevada in a little over 2 years. And many, many of these fugitives stand before one of these district court judges in Nevada.

So I could run through a laundry list of statistics and tables which all demonstrate, Mr. Chairman, that Nevada desperately needs Roger Hunt and Kent Dawson, who I am very proud to introduce today. I have known both of these gentlemen for approximately 30 years.

Mr. Chairman, as a U.S. magistrate, Roger Hunt has been a judge and has demonstrated his experience and leadership in the Federal court system for the District of Nevada. He has done an outstanding job in the 7 years that he has been there. There isn't a person that I have found since selecting Roger Hunt that has said a single negative word about him or his work in the courts. He is a fourth-generation Nevadan. He is well respected by all the judges—local, State, and Federal judges—and he will make an out-

standing addition to an already excellent U.S. district court. Judge Hunt is joined here today by his wife, Mauna Sue, and they have six children and three grandchildren.

Judge Kent Dawson is also a long-time friend of mine, Mr. Chairman. He presently serves in Nevada's second largest city as a justice of the peace. He previously served as a municipal judge in Henderson. I have known and watched his legal prowess in the courts for many years. He did an outstanding job in the private sector, as did Roger Hunt, before he took leadership in the bench. He is here with his wife, Ruth. They have four children and three grandchildren.

I can't say enough good about these two men. They will just be tremendous assets to not only the Nevada bench but the Federal bench for our country. And I appreciate very much this committee allowing them to be heard at this very most appropriate time to get judges in the State of Nevada.

Senator THURMOND. Senator Bryan.

**STATEMENT OF HON. RICHARD H. BRYAN, A U.S. SENATOR
FROM THE STATE OF NEVADA**

Senator BRYAN. Thank you very much, Mr. Chairman. Let me first thank you for convening this hearing and to commend my senior colleague for the choices that he has made in submitting these nominees.

Senator REID. That we made.

Senator BRYAN. I concur in every respect enthusiastically. Let me in no way suggest that I don't have anything but the greatest respect for these two men who are before you today.

Mr. Chairman, we in Nevada have an outstanding Federal bench, I think by any objective standards far exceeding any parochial biases that Senator Reid and I might bring to the table. It is a bench that is without equal in any United States district throughout the country.

Nominees have been submitted by Senator Cannon, Senator Laxalt, Senator Hecht, and more recently Senator Reid, with my full concurrence. Each of those judges are individuals that I have confidence in. Each of them bring energy and each of them bring a distinguished record. They are, Mr. Chairman, in my judgment the most overworked Federal judges in America, and that is why it is important that the two nominees that are before this committee must be considered and acted upon swiftly in order to provide the quality of justice that each of the litigants in our own State is entitled.

I am going to ask unanimous consent that the full statement that I have here be made a part of the record. Also, let me simply say that I want to associate myself with the comments of my senior colleague and say that I, too, have been privileged to know each of these practitioners, Judge Hunt and Judge Dawson, since they began their legal careers in Southern Nevada in the early 1970's, at a time in which I was a private practitioner. I respect their legal abilities, as do their colleagues. I respect their integrity. And I respect the kind of energy and commitment that I know that they will bring to the Federal bench.

Finally, I respect their judicial demeanor. They are the kind of men who will distinguish themselves as members of the bench, to be fair to both litigants and lawyers that appear before the bar, and will dispense the quality of justice that Americans and Nevadans are entitled.

I cannot speak more enthusiastically about them. As I say, my colleague has chosen wisely, and I would urge your swift confirmation so that this can move to the floor for action.

Again, Mr. Chairman, I thank you. I am going to have to excuse myself to go to a markup with Senator Hatch, but I thank you for your consideration and hope that we might receive action on these immediately.

[The prepared statement of Senator Bryan follows:]

PREPARED STATEMENT OF HON. RICHARD H. BRYAN, A U.S. SENATOR FROM THE
STATE OF NEVADA

Mr. Chairman, I want to thank you for the opportunity to speak on behalf of both Judge Roger Hunt and Justice of the Peace Kent Dawson regarding their nominations as judges to the United States District Court.

Judge Roger L. Hunt has dutifully served the State of Nevada in several capacities throughout his lifetime. While attending law school at George Washington University, Judge Hunt worked as a legislative aide to former Senator Howard Cannon. After receiving his law degree in 1970, he returned to Nevada to serve as Clark County deputy district attorney for one year. In December of 1971, Judge Hunt entered into private law practice in Nevada. During his time in private practice, he volunteered in several community forums including the following: former chief of the Nevada Indian Commission; former member of the Nevada Commission on Drug Abuse Education, Prevention, Enforcement and Treatment; and, former board member of the Boulder Dam Area Council of the Boy Scouts of America.

In 1992, after more than 20 years in private practice, Judge Hunt was appointed U.S. Magistrate in Nevada. During his tenure as a federal magistrate, Judge Hunt has done an exemplary job in providing equal justice under the law. I believe that with almost 30 years of experience in the legal arena, and as a fourth generation Nevadan, Judge Hunt would be a welcome and laudable addition to the United States District Court in Nevada.

Justice of the Peace Dawson has also served the State of Nevada throughout his professional career. Graduating from the University of Utah Law School in 1971, Judge Dawson relocated to Nevada and worked for one year as a law clerk to Judge James Guinan of the Washoe County District Court. In June of 1973, he was appointed City Attorney for Henderson, Nevada, while also serving as General Counsel to the Henderson Public Improvement Trust.

For the next 10 years, Judge Dawson was a partner at Harding and Dawson, Chtd., and then began his own legal corporation and practiced law there through 1995. After serving as judge pro tem with the Henderson Municipal Court for two years, Judge Dawson then became justice of the peace for Henderson and is currently working in that capacity.

In addition to his legal practices, Judge Dawson has served in the following community positions: member of the Henderson Chamber of Commerce; consultant to the Clark County Pro Bono Project; and, advisor to the Boulder Dam Area Council Boy Scouts of America.

With almost 30 years expertise in the field of law, combined with an outstanding record of service in Nevada, I believe that Judge Dawson would be a credible and distinguished member of the U.S. District Court in Nevada.

I am very pleased that the Senate Judiciary Committee has allowed this hearing to take place concerning these nominations, and I am hopeful that both Judge Hunt and Judge Dawson will be afforded the opportunity to serve as U.S. District Court judges in the near future.

Senator THURMOND. Thank you.
Now we come to brains and beauty. Senator Hutchison.

**STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S.
SENATOR FROM THE STATE OF TEXAS**

Senator HUTCHISON. Thank you, Mr. Chairman.

Mr. Chairman, I am here today to introduce to the committee Donnie Marshall, who has been nominated to be Administrator of the Drug Enforcement Agency. I want to say that I am very proud that he is still a Texan and considers that as his permanent home and that I could introduce him as such.

He was born and raised in Texas in a small town that my great-great-grandparents settled, San Augustine, TX. He is a graduate of the Stephen F. Austin University in Nacogdoches, which is the oldest town in Texas. He has had a career in law enforcement since 1969. In fact, he has worked for the DEA since its inception. For 30 years, he has been fighting the drug war in our country.

Mr. Marshall was confirmed by the Senate as Deputy Administrator for the DEA in September 1998. He was named Acting Administrator in July 1999. If confirmed as Administrator, he will be the seventh Administrator of the DEA since it was established in 1973.

I can't say enough about the efforts of our DEA agents. They literally put their lives on the line every day so that our country can be free of the scourge of illegal drugs. In 1998, the DEA made 33,000 arrests. They seized over 400,000 kilograms of drugs, ranging from heroin to cocaine to marijuana. In the 1980's and 1990's, 36 agents lost their lives in the line of duty.

Sadly, Mr. Chairman, as you know, the drug epidemic is alive and well in the United States. In 1998, one in ten children ages 12 to 17 were current users of illegal drugs. That is nearly double the rate since 1992.

I am pleased that the President has nominated a career agent to head the DEA. The drug war is not a Republican or a Democrat war. We need the best and most experienced agents that we can find to lead our anti-drug efforts. I believe Donnie Marshall is just such a man.

I also want to take this chance, Mr. Chairman, to say that he brought his wife and three children with him, and I would like to ask for them to stand. Catherine Pressler is his wife. His three children are sons, Emory and John Ross, and his daughter, Alissa, and I would say that today is "Take Our Daughters to Work Day," and he has accomplished that by bringing his daughter, Alissa.

So I welcome them, and I recommend Mr. Marshall highly to this committee.

Senator MOYNIHAN. Mr. President, may I say that Mr. Garaufis' father and brother are with him today as well, and I see my distinguished colleague Senator Schumer is here. He would know that I spoke briefly on behalf of Professor Lynch, but I know he was going to add much more, as there is so much more to say.

Senator SCHUMER. Thank you, my senior leader.

Senator THURMOND. I would be glad to call on you now.

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

Senator SCHUMER. Well, thank you, Mr. Chairman, and I appreciate your holding these hearings and the beneficence with which

you always preside. And I want to thank my senior colleague, Senator Moynihan, who has a distinguished record, of course, we know, in the entire Senate but also in his filling the bench with the highest quality of candidates over the years he has been Senator, which I have learned in my first year is one of the great joys of being a Senator is to be able to nominate distinguished people to the bench, and I want to thank Senator Moynihan. Our Legal Committee, which is doing a great job, was really guided by his Legal Committee, and we model it on what he has done.

I want to introduce, Mr. Chairman, with great—

Senator THURMOND. Senator, feel free to come back again. [Laughter.]

Senator SCHUMER. And let's hope he will be back with more nominations, Mr. Chairman.

But, in any case, it is with great pride and pleasure I introduce two superb New Yorkers to you and this committee, and that is Gerard Lynch and Nick Garaufis. At my recommendation, Mr. Chairman, President Clinton has nominated Gerard Lynch to fill a vacant Federal judgeship in the Southern District of New York. Professor Lynch's experiences and accomplishments as both a practitioner of law, a professor of law, and as a public servant, make him a superb candidate to be a Federal judge.

Professor Lynch's background and career accomplishments are, quite frankly, Mr. Chairman, staggering. He was born and raised in Brooklyn, a place near and dear to my heart. He then attended Columbia College and graduated first in his class, followed by Columbia Law School, where he also was number one in his class.

After law school, he accepted two judicial clerkships, first with one of New York's great jurists, Judge Wilfred Feinberg of the Second Circuit, and then with Justice William Brennan on the Supreme Court.

Since that time, he has had a multifaceted career that is impressive and is hard to sum up quickly, but I will try.

Since 1977, he served as Paul J. Kellner Professor of Law at Columbia Law School where he teaches criminal law and criminal procedure, as well as constitutional law and other courses. He is a leading expert on the Federal racketeering laws and has written numerous articles on the subject. He has also published articles on other aspects of criminal law, constitutional theory, and legal ethics. And maybe most importantly, he is considered one of Columbia Law School's outstanding professors, winning a number of awards for excellence in teaching and serving as a guide and mentor to countless students over the years.

I will admit I have a little inside information about this, Mr. Chairman, because a member of my staff went to Columbia.

Professor Lynch, however, has not just been a professor. He also spent years as a Federal prosecutor in the Southern District of New York, one of the premier U.S. Attorney Offices in the country. He tried numerous cases, including white-collar and political corruption cases, and eventually rose to be chief of the Appellate Division there.

In 1990, Professor Lynch was asked to return to that office as the chief of the Criminal Division under U.S. Attorney Otto

Obermeyer. In that capacity, he supervised more than 135 prosecutors and oversaw all of the office's criminal cases.

He has also served as counsel to numerous State, city, and Federal commissions and has worked with a number of special prosecutors investigating corruption. Moreover, from 1988 to 1990, he served as a part-time associate counsel for the Office of Independent Counsel.

More recently, Professor Lynch has been counsel to a top New York law firm, primarily handling white-collar criminal matters and regulatory matters, while still maintaining a full course load teaching at Columbia.

There is obviously much more I could say ranging from Gerry's study of Latin and Greek to his love of theater, art, and ballet, and his membership in a Shakespeare club. I won't tell you about his recent roles.

But I will close by admitting I am very excited about the prospect of Professor Lynch becoming the next member of the Southern District of the New York bench. I know his wife and who, who unfortunately couldn't be here today, are very proud of him, and rightfully so. He has the rare combination of intelligence, practical experience, judicious temperament, fairness, and a devotion to hard work that make for truly great judges.

Mr. Chairman, I know Senator Moynihan has already introduced Nick Garaufis, but I would also like to say a few words in favor of his nomination. I have known Nick for a very long time, and his dedication to public service has been preeminent. He is currently serving as chief counsel at the Federal Aviation Administration, a position he was appointed to in 1995, and prior to that appointment, he served for 9 years as chief counsel to the president of the borough of Queens. And when I worked with him there, Mr. Chairman, he again showed intelligence, dedication, hard work, fairness, a judicious temperament, and was liked by everybody who he dealt with.

He also previously served in the New York State Attorney General's Office. He has been a member of the local school board in Bayside, Queens, one of the best in the entire city and State of New York, and he has been a substitute teacher in the New York City Public Schools. Though these positions have been a little less high profile, to my mind they are of comparable importance, and they speak significantly about the character of Nick Garaufis.

He is obviously a man who is devoted to public service and the public good, particularly in New York. I very much hope that he will continue that service as a judge in the Eastern District.

Mr. Chairman, thank you for the honor of introducing these two very fine nominees.

Senator THURMOND. Thank you very much.

Senator SCHUMER. Oh, Mr. Chairman, could I get unanimous consent to add the statements of my colleague, Senator Leahy, into the record?

Senator THURMOND. Without objection, so ordered.

Senator SCHUMER. Thank you, sir.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY, A U.S. SENATOR FROM THE
STATE OF VERMONT

This afternoon the Judiciary Committee holds what is only equivalent to a second hearing for judicial nominees this year. Before today we have heard from only two nominees to our Courts of Appeals and four to District Courts. Today we will hear from another five lucky nominees to the District Courts but no nominee to a Court of Appeals. The Committee has been woefully slow in acting on nominees to federal courts across the country and, in particular, on nominees to the Courts of Appeals.

I do thank the Chairman for proceeding today with five outstanding judicial nominees: Judge Kent Dawson, nominated to the District Court in the District of Nevada; Nicholas Garaufis, nominated to the District Court in the Eastern District of New York; Judge Phyllis Hamilton, nominated to the District Court in the Northern District of California; and Judge Roger Hunt, nominated to the District Court in the District of Nevada; and Gerard Lynch, nominated to the District Court in the Southern District of New York.

Donnie Marshall, who has been nominated by the President to be the Administrator of the Drug Enforcement Administration, has also been included in this hearing. Unfortunately, we have been unable to obtain action on the nomination of Don Vereen to be the Deputy Director of the Office of National Drug Control Policy or Dan Marcus, whose nomination to the third highest position at the Department of Justice, the office of Associate Attorney General, continues to languish without Committee action.

There are currently 78 vacancies on the federal courts across the country, and there are 10 more on the horizon. Had Congress authorized the additional judgeships that the Judicial Conference has proposed over the past several years, judicial vacancies would currently number over 130.

The vacancies on the courts of appeals around the country are particularly acute. The Ninth Circuit continues to be plagued by multiple vacancies. We should be making progress on the nominations of Barry Goode, Judge Johnnie B. Rawlinson and James E. Duffy, Jr. I am acutely aware that there is no one on the Ninth Circuit from the State of Hawaii. I know that federal law requires that "there be at least one circuit judge in regular active service appointed from the residents of each state in that circuit," 28 U.S.C. 44(c), and would like to see us proceed to confirm Mr. Duffy and the other well-qualified nominees to that Court of Appeals.

The Fifth Circuit continues to labor under a circuit emergency declared last year by its Chief Judge. We should be moving the nominations of Alston Johnson and Enrique Moreno to that Circuit to help it meet its responsibilities.

Earlier this year I received a copy of a letter from the Chief Judge of the Sixth Circuit concerning the multiple vacancies plaguing that Circuit. Chief Judge Merritt was disturbed by a report that this Committee would not be moving any nominees for the Sixth Circuit this year. We should be moving on the nominations of Kathleen McCree Lewis, Kent Markus, and Helene White.

The Senate has only confirmed seven judges all year, and six were nominations carried over on the Senate Executive Calendar from last session and that could have been acted on last year. By this time in 1992, the Committee had held 5 confirmation hearings for judicial nominees and 25 judges had been confirmed. By this date in 1994, the Committee had held 6 hearings, and 19 judges had been confirmed. By this time in 1998, the Committee had held 4 hearings and 22 judges had been confirmed. This year we remain leagues behind last year's pace, and I challenge this Committee and the full Senate to return to that pace.

Working together the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts across the country. I look forward to hearing from these outstanding nominees today and urge all Senators to join us to make the federal administration of justice a top priority for the Judiciary Committee and for the Senate this year.

Senator THURMOND. Senators Feinstein and Boxer have requested that their statements of strong support for the nomination of Phyllis Hamilton be entered into the record. Without objection, that will be done. She deeply regrets that she could not be here today. She intended to come and speak, but she is on the floor of the Senate debating the victims' rights amendment to the Constitution and simply could not get away.

[The prepared statements of Senators Feinstein and Boxer follow:]

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE
STATE OF CALIFORNIA

I rise with pleasure to introduce Phyllis Hamilton to the Judiciary Committee as my nominee to be United State District Court Judge for the Northern District of California.

Phyllis Hamilton presently serves as a Federal Magistrate for the Northern District of California, where she has earned the highest praise from her legal peers for her professionalism, intellect, and fair handling of cases.

Magistrate Hamilton's path to her current position reveals an exceptional work ethic, dedication, and commitment to the law.

She grew up in rural Illinois, raised by her aunt, in a community where most residents worked in factories. Knowing from the age of 14 that she wanted to be a lawyer, Magistrate Hamilton completed her undergraduate degree at Stanford in just three years. She then attended law school at the University of Santa Clara, and graduated with honors.

Magistrate Hamilton has spent her entire professional career in Northern California. She has served as an Administrative Judge for the United States Merit System Protection Board and as a Municipal Court Commissioner in Alameda County. At 33, she was one of the youngest sitting Commissioners in the Oakland Municipal Court.

Magistrate Hamilton obtained an appointment as a Federal Magistrate in 1991. In 1999, Magistrate Hamilton was re-appointed to a second eight-year term by the Northern District Court of California after a unanimous recommendation by a Merit Review Panel. I would note that the Panel did not receive a single, negative public comment when it solicited public input on her candidacy.

Magistrate Hamilton enjoys the strong support of her legal peers. Marilyn Hall Patel, Chief Judge of the Northern District Court has described her as being "an outstanding candidate for the position" of an Article III Judge, and "one of the strongest judicial officers of this court."

District Court Judge Martin Jenkins writes that Magistrate Hamilton has distinguished herself as "a judge who is uncommonly bright, wonderfully articulate and conscientious in a way that inspires respect from her colleagues and lawyers appearing before her."

Burnham Matthews, Chief of Police of the City of Alameda, strongly endorses Magistrate Hamilton. He notes that her high level of professionalism has "earned [her] a positive and solid reputation among police officers throughout the department."

Alameda County Deputy District Attorney Thomas Stark, echoes these views: "I know that I speak for every lawyer who has appeared in front of her when I say that she is supremely talented, smart and tough—all important characteristics for a judge. She treats everyone who appears in front of her fairly."

Mr. Chairman, the Federal District Court and the country would be well served to have Magistrate Hamilton sit on the Federal bench. I strongly recommend her to the Judiciary Committee, and urge that she be speedily confirmed.

PREPARED STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE
OF CALIFORNIA

Today, the Committee considers Phyllis J. Hamilton for the U.S. District Court for the Northern District of California. Judge Hamilton was nominated by the President upon the recommendation of my colleague, Senator Feinstein, and I support her nomination.

From 1976 to 1980, Judge Hamilton served as a Deputy Public Defender in the California State Public Defender's Office. From 1980 to 1985, she served as an Administrative Judge for the San Francisco Regional Office of the U.S. Merit Systems Protection Board. From 1985 to 1991, Judge Hamilton served as Court Commissioner to the Municipal Court for the Oakland-Piedmont-Emeryville Judicial District. Judge Hamilton currently serves as a U.S. Magistrate Judge on the U.S. District Court for the Northern District of California.

Judge Hamilton has strong support from the judicial and local communities, including the Honorable Martin J. Jenkins of the U.S. District Court for the Northern District of California and Jeffrey P. Stark, Deputy District Attorney for Alameda County.

I urge you to move her nomination forward in an expeditious manner.

Senator THURMOND. Now, I ask that each witness nominee come to the witness table and raise your right hands and I will administer the oath.

Raise your right hands and I will administer the oath. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge DAWSON. I do.

Mr. GARAUFIS. I do.

Judge HAMILTON. I do.

Judge HUNT. I do.

Mr. LYNCH. I do.

Senator THURMOND. Have seats.

If any of you have any opening statements or would like to introduce any family or friends who are with you here today, please feel free to do so at this time. We will start with Judge Dawson and go on down the line.

**TESTIMONY OF KENT J. DAWSON, OF NEVADA, TO BE U.S.
DISTRICT COURT JUDGE FOR THE DISTRICT OF NEVADA**

Judge DAWSON. Thank you. I would like to introduce my wife, Ruth, who is here with me, and also to recognize my family and my coworkers from Nevada, my fellow attorneys, also to thank Senator Reid and Senator Bryan for being here, for presenting my name for nomination, and for the great friends and supporters that they have been throughout the entire time that I have lived in Nevada.

Thank you, Mr. Chairman.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Kent Joseph Dawson

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

Residence: Henderson, Nevada 89015;
Office: 243 Water Street, Henderson, Nevada 89015.

3. Date and place of birth.

June 13, 1944, Ogden, Utah.

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

Married. My wife is Ruth Walker Dawson. She is a school teacher for the Clark County School District at 2832 E. Flamingo Road, Las Vegas, Nevada.

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

Weber State College, 1962-1963; 1965-1968, Bachelor of Science, 1969;

University of Utah School of Law, 1968-1971, Juris Doctor, 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.

1968-1972 - Joseph Dawson Orchards, supervising laborers;

1971-72, Law Clerk to Judge James Guinan, Washoe District Court;

October 1972 - June 1973, Assistant City Attorney, City of Henderson, Nevada;

June 1973 - May 1979, City Attorney, City of Henderson, Nevada;

1973-1995, General Counsel, Henderson, Nevada Public Improvement Trust;

1977 (approx.) Acting City Manager, Henderson, Nevada (for a brief time);

1980 (approx.) Acting City Attorney for Boulder City, Nevada at various times during the 1980's while they searched for a new city attorney;

May 1979 - December 1989, partner Harding & Dawson, Chtd.;

December 1989-February 1995, owner and sole shareholder of law practice, Kent J. Dawson, Chtd., a professional law corporation;

February, 1995 - present, Henderson Justice Court, employed by Clark County, Nevada;

1980 - present, Multistate Properties, Inc., a Nevada corporation, (closely held family corporation), officer/director;

1980 - present, Multistate Properties Partnership, Family Partnership, Partner;

1995 - present, Kent J. Dawson, Chartered, a Nevada corporation, officer/director (The corporation does not currently practice law. The corporation continues as an active entity to manage leasehold property and for related purposes.);

1992-1999, Papnet Utah, a Nevada corporation, officer/director (resigned);

1992-1998, Cytology West, a Nevada corporation, officer/director (resigned);

1994 - present, 616 South Third Street, LLC, member/manager;

1995 - 1999, 629 S. Casino Center, LLC, former member/former manager.

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.

Scholarships in music and athletics for first year of undergraduate college;
Numerous awards from the Henderson Chamber of Commerce for community service.

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

any offices which you have held in such groups.

Utah Bar Association (1971 - present);
Nevada Bar Association (1972 - present);
Clark County Bar Association various times (1973 - present);
Nevada Judges Association (1996 - present);
-Member of Judicial Education Planning Group, Nevada Administrative Office of
the Courts -1999;
Member of Clark County Bench Bar Committee - 1998

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

Member, Henderson Chamber of Commerce;
Member Board of Directors, Henderson Chamber of Commerce, Chairman of
Issues Committee;
Boy Scouts of America;
LDS Church.

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

State Courts of Utah and U.S. District Court for the District of Utah (Admitted Oct. 1971);

State Courts of Nevada and U.S. District Court for the District of Nevada (Admitted Oct. 1972);

United States Court of Appeals for the Ninth Circuit (Admitted May 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 the 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:

Instructor, "Procedure in Civil Actions," Nevada Judges Seminar, June 17-20, 1997;

Instructor, "Landlord/Tenant Relations," Nevada Judges Seminar, Winter Seminar, January 26-29, 1999;

Quarterly newsletter articles for Henderson Chamber of Commerce.

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 was May 1999.

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 served as Henderson Municipal Court Judge Pro Tem from 1993 -1995. I was appointed by the City Council. This is a misdemeanor trial court.

I am currently serving as Justice of the Peace, Henderson Justice Court. I was initially appointed in 1995 by the Clark County Commission and subsequently elected to a six year term in 1996. The Court exercises jurisdiction in civil cases up to \$7,500. Original jurisdiction is vested in the Court for landlord/tenant cases and protection orders, preliminary hearings for gross misdemeanor and felony cases. The court is also a trial court for misdemeanors.

15. Citations: If you 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 sufficiently reported, please provide copies of the opinions.

1. Written decisions are not required in Justice Court absent demand of a party. I have on occasion as a service to litigants, issued written decisions in those cases where it might be helpful in understanding the Court's decision. Copies of the following decisions are submitted herewith:

(1) **Hy-Bar Sales Co., Inc., a Utah corporation v. R. Glenn Woods, et al.**, Henderson Justice Court Case No. 065-97C (2 orders and 1 Decision submitted herewith.)

(2) **Carol A. Depino v. Katherine Moore**, Henderson Justice Court Case No. 142-97C.

(3) **R.C.R. Plumbing, Inc. v. Highland Assoc., et al.**, Henderson Justice Court Case No. 066-97C.

(4) **Rainbow Rentals, a Nevada corporation v. Bass, Inc., a Nevada corporation d/b/a Rainbow's End Bass & Gass**, Henderson Justice Court Case No. 084-96C - (Two orders submitted herewith.)

(5) **Development Associates, Inc., a Nevada corporation v. Edward Sargie, et al.**, Henderson Justice Court Case No. 086-98 C.

(6) **David Hohman, v. Clete Goodwin, an individual d/b/a C & N Performance**, Henderson Justice Court Case No. 145-97 C.

(7) **Donald Benedict and Linda Benedict v. American Property Management, a Nevada corporation and Millie Englund, an individual**, Henderson Justice Court Case No. 192-97C.

(8) **Michelle George, Executor of the Estate of Alberta Weaver v. Phyllis Cope d/b/a Vista Mobile Home Park**, Henderson Justice Court Case No. 120-98C.

2. None of the decisions were reversed or appealed.

3. None of the decisions contained any opinion on federal or 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 elected public office.

I was appointed as Henderson City Attorney, 1973-1979;

I was appointed General Counsel to the Henderson, Nevada Public Improvement Trust, 1973-1995;

I was appointed acting City Manager, Henderson, Nevada for a brief time in approximately 1977;

I was appointed acting City Attorney for Boulder City, Nevada twice during the 1980's while they searched for a new city attorney.

(I have not had an unsuccessful candidacy for elected 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;

1971-72, Law Clerk to Judge James Guinan, State District Court, Washoe County, Reno, Nevada.

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;

October 1972 - June 1973
Assistant City Attorney, City of Henderson, Nevada,
240 Water Street, Henderson, Nevada 89015;

June 1973 - May 1979
City Attorney, City of Henderson, Nevada
240 Water Street, Henderson, Nevada 89015;

1973 -1995
General Counsel to City of Henderson, Nevada Public
Improvement Trust
626 South Third Street, Las Vegas, Nevada 89101

1977
City Manager, Henderson, Nevada
240 Water Street, Henderson, Nevada 89015;

1980's
Acting City Attorney for Boulder City , Nevada
Boulder City, Nevada.

May 1979 - December 1989
Harding & Dawson, Chtd.,
626 South Third Street, Las Vegas, Nevada 89101;

December 1989 - February 1995
Kent J. Dawson, Chtd.
626 South Third Street, Las Vegas, Nevada 89101;

February, 1995 to present
Henderson Justice Court, Clark County, Nevada
243 Water Street, Henderson, Nevada 89015.

- 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?

1973 - 1979 - My practice was governmental with minor noncontested civil;
1979 - 1989 - My practice was governmental, insurance defense, general civil;
1989 - 1995 - My practice was general civil practice with emphasis on corporate, governmental, personal injury, family law and probate.
 2. Describe your typical former clients, and mention the areas, if any in which you have specialized.

Some of my typical governmental clients were the City of Henderson, Nevada; Boulder City, Nevada; and City of Henderson, Nevada Public Improvement Trust.

Some of my typical insurance defense clients were Allstate Insurance Company, The Hartford Insurance Company and Safeco Insurance Company.

In general civil practice I represented construction companies, manufacturers, realtors, medical doctors, shopping center owners, etc., including: Jake's Crane & Rigging; Basic Ready Mix, Inc.; Levi Strauss & Co.; PepsiCo International, W.W. Grace & Co.; Capital Cabinet; and Maury Abrams Co.
- c.
1. Did you appear in court frequently, occasionally, or not at all? If the frequency of

your appearances in court varied, describe each such variance, giving dates:

Regularly.

2. What percentage of these appearances was in:

(a) federal courts: 15-20%

(b) state courts of record: 80-85%

(c) other courts: 0%.

3. What percentage of your litigation was:

(a) civil: 90%

(b) criminal: 10%

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

I tried misdemeanor trials as City Attorney in excess of 1,000; other cases I tried were in excess of 250. I was sole counsel in 90% of those cases; chief counsel in 5% of those cases; and associate counsel in the remaining 5%.

5. What percentage of these trials was:

(a) jury: 1%.

(b) non-jury: 99%.

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 the 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. **In Re: Estate of Chong**, 111 Nev 1404 (1995).

This case centered around an objection to distribution of the assets of an estate. The objecting parties were the decedent's son and grandson (Appellants) opposed by the estate and decedent's second wife (Respondent). The dispute involved disposition of funds in saving and checking accounts totaling \$173,284.45. The trial court presumed intestacy and ruled that the funds be distributed according to the laws of intestacy. The Nevada Supreme Court reversed and ordered that funds in the savings account in the amount of \$94,250.44 be distributed to the grandchildren (Appellants) under the "residuary clause" of the Decedent's will. The Court also ordered the trial court to determine whether the checking account (\$77,461.98) was effectively transferred into a inter vivos trust and, if not, said checking account would become part of the residuary and, as with the savings account, be transferred to the Appellants.

Party Represented: Appellants, Wei Chong, Daniel Chong and Michael Chong.

Nature of Participation: Sole counsel for Objectors and Appellants.

Final Disposition: Reversed and remanded with partial instructions.

(a) Dates of Representation: 1994 -1995.

(b) Name of Court and Judge before whom case was tried: Trial: Eighth Judicial District Court of Nevada, Honorable J. Charles Thompson (now Assistant District Attorney with Clark County, Nevada); Appellate: Nevada Supreme Court.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: John Gorman, Esq., attorney for Respondent, Estate of Chong, 3690 S. Eastern Avenue, #201A, Las Vegas, Nevada 89109 (702 733-0332).

2. **Coroneos, Funk, et al., v. City of Henderson**, A 300362.

The heirs of decedent Coroneos brought an action for wrongful death based upon the failure of a traffic control device at the intersection of Basic Road and Boulder Highway, Henderson, Nevada. Some witnesses claimed the lights were green for both through and cross traffic at the same time. Discovery, including expert testimony, showed that the lights were out for through traffic but green for cross traffic. The lights had been reported out earlier during the day following a power failure. The issue was whether the City was on notice of a malfunction of the traffic control device. (State statutes provide for immunity absent notice.)

Party Represented: City of Henderson.

Nature of Participation: Sole counsel for Defendant City of Henderson.

Final Disposition: Summary judgment.

(a) Dates of Representation: 1990-1994.

(b) Name of Court and Judge before whom case was tried: Eighth Judicial District Court of Nevada, Honorable Myron Leavitt.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Michael Mills, Esq., attorney for Counterdefendant Coroneos, 3650 N. Rancho Drive, #114, Las Vegas, Nevada 89130, (702) 240-6060; John Marchiano, Esq., attorney for Plaintiff Coroneos, 219 Lead Street, Henderson, Nevada 89015 (702) 565-0473; Pyatt & Eglett, Attorney for Plaintiff Funk, 201 Las Vegas Boulevard South, #300, Las Vegas, Nevada 89101 (702) 383-6000.

3. **Reynolds v. City of Henderson**, CV-S-90-005 RDF.

Plaintiff brought a federal civil rights action for his termination as a city employee based on accusations that he sexually harassed a co-employee. The Plaintiff was reinstated by the Civil Service Board with a period of suspension. Plaintiff claimed that his rights were violated in the pre-termination hearing conducted by a hearings officer employed by the City.

Party Represented: City of Henderson.

Nature of Participation: Supervision of work by associate attorney.

Final Disposition: Judgment for City of Henderson.

(a) Dates of Representation: 1990-1994.

(b) Name of Court and Judge before whom case was tried: U.S. District Court (Nevada), Honorable Roger D. Foley/Roger Hunt, U.S. Magistrate.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Richard Segerblom, Esq., attorney for Plaintiff, 704 South Ninth Street, Las Vegas, Nevada 89101, (702) 388-9600; Jerald Wilkerson, Esq., an associate for my firm. He conducted the trial and appeal under my supervision, phone (702) 363-4208.

4. Archtec, Inc., Dennis Rusk, et al. v. City of Henderson, Nevada, Henderson District Library, CV-S-88-888 LDG.

Plaintiff was employed as independent contractor architect to design a new city hall for the City of Henderson and a library for the Henderson Library District with combined budgets of approximately \$5,000,000.00. The lowest and only bid came in at approximately \$10,000,000.00 which resulted in Plaintiff's termination. Plaintiff claimed that he was terminated as a result of a vast conspiracy among various entities and persons in violation of his federal civil rights. He supported his damage claim with an analysis from DeLoitte, Haskins & Sells.

Party Represented: City of Henderson, Nevada.

Nature of Participation: I conducted virtually all of the numerous depositions and other discovery on behalf of the City of Henderson and supervised an associate who prepared motions and argued the appeal.

Final Disposition: Dismissed by court order.

(a) Dates of Representation: 1988-1993.

(b) Name of Court and Judge before whom case was tried: Honorable Lloyd D. George, U.S. District Court Nevada, Affirmed Ninth Circuit Court of Appeals.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Alan J. Lefebvre, Esq., attorney for Plaintiff, 1404 S. Jones Blvd., Las Vegas, Nevada 89102 (702) 383-8668; Clifford M. Jeffers, Esq., attorney for Henderson District Library, P.O. Box 552215, Las Vegas, Nevada 89155, (702) 455-4761; Jerald Wilkerson, Esq., an associate for my firm. He prepared motions and responded to the appeal under my supervision, phone (702) 363-4208.

5. Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corporation, Barry Silverton, Transcontinental Corporation, et al., CV-S-87-768 RDF.

Plaintiffs sought to enforce various contracts related to development of a 330 acre artificial lake and surrounding residential and commercial properties. Plaintiffs' contracts were contingent upon Plaintiff providing a bona fide commitment from a bank to finance the project. The commitment provided by Plaintiffs to Defendant contained contingencies. Defendant Silverton, following receipt of the commitment, sought out other partners. Plaintiffs sued Pacific Malibu Development Corporation, Barry Silverton and his new partner, Transcontinental Corporation, in state court. The first state court action was dismissed by Plaintiffs, without notice to the Defendants, for the apparent purpose of drawing a more favorable state court judge, and refiled in another

department. The second action was removed to U.S. District Court where Plaintiffs voluntarily dismissed against Defendant Transcontinental Corporation then refiled.

Party Represented: Pacific Malibu Development Corporation and Barry Silverton.

Nature of Participation: Argued motion for dismissal before Judge Foley in U.S. District Court; prepared the response to Plaintiffs' applications in District Court and conducted extensive discovery and developed evidence and defense of "dismissal with prejudice" following second voluntary dismissal. I was sole counsel for Defendants Barry Silverton and Pacific Malibu Development Corporation until their defense was assumed by the Joint Venture.

Final Disposition: Dismissed, affirmed by Ninth Circuit Court of Appeals.

(a) Dates of Representation: 1987-1992.

(b) Name of Court and Judge before whom case was tried: Honorable Roger D. Foley, succeeded by Philip S. Pro.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Rodney Jean, Esq., attorney for Transcontinental, 300 South Fourth Street, Las Vegas, Nevada 89101, (702) 383-8888; Carl H. Hanzelik, Esq., attorney for Plaintiffs, 2600 The Fidelity Bldg., Philadelphia, PA 19109; Kevin R. Stolworthy, Jr., Esq., attorney for Plaintiffs, 3773 Howard Hughes Pkwy., 3rd Floor, Las Vegas, Nevada 89109 (702) 734-2220; Peter Bernhard, Esq., attorney for Joint Venture, 3980 Howard Hughes Pkwy., #550, Las Vegas, Nevada 89109, (702) 650-6565; I was sole counsel for Barry Silverton and Pacific Malibu Development Corporation until their defense was assumed by the attorney for the Joint Venture.

6. **Bush v. Bush**, D 122554.

This was a case of first impression in Nevada. Non-resident Defendant father, after being told by the resident mother (Nevada) that she could not take care of the son if the father sent the son from California to Nevada, sent the mentally handicapped son to Nevada without provision for the child's support. Plaintiff sued in Nevada and served the summons and complaint under Nevada's long-arm statute which provides for service upon non-resident defendants in cases of tort committed within the State of Nevada. Defendant moved to quash service of summons based on lack of jurisdiction. The trial court found that the State of Nevada did have jurisdiction over the Defendant based upon Nevada's long-arm statute and denied the motion to quash summons. The case was then tried in family court to determine the amount of support owed by Defendant.

Party Represented: Plaintiff.

Nature of Participation: Sole counsel for Plaintiff. Prepared all pleadings, evidence and presented argument to the District Court.

Final Disposition: Court held that Nevada long-arm statute applied to give jurisdiction over Defendant.

(a) Dates of Representation: November 1989 - March 1990.

(b) Name of Court and Judge before whom case was tried: Eighth Judicial District Court of Nevada, Honorable J. Charles Thompson (now Assistant District Attorney with Clark County, Nevada).

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Brian M. Adams, Esq., attorney for Defendant, 300 E. Fremont, #110, Las Vegas, Nevada 89101 (702) 384-9275.

7. **Davis v. City of Henderson, et al.**, CV-S-86-823.

Plaintiff claimed that a conspiracy existed to terminate his employment as a police officer with the City of Henderson, Nevada and that the chief of police, assistant chief of police and others were involved in that conspiracy, which resulted in procuring his resignation under pressure. He also sought to have me removed as counsel for the City of Henderson based upon my prior representation of him in earlier unrelated (divorce) cases.

Party Represented: City of Henderson, Nevada.

Nature of Participation: Sole counsel for City of Henderson, Nevada.

Final Disposition: Nuisance value settlement.

(a) Dates of Representation: 1986-1990.

(b) Name of Court and Judge before whom case was tried: U.S. District Court, Nevada, Honorable Lloyd D. George, Lawrence Leavitt, U.S. Magistrate.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: John D. Fadgen, Esq., attorney for Plaintiff, 616 South Third Street, Las Vegas, Nevada 89101 (702) 384-7226; Michael Bohn, Esq., attorney for Plaintiff, 873 N. Eastern Avenue, Las Vegas, Nevada 89101 (702) 642-3113; Harold Gewerter, Esq., attorney for Plaintiff, (no longer in practice, address not available.)

8. **Ennis and Sauer v. Ronnow, et al.**, CV LV 85-623.

Plaintiffs sought damages against defendants for breach of a partnership agreement.

The agreement provided for the parties to manufacture "leaky pipe", a water conservation product installed underground, delivering water to plants as needed. Plaintiffs claimed that defendants failed to carry out their duties to establish a factory and produce a usable product. Plaintiffs sought damages against Defendants.

Defendants counterclaimed for damages against Plaintiffs for failure to perform their obligations under the contract.

Party Represented: Defendants Clark Ronnow and Lane Ronnow.

Nature of Participation: Sole counsel for Defendants Ronnow .

Final Disposition: Judgment for Defendants/Counterclaimants

(a) Dates of Representation: 1985-1986.

(b) Name of Court and Judge before whom case was tried: U.S. District Court, Nevada, Honorable Lloyd D. George.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Herb Waldman, Esq., attorney for Co-Defendant, 3275 S. Jones, #105, Las Vegas, Nevada 89146, (702) 493-8050; Jason Landess, Esq., attorney for Plaintiffs, 6600 West Charleston Blvd., #118, Las Vegas, Nevada 89102, (702) 320-1411.

9. Caldwell v. Eldorado Villas Homeowners Association, et al., A 13426.

Plaintiff was a member of a homeowner's association that charged dues payable on a monthly basis. She withheld her dues based on a claim that the association was not properly maintaining the landscaping of association owned common areas. The association proceeded to foreclose on its statutory lien. Plaintiff paid all but one month of dues (approximately \$100). Plaintiff had approximately \$80,000.00 in equity in the property which was lost as a result of the foreclosure sale. At trial Plaintiff claimed that she had paid all association dues but was unable to provide receipt for the one month of dues which homeowner's association records showed had not been paid.

Party Represented: Defendant.

Nature of Participation: Sole counsel for Eldorado Villas Homeowners Association.

Final Disposition: Jury verdict for defense.

(a) Dates of Representation: 1982-1984.

(b) Name of Court and Judge before whom case was tried: Eighth Judicial District

Court, Honorable J. Charles Thompson (now District Assistant District Attorney with Clark County, Nevada).

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: Phillip Aurbach, Esq., attorney for Plaintiff, 228 South Fourth Street, Las Vegas, Nevada 89101 (702) 382-0711; Earl T. Ayers, Esq., attorney for Defendant, .

10. G.A. Smith v. City of Boulder City, A 191511.

The voters of Boulder City, becoming concerned over a perceived loss of "quality of life" in their city due to rapid growth, passed an initiative ordinance limiting growth to a few new dwelling units per year. A subsequent act of the City provided the administrative framework for enforcement of the initiative ordinance. The initiative ordinance was then challenged in this action by G.A. Smith, a developer who was denied a building permit for his property.

Party Represented: Defendant, City of Boulder City.

Nature of Participation: I was employed by Boulder City to prepare all paperwork and legal arguments for the City and argue the case to District Court. City Attorney Steven Parsons was present at trial, and gave a brief argument on the "political" aspects of the case.

Final Disposition: Judgment for defendant.

(a) Dates of Representation: 1982-1983.

(b) Name of Court and Judge before whom case was tried: Eighth Judicial District Court of Nevada, Honorable Howard Babcock.

(c) Individual name of counsel and co-counsel for each of the other parties, address and phone number: James A. Wagner, Esq., attorney for Plaintiff, 218 S. Maryland Parkway, Las Vegas, Nevada 89101, (702) 388-8920; Steven J. Parsons, Esq., City Attorney for Boulder City, 7201 W. Lake Mead Blvd., Suite 108, Las Vegas, Nevada 89128, phone, (702) 384-9900.

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 experience in trial courts has included virtually every area of civil practice. I have completed numerous probate cases (including trials in contested cases), had an extensive practice in the family court, handled several cases as a defendant's or plaintiff's attorney involving damages in excess of \$1,000,000.00, and have counseled parties in numerous real estate and sale of business transactions and numerous lien foreclosure cases. I am considered an expert in governmental immunity by both the insurance carriers who insure various cities in this County as well as the self-insured cities who retained my services. Most of my governmental immunity cases were decided by summary judgment in favor of the entity. I also handled numerous bankruptcy cases on behalf of various clients.

The Henderson Nevada Public Improvement Trust was established in 1973 through adoption of a Declaration of Trust and Indenture of Trust prepared by me as City Attorney of Henderson, Nevada, and outside counsel Samuel Stone (Oklahoma). The stated purpose of the Trust is to encourage industry and development through the issuance of bonds. Creation of the trust was authorized by Nevada Statutes. The Trust and its authority to issue bonds was preserved from general repeal by an amendment to the City Charter enacted by the Nevada legislature based upon my testimony. I was counsel to the Trust from 1973 through 1995 when I was appointed to the bench. During that time, I met with literally hundreds of businesses whose plans were contingent upon the availability of bonds. Companies such as PepsiCo, Mars, Levi Strauss, Gold Bond/Breyers, and Imperial Plastics located their manufacturing facilities in this area and added thousands of jobs to the economy as a result. Many hundreds of unpaid hours were expended in explaining and guiding companies through the process. Bonds administered by this entity financed infrastructure for several thousand acres of planned communities and set the stage for Henderson to become the fastest growing city in the United States (1998 and 1999). In some cases, approval of the Governor and State Board of Finance was required. I organized and prepared those applications and presentations. I was also responsible for the first issuance of industrial development bonds in the cities of Las Vegas (PepsiCo International) and North Las Vegas (Capital Cabinets).

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 still have fees owing from a few (less than 5) former clients. Those individuals would be unlikely to come before me as a Federal Judge.

I have some retirement benefits with the Nevada Public Employees Retirement System (PERS) as a result of employment with the City of Henderson and Clark County, Nevada.

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 am aware of the very few former clients who still owe my law firm for legal services rendered. I will recuse myself in cases where such relationship exists. As stated, such potential conflicts are unlikely; however, I would comply with the Code of Judicial Conduct if such conflict occurred.

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 accompanying financial disclosure report.

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

See attached Net Worth statement.

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

Yes, I was a candidate for Judge in the Henderson Justice Court during 1996. I did not have a formal fund-raising effort. My responsibilities were to manage the campaign and stand for election.

NET WORTH

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

ASSETS**LIABILITIES**

Cash on hand and in banks - \$120,000	Notes payable to banks-secured - \$149,000
U.S. Government securities - add schedule 0	Notes payable to banks - unsecured - \$35,000
Listed securities - add schedule - \$32,000	Notes payable to relatives - 0
Unlisted securities - add schedule - 0	Notes payables to others - 0
Accounts and notes receivable: - \$426,000	Accounts and bills due - 0
Due from relatives and friends - 0	Unpaid income tax - 0
Due from others - \$300,000	Other unpaid tax and interest- 0
Doubtful - \$116,000	Real estate mortgages payable - add schedule - \$100,000
Real estate owned - add schedule - \$3,225,000	Chattel mortgages and other liens payable - 65,000
Real estate mortgages receivable	Other debts - itemize:
Autos and other personal property - \$131,000	
Cash value - life insurance	
Other assets - itemize:	
Kent J. Dawson, Chtd. - \$94,000	
Six Sixteen South Third LLC - \$200,000	
Multistate Properties Partnership - \$100,000	Total liabilities \$349,000
KJD Irrevocable Trust - \$60,000	Net worth \$4,455,000
Total Assets \$4,804,000	Total liabilities and net worth \$4,804,000
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	

SCHEDULE OF REAL ESTATE OWNED

Vacation home, Brian Head, Utah - \$200,000;

13 vacant lots located at Brian Head, Utah, (12 residential on Navajo Ridge and 1 commercial) (no addresses available) - \$400,000;

Partnership interest as tenant in common in land near the intersection of Boulder Highway and Elliot Road, Henderson, Nevada, commercial (no address available) - \$100,000;

Building lot located in Tauranga, New Zealand - \$100,000;

19 building lots located at Pico Rio Court and Polita Court, Las Vegas, Nevada - \$1,600,000;

Approximately 25 acres of undeveloped residential property located at Owens and Los Feliz, Las Vegas, Nevada (no address available) - \$700,000;

Building lot located at Milan and Oslo Streets, Henderson, Nevada (no address available) - \$50,000;

Building lot located at Rancho and Blackridge Streets, Henderson, Nevada - \$75,000

SCHEDULE OF REAL ESTATE MORTGAGES PAYABLE

Merrill Lynch Credit Corporation \$100,000 on 614 East Fairway Road, Henderson, Nevada.

SCHEDULE OF LISTED SECURITIES OWNED

NetMed, Inc. - 145,250 shares - \$32,000

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Initial Report

Report Required by the Ethics Reform Act of 1989, Pub L No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Dawson, Kent J.		2. Court or Organization U.S. District Court, Nevada	3. Date of Report 04/07/2000
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - active		5. Report Type (check type) Nomination, Date 04/06/2000 <input checked="" type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 01/01/1999 to 03/30/2000
7. Chambers or Office Address 243 Water Street Henderson, Nevada 89015		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	Justice of the Peace	Henderson Justice Court
2	Officer	Kent J. Dawson, Chtd., (A professional law corporation)
3	Manager/Member	616 S. Third Street LLC

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

	DATE	PARTIES AND TERMS
<input type="checkbox"/>	NONE (No reportable agreements.)	
1	11/1/72	Kent Dawson/Nevada Public Employees Retirement System - retirement plan w/former employer - no control
2	2/1/95	Kent Dawson, Chtd/Kent Dawson - Rental income and compensation for legal services rendered before becoming a judge.
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	12/31/99	County of Clark, Judicial Salary	\$ 88,707.00
2	12/31/99	Clark County School District (S), Teacher salary	\$ 17,382.00
3	12/31/99	Kent J. Dawson, Chtd., salary	\$ 500.00
4	12/31/99	City of Henderson, Nevada, Alternate Municipal Judge Compensation	\$ 300.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dawson, Kent J.	04/07/2000

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Community Bank of Nevada	Secured Loan	M
2	First Security Bank of Nevada	Credit Line	K
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 Dawson, Kent J.	Date of Report 04/07/2000
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VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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	(4) Gain	(5) Identity of buyer/seller (if private transaction)		
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)										
1 NetMed Stock (J)		None	K	T	Exempt					
2 Vacant land, Brianhead, Utah (J)		None	N	W	None					
3 Vacant land, Boulder Hwy near Elliot Rd., Henderson, NV (J)		None	M	W	None					
4 Rental property, 616 S. Third St., Las Vegas, NV (J)	D	Rent	M	W	None					
5 Vacant land, Tauranga, New Zealand (J)			L	W	None					
6 Building lots @Pico Rio & Polita Ct., Las Vegas, NV (J)		None	PI	W	Sold 1 lot	10219	M	F	Van Arsdale	
7 Vacant land, 25 acres, Owens & Los Feliz, Las Vegas, NV (J)		None	O	W	None					
8 Vacant lot, Rancho@Blackridge, Henderson, NV (J)		None	L	W	None					
9 Vacant lot Milan@Oslo, Henderson, NV (J)		None	K	W	None					
10 Community Bank of Nevada (J)	C	Interest	L	T						
11 Kent J. Dawson, Chtd. (J)		None	L	W	Exempt					
12 KJD Irrevocable Trust (S)		None	L	W	None					
13										
14										
15										
16										
17										

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: I=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 (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 Dawson, Kent J.	Date of Report 04/07/2000
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

None.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dawson, Kent J.	04/07/2000

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	Manager/Member	629 S. Casino Center LLC
5	Director	Henderson Chamber of Commerce
6	Officer	Multistate Properties, Inc.
7	Partner	Multistate Properties Partnership

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dawson, Kent J.	04/07/2000

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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

4/07/00

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.

During my career I have regularly contributed to the Clark County Pro Bono Program. In the year 1991-1992, my firm was recognized by the County Bar Pro Bono Project and received the "Outstanding Contribution by a Law Firm" award. Also, as a church leader, I have taken numerous cases outside of the formal pro bono program of the county bar association. In one case, I wrote off \$30,000.00 in legal fees expended to enable an individual to obtain a settlement from a recalcitrant insurance company. The settlement was sufficient to pay off medical bills and enabled the client to avoid filing bankruptcy. In another case, I sued an insurance company (Federal Court) because it refused to cover approximately \$100,000.00 in medical bills for a critically premature infant unless the infant was transferred to one of their own hospitals, several hundred miles away from the infant's mother and family. It was the physician's opinion that if the baby were moved it would die. I obtained payment of all medical bills and enabled the baby to remain in a local hospital where the mother could have daily contact and still take care of her other six children, without charging any fees for my legal services.

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

I have never been a member of such an 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 in Nevada for federal court. I was interviewed personally by Senator Harry Reid. I was also interviewed by the American Bar Association, Department of Justice and the Federal Bureau of Investigation.

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

No.

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

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

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

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

I firmly believe in the principle of "separation of powers." The judiciary should not encroach on powers of government vested in the legislative or executive branches. Federal Courts are courts of limited jurisdiction. Decisions must involve actual cases or controversies and fit within one of the expressed bases for jurisdiction. Precedent, standing, appellate review and principles of *stare decisis* are important limits on judicial authority. I recognize the purpose and value of each of the foregoing principles of judicial restraint.

425

**KENT J. DAWSON
614 E. FAIRWAY ROAD
HENDERSON, NEVADA 89015**

XXXXXXXXXXXXXXXXXX

April 7, 2000

Eleanor D. Acheson, Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Room 4234
Washington, DC 20530

Re: Medical Science Associates and other investments

Dear Ms. Acheson:

The following is an explanation of events surrounding the Medical Science Investment which resulted in certain penalties and interest on 1980, 1981, 1982 and 1983 personal tax returns.

In early 1983, Samuel Harding and I were notified by our accountant, David Andrews, CPA, that corporate income for the law firm, Harding & Dawson, Chartered, would be unusually high and that we should consider some investments with tax advantages. As a result of that advice, a meeting was arranged with Michael Southard who was advertising shared equity investments in real estate. His company, the Mission Company, was doing business in Clark County, Nevada and Mr. Southard was known to me through previous dealings in unrelated matters. At a meeting arranged to discuss the shared equity investment, Mr. Southard introduced Arthur Geldbach, PhD, representing that Mr. Geldbach was an experienced and knowledgeable person in the field of investments and tax. Dr. Geldbach participated in making a sales presentation of the shared equity investment to both Harding and myself. In subsequent meetings with Southard and Geldbach, certain representations were made regarding IRS approval, income, failure rate, qualification of prospective partners and valuation. We informed Dr. Geldbach that we required a portfolio of investments that would provide a continuous and safe source of cash flow in succeeding years, provide tax deductions and /or credits for 1983, and not involve continuing obligations on our part in excess of assured distributions from the portfolio investments as a whole. In exchange for a fee

April 7, 2000

Page 2

of \$5,000.00, Dr. Geldbach undertook to select and obtain for Harding and myself a portfolio of secure investments tailored to our needs. Pursuant to that retainer, Dr. Geldbach introduced a series of investments which he represented were either preapproved by the Internal Revenue Service or in which identical earlier series had been approved by the IRS.

In August of 1983 Dr. Geldbach advised Harding and myself that limited partnership interests in Medical Science Associates was a suitable investment in accordance with our expressed investment needs. Medical Science Associates was one of a series of limited partnerships created and promoted by Jules Klar for the purpose of obtaining rights to market certain continuing medical education video tapes. Based upon representations of Geldbach that a previous identical program had been approved by the IRS, Harding and myself purchased limited partnership interests in Medical Science Associates. In November of 1983, Jules Klar, on behalf of Medical Science Associates, assured Harding and myself that the IRS would be unable to challenge proposed tax benefits for 1983. It is now believed that such representations, among others, were made to induce Harding and myself to continue with installment payments on the investment. In purchasing said investment, Harding and myself also relied upon an independent appraisal by the publishing company McGraw Hill Corporation. McGraw Hill represented that the tapes had the value ascribed to them in the offering materials from Medical Science Associates.

Dr. Geldbach also presented other investments to us which were misrepresented as to income potential demonstrated by earlier identical programs, IRS approval and value of partnership property.

Unbeknownst to Harding and myself, in addition to the money which we had paid Geldbach to conduct the due diligence investigation, Geldbach was receiving payments from the brokers/sellers of the investments. Unbeknownst to Harding and myself, the individual who made the appraisal for McGraw Hill was a convicted felon and the appraisal was materially false. After learning of the falsity of such representations, Harding and myself filed suit in 1985 against Geldbach, Medical Science Associates Limited Partnership, and others. Harding and myself were also parties to a later suit filed against McGraw Hill based upon the fraudulent appraisal issued by that company.

In a bifurcated trial, McGraw Hill was found liable for the false appraisal. The damage portion of the trial was settled before verdict with a confidential settlement. A confidential settlement was also reached with Defendant Geldbach and his insurance carrier.

During the same time, the various limited partnerships were being audited and adjusted. I received notices of adjustments to my individual income tax returns for years 1980 forward. I conceded the tax liability, but disputed penalties for negligence

April 7, 2000

Page 3

and valuation overstatements based upon my reliance on a paid professional investment advisor and the McGraw Hill appraisal. On the filing of a tax court petition, the appeals officer agreed to concede the penalties based upon the facts of the case and its similarity to Mollen v. United States, 72 Afr 2d, 93 6443, 93-2USTC ¶150, 585 (Dist. AZ 1993). The appeals officer was overruled and not allowed to settle the case. The case was then forwarded to the office of District Counsel for litigation. The District Counsel office, upon review of the facts of the case, determined that the penalties should be conceded, however, District Counsel was overruled by National Coordinators for the Medical Science Associates tax shelter.

The tax court ultimately found against me, determining that I was a sophisticated business attorney and required to do more than rely upon an investment advisor and the appraisal by McGraw Hill. The decision was filed February 12, 1996. Thereafter, federal tax notices were sent on July 1, 1996. A payment plan was agreed to within the first two weeks of August 1996 for payments to commence September 28, 1996 and continue at the rate of \$15,000.00 per month to and including December 28, 1996, then a \$55,000.00 payment on January 28, 1997, with the remaining balance to be paid on February 28, 1997. Each and every payment was made on or before the due date. However, on October 13, 1996, a Notice of Levy was mistakenly issued which was later withdrawn with a letter of apology from the Internal Revenue Service. All payments were completed as scheduled.

Sincerely,



Kent J. Dawson

KJD/ds

KENT J. DAWSON

Birth: June 13, 1944 Ogden, Utah
 Legal Residence: Nevada
 Marital Status: Married Ruth W. Dawson
 Four children
 Education: 1962 - 1963 Weber State College
 1965 - 1968 B.S. degree, 1969
 1968 - 1971 University of Utah
 School of Law
 J.D. degree
 Bar: 1971 Utah
 1972 Nevada
 Experience: 1971 - 1972 Law Clerk to the Honorable James Guinan
 Washoe District Court
 Reno, Nevada
 1972 - 1979 City of Henderson
 Assistant City Attorney, 1972-1973
 City Attorney, 1973-1979
 1973 - 1995 Nevada Public Improvement Trust
 General Counsel to City of Henderson
 1977 City of Henderson
 Acting City Manager
 1979 - 1989 Harding & Dawson
 Partner
 1989 - 1995 Kent J. Dawson, P.C.
 (sole practitioner)
 1993 - 1995 Henderson Municipal Court
 Judge Pro Tem
 1995 - present Henderson Justice Court
 Clark County, Nevada
 Justice of the Peace
 Office: 243 Water Street
 Henderson, Nevada 89015

To be United States District Judge for the District of Nevada

**TESTIMONY OF NICHOLAS G. GARAUFIS, OF NEW YORK, TO BE
U.S. DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT
OF NEW YORK**

Mr. GARAUFIS. Good afternoon, Mr. Chairman. I would like to thank my father, George Garaufis, and my brother, Michael Garaufis, for joining me here today for this hearing. I would also like to thank my two sons, Jamie and Matthew, who are not here, for their support and acknowledge the fact that my mother, Demetria Garaufis, who recently underwent surgery in New York, could not be here today, but is thinking about us here today.

In addition, I would like to thank the deputy chief counsel of the FAA, James Whitlow, and my staff assistant for the last 5 years at the FAA, Ms. Dee Davis, for their presence here today, and in addition, acknowledge the presence of two members of Senator Moynihan's judicial screening panel at the time of their recommendation to the Senator of my name, Judge Richard Eton and Kenneth Gross, who are both here today. And in addition, two of my very dear friends, Susan McNally and Marvin Rappaport, two very fine lawyers in the District of Columbia, who have also joined us, I thank them for being here, and I thank you very much for holding this hearing.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Nicholas George Garaufis

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

Residences: Bayside, NY
Washington, D.C.

Office: Federal Aviation Administration
Washington, D.C.

3. Date and place of birth.

September 28, 1948; Paterson, NJ

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

Widowed; wife, Eleanor Prescott, died on February 9, 1997

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

Columbia College, New York, NY, 9/65–5/69, B.A. received 5/69
Columbia Law School, New York, NY 9/71–5/74, J.D. received 5/74

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

1969–1971 – Teacher, New York City Public Schools

1970–1995 – Member, Board of Directors, Spectator Publishing Co., Inc., New York, NY

1971–1974 – Substitute Teacher, New York City Public Schools

1972 – Summer Associate, Thacher, Proffitt & Wood, New York, NY

1974–1975 – Associate, Chadbourne & Parke (then Chadbourne, Parke, Whiteside & Wolff), New York, NY; Summer Associate, 1973

1975–1978 – Assistant State Attorney General, Office of New York State Attorney General, New York, NY

1978–1979 – Special Assistant, Attorney General, Office of New York State Attorney General, New York, NY

1978–1982 – Partner, Garaufis & Kerson, Bayside, NY
 1977–1983 – Member, Community School Board 26, Bayside, NY
 1980–1985 – President, Fort Totten Development Corporation
 1982–1985 – President, Fort Totten Preservation Council
 1982–1983 – Sole Practitioner, Nicholas G. Garaufis, Attorney at Law, Bayside, NY
 1983–1985 – Partner, Garaufis & McElroy, Bayside, NY
 1983–1984 – Counsel, Hon. James H. Scheuer, Member of Congress, House of Representatives, Washington, D.C. (part-time)
 1985–1986 – Partner, Garaufis, McElroy & Block, Bayside, NY
 1986 – Partner, Garaufis & Block, Bayside, NY
 1986–1995 – Counsel, Office of the President of the Borough of Queens, City of New York, Kew Gardens, NY
 1995 – President and Member, Board of Directors, Council for Airport Opportunity, Inc., Jamaica, NY
 1995–present – Chief Counsel, Federal Aviation Administration (FAA) Washington, D.C.

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

Yes. 1969 – 1975, New York Army National Guard and U.S. Army Reserves, highest rank: E-4, XXXXXXXXXXXX Honorable Discharge.

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

Recipient of 1993 Samuel A. Hirshowitz Public Service Award, conferred by the Louis J. Lefkowitz Attorney General Association.

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

- a. American Bar Association – 1975 – present
 b. Association of the Bar of the City of New York, 1975 – present

Principal committee memberships:

Judiciary Committee, 1984 – 1994 (regular and interim member)
 Committee to Encourage Judicial Service, 1991 – 1995
 Delegate to House of Delegates, New York State Bar Association,
 1981 – 1985
 Civil Court Committee, 1979 – 1980

I attempting to obtain any committee reports issued by these committees during my period of service.

- c. New York State Bar Association, 1975 – present
- d. Queens County (New York) Bar Association, 1975 – 1997

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

I am not a member of any organization that is active in lobbying before public bodies. I belong to The Wings Club of New York (an aviation industry social club that does not engage in lobbying before 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.

Admissions with date of admission:

- New York State Bar, First Judicial Department, 1975;
- U.S. District Courts: Southern and Eastern Districts of New York 1975; Western District of New York, 1977
- U.S. Court of Appeals for the Second Circuit, 1975
- U.S. Supreme Court, 1978

There have been no lapses in my membership in the bar of any 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.

Congressional Testimony:

U.S. House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Aviation, March 7, 1996, Hearing regarding Airport Revenue Diversion (statement attached hereto)

U.S. Senate, Committee on Commerce, Science and Transportation, Subcommittee on Aviation, May 1, 1996, Appearance on a panel regarding Airport Revenue Diversion (no formal statement)

U.S. House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Aviation, October 4, 1990, Hearing regarding Airport Noise (attempting to obtain testimony)

U.S. House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Aviation, September 26, 1990, Hearing on Relocation of FAA Eastern Regional Headquarters (attempting to obtain testimony)

U. S. Senate, Government Affairs Committee, Nov 1, 1983, Hearing regarding Fort Totten, NY, surplus land disposition (attempting to obtain testimony)

Speeches on issues of constitutional or legal policy (text or speaking points attached hereto):

Airports Council International-North America Convention
Washington, DC - September 11, 1995

Embry Riddle Aeronautical University
Aviation Law/Insurance Symposium
Daytona Beach, FL - January 22, 1996

Airports Council International-North American Convention
San Francisco, CA - April 21, 1996

Airports & Environmental Law Conference
Seattle, WA - June 10, 1996

Airports Council International-North American Convention
Orlando, FL - October 5, 1998

New York Women in Transportation Meeting
New York, NY - October 13, 1998

American Bar Association, Air and Space Law Forum
Washington, D.C. - January 31, 2000

Jet Blue Airlines, Inauguration of Service, Statement on behalf of the Secretary of Transportation, Buffalo, NY, February 11, 2000

Numerous speeches before community groups during my tenure as Counsel to the Queens Borough President (no formal written notes available)

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

The state of my health is good. My last physical examination took place in September, 1999.

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

I have never held judicial office.

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

Not applicable.

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

Office held:

1995 – present – Chief Counsel, Federal Aviation Administration (appointed)
1986 – 1995 – Counsel to the President, Borough of Queens (appointed)
1977 – 1983 – elected member of Community School Board 26,
Queens, NY (non-political office).

Other:

1975 – unsuccessful candidate for Community School Board 26,
Queens, NY;
1982 – unsuccessful candidate for New York State Senate, 11th Senatorial
District (Queens and Nassau Counties);
1983 – unsuccessful candidate for Community School Board 26,
Queens, NY

17. **Legal Career:**

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

a.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 never clerked for a judge.

a.2. whether you practiced alone, and if so, the addresses and dates:

I have practiced alone at two locations. My office was located at 45-40 Bell Boulevard, Bayside, NY 11361. Dates of practice: 4/82 to 4/83. I also handled a few private non-litigated matters between 8/86 and 6/95 from my home office (216-18 Corbett Road, Bayside, NY 11361) at which time I was employed as Counsel to the President of the Borough of Queens, NY.

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:

Chadbourne & Parke (then Chadbourne, Parke, Whiteside & Wolff)
30 Rockefeller Plaza, New York, NY. 6/74 to 5/75. I was an associate of the firm, handling general litigation and corporate assignments.

New York State Attorney General, 120 Broadway, New York, NY 10271,
6/75 to 4/78. I served as an Assistant (and Deputy Assistant) New York State Attorney general in the litigation bureau, handling state and federal codes, including appeals. I also served, *pro bono publico*, as a Special Assistant Attorney General, 5/78 to 3/79.

Garaufis & Kerson, 45-40 Bell Boulevard, Bayside, New York 11361,
4/78 to 4/82. I was a partner in a law practice, handling general civil matters including litigation and appeals, trusts and estates, real estate and business law.

Garaufis & McElroy, 45-40 Bell Boulevard, Bayside, New York 11361,
4/83 to 11/85. This was the continuation of my law practice with a different partner, Andrew C. McElroy.

Garaufis, McElroy & Block, 45-40 Bell Boulevard, Bayside, New York 11361,
11/85 to 2/86. This was the continuation of my law practice with an additional partner, Alan M. Block.

Garaufis & Block, 45-40 Bell Boulevard, Bayside, New York 11361,
2/86 to 8/86. This was the continuation of my law practice upon the departure of Andrew C. McElroy.

Office of the President of the Borough of Queens, City of New York, 120-55 Queens Boulevard, Kew Gardens, New York 11424, 8/86 to 6/95. I served as chief legal counsel to the county executive of Queens County, handling legislative, contract, personnel, ethics and aviation law. I also served as a trustee representative to the New York City Employees Retirement System Board of Trustees.

Federal Aviation Administration (FAA), 800 Independence Avenue, S.W., Washington, D.C. 20591, 6/95 to present. Position Chief Counsel. I serve as the chief legal officer of the FAA, heading a staff of 200 attorneys and 70 support staff in 13 offices. The FAA's mission is to protect and oversee civil aviation safety and security and to manage the Nation's airspace 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?

From 1974 to 1978 my practice in a large firm and as an assistant (and deputy assistant) state attorney general consisted of handling litigated matters, mainly in the federal courts. While at Chadbourne, I conducted legal research and prepared memoranda for civil litigation and corporate matters. While at the New York State Attorney General's Office, I worked on several major cases involving procedural due process and federal labor preemption. During this time I also handled appeals in the state and federal courts and assisted other attorneys with their major litigation.

As a private practitioner from 1978 to 1986, the nature of my practice shifted to real estate, trusts and estates, state court civil litigation and counseling small businesses and individuals. During a portion of that period (1983 to 1985), I also served as part-time counsel to Congressman James H. Scheuer.

As Counsel to the Queens Borough President from 1986 to 1995, I provided legal guidance respecting state and city constitutional law, interpretation of statutes and decisional law. I also drafted legislative proposals, assisted the city's litigation attorneys in handling lawsuits to which the Borough President was a party and shared the Borough President's fiduciary responsibilities as a member of a public employees' pension system board of trustees overseeing \$23 billion in assets. In 1989 when the United States Supreme Court found the voting structure of the New York City Board of Estimate to be in violation of the "one person, one vote" principle, I represented the Borough President in negotiations with the New York Charter Revision Commission in developing the restructured 1989 New York City Charter. This required me to draft provisions, negotiate revisions, provide counsel to my client and other similarly situated parties, and engage in public advocacy. The revised Charter was approved by the voters of the City at a public referendum in November 1989 and is currently in full force and effect.

Currently, I serve as FAA Chief Counsel, overseeing all the legal activities of the agency. As chief legal officer of an operating agency, I deal with a wide range of legal and public policy issues, as well as day-to-day problems. During my tenure with the FAA, the agency has undergone great change, including the creation of new, Congressionally authorized, personnel and acquisition systems established to streamline operations and implement efficiencies found more often in the private sector. I have also worked on the strengthening of safety and security regulatory policies in the wake of the Valujet and TWA Flight 800 incidents. I have overseen the establishment of a new Office of Dispute Resolution (ODRA) as

sanctioned by the 1996 Transportation Appropriations Act. ODRA's mission is to more efficiently resolve disputes in the award and completion of agency contracts. At the FAA, I also serve as the senior legal advisor to the FAA Administrator in adjudication of civil penalties for violations of statutory and regulatory requirements. In this regard, the Administrator acts in a quasi-judicial capacity.

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

My client base has been extremely diverse. As a Wall Street associate, my work was comprised mainly of research and trial preparation for corporate clients. At the New York State Attorney General's office, my clients included state judges sued in their official capacity, heads of state agencies and prison officials, among others. While in community private practice, my clients ranged from individuals to small businesses and not-for-profit organizations.

For nearly 15 years I have worked in municipal and federal counsel positions. As counsel to the Queens Borough President, I had a single client with a wide scope of governmental interests. As Chief Counsel of the FAA, my clients are the FAA Administrator and the agency itself, comprised of several "lines of business", each with its own statutory and regulatory responsibilities and constituencies. In an agency with nearly 50,000 employees and a 24 hours-a-day operation year-round, counsel are called upon to provide advice at any time.

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 extensively during my tenure as an Assistant New York State Attorney General. I appeared in court less so during my years in community private practice. Since entering government service again in 1986, I have appeared in court infrequently.

c.2. What percentage of these appearances was in:

- (a) federal courts: 40%
- (b) state courts of record: 60%
- (c) other courts: None

c.3. What percentage of your litigation was:

- (a) civil: almost 100%
- (b) criminal: 0%

c.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 was involved in one bench trial for the New York State Attorney General, in which I served as associate counsel.

c.5. What percentage of these trials was:

(a) jury: None

(b) non-jury: 100%

18. **Litigation:** Describe ten of the most significant litigated matters, or matters that would be representative of your litigation experience, which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the 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 dates of the trial period or periods, (b) the name of the court and the judge before whom the case was tried, (c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.

The following constitute the most significant litigated matters that I have handled:

1. *New York Telephone Co, et al. v. New York State Department of Labor*, 440 U.S. 519 (1979), 566 F.2d 388 (2d Cir. 1977), reversing 434 F. Supp. 810 (S.D.N.Y. 1977), (Trial Judge: Richard Owen, D.J.). Trial dates: April 1977. Circuit Panel: Thomas Meskill, C.J., Frederick Bryan, D.J. and Charles Stewart, Jr., D.J. In this case the United Supreme Court upheld a New York statute authorizing the payment of unemployment compensation after an eight-week waiting period for persons engaging in a legal strike or other labor controversy. The Court concluded that although the New York statute conflicts with national labor policy, payments of such benefits are authorized under the Social Security Act, not the National Labor Relations Act, and have been tolerated by Congress. On at least two separate occasions Congress considered legislation to bar the payment of benefits under such circumstances, but declined to enact such a prohibition.

My role in the litigation was to research and draft legal arguments for the briefs at all stages of the litigation, to help prepare witnesses for trial and to argue motions in collateral litigation in the Southern and Western Districts of New York during the pendency of the appeals.

The State's lead counsel was Maria L. Marcus, now Professor of Law, Fordham Law School, 140 West 62nd Street, New York, NY 10023, telephone (212) 636-6823. Our opposing counsel was Stanley Schair, Esq., Benetar Bernstein Schair & Stein, 330 Madison Avenue, New York, NY 10017, telephone (212) 697-4433.

2. *In re Ackerman v. Steisel*, 66 N.Y.2d 833 (1985) aff'g 104 A.D. 2d940. Appellate Division Panel: Vito Titone, Lawrence Bracken, James Niehoff, Isaac Rubin, J.J.; Special Term Judge Albert Buschmann. This was a special proceeding challenging a municipal action by the City of New York to usurp parkland for use by certain city agencies (sanitation and public works) that continued from the end of World War II until the final decision by the New York State Court of Appeals in this case.

I represented U.S. Representative Gary L. Ackerman and several other community leaders on a *pro bono publico* basis at the trial, intermediate appellate and final appellate levels. The appellate courts upheld the New York common law rule, first enunciated in 1871, that parkland cannot be alienated, for any non-park purpose, without the consent of the State Legislature, plainly conferred. As a result of this litigation, the state's highest court reaffirmed this principle and an urban community regained precious parkland for ballfields and passive recreation. There was no trial in this matter. I prepared all the pleadings, supervised all the legal research and argued the case in all courts.

Co-counsel was Alan M. Block, Esq., 46 Forge Road, Sharon, MA 02167, (781) 784-9029. Opposing counsel: Faye Leoussis, Office of New York City Corporation Counsel, 100 Church Street, New York, NY 10007, (212) 788-0667. Principal client: The Honorable Gary L. Ackerman, Member of Congress, House of Representatives, Washington, D.C. 20515, (202) 225-2601.

3. *Pugh v. Ross*, (S.D.N.Y. 1976) Marvin Frankel, D.J. This was a procedural due process challenge to procedures for handling appeals of unemployment compensation decisions made by the Unemployment Insurance Division of the New York State Department of Labor.

I represented the New York State Unemployment Insurance Appeals Board. After motions for summary judgment and extensive negotiations between the parties, the State agreed to enter into a consent order to remedy the alleged deficiencies in process for handling such appeals. I handled all aspects of the litigation personally, from the inception of the litigation when the plaintiffs sought a temporary restraining order from Judge Frankel, to the preparation of the settlement agreement.

My opposing counsel were John C. Gray, Esq., Project Director, South Brooklyn Legal Services, 105 Court Street, Brooklyn NY 11201, (718) 237-5500 and David Raff, Esq., 59 John Street, New York, NY 10038, (212) 732-5440.

4. *Donato v. Secretary of Health and Human Services*, 721 F.2d 414 (2d Cir. 1983). Circuit Panel: Walter Mansfield, Amalya Kearsse and Ralph Winter, C.J.J. This was an appeal from the district court's dismissal of an action challenging a determination of denial of supplemental security benefits for the appellant. I represented the appellant, *pro bono publico*, as a member of the Second Circuit's panel of attorneys for indigent appellants. I researched and wrote the brief and argued the appeal before the Second

Circuit. The court reversed and remanded the case to the Social Security Administration for a new determination consistent with its decision. I did not handle the remand.

The Second Circuit executive familiar with my service is Eileen F. Shapiro, Esq., now retired senior staff attorney, U.S. Court of Appeals for the Second Circuit. Ms. Shapiro may be reached at Flemming, Zulach & Williamson, LLP, 1 Liberty Plaza, New York, NY 10006, (office) (212) 412-9500, (home) xxxxxxxxxxxxxxxx. Opposing counsel Kevin P. Simmons, AUSA and Roger L. Field, AUSA have both left the U.S. Attorney's office are not listed in Martindale-Hubbell for New York City.

5. *Perez v. Metz*, 459 F. Supp. 1131 (S.D.N.Y. 1977) William Conner, D.J. This was a collateral attack of a state court conviction.

In this case, two prisoners challenged their convictions on the constitutional claim that their common representation by a single attorney despite their conflicting interests deprived them of the Sixth Amendment right to the effective assistance of counsel and to their due process right to a fair trial.

As an assistant New York State Attorney General, I handled the response to habeas corpus petitions and other prisoner cases. I researched and wrote the brief and appeared at status conferences before Judge Conner. There was no hearing or trial held during my representation of the New York State respondents. The court dismissed the petition as to one petitioner, but granted a hearing to the other to determine the circumstances of the dual representation and whether one attorney's dual representation of the two prisoners at trial effectively deprived the second prisoner of effective counsel.

The opposing counsel in this case was Dominick J. Porco, Esq., 41 Madison Avenue, New York, New York 10010, (212) 213-9400.

6. *Jeffrey v. Ward*, 44 N.Y.2d 812 (1978). This was an appeal by a prisoner seeking credit for additional 'good time' toward his release from prison. The Appellate Division below had granted the petitioner jail time credit and the State appealed.

I represented the State of New York in the appeal to the Court of Appeals. I researched and drafted the government's brief. The oral argument was assigned to another assistant attorney general. The Court of Appeals reversed, reinstating the trial court's judgment. This type of case is typical of the appellate matters that I handled at the Attorney General's office. Lead opposing counsel was William E. Hellerstein, Legal Aid Society. Mr. Hellerstein is listed in Martindale-Hubbell at 151 W 13 St, New York, NY. His telephone is (212) 989-5532.

7. *Tawwab v. Metz*, 554 F.2d 22 (2d Cir. 1977). Circuit Panel: Wilfred Feinberg, Murray Gurfein & Thomas Meskill, C.J.J. This was an appeal by eight New York State prisoners of the Sunni Muslim faith complaining of infringement of their rights under the First, Sixth and Fourteenth Amendments of the Constitution and seeking declaratory and injunctive relief and damages.

I researched and wrote the government's brief and argued the appeal. At the oral argument, I advised the court that the claim for injunctive relief appeared to be moot due to the transfer or release of the inmates. The court determined that the other claims lacked sufficient merit and remanded to the district court with instructions to dismiss the complaint as moot.

Lead opposing counsel was Daniel J. Steinbock of Prisoners' Legal Services (PLS). I was unable to locate Mr. Steinbock through PLS or in Martindale-Hubbell. PLS is currently located at 118 Prospect Street, Ithaca, NY 14850, (607) 273-2283.

8. *Friends of Gateway v. Rodney Slater, Secretary of Transportation*, No. 99-4081 in the United States Court of Appeals for the Second Circuit, argument scheduled for 3/9/00. Panel not yet announced. This is a petition for review of the Federal Aviation Administration decision to install a Terminal Doppler Weather Radar on property administered by the FAA within the Gateway National Recreation Area. After installation, the radar system will provide notice of dangerous weather conditions to air traffic controllers at JFK International and LaGuardia Airports. Petitioners claim that the site chosen for the radar was inconsistent with language in the Gateway Act and with earlier comments on the decision by the Department of Interior.

I was the agency liaison with the Department of Interior and Council of Environmental Quality and participated in drafting an MOU for the Executive Agencies involved. I supervised the agency's lead attorney and participated in the briefs for the Government. The primary counsel for the FAA was Hans Bjornson, Airports and Environmental Law Division, FAA, 800 Independence Ave., SW, Washington, DC 20591, telephone (202) 267-3199. Department of Justice counsel are Ellen Durkee and Jeffrey Dobbins, U.S. Department of Justice, Washington, DC 20004, (202) 514-4426 (Durkee), (202) 514-4358 (Dobbins). Mr. Dobbins will argue the appeal. I have not had any contact with petitioners' counsel. She is Minna J. Kotkin, BLS Legal Services Corp., Federal Litigation Program, One Boerum Place, Brooklyn, NY 11201, (718) 780-7994.

9. *National Parks and Conservation Association v. Department of Transportation*, No. 98-72368 in the United States Court of Appeals for the Ninth Circuit, decision pending. Circuit Panel: Dorothy W. Nelson, Alex Kozinski and William Fletcher, C.J.J. This is a petition for review of the FAA's approval of proposed runway development and airport improvement projects at Kahului Airport, in Maui, Hawaii. The petitioners challenge the accuracy of the FAA's analysis of the risk that the expansion poses to biotic communities in Haleakala National Park, which is located about 15 miles from the airport. They claim that the airport expansion would increase the introduction of destructive alien species to Maui and harm the Park's unique ecosystem. The FAA's decision was based upon an environmental impact statement, a biological assessment, and a Federal-State MOU and Alien Species Action Plan developed by a multi-agency task force. The agency believes that the extensive mitigation measures in the MOU and Action Plan would adequately protect the park's resources from adverse impacts from airport operations.

I supervised the agency's lead attorney, was a liaison with the then Attorney General of the State of Hawaii, and reviewed the briefs for the Government, filed June 30, 1999. Oral argument was November 26, 1999. The primary counsel for the FAA was Daphne A. Fuller, Manager of the Environmental Law Branch, 800 Independence Avenue, SW, Washington, DC. 20591, telephone (202) 267-3199. The former Attorney General of Hawaii is Marjorie Bronster, Bronster, Crabtree & Hoshibata, 1001 Bishop Street, Suite 2300, Pauahi Tower, Honolulu, HI 96813, (808) 524-5644. Opposing counsel is Deborah A. Sivas, Stanford Law School, 599 Nathan Abott Way, Stanford, CA 94305-8610, (650) 723-0325.

10. *Grand Canyon Air Tour Association v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). Circuit Panel: This was a challenge by four groups of petitioners to a rule that intended to make progress toward substantial restoration of natural quiet in the Grand Canyon National Park. The rule modified the dimensions of the Grand Canyon National Park Special Flight Rules Area, modified and established new flight corridors, modified and established new flight-free zones, and placed restrictions on commercial air tour activity.

I coordinated the FAA's litigation strategy with the Department of Justice, supervised the agency's lead attorney, and reviewed the briefs for the Government. The court upheld the agency's actions as the first part of a three-part plan to reduce aircraft noise from sightseeing tours and holding a number of the claims to be unripe.

The primary counsel for the FAA was Patricia Lane, who is no longer with this agency. Ms. Lane may be reached at The Humane Society of the United States, 700 Professional Drive, Gaithersburg, MD 20879, (301) 258-3153. Department of Justice counsel was Albert M. Ferlo, Jr., U.S. Department of Justice, Washington, DC 20004, (202) 514-2757. Lead opposing counsel, with whom I had no contact, was E. Donald Elliot, Paul, Hastings, Janofsky & Walker, 1299 Pennsylvania Avenue NW, Washington, DC 20004, telephone (202) 508-9558.

Because some of my cases date from the 1980's and my more recent cases did not involve me as trial counsel, I am providing the names of individuals who are familiar with my professional activities in recent years, as follow:

Marjorie Bronster, Esq.
 (Formerly Hawaii Attorney General)
 Bronster, Crabtree & Hoshibata
 1001 Bishop Street
 Suite 2300
 Pauahi Tower
 Honolulu, HI 96813
 (808) 524-5644

The Honorable Richard A. Brown
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11414
(718) 286-6300

Jeffrey S. Green, Esq.
General Counsel
The Port Authority of New York and New Jersey
One World Trade Center
New York, NY 10048
(212) 435-6910

Kenneth A. Gross, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP.
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7007

Marisa Lago, Esq.
Director, Office of International Affairs
Securities and Exchange Commission
(Formerly Counsel to New York City Economic Development Corp.)
450 5th Street, NW
Washington, DC 20549
(202) 942-2770

Professor Eric Lane
Hofstra University School of Law
121 Hofstra Avenue
Hempstead, New York 11550
(516) 463-5884

The Honorable Alfred D. Lerner
Associate Justice, Appellate Division
New York State Supreme Court
26th Street and Madison Avenue
New York, NY 10010
(212) 340-0440

Ann McNamara, Esq.
Senior Vice President and General Counsel
American Airlines
4333 Amon Carter Boulevard
Mail Drop 5618
Fort Worth, TX 76155
(817) 967-1401

David Paget, Esq.
Sive, Paget & Riesel
460 Park Avenue
New York, NY 10022
(212) 421-2150

The Honorable David G. Trager
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201
(718) 260-2510

Carl W. Vogt, Esq.
Office of the President
Williams College
P.O. Box 687
Williamstown, MA 01267
(413) 597-4233

Robert C. Warren, Esq.
Senior Vice President and General Counsel
Air Transport Association
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 626-4212

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 1989 during my tenure as Counsel to the Queens Borough President, I helped to negotiate revisions in the New York City Charter. This project was necessitated by the U.S. Supreme Court's decision in *Morris v. Board of Estimate*, 489 U.S. 688 (1989), aff'g 831 F. 2d 384, which effectively directed the dissolution of New York City's

chief governing body, the Board of Estimate. It became necessary to develop creative and constitutionally viable alternative governance structures. My client and employer, the Queens Borough President, was a voting member of that body.

Currently, I serve as FAA Chief Counsel, overseeing the activities of 200 attorneys. As chief legal officer for an operating agency, I deal with a wide range of legal issues and policies. During my tenure at the FAA, the agency has undergone great change. This includes the creation of new personnel and acquisition systems established to streamline operations and implement efficiencies, to make the agency function more like the private sector. I have also worked on the strengthening of safety and security regulatory policies in the wake of the Valuejet and TWA Flight 800 incidents. I have overseen the establishment of a new Office of Dispute Resolution (ODRA) as authorized by the 1996 Transportation Appropriations Act. ODRA's mission is to expedite resolution of disputes in the awarding and implementation of agency contracts. ODRA extensively uses alternative dispute resolution, before quasi-judicial action is initiated.

At the FAA, I also serve as the senior legal advisor to the FAA Administrator in the review of civil penalties imposed for violations of statutory and regulatory requirements. In this regard, the Administrator acts in a quasi-judicial capacity, reviewing appeals from decisions of administrative law judges. Much of my practice focuses on the interpretation of statutes and regulations for agency staff and regulated parties. Occasionally, my office issues formal opinions that the federal courts may look to in adjudicating cases. We are often called upon by the Justice Department and the United States Attorneys to provide assistance in aviation litigation. I closely supervise staff attorneys in the more sensitive cases.

I also served as a member of the Judiciary Committee of the Association of the Bar of the City of New York for over a decade, beginning in 1984. For the first three years I was a regular committee member, and thereafter I served as an "interim" member for six months each year. During this lengthy period I personally investigated and reported on the candidacies of dozens of candidates for appointment (or as appropriate, election) to the municipal, state and federal judiciary within the City of New York.

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.

ABC Inc. Pension Plan. Monthly survivor benefits, payable to me beginning no sooner than January 1, 2002. I may elect to receive monthly payments upon my late wife's 55th birthday, or thereafter. Monthly pension benefits will be adjusted based on date elected.

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

I do not believe that my financial activities will create a problem during my service on the bench. However, in any matter before me I will adhere to the Guidelines of Judicial Conduct as it relates to conflicts. I will examine my docket of cases to ascertain whether any other actions should be taken, and if I determine that I cannot, in a timely manner, resolve such a potential conflict of interest, I will recuse myself from hearing any case (s) which might create an appearance of, or potentially 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.

I have no plans, commitments or agreements to pursue any outside employment during my service with the court.

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

See attached Financial Disclosure Report (AO-10).

5. Please complete the attached financial net worth statement in detail.

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.
 1. Rep. Seymour Halpern (R-NY) reelection campaigns: 1964, 1966, 1968, 1970. I was a campaign volunteer.
 2. I was a candidate for election to New York State Senate in 1982.
 3. Rep. Gary L. Ackerman (D-NY) election campaign: 1983 and reelection campaigns 1984, 1986, 1988, 1990. I was a campaign volunteer. I also served as assistant campaign treasurer, Committee to Elect Gary L. Ackerman, Inc., 1985-1994.
 4. New York City of the Councilwoman Julia Harrison election campaign: 1985. I was the campaign chairman.
 5. Clinton-Gore Campaign: 1992. I was a campaign volunteer in New York Primary.

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Garaufis, Nicholas G.		2. Court or Organization Eastern District of New York	3. Date of Report 02/29/2000
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 type) <input checked="" type="checkbox"/> Nomination, Date 02/29/2000 Initial _____ Annual _____ Final _____	6. Reporting Period 01/01/1998 to 01/31/2000
7. Chambers or Office Address Federal Aviation Admin. 800 Independence Avenue, SW Washington, DC 20591		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.)

<input checked="" type="checkbox"/> NONE (No reportable positions.)	POSITION	NAME OF ORGANIZATION / ENTITY
1		
2		
3		

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

<input type="checkbox"/> NONE (No reportable agreements.)	DATE	PARTIES AND TERMS
1	02/09/97	ABC, Inc. Pension Plan monthly survivor benefit, payable to me beginning no sooner than 1/1/02. Monthly benefit will be adjusted based on date elected.
2	06/09/95	City of New York Deferred Compensation Plan. Pre-tax contributions to retirement-savings program are distributed to me at rate of \$5,000 semi-annually
3	06/09/95	City of New York Employees Retirement System pension contributions. Contributions are subject to withdrawal at any time.

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

<input checked="" type="checkbox"/> NONE (No reportable non-investment income.)	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1			
2			
3			
4			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Garaufis, Nicholas G.	02/29/2000

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

<input type="checkbox"/> NONE (No such reportable reimbursements.)	SOURCE	DESCRIPTION
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

<input type="checkbox"/> NONE (No such reportable gifts.)	SOURCE	DESCRIPTION	VALUE
1	EXEMPT		
2			
3			

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

<input checked="" type="checkbox"/> NONE (No reportable liabilities.)	CREDITOR	DESCRIPTION	VALUE CODE*
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 Garaufis, Nicholas G.	Date of Report 02/29/2000
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS-- income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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 Oppenheimer Capital Income A Fund	E	Dividend	M		EXEMPT				
2 Oppenheimer International Growth A Fund	D	Dividend	M		EXEMPT				
3 Oppenheimer New York Municipal A Fund	B	Dividend	K		EXEMPT				
4 Oppenheimer Quest Opportunity A Fund	E	Dividend	M		EXEMPT				
5 Oppenheimer Total Return A Fund	E	Dividend	M		EXEMPT				
6 MFS Research Fund	C	Dividend	J		EXEMPT				
7 Walt Disney Company Common Stock	A	Dividend	J		EXEMPT				
8 Alliance Growth A Fund	E	Dividend	M		EXEMPT				
9 Alliance Premier Growth A Fund	E	Dividend	M		EXEMPT				
10 Alliance Quasar A Fund	D	Dividend	M		EXEMPT				
11 Alliance Real Estate Fund	A	Dividend	J		EXEMPT				
12 Oppenheimer Quest Small Cap Fund	D	Dividend	L		EXEMPT				
13 Alliance Technology A Fund	A	Dividend	K		EXEMPT				
14 Alliance Growth & Income B	B	Dividend	J		EXEMPT				
15 Alliance Growth B Fund	A	Dividend	J		EXEMPT				
16 Alliance Premier Growth B Fund	A	Dividend	J		EXEMPT				
17 Alliance Quasar Fund B	A	Dividend	J		EXEMPT				
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 HI=\$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 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: Garaufis, Nicholas G. Date of Report: 02/29/2000

VII. Page 2 INVESTMENTS and TRUSTS-- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <i>Place "(O)" 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.)									
18 City of New York Deferred Compensation Plan	D	Dividend	K		EXEMPT				
19 City of New York Employees Retirement System	A	Dividend	J		EXEMPT				
20 Equivest Variable Annuity	D	Dividend	K		EXEMPT				
21 Triboro Bridge Revenue Bond	A	Interest	J		EXEMPT				
22 New York State Medical Facilities Rev. Bond	A	Interest	J		EXEMPT				
23 New York State Environmental Facilities bond	A	Interest	J		EXEMPT				
24 NY City Transit, AU/Livingston Bond	A	Interest	J		EXEMPT				
25 Oppenheimer Equity Income A Fund	E	Dividend	M		EXEMPT				
26 Alliance Technology B Fund	D	Dividend	M		EXEMPT				
27 Nicholas G. Garaufis 1997 Family Trust	D	Dividend	L		EXEMPT				
28 ABC, Inc. Pension Plan		None			EXEMPT				
29									
30									
31									
32									
33									
34									
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) 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									
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 Garaufis, Nicholas G.	Date of Report 02/29/2000
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.*(Indicate part of report.)*

Section VII, Item 28. ABC, Inc. Pension Plan. I am designated to receive monthly pension benefits under my late wife's pension plan. I may elect to receive benefits on or after January 1, 2002. Monthly benefit is approximately \$1,000 if I elect to receive benefits on the earliest date.

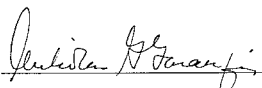
FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Garaufis, Nicholas G.	02/29/2000

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 2/29/00

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

12/28/99

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

ASSETS			LIABILITIES		
Cash on hand and in banks	3,748.12		Notes payable to banks—secured	19,514.50	
U.S. Government securities—add schedule			Notes payable to banks—unsecured		
Listed securities—add schedule	1,667,727.10		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	91,514.60	
Real estate owned—add schedule	405,000.00		Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize: NONE		
Autos and other personal property	31,000.00		All other debts are paid in full by due date		
Cash value—life insurance	49,407.40				
Other assets—itemize:	173,656.87				
			Total Liabilities	111,029.10	
			Net Worth	2,221,510.39	
Total Assets	2,332,539.49		Total Liabilities and net worth	2,332,539.49	
CONTINGENT LIABILITIES	NONE		GENERAL INFORMATION		
As endorser, cosigner or guarantor			Are any assets pledged? (Add schedule.)	NO	
On leases or contracts			Are you defendant in any civil or legal actions?	NO	
Legal Claims			Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax					
Other special debt					

Nicholas G. Garaufis
 Financial Statement
 Net Worth
 12/28/99

Addendum

Liabilities:

Old Kent Mortgage Co., Mortgage securing note on personal residence: Bayside, New York
 \$91,514.60

Assets:

LISTED SECURITIES:

Non-Qualified

Alliance Growth & Income Fund	\$ 22,455.00
Alliance Technology Fund	\$158,783.18
Oppenheimer Capital Income A Fund	\$146,493.07
Oppenheimer Int'l Growth A Fund	\$227,910.44
Oppenheimer NY Municipal A Fund	\$ 27,335.60
Oppenheimer Quest Opportunity A Fund	\$167,457.23
Oppenheimer Total Return A Fund	\$198,267.16
MFS Research Fund	\$ 3,892.99
Walt Disney Company	\$ 5,001.75
ATT	\$ 151.55

Qualified

Alliance Growth Fund	\$198,061.09
Alliance Premier Growth Fund	\$238,717.72
Alliance Quasar Fund	\$158,277.05
Alliance Real Estate Fund	\$ 5,919.77
Oppenheimer Quest Small Cap Fund	\$ 74,625.83
Alliance Technology A Fund	\$ 15,430.98

Nicholas G. Garaufis, custodian for James Garaufis

Alliance Growth & Income B	\$ 3,369.52
Alliance Growth Fund B	\$ 4,398.04
Alliance Premier Growth Fund B	\$ 5,716.21
Alliance Quasar Fund B	\$ 3,830.03

456

Nicholas G. Garaufis, custodian for Matthew Garaufis	
Alliance Growth & Income B	\$ 372.59
Alliance Growth Fund B	\$ 429.47
Alliance Premier Growth Fund B	\$ 427.92
Alliance Quasar Fund B	\$ 401.68

Total LISTED SECURITIES \$1,667,727.10

OTHER ASSETS:

Equinvest Variable Annuity, Account No. 98,502,717:

Alliance Common Stock Fund	\$ 7,689.47
Alliance Equity Index Fund	\$ 7,292.81
T. Rowe Int'l Stock Fund	\$ 7,019.99
T. Rowe Equity Income Fund	\$ 5,667.53
Warburg Pincus Small Co. Fund	\$ 4,590.63

Total Equinvest \$ 32,260.44

Thrift Savings Plan – through Federal employment \$ 87,844.30

NY City Deferred Compensation Plan – balance in account \$ 48,008.00

NY City Employees Retirement System – Contributions & Interest \$ 5,544.13

Total – OTHER ASSETS \$173,656.87

Automobiles:

Automobile No. 1	\$ 20,000.00
Automobile No. 2	\$ 6,000.00
Automobile No. 3	\$ 5,000.00

Total – AUTOMOBILES \$ 31,000.00

REAL ESTATE OWNED

Private House \$325,000.00

Cooperative Apartment \$ 80,000.00

Total - REAL ESTATE \$405,000.00

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 provided *pro bono* legal counsel to community groups in Queens, New York. I was counsel to a volunteer ambulance corps for over ten years. This group provides emergency and transport ambulance service to members of the community regardless of financial position and without charge. I have also provided *pro bono* legal counsel to public officials in litigation involving community needs. Moreover, I served on a panel of attorneys handling assignments on behalf of indigent civil appellants in the United States Court of Appeals for the Second Circuit. During my years of private practice, from time to time I also assisted indigent persons referred to my law practice by the pastor of my church and others.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold 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?

Between 1979 and 1986, I was a member of the Kiwanis Club of Bayside, New York. During that period, Kiwanis International did not admit women as members. However, during the period of my membership in the Bayside Club, the club sponsored (and I supported) changes in the by-laws of Kiwanis International that would admit women to membership. Such a revision was ultimately approved by Kiwanis International and women are now admitted as members of Kiwanis.

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. Senator Daniel Patrick Moynihan maintains a judicial screening panel. In April 1999, I applied to the panel for consideration for appointment to the District Court. The panel interviewed me in April 1999. In May 1999, the panel reported me out favorably for the Senator's consideration for the next vacancy on the Eastern or Southern Districts of New York. In September 1999, Chief Judge Sifton advised Senator Moynihan of his intention to take senior status in March 2000. Senator

Moynihan recommended me for appointment to fill that vacancy in a letter to The President, dated December 20, 1999. I was then interviewed by representatives of the Department of Justice, the Office of the White House Counsel, the Federal Bureau of Investigation and The Standing Committee on the Federal Judiciary of the American Bar Association. On February 28, 2000, President Clinton forwarded my name to the Senate to fill this vacancy.

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 reasonable be interpreted as asking how you would rule on such a 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 "judiciary 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 appropriate role of the Federal judiciary within the Federal government has become the subject of growing debate in recent years because of the concern that too many judges are too willing to use individual cases to impose broad, affirmative duties upon society as a whole. Criticism of this "judicial activism" has increased because of a tendency by some in the judiciary to employ the individual plaintiff as a vehicle to

usurp many of the prerogatives of other branches and levels of government through the imposition of far reaching orders extending to broad classes of individuals who may not even be parties to the litigation.

Courts should refrain from deciding cases which are not yet ripe for adjudication and which may be resolved without judicial intervention. Since the effects of a court's intervention can extend well beyond the parties, care must be exercised to avoid decisions that are not necessitated by a court's obligation to resolve concrete issues properly within its jurisdiction. At the same time, a court should decline invitations to address issues not properly before it or to undertake problem-solving more appropriately left to the other branches of government. Having worked in both the legislative and executive branches, I have great respect for the constitutional responsibilities and prerogatives of the political branches, and would afford them the deference to which they are entitled.

A court should also pay careful attention to the relevant prior decisions of appellate courts when adjudicating controversies. Litigants are entitled to the benefit of stability in the law when assessing the correctness of their positions. Since the central role of a trial court is to apply existing law to the adjudicated facts, maintaining a sharp focus on prior judicial precedent is an integral part of administering justice.

NICHOLAS G. GARAUFIS

Birth: September 28, 1948 Paterson, New Jersey

Legal Residence: New York

Marital Status: Widow Two children

Education: 1965 - 1969 Columbia College
B.A. degree, 1969

1971 - 1974 Columbia Law School
J.D. degree, 1974

Bar: 1975 New York

Experience: 1973 - 1975 Chadbourne & Parke
Associate

1975 - 1978 New York State Department of Law
Assistant New York State Attorney
General

1978 - 1982 Garaufis & Kerson
Partner

1983 - 1985 Garaufis & McElroy
Partner

1985 - 1986 Garaufis, McElroy & Block
Partner

1986 - 1986 Garaufis & Block
Partner

1986 - 1995 Office of the President of the
Borough of Queens, City of New York
Chief Legal Counsel

1995 - present Federal Aviation Administration
Chief Counsel

Office: Office of Chief Counsel
Federal Aviation Administration
800 Independence Avenue, SW
Washington, D.C. 20591

To be United States District Judge for the Eastern District of New York

Senator THURMOND. We have a Judge Hamilton in my State that I appointed judge. Do you know him?

Judge HAMILTON. No, I don't.

Senator THURMOND. Go ahead.

**TESTIMONY OF PHYLLIS J. HAMILTON, OF CALIFORNIA, TO BE
U.S. DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT
OF CALIFORNIA**

Judge HAMILTON. First of all, I would like to thank the committee for holding this hearing, and although Senator Feinstein could not be here this afternoon, I certainly want to thank her for my recommendation.

I would like to at this time to recognize and thank my husband, Stephen Rowell, who is present, and I would like to recognize our children, Stevie and Mariska, who could not be here today.

I would also like to take the opportunity to recognize Tom Hnatowski, who I believe is in the audience, from the Magistrate Judges Division of the Administrative Office of the Courts, and I simply would like to say that the Magistrate Judges Division has always provided great support to all of us, including helping me find a hotel room in this very difficult town.

Thank you.

[The biographical information follows:]

SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Phyllis Jean Hamilton
From 1977-79 I used the name of Phyllis Hamilton Webb
2. Address: List current place of residence and office address(es).

Residence: Oakland, California

Office: U.S. District Court
450 Golden Gate Avenue
San Francisco, CA 94102
3. Date and place of birth.

June 12, 1952
Jacksonville, Illinois
4. Marital status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married.
Stephen Q. Rowell
Attorney
Oakland City Attorney's Office
1 Frank Ogawa Plaza
Oakland, CA 94612
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Stanford University, Sept 1970 - Aug 1973
B.A. conferred June 1974

Santa Clara University School of Law, Aug 1973 - May 1976
J.D. conferred May 1976, cum laude

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

Office of the State Public Defender, State of California
Deputy Public Defender
October 1976 - March 1980

Farinon Electric Corp.
Manager, EEO Programs (a non-legal position)
April 1980 - November 1980

U.S. Merit Systems Protection Board, San Francisco
Regional Office
Administrative Judge
November 1980 - May 1985

Youth Law Center
Board of Directors
1980 - 1985

Municipal Court, Oakland-Piedmont-Emeryville Judicial District
Court Commissioner
June 1985 - February 1991

Women Lawyers of Alameda County
Board of Directors
1990 - 1999

U.S. District Court, Northern District of California
U.S. Magistrate Judge
April 1991 - present

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

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.

I attended both college and law school on scholarships.

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

National Association of Women Judges, 1993-present
California Women Lawyers, 1991-present
Charles Houston Bar Association, 1986-present
Women Lawyers of Alameda County
Board of Directors 1990 - 1991
Alameda County Bar Association, 1987-1984
Member of Executive Board, Ninth Circuit Magistrate Judges Conference, 1993-1996
Chair, Ninth Circuit Magistrate Judges Education Committee, 1996-1999
Member, Criminal Justice Act Committee, Northern District of California, 1996-present
Member Federal Magistrate Judges Association, 1991-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.

I belong to no 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.

Supreme Court State of California, December 1976
U.S. District Court for Northern District of California,
December 1976

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

I have not published anything that I have written except court opinions.

I have never given a speech on constitutional law or legal policy. The only public speaking in which I have engaged has been in the nature of continuing legal education. I have participated as a panel member or presenter for the Continuing Education of the Bar (CEB), the San Francisco Barrister's Club, and the Federal Practice Program on issues related to practicing in the U. S. District Court for the Northern District of California. I did not prepare or provide written materials.

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

Excellent.
December 14, 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.

Court Commissioner (1985 - 1991), for the Municipal Court for the Oakland-Piedmont-Emeryville Judicial District, Oakland, California. The municipal court was then a trial court of general jurisdiction for misdemeanor criminal cases and for civil cases valued at \$25,000.00 or less. I was appointed by the judges of the court in June 1985 and served until I resigned in February 1991, to accept my current position.

U.S. Magistrate Judge (1991 - present), for the U.S. District Court for the Northern District of California, San Francisco, California. This is a court of limited jurisdiction based upon federal question or diversity of citizenship. I was appointed on April 2, 1991, for an eight-year term and was reappointed on April 2, 1999, for a second eight-year term.

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. High Tech Med. Instrumentation, Inc. v. New Image Indus., C-93-4152 PJH (January 7, 1999).

Not reported, copy attached. No appellate review.

b. High Tech Med. Instrumentation, Inc. v. New Image Indus., 161 F.R.D. 86 (March 17, 1995).

Reported, copy attached. No appellate review.

c. Copas v. East Bay Mun. Util. Dist., C-92-3649 PJH (May 26, 1999).

Not reported, copy attached. No appellate review.

d. Fockaert v. County of Humboldt, C-98-2662 PJH, (January 15, 1999).

Not reported, copy attached. No appellate review.

e. Harrison v. Denny's Restaurant, Inc., C-96-0343 PJH, (April 24, 1997).

Not reported, copy attached. No appellate review.

f. Gomez v. American Bldg. Maintenance, 940 F. Supp. 255 (September 23, 1996).

Reported, copy attached. No appellate review.

g. CHW West Bay v. Shalala, C-98-1528 PJH, (August 6, 1999).

Not reported, copy attached. No appellate review.

h. United States v. Powers, C-94-3401 PJH, (May 20, 1996).

Not reported, copy attached. No appellate review.

i. Wright v. Pacific Gas & Elec. Co., C-95-1072 PJH, (May 6, 1997).

Not reported, copy attached. No appellate review.

j. Lake's Unlimited, Inc. v. Allen, C-94-4142 PJH (December 21, 1995).

Not reported, copy attached.

Affirmed by the 9th Circuit at 114 F.3d 1194 (9th Cir. 1997). Copy of affirmance attached.

(2) I am aware of only one decision of the Court of Appeal for the Ninth Circuit which reversed one of my opinions.

ABC Nat'l Line Erection Apprenticeship Training Trust v. Aubry, 68 F.3d 343 (9th Cir. 1995). This appeal presented the question of whether the impact of California's prevailing wage law on an apprenticeship program which had not been approved by the State of California confers standing upon the trust that administers such a program to challenge the relevant provisions of the California Labor Code as preempted by ERISA. I had found that the trust fund lacked standing since it suffered no injury fairly traceable to the enforcement activity of the state. The Ninth Circuit found, however, that state approval coupled with the regulation of contractors created an injury fairly traceable to the state. This decision was based in large part on the court's decision in Dillingham v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995), a case decided after the briefing in the case before me. In Dillingham, the court ruled that ERISA preempted the enforcement of California's prevailing wage law against contractors paying apprentice wages to apprentices from programs that have not received state approval. This ruling effectively granted appellant the substantive relief it sought by ending the enforcement of state law against contractors paying into unapproved apprenticeship programs.

Copies of my underlying opinion and the Ninth Circuit opinion are attached.

I am aware of two Reports and Recommendations (R&R) that I prepared which were not adopted by the district judge.

CALPIRG v. Shell Oil Co., C92-4023 TEH and C93-0622 TEH (N.D. Cal). The California Public Interest Group (CALPIRG) filed suit against Shell, under the Clean Water Act, alleging that Shell improperly discharged excessive amounts of selenium and cyanide into San Francisco Bay. Four months later, the Pacific Coast Federation of Fishermen's Association (PCFFA) filed a complaint alleging identical claims. The two cases were consolidated. CALPIRG and Shell subsequently negotiated a settlement which required that Shell pay attorney's fees to CALPIRG. PCFFA joined in the settlement, but with the agreement that it could file a separate application for attorney's fees. District Judge Henderson referred the attorney's fees petition to me for an R&R.

I recommended that PCFFA's application be granted because PCFFA was a prevailing party within the meaning of the attorney's fees provision of the Clean Water Act, 33 U.S.C. § 1365, I found that an award of fees was appropriate under that section because PCFFA had served as a catalyst in Shell's entering into the settlement agreement. Judge Henderson did not adopt the recommendation. He found that while PCFFA was a prevailing party, an award of fees was not appropriate because PCFFA, in filing a duplicate suit, had not contributed substantially to the goals of the Act in doing so.

United States for the use of McPhail's, Inc. V. Velcich Assoc., Inc., C92-4142 EFL (N.D. Cal). The parties signed a settlement agreement, under which defendant agreed to pay and plaintiff agreed to accept \$10,000 as a full compromise. The check that defendant sent contained a notation that it would be void if plaintiff's attorney did not drop all proceedings regarding a separate lawsuit involving defendant and a different plaintiff. The only connection between the plaintiffs in the two lawsuits was that both were represented by the same attorney. Plaintiff filed a motion to enforce the settlement agreement and for attorney's fees. District Judge Lynch referred the motion to me for an R&R.

I recommended that the motion to enforce the settlement agreement be granted and that attorney's fees be awarded to plaintiff because defendant had acted in bad faith in attempting to add an additional condition to the signed settlement agreement and in opposing plaintiff's motion to enforce. Judge Lynch adopted the recommendation regarding enforcement of the settlement agreement. He found, however,

that although it was a close issue, defendant was confused about the settlement process and had not, therefore, acted in bad faith in opposing the motion to enforce.

Copies of the underlying R&R and the district judges's opinion are attached.

(3) I have not written significant opinions on federal or 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.
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 not practice 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;

California State Public Defender's Office

1390 Market Street
San Francisco, CA 94102
Deputy Public Defender
October 1976 - March 1980

United States Merit Systems Protection Board, San Francisco Regional Office

525 Market Street
San Francisco, CA 94105
Administrative Judge
November 1980 - May 1985

Municipal Court for the Oakland-Piedmont Emeryville Judicial District

661 Washington Street
Oakland, CA 94607
Court Commissioner
June 1985 - February 1991

United States District Court Northern District of California

450 Golden Gate Avenue
San Francisco, CA 94102
United States Magistrate Judge
April 1991 - 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?

California State Public Defender's Office (1976 - 1980)

As a deputy public defender, I provided appellate representation for indigent criminal defendants after their felony convictions in state court. I was not assigned any capital cases. My duties

included analysis of trial transcripts, research and writing briefs and petitions for review, and oral arguments in the appellate courts of the state. Additionally, while participating in a six-month exchange program with a local public defender's office, I tried about six cases in state court.

United States Merit Systems Protection Board
(1980 - 1985)

The Merit Systems Protection Board (MSPB) is a quasi-judicial agency with administrative judges assigned to the various regional offices. My duties included hearing and deciding appeals by federal employees who had been terminated, demoted or suspended for disciplinary or performance reasons; appeals from the denial of retirement benefits and from reductions-in-force; claims of employment discrimination and sexual harassment; and motions for attorneys fees. Most litigants were represented by counsel. Hearings were provided for a geographic region roughly equivalent to the Ninth Circuit. I issued written decisions on approximately one hundred matters per year. My decisions were subject to review by the full Board and the Court of Appeal for the Federal Circuit. During my last year, I supervised three other judges.

Municipal Court

Oakland-Piedmont Emeryville Judicial District
(1985 - 1991)

My duties included presiding over the misdemeanor arraignment, small claims and traffic departments and conducting civil jury trials upon stipulation of the parties. The misdemeanor arraignment department is staffed daily by members of the District Attorney's and Public Defender's Offices. It was my responsibility to advise defendants of their charges and of their constitutional rights; to appoint attorneys; to rule on bail motions; to issue warrants; to accept pleas and to impose sentences. The violations ranged from minor infractions to very serious misdemeanors such as assault with a deadly weapon, auto theft, and illegal possession of concealed and loaded weapons. The sentences I imposed ranged from small fines to one-year

jail terms. When sitting in the small claims department, I conducted approximately 40 court trials per day for unrepresented parties. When sitting in the traffic department I conducted approximately ten court trials and one to two hundred arraignments daily. The civil jury trials that I conducted were primarily unlawful detainer actions.

**United States District Court
Northern District of California
(1991 - present)**

The majority of my time is devoted to civil cases. Commencing in March of 1996, the magistrate judges in the Northern District of California were placed on the wheel and receive civil cases in the same manner they are assigned to district judges. I have an assigned caseload numerically equivalent to 20% of the average caseload of a district judge. In addition, district judges refer cases to me at various stages of the litigation for disposition. Upon the consent of the parties, I am responsible for all aspects of these cases including case management, resolution of dispositive motions and trial. I generally have about 50 - 75 such cases on my docket. I conduct an average of five to six trials yearly and adjudicate ten to twenty civil motions monthly.

I also hear and decide motions (primarily discovery) and conduct evidentiary hearings on cases which are assigned to district judges. I prepare and submit to the district judges findings of fact and recommendations for disposition on case dispositive motions and I issue orders on non-dispositive motions. I conduct approximately two hundred settlement conferences yearly and am exposed to the full range of cases litigated in Federal District Court including cases arising under the Federal Tort Claims Act, ERISA and other federal statutes, civil rights cases, cases in admiralty and maritime, employment discrimination cases, insurance cases, intellectual property cases, and all manner of cases based on diversity jurisdiction.

I preside over the criminal calendar every fifth month and hold court daily during this month. I conduct preliminary proceedings in felony cases including initial appearances, arraignments, preliminary hearings and bail/detention hearings and issue arrest and search warrants. I handle all aspects of misdemeanor cases including trial and sentencing. I have presided over hundreds of misdemeanor cases, most of which resulted in guilty pleas, and have conducted several dozen court and jury trials.

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

During the time that I practiced law as a Deputy State Public Defender, my former clients were indigent criminal defendants.

- 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 only period that I litigated and appeared in court was when I worked as a Deputy State Public Defender. During that time I appeared in court occasionally.

2. What percentage of these appearances was in:

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

- (a) 0%
 (b) 100%
 (c) 0%

3. What percentage of your litigation was:

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

- (a) 0%
- (b) 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.

As a Deputy State Public Defender, I estimate that I tried six cases to verdict and handled 50 appeals to decision.

5. What percentage of these trials was:

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

- (a) 50%
- (b) 50%

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 litigated approximately 50 cases more than twenty years ago as a deputy state public defender and I no longer have records of these cases or any recollection of the details of any cases that I handled. The following members of the legal community have appeared before me several times in recent years:

Angela Bradstreet
Carroll Burdick & McDonough
44 Montgomery Street, #400
San Francisco, CA 94104
(415) 989-5900

William Dritsas
Seyfarth Shaw Fairweather & Geraldson
101 California Street, Suite 2900
San Francisco, CA 94111
(415) 397-2823

Patricia Gillette
Heller Ehrman White & McAuliffe
333 Bush Street
San Francisco, CA 94104
(415) 772-6456

Victor Theusen
Attorney at Law
11 Western Avenue
Petaluma, CA 94952
(707) 763-5030

Art Hartinger
Liebert Cassidy & Frierson
49 Stevenson Street, Suite 1050
San Francisco, CA 94105
(415) 546-6100

Shelley K. Wessels
Fish & Richardson
2200 Sand Hill Road, Suite 100
Menlo Park, CA 94025
(415) 854-5277

Gregory Fox
Bertrand Fox & Elliot
655 Montgomery Street, Suite 1100
San Francisco, CA 94111
(415) 397-7701

Lynne Hermle
Orrick Herrington & Sutcliffe
1020 Marsh Road
Menlo Park, CA 94025
(650) 614-7422

Anne-Christine Massullo
U.S. Attorney's Office
450 Golden Gate Avenue
San Francisco, CA 94102
(415) 522-6842

Peter Edrington
 Edrington Schirmer & Murphy
 565 Ygnacio Valley Road, Suite 315
 Walnut Creek, CA 94596
 (925) 926-1300

Dennis Aftergut
 Office of the City Attorney
 1390 Market Street, 5th Floor
 San Francisco, CA 94117
 (415) 554-4213

Brad Yamauchi
 Minami Lew & Tamaki, LLP
 360 Post Street, 8th Floor
 San Francisco, CA 94108
 (415) 788-9000

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 District Court in the Northern District of California utilizes its magistrate judges in a manner that is fairly unique. Unlike most districts throughout the country, magistrate judges in the Northern District, where I currently sit, engage in predominately case dispositive work. We settle cases and we try a significant number of all cases tried in this district. The district judges have confidence in the ability of the magistrate judges and we have been placed on the wheel and are assigned cases upon filing just as they are. Upon the consent of the parties, we handle those assigned cases through trial and judgment. About 75% of the parties assigned to magistrate judges do consent. Granted that the magistrate judges typically obtain consent in the more routine, low profile cases, we are nonetheless exposed to the full range of cases filed in the district court, with the exception of death penalty habeas petitions and bankruptcy appeals.

United States Magistrate Judges for the Northern District of California fully participate in court governance. I currently serve as a voting member on two committees, the Non-Appropriated Funds Committee and the Criminal Justice Act Committee.

For six years I have worked on behalf of the magistrate judges system in the 9th Circuit. First I served for three years on the Executive Board of the Magistrate Judges Conference whose purpose it is to foster and coordinate the participation of magistrate judges in the 9th Circuit Judicial Conference and its committees, to enhance the effectiveness of magistrate judges in the circuit and to serve as liaison with the Chief Judge of the Circuit. After my term on the Board, I was appointed by the Chief Judge of the Circuit to serve as Chair of the Magistrate Judges' Education Committee. The committee is responsible for providing and coordinating the continuing education of the circuit's magistrate judges. The committee provides annual training programs on topics ranging from intellectual property issues in federal litigation, to case management of pro se litigation to court automation.

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 own no stocks and have limited financial interests in businesses that are likely to come before the court. The only investments that I currently hold that could result in a conflict are two IRA accounts in insurance company annuities. I would follow the applicable practices, policies and rules regarding conflicts of interest and recuse myself from cases in which either insurance company was a party. I will also recuse myself from cases involving companies and businesses in which my spouse has a financial 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).

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.

NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	\$ 10,000	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	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid tax and interest	0
Doubtful	0	Real estate mortgages payable--add schedule	\$179,000
Real estate owned--add schedule	\$325,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts--itemize:	
Autos and other personal property	\$ 20,000	Auto Loan	\$ 5,000
Cash value--life insurance	0	Equity Line	\$ 3,500
Other assets--itemize:			
2 IRA's	\$ 70,000		
Deferred Compensation (TSP)	\$190,000		
Household furnishings, art, clothing and jewelry	\$ 50,000	Total liabilities	\$187,500
		Net Worth	\$477,500
Total Assets	\$665,000	Total liabilities and net worth	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule.)	No
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		

Phyllis J. Hamilton

REAL ESTATE SCHEDULE

Property	Market Value	Mortgage Holder/Balance
Rental Prop.#1 Oakland, CA	\$325,000	GMAC Mortgage Corp, 179,000

Stephen Q. Rowell

NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	\$ 5,000	Notes payable to banks--secured	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	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid tax and interest	0
Doubtful	0	Real estate mortgages payable--add schedule	\$733,000
Real estate owned--add schedule	\$1,135,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts--itemize:	
Autos and other personal property	\$ 50,000		
Cash value--life insurance	\$ 4,000		
Other assets--itemize:			
See Schedule	\$ 225,700		
		Total liabilities	\$773,000
		Net Worth	\$686,700
Total Assets	\$1,419,700	Total liabilities and net worth	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule.)	No
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		

Stephen Q. Rowell

REAL ESTATE SCHEDULE

Property	Market Value	Mortgage Holder/Balance
Primary residence Oakland, CA	\$485,000	GE Capitol, \$211,00 SanwaBank, \$89,000
Rental Prop. #2 Oakland, CA	\$275,000	First Nationwide, \$166,000
Rental Prop. #3	\$375,000	Washington Mutual, \$235,000 Carl Pierson, #31,500

ASSETS SCHEDULE

Rollover IRA	\$180,000
Deferred Compensation	\$ 13,500
Non-contributory IRA	\$ 3,500
Contributory IRA	\$ 2,700
Mutual Funds (Non-retirement)	\$ 16,000
Stocks (Non-retirement)	\$ 10,000

AO-10
Rev. 1/98

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1998**

*Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C. App. 4, 101-112)*

1. Person Reporting (Last name, first, middle initial) HAMILTON, PHYLLIS J.	2. Court or Organization Northern District of California	3. Date of Report 2-14-00
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge - Nominee	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>2-9-00</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/1/98 - 1/31/00
7. Chambers or Office Address 450 Golden Gate Avenue San Francisco, CA 94102	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 checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
2	
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 checked="" type="checkbox"/> NONE (No reportable non-investment income.)		
1		
1999	Oakland City Attorney's Office (S)	\$
2		\$
3		\$
4		\$
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Phyllis J. HAMILTON	2-14-00

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 23-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Wells Fargo Bank	Equity line account	J
2	GMAC Mortgage Corp.	Mortgage on Rental Prop. #1 Oakland, CA (Pt. VII, Line 4)	M
3	First Nationwide (S)	Mortgage on Rental Prop. #2 Oakland, CA (Pt. VII, Line 5)	M
4	Washington Mutual (S)	Mortgage on Rental Prop. #3 Oakland, CA (Pt. VII, Line 6)	M
5	Carl Pierson (S)	Mortgage on Rental Prop. #3 Oakland, CA (Pt. VII, Line 6)	M
6			

* Value Codes: 0=\$0-\$5,000; 1=\$5,000-\$10,000; 2=\$10,000-\$15,000; 3=\$15,000-\$20,000; 4=\$20,000-\$25,000; 5=\$25,000-\$30,000; 6=\$30,000-\$35,000; 7=\$35,000-\$40,000; 8=\$40,000-\$45,000; 9=\$45,000-\$50,000; 10=\$50,000-\$55,000; 11=\$55,000-\$60,000; 12=\$60,000-\$65,000; 13=\$65,000-\$70,000; 14=\$70,000-\$75,000; 15=\$75,000-\$80,000; 16=\$80,000-\$85,000; 17=\$85,000-\$90,000; 18=\$90,000-\$95,000; 19=\$95,000-\$100,000; 20=\$100,000-\$125,000; 21=\$125,000-\$150,000; 22=\$150,000-\$200,000; 23=\$200,000-\$250,000; 24=\$250,000-\$300,000; 25=\$300,000-\$350,000; 26=\$350,000-\$400,000; 27=\$400,000-\$450,000; 28=\$450,000-\$500,000; 29=\$500,000-\$550,000; 30=\$550,000-\$600,000; 31=\$600,000-\$650,000; 32=\$650,000-\$700,000; 33=\$700,000-\$750,000; 34=\$750,000-\$800,000; 35=\$800,000-\$850,000; 36=\$850,000-\$900,000; 37=\$900,000-\$950,000; 38=\$950,000-\$1,000,000; 39=\$1,000,000-\$1,250,000; 40=\$1,250,000-\$1,500,000; 41=\$1,500,000-\$2,000,000; 42=\$2,000,000-\$2,500,000; 43=\$2,500,000-\$3,000,000; 44=\$3,000,000-\$3,500,000; 45=\$3,500,000-\$4,000,000; 46=\$4,000,000-\$4,500,000; 47=\$4,500,000-\$5,000,000; 48=\$5,000,000-\$5,500,000; 49=\$5,500,000-\$6,000,000; 50=\$6,000,000-\$6,500,000; 51=\$6,500,000-\$7,000,000; 52=\$7,000,000-\$7,500,000; 53=\$7,500,000-\$8,000,000; 54=\$8,000,000-\$8,500,000; 55=\$8,500,000-\$9,000,000; 56=\$9,000,000-\$9,500,000; 57=\$9,500,000-\$10,000,000; 58=\$10,000,000-\$10,500,000; 59=\$10,500,000-\$11,000,000; 60=\$11,000,000-\$11,500,000; 61=\$11,500,000-\$12,000,000; 62=\$12,000,000-\$12,500,000; 63=\$12,500,000-\$13,000,000; 64=\$13,000,000-\$13,500,000; 65=\$13,500,000-\$14,000,000; 66=\$14,000,000-\$14,500,000; 67=\$14,500,000-\$15,000,000; 68=\$15,000,000-\$15,500,000; 69=\$15,500,000-\$16,000,000; 70=\$16,000,000-\$16,500,000; 71=\$16,500,000-\$17,000,000; 72=\$17,000,000-\$17,500,000; 73=\$17,500,000-\$18,000,000; 74=\$18,000,000-\$18,500,000; 75=\$18,500,000-\$19,000,000; 76=\$19,000,000-\$19,500,000; 77=\$19,500,000-\$20,000,000; 78=\$20,000,000-\$20,500,000; 79=\$20,500,000-\$21,000,000; 80=\$21,000,000-\$21,500,000; 81=\$21,500,000-\$22,000,000; 82=\$22,000,000-\$22,500,000; 83=\$22,500,000-\$23,000,000; 84=\$23,000,000-\$23,500,000; 85=\$23,500,000-\$24,000,000; 86=\$24,000,000-\$24,500,000; 87=\$24,500,000-\$25,000,000; 88=\$25,000,000-\$25,500,000; 89=\$25,500,000-\$26,000,000; 90=\$26,000,000-\$26,500,000; 91=\$26,500,000-\$27,000,000; 92=\$27,000,000-\$27,500,000; 93=\$27,500,000-\$28,000,000; 94=\$28,000,000-\$28,500,000; 95=\$28,500,000-\$29,000,000; 96=\$29,000,000-\$29,500,000; 97=\$29,500,000-\$30,000,000; 98=\$30,000,000-\$30,500,000; 99=\$30,500,000-\$31,000,000; 100=\$31,000,000-\$31,500,000; 101=\$31,500,000-\$32,000,000; 102=\$32,000,000-\$32,500,000; 103=\$32,500,000-\$33,000,000; 104=\$33,000,000-\$33,500,000; 105=\$33,500,000-\$34,000,000; 106=\$34,000,000-\$34,500,000; 107=\$34,500,000-\$35,000,000; 108=\$35,000,000-\$35,500,000; 109=\$35,500,000-\$36,000,000; 110=\$36,000,000-\$36,500,000; 111=\$36,500,000-\$37,000,000; 112=\$37,000,000-\$37,500,000; 113=\$37,500,000-\$38,000,000; 114=\$38,000,000-\$38,500,000; 115=\$38,500,000-\$39,000,000; 116=\$39,000,000-\$39,500,000; 117=\$39,500,000-\$40,000,000; 118=\$40,000,000-\$40,500,000; 119=\$40,500,000-\$41,000,000; 120=\$41,000,000-\$41,500,000; 121=\$41,500,000-\$42,000,000; 122=\$42,000,000-\$42,500,000; 123=\$42,500,000-\$43,000,000; 124=\$43,000,000-\$43,500,000; 125=\$43,500,000-\$44,000,000; 126=\$44,000,000-\$44,500,000; 127=\$44,500,000-\$45,000,000; 128=\$45,000,000-\$45,500,000; 129=\$45,500,000-\$46,000,000; 130=\$46,000,000-\$46,500,000; 131=\$46,500,000-\$47,000,000; 132=\$47,000,000-\$47,500,000; 133=\$47,500,000-\$48,000,000; 134=\$48,000,000-\$48,500,000; 135=\$48,500,000-\$49,000,000; 136=\$49,000,000-\$49,500,000; 137=\$49,500,000-\$50,000,000; 138=\$50,000,000-\$50,000,000 or more.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Phyllis J. Hamilton	Date of Report 2-14-00
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VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets (including trust assets)	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Type (e.g., Div, Int)	Amt. (A-H)	Value Code (I-P)	Value Method Code (Q-W)	Type (e.g., buy, sell, merger, redemption)	Date (Month, Day)	Value Code (J-P)	Gain Code (A-H)	Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
1 Lincoln National Life Insurance Co - IRA	C	INT	L	T	EXEMPT				
2 Massachusetts Mutual Life Insurance Co - IRA	A	DIV	J	T	EXEMPT				
3 Stagecoach Tax Free Money Market Account	A	DIV	J	T	EXEMPT				
4 Rental Property #1 Oakland, CA	D	RENT	N	Q (2/99)	EXEMPT				
5 Rental Property #2 (S) Oakland, CA	D	RENT	N	Q (10/99)	EXEMPT				
6 Rental Property #3 (S) Oakland, CA	D	RENT	N	Q (10/99)	EXEMPT				
7 Wells Fargo Bank (S)	A	INT	J	T	EXEMPT				
8 Janus Worldwide Mutual Fund (S)	A	DIV	J	T	EXEMPT				
9 Janus Twenty Mutual Fund (S)	A	DIV	J	T	EXEMPT				
10 Schwab 1000 Mutual Fund (S)	A	DIV	J	T	EXEMPT				
11 Schwab Total Bond Mutual Fund (S)	A	DIV	J	T	EXEMPT				
12 Strong Advantage Mutual Fund (S)	A	DIV	J	T	EXEMPT				
13 Strong Corporate Bond Mutual Fund (S)	A	DIV	J	T	EXEMPT				
14 Intel - stock (S)	A	DIV	J	T	EXEMPT				
15 Cisco - stock (S)	A	None	J	T	EXEMPT				
16 IBM - stock (S)	A	DIV	J	T	EXEMPT				
17 Amazon.com - stock (S)	None	None	J	T	EXEMPT				
18 MCI Worldcom - stock (S)	A	DIV	J	T	EXEMPT				

1 Income Gain Codes: A=\$1,000 or less (See Col. B1, D8); 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=More than \$25,000,000

2 Value Codes: J=\$15,000 or less (See Col. D1, D9); K=\$15,001-\$50,000; L=\$50,001-\$100,000; M=\$100,001-\$250,000; N=\$250,001-\$500,000; O=\$500,001-\$1,000,000; P=\$1,000,001-\$5,000,000; Q=\$5,000,001-\$25,000,000; R=More than \$25,000,000

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Phyllis J. HAMILTON	2-14-00

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 34-54 of Instructions.)

A. Description of Assets (including trust assets) <small>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.</small>	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				
	Int. 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.)									
1 T Rowe Price - stock (S)	A	DIV	J	T	EXEMPT				
2 General Electric stock (S)	A	DIV	J	T	EXEMPT				
3 SBC Communications stock (S)	A	DIV	J	T	EXEMPT				
4 Clorox stock (S)	A	DIV	J	T	EXEMPT				
5 TriContinental stock (S)	A	DIV/CAP	J	T	EXEMPT				
6 DEFERRED COMPENSATION MUTUAL FUNDS:									
7 Vanguard Institutional Index (S)	A	DIV	J	T	EXEMPT				
8 Janus Worldwide (S)	A	DIV	J	T	EXEMPT				
9 Ariel Capital Appreciation (S)	A	DIV	J	T	EXEMPT				
10 Harbor Bond Fund (S)	A	DIV	J	T	EXEMPT				
11 Dreyfus Intermediate Bd (S)	A	DIV	J	T	EXEMPT				
12 RETIREMENT ACCOUNTS: Charles Schwab IRA Rollover									
13 America On Line -stock (S)	A	NONE	J	T	EXEMPT				
14 Cisco Systems -stock (S)	A	NONE	J	T	EXEMPT				
15 Caterpillar -stock (S)	A	DIV	J	T	EXEMPT				
16 Clorox - stock (S)	A	DIV	J	T	EXEMPT				
17 Compaq - stock (S)	A	DIV	J	T	EXEMPT				
18 Eastman Kodak -stock (S)	A	DIV	J	T	EXEMPT				

1. Income/Gain Codes: A-\$1,000 or less (See Col. B1, D4) F-\$50,001-\$100,000 B-\$1,001-\$2,500 G-\$100,001-\$1,000,000 C-\$2,501-\$5,000 H-\$1,000,001-\$5,000,000 D-\$5,001-\$15,000 I-\$15,001-\$50,000 E-\$15,001-\$50,000
2. Value Codes: F-\$15,000 or less (See Col. C1, D3) N-\$250,001-\$500,000 K-\$15,001-\$50,000 O-\$500,001-\$1,000,000 L-\$50,001-\$100,000 M-\$100,001-\$250,000 P-\$25,000,001-\$50,000,000 P1-\$1,000,001-\$5,000,000 P2-\$5,000,001-\$25,000,000 R-More than \$50,000,000
3. Value Method Codes: G-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 Phyllis J. HAMILTON	Date of Report 2-14-00
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VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets (including trust assets) <small>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership of spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.</small>	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				
	Ant. Code (A-H)	Type (e.g. div, int)	Value Code (F-P)	Value Method Code (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month/Day	(3) Value Code (F-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 General Electric-stock (S)	A	DIV	J	T	EXEMPT				
2 Intel Corp-stock (S)	A	DIV	J	T	EXEMPT				
3 Johnson & Johnson-stock(S)	A	DIV	J	T	EXEMPT				
4 MCI Worldcom-stock (S)	A	DIV	J	T	EXEMPT				
5 Microsoft-stock (S)	A	NONE	J	T	EXEMPT				
6 Proctor & Gamble-stock (S)	A	DIV	J	T	EXEMPT				
7 Schering & Plough-stock(S)	A	DIV	J	T	EXEMPT				
8 Sears Roebuck & Co-stock(S)	A	DIV	J	T	EXEMPT				
9 TRI Continental Corp-stock (S)	A	DIV	J	T	EXEMPT				
10 PE-Celera-stock (S)	A	NONE	J	T	EXEMPT				
11 Vanguard Small Cap Index(S) mutual fund	A	Div/Cap Gain	J	T	EXEMPT				
12 Vanguard Index 500 (S) mutual fund	B	Div/Cap Gain	K	T	EXEMPT				
13 Vanguard Growth Index (S) mutual fund	A	Div/Cap Gain	K	T	EXEMPT				
14 Fasciano Fund (S) mutual fund	A	Div/Cap Gain	J	T	EXEMPT				
15 Janus Overseas (S) mutual fund	A	Div/Cap Gain	K	T	EXEMPT				
16 Templeton Growth (S) mutual fund	A	Div/Cap Gain	J	T	EXEMPT				
17 Vanguard Total Bond Index(S) mutual fund	A	DIV	K	T	EXEMPT				
18 Fidelity Select Technology(S) mutual fund	A	DIV/CAP	J	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; 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: I=\$15,000 or less; J=\$15,001-\$50,000; K=\$50,001-\$100,000; L=\$100,001-\$500,000; M=\$100,001-\$250,000; N=\$250,001-\$500,000; O=\$500,001-\$1,000,000; P1=\$1,000,001-\$5,000,000; P2=\$5,000,001-\$25,000,000; P3=\$25,000,001-\$50,000,000; P4=More than \$50,000,000

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

Name of Person Reporting Phyllis J. HAMILTON	Date of Report 2-14-00
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VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets (including trust assets) <small>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "D" after each asset exempt from prior disclosure.</small>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code3 (Q-W)	If not exempt from disclosure					
					(1) 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.)										
CHARLES SCHWAB IRA										
1 Janus Mercury Fund (S)	A	DIV/CAP	J	T	EXEMPT					
2 Schwab 1000 Fund (S)	A	DIV/CAP	J	T	EXEMPT					
3 Exodus Communications (S) Stock	NONE	N/A	J	T	EXEMPT					
4										
5										
6										
7										
8										
9										
10										
11										
12										
13										
14										
15										
16										
17										
18										

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

2. Value Codes: J=\$15,000 or less (See 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=More than \$50,000,000

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Phyllis J. HAMILTON	2-14-00

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

III, VI, VII. I was married on October 15, 1999 and have provided information on my spouse beginning with that date.

VI., lines 1 & 2, and VII line 4, not previously reported because they were secured by my personal residence which is now rental property #1.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature [Handwritten Signature] Date 2-14-00

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, § 104.)

FILING INSTRUCTIONS:

Mail signed original and 2 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

40-10
Rev. 1/98

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1998**

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial) HAMILTON, PHYLLIS J.		2. Court or Organization NORTHERN DISTRICT OF CALIFORNIA	3. Date of Report May 5, 1999
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 appropriate type) Nomination, Date _____ Initial <input checked="" type="checkbox"/> Annual _____ Final _____	6. Reporting Period 1/1/98 - 12/31/98
7. Chambers or Office Address 450 Golden Gate Avenue San Francisco, CA 94102		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.)

	POSITION	NAME OF ORGANIZATION/ENTITY
<input checked="" type="checkbox"/> XXX	NONE (No reportable positions.)	
1		
2		
3		

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

	DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> XXX	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 checked="" type="checkbox"/> XXX	NONE (No reportable non-investment income.)		
1			\$
2			\$
3			\$
4			\$
5			\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	PHYLLIS J. HAMILTON	may 5, 1999

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 23-28 of Instructions.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>
XXX	NONE (No such reportable reimbursements.)	
1		
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
XXX	NONE (No such reportable gifts.)		
1			\$
2			\$
3			\$
4			\$

VI. LIABILITIES. *(Includes those of spouse and dependent children; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
XXX	NONE (No reportable liabilities.)		
1			
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.

Name of Person Reporting PHYLLIS J. HAMILTON	Date of Report May 5, 1999
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VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

Description of Assets (including trust assets) <i>Indicate, where applicable, owner of the asset by using the identical "(J)" for joint ownership of reporting individual and spouse, "(D)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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)	(2)	(1)	(2)	If not exempt from disclosure:				
	Type Code1 (A-H)	Type Code2 (G, J, K, L, M, N, O, P, R, S, T, V, W, X, Y, Z)	Value Code1 (I-P)	Value Method Code3 (Q-W)	Type (3) (Buy, sell, merger, redemption)	Date: Month/Day (2)	Value Code2 (J-P)	Gain Code1 (A-H)	Identity of buyer/seller (if private transaction) (5)
Lincoln National Life Insurance Co. - IRA	C	INT	L	T	NONE				
Stage Coach Equity Value Fund - IRA	A	DIV			Sell (Rollover from)	11/98	J		
Massachusetts Mutual Life Insurance Co. - IRA	A	DIV	J	T	Buy (Rollover to)	11/98	J		
Stage Coach Tax Free Money Market - Mutual Fund	A	DIV	J	T	NONE				
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									

1. Income/Gain Codes: A=\$1,000 or less; B=\$1,001-\$3,500; C=\$3,501-\$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; I2=More than \$5,000,000

2. Value Codes: F=\$15,000 or less; K=\$15,001-\$50,000; L=\$50,001-\$100,000; M=\$100,001-\$250,000; N=\$250,001-\$500,000; O=\$500,001-\$1,000,000; P1=\$1,000,001-\$5,000,000; P2=\$5,000,001-\$25,000,000; P3=\$25,000,001-\$50,000,000; P4=More than \$50,000,000

3. Value Method Codes: 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
	PHYLLIS J. HAMILTON	May 5, 1999

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

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature  Date May 5, 1999

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, § 104.)

MAILING 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.

Other than a brief period in which I served in a non-legal position as an EEO Manager for a private company, I have worked for governmental agencies and/or in judicial positions and have been prohibited from providing pro bono services to individuals and organizations. However, I frequently serve as a speaker or panel member without compensation for various legal education groups, as a moot court judge for various law schools and other organizations, and as a mentor for high school and law school students interested in careers in the law.

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 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 of which I am aware. I submitted an application to Senator Feinstein who had announced that she was seeking candidates for a vacant position in our district. I was subsequently contacted by the chair of Senator Feinstein's screening committee and advised that I would be interviewed by the

entire committee. The committee was comprised of about 20 people, both lawyers and non-lawyers. I was subsequently contacted by a member of the Senator's staff and advised that I was a finalist. I was interviewed by Senator Feinstein. I was subsequently contacted by Senator Feinstein and advised that she had decided to recommend that the President nominate me to fill the vacancy on the court. Shortly thereafter, I was contacted by White House counsel and the Department of Justice and advised of this and other forms that I would have to complete. I was interviewed in person by several officials of the Department of Justice, a special agent of the FBI and a lawyer representative of 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.

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Article III of the Constitution limits federal judicial power to designated cases or controversies. It is also the source of other limitations on federal jurisdiction such as the requirement of standing and the doctrine of mootness. These limitations are critical and not subject to waiver. Federal judges may only act within these limitations. Additionally, federal judges must exercise their judicial authority with due respect for the separation of powers. Judges are neither politicians nor legislators and must follow the Constitution, the laws enacted by the legislative branch and the precedent established by the appellate courts.

PHYLLIS J. HAMILTON

Birth:	June 12, 1952	Jacksonville, Illinois
Legal Residence:	California	
Marital Status:	Married	Stephen Q. Rowell
Education:	1970 - 1973	Stanford University B.A. degree, 1974
	1973 - 1976	Santa Clara University School of Law J.D. degree
Bar:	1976	California
Experience:	1976 - 1980	Office of the State Public Defender State of California Deputy Public Defender
	1980	Farinon Electric Corporation Manager, EEO Programs
	1980 - 1985	U.S. Merit Systems Protection Board San Francisco Regional Office Administrative Judge
	1985 - 1991	Municipal Court Oakland-Piedmont-Emeryville Judicial District Court Commissioner
	1991 - present	U.S. District Court Northern District of California U.S. Magistrate Judge
Office:	450 Golden Gate Avenue San Francisco, California 94102	

To be United States District Judge for the Northern District of California

Senator THURMOND. Judge Hunt.

**TESTIMONY OF ROGER L. HUNT, OF NEVADA, TO BE U.S.
DISTRICT COURT JUDGE FOR THE DISTRICT OF NEVADA**

Judge HUNT. I would like to introduce my wife, who has stuck with me now for 35 years and is here to support me today, Mauna Sue. I appreciate her being here.

Senator THURMOND. Stand up. Thank you. Ladies always look better when you see them. [Laughter.]

Judge HUNT. I also appreciate the support of my five living children, Rachelle, Kristina, Tyler, Melanee, and Ryan, who are here in spirit if not physically. I also appreciate the committee setting this hearing and inviting me to come. I appreciate Senator Reid and his willingness to submit my name for nomination and both his and Senator Bryan's strong support.

I would echo Judge Hamilton's expression of appreciation to Tom Hnatowski, to the Administrative Office and their support of magistrate judges, and the magistrate judges' support to everything that takes place with their fellow judges.

Thank you.

[The biographical information follows:]

ROGER L. HUNT

Birth:	April 29, 1942	Overton, Nevada
Legal Residence:	Nevada	
Marital Status:	Married	Mauna Sue (Hawkes) Hunt Five children
Education:	1960 - 1961	College of Southern Utah No degree earned
	1963 - 1967	Brigham Young University B.A. degree, 1967
	1967 - 1970	George Washington University J.D. degree, 1970
Bar:	1970	Nevada
Experience:	1970 - 1971	Clark County District Attorney's Office Deputy District Attorney
	1971 - 1992	Edwards, Hunt, Hale and Hansen Associate (in predecessor firms) Senior partner
	1992 - present	United States Magistrate Judge District of Nevada
Office:	Foley Federal Building - Room 2300 300 Las Vegas Boulevard South Las Vegas, Nevada 89101	

To be United States District Judge for the District of Nevada

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Name: Roger Lee Hunt

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

Office Address: Foley Federal Building - Room 2300
300 Las Vegas Boulevard South
Las Vegas, Nevada 89101

Home Address: 2058 Jupiter Hills
Henderson, Nevada 89012

3. **Date and place of birth.**

Date of Birth: April 29, 1942

Place of Birth: Overton, Nevada

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

Married: Mauna Sue (Hawkes) Hunt - July 20, 1965
My wife is not employed.

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

College of Southern Utah (now Southern Utah University)
Cedar City, Utah
(1960-61)
I left to serve two-year full-time mission for my church.

Brigham Young University
Provo, Utah
(1963-67) B.A. in History (1966) and I worked one year on a Masters in History; then left to pursue a law degree.

George Washington University
Washington, D.C.
(1967-70) Juris Doctorate, with Honors (June 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.**

Upon leaving Brigham Young University, I returned to Bunkerville, Nevada, and worked for my father on his dairy farm for a couple of months (middle of May to middle of July 1967) before driving to the Washington, D.C. area to attend law school.

Senate Elevator Operator
United States Senate
Washington, D.C.
(October 1967- April 1968)

Senate Postal Sorter
United States Senate
Washington, D.C.
(April 1968-August 1968)

Legislative Aide to
Senator Howard W. Cannon
United States Senate
Washington, D.C.
(August 1968-December 1970)

Deputy District Attorney
Clark County District Attorney's Office
Las Vegas, Nevada 89101
(January 1971 to December 1971)

I resigned from the District Attorney's office in December 1971 and joined the law firm of Rose and Norwood. While the name of the firm and some of the partners have changed, I practiced with the same firm more than 20 years. I became a partner in 1973 and a senior partner in 1974. The various names of the firm, together with the dates and duration of the name, are listed below:

Rose and Norwood, Ltd.
Las Vegas, Nevada
(1971-72)

Rose, Norwood and Edwards, Ltd.
Las Vegas, Nevada
(1972-74)

Rose, Norwood, Edwards and Hunt, Ltd.
Las Vegas, Nevada
(1974-75)

Rose, Edwards and Hunt, Ltd.
Las Vegas, Nevada
(1975-77)

Rose, Edwards, Hunt and Pearson, Ltd.
Las Vegas, Nevada
(1977-80)

Edwards, Hunt, Pearson and Hale, Ltd.
Las Vegas, Nevada
(1980-84)

Edwards, Hunt and Hale, Ltd.
Las Vegas, Nevada
(1984-86)

Edwards, Hunt, Hale and Hansen, Ltd.
Las Vegas, Nevada
(1986-92)

U.S. Magistrate Judge
Las Vegas, Nevada
(July 1992-Present)

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

I have not had any 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.

Valedictorian, Virgin Valley High School, 1960
 Man of the Hour, College of Southern Utah, 1961
 Union Pacific Leadership Scholarship, 1960
 Graduate Teaching Assistantship in History, BYU, 1966-67
 Academic Scholarship, George Washington National Law Center, 1967-69
 Graduated, *cum laude*, George Washington National Law Center, 1970
 Silver Beaver, Highest Council Award to a Volunteer, Boulder Dam Area Council
 Boy Scouts of America (1982)
 Inducted as a Member, Phi Alpha Theta, National History Honor Society, 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.

Phi Delta Phi, legal fraternity
 American Bar Association
 Clark County Bar Association
 State Bar Association of Nevada
 American Trial Lawyers Association
 Nevada Defense Lawyers Association (President, July 1990-July 1992)
 Nevada American Inn of Court (President-elect, 1992-93; President, 1993-96)
 District Court Liaison to the CJA (Criminal Justice Act) Panel for criminal appointments (1992-present)
 Chair of the CJA Panel Selection Committee for southern Nevada portion of U.S. District Court for the District of Nevada (1992 to present)
 Chair of the District of Nevada Local Rules Committee (1994 to present)
 Member of the Executive Board of the Ninth Circuit Magistrate Judges' Conference (1998 to present)
 Chair of the Executive Board of the Ninth Circuit Magistrate Judges' Conference (August 1999 to the present)
 Non-voting member of the Ninth Circuit Judicial Council (August 1999 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.

I do not belong to any organizations that are active in lobbying before public bodies. I also do not belong to any country club, athletic facility, or fraternal organization (except professional and service organizations listed above).

I belong to the Fountain Hills Homeowners Association and the Green Valley Ranch Homeowners Association because my residence is situated within those developments in the City of Henderson, Nevada. Membership is open to any member of the public who chooses to purchase a home within the developments. There are no other restrictions.

I am a member of the Church of Jesus Christ of Latter-Day Saints. Membership has always been open to the public.

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 Supreme Court and State District Court: admitted 1970

U.S. District Court, District of Nevada: admitted 1970

U.S. Court of Appeals, Ninth Circuit: admitted 1980

U.S. Supreme Court: admitted 1977

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

I have not published any books, articles, or reports, nor given speeches on constitutional law or legal policy. Many years ago I prepared several pages for a continuing legal education class on civil pretrial discovery, which were included in the handout materials. However, I cannot recall when that occurred and am unable to locate a copy of the materials. I also wrote articles for a college newspaper on sports events, but do not have copies of any.

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

My general health is very good. However, in December 1999, while playing a game of basketball, I was knocked to the floor quite hard and experienced discomfort in my lower back and eventually my right knee. Because of the symptoms and their persistence, I ultimately underwent surgery on January 13, 2000, performed by Dr. Jaswinder Grover, an orthopedic surgeon. Although any procedure close to nerves is sensitive, the doctor considered the procedure relatively minor and routine. It involved an incision and removal of the two disc fragments at L-4 and reduction of the bulging portion of the disc one level below. Surgery was successful. I was released from the hospital in three days, took the rest of the week off and am now back at work.

At my post-operation examination on January 24, 2000, Dr. Grover was pleased with the success of the procedure and the incision has since healed. I am undergoing physical therapy to return the muscles to their proper strength and address lingering discomfort from the surgery. Otherwise, the pain is gone and I feel relatively well and anticipate returning to full health soon.

I had a general physical examination on January 27, 2000 by Dr. William Schofield, Doctor of Internal Medicine, who found me fit.

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 am a United States Magistrate Judge for the District of Nevada, appointed July 13, 1992. The jurisdiction is defined by 28 U.S.C. § 636 and involves handling all pretrial criminal and civil matters before the U.S. District Court, and handling all misdemeanors to conclusion. The pretrial duties include initial appearances, arraignments and pleas, detention hearings, suppression hearings, discovery motions, settlement conferences, and dispositive motions by report and recommendation. I also try civil cases, jury and bench trials, upon consent of the parties. This is the only judicial office I have held.

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) Ten most significant opinions:

- (1) Pioneer Chlor Alkali Company vs. National Union Fire Ins., et al., 863 F.Supp. 1237 (D. Nev. 1994)
- (2) U.S.A. vs. Nye County, et al., 957 F.Supp. 1172 (D. Nev. 1997)
- (3) State of Nevada Ex Rel, et al. vs. Loral Aerospace Corp., CV-S-94-687-RLH, CV-S-94-883-RLH, 1997 WL 118395 (D. Nev. 1997)
- (4) U.S.A. vs Larry Lee Everett, MAG-96-2106-M-RLH, 972 F. Supp. 1313 (D. Nev. 1997)
- (5) *In re* Stratosphere Corporation Securities Litigation, 182 F.R.D. 614 (D. Nev. 1998)
- (6) Moses vs. Danek Medical, Inc., et al., (Not reported in F. Supp.2d - Reported in Prod. Liab. Rep (CCH) P 15,5000, 1998 WL 1041279 (D. Nev. 1998)
- (7) Long vs. Coast Resorts, Inc., CV-S-97-1570-RLH, 32 F.Supp.2d 1203 (D. Nev. 1999)
- (8) Kagan vs. State of Nevada, et al., CV-S-97-1411-RLH, 35 F. Supp.2d 771 (D. Nev. 1999)
- (9) U.S.A. vs. Lamalsikou Lowe, CR-S-99-299-JBR(RLH) (Dec. 3, 1999), report and recommendation. (A copy is attached.)
- (10) Kirkland vs. Union Pacific Railroad, CV-S-99-319-JBR(RLH), 1999 WL 1206840 (D.Nev. Dec. 9, 1999)

(b) Reversals or significant criticism:

In my eight years as a Magistrate Judge, none were reversed or received significant criticism by an appellate court. In the cases identified in (c), below, which were consolidated, the Circuit Court remanded the matter to the district court to calculate and award post-judgment interest on refunded taxes, and to transfer, to the Court of Claims, the issue of whether the federal government was contractually bound to reimburse the contractors for taxes paid. *U.S. v. Nye County, Nevada*, 178 F.3d 1080 (9th Cir. 1999). Also, as a Magistrate Judge, from time to time I prepare reports and recommendations to District Judges. On rare occasions, the District Judges have declined to adopt my recommendation.

(b) Opinions on constitutional issues:

- (1) U.S.A. vs. Nye County, et al., 957 F.Supp. 1172 (D. Nev. 1997)
- (2) State of Nevada Ex Rel, et al. vs. Loral Aerospace Corp.,
CV-S-94-687-RLH, CV-S-94-883-RLH, 1997 WL 118395 (D. Nev. 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.

NEVADA INDIAN COMMISSION (Appointed by Governor):
Member, March 1973 to September 1978
Chairman, June 1975 to September 1978

NEVADA COMMISSION ON DRUG ABUSE EDUCATION, PREVENTION,
ENFORCEMENT AND TREATMENT (Appointed by Governor):
Member, March 1991 to July 1992

I have never been an unsuccessful candidate for elective public office.

(17) Legal Career:

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

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

I have never served as a law clerk to a judge.

- (2) whether you practice 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;**

After passing the bar in 1970 I remained in the employ of Senator Howard Cannon through December 1970.

Legislative Aide to
Senator Howard W. Cannon
United States Senate
Foley Federal Building
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101

I then became a Deputy District Attorney in Clark County.

Deputy District Attorney
Clark County District Attorney's Office
200 South Third Street
Las Vegas, Nevada 89101
702-455-4801
(01/1971 to 12/1971)

For the first five months I handled a multitude of felony preliminary hearings and misdemeanor trials. The last seven months I tried twelve felony jury trials, including cases involving murder, embezzlement, drug sales and possession of drugs. I was lead or sole counsel on ten and was associate counsel to Melvin Harmon on two of the trials.

I resigned from the District Attorney's office in December 1971 and joined the law firm of Rose and Norwood, where I began immediately trying civil jury trials. While the name of the firm and some of the partners have changed, I practiced with the same firm more than 20 years. I became a partner in 1973 and a senior partner in 1974. The various names of the firm, together with the dates and duration of the name, my title, and the addresses are listed below:

Rose and Norwood, Ltd. (Associate)
116 South Fourth Street
Las Vegas, Nevada 89101
(1971-72)

Rose, Norwood and Edwards, Ltd. (Associate, then Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1972-74)

Rose, Norwood, Edwards and Hunt, Ltd. (Senior Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1974-75)

Rose, Edwards and Hunt, Ltd. (Senior Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1975-77)

Rose, Edwards, Hunt and Pearson, Ltd. (Senior Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1977-80)

Edwards, Hunt, Pearson and Hale, Ltd. (Senior Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1980-84)

Edwards, Hunt and Hale, Ltd. (Senior Partner)
116 South Fourth Street
Las Vegas, Nevada 89101
(1984-86)

Edwards, Hunt, Hale and Hansen, Ltd. (Senior Partner)
415 South Sixth Street - Suite 300
Las Vegas, Nevada 89101
(1986-92)

U.S. Magistrate Judge
Foley Federal Building - Room 2300
300 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(1992-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?**

While I was a Deputy District Attorney, my practice consisted solely of criminal litigation. My civil practice has been one of predominantly civil litigation in the area of personal injury defense, though I have represented

several criminal defendants, by appointment or because they were children of acquaintances, for armed robbery and drug-related offenses.

While in private practice I was lead counsel in numerous jury trials and have been involved in between 50 and 100 lawsuits at any give time, except for approximately four years between 1981-1985 when I was involved almost full-time with the MGM Hotel and Hilton Hotel Fire Litigations.

I have also tried cases involving personal injury (both for defendants and plaintiffs), state highway construction, insurance coverage, divorce, parental termination, and real estate. I have represented quasi-municipal water companies. I represented the City of Mesquite in its formation as a city and served as its outside counsel during the first year of its status as a city. I have represented clients before the Public Service Commission, successfully obtaining certification, and have testified before a United States Senate subcommittee on behalf of a client regarding private legislation. I have also handled probate, guardianships, adoptions and bankruptcy matters.

In addition to the cases I have tried, I have prepared scores for trial only to have them settle on the eve (or morning) of trial.

I enjoyed an "A V" rating in *Martindale-Hubbell*, a national legal rating publication, which is the highest proficiency rating given by that publication. The rating reflects the evaluations of lawyers by their peers.

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

My clients consisted of persons, businesses and governmental agencies who were insured against liability and the target of any and all kinds of lawsuits. My clients also included municipalities, business owners and contractors engaged in business transactions and litigation.

For 20 years I specialized in litigation, particularly in the area commonly known as insurance defense.

(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 regularly.

- (2) What percentage of these appearances was in:
- (a) federal courts: 25%
 - (b) state courts of record: 75%
 - (c) other courts. 0%

- (3) What percentage of your litigation was:
- (a) civil: nearly 100% from 1972 to 1992
 - (b) criminal: 100% during 1971

- (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 150-200 cases to verdict or judgment (including misdemeanor trials, subrogation trials, and domestic relation trials, as well as jury and bench trials involving criminal, personal injury, construction and contractual matters). I was associate counsel on 4 or 5 cases. I was lead counsel on approximately the same number and sole counsel on all the rest.

- (5) What percentage of these trials was:
- (a) jury: 25% to 30%
 - (b) non-jury: 70% to 75%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, 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.

When I am listed as sole counsel, I conducted all aspects of the litigation, including preparation of pleadings, motions, briefs, discovery, trial, and, where necessary, the appeal.

(I) *In re MGM Hotel Fire Litigation* (MDL 453) Litigation period: 1981-1985

Trial Counsel:

- Plaintiffs: Numerous attorneys from both Nevada and other jurisdictions represented hundreds of plaintiffs.
- Defendants: Numerous attorneys, including myself, represented in excess of fifty defendants. There were several hundred attorneys involved, most of whom were from out of state.

Because most of my dealings were with local attorneys, I do not recall the names of the out-of-state counsel and doubt that after this length of time they would remember me. The names of some Nevada attorneys who are familiar with my involvement are as follows:

James B. Gibson (for a defendant) Rooker & Gibson 701 N. Green Valley Pkwy., #105 Henderson, NV 89014 (702-990-8100)	Hon. Michael A. Cherry, (Special Discovery Master) 200 S. Third Street Las Vegas, NV 89155 (702-455-5117)
Neil G. Galatz (for plaintiffs) Galatz, Earl & Associates 710 S. Fourth Street Las Vegas, NV 89101 (702-386-0000)	James Olson (for a defendant) Rawlings, Olson, Cannon, <i>et. al.</i> 301 E. Clark Ave., Suite 1000 Las Vegas, NV 89101 (702-384-4012)
Stephen Stein (for a defendant) 520 S. Fourth Street Las Vegas, NV 89101 (702-384-5563)	Kathleen England (for a defendant) Kummer, Kaempfer, <i>et. al.</i> 3800 Howard Hughes Pkwy., #700 Las Vegas, NV 89109 (702-792-7000)
Corby Arnold (for a defendant) 2965 S. Jones, Suite A Las Vegas, NV 89102 (702-951-5111)	Thomas Kummer (for a defendant) Kummer, Kaempfer, <i>et. al.</i> 3800 Howard Hughes Pkwy., #700 Las Vegas, NV 89109 (702-792-7000)
Von S. Heinz (for a defendant) Ashcraft & Heinz, 3960 Howard Hughes Pkwy. Fifth Floor Las Vegas, NV 89109 (702-990-3570)	Thomas Beatty (for a defendant) 601 E. Bridger Ave. Las Vegas, NV 89101 (702-382-5111)

Presiding Judge: Judge Louis Bechtel, U.S. District Judge, Eastern District of Pennsylvania.

Local Magistrate: Judge Philip M. Pro, U.S. Magistrate Judge for the District of Nevada (now a District Judge)

This case was a consolidation of numerous suits filed in a multitude of jurisdictions. The matter was handled under the special rules for Multi-District Litigation with a federal judge being selected by the panel established under those rules. A local U.S. Magistrate, now U.S. District Judge Philip M. Pro, however, did the bulk of the work in conducting and directing discovery and hearing motions.

The case arose out of the fire at the MGM Hotel on November 22, 1980, which resulted in the death of 87 persons and the injury of several hundred others.

Because of the massive size of the litigation, a special master was appointed to handle day-to-day questions of discovery, a special document depository was established and space rented for the particular purpose of handling the requirements of discovery.

The scheduling of discovery was handled by committees of defense and plaintiff attorneys involved in the case. Tracks of depositions were established so that numerous depositions could occur simultaneously. At one time there were thirteen tracks of depositions being conducted simultaneously, from 9:00 a.m. until 6:00 p.m., six days a week. Some of the depositions would run for weeks and be attended by twenty or thirty lawyers. It was necessary for me to work full-time and to be selective in the pertinent depositions to be attended by the three other attorneys I directed who were also working full-time on this litigation.

I was lead counsel for the glazier, Olson Glass Co., who installed not only glass products, but the acrylic product used in the underside of the porte cochere. Three attorneys and a paralegal worked under my direction.

The case never went to trial but eventually settled in one of the largest settlements of its kind. I was able to settle the claim against my client for \$350,000, which I thought reasonable in light of the multimillions paid by other defendants in the suit, and the fact that pictures of my client's product going up in flames dominated the pictures presented by the media.

(II) *Marine Office of America, et al. vs. Forever Living Products, Inc., d.b.a. Callville Bay Marina* (85-A-243722) Representation period: 1985-1990

Trial Counsel:

Plaintiffs: Ralph Rohay
3675 Pecos-McLeod, #800, Las Vegas, NV 89121
(702-737-1122)

Defendant: Roger L. Hunt
Travis Williamson, now practicing in Texas
Law Offices of Travis Williamson
807 Brazos, Suite 800, Austin, TX 78701
(512-322-0707)

Trial Judge: Myron Leavitt (now on Nevada Supreme Court: 775-687-8667)
Eighth Judicial District Court

This jury trial arose out of a storm on Lake Mead which occurred July 11, 1984 and effectively destroyed the Callville Bay Marina, causing hundreds of thousand of dollars damage to boats, not to mention the damage to the largest marina on Lake Mead. The suit was brought by four insurance companies and several individuals who claimed that the marina was negligently built, maintained and operated. The marina was undergoing renovation at the time of the storm and had removed the breakwater just two or three months before the storm. The total claim of the plaintiffs was approximately \$750,000. The Plaintiffs used a marine expert from Scripps Institute in California who testified that the absence of the breakwater was pivotal in that the breakwater would have been able to diminish the wave action of the storm sufficiently that the marina would not have been destroyed.

I was lead counsel for Defendant. As the case drew close to trial, I utilized the services of a firm associate to help organize exhibits and to provide a training opportunity by permitting him to prepare cross-examination of some of the witnesses. The defense was based upon the theory that the storm was an act of God and its magnitude was unforeseeable. My associate, Travis Williamson, and I used a marine engineer who designed marinas, as our expert.

The jury found for our client, the defendant, and the court awarded us nearly \$60,000 in costs and attorneys fees because the plaintiffs had not exceeded the amount of a formal offer of judgment.

(III) Welch vs. Hubbard (case number unavailable) Trial date: 2/8/1988

Trial Counsel:

Plaintiffs: Roger L. Hunt (sole counsel)

Defendant: J. Mitchell Cobeaga,
 Beckley, Singleton, Jemison, Cobeaga & List
 530 Las Vegas Blvd. South, Las Vegas, NV 89101
 (702-385-3373)
 Joseph Bongiovi, now providing legal services as
 Bongiovi Dispute Resolutions
 2965 Mondavi Ct., Las Vegas, NV 89117
 (702-889-4600)

Trial Judge: Michael Wendell - Retired (702-645-3645)
 Eighth Judicial District Court

This jury trial arose out of an automobile accident in which the Welch family, Nick and Joan and their son, Tom, were injured when the defendant struck their pickup as it was turning left off the Henderson cutoff (State Highway 146) onto Eastern Avenue. The impact spun the pickup around, ejecting all three members of the Welch family. The Welch family suffered significant injuries and their son's promising baseball career was ruined.

The medical costs were not significantly high, \$8,000-\$12,000 each and the cuts and bruises had healed. Accordingly, the defendant only offered a total of \$139,000 in settlement. However, the Jury awarded the family a total of \$550,000.

(IV) Boone vs. SAR Enterprises & Holiday Casino and Holiday Inn (A-206892)
 Trial date: 7/30/86 to 8/5/86

Trial Counsel:

Plaintiff: Carl E. Lovell
 2801 S. Valley View, Suite 1B
 Las Vegas, NV 89102
 (702-362-7922)

Defendant Holiday Casino: Roger L. Hunt
 Gloria J. Sturman
 Edwards, Halc, Sturman & Atkin
 415 S. Sixth Street, Suite 300
 Las Vegas, NV 89101
 (702-382-1414)

Defendant Holiday Inn: Christopher Raleigh
Raleigh, Hunt & McGarry
302 E. Carson Ave., Suite 1102
Las Vegas, NV 89101
(702-386-4842)

Trial Judge: James Brennan (702-455-0446) now tries cases as a senior judge
Eighth Judicial District Court

This jury trial arose out of a claim by plaintiff that as he was leaving the Holiday Casino late one night he was accosted by a man with a gun who came out of the shadows of an alcove at the entrance, which was alleged to be inadequately lighted, taken to a car, driven to a remote spot where he was robbed and pistol-whipped. He was then, according to his story, taken home where the robber also took his wife and began to drive around, waiting for a bank to open so they could obtain more money for the robber. As the story went, the man persuaded the robber that he had to attend to the call of nature. The man stopped at a service station so the plaintiff could relieve himself. Whereupon, the plaintiff called the police. When the sound of the sirens reached the robber he pushed the plaintiff's wife out of the car and attempted to flee, only to be involved in an accident and apprehended. The man was tried and convicted. At the time of this civil trial, the man was still in prison. I handled all aspects of the trial, but my associate, Gloria Sturman, assisted me at trial.

The case was tried less than a year after a large (\$5 million) verdict had been rendered against a hotel-casino in a similar case. Going into the trial the plaintiff was demanding \$1,000,000 in settlement. Each defendant had offered \$1500.

I took the deposition of the alleged robber who was incarcerated in the Jean Prison. His story was somewhat different. He said he had been gambling with the plaintiff who had been drinking quite a bit. When it came time for the plaintiff to leave, he asked the man if he would take him home so he could get his wife to return with him to get his car. The man obliged. On the way to the plaintiff's home, the plaintiff made a pass at the man, who promptly kicked him out of the car. Then, feeling sorry for the plaintiff, the man permitted him to get back into the car and he took the plaintiff home. There, they awoke plaintiff's wife, who dressed and accompanied them as they returned, or so the man thought, to the casino. On the way, the plaintiff asked to stop and used the bathroom at a service station. Upon hearing the sirens, the man, realizing he was in a car with a woman whom he did not know, and concerned how that would look to the police, proceeded to ask her to get out and he left the scene as quickly as possible. The accident, arrest, and conviction ensued.

The plaintiff had claimed that throughout the events of the evening, the man had held a gun on him. The police investigation did in fact turn up a gun. However, the gun was in the trunk of the car, where the man could not have hidden it, and it had no handle. Furthermore, the car had been borrowed from a friend.

Just prior to argument to the jury, the plaintiff settled with the Holiday Inn for \$1500 and agreed to dismiss the complaint against my client, the casino, if we would not pursue costs and attorney fees against him. We agreed.

(V) *McMurtry vs. Gray and Clark* (case number not available)
Approximate trial date: 1974

Trial Counsel:

Plaintiff:	Edwin Pomeranz - (Deceased)
Defendant Gray:	Roger L. Hunt (sole counsel)
Defendant Clark:	Drake DeLanoy DeLanoy, Schuetze & McGaha 1000 E. Sahara Ave, Suite 1, Las Vegas, NV 89104 - (702-369-3225)
	Rene Arceneaux - (Deceased)
	Rex Jemison Beckley, Singleton, Jemison, Cobeaga & List, Chtd. 530 Las Vegas Blvd. South, Las Vegas, NV 89101 - (702-385-3373)

Trial Judge: Michael Wendell (Retired) (702-645-3645)
Eighth Judicial District Court

This case involved a three-car, rear-end accident. The plaintiffs were in the first car. Clark was driving the second car and Gray was driving the third. There was no question that Clark hit the plaintiff and that Gray hit Clark. The critical question was whether Gray knocked Clark into the McMurtry vehicle a second time.

While the jury was out, the attorneys for Clark entered into an agreement with plaintiff's counsel that Clark would pay plaintiffs \$50,000 win or lose. But the \$50,000 would be the maximum exposure that Clark would face regardless of any higher verdict. Plaintiff was convinced that Clark's expert had effectively put the blame for the more severe impact on Gray. Counsel for Clark approached me during the jury's deliberations and advised me of the agreement with plaintiffs' counsel. That act, which forewarned me of the agreement, was an act of professional and ethical courtesy which I found laudatory.

The jury returned a verdict of \$90,000 against Clark and found in favor of my client, Gray. The jury was surprised that the plaintiffs, in whose favor they had awarded a substantial verdict, were the only ones not happy, not realizing that they had effectively left \$40,000 on the table by entering into the agreement.

(VI) Humana, Inc., et al. vs. Hemmeter (A-274231) Representation period: 1989-1991

Trial Counsel:

Plaintiffs: Dennis Kennedy
Lionel, Sawyer & Collins
300 South Fourth Street, Suite 1700,
Las Vegas, NV 89101 - (702-383-8888)
Louis Garfinkel
Berkley, Gordon, Levine, Goldstein & Garfinkel
2700 W. Sahara Ave., 5th Floor,
Las Vegas, NV 89102 - (702-227-0700)

Defendant: Morton R. Galane
302 E. Carson Ave., Suite 1100,
Las Vegas, NV 89101 - (702-382-3290)
Roger L. Hunt
Laurel Duffy
Attorney General's Office,
555 E. Washington, Suite 3900,
Las Vegas, NV 89101 - (702-455-6265)

Trial Judge: Gerard Bongiovanni - (702-384-0430)
Eighth Judicial District Court

This case involved a claim by plaintiff Humana Corporation and several of its subsidiaries, that Dr. George Mead Hemmeter, their Chief of Staff, had defamed them by statements regarding their compliance with the Hospital Containment Law passed in 1987. Dr. Hemmeter counter-sued for abuse of process. Both parties demanded compensatory and punitive/exemplary damages.

Since I entered the defense some months after the initiation of discovery, as co-counsel with the firm of Morton Galane, my role was secondary. The strategy devised by us as defense counsel was to go on the offensive with Hemmeter's counter-claim against the plaintiffs. I was to handle the defense. Changing the emphasis from Plaintiff's claim to Defendant's claims caused more time to be spent by Galane in proving that case, than by me in defending Hemmeter against the Plaintiff's claims. The strategy worked.

The trial lasted seven weeks and included testimony from State government officials and State legislators.

The case presented important and interesting questions involving the First Amendment rights of freedom of speech and freedom of petition. Questions of privilege regarding statements made to the Attorney General of the State of Nevada and at hearings of the legislature were also addressed. Finally, the questions of the status of the law of punitive/exemplary damages and the definition of malice also were hotly contested because of then recent Nevada Supreme Court decisions.

The jury deliberations were trifurcated, which is somewhat unusual, with the jury first deciding the underlying actions of defamation and abuse of process, and bringing back a verdict; then they were sent out to decide if punitive/exemplary damages should be assessed; and, finally, sent out to determine the amount of punitive/exemplary damages.

The verdict was in favor of Dr. Hemmeter for over \$2.3 million compensatory and \$7.5 million punitive/exemplary.

(VII) GP Construction v. State of Nevada (No case number available)
Approximate trial date: 1981

Trial Counsel:

Plaintiffs:	Roger L. Hunt John Marshall Marshall & Willis 3945 Wasatch Blvd., Suite 292, Salt Lake City, UT 84124 (801-273-8500)
Defendant:	Dale Haley Mushkin & Hafer 930 S. Third Street, Suite 300, Las Vegas, NV 89101 (702-386-3999)

Trial Judge: Myron Leavitt (now on Nevada Supreme Court: 775-687-8667)
Eighth Judicial District Court

This trial arose out of a contract to construct a portion of a state highway, during the oil crisis of the 1970's. After the contract was put out to bid, but before it was awarded to my client, the State verbally promised, and issued memoranda which confirmed that promise, that with respect to the asphalt portion of the contract, it would be handled on a "cost-plus" basis. However, the contract, as awarded, did not contain "cost-plus" language, although subsequent contracts did contain that contractual language. During the process of awarding the contract and thereafter, during the construction phase, the oil prices skyrocketed. The plaintiffs (two construction companies in a joint venture) were forced to complete the contract on an as-bid basis, causing losses of several hundreds of thousands of dollars. Appeals to the state Department of Transportation were rejected. Even the governor's encouragement to the department, just prior to trial, to find a reasonable resolution fell on deaf ears. Efforts to find alternative resolutions were rejected.

and trial ensued. John Marshall was corporate counsel for the plaintiff when doing work in Utah and was asked to assist at trial.

The Court found that the promises had been made and that the plaintiffs had relied on those promises to their detriment and to the enrichment of the State of Nevada, and awarded in excess of \$334,000 in damages.

(VIII) Garrissey v. McClure & Sam Krug Chrysler (A-83694)

Trial date: 4/7/75 to 4/11/75

Trial Counsel:

Plaintiff: Thomas Cochran (deceased)
 Defendants: Roger L. Hunt (sole counsel for defendant McClure)
 Mark Scott (counsel for defendant Sam Krug Chrysler)
 Beckley, Singleton, Jemison, Cobeaga & List
 530 Las Vegas Blvd. South, Las Vegas, NV 89101
 (702-385-3373)

Trial Judge: Thomas J. O'Donnell (deceased)
 Eighth Judicial District Court

This jury trial arose out of a collision wherein Ms. McClure, my client, rear-ended the plaintiff, Mr. Garrissey, when her brakes failed. Ms. McClure had just had her brakes serviced and repaired by Sam Krug Chrysler a few months earlier. The law in Nevada seemed to be that the owner of an automobile could not delegate the responsibility of the maintenance of his or her vehicle to another. Furthermore, there was some distance (several hundred feet) between the time Ms. McClure realized her brakes had failed and the moment she actually struck the vehicle in front of her. The issue of her failure to avoid the accident regardless of the defective brakes was primary to the plaintiff's case. We were able to persuade the jury that Ms. McClure, caught in the middle of three lanes of traffic, tried desperately every alternative course of action, to no avail. The jury found only against the co-defendant, finding no negligence on the part of Ms. McClure.

During closing argument, in demonstrating the limited time in which to act (after calculating the number of seconds, given her speed, it would have taken between her discovery of the brake failure and the collision), I established a rhythmic sequence by snapping my fingers at one-second intervals, while describing her desperate attempts to stop the vehicle and then, upon learning she could not, to find (unsuccessfully) somewhere to swerve to avoid the accident. At the end of the established time window, I clapped my hands to demonstrate the impact. My client, reliving the accident, spontaneously burst into tears. Though unrehearsed and unplanned (I had not told her what I intended to do in closing argument, and her response, in fact, startled me), the effect was dramatic.

(IX) **Beaugareau v. Marshall** (No case number available)
Approximate trial date: 1974

Trial Counsel:
Plaintiff: Ralph Denton
Denton & Lopez
626 S. Seventh Street, Las Vegas, NV 89101
(702-384-1723)
Defendant: Roger L. Hunt (sole counsel)

Trial Judge: William C. Compton (deceased)
Eighth Judicial District Court

This jury trial arose out of an altercation in Boulder City, Nevada, following a Fourth of July parade and other festivities. The defendant and his family had driven to the event and, while parking the car, had inadvertently run into the plaintiff's chain link fence, bending one of the poles. The plaintiff was furious when he discovered the errantly parked car and waited for the defendant to return. When the defendant returned, the plaintiff berated him and demanded that arrangements be made immediately to fix the fence. The defendant, whose wife was wheelchair bound and who had a number of small children, hastily scribbled his name and insurance company on a piece of paper torn from a magazine and attempted to drive away. The plaintiff denied that the defendant had given him any such paper and claimed the defendant tried to leave the scene of the damage without identifying himself or offering to repair the fence. Accordingly, the plaintiff stood in front of the defendant's vehicle to prevent him from leaving. The defendant pulled forward anyway causing the plaintiff to have to jump to the side and, according to the plaintiff, struck the plaintiff with the car. The plaintiff, suing for vehicular assault, claimed he tried to get the defendant to stop, but to no avail, and also claimed he was injured by the defendant striking him with his vehicle. My client prevailed.

(X) **Burton v. Estrada** (A-121387) Trial date: 8/23/76 to 8/27/76

Trial Counsel:
Plaintiff: George Johnson
517 Third Street, Las Vegas, NV 89101
(702-382-3946)
Defendant: Roger L. Hunt (sole counsel)

Trial Judge: J. Charles Thompson (now Assistant District Attorney - 702-455-4784)
Eighth Judicial District Court

This jury trial arose out of an automobile accident. The plaintiff was a taxi driver who was rear-ended by defendant. The real issue was the extent of injuries and the amount of damage. The damage to the plaintiff's vehicle was not extensive and the defendant

described the accident as very minor. The plaintiff told a radically different story and claimed that he was violently thrown around in his vehicle. Complicating the case was the fact that the plaintiff complained of numerous soft tissue and other injuries. However, because he claimed that he was allergic to all pain medication, the doctors were unable to conduct extensive tests to determine the best type of treatment, and they were precluded from performing the surgery they claimed was necessary based upon his subjective complaints. The doctors accepted his complaints as legitimate and declared that he was in need of expensive and extensive surgery, or he would have to endure his pain for the rest of his life, if he could not withstand surgery.

The plaintiff had had seven hospitalizations in the past. It appeared that he was exaggerating the severity of the accident. His ability to describe symptoms appeared to possibly be the result of experience with prior injuries or preexisting conditions. The hospital records showed that not only had he been given pain medication on many, many occasions, without adverse reaction, but he had actually requested it on many occasions, without any detrimental effects. A total of seven hours of cross-examination of the various doctors called to testify verified what the pharmacist had discovered. Much of the plaintiff's testimony was discounted.

The demand at the beginning of trial was in excess of \$100,000. We had previously offered \$15,000 to settle. In an effort to keep the verdict below the offer, I argued for \$12,000. The jury returned a verdict of \$10,000.

* * *

In addition, because I have been a U.S. Magistrate Judge for nearly eight years, the following additional information is provided regarding attorneys who have appeared before me while I have served in that position:

J. Mitchell Cobeaga,
Beckley, Singleton, Jemison, Cobeaga & List
530 Las Vegas Blvd. South, Las Vegas, NV 89101
(702-385-3373)

Peggy Leen,
Deputy District Attorney
200 S. Third Street, Las Vegas, NV 89101
(702-455-2720)

Von S. Heinz,
Ashcraft & Heinz
3960 H. Hughes Parkway, 5th Floor, Las Vegas, NV 89109
(702-990-3570)

- Gerald Gillock,
Gillock, Markley & Killebrew
1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106
(702-385-1482)
- Gerald L. Mikesell,
Nevada Power Co., 6226 W. Sahara Ave., Las Vegas, NV 89103
(702-367-5628)
- Robert Massi,
Robert Massi. Ltd., 3202 W. Charleston Blvd., Las Vegas, NV 89102
(702-870-1100)
- Kevin Stolworthy,
Jones Vargas, 3773 Howard Hughes Parkway, 3rd Floor, Las Vegas, NV 89109
(702-734-2220)
- Oscar Goodman, current Mayor of Las Vegas and prominent defense attorney
520 S. Fourth Street, Las Vegas, NV 89101
(702-384-5563)
- Franny Forsman, Federal Public Defender
Office of the Federal Public Defender
330 S. Third St., Suite 820, Las Vegas, NV 89101
(702-388-6577)
- Kevin Kelly,
Kelly & Sullivan, 302 E. Carson Ave., Suite 600, Las Vegas, NV 89101
(702-385-7270)
- Karen Winckler,
Wright, Judd & Winckler, 302 E. Carson Ave., 3rd Floor, Las Vegas, NV 89101
(702-382-4004)
- Douglas Mitchell,
Dickerson, Dickerson, Consul & Pocker
777 N. Rainbow, Suite 350, Las Vegas, NV 89107
(702-388-8600)
- Daniel J. Albrechts,
Daniel J. Albrechts, Ltd., 514 S. Third Street, Las Vegas, NV 89101
(702-474-4004)

Daniel Schiess,
Asst. US Attorney, 701 E. Bridger Ave., Las Vegas, NV 89101
(702-388-6336)

Walter Green,
Asst. US Attorney, 701 E. Bridger Ave., Las Vegas, NV 89101
(702-388-6336)

9. **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.)**

Most of my career as a lawyer involved litigation. While the vast majority of the matters I handled were settled prior to trial, most of my representation involved preparation for trial and the trials themselves of cases which did not settle. However, I also had clients who were engaged in business activities which did not involve litigation. For example, I represented the owner of several upscale men's clothing stores. I represented several sand and gravel, concrete and highway construction companies, one of which was a combination of all three owned by one family. I negotiated and prepared the documents for the sale of the latter in a multimillion dollar sale. I was also successful in prevailing upon a Congressman from Nevada to initiate a private bill for a client who held a sand and gravel mineral claim, but who faced the loss of the claim which constituted a primary asset of a widow of a former legislator and State District Judge. I testified at the Senate subcommittee hearing on the bill. By the generosity of Congress, the bill was passed, and the family was able to continue to enjoy the fruits of the claim.

In addition to the foregoing, I have been active in the various bar associations to which I belong and have served in a number of capacities in organizations dedicated to improving legal representations, including (as identified above) the American Trial Lawyers Association and the Nevada Defense Lawyers Association (President, July 1990-July 1992), of which I was a member while practicing law. I have been active in the Nevada American Inn of Court since becoming a U.S. Magistrate Judge in July 1992, and served as President-elect, (1992-93); and President for two terms, (1993-96).

Upon appointment as a Magistrate Judge, I was immediately appointed as District Court Liaison to the CJA (Criminal Justice Act) Panel for criminal appointments (1992-present) and Chair of the CJA Panel Selection Committee for southern Nevada portion of U.S. District Court for the District of Nevada (1992 to present). In cooperation with the CJA Panel, I organized a mentoring program which provides opportunities for attorneys who are young or inexperienced in federal criminal practice. Under the program, these attorneys work with experienced attorneys for a period of eight months, after completing

nine hours of continuing legal education in federal criminal defense instruction, to get experience in the numerous areas federal criminal defense attorneys are involved (*e.g.*, initial appearances, detentions hearings, suppression hearings, pretrial motion practice, sentencing guidelines, negotiations of pleas and trials). This mentoring opportunity has paved the way for a number of attorneys to successfully apply for membership in the CJA Panel. I also serve as the Chair of the District of Nevada Local Rules Committee (1994 to present) and oversee the Vice-Chairs of the civil, criminal and bankruptcy subcommittees on Local Rules.

Additionally, I participate and assist as a judge in local high school constitutional history competitions and regional law student trial competitions. I host local students who wish to observe the activities of the Court and respond to invitations to speak to civic groups about the federal District Court and its functions.

Finally, I was elected as a Member of the Executive Board of the Ninth Circuit Magistrate Judges' Conference (1998 to present), which represents approximately 80 Magistrate Judges, and was recently elected Chair of the Executive Board of the Ninth Circuit Magistrate Judges' Conference (August 1999 to the present).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

The answer is none, except that my wife and I own a one-third interest in the third floor of an office building wherein my former law firm is a tenant. Although called the "Top of the Court Partnership," the interest is held as a tenancy in common. I am not actively involved in the management. I only receive my portion of the rent. I have always recused myself from any and all cases involving members of my former law firm.

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 know of no potential conflicts of interest, except as described in number 1, above. Any potential conflict as to that matter has been addressed by simply requesting reassignment of cases involving the law firm and its attorneys. I will, of course, always follow the Code of Conduct regarding conflicts.

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

I have no plans, commitments, or agreements to pursue outside employment during my service with the court.

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.)

My Financial Disclosure Report, required by the Ethics in Government Act of 1978, covering the required period, is attached in response to this question.

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

A financial net worth statement, with schedule, 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.**

I have never held a position or played a role in a political campaign.

40-10 (a)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Reform Act of 1989, Pub L. No.
101-194, November 30, 1989
(5 U.S.C. App. 4, Sec. 101-112)

Person Reporting (Last name, first, middle initial) DNT, ROGER L.	2. Court or Organization U.S. District Court of Nevada	3. Date of Report 03/27/2000
Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge	5. Report Type (check type) X Nomination, Date 03/27/2000 Initial Annual Final	6. Reporting Period 01/01/1999 to 03/27/2000
Chambers or Office Address oley Federal Bldg. Room 2300 00 Las Vegas Blvd. South Las Vegas, Nevada 89101		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.

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

	POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/>	NONE (No reportable positions.)	
1	Partner	Top of the Court (See VIII)
2		
3		

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		

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

	DATE	SOURCE AND TYPE	GROSS INCOME (years, not spouse's)
<input checked="" type="checkbox"/>	NONE (No reportable non-investment income.)		
1			
2			
3			
4			

FINANCIAL DISCLOSURE REPORT	HUNT, ROGER D.	Date of report 03/27/2000
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V. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input checked="" type="checkbox"/>	NONE	
1		
2		
3		
4		
5		
6		
7		

VI. GIFTS
(includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input checked="" type="checkbox"/>	NONE		
1			
2			
3			

VII. LIABILITIES
(includes those of spouse and dependent children. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE		
1	First Republic Savings Bank	Mortgage on rental office	N
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 HUNT, ROGER S. (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.) 03/27/2000

Part II. Page 1 INVESTMENTS and TRUSTS - income, value, transactions

A. Description of Assets (including trust assets) <i>Place "(C)" 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 1/3 Interest in Office Building, Las Vegas, NV	E	Rent	N	W	None				
2 Unimproved Real Estate - Lincoln County, NV		None	J	W	None				
3 Stock, Southwest Gas Corporation	A	Dividend	J	T					
4 Cumorah Credit Union - Las Vegas, NV	B	Interest	K	T	None				
5 Cumorah Credit Union (IRA) Las Vegas, NV	D	Dividend	M	T	None				
6 Pace Investment Fund (IRA) Paine Webber	C	Dividend	M	T	None				
7									
8									
9									
0									
1									
2									
3									
4									
5									
6									
7									

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
 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more
 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
 Val Meth 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	HON. ROGER L.	03/27/2000
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III. ADDITIONAL INFORMATION OR EXPLANATIONS.*(Include part of report.)***Positions:**

The Top of the Court Partnership is used for rental of office space (VII.1) but I am not actively involved in management. I only receive my portion of the rent.

FINANCIAL DISCLOSURE REPORT	HURT, ROGER L.	03/27/2000
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X. 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 3/27/2000

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

PERSONAL FINANCIAL STATEMENT
of
ROGER LEE HUNT

as of January 2000

ASSETS		LIABILITIES	
Description	Cash or Value	Description	Amount Owed
Cash on hand or in banks	\$ 60,000	Revolving debt (credit cards)	\$ 1,000
Stock (Southwest Gas-462 shares)	\$ 12,260	Notes Payable	0
Annual Office Space Rent Receivable	\$ 24,000	Unpaid taxes	0
Personal Property 3 autos, 2 snowmobiles, ATV Furniture	\$ 40,000 \$ 150,000	Notes secured by personal property	0
Retirement Accounts Pace Investment Fund (IRA-Paine Webber) Certificates of Deposit (IRA-Cumora Credit Union)	\$ 149,290 \$ 142,000	Other debts:	0
Real Estate Owned (See schedule)	\$1,049,333	Real Estate Mortgages Owed (See schedule)	\$383,196
Total Assets	\$1,626,883	Total Liabilities	\$384,196
		Net Worth (assets, less liabilities)	\$1,433,529

REAL ESTATE SCHEDULE

Type of Property & Location	Rental Income	Market Value	Mortgage Balance	Mortgage Holder
Residence-Henderson, Nev	0	\$ 375,000	\$135,000	Chase Manhattan
Recreational Property-2 lots, with cabin, Southern Utah	0	\$175,000	0	None
Unimproved Property-20 acres, near Panaca, Nevada	0	\$ 16,000	0	None
1/3 Interest in third floor of office building, Las Vegas, Nevada	\$24,000/year	(reflecting my 1/3 interest) \$483,333	(reflecting my 1/3 obligation) \$248,196	First Republic
Total		\$1,049,333	\$383,196	

I, Roger L. Hunt, certify that the above is true and correct to the best of my knowledge and belief.

Signature

Date

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 10 years prior to becoming a U.S. Magistrate Judge, I handled, pro bono, all of the parental terminations for LDS Social Services, preparatory to placement of children for adoption. The adoptions are of necessity handled by others. An average of five to ten hours per month were devoted to this work. I also periodically handled, pro bono, legal matters for low income residents of the small farming community where I was reared.

Throughout my life I have been involved in working on projects (dairy farms, orchards, food canneries, etc.) which provide food and clothing to the poor. I have also provided assistance to those in need, through positions I have held in my church and in the Boy Scouts of America. I have participated in various service projects, not only for individuals, but for service organizations in the community (county child welfare, soup kitchens, battered women's shelters, etc.) to provide food, clothing, bedding, furniture and other personal items, and to paint housing facilities.

Also, before becoming a magistrate judge, I periodically spoke to church and community groups on wills, probate, adoptions and other issues pertinent to family relations and counseled individuals on dealing with and resolving domestic problems.

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

I have never belonged to any organizations that engage in such discrimination.

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

There is not a selection commission for recommending candidates to District or Circuit Court positions, to my knowledge. My first knowledge that Senator Reid was considering me came about a week or so before he announced his selection, when his office called and asked me to meet with him. He interviewed me about my interest, my background, my qualifications and whether there was anything in my background or history that would either disqualify me, or embarrass the judiciary or those responsible for my selection or appointment. A few days later there were two follow-up conversations, just before the announcement. Since that time I have been interviewed by representatives of the Department of Justice, the FBI, and the American Bar Association. In addition, I have completed a number of questionnaires as requested.

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

No one has asked me any questions that I interpreted as asking how I would rule in any case or on any issue or question.

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

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

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

1. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
2. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
3. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
4. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

5. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

In my view, the primary purpose of the courts is to provide an important forum for the resolution of specific, ripe disputes between identifiable parties who have standing and are properly subject to the jurisdiction of the court. The judge's role is to interpret and apply the law in an effort to resolve each dispute in accordance with the applicable constitutional, statutory and case precedent, as fairly, and as quickly as possible. *Stare decisis* is essential in this process.

While the federal courts have the authority to evaluate the constitutionality of laws and acts of the other branches of the government, it does injustice to our ingenious system of government when the judiciary becomes impatient and attempts to usurp duties and responsibilities of the other two branches of government. The Executive and Legislative branches of the government are best equipped to confront and develop informed and creative solutions to issues of public policy, and are properly accountable to the people, under our democratic process, for their efforts in that regard. The judiciary, on the other hand, is neither accountable to the public at election time, nor equipped to provide the forum for sufficient public debate on issues of public policy.

Senator THURMOND. Mr. Lynch.

**TESTIMONY OF GERARD E. LYNCH, OF NEW YORK, TO BE U.S.
DISTRICT COURT JUDGE FOR THE SOUTHERN DISTRICT OF
NEW YORK**

Mr. LYNCH. Thank you very much, Mr. Chairman. I would like to thank you for holding this hearing, first of all. It is a great and humbling honor to be here.

I would like to thank Senators Schumer and Moynihan for their very kind remarks, and to acknowledge and thank for their support my wife, Dr. Karen Marisak, who could not be here today, having to work back in New York, and my son, Christopher, who is taking some final examinations in his college classes today, and I empathize with him a great deal given what I am doing today.

Thank you very much.

[The biographical information follows:]

GERARD E. LYNCH

Birth: September 4, 1951 Brooklyn, New York
 Legal Residence: New York
 Marital Status: Married Karen Marisak
 One child
 Education: 1968 - 1972 Columbia College
 B.A. degree, *summa cum laude*, 1972
 1972 - 1975 Columbia University School of Law
 J.D. degree, 1975
 Bar: 1976 New York
 Experience: 1975 - 1976 Hon. Wildred Feinberg
 United States Court of Appeals for
 the Second Circuit
 Law Clerk
 1976 - 1977 Hon. William J. Brennan, Jr.
 Supreme Court of the United States
 Law Clerk
 1977 - present Columbia University School of Law
 Professor
 1980 - 1983 United States Attorney's Office
 Southern District of New York
 Assistant United States Attorney
 1988 - 1990 Office of Independent Counsel
 (Iran/Contra)
 Associate Counsel
 1990 - 1992 United States Attorney's Office
 Southern District of New York
 Chief of Criminal Division
 1992 - present Covington & Burling
 Counsel
 Office: Columbia University School of Law
 435 West 116th Street
 New York, N.Y. 10027

To be United States District Judge for the Southern District of New York

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Gerard Edmund Lynch

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

Home: New York, N.Y.

Office: Columbia University School of Law
435 West 116th Street
New York, N.Y. 10027

Additional

Office: Covington & Burling
1330 Avenue of the Americas
New York, N.Y. 10019

3. Date and place of birth:

September 4, 1951
Brooklyn, New York

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

Married.

Spouse's Name: Karen Marisak
Spouse's Occupation: Clinical Psychologist

Employers: (1) Self-employed in private practice of
psychology/psychoanalysis.

20 W. 86th Street
New York, NY 10024

(2) Chief Psychologist
Flushing Hospital Mental Health Clinic
146-01 45th Avenue, Suite 110
Flushing, NY 11355

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

Columbia College
Columbia University in the City of New York
New York, N.Y. 10027
attended: September 1968 - June 1972
degree: B.A. summa cum laude 1972

Columbia University School of Law
435 West 116th Street
New York, New York 10027
attended: September 1972 - June 1975
degree: 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:

1972-1975 Office of Columbia College Admissions
212 Hamilton Hall
Columbia University
New York, N.Y. 10027

Part-time interviewer and admissions representative during law school term and summers of 1972 and 1973

- 1974 Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll
(Now: Kramer, Levin, Naftalis & Frankel)
919 Third Avenue
New York, N.Y. 10022

Summer associate
- 1975-1976 The Honorable Wilfred Feinberg
United States Court of Appeals for the Second Circuit
United States Courthouse, Foley Square
New York, N.Y. 10007

Law clerk
- 1976-1977 The Honorable William J. Brennan, Jr., United States Supreme Court
Supreme Court of the United States
Washington, D.C. 20543

Law clerk
- 1977- present Columbia University School of Law
435 West 116th Street
New York, N.Y. 10027

Member of the Faculty of Law
(Paul J. Kellner Professor of Law, since 1996; Vice Dean 1992-97;
Professor since 1987; Associate Professor 1980-86; Assistant Professor 1977-80)
(On public service leave 1980-83, 1990-91)
- 1980-1983 United States Department of Justice
Office of the United States Attorney, Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Assistant United States Attorney, Criminal Division
(Deputy Chief Appellate Attorney, 1982-83; Chief Appellate Attorney, 1983)
- 1986 City of New York Special Commission to Investigate City Contracts (Martin
(part time) Commission)

Special Counsel

1987 New York State Commission on Government Integrity (Califano Commission)
(part time) Chief Counsel

1987-1988 Office of Independent Counsel James C. McKay
(part time) Associate Independent Counsel

1988-1990 Office of Independent Counsel (Iran/Contra)
(part time) 555 Thirteenth Street NW
Washington, D.C. 20004

Associate Counsel

1990-1992 United States Department of Justice
Office of the United States Attorney, Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Chief, Criminal Division

1992-present Covington & Burling (formerly Howard, Smith & Levin LLP; formerly Howard,
(part time) Darby & Levin)
1330 Avenue of the Americas
New York, New York 10019

Counsel

1999-2000 Office of Independent Counsel Carol Elder Bruce
(part time) Special Counsel

2000-present New York Council of Defense Lawyers
Member, 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.

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.

College: Albert Asher Green Prize (valedictorian); Phi Beta Kappa;
David Truman Award (outstanding contribution to the academic life of the College);
Earle Prize in Classics; John Jay National Scholarship; National Merit Scholarship.

Law School: John Ordranax Prize (graduated first in class); James Kent Scholar
(highest honors) 1972-73, 1973-74, 1974-75; Lawrence S. Greenbaum Prize (winner,
Harlan Fiske Stone Moot Court competition); prizes for best performance in torts,
contracts, property and constitutional law.

Teaching Awards:
Willis Reese Award for Excellence in Teaching (law school, student voted), 1994
Presidential Award for Outstanding Teaching (university-wide, faculty selected), 1997

Elected to membership, American Law Institute, 1998

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 the Bar of the City of New York
* Committee on Federal Courts, 1993-1996
* Committee on Criminal Advocacy, 1986-1989
* Council on Criminal Justice, Subcommittee on Federal Sentencing Guidelines,
1986-1987
* Committee on Legal Education and Admission to the Bar, 1978-81, 1984-86

New York State Bar Association
* Committee on Civil Prosecution, 1992-1994

New York Council of Defense Lawyers, 1998-present
* Member, Board of Directors, 2000-present

Advisory Committee to Second Circuit Rules Committee, 1999-present

Second Circuit Judicial Conference, Planning and Program Committee, 1989-92

United States District Court for the Eastern District of New York, Committee on
Revision of Local Criminal Rules, 1985-88

American Law Institute, 1998-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.

My "memberships" in organizations are primarily a result of contributions to cultural or political organizations of which one becomes a member by contributing money, such as:

American Civil Liberties Union
New York Civil Liberties Union
Metropolitan Museum of Art
Museum of Modern Art
School of American Ballet
Alvin Ailey American Dance Theater
New York City Ballet Guild
American Ballet Theater
Wildlife Conservation Society (Bronx Zoo)
American Automobile Association
WNET-TV (New York public television)
WNYC (New York public radio)
WBGO (Newark public radio)

I assume that all or most of these groups engage in some form of lobbying before public bodies; I myself have never participated in any such lobbying activities.

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

New York state courts (1976)
United States Supreme Court (1985)
United States Court of Appeals for the Second Circuit (1979)
United States Court of Appeals for the Fourth Circuit (1989)
United States Court of Appeals for the District of Columbia Circuit (1989)
United States District Courts for the Southern District of New York (1992)
United States District Courts for the Eastern District of New York (1992)

All dates are dates of first admission; in all cases I have remained a member of the bar in question in good standing from that date to the present without lapses.

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.

Academic Publications:

Our Administrative System of Criminal Justice, 66 Fordham Law Review 2117 (1998)

Toward a Model Penal Code, Second (Federal?): The Challenge of the Special Part, 2 Buffalo Criminal Law Review 295 (1998)

Plea Bargaining: El Sistema No Contradictorio de Justicia Penal en Estados Unidos, 1998/A Nueva Doctrina Penal 293 (Buenos Aires 1998)

The Role of Criminal Law in Policing Corporate Misconduct, 60 Law & Contemporary Problems 23 (1997)

William J. Brennan, Jr., American, 97 Columbia Law Review 1603 (1997)

The Sentencing Guidelines as a (Not-So-Model) Penal Code, 7 Federal Sentencing Reporter 112 (1994), reprinted in FSR Highlights from a Decade of Guideline Sentencing, 10 Federal Sentencing Reporter 25 (1997)

The Allocation of Discretion Under the Guidelines (Conference Proceedings), 101 Yale Law Journal 2066 (1992)

How Useful is Civil RICO in the Enforcement of Criminal Law? 35 Villanova Law Review 929 (1990)

A Conceptual, Practical and Political Guide to RICO Reform, 43 Vanderbilt Law Review 769 (1990)

A Reply to Professor Goldsmith, 88 Columbia Law Review 802 (1988)

RICO: The Crime of Being a Criminal, Parts I & II, 87 Columbia Law Review 661 (1987); Parts III & IV, 87 Columbia Law Review 920 (1987), excerpted in Leonard Orland (ed.), Corporate and White Collar Crime: An Anthology (1995), and in numerous casebooks

The Lawyer as Informer, 1986 Duke Law Journal 491 (1986)

Constitutional Law as Moral Philosophy, 84 Columbia Law Review 537 (1984)

Review of Ely, Democracy and Distrust, 80 Columbia Law Review 857 (1980), reprinted in Michael J. Glennon (ed.), A Constitutional Law Anthology (1992)

Review of Berger, Government by Judiciary, 63 Cornell Law Review 1091 (1978)

Op-ed and Popular Publications:

The Problem Isn't in the Starrs but in a Misguided Law, The Washington Post, Feb. 22, 1998, at C3.

Special Prosecutors: What's the Point? The Washington Post, May 28, 1995, at C7 (with Philip K. Howard)

IRS Can't Lasso Leona with a Loophole, New York Newsday, Aug. 25, 1989.

RICO Law is Too Much of a Good Thing, New York Newsday, Jan. 11, 1989, at 55

Insult to Injury, The New Republic 198(14):17 (April 4, 1988)

Megatrials, White-Collar Crime Reporter 2(6):1 (June 1988)

The Brethren: As Seen from Below, Columbia College Today 7(1):8 (March 1980)

I have never given anything in the nature of a political speech or a speech open to the public or reported in the press. I have not kept track of the times I have spoken or lectured before bar or judicial groups, continuing legal education panels, alumni or student organizations, and the like, nor kept copies of such remarks. I am not aware of any press coverage of any such lectures or talks.

I am frequently asked by reporters to comment on legal issues of public interest. Since I generally try to respond to such inquiries where I think I can explain some aspect of the criminal justice system to the public, and since I believe it is rarely if ever appropriate to do so on an off-the-record basis, I have been quoted by name very frequently in the press.

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

Excellent.
January 17, 2000

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.

I have never held or been a candidate for elected public office.
Other than the appointed positions in government service as a law clerk and prosecutor that are referred to elsewhere in this application, I have never held public 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.

Yes.

- 1975-1976 The Honorable Wilfred Feinberg, United States Court of Appeals for the Second Circuit
- 1976-1977 The Honorable William J. Brennan, Jr., United States Supreme Court

2. Whether you practiced alone, and if so, the addresses and dates.

I have never maintained an office for the practice of law. From 1977-1980, and from 1983-1989, while teaching at Columbia Law School, I handled occasional legal matters, mostly pro bono and on occasion for paying clients.

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.

- 1974 Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll
(Now: Kramer, Levin, Naftalis & Frankel)
919 Third Avenue
New York, N.Y. 10022
Summer associate
- 1980-1983 United States Department of Justice
Office of the United States Attorney, Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Assistant United States Attorney, Criminal Division
(Deputy Chief Appellate Attorney, 1982-83; Chief Appellate Attorney, 1983)
Investigated, prosecuted and tried federal criminal cases; supervised all criminal appellate litigation
- 1988-1990 Office of Independent Counsel (Iran/Contra)
555 Thirteenth Street NW
Washington, D.C. 20004

Associate Counsel
Directed prosecution responses to substantive pre-trial motions in United States v. Oliver North; briefed and argued appeals in United States v. North, 910 F.2d 843 (as modified, 920 F.2d 940) (D.C. Cir. 1990); United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990); and Appeal of the United States, 887 F.2d 465 (4th Cir.1989).

- 1990-1992 United States Department of Justice
Office of the United States Attorney, Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007
- Chief, Criminal Division
Supervised all criminal litigation; responsible for management and supervision of
135 federal prosecutors
- 1992-present Covington & Burling (formerly Howard, Smith & Levin LLP; formerly Howard,
Darby & Levin)
1330 Avenue of the Americas
New York, New York 10019
- Counsel
Counsel to white-collar criminal defense practice group; appellate and pre-
indictment defense practice in complex criminal matters, internal investigations,
and occasional civil litigation

The activities listed above constitute either full-time or significant part-time commitments. In addition, I have had occasional short-term or less extensive part-time involvements in public service, as follows:

Special Counsel, Office of Independent Counsel Carol Elder Bruce (special prosecutor investigating allegations regarding Interior Secretary Bruce Babbitt), 1999-present.

Associate Independent Counsel, Office of Independent Counsel James C. McKay (special prosecutor investigating Attorney General Edwin Meese's alleged involvement in Wedtech scandal), 1987-88.

Chief Counsel, New York State Commission on Government Integrity (Califano Commission), 1987

Special Counsel, City of New York Special Commission to Investigate City Contracts (Martin Commission), 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.

My primary activity since graduating from law school and completing my judicial clerkships has been teaching law. Since 1977, I have been a full-time member of the faculty of law of the Columbia University School of Law, engaging in full-time teaching and research during most of that time. My primary specialization, both as a teacher and as a practicing lawyer, has been in criminal law. In addition to courses and seminars in the general field of criminal law, such as substantive criminal law, criminal procedure, sentencing, criminology, criminal litigation, and ethical issues in criminal practice, I have taught from time to time other subjects, including contracts, constitutional law, professional responsibility, legal education, immigration law and international human rights, in both classroom and clinical settings.

Apart from teaching and scholarship, I have had various administrative responsibilities at the law school, including service for five years as Vice Dean, with responsibility for curriculum, teaching assignments, and hiring of adjunct instructors; chairing the search committee for our present dean, chairing the curriculum and judicial clerkship committees at various times, and serving as a University Senator.

However, unlike many legal academics, I have made it a point to acquire practical knowledge of the law. During the past 23 years, I have twice taken extended leaves to engage in public service, serving as a full-time federal prosecutor for a total of five years. In addition, since 1983 I have made a practice of regularly taking legal assignments, including government service, pro bono, and paying matters, on a part-time basis, within the limits permitted by the Law School. These assignments include the following:

(1) 1980-1983. As an Assistant United States Attorney for the Southern District of New York, I investigated and tried criminal cases for the United States. Initially, I was assigned to the General Crimes Unit, working on matters that could be tried in less than a week. Subsequently, I was assigned to the Major Crimes Unit, working on white collar and political corruption cases, and to the Appeals Unit, where I was responsible for supervising the Office's criminal appellate litigation. When I left to return to full-time teaching, I was the Office's Chief Appellate Attorney.

(2) 1983-1988. After leaving the government and returning to Columbia, I occasionally handled matters, mostly but not exclusively on a pro bono basis, including cases in the Supreme Court and in the United States Court of Appeals for the Second Circuit, both as counsel of record to parties and representing various *amici curiae*, including the American Civil Liberties Union and the Association of the Bar of the City of New York. I also served as part-time associate counsel to Independent Counsel James C. McKay, in connection with his investigation into allegations against Attorney General Edwin Meese arising out of the so-called "Wedtech" affair, and for brief periods as Counsel to New York City and State Commissions investigating corruption in city and state government.

(3) 1988-1990. As part-time Associate Counsel in the Office of Independent Counsel, Iran/Contra, I was responsible for briefing and arguing substantive motions in the case of United States v. Oliver North, as well as having primary responsibility for the Office's appellate litigation in the North and Fernandez cases. In these roles I supervised and coordinated a large team of lawyers, and had primary responsibility for arguing legal matters in the district court and in the courts of appeals.

(4) 1990-1992. As Chief of the Criminal Division in the United States Attorney's Office, SDNY, I was responsible for supervision and management of all the Office's criminal cases, and for the supervision of approximately 135 federal prosecutors. In this capacity I argued several appeals and appeared in district court as needed to express the position of the Office. I advised AUSAs on a daily basis in the conduct of trials and investigations, and regularly made decisions regarding those cases. I personally handled a small number of investigations and litigations, but did not personally try any cases.

(5) 1992-present. After returning again to teaching, I became counsel to the firm of Howard Darby & Levin (later Howard Smith & Levin; now the New York office of Covington & Burling), primarily handling white collar criminal defense and regulatory matters. While I have appeared in both the district court and in the court of appeals in a civil matter, and have represented clients in regulatory investigations, the bulk of the practice involves white collar criminal work: internal investigations, representing witnesses and subjects in grand jury investigations, and criminal appeals. I have argued several criminal appeals, and have advocated clients' interests before prosecutors and regulatory bodies. In addition to paying clients of the firm, I have handled a number of pro bono matters and have served as counsel to Independent Counsel Carol Bruce in connection with her investigation of Secretary Babbitt.

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

As noted above, my primary specialization has been in criminal law, with an emphasis on federal criminal law. My principal former client, by any measure, has been the government of the United States of America, since my only periods of full-time law practice, and some of my most significant part-time assignments, have been as a federal prosecutor, either with the Department of Justice or with Independent Counsel. As a defense lawyer, my specialization has been in white collar and regulatory matters. Typical clients have been individual attorneys, business executives and entrepreneurs who have been witnesses or subjects in grand jury investigations or defendants in criminal cases; occasionally I have represented or advised business firms or corporations.

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

During my periods of public service listed above (as an Assistant United States Attorney, 1980-1983 and 1990-1992, and as Associate Independent Counsel, 1988-1990), I appeared in court regularly – during my first tenure as an AUSA, on a daily basis, and regularly if somewhat less frequently in the other periods. Since 1992 I have appeared in court occasionally in connection with my practice as Counsel to Covington & Burling and predecessor firms.

C. 2. What percentage of these appearances was in:

(a) federal courts?	95
(b) state courts of record?	5
(c) other courts?	0

C. 3. What percentage of your litigation was:

(a) civil?	5
(b) criminal?	95

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

Approximately 10. Of those, all but two were as chief or sole counsel, and two were as associate counsel.

C. 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 the 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. United States v. Brennan. United States Court of Appeals for the Second Circuit, Dkt. Nos. 97-1440, 97-1441. Argued April 30, 1998, decided July 7, 1999. Reported at 183 F.3d 139.

I represented John V. Brennan, former president and CEO of United States Aviation Underwriters, Inc., the managing company of the largest aviation insurance consortium in the United States, in his appeal from his conviction, along with the company, of mail fraud in connection with the allocation of responsibility for an airline crash. Mr. Brennan was sentenced to nearly five years' imprisonment, and his company to fines and restitution of over \$40 million. (I was not involved in the case until after the trial.) The case involved numerous complex issues including the fiduciary responsibilities of insurers, the proper scope of the mail fraud statute in application to non-disclosures by fiduciaries, the application of the McCarran-Ferguson Act, whether the alleged misrepresentations by the defendants were sufficient to support mail fraud liability, and the proper venue in mail fraud cases.

The Second Circuit reversed the conviction and ordered the indictment dismissed on grounds of improper venue (the issue I argued orally to the court), and in dictum suggested that there were serious difficulties with the legal theories underlying the government's case. The government did not seek further review of the case.

I was counsel of record for Mr. Brennan, and briefed and argued the case for him, with the assistance of Cindy Soohoo, an associate at Howard Smith & Levin (now at Covington & Burling, 1330 Avenue of the Americas, NYC, 212-841-1120), and Edward A. McDonald, of Reboul, MacMurray, Hewitt, Maynard and Kristol (45 Rockefeller Plaza, NYC, 212-841-5700), who was also trial counsel. USAU was represented by Andrew L. Frey, of Mayer Brown & Platt (1675 Broadway, NYC, 212-506-2635), with the assistance of Julie E. Katzman, then an associate at Mayer Brown, now a member of the minority staff of the Senate Judiciary Committee (202-224-0957), and David M. Zornow, of Skadden, Arps, Slate, Meagher & Flom (919 Third Avenue, NYC, 212-735-

3000), who was also trial counsel. (The briefs for the two appellants constituted an integrated whole, composed by both firms.) The Government was represented by AUSAs Alan B. Vickery and Lee G. Dunst, Assistant United States Attorneys for the Eastern District of New York. The panel consists of Judges Jon O. Newman, Pierre N. Leval and Aronld Wexler (of the EDNY, by designation).

B. United States v. Blarek, United States Court of Appeals for the Second Circuit, Dkt. Nos. 98-1291, 98-1292. Decided in unreported opinion December 23, 1998.

I represented on appeal Frank Pellecchia and Alexander Blarek, two decorators and interior designers who were convicted of money laundering offenses for decorating houses and apartments in Colombia for Jose Santacruz Londono, a major drug trafficker, and receiving payment from funds derived from Santacruz's drug trafficking activities. The case received significant publicity, because it involved the conviction of otherwise legitimate businessmen for money laundering offenses and RICO violations as a result of their acceptance of tainted funds. The conviction was affirmed, a petition for certiorari (filed on behalf of petitioners by Alan Dershowitz) was denied.

I was counsel of record for Mr. Blarek, and briefed and argued the appeal for both defendants, with the assistance of Theodore R. Posner, then an associate at Howard, Smith & Levin, now legislative counsel to Rep. Sander M. Levin, 2268 Rayburn House Office Building, Washington, DC 20515-2212, 202- 225-4961. Co-Counsel, representing Mr. Pellecchia, who also was trial counsel, was Paul Shechtman, of Stillman & Friedman, 425 Park Avenue, New York, 212-223-0200. The Government was represented by Mark Lerner and Richard Weber, Assistant United States Attorneys for the Eastern District of New York. The panel was composed of Judges Guido Calabresi, Thomas Meskill, and Milton Pollack (of the SDNY, by designation).

C. United States v. Pedro Lara, United States Court of Appeals for the Second Circuit, Docket Nos. 93-1750, 93-1773, 93-1780, 93-1794, 93-1795, 93-1837. Argued November 14, 1994, decided February 2, 1995. Reported at 47 F.3d 60.

I represented on appeal, pro bono by special appointment of the District Court, Pedro Lara, a young man who had been convicted of narcotics offenses. The most significant aspect of the appeal was that the Government was appealing a downward sentencing departure made by Judge John Martin of the Southern District, on the ground that the amount of narcotics attributed to Mr. Lara grossly overstated his culpability, because it represented an aggregate amount of narcotics distributed over a long period of time by a large organization of which he was accused of being only a minor part. We were unsuccessful in urging grounds for reversal of Mr. Lara's conviction, but successful in resisting the Government's appeal.

I briefed and argued the appeal for Mr. Lara, with the assistance of Stephen R. Peikin, then an associate of Howard Darby & Levin, and now an AUSA in the Southern District of New York. Two other appellants were represented by Martin G. Fogelson (470 Park Avenue South, 686-4262) and James C. Neville (20 Vesey Street, 233-0858). (Their appeals were largely independent of mine.) The government was represented by AUSA Michael S. Sommer of the SDNY, now a partner in McDermott, Will & Emery, 50 Rockefeller Center, NYC, 212-547-5400. The panel consisted of Judges Jon O. Newman and Pierre N. Leval, and the late Judge Francis X. Altamari.

D. Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon. United States Court of Appeals for the Second Circuit, Docket No. 93-7418. Argued October 18, 1993, decided January 3, 1994. Reported at 13 F.3d 537.

I represented Carol Sui Han Leo, the plaintiff in a suit for violation of fiduciary duty against the law firm of Milbank, Tweed, Hadley & McCloy, on an appeal from a judgment in her favor for approximately two million dollars. Mrs. Leo, acting through an agent named Chan Cher Boon, had retained Milbank, Tweed to represent her in an effort to purchase a bankrupt Swiss bank. After Boon was fired as agent, he associated himself with a competing syndicate, and Milbank, Tweed undertook to represent that group in opposition to the interests of Mrs. Leo. The judgment was affirmed. The opinion of the Court of Appeals emphatically rejected the firm's claims that its conduct had been appropriate.

I argued the case in the Court of Appeals, and was primarily responsible for briefing the appeal, along with Sara E. Moss and Robert P. Haney, partners in Howard, Darby & Levin, and Nancy L. Kestenbaum, an associate of the firm, who were trial counsel. (Ms. Moss is now General Counsel of Pitney Bowes, Inc., 1 Elmcroft Road, Stamford, Connecticut, 203-351-7924; Mr. Haney is a partner in Covington & Burling, 212-841-1062; and Ms. Kestenbaum is now an AUSA in the Southern District of New York.) Opposing counsel was Harvey R. Miller of Weil, Gotshal & Manges, 767 Fifth Avenue, NYC, 212-310-8000. The panel consisted of Judges Joseph M. McLaughlin, Dennis G. Jacobs and Thomas M. Reavley (of the Fifth Circuit, by designation). (In addition to the appeal, I also had primary responsibility for oral argument of the defendants' motions for judgment notwithstanding the verdict and for a new trial before the District Court, Chief Judge Thomas P. Griesa, United States District Court for the Southern District of New York.)

E. United States v. Oliver North, United States Court of Appeals, Docket No. 89-3118. Argued February 6, 1990, decided July 20, 1990. Reported at 910 F.2d 843 (as modified, 920 F.2d 940).

I was asked by Independent Counsel Lawrence E. Walsh to join the staff of the Office of Independent Counsel, Iran/Contra, to supervise the responses to substantive legal motions in the prosecution of Oliver North. The defendant made numerous pre-trial motions to dismiss the indictment and for other relief, and, with the assistance of a rather large team of lawyers, we succeeded in persuading the District Court to reject virtually all of them and to proceed to trial on the indictment. (Several counts were later dismissed on prosecution motion pursuant to the Classified Information Procedures Act because of the Government's refusal to declassify various documents material to the case.) After Mr. North was convicted on a few counts, I returned to supervise the briefing of the appeal, and to argue the case. The convictions were reversed.

I handled most of the briefing and argument of substantive pre-trial motions, with the assistance of Bruce Green (now a professor at Fordham University School of Law, 212-636-6851) and a number of other lawyers, before the late Judge Gerhard Gesell, and briefed and argued the appeal, with the help of a number of others. Barry S. Simon of Williams & Connolly, 725 12th Street N.W., Washington, D.C. 20005, 202-434-5000, argued on behalf of Mr. North. The appellate panel consisted of Judges Laurence H. Silberman, David B. Sentelle and Patricia Wald.

F. Appeal of the United States (United States v. Fernandez), United States Court of Appeals for the Fourth Circuit, Docket No. 89-5804. Argued August 23, 1989, decided September 29, 1989. Reported at 887 F.2d 465. (See also United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990).)

This was another matter I handled for the Independent Counsel, Iran/Contra. The case involved important issues under the Independent Counsel Act and the Classified Information Procedures Act. The matters involved litigation between the United States (represented by the Justice Department) and itself (represented by the Independent Counsel). In essence, the Attorney General sought to take an interlocutory appeal from a ruling of the District Court, rejecting the Independent Counsel's proposal to substitute redacted versions of classified materials that the Court had ruled relevant to the case. Independent Counsel's position was that the decision to take such an appeal was confided to Independent Counsel, not to the Attorney General. (Although both halves of "the United States" agreed that the District Court should have allowed the substitution, the question was who would control the prosecution, including the tactical choice of when to attempt to accommodate the Court's rulings and when to appeal.) We were successful in having the Attorney General's appeal dismissed, but the victory was ultimately meaningless; the District Court eventually dismissed the case, ruling that the refusal to

declassify documents would deprive the defendant of a fair trial. I also argued the Independent Counsel's later appeal of that order, but the decision was affirmed.

I handled the briefing and argument of both appeals in the Fourth Circuit. The Attorney General's position was argued by then-Assistant Attorney General Edward S.G. Dennis, Jr., with the assistance of Ronald K. Noble (now a Professor of Law at NYU, 212-998-6702). Both appeals were heard by a panel consisting of Judges Robert F. Chapman, J. Harvie Wilkinson III and William W. Wilkins, Jr.

G. United States v. Hana Koecher, United States Supreme Court, Docket No. 84-1922. Decided February 25, 1986. Reported at 475 U.S. 133.

In this case, I represented Hana Koecher, the wife of an accused Czechoslovakian spy. Mrs. Koecher was subpoenaed to testify before a grand jury investigating her husband, and declined to testify on grounds of the spousal privilege. Her claim was upheld by the Second Circuit (755 F.2d 1022), in one of Judge Henry Friendly's last opinions, and the Government sought and received certiorari from the Supreme Court. The case was referred to me by the ACLU, and I took the case on a pro bono basis in the Supreme Court. The issue presented was whether there is a "co-conspirator exception" to the marital testimonial privilege. In the end, the case was dismissed as moot when my client and her husband were traded to the Russians in exchange for the freedom of the Soviet dissident and activist Natan Sharansky.

I briefed and argued the case in the Supreme Court, with the assistance of George Kannar of the ACLU (now a law professor at the State University at Buffalo (716-645-2400)). The Government brief was signed by then-Solicitor General Charles Fried, then-Assistant Attorney General (now Judge) Stephen Trott, then-Deputy Solicitor General Andrew Frey (now a member of Mayer Brown & Platt, 1675 Broadway, New York, NY, 212-506-2635 in New York), then Assistant to the Solicitor General Andrew Pincus, and AUSA Barry Bohrer (now a member of Morvillo, Abramowitz, Grand, Iason & Silberberg, 565 Fifth Avenue, New York, NY 10017, 212-856-9600), but my recollection is that someone else from the Solicitor General's Office, whose name I cannot recall, argued the case. I was not involved in the case before it reached the Supreme Court. I did make a brief appearance in the District Court in connection with entering the agreements that mooted the case, before the Honorable Shirley Wohl Kram, United States District Court for the Southern District of New York. The United States was represented at that proceeding by then-AUSA Bruce Green (now a professor at Fordham University School of Law, 212-636-6851).

H. United States v. Andrea Aiello, United States Court of Appeals for the Second Circuit, Docket Nos. 84-1404, 84-1405 and 84-1413. Argued March 25, 1985, decided Aug. 7, 1985. Reported at 771 F.2d 621 (2d Cir. 1985).

This was the first case I ever handled as a defense lawyer after leaving the United States Attorney's Office in 1983. The defendant, a tile importer from Buffalo, was convicted of importing narcotics. The case involved a significant issue – whether the Government, in seeking a warrant for video surveillance without audio, was required to comply with standards analogous to those required by statute for aural electronic surveillance. The Court of Appeals held that it was not, and affirmed the convictions.

I briefed and argued the case for Mr. Aiello with respect to the electronic surveillance issues. Co-counsel were Anne C. Feigus and Mark F. Pomerantz, then of Fischetti, Feigus & Pomerantz, now a member of Rogers & Wells, 200 Park Avenue, 212-878-8000). The Government was represented by then-AUSA William J. Cunningham III of the Eastern District of New York. The panel consisted of Judges James L. Oakes and Ralph K. Winter, and the late Judge Walter R. Mansfield.

I. United States v. Patrick J. Cunningham and John J. Sweeney, United States District Court for the Southern District of New York, Indictment No. 81 Cr. 458. Tried May 24, 1982 to June 18, 1982.

Appeal to United States Court of Appeals for the Second Circuit, Docket Nos. 83-1046, 83-1052, 82-1402. Argued September 28, 1983, decided November 28, 1983. Reported at 672 F.2d 217 (2d Cir. 1983).

(See also United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982).)

United States v. Marie Falco, United States District Court for the Southern District of New York, Indictment No. 81 Cr. 415. Tried December 14-23, 1981.

Appeal to United States Court of Appeals for the Second Circuit, Docket No. 82-1104 Decided August 10, 1982, in an unreported opinion.

These were the most significant cases I tried as a line prosecutor. Patrick Cunningham, a former New York State Democratic Chairman, was convicted of tax evasion, perjury and obstruction of justice, along with his brother-in-law John Sweeney, and, in a related case separately tried, his secretary, Marie Falco, was convicted of perjury. The defendant was a politically significant figure, and the case was sharply contested. The cases were tried personally by United States Attorney John S. Martin, Jr., who selected me to be co-counsel, with significant responsibility for witness preparation, briefing of legal issues (including an attorney disqualification motion that was granted, leading to an appeal to the Second Circuit and reversal of the District Court's order), and presentation of the cases in court, including delivering the main summations in both trials. All three defendants were convicted, and I had primary responsibility for briefing and arguing the

appeals, in which all convictions were affirmed (and three counts on which the District Court had set aside the verdict were reinstated).

I was trial co-counsel, and briefed and argued the Government's position on appeal, with United States Attorney John S. Martin, Jr. (now United States District Judge, SDNY, 212-637-0228). Mr. Cunningham was represented by Michael Tigar (now Professor of Law at American University, 202-274-4088), Mr. Sweeney by Michael Kennedy, and Ms. Falco by Gerald B. Lefcourt (148 E.78th Street, 737-0400). The Cunningham case was tried before Judge Charles L. Brieant; the panel on appeal consisted of Judges Amalya L. Kearse and Ralph K. Winter, and the late Judge Walter R. Mansfield; the panel on appeal of the disqualification motion consisted of Judges Thomas Meskill and Amalya L. Kearse, and the late Judge Charles Metzner of the SDNY, sitting by designation. The Falco case was tried before the late Judge Vincent L. Broderick.

J. United States v. Steven Weil, United States District Court for the Southern District of New York, Indictment No. 81 Cr. 57. Tried June 25, 1981 to July 13, 1981. Appeal to the United States Court of Appeals for the Second Circuit, Docket No. 81-1374. Decided February 16, 1982 in an unreported opinion.

This was the most significant case I tried solo as a line prosecutor. Steven Weil was a stock manipulator who was convicted of multiple counts of perjury before the Securities and Exchange Commission. The trial lasted three weeks, and the defendant raised a defense of mental impairment as a result of injuries suffered in an air crash. The case involved the presentation of a number of kinds of complex evidence, including securities experts and deposition testimony of a Swiss investor, and the testimony of somewhat notorious co-operating witnesses Jerome Allen and Phillip Stoller. In addition, the defendant put on a substantial case, necessitating the cross-examination of witnesses including an expert neurologist, an expert psychiatrist, the defendant's wife, and a former prosecutor who had investigated the defendant in an earlier case. The defendant was convicted on all counts and the convictions were affirmed by the Second Circuit in an unreported opinion.

I was sole trial and appellate counsel for the United States. The defendant was represented by Paul Holian of Boston, Massachusetts. (There is no current listing for Mr. Holian in the Martindale-Hubbell on-line Lawyer Locator.) The trial judge was the Honorable Robert W. Sweet.

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.

My primary legal activities have fallen into three categories. First, and most significantly, I have been engaged in teaching law and legal scholarship. Since 1977, I have been a member of the faculty of the Columbia University School of Law. Since the spring of 1979, in my second year of teaching, when I was asked to take over a section of the first-year course in criminal law, my primary field of specialization has been criminal law and procedure. I have devoted more of my time to teaching itself than is perhaps common among faculty at major research universities, and I am proud to have received several awards in recognition of the quality of classroom teaching and devotion to the educational needs of my students. I have also written a number of articles, one of which, on the federal RICO statute, has been widely cited, and excerpted in casebooks and other works.

Second, I have engaged in significant public service. Beginning with my earliest jobs as a law clerk, I have devoted a significant part of my career to serving the public. The bulk of this experience has been in law enforcement. As a full-time federal prosecutor in the Southern District of New York, from 1980-1983, I investigated and tried criminal cases, and served as Deputy Chief and Chief Appellate Attorney, briefing or supervising the briefing of scores of appeals. I later returned to the United States Attorney's Office from 1990-1992, at the request of then-United States Attorney Otto Obermaier, to serve as Chief of the Criminal Division, with supervisory responsibility over the entire criminal docket of the Office. In addition to that, I have served on a part-time basis as associate or special counsel to three different independent prosecutors, James McKay, Lawrence Walsh, and Carol Elder Bruce.

Finally, since leaving government service in 1992, I have served as a part-time counsel at the law firm of Howard, Darby & Levin and successor firms, now a part of Covington & Burling. This activity has enabled me to see the practice of law from the standpoint of the private sector, both in the criminal process, representing witnesses and subjects of investigations as well as engaging in the appellate litigation described above, and in occasional complex civil cases.

II. FINANCIAL DATA AND CONFLICTS 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 no such expectations or agreements. As listed on the attached financial statement, I have accumulated a TIAA-CREF retirement account as a result of my employment at Columbia, which will be available as a retirement fund.

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 comply with all requirements of the Code of Judicial Conduct and any relevant statutes and case law with respect to disqualification from any case in which I have any financial or other interest, or in which my objectivity and fairness could reasonably be questioned.

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

I would hope to continue teaching at Columbia, on a part-time basis, with the permission of the Chief Judge of the Circuit, within the limits permitted to judges. Other than that I would not expect to pursue any other employment.

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 Form AO-10.

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
Rev. 1/98

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1998**

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial) Lynch, Gerard E.	2. Court or Organization United States District Court Southern District of New York	3. Date of Report 3/1/2000
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="checkbox"/> Nomination, Date <u>2/28/00</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/1/99 - 2/1/00
7. Chambers or Office Address Columbia University School of Law 435 West 116th Street New York, NY 10027	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 Paul J. Kellner Professor of Law,	Columbia University
2 Counsel,	Covington & Burling
3 Reporter, Sentencing Project,	American Law Institute

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

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	I hope to arrange to continue teaching at Columbia University, though at present
2	I have no definite agreement.
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 1/1/98-2/1/00	Columbia University	\$ 311,090
2 1/1/98-2/1/00	Covington & Burling (formerly Howard, Smith & Levin)	\$ 381,215
3 7/1/99-1/1/00	American Law Institute	\$ 15,000
4 10/1/99-1/15/00	Office of Independent Counsel	\$ 11,700
5 1/1/98-2/1/00	Flushing Hospital (S)	\$ _____

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gerard E. Lynch	3/1/2000

IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE_CODE*</u>
<input checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			
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
	Gerard E. Lynch	3/1/2000

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

Description of Assets (including trust assets) <i>Indicate, where applicable, owner of the asset by using the parenthetical (OP) for joint ownership of property, the value and spouse, (S) for separate ownership spouse, (TK) for ownership by dependent child.</i> <i>Place (X) after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. 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 Code2 (I-M)	Value Code3 (O-P)	Value Method Code3 (Q-W)	Type Code4 (X-Z)	Date Month/Day	Value Code2 (D-B)	Gain Code1 (A-H)	Identity of buy/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 Citibank checking and money market (J)	C	INT	M	T	EXEMPT				
2 Merrill Lynch money Market (J)	C	DIV	L	T	EXEMPT				
3 Merrill Lynch money market (DC)	B	DIV	K	T	EXEMPT				
4 Olde Discount Brokerage money market (J)	B	DIV	K	T	EXEMPT				
5 Boeing Company (J)	A	DIV	J	T	EXEMPT				
6 Cube Microsystems (J)	none		K	T	EXEMPT				
7 Walt Disney Co. (J)	A	DIV	J	T	EXEMPT				
8 Johnson & Johnson (J)	none		J	T	EXEMPT				
9 ABN Amro Cap Fd. Tr. I (J)	A	DIV	J	T	EXEMPT				
10 Duke Cap Fin Tr. II (J)	A	INT	J	T	EXEMPT				
11 PLC Capital Trust (J)	B	INT	J	T	EXEMPT				
12 Potomac Edison Co. (J)	A	INT (OID)	J	T	EXEMPT				
13 NYC Bonds (J)	A	INT	K	T	EXEMPT				
14 Triborough BTA Bonds (J)	B	INT	K	T	EXEMPT				
15 AIM Constellation Fund Cl A (J)	B	DIV	K	T	EXEMPT				
16 Alliance High Yield F. Cl B (J)	A	DIV	J	T	EXEMPT				
17 Alliance Premier Growth Cl B (J)	B	DIV	K	T	EXEMPT				
18 Nuveen Municipal Value Fund (J)	B	DIV	K	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; F- \$50,001-\$100,000; G- \$100,001-\$150,000; H- \$150,001-\$500,000; I- \$500,001-\$1,000,000; J- More than \$1,000,000.
 2. Value Codes: J- \$15,000 or less; K- \$15,001-\$50,000; L- \$50,001-\$100,000; M- \$100,001-\$250,000; N- \$250,001-\$500,000; O- \$500,001-\$1,000,000; P- \$1,000,001-\$5,000,000; Q- \$5,000,001-\$25,000,000; R- More than \$25,000,000.
 3. Value Method Codes: O- Appraisal; P- Cost (real estate only); Q- Assessment; R- Other; S- Book value; T- Cash/Market; U- Estimated.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gerard E. Lynch	3/1/2000

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets (including trust assets) <small>Indicate, where applicable, owner of the asset by marking the appropriate box: (X) for joint ownership of reporting individual and spouse; (S) for separate ownership by spouse; (D) for ownership by dependent child. Place (X) after each asset entry from Form 1099-DIV.</small>	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. Code1 (A-D)	Type Code2 (E) Div. (F) (G) or (H)	Value Code3 (I-D)	Value Method Code3 (Q-W)	Type Code4 (X) Buy/Sell (Y) Merger (Z) Redemption	(1) Date Month/Day	(2) Value Code2 (J-P)	(3) Gain Code3 (A-H)	(4) Identity of buyer/seller (if private transaction)	(5)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)										
1 Oppenheimer Main St Gr. & Inc. A (J)	B	DIV	K	T	EXEMPT					
2 Pilgrim Bank & Thrift Fund A (J)	B	DIV	J	T	EXEMPT					
3 Oppenheimer Convertible Securities Cl B (J)	B	DIV	K	T	EXEMPT					
4 Putnam Health Services Trust Cl B (J)	none		J	T	EXEMPT					
5 Putnam Intl Growth Fund Cl B (J)	A	DIV	K	T	EXEMPT					
6 Seligman Large Cap Value Fd Cl B (J)	none		K	T	EXEMPT					
7 Stern Roe Adv. Growth Stock Fd Cl B (J)	none		K	T	EXEMPT					
8 AIM Tax Free Intermediate Shares (J)	A	DIV	J	T	EXEMPT					
9 Alliance Municipal Income Fund NY Port. Cl B (J)	C	DIV	L	T	EXEMPT					
10 Rochester Municipals Fd Cl A (J)	B	DIV	K	T	EXEMPT					
11 Investment Company of America (DC)	B	DIV	K	T	EXEMPT					
12 Rochester Municipals Fd Cl A (DC)	C	DIV	L	T	EXEMPT					
13 FT Communications Gr Tr Ser 2 (J)	A	DIV	J	T	EXEMPT					
14 FT Business Svcs Growth Ser 2 (J)	none		J	T	EXEMPT					
15 FT Financial Svcs Growth Ser 5 (J)	A	DIV	J	T	EXEMPT					
16 FT Pharmaceutical Growth Ser 5 (J)	A	DIV	J	T	EXEMPT					
17 Nuveen DJ Pharm Mar 1999 UTS (J)	A	DIV	J	T	EXEMPT					
18 Nuveen E Commerce Jan 1999 UTS (J)	none		K	T	EXEMPT					

1 Income/Type Codes: A-\$1,000 or less (See Col. B1-D4)	B-\$1,001-\$2,500	C-\$2,501-\$5,000	D-\$5,001-\$15,000	E-\$15,001-\$50,000
2 Value Codes: I-\$15,000 or less (See Col. G1-I3)	J-\$15,001-\$50,000	K-\$50,001-\$100,000	L-\$100,001-\$500,000	M-\$500,001-\$1,000,000
3 Value Method Codes: Q-Appraisal (See Col. C2)	R-Cost (real estate only)	S-Assessment	T-Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Gerard E. Lynch	Date of Report 3/1/2000
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VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets (including trust assets)	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure:				
	Am't Code (A-D)	Type Code (div, rent, int)	Value Code (A-F)	Value Method Code (C-W)	Type Code (buy, sell, mtr, etc.)	(1) Date Month	(2) Value Code (A-P)	(3) Gain Code (A-H)	(4) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
1 Nuveen Tax Free Unit TR INSD (J)	R	INT	K	T	EXEMPT				
2 VKAC Internet TR Ser 10 UTS (J)	A	DIV	K	T	EXEMPT				
3 TIAA-CREF	none		N	T	EXEMPT				
4 Citibank Balanced Portfolio Fd Cl A (IRA)	B	DIV	none	T	EXEMPT				
5 Merrill Lynch IRA Money market (S)	B	DIV	K	T	EXEMPT				
6 Citibank IRA money market	none		K	T	EXEMPT				
7 Treasury Zero-coupon bonds (DC)	C	INT (OID)	K	T	EXEMPT				
8 Compaq Computer Corp. (J)	A	DIV	none	T	EXEMPT				
9 First Trust REIT Value Ser 1 UTS (J)	none		none	T	EXEMPT				
10 FT DIJA Target 5 TR April 1998 (J)	B	CAP GAIN	none	T	EXEMPT				
11 Integrated Device Tech (J)	C	CAP GAIN	none	T	EXEMPT				
12 Microtest Inc. (J)	none		none	T	EXEMPT				
13 Read-Rite Corp. (J)	none		none	T	EXEMPT				
14 Silicon Graphics (J)	none		none	T	EXEMPT				
15 3 Com Corp. (J)	C	CAP GAIN	none	T	EXEMPT				
16 Merrill Lynch Intl. Equity Fd. Cl D (J)	none		none	T	EXEMPT				
17 Merrill Lynch Global Alloc. Fd D (J)	none		none	T	EXEMPT				
18 AIM Aggressive Gr Fd Cl A (J)	A	CAP GAIN	none	T	EXEMPT				

1. Income/Grant 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-\$50,000,000; J-More than \$50,000,000.
 2. Value Codes: J-\$15,000 or less; K-\$15,001-\$50,000; L-\$50,001-\$100,000; M-\$100,001-\$250,000; N-\$250,001-\$500,000; O-\$500,001-\$1,000,000; P-\$1,000,001-\$5,000,000; Q-\$5,000,001-\$25,000,000; R-\$25,000,001-\$50,000,000; S-More than \$50,000,000.
 3. Value Method Codes: O-Appraisal; P-Book value; R-Cost (real estate only); S-Assessment; T-Cash/Market; U-Other; W-Estimated.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gerard E. Lynch	3/1/2000

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

Part I
 4. Counsel, Office of Independent Counsel Carol Bruce

Part III
 6. 1/1/98-2/1/00 Private Practice of Psychotherapy (S) -----

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 is 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, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Gerard E. Lynch Date 3/1/2000

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, § 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

SENATE JUDICIARY COMMITTEE
 Part II, Question 5
 Statement of Net Worth

[This statement consolidates accounts held by me and my wife, as well as custodial accounts held by me as custodian for my son under the Uniform Gifts to Minors Acts]

ASSETS

Cash on hand and in banks (see Schedule A)	\$ 315,271
US Government Securities (see Schedule B)	25,000
Listed Securities (see Schedule C)	679,135
Accounts and Notes Receivable	None
Real Estate Owned	None
Real Estate Mortgages Receivable	None
Autos and other personal property	
One 1989 Saab	5,000
Cash Value Life Insurance	None
Other Assets:	
Retirement Accounts:	
TIAA-CREF	317,116
Citibank IRA (cash)	20,959
Merrill Lynch IRA (cash) (S)	21,944
Total Assets:	\$1,384,425

LIABILITIES

Notes payable to banks – secured	None
Notes payable to banks – unsecured	None
Notes payable to relatives	None
Notes payable to others	None
Accounts and bills due	None
Unpaid income tax	None
Other unpaid tax and interest	None
Real estate mortgages payable	None
Chattel mortgages and other liens payable	None
Other debts	None
Total liabilities:	None
Net worth	\$1,384,425

CONTINGENT LIABILITIES

As endorser, co-maker or guarantor	\$	None
On leases or contracts		None
Legal Claims		None
Provision for Federal Income Tax		25,000
Other special debt		None

GENERAL INFORMATION

Are any assets pledged?	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

Note: On this statement, and on all schedules, the designation (S) refers to assets owned by my wife; the designation (DC) to assets owned by my dependent child. All other assets are held jointly by myself and my wife.

Schedule A
Cash Accounts

Citibank checking and money market	\$ 174,660
Merrill Lynch money market	67,224
Olde Discount Brokerage money market	35,323
Merrill Lynch money market (DC)	38,064

Total: \$ 315,271

573

Schedule B
Government Securities

Treasury Zero-Coupon Bonds (DC)	\$25,000
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Schedule B
Securities

Stocks	
Boeing Company	\$ 4,462
C Cube Microsystems	41,718
Walt Disney Co.	3,675
Johnson & Johnson	8,450
ABN Amro Cap Fd. Tr. I	10,562
Duke Cap Fin Tr. II	4,200
PLC Capital Trust	11,250
Potomac Edison Co.	11,500
Municipal Bonds	
NYC Bonds	15,473
Triborough BTA Bonds	25,442
Mutual Funds	
AIM Constellation Fund Cl A	18,680
Alliance High Yield Fd. Cl B	8,870
Alliance Premier Growth Cl. B	31,432
Nuveen Municipal Value Fd	16,125
Oppenheimer Main St Gr & Inc. A	20,189
Pilgrim Bank & Thrift Fund A	6,529
Oppenheimer Convertible Securities Cl B	26,552
Putnam Health Services Trust Cl B	11,501
Putnam Intl Growth Fund Cl B	16,453
Seligman Large Cap Value Fd. Cl B	30,303
Stern Roe Adv. Growth Stock Fd Cl B	40,895
AIM Tax Free Intermediate Shares	11,670
Alliance Municipal Income Fund NY Port. Cl B	53,090
Rochester Municipals Fd Cl A	34,848
Investment Company of America (DC)	15,708
Rochester Municipals Fd Cl A (DC)	98,373
Unit Investment Trusts	
FT Communications Gr Tr Ser 2	8,529
FT Business Svcs Growth Ser 2	3,974
FT Financial Svcs Growth Ser 5	4,647
FT Pharmaceutical Growth Ser 5	7,660
Nuveen DJ Pharm Mar 1999 UTS	9,439
Nuveen E Commerce Jan 1999 UTS	16,941
Nuveen Tax Free Unit TR INSD	22,109
VKAC Internet TR Ser 10 UTS	27,886
Total:	\$ 679,135

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Throughout my career, I have devoted my primary attention to legal scholarship, public service, and law reform activities, and never sought out the most lucrative opportunities available to me. Thus, my primary employment since graduation from law school has been in teaching and in government service, rather than in law firms or in the service of private clients.

Even while in law teaching, however, I have made it a point to engage in pro bono legal activities. For example, two of the most significant matters I have litigated (United States v. Koecher and United States v. Lara, both discussed above) were pro bono matters (and most of the others were prosecutions in which I represented the government). I have also written a number of amicus curiae briefs for the American Civil Liberties Union, all without compensation.

Since 1992, I have devoted about one day per week to law practice, and I try to devote some portion of that to pro bono activities. In the case of United States v. Lara, for example, I was appointed to handle an appeal on behalf of an indigent criminal defendant. The time devoted to that case without compensation ranked it as one of my largest time commitments during 1993 and 1994.

As noted above, I have devoted considerable time to bar association and other law-improvement activities throughout my career.

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, and would never belong, to any club or other organization that discriminates on the basis of race, sex or religion.

3. (A) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? (B) 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).

(A) As I understand the process, Senator Schumer is advised on nominations to the federal courts by a merit selection committee that he has appointed, composed of members of the bar and general public from various places in New York. I was recommended to Senator Schumer by that committee.

(B) Some time in the spring of 1999, I was asked by a member of Senator Schumer's advisory committee if I would be interested in applying for a vacancy on the district court. I decided to apply, and submitted an application. In early September, 1999, I was interviewed by the committee. I was later advised by the chair of the committee that the committee would recommend me to Senator Schumer, and on November 5, 1999, I met with the Senator. Late in December, I was advised by the chair of the committee that the Senator would submit my name to the White House. On January 6, 2000, I met with members of the Department of Justice Office of Policy Development, and of White House Counsel's Office, in Washington, D.C. In February, 2000, I was separately interviewed by an agent of the Federal Bureau of Investigation, and by a member of the committee of the American Bar Association that deals with federal judicial appointments, in connection with their respective investigations of my character and qualifications.

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.

There is no question in my mind that the principal function of the courts is the resolution of disputes and grievances brought to the courts by the parties. A judge who comes to the bench with an agenda, or a set of social problems he or she would like to "solve," is in the wrong business. In our system of separation of powers, the courts exist to apply the constitution and laws to the cases that are presented to them, not to resolve political or social issues. The bulk of the work of the lower courts consists of criminal cases and the resolution of private disputes and commercial matters.

With respect to employing individual plaintiffs as vehicles for broad orders, and with respect to justiciability issues such as standing, ripeness and mootness, it is the role of a district judge to follow the constitution, statutes, rules of procedure, and the precedents of the appellate courts. In some instances, these rules provide for class actions or other forms of litigation that can lead to broad relief. But it is not the role of a judge to seek out "opportunities" to broaden disputes before the courts. I was trained in my very first clerkship that the good judge seeks to rule on narrow grounds where possible, to avoid dictum, and to resolve disputes as simply as possible.

With respect to imposing broad duties on government and overseeing governmental or other institutions, the answer seems to me much the same. Judges have no experience or qualifications to run prisons, schools, unions, or other institutions, and judicial control of such institutions tends to obscure and undermine the proper forms of democratic accountability. There are occasions on which statutes or case law require affirmative relief of various kinds. The RICO statute, for example, authorizes the government to seek broad equitable relief that has in some cases included virtual judicial trusteeships over institutions such as corporations and labor unions. Where the law requires such relief, it is the judge's duty to follow the law. But a judge should always approach demands for such relief with extreme caution.

My primary experience of litigation has been in criminal law. In that area, the courts face cases that in some sense touch on the largest social issues, public controversies, and social pathologies. But the role of the courts in these cases is strikingly limited, and concerns the just resolution, under the law, of very concrete cases. The responsibility of judge and jury in such cases is to determine the facts of a particular transaction and to apply specific legal standards to those facts. I believe that the basic role of the courts is the same in other areas of law: to apply specific legal standards to resolve the particular disputes brought to court by citizens.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. All right. Now we are ready to start.

Judge Dawson, sometimes the legislature fails to act on various public policy matters. What role, if any, do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Judge DAWSON. I believe that the failure of the legislature to address an issue may mean that that issue does not need to be—

Senator THURMOND. Speak louder. I can't hear you.

Judge DAWSON. I believe that the legislative failure to address an issue may mean that that issue doesn't need to be addressed, and the judges are not there to be engines of social change. They are there to interpret laws and to follow precedent.

So I believe that the absence of legislative action may say as much as legislative action itself.

Senator THURMOND. Mr. Garaufis, please explain the process and review that you will undertake as a judge to evaluate whether a law is unconstitutional.

Mr. GARAUFI. Mr. Chairman, the first thing that I would do is look to the statute itself and apply the principle that there is a presumption of constitutionality. I would then look at the precedent which has been created for us by the Supreme Court of the United States and by the circuit courts in interpreting similar statutes in order to get the guidance that I would require in order to make such a determination.

I think that the key element of the examination is the presumption of constitutionality of enacted statutes.

Senator THURMOND. Judge Hamilton, there has been much controversy about judges overturning the will of the people through voter initiatives in California, such as proposition 209. Should judges show deference to the voters when reviewing the constitutionality of voter initiatives?

Judge HAMILTON. Mr. Chairman, indeed, laws enacted by the voter initiative process are entitled to the same deference, presumption of constitutionality as those laws enacted by our elected officials. So to that extent, I would have to answer yes, there obviously should be deference given to duly enacted laws either by the voters or by the State legislature.

Senator THURMOND. This question to both Judge Hamilton and Judge Hunt. As you know, the Prisoner Litigation Reform Act was an attempt to limit prisoner litigation and limit court involvement in the operations of prisons. Do you believe that the Act has generally been beneficial to the legal system, or do you believe it places too many restrictions on the ability of judges to remedy constitutional violations in the prison context?

Judge HAMILTON. To the extent that I have dealt with the Prisoner Litigation Reform Act in my current role as a magistrate judge, I have not found that there have been restrictions such that I am not able to fashion the kind of relief that I feel is appropriate. And I do believe that there are certainly provisions—I am not familiar with the entire Act, but I do believe there are provisions that are—

Senator THURMOND. Speak in your loud speaker. This is a big room.

Judge HAMILTON. I am sorry. You can't hear me, Mr. Chairman?

Senator THURMOND. Speak in your loud speaker. That is all. Anything else you got to say?

Judge HAMILTON. No.

Judge HUNT. I agree, I think generally it has been beneficial for the administration of justice. I don't think any limitations put there have acted to remove or deny anyone the rights that they should have either under the Constitution or the statutes.

Senator THURMOND. Professor Lynch, in a February 1998 Washington Post editorial, you wrote, "Some laws (simple possession of marijuana) are politically controversial. Others (unauthorized commercial use of Smoke Bear) are just silly. We don't really expect all these laws to be enforced to the hilt."

Do you have any concerns about current Federal drug laws, and would you have any reluctance to impose them as a judge?

Mr. LYNCH. No, Mr. Chairman, I have no concerns about the legitimacy or the importance of our current Federal drug laws. As a Federal prosecutor for 5 years, both as a line prosecutor and as chief of the Criminal Division of the United States Attorney's office that brought numerous, significant narcotics cases, I have been honored to be a foot soldier, as it were, in the war on drugs, and I think that is an important public policy. I certainly would have no difficulty in enforcing those laws as a judge.

The reference that you refer to is actually a very brief excerpt from a very short article, which is not about drugs at all. It was about the independent counsel statute, and I was attempting to illustrate the point of the discretion of the executive with respect to enforcement of different kinds of laws.

Senator THURMOND. Professor Lynch, you have been critical of the power of the Federal Sentencing Commission and have referred to the Sentencing Guidelines as a penal code. What is your view of the Sentencing Guidelines, and could you strictly follow them as a judge?

Mr. LYNCH. I have always been a supporter of the concept of Federal Sentencing Guidelines. Back when I was still a law student, more than 25 years ago, I read when it came out Judge Marvin Frankel's book on sentencing, which I think was extremely influential and extremely correct in arguing that it was disgraceful that Federal judges should be able to apply each their own philosophy of sentencing and not follow any common rules of regulations. I have supported the concept of sentencing guidelines and, once again, in my career as a prosecutor, in the latter incarnation when I was chief of the Criminal Division, that was during the period, the early period of the Federal guidelines, and once again, I had no trouble in enforcing those laws and in attempting to persuade judges to follow the guidelines. And I expect I would do the same.

To the extent I have been critical of aspects of the sentencing guidelines, of course, any of us, if we were members of the Sentencing Commission, might urge slightly different guidelines. But the Congress has delegated the task of writing sentencing guidelines to the Commission, not to Federal judges, and it is up to the

Commission to set the guidelines and it is up to judges to apply them as they are written.

Senator THURMOND. Professor Lynch, in a symposium in June 1992, you stated that the sentencing guidelines, “have put an end to the judge’s discretion” and have enhanced the power of the prosecutor. Is it your view that the guidelines provide too little discretion for judges and need to be significantly changed?

Mr. LYNCH. No, Mr. Chairman, I don’t think that the guidelines need to be significantly changed with respect to the discretion given to Federal judges. I think that it is possible that some of them might be more flexible than the ones as they are written now, though, as I have said before, it is up to Federal judges to follow them regardless of their opinion with respect to those guidelines.

I think it is true that the guidelines and the existence of the guidelines have shifted significant power to Federal prosecutors. I exercised that power in the interest of law enforcement when I was a Federal prosecutor, and I would be obliged to defer to that discretion and enforce the law as it is written to those cases the Federal prosecutors would bring before me if I were confirmed as a judge.

Senator THURMOND. Professor Lynch, in a tribute to Justice Brennan in the Columbia Law Review in 1997, you wrote, and I quote, “Justice Brennan’s belief that the Constitution must be given meaning for the present seems to be a simple necessity.”

Do you believe that seeking out the original meaning of the Constitution is not the proper approach to constitutional interpretation?

Mr. LYNCH. I believe, Mr. Chairman, that the starting place in interpreting the Constitution is with the language of the document. As with legislation passed by the Congress, it is the wording of the Constitution that was ratified by the people and that constitutes the binding contract under which our Government is created.

In attempting to understand that language, it is most important to look to the original intent of those who wrote it and the context in which it was written. At the same time, with respect to many of those principles, the Framers intended to adopt very broad principles. Sometimes the understanding of those principles changes over time.

Senator THURMOND. Now, the following questions are for all the nominees. I will start here and you give your answer to the same question on down the line.

Do any of you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Judge DAWSON. The Constitution anticipates the death penalty under certain circumstances, and I have no personal feelings which would interfere with my duty to follow the law.

Senator THURMOND. If you could just answer yes or no, it would save time.

Mr. GARAUFIS. No, I have no feelings——

Judge HAMILTON. No.

Judge HUNT. No.

Mr. LYNCH. No, Mr. Chairman.

Senator THURMOND. That is the way to do it. [Laughter.]

Senator SCHUMER. The voice of experience has spoken.

Senator THURMOND. What is your view of mandatory minimum criminal sentences? And would you have any reluctance to impose them as a judge?

Judge DAWSON. I have heard from judges who impose mandatory minimum sentences under the Federal guidelines that they are helpful. I have as a lower court judge had minimum sentences in many types of cases and have always imposed those, and I would have no problem following the minimum sentencing guidelines.

Mr. GARAUFIS. I have no objection to them, and I would have no trouble imposing them.

Judge HAMILTON. I have no objection to them, and I would have no trouble imposing them.

Judge HUNT. I can say ditto, Mr. Chairman. I have no difficulty with them. I think they serve a useful purpose. I have no difficulty in imposing them.

Mr. LYNCH. It is for the Congress to decide what is the punishment that should be applicable to violations of Federal criminal law, both in terms of maximums and, if the Congress thinks it is necessary, mandatory minimum sentences. Where that is the law, that would be the obligation of a judge to follow, and I have no objection or difficulty in doing so.

Senator THURMOND. Next question, to be answered by all of you. It is my view that judges should have judicial temperament. I have seen some judges on the bench show anger and disrespect, which I think is a great mistake. That is coming from me. It is my view that judges should have judicial temperament. The more power an individual has, the more courteous he or she should be. I used that sentence years ago, and I still think it is sound.

Do you agree with that?

Judge DAWSON. Mr. Chairman, yes, I agree with that.

Mr. GARAUFIS. Mr. Chairman, I agree wholeheartedly with it.

Judge HAMILTON. I agree wholeheartedly with it.

Judge HUNT. Me, too. I think it is very important, Mr. Chairman, for a judge to be polite, considerate in his dealings.

Mr. LYNCH. A judge should set an example of civility in the courtroom and certainly should show respect for all litigants and their lawyers.

Senator THURMOND. Probably no one in our society has more power over the lives of individuals than a Federal judge, so it is especially important that someone in this role be courteous and civil. Do you agree?

Judge DAWSON. Yes, sir, I do agree with that.

Mr. GARAUFIS. Yes, sir.

Judge HAMILTON. Yes.

Judge HUNT. Absolutely.

Mr. LYNCH. Yes, sir.

Senator THURMOND. Senator Schumer.

Senator SCHUMER. Mr. Chairman, as usual, you have covered the waterfront well. I have no questions, and I congratulate all five of our nominees, particularly the two from New York, on a job well done.

Senator THURMOND. I believe we have completed the questions for this panel, so you are now excused.

Judge DAWSON. Thank you, Mr. Chairman.

Mr. GARAUFIS. Thank you, Mr. Chairman.

Judge HAMILTON. Thank you.

Judge HUNT. Thank you.

Mr. LYNCH. Thank you, Mr. Chairman.

Senator THURMOND. Mr. Marshall, come to the desk. Come have a seat.

We will now consider the nomination of Mr. Donnie Marshall to serve as Administrator of the Drug Enforcement Administration, a position that is at the forefront of America's war on drugs.

Mr. Marshall, who has served as Acting Director since last year, enjoys the impressive distinction of being the first person to have risen through the ranks to become the Administrator. He began his career in Federal law enforcement in 1969 as a special agent for the predecessor agency of the DEA, and since then has served in almost every capacity of the agency, in both domestic and foreign assignments. In his many positions, he has distinguished himself as a hard-working and dedicated public servant. Unquestionably, his wealth of experience and intimate knowledge of the DEA will serve him well in this capacity.

Crime and violence skyrocketed in the United States over the past several decades. Drug use among teenagers almost doubled during the first 5 years of the Clinton administration. While teen drug use has leveled off in the last few years, as has other types of crime, it still remains at an unacceptably high level.

The drug cartels are creative in finding additional routes to traffic drugs, such as the Caribbean, or finding new ways to promote drug abuse, most recently with the Internet. The DEA must also be creative and dynamic in its response.

The agency must maintain itself as the lead Federal agency in domestic drug law enforcement and should continue to vigorously pursue the international drug syndicates. Our Federal drug policy should never de-emphasize the importance of prosecuting offenders and disrupting the supply of drugs, both of which are key to DEA's mission.

The DEA cannot do this job alone. They must enlist the assistance of other law enforcement agencies and should improve inter-agency cooperation both domestically and in the international environment.

I am pleased to welcome Mr. Marshall, and I look forward to discussing these important issues with him.

Mr. Marshall, please stand and raise your right hand. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MARSHALL. Yes, I do.

Senator THURMOND. Have a seat. If you have an opening statement, you have an opportunity now to make it.

TESTIMONY OF DONNIE R. MARSHALL, OF TEXAS, TO BE ADMINISTRATOR, U.S. DRUG ENFORCEMENT ADMINISTRATION

Mr. MARSHALL. I do, Mr. Chairman, and I will be brief. I want to thank you, first of all, for the opportunity to appear and be considered for what I think is one of the most vital jobs in our country at this point in our history.

I also want to thank you, Mr. Chairman, and the members of this committee for all of the cooperation that you have extended to DEA and to me personally during the last several years that it has been our pleasure to work together.

I have devoted most of my adult life to the cause of reducing drug abuse. I became interested in public service very early in my life, partly as a result of the example set by my father, who was a Department of Agriculture employee helping farmers in the poorest county in Texas. I worked very early in my life as a firefighter in East Texas, and it was during that time that I became interested in law enforcement.

I got interested, Mr. Chairman, specifically in drug law enforcement because I saw drugs ruin the lives of two close friends of mine, a high school friend and a college friend. The high school friend was the son of a doctor in the town where I grew up, and he lost his own dream of becoming a doctor because he began using marijuana and cocaine. The college friend began using heroin and, after a short time, literally disappeared from the face of the Earth, and neither his family nor his friends know what happened to him to this day.

So to me, Mr. Chairman, the issue of drug abuse and drug trafficking has always been a very personal thing, and I have become more intensely dedicated to this cause during my 30-year career as I have seen the violence and human tragedy associated with drugs and as I have watched my own children grow up and see the temptations and the choices that they are faced with every single day.

Now, my career with DEA has been very demanding, but it has also been very rewarding. It would not have been possible for me to pursue this career without the love and support of my wife and our three children. No law enforcement officer can do his or her job effectively without the support of their family, and I think my family is symbolic of all of the law enforcement families throughout America at all levels. Our families, our spouses, our children are really the real heroes of law enforcement in our country, and Senator Hutchison was kind enough to introduce my family in the beginning, so I will not ask them to stand again at this point.

DEA has been an effective force, I believe, Senator, in this country for many, many years. We have had many enforcement successes. We have also been a leader in demand reduction and education and prevention. And drug abuse in this country is roughly half what it was at its peak in 1979 and 1980, and I believe that DEA has contributed to that reduction in many major ways, both in our law enforcement role and in demand reduction. And I am proud of those accomplishments.

But drug abuse and drug crime are still far too high. As Senator Hatch referred to in his opening statements, many categories of drug abuse have been rising again since the early 1990s, drugs like methamphetamine, heroin, ecstasy, and marijuana, which I believe is a gateway to many of the others. Drugs are far more available in rural and small-town America today than they have ever been, and criminal organizations based in Mexico, Colombia, Dominican Republic, and other countries are far wealthier and more violent today than at any other time in our history.

So, Mr. Chairman, we have many challenges to meet, and challenges that I want to help our country meet, and challenges that I believe we can successfully meet. My vision for DEA is to help further reduce that drug use and availability of the drug crime and the drug violence that goes along with that, using a number of different approaches. We have to use and enhance our traditional law enforcement effort. We have to meet the growing technology challenges as traffickers themselves become more sophisticated. We have to be effective in recruiting, training, and retaining a skilled and dedicated workforce. And we have to enhance our cooperation with other law enforcement agencies at all levels.

Having done that, Mr. Chairman, I believe that we then have to build upon our law enforcement successes through DEA's leadership in the demand reduction and community action arena. And, finally, in order to successfully attack the problem on those fronts, we have to be successful in maintaining the public trust and confidence in DEA and in our mission, because without the trust and confidence of the American people, we cannot succeed, but with their cooperation, we will not fail. And the 9,000 employees of DEA are very brave and dedicated and talented men and women, and they are men and women who have earned and deserve the respect and gratitude of the American people.

So, in closing, Mr. Chairman, I want to thank this committee again for your support and your assistance in the cause of drug law enforcement. I spoke earlier of the need for the support of the American people, but equally important is the need for the support of this committee, the entire Senate, and your colleagues in the House. And I thank you for that support. Together, Mr. Chairman, I believe that we have made a difference, and I believe that we can make a greater difference in the future.

Thank you.

Senator THURMOND. Thank you.

QUESTIONING BY SENATOR THURMOND

Mr. Marshall, the Internet is increasingly being used as a vehicle for committing many types of crime, including drug crime. If confirmed, what steps will you take to get your agency involved in combatting drug trafficking and drug sales over the Internet?

Mr. MARSHALL. Mr. Chairman, we have already begun doing a number of things, and I hope to enhance those efforts in the future. We have begun actually in several of our field divisions conducting investigations into actual instances of drug sales over the Internet or offers of drug sales over the Internet. We have set up within DEA a computer forensics unit, and we need to expand on that. And in our future budget submissions, we are hoping to get approved additional resources for that.

But you are absolutely right. We must do more. We have already begun those efforts, and I will enhance those efforts in the future.

Senator THURMOND. Last year, the General Accounting Office reported that the DEA has no annual mid-range or long-range measurable performance targets for disrupting and dismantling drug-trafficking organizations. This makes it more difficult to assess the agency's overall effectiveness. How is the DEA working to establish performance targets?

Mr. MARSHALL. We have begun working on that issue, Mr. Chairman, and we are very close to publishing a strategic management plan which does, in fact, contain performance measures of effectiveness. We started with a vision that I prepared for DEA. We then prepared the strategic management system, and it does contain those performance measures, and I hope to be able to have that published within the next 30 to 60 days.

Senator THURMOND. What drug organizations constitute the major and emerging threat in narcotics trafficking today? And how are you planning to address them?

Mr. MARSHALL. There are many organizations that constitute that threat, Mr. Chairman. Right now I have to say that the drug organizations based in Colombia, Mexico, and the Dominican Republic provide—constitute the major threat to the United States, and particularly the organizations based in Mexico. Because of their alliance with the Colombian drug producers, they have been able to move into markets into the United States and create new markets into the United States in smaller and medium-size communities' markets where heretofore they had not been. They are very wealthy. They are very violent. And we plan to attack these organizations as we have done very successfully recently both in their cells inside the United States and within investigations against their command and control structures in these foreign countries.

We have done that very successfully in Colombia. We have not been quite as successful in Mexico and some of the other countries. But we need to continue, Mr. Chairman, attacking the command and control structures of these organizations, bringing them to justice in the United States.

Senator THURMOND. How would you characterize drug trafficking that either originates in or is transmitted through the People's Republic of China? And how cooperative is that nation in working with your agency?

Mr. MARSHALL. There has been an increase in recent years in heroin trafficking both in China and transiting through China. I believe on the basis of the best information that we have that China has a growing heroin addiction problem. We have recently, as you may know, opened a DEA office in the People's Republic of China. We have early indications that they are very cooperative to this point. We have a lot of work to do in China. Our agent has only been there for about 6 months, so we are learning as we go.

But we plan to continue to increase those efforts, and I believe that that will be a productive venture.

Senator THURMOND. It is my understanding that the DEA is having difficulty getting agents to accept assignments in Puerto Rico. Would making Puerto Rico an overseas assignment for DEA agents help you meet those trafficking needs in this territory?

Mr. MARSHALL. I think that would be, Mr. Chairman, one of the measures that would help us staff Puerto Rico. There are many impediments to that, and it would perhaps require legislative action, and it is really a very complicated issue which would take quite a few minutes to address completely. But we will work with your staff and with this committee to see if we can fully define for you the measures that we might need to take.

Senator THURMOND. I am concerned that the entire Caribbean area, including Haiti and Puerto Rico, are becoming an increasingly attractive avenue through which to smuggle cocaine and other drugs to American soil. Do you believe that drug trafficking in the Caribbean is increasing? And what is the DEA doing to address this emerging threat?

Mr. MARSHALL. There are some signs, Senator, that the traffic is increasing through the Caribbean. The predominant route for South American Colombian products is still through Mexico. But we do see that possible shift into the Caribbean. And we are doing many things in the Caribbean. We have recently concluded a couple of special operations, Operation Columbus and Operation Conquistador, which were very successful in terms of not only in their enforcement results—we arrested a number of major traffickers and seized large quantities of drugs—but what was more significant about this is that we pulled together in those operations over 26 Caribbean, Central American, and South American countries to work together and coordinate their enforcement efforts.

So that is one of the things that we are doing. We can increase those kinds of efforts more in the future. We are continuing to try to build the capabilities of police in places like the Dominican Republic, Haiti, and really all of the countries in that region. We are conducting training for them. We are sharing intelligence. We are providing equipment. We are doing any number of things, Mr. Chairman, and I believe that we are prepared to meet that challenge if we see a major shift back into that area.

Senator THURMOND. I have received reports that there is a lack of coordination among the agencies involved in establishing a strategic for combatting drug trafficking in the arrival zones. Do you believe that additional steps should be taken to make enforcement efforts at the arrival zones more cohesive and less duplicative?

Mr. MARSHALL. Additional cooperation and coordination mechanisms really are always needed. We can never have as much or sufficient amount of cooperation and coordination, and, yes, I do think that we can do more in coordinating the activities in the arrival zone. I have recently attended a number of meetings with my counterparts from Customs, Coast Guard, and other agencies, and we are in the process of establishing some different and enhanced procedures to do that better cooperation, Mr. Chairman.

Senator THURMOND. Problems have existed for many years with criminal influence and corruption in law enforcement in Mexico, as demonstrated by the recent murder of the police chief in Tijuana. What is the current state of cooperation by Mexican authorities with U.S. law enforcement? And what is being done to protect DEA agents who work in Mexico?

Mr. MARSHALL. Mr. Chairman, that is, I think, an appropriate and very—the question of the moment, I think, because I commented earlier about the Mexican traffickers being the most significant threat that we see in the country right now.

What we see with regard to law enforcement cooperation, Mr. Chairman, is a small cadre, a nucleus of law enforcement people in the Mexican attorney general's office that we can work with, that we do work with, and we work with reasonably effectively.

Beyond that small nucleus, however, the picture is not very bright. The law enforcement results from Mexico in the last year have been minimal. There have been no extraditions of major drug fugitives back to the United States. Corruption continues to play a major role in Mexico. And with the exception of the small core of people that we work with, it is not really a bright picture at the moment, Mr. Chairman. And I apologize for not having better news with regard to that issue.

Senator THURMOND. In the 1990s, the DEA made domestic drug trafficking a high priority. In this regard, the DEA has devoted more resources to street-level narcotics through mobile enforcement teams. Has this domestic emphasis hampered your ability to disrupt and dismantle major international drug organizations?

Mr. MARSHALL. Mr. Chairman, I don't believe that it has affected our effort internationally, and I will explain why. All of our enforcement efforts, domestic and international, are very closely intertwined. We look at the drug traffickers as a continuum group of people who do not recognize international borders. And we have to ensure that we identify the entire organization, from the sources in Peru, Bolivia, Colombia, and other places, right down to the street level here in the United States.

And what we have tried to do is gather intelligence on those organizations. Using that intelligence we try to interdict the drugs that they are bringing in as well as investigate the leaders of these organizations. And at each step of the cycle, information and intelligence feeds interdiction. That in turn feeds investigations. Investigations then allow us to arrest the traffickers, the leaders, both in the United States and in foreign countries, like we did recently very successfully in Operation Millennium.

So I do not believe that it is hurt our efforts domestically because it is all so—or internationally, rather, because it is all so closely intertwined.

Senator THURMOND. A typical large metropolitan area in the United States has many law enforcement agencies investigating narcotics crime, including the DEA, the FBI, INS, IRS, the Customs Service, and State and local police forces. Can more be done to improve cooperation among all of these agencies, including the sharing of resources and intelligence information?

Mr. MARSHALL. Certainly more can be done, Senator, and we are, in fact, looking right now to enhance our intelligence-sharing capabilities. And we are doing that through such things as the high-intensity drug-trafficking area intelligence centers. We are trying to do that through DEA's own national drug pointer index system. We are trying to do that through the establishment of a counter-drug intelligence executive secretariat.

We always need to ensure that we have that intelligence gathering and assessment and sharing mechanisms finely tuned, and I assure you that I will continue to give that my highest attention and highest priority in the event that I am confirmed as the head of DEA.

Senator THURMOND. The failure to adequately share information regarding domestic drug intelligence has long been a problem. Recently, the Office of National Drug Control Policy issued a counter-drug intelligence plan to try to address this problem. Do you think

this plan will significantly improve cooperation and coordination of intelligence among agencies?

Mr. MARSHALL. I believe that that is an element that can contribute positively toward the effort, and the first chairman of that counter-drug secretariat is a senior executive service member, a special agent of DEA. We are in the process of organizing that and setting that up and defining our procedures, and, yes, I do believe that will enhance our abilities.

Senator THURMOND. A Columbia University study found that drug use among teenagers is much higher in rural areas than in urban areas, especially for drugs such as meth, crack cocaine, and cocaine. Are you concerned about this high rate of drug use by rural teenagers? And how should we address this?

Mr. MARSHALL. I am very concerned about that, Senator, and we need to address it in a number of ways. We need, first of all, I think, to utilize the mobile enforcement teams that we have used so effectively over the last several years to attack drug violence in many of those communities. We have a new program that we just have begun over the last year or so called the regional enforcement teams. We have one of those in North Carolina. We have one of those in Iowa. And we are creating a third in Nevada.

What those teams will do is they will also be mobile, and they will go into these smaller and medium-size communities to help out with drug problems in those places. However, I believe that we need to further establish a permanent presence in a lot of those places, and we will be requesting additional resources in our 2002 budget cycle to do that. I think we need to and we should help out those kinds of communities much more than we have been able to thus far.

Senator THURMOND. Ecstasy and other so-called club drugs are becoming more and more popular among teenagers today, and these drugs are being seized in record numbers by law enforcement. Do you consider ecstasy to be a serious threat? And how is the DEA addressing this dangerous drug?

Mr. MARSHALL. There is no question, Mr. Chairman, it is a serious threat, and it is a threat that we have recognized for some time now. The way we are addressing this is really on a number of fronts.

This drug right now is manufactured predominantly outside the United States, predominantly, actually, in Europe. And we are working with our counterparts there to see if we can take measures to limit the actual manufacture of it.

We have entered into partnerships with State and local law enforcement agencies, with the U.S. Customs Service, and we have been very, very effective recently in investigating some of the larger organizations that are responsible for bringing ecstasy into our country.

We recently closed out an operation called Operation Rave in which we identified and immobilized a major ecstasy-trafficking organization. From that investigation we learned a lot about how this trafficking in that drug works, and you can look for increased and more successes in that regard in the future.

Senator THURMOND. Mr. Marshall, I would like to thank you for being here today.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Donnie Ross Marshall
2. Address: List current place of residence and office address(es)
Residence:
Oak Hill, Virginia 20171-1912
Office:
700 Army Navy Drive
Arlington, Virginia 22022
3. Date and Place of Birth
April 1, 1947; Dallas, Texas
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married
Catherine Louise Pressler
Food Professional – not currently employed outside the home
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
Stephen F. Austin State University
Nacogdoches, Texas 75967
1965-1969
Bachelor of Science degree, January 1969
University of Southern California
Washington Public Affairs Center
Washington, D.C.
1983-1984
Graduate courses; no degree awarded
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 employce since graduation from college.

January 1969-December 1969

Nacogdoches Fire Department

Nacogdoches, Texas 75961

Firefighter/Paramedic

December 1969 to Present: I have been employed by the U.S. Drug Enforcement Administration (DEA) and its predecessor agency, Bureau of Narcotics and Dangerous Drugs (BNDD) and have held the following positions:

1999-Present: Acting Administrator, DEA Headquarters

1998-1999: Deputy Administrator, DEA Headquarters

1996-1998: Chief of Operations, DEA Headquarters

1995-1996: Chief of Domestic Operations, DEA Headquarters

1986-1995: Special Agent in Charge, Aviation Division, Dallas

1984-1986: Assistant Special Agent in Charge, Aviation Division, Dallas

1983-1984: Chief, Statistical Services Section, DEA Hqrs

1982-1983: Senior Inspector, Office of Inspections, DEA Hqrs

1981-1982: Deputy Regional Director, Latin America Region, DEA Hqrs

1979-1981: Staff Coordinator, Latin America Section, DEA Hqrs

1975-1979: Country Attache, DEA Brazil Country Office

1972-1975: Resident Agent in Charge, DEA Austin, Texas

1969-1972 Special Agent, BNDD, Dallas and Houston, Texas

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

Yes

1966-1968

U.S. Marine Corps Reserve

LCpl - [REDACTED]

Honorable Discharge

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

DEA Administrator's Award for Exceptional Service, 1995

SES Performance Award, 1995, 1996, 1998, 1999

Presidential Distinguished Rank Award, 1999

9. Bar Associations: List all bar associations, legal or judicial-related committee 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.

Even though I am not an attorney, I belong to the International Association of Chiefs of Police (IACP). Since October 1999, I have served as a member of the Executive Committee and as Chairman of the IACP's Narcotics and Dangerous Drugs 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.

I belong to no lobbying organizations.

I am currently a member in good standing with the International Association of Chiefs of Police (IACP). The IACP is not a lobbying organization. Instead, the IACP is a private, non-profit association comprised of individual senior executives in state, local and federal law enforcement agencies. "The primary objective of the IACP is to advance the science and art of police services; develop and disseminate improved administrative, technical, and operational practices and promote their use in police work; foster police cooperation and the exchange of information and experience among police administrators throughout the world; bring about recruitment and training in the police profession of qualified persons; and encourage adherence of all police officers to high professional standards of performance and conduct. The IACP does, however, employ two individuals who are registered lobbyists and whose duties are to advance issues of general concern to the law enforcement community. Through my membership and participation with the IACP, I have not and do not lobby for that organization."

I also belong to the Stephen F. Austin State University Alumni Association, Nacogdoches, Texas 75967.

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 not an attorney

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.

Methamphetamine: A Growing Domestic Threat
Police Chief Magazine, March 1996

Responding to the Methamphetamine Problem
Police Chief Magazine, February 1998

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

Good health; April 23, 1999

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

None

15. Legal Career:

- A. Describe chronologically your law practice and experience after graduation from law school including:
1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
 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;
- 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.
- C.
1. Did you appear in court frequently, occasionally, or not at all? If the frequency 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 courts 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 am not an attorney

16. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
 - (a) the date of representation;
 - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
 - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

First, let me begin by stating that I am not an attorney and therefore have not personally represented the Drug Enforcement Administration (DEA) or the United States in legal matters during my career. However, as a career law enforcement officer with more than 30 years of service, I have a great deal of experience with legal proceedings and dispute resolution in other capacities. A few examples of this experience in set forth below.

Over 20 years ago, an Equal Employment Opportunity case was filed against the agency on behalf of the Black agents of DEA. The case I speak of is Segar v. Reno. As a provision of this case, DEA was required to evaluate and validate several of its systems to ensure they were free from discriminatory bias. I served as a subject matter expert in the development of a promotion system for agents competing for promotion to Grades 14 and 15 which evolved into the Special Agent Promotion Program (SAPP). Additionally, once the development phase was completed, I served as an assessor, working to ensure that the new system would fairly judge and rate agents strictly on their merit. This system has been approved by the court and is now institutionalized in DEA, and is one of the few validated promotion systems in DEA.

From 1996 to 1998, I served as a member of the Career Board, using my knowledge of the SAPP on promotions, reassignments, etc., for GS-14 and GS-15 positions within DEA. Later, as Deputy Administrator and Acting Deputy Administrator, I was the agency's settlement authority. DEA's attorneys would brief me on matters in litigation whenever a decision on settlement was necessary. In all such instances, my goal was to see that justice was done. If DEA had acted properly, I refused to settle the case. If DEA acted negligently or otherwise wrongly, however, I authorized settlement to see that injured parties were made whole. Additionally, I rendered final decisions on all promotion and reassignment actions for GS-14 and GS-15 positions. I monitored selections, promotions and reassignment actions for GS-14 and GS-15 positions. I monitored selections, promotions and reassignments of DEA personnel, ensuring that decisions were in accord with all agreements and provisions of the Special Agent Promotion Program.

As the Acting Administrator, I am personally involved in mediating and negotiating many contentious issues. I worked with representatives on both sides of issues to ensure that those matters that can be settled informally are settled and not allowed to escalate into unnecessary court battles. Recently, the fairness and validity of the current selection/promotion process was raised, specifically whether including the management official's (i.e., Special Agents in Charge, Office Heads, etc.) recommendation was fair to the plaintiff group. Under my direction, an interim resolution was agreed upon so that vacant positions could be filled. We continue to work to validate this process and to find a permanent resolution which will meet the satisfaction of all parties. Also, I continue to discuss various issues with the Chair of the Hispanic Advisory Committee to ensure that their concerns are readily addressed and that provisions of their lawsuit are appropriately administered.

Throughout my career at DEA and its predecessor agency, I have had many occasions to testify and to serve as affiant on warrant applications. I have had and continue to have the opportunity and the pleasure to work with all racial and ethnic groups that make up this agency, as well as counterpart state, local and foreign law enforcement agencies. I meet regularly with various committees to ensure that their needs are being met and that the agency continues to treat all employees fairly and with respect. I have experience in virtually all of the program areas – operational and administrative – that are so necessary in having an effective and proactive approach to countering the drug problems facing this country. Through hard work and dedication, I have gained the respect and support of the people that make up the DEA. Additionally, I have a genuine understanding of all people, their needs collectively and as individuals, as well as the operational requirements of this agency. Because I have garnered these skills

during my career, I believe I can take the DEA into the 21st Century and continue to enhance our ability to accomplish our mission.

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

As already stated, I am not an attorney, however, during my tenure as a Criminal Investigator, I have been involved in varied legal activities and proceedings, particularly as they relate to drug law enforcement. I have conducted complex criminal and diversion investigations, both domestically and overseas. I have worked and managed intelligence gathering activities, been responsible for liaison activities with foreign, state and local counterparts and served as advisor to U.S. Ambassadors and country teams. I conducted field internal audits, as well as investigations of alleged wrongdoings of DEA employees – administrative and criminal. I have mediated and negotiated the settlement of issues involving court cases. I am knowledgeable of the laws that I am sworn to uphold and of those that apply to the various activities cited above. I have testified in court on investigations and before Congress, and I am required to understand and ensure the compliance of the regulations and guidelines that govern DEA's regulatory, financial, personnel and investigative functions.

In addition to the above skills and knowledge, I also have varied experience as a manager, responsible for every aspect of the operations and programs that comprise the DEA. From investigations to support, I have been personally involved in and responsible for all functional areas of the agency including investigations – international and domestic, intelligence, personnel, strategic planning and policy development, compliance and internal investigations, program evaluation, statistical and management information systems, training, budget, etc.

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. I am a salaried employee of the Drug Enforcement Administration with no outside employment or income. The only deferred income arrangements I possess is my U.S. government 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 litigated and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

I do not have any potential conflict of interest. In the event of a potential conflict of interest, I will consult with and follow the advice of the DEA and Department of Justice Ethics Officials.

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

No

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

See attached Financial Disclosure Form, SF-278

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

Financial 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 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	10	943.39	Notes payable to banks—secured	0	000.00
U.S. Government securities—add schedule	0	000.00	Notes payable to banks—unsecured	0	000.00
Listed securities—add schedule	0	000.00	Notes payable to relatives	0	000.00
Unlisted securities—add schedule	0	000.00	Notes payable to others	0	000.00
Accounts and notes receivable:	0	000.00	Accounts and bills due	0	000.00
Due from relatives and friends	0	000.00	Unpaid income tax	0	000.00
Due from others	0	000.00	Other unpaid tax and interest	0	000.00
Doubtful	0	000.00	Real estate mortgages payable—add schedule	106	156.86
Real estate owned—add schedule	151	000.00	Citicorp Mortgage		
Real estate mortgages receivable	0	000.00	Chattel mortgages and other liens payable	0	000.00
Autos and other personal property	13	000.00	Other debts—itemize:		
Cash value—life insurance	0	000.00	Justice Fed Credit Union	26	161.93
Other assets—itemize:					
thrift savings cash value	234	312.74			
Total assets	409	255.89	Total liabilities	132	318.79
			Net worth	276	937.10
			Total liabilities and net worth	409	255.89
CONTINGENT LIABILITIES	0	000.00	GENERAL INFORMATION		
As endorser, comaker or guarantor	0	000.00	Are any assets pledged? (Add schedule.)	no	0 000.00
On leases or contracts	0	000.00	Are you defendant in any suits or legal actions?	no	0 000.00
Legal Claims	0	000.00	Have you ever taken bankruptcy?	no	0 000.00
Provision for Federal Income Tax	0	000.00			
Other special debt	0	000.00			

Donnie R. Marshall
Donnie R. Marshall

2-14-00
Date

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 do volunteer work as an adult leader with the Boy Scouts of America approximately 300 hours per year.

I also serve on the National Law Enforcement Exploring Committee, approximately 15 hours per year.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex or religion – through either formal membership requirements or the practical implementation of membership policies? Is so, list with dates of membership. What have you done to try to change these policies.

No



U.S. Department of Justice

FEB 24 2000

Washington, D.C. 20530

Stephen D. Potts
Director
Office of Government Ethics
Suite 500
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

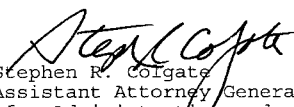
Dear Mr. Potts:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Donnie R. Marshall who has been nominated by the President to serve as Administrator, Drug Enforcement Administration, Department of Justice.

We have conducted a thorough review of the enclosed report, and have counseled Mr. Marshall who will recuse himself or seek a waiver before participating in any matters affecting his financial or personal interests.

In light of this counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,


Stephen R. Colgate
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

SP 278 (Rev. 6/90)
5 CFR Part 2634
U.S. Office of Government Ethics

Form Approved
OMB No. 3799-0001

Reporting Status <input type="checkbox"/> Incumbent <input checked="" type="checkbox"/> New Executive Nominee <input type="checkbox"/> Termination Date (If Applicable)		Termination Date (If Applicable) Month/Day/Year		Agency Use Only FEB 23 2000
Reporting Individual's Name Marshall		First Name and Middle Initial Donnie Ross		ONE Use Only
Position for Which Filing Administrator		Department or Agency (If Applicable) Drug Enforcement Administration		Fee for Late Filing Any individual who is required to file this report after the 30-day period is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a \$200 fee.
Location of Present Office 700 Army Navy Dr., Arlington, VA 22202		Telephone No. (Include Area Code) 202-307-8000		Reporting Periods Incumbents: The reporting period is the preceding calendar year except for Schedule C and Part I of Schedule D. Candidates for President and Vice President: The reporting period is the calendar year up to the date you file. Part II of Schedule D is not applicable.
This is (check one) <input type="checkbox"/> Full-time position <input type="checkbox"/> Part-time position <input type="checkbox"/> Part-time position (Specify hours per week)		Do You Intend to Create a Qualified Diversified Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Filers: The reporting period begins at the end of the period covered by the preceding report and ends at the date of termination. Part II of Schedule D is not applicable.
Signature of Reporting Individual [Signature]		Date (Month, Day, Year) 12-17-99		Candidates for President and Vice President:
Signature of Other Reviewer (If desired by agency)		Date (Month, Day, Year) 2/24/00		Schedule A: The reporting period for income (BLOCK O) is the preceding calendar year and the current calendar year up to the date of filing. Value added is any net change that is within 31 days of the date of filing.
Signature of Designated Agency Ethics Official (Agency Official)		Date (Month, Day, Year) 12-17-99		Schedule B: Not applicable.
Signature of Reporting Individual		Date (Month, Day, Year)		Schedule C, Part I (Liabilities): The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
Office of Government Ethics		Date (Month, Day, Year)		Schedule C, Part II (Agreements or Arrangements): Show any agreements or arrangements as of the date of filing.
Comments of Reporting Officials (If additional space is required, use the reverse side of this sheet)		Date (Month, Day, Year)		Schedule D: The reporting period is the preceding two calendar years end on the date of filing.

1991 Edition. Can Be Used; Revisions Prior to 1991. Contact RE Used. 378-111 NNN 7540-01-070-8444

SF 278 (Rev. 8/94)
 U.S. Office of Government Ethics

Reporting Individual's Name

Marshall, Donnie R.

Page Number

2

SCHEDULE A

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

Valuation of Assets at close of reporting period

Assets and Income

Identify each asset held by you, your spouse, or dependent children for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period.
 Identify each asset by source of income held by you, your spouse, or dependent children which generated over \$200 in income during the reporting period.

None

Examples
 One City Atlanta Classroom
 Dow Jones & Smith, Birmingham, State
 Remington Equity Fund
 ABC Share Fund (Mutual Fund)

1 Residence (Rental)
 3707 Remington Drive
 Carrollton, TX 75007

Type	Amount										Date (Mo./Day/Yr.) Only if Honoraria	
	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$10,000	\$10,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Actual Amount Only if "Other" specified		
Dividends												
Rent and Royalties												
Interest												
Capital Gains												
Exempt Investment Fund												
Exempt Trust												
Qualified Trust												
Other (Specify Type)												

SP-278 (Rev. 8/84)
 5 CFR Part 2624
 U.S. Office of Government Ethics

Reporting Individual's Name
Marshall, Donnie R.

Page Number
24

SCHEDULE C

Part I - Liabilities

Report liabilities of \$10,000 or more by a creditor on property owned by you or your spouse, partner, or dependent child. Exclude unsecured revolving credit accounts. See instructions for revolving charge accounts.

1	2	3	4	5	6	7		8	9	10	11	12
						13	14					
	Citicorp Mortgage	Mortgage Rental Property Texas	1985	7.875	30 yrs							
	Justice Federal Credit Union	Line of Credit	1992	12.9	on open demand							

None

Interest Rate

Date Incurred

Term if applicable

32 Pts. on demand

Check off amount in \$10,000 increments

Part II - Agreements or Arrangements

Report all agreements or arrangements for: (1) leave of absence; and (2) future employment. See instructions regarding the reporting of negotiations for any of these arrangements.

1	2	3	4	5	6

None

Due Date

Due Jones & Smith, Hometown, State

1981 Edition, One Book, Editions Prior to 1981, Current Use.

SE 278 (Rev. 6-80)
5 CFR Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name

Marshall, Donnie R.

SCHEDULE D

Page Number

65

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

From (Mo., Yr.)	To (Mo., Yr.)	Position Held	Type of Organization		None <input type="checkbox"/>
			Non-profit, education, Law firm	President, Partner	
1					
2					
3					
4					
5					
6					

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of this reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

From (Mo., Yr.)	To (Mo., Yr.)	Brief Description of Duties	None <input type="checkbox"/>
1			
2			
3			
4			
5			
6			

1981 Edition. Can. Be Used. Editions Prior to 1981 Cannot Be Used.

U.S. Department of Justice
Drug Enforcement Administration



Donnie R. Marshall was born in Dallas, Texas, and grew up in San Augustine, in rural East Texas. He was named to the National Honor Society during his senior year at San Augustine High School. He worked as a firefighter/EMT while attending Stephen F. Austin State University, Nacogdoches, Texas, where he graduated in 1969 with a Bachelor of Science Degree.



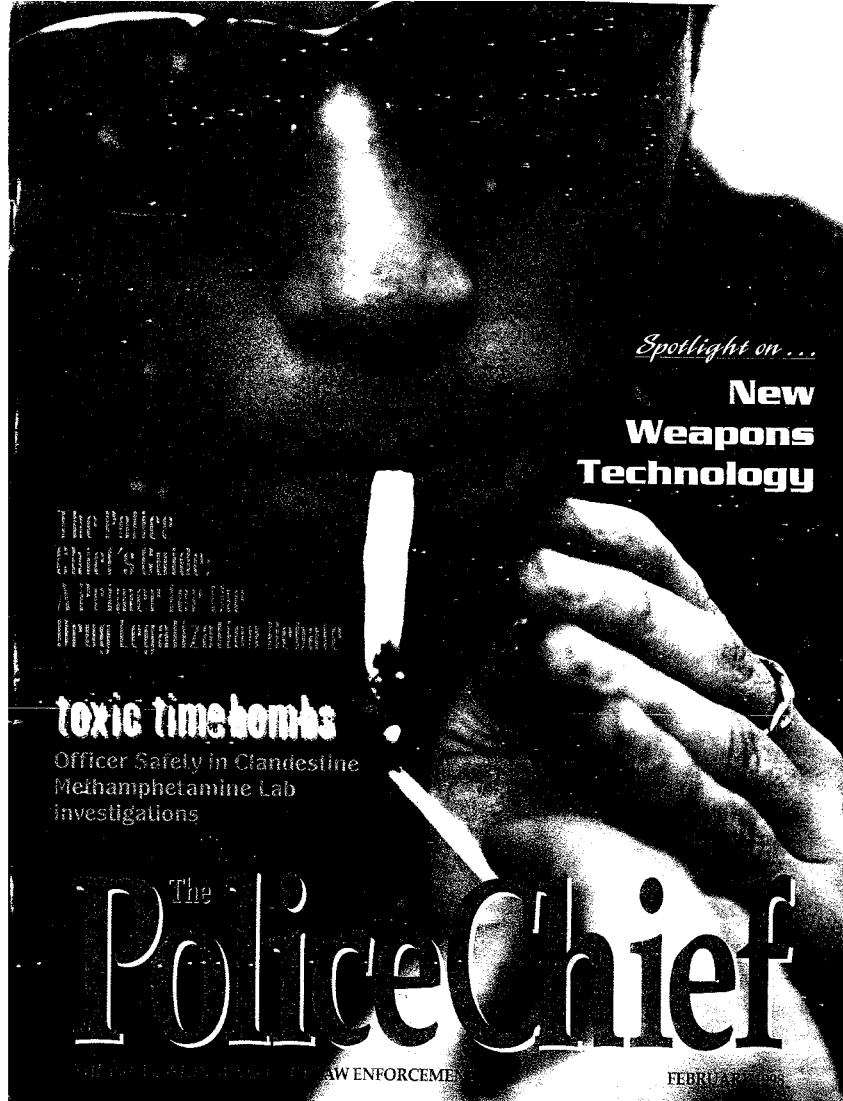
Donnie R. Marshall
Acting Administrator

Mr. Marshall began his career in law enforcement in 1969 as a Special Agent in Dallas, Texas, with the Bureau of Narcotics and Dangerous Drugs, a predecessor agency of the Drug Enforcement Administration (DEA).

Mr. Marshall continued his drug law enforcement career with the DEA and served as a Special Agent in Dallas and Houston, Texas; as a Resident Agent in Charge of the Austin, Texas Office; as Country Attache in Brazil; as Deputy Regional Director of the Latin America Region; as Senior Inspector of the Office of Professional Responsibility; as Chief of the Statistical Services Section; as Assistant Special Agent in Charge of the Dallas Division; as Special Agent in Charge of the Aviation Division; as Chief of Domestic Operations; and as Chief of Operations. Currently, Mr. Marshall is a member of the Executive Committee of the International Association of Chiefs of Police (IACP), Chairman of the IACP's Narcotics & Dangerous Drugs Committee, and a graduate of the National Executive Institute.

Mr. Marshall was named Acting Deputy Administrator on February 23, 1998. He was formally nominated as Deputy Administrator by President Bill Clinton on September 24, 1998, unanimously confirmed by the U.S. Senate on October 21, 1998, and sworn in on December 1, 1998. He was named Acting Administrator following the retirement of Administrator Thomas A. Constantine on July 2, 1999. President Clinton formally nominated Mr. Marshall as Administrator of the DEA on February 9, 2000.

Mr. Marshall is married and has three children.



Spotlight on ...

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The Police
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A Primer for the
Drug Legalization Debate

toxic timebombs

Officer Safety in Clandestine
Methamphetamine Lab
investigations

The Police Chief

THE POLICE CHIEF OF LAW ENFORCEMENT

FEBRUARY 1995



Every year, drug abuse kills 14,000 Americans and cost taxpayers nearly \$70 billion. It incites child and spousal abuse, property and violent crime, and the spread of AIDS and other diseases, while costing employers millions of dollars in accidents, mistakes and absenteeism. Image copyright © 1997 PhotoDisc, Inc.

PoliceChief

FEBRUARY 1998
VOLUME LXV, NUMBER 2

The official publication of the International Association of Chiefs of Police, Inc.

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 The Police Chief (ISSN 0032-3571) is published monthly by the International Association of Chiefs of Police, 515 N. Washington St., Alexandria, VA 22314-2427, USA, 703-696-6067, fax 703-696-4543. Periodicals postage paid at Alexandria, Virginia, and additional mailing offices. Subscription rate of \$33 to IACP members is included in annual membership dues of \$100; subscription rate to nonmembers is \$25 per year, domestic and foreign. Single copy, current issue, \$2.50; back issues, \$3, except April/Issue's Guide issue, \$17.50.
 POSTMASTER: Send address changes to the Police Chief, 515 N. Washington St., Alexandria, VA 22314-2427, USA.
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 Printed in the USA.

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Responding to the Methamphetamine Problem

By George Doane, Chief, California Bureau of Narcotic Enforcement, Sacramento, California, and Donnie Marshall, Chief of Operations, DEA, Washington, D.C.

Three years ago, an upsurge of methamphetamine trafficking and abuse began sweeping across the country with the speed and devastation of an out-of-control brushfire. In response, the Drug Enforcement Administration (DEA), with vital input from the California Bureau of Narcotics Enforcement (BNE) and the California Narcotics Officers' Association (CNOA), hosted a national Methamphetamine Conference to put the best minds in the country to work on solving this growing threat.

Historically, methamphetamine had been considered a West Coast problem. But by 1995, it had begun sweeping eastward. In Arkansas, meth-related investigations rose from 543 in 1988 to over 2,000 in 1995. Missouri authorities reported that lab seizures increased from 12 in 1994 to more than 244 in the first nine months of 1997. In Iowa, the number of meth-related arrests surpassed drunk driving arrests. The violence associated with this powerful stimulant has also had a devastating impact on crime statistics for some western and midwestern communities. In Contra Costa County, California, for example, police have found that methamphetamine was involved in 89 percent of reported domestic dispute cases.

A Schedule II controlled substance, methamphetamine is the most prevalent controlled substance clandestinely synthesized in the United States. Between January 1, 1994, and September 30, 1997, DEA was involved in the domestic seizure of more than 2,400 clandestine methamphetamine labs ("clan labs"). During the first nine months of 1997, 98 percent of the clan labs seized by DEA were producing methamphetamine.

Prologue

In November of 1994, while attending the annual conference of the CNOA, DEA Administrator Thomas A. Constantine met with representatives of CNOA and BNE, who brought to his attention the magnitude of the methamphetamine situation in California. The following May, at

the annual meeting of the IACP Narcotics and Dangerous Drugs Committee in San Diego, members of these two California law enforcement organizations again discussed the methamphetamine situation with Constantine. Although meth had always been a problem in California, BNE and CNOA officials were alarmed at the rate of escalation they were seeing. More frightening was the fact that their fellow state and local officers across the country were confronting similar ordeals.

(At the time of that meeting, Drug Abuse Warning Network (DAWN) statistics were skyrocketing. Indeed, DAWN documented approximately 2,550 meth-related deaths in the United States between January 1992 and June 1996. DAWN statistics show that methamphetamine is second only to cocaine for emergency room episodes in Phoenix, and ranks third—behind heroin and cocaine—in San Francisco and San Diego.)

Moreover, the face of meth trafficking had changed. What was once controlled by independent, regionalized outlaw motorcycle gangs had been taken over by criminal organizations from Mexico. These sophisticated traffickers, using well-established networks developed through years of heroin and marijuana trafficking, had been transporting cocaine for Colombian traffickers, taking their payment in cash. As they became more savvy, however, they demanded payment for their transportation services in cocaine. With cocaine in their arsenal, the Mexico-based groups evolved beyond transportation and became full-fledged traffickers in their own right. Next, they took control of the meth traffic.

The international connections in Europe, Asia and the Far East that the Mexican traffickers had developed provided them with ton-quantities of the chemicals they needed to manufacture methamphetamine—especially ephedrine. In 1994, two Mexico-bound shipments of ephedrine totaling 5.7 metric tons were seized at the Dallas-Fort Worth Airport, with follow-up investigations revealing that portions of the shipments had origi-

nated in China and India. In 1996, Mexican law enforcement authorities reported the seizure of 3,522 kilograms of ephedrine and 10,300 kilograms of phenylpropanolamine (an amphetamine lab precursor) during 1996.

These well-organized traffickers have constructed countless clan labs both in Mexico and in California, routinely smuggling both chemicals and methamphetamine across the border. In 1994, BNE seized 419 clan labs in California, of which 52 were "super labs," producing more meth than the other 367 combined. From California, methamphetamine is distributed across the border to places like Oklahoma City, Atlanta and Tampa, usually by car or truck.

The National Methamphetamine Conference

Both DEA and the California authorities agreed that a serious national review of the emerging meth problem was in order, and a National Methamphetamine Conference was held in Arlington, Virginia, from February 13-15, 1996.

The DEA felt it was imperative that the conference take a field-driven approach, with those who knew the problem firsthand providing most of the input. Though DEA sponsored the conference, it called upon the California BNE and the CNOA to help plan it. With that groundwork in place, invitations went out to representatives of federal, state and local law enforcement agencies, as well as prevention and treatment specialists.

Over 100 agencies participated. Two-thirds of the attendees were state and local law enforcement representatives from police departments in both large and small cities, including sheriffs' offices in rural and urban counties. Agencies as diverse as the New York City Police Department and the Yellowstone County Sheriff's Office in Billings, Montana, attended the conference.

The experiences of these officers on the front lines of the meth problem were complemented by insights supplied by the

IACP, the National Sheriffs' Association, the Clandestine Laboratory Investigators Association, the Justice Department's Criminal Division, the National Association of U.S. Attorneys and others.

A comprehensive questionnaire asked participants about meth production, trafficking and use in their jurisdictions. The survey results presented a picture of the methamphetamine situation across the country that confirmed what California authorities had been saying:

- Eighty-one percent said that meth trafficking had increased or increased significantly in the past five years. (Only in New England had there been no significant increase.)

- Sixty-three percent cited methamphetamine trafficking and production as a leading—or the primary—threat in their jurisdictions.

- Fifty-two percent said they regularly encountered clandestine meth labs in their areas.

- Forty-four percent ranked methamphetamine as the number-one threat, second only to cocaine, which was ranked first by 50 percent of respondents.

Although the threat posed by methamphetamine was obviously growing, resources to meet the threat were not. Sixty-four percent of respondents admitted that

their agencies were having difficulties in conducting meth investigations. Forty-nine percent cited scarce personnel as the primary difficulty, in addition to limited financial resources, lack of available information and intelligence, and the hazards associated with clan labs.

These dangers were so severe that 71 percent indicated that officers in their areas had reported health problems that may have been caused by exposure to the hazardous chemicals found at clandestine meth labs; 78 percent indicated that they had encountered firearms at these sites; and 45 percent said they encountered booby traps. Three-fifths said their agencies had difficulty finding sufficient resources and equipment to meet the specialized training requirements of officers working clan labs.

In terms of structure, the conference revolved around seven working groups, each devoted to a specific aspect of the methamphetamine problem: investigative/enforcement strategy, chemical control, information sharing, clandestine labs, technology, safety and environmental issues, and demand reduction. Each group had at least two moderators, one from the DEA and one from a state or local law enforcement agency. During the give-and-take portion of the workshop,

experts from the federal, state and local levels all across the country came together to share their views, successes and setbacks in their fight against methamphetamine. Finally, each group drew up a list of recommendations for solving the problems within its area.

An important result of the conference was the adoption of a formal definition for clandestine laboratory. By standardizing the definition, law enforcement will avoid double counting or under reporting, and will get a far more accurate picture of the methamphetamine situation.

The resulting recommendations were forwarded to Attorney General Janet Reno, and became key elements in the National Methamphetamine Strategy released in May 1996. Concurrently, the conference participants returned to their home districts and began implementing solutions with vigor.

What's Been Done

- The California BNE and DEA have joined forces; today, both agencies cross-train and have assigned narcotics agents to each other's clan lab teams.
- The BNE, the Western States Intelligence Network (WSIN) and DEA are in the process of establishing a national clan

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lab database—located in DEA's El Paso Intelligence Center—that will be used to assist all law enforcement in meth investigations. The database will provide a true, national perspective on clan labs, with input from all levels of law enforcement.

- DEA methamphetamine arrests have increased from 2,824 in FY '95 to 4,341 for the first three quarters of FY '97.
- DEA participated in the seizure of a

record-high 879 clandestine meth labs in 1996, a dramatic increase from the 327 seized in 1995. (These figures show DEA participation seizures only; BNE and WSN records show an additional 892 meth labs seized in California, 59 in Washington and 41 in Oregon by state and local police without DEA participation.)

- During May and June 1995, DEA seized 38 tons of ephedrine and pseudo-

The Comprehensive Methamphetamine Control Act of 1996

On October 3, 1996, President Clinton signed into law the Comprehensive Methamphetamine Control Act of 1996 (MCA). It broadens controls on listed chemicals used to produce methamphetamine, increases penalties for the trafficking and manufacture of methamphetamine and listed chemicals, and expands controls to include the distribution of lawfully marketed drug products that contain the listed chemicals ephedrine, pseudoephedrine and phenyl-propranolamine (PPA).

A brief summary of the MCA's major provisions follows.

1. The MCA makes the possession of List I chemicals a crime in instances where the chemicals were obtained under authority of a registration if that registration has been suspended or revoked. In addition, this provision facilitates the forfeiture of such chemicals.

2. The MCA extends federal "long-arm" jurisdiction for certain controlled substance offenses, to include the manufacture and distribution of listed chemicals outside the United States with intent to legally import them into the United States. Therefore, violations committed outside the territorial jurisdiction of the United States shall be subject to prosecution in the United States.

3. The MCA establishes higher maximum penalties for the manufacture, import, export, possession or distribution of chemicals or equipment used in methamphetamine production. This provision increases the maximum penalties to 10 years for a first offense and 20 years for a subsequent offense. The MCA also directs the sentencing commission to review and afford guidelines for sentencing methamphetamine offenses and to enhance penalties for offenses involving List I chemicals.

4. The MCA imposes a civil fine up to \$250,000 for any firm that distributes a laboratory supply (defined as a listed chemical or any chemical or equipment that the Attorney General publishes on a special surveillance list) to a person who uses it in a clandestine laboratory, where the distribution is with "reckless disregard" for the intended illicit use.

5. The MCA enhances injunctive authority; it also establishes new injunctive authority relating to various violations of the Controlled Substances Act (CSA), including certain violations relating to listed chemicals and other chemicals, products and equipment used in the illicit manufacture of controlled substances.

6. The MCA includes provisions for the restitution of cleanup costs by a defendant convicted of offenses involving methamphetamine clandestine laboratories.

7. The MCA also establishes several advisory panels and task forces to evaluate methamphetamine education and prevention programs, to monitor methamphetamine abuse within the United States and to develop programs to aid industry in better identifying suspicious orders.

8. The MCA adds iodine as a List II chemical but regulates only domestic transactions of this substance. In addition, the MCA effects controls on domestic transactions of hydrogen chloride gas.

9. The MCA modifies the exemption for legal drug products that contain either ephedrine, pseudoephedrine or phenyl-propranolamine. Whereas the removal of the exemption for ephedrine combination products was effective upon signing of the MCA, most transactions involving legal drug products containing pseudoephedrine and phenylpropranolamine will remain exempt through October 3, 1997.

Therefore, at this time, ephedrine combination products are subject to the record-keeping, reporting, registration and import/export notification provisions of the CSA, with a single transaction threshold of 24 grams (for retail sales and for sales by mail order). This new threshold applies only to ephedrine combination products, and the threshold remains zero for ephedrine products that do not contain another active ingredient.

10. Also effective immediately, all transactions of ephedrine, pseudoephedrine and phenylpropranolamine to non-regulated parties by postal, private or commercial carrier must be reported to DEA on a monthly basis (regardless of size).

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THE POLICE CHEERLEADER BY 1998 39

ephedrine from three rogue chemical companies.

- BNE, DEA and the U.S. Attorney's Office established a West Coast Methamphetamine Strategy Group to target rogue chemical companies.

- Two special enforcement programs—Operation Velocity and Operation Backtrack—were established to target high-level meth traffickers and rogue chemical companies.

- In conjunction with BNE and WSIN, DEA compiled available methamphetamine databases and published a *Methamphetamine Databases* booklet as a resource for narcotics investigators.

- In May 1997, the Office of National Drug Control Policy provided DEA with \$1.4 million to provide clan lab certification safety schools to state and local police officers nationwide.

- Approximately \$100,000 worth of new equipment was purchased to increase the training of law enforcement personnel at two new training facilities in Kansas City, Missouri, and San Diego, California. This regionalized training approach will not only be cost-effective, but will also allow the training to be tailored to the particular needs of that region.

- DEA conducted scientific research and is issuing new Nomex fire-resistant

ballistic vests, air purifiers and air monitors to improve officer safety.

Legal Solutions

The Methamphetamine Conference brought attention to many of the issues involved in the meth problem, which were subsequently incorporated into the National Methamphetamine Strategy. New legislation was passed giving law enforcement more muscle in dealing with the problem. Signed into law by President Clinton on October 3, 1996, the Comprehensive Methamphetamine Control Act of 1996 gives law enforcement the ability to control the sale of large quantities of ephedrine combination products without inhibiting anyone's legitimate need for the product. The law also gives authority in controlling the smuggling of precursor chemicals, and increases the penalties for possession, distribution and import/export of materials needed for methamphetamine production. Finally, the law allows the courts to order a defendant convicted of manufacturing methamphetamine to pay the cost of cleanup of the lab site. Last year, DEA alone spent \$4 million on clan lab clean-up—double the expenditure of the previous year.

California courts have also recognized

the seriousness of the meth problem. For example, the state court found a woman guilty of second-degree murder when her three children burned to death after her methamphetamine cooking process turned their mobile home into a toxic inferno. California prosecutors may now bring second-degree murder charges against a defendant if his methamphetamine-manufacturing process resulted in a death, even if they cannot prove that the defendant knew the dangers involved or intended to kill.

The National Methamphetamine Conference was a distinct success. The direct input of so many experts concerned with the many aspects of the methamphetamine problem proved invaluable, as the enthusiasm generated snowballed into concrete action. Regional meth conferences have been held throughout the country. The successful relationship between DEA and state and local law enforcement agencies that came from the Methamphetamine Conference was strengthened in February 1997 when DEA sponsored a National Heroin Conference in Reston, Virginia—built on the same solid foundation of encouraging those with first-hand knowledge of the heroin situation to define the problem and propose solutions. ♦

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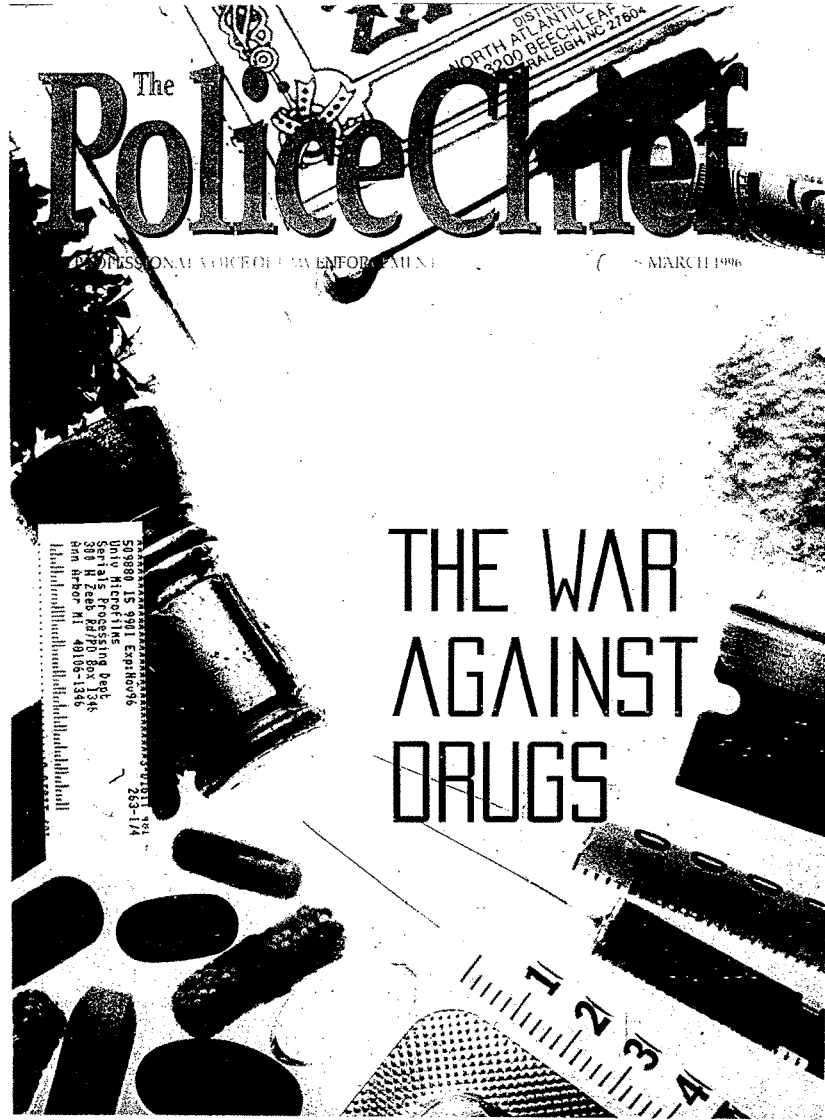
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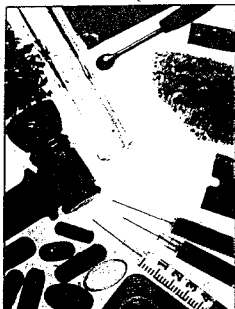
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As DEA Administrator Tom Constantine points out in his message to the readership this month, there is not — and has never been — a “quick and easy solution” to the complex problem of drug trafficking, usage and related violence. Outlining some of the measures undertaken at the federal, state and local levels, he calls on each of us to “perform our professional responsibilities at an even higher level than that existing today.” Photo © George Cody.

PoliceChief

MARCH 1996
VOLUME LXIII, NUMBER 3

The official publication of the International Association of Chiefs of Police, Inc.

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Second-class non-profit postage paid at Merrifield, Virginia, and at additional mailing offices. The Police Chief (ISSN 0193-5771) is published monthly by the International Association of Chiefs of Police, 515 N. Washington St., Alexandria, VA 22314-2357, USA; 703/684-6747; fax: 703/684-6743. Subscription rate of \$22 to IACP members is included in annual membership dues of \$100; subscription rate to nonmembers is \$25 per year, domestic and foreign. Single copy, current issue, \$2.50; back issues, \$3, except April Boyer's Guide issue, \$12.50.

POSTMASTER: Send address changes to the Police Chief, 515 N. Washington St., Alexandria, VA 22314-2357, USA.

NOTE: New subscriptions and changes of address require six to eight weeks to process. Subscriptions begin with next available issue; for backdated subscriptions, place separate order for back issues desired. IACP will not be responsible for replacement of an issue if not postpaid or non-delivery by the 15th of the third month following the month of issue. Please check address label and promptly mail any necessary changes.

Articles are contributed by practitioners in law enforcement or related fields. Manuscripts must be original work, previously unpublished and not simultaneously submitted to another publisher. No word rate is paid or other remuneration given. Contributors' opinions and statements are not purporting to reflect official IACP policy or imply IACP endorsement.

Microform is available from: University Microfilms International, 300 N. Zeeb Rd., Ann Arbor, MI 48106, USA.

Printed in the USA.



BPA business publication membership period: September 1997

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Methamphetamine: A Growing Domestic Threat

*By George Doane, Chief, California Bureau of Narcotic Enforcement, Sacramento, California,
and Donnie Marshall, Chief, Domestic Operations, DEA, Washington, DC*

The domestic production, trafficking and distribution of methamphetamine are becoming the fastest-growing domestic drug threat to the United States. Even now within the United States, methamphetamine is the number-one clandestinely produced drug product. And while clandestine drug laboratories are sometimes capable of producing a variety of drugs such as LSD and PCP, 92 percent of all such labs seized in the United States manufactured methamphetamine as their primary product. This has led to an unprecedented increase in the availability and affordability of methamphetamine—commonly referred to on the street as crank, speed or crystal.

The evidence of methamphetamine's new-found favor among drug abusers,

distributors and manufacturers abounds in criminal and health records. For instance, deaths from methamphetamine have increased dramatically as its use has increased. In Phoenix, Arizona, alone, methamphetamine-related deaths increased 510 percent from 20 deaths in 1992 to 122 in 1994; in Hawaii, methamphetamine-related deaths tripled from 12 to 36 between 1993 and 1994; and in California, where methamphetamine has long been a problem, death rates continue to increase steadily in all of California's major cities, with increases of 50 to 150 percent between 1991 and 1993. The combined methamphetamine death total for San Francisco, Los Angeles and San Diego in 1993 is 370.

As high as they are, the death totals might well have been higher if not for the

medical expertise of the nation's emergency rooms. Drug Abuse Warning Network statistics indicate that in 1993, 1,139 individuals received emergency medical care for methamphetamine overdoses in Los Angeles alone, and that 479 received treatment in Phoenix. Similar numbers were reported in the other major cities where methamphetamine is abused; for the first time in San Diego, there were more treatment admissions for methamphetamine than alcohol. Authorities in San Diego and southern San Francisco County report that there were nearly 3,000 admissions to methamphetamine treatment programs, up from 600 in 1988.

Between 1989 and 1994, methamphetamine consistently accounted for at least 80 percent of DEA's clandestine laboratory seizures. For example, the number of

labs seized by the DEA in Missouri doubled from 1994 to 1995; in Utah, the numbers tripled from 1993 to 1994; in California, lab seizures increased from 383 in 1991 to 533 in 1994. A total of 2,255 active drug labs were seized during that period.

Nationwide, methamphetamine is also purer than before. In 1994, the average purity had jumped from 46 percent to 72 percent.

Additionally, the violence associated with methamphetamine is unparalleled by that experienced in any other drug category. In Phoenix, police say methamphetamine is largely responsible for the 40 percent jump in homicides in 1994. Phoenix also reports the case of a man who, having taken methamphetamine for several days, decapitated his son in a methamphetamine-induced rage.

Recently in Riverside County, California, a methamphetamine laboratory being operated in a trailer house occupied by four adults and three children blew up and burned, causing the deaths of all three children. The adults escaped the scene with moderate injuries, leaving the children to burn to death. So worried about prosecution and apprehension were the perpetrators that they would not allow neighbors who knew the children were in the residence to enter and effect their rescue.

These children's charred remains are testimony to the severity of the problem. But the story does not end there; there are thousands upon thousands of anecdotal stories of spousal abuse, sexual child abuse, neglect, armed robberies, homicides and other serious violent crimes that are clearly methamphetamine-induced. Simply put, when methamphetamine production and abuse become prevalent in any geographic area, the ancillary criminal behavior in that area will grow as well. And, unfortunately for rural America, more and more methamphetamine labs are moving from the metropolitan to the rural environment to avoid detection by law enforcement or interference by neighbors. "Out in the country," they can both contaminate our natural resources and thrive in an area where law enforcement is spread the thinnest.

To understand the complexity of methamphetamine trafficking, it is important to take a brief look at how precursor chemical suppliers and their products play a pivotal role in the production of methamphetamine. There are two sources of supply for these chemicals—the domestic chemical industry from which ephedrine, pseudoephedrine and other essential chemicals and solvents are diverted, and the international chemical market, which feeds the methamphetamine production in the United States through Mexico and Canada.

Beginning in 1990, new U.S. laws drastically reduced the availability of domestic chemicals needed for methamphetamine production, but by 1992 traffickers in Mexico had identified other sources of supply for precursor chemicals, and the export of ephedrine from those nations to Mexico began. The ultimate receiver of this first thrust into the methamphetamine business by the Mexican national traffickers was California. Sources were major legitimate manufacturers in the Czech Republic, India and China who were selling to brokers in Switzerland and other countries; in turn, these brokers arranged for transportation to Mexico. Traffickers from Mexico were able to import over 170 metric tons of ephedrine—enough to make approximately 140 metric tons of methamphetamine—in little over a year.

Simultaneously, domestic traffickers discovered a loophole in the U.S. law. The Chemical Diversion and Trafficking Act controlled ephedrine and pseudoephedrine as chemicals, but did not extend to pills that contained these chemicals. West Coast methamphetamine traffickers discovered they could order hundreds of pounds of these tablets from mail-order supply houses, most of which were located on the East Coast. DEA investigations have shown that many of these suppliers were well aware of the purpose for which these pills were being purchased. In a single case involving a company in Pennsylvania, records show that almost 91 tons of pills were sold to traffickers in less than two years. In another case, one distributor located on the East Coast sold

49,291 pounds of pseudoephedrine tablets to drug

producers in California in a three-month period.

The Involvement of Traffickers from Mexico

One of the more troubling developments in the methamphetamine trade over the past several years has been the deep involvement—and current domination—of the trafficking groups from Mexico. A brief history of the involvement of trafficking organizations from Mexico will give an idea of the breadth and depth of their abilities to identify drug supplies, transport these drugs to U.S. distributors and saturate the market with their products.

Traffickers from Mexico have been involved in the drug trade since the early 1970s. Using their well-established networks, which smuggled goods over the Southwest border for years, groups from Mexico became major players in the heroin and marijuana markets of the 1970s and 80s.

Established traffickers from Mexico have learned well the lessons taught to them by the Cali mafia. Like their mentors, the traffickers from Mexico rely on a network of highly controlled cells that operate different aspects of their business. And like the Cali mafia, trafficking organizations from Mexico employ a network of sophisticated communications to ensure their secrecy.

In 1995, major trafficking organizations from Mexico—the Caro Quintero group, the Garcia Abrego organization, the Arellano Felix network, the Amado Carrillo Fuentes organization and the Amezcua brothers—dominated the trafficking scene. These organizations are heavily involved in both methamphetamine production and trafficking, as well as cocaine smuggling.

These major poly-



A DEA chemist involved in the cleanup of a methamphetamine lab pulls a hazardous waste sample for laboratory analysis.

drug organizations have, over the past three years, replaced outlaw motorcycle gangs as the predominant methamphetamine producers, traffickers and distributors in California, and in much of the United States. This is a critical point: Groups from Mexico are self-sufficient in all aspects of the methamphetamine trade. Unlike the cocaine business—where traffickers from Mexico rely on Peruvian and Bolivian peasants to grow and harvest coca leaves, Colombian lab operators to turn coca paste into cocaine and Cali bosses to approve each shipment—traffickers from Mexico can now call all the shots themselves. This is an ominous situation.

Domestic Methamphetamine Traffickers

Within the United States, methamphetamine is being distributed by numerous organizations working with traffickers from Mexico. As with the cocaine trade, it is difficult to separate the business into clear domestic and international sectors. As far as the DEA is concerned, the drug trade, including the methamphetamine business, is a seamless continuum, in which both sectors


are interdependent. The outlaw biker groups and traditional gangs, such as the Bloods and the Crips, depend on traffickers from Mexico to manufacture and transport the methamphetamine. These traffickers are also dependent on home-grown traffickers in the United States to distribute their product. The major Mexican trafficking groups cooperate and coordinate all aspects of the methamphetamine business.

Working with state and local partners, DEA is attacking each link in the methamphetamine business and working to target methamphetamine production, arrest the lab operators and methamphetamine traffickers and shut down chemical companies supplying the chemicals needed to produce methamphetamine. Although all areas of the country are showing signs of increased methamphetamine problems, some areas of the country have experienced a phenomenal growth in methamphetamine usage. There is no question, for example, that California has been particularly hard hit by the methamphetamine situation. The majority of clandestine labs seized in the United States have been in California. DEA and the California Bureau of Narcotic Enforcement (BNE) have worked closely to address this problem by conducting joint major

methamphetamine investigations and forming clandestine laboratory enforcement task forces where necessary to combat the problem. Often, a combination of federal and state agents employing a combination of state and federal statutes has the most devastating impact on the organized groups that operate methamphetamine labs.

Environmental Contamination/ Hazardous Waste Removal

The danger of chemical fires and explosions so common at clandestine drug laboratories extends far beyond the actual manufacturing process. After producing finished methamphetamine, clandestine lab operators typically leave five to six pounds of hazardous waste material at the laboratory site for each pound of methamphetamine produced. Since the drug lab operators typically operate on the property of an unknowing and unwitting landlord, law enforcement or local environmental agencies are often burdened with the initial cleanup costs, which can be extreme. Property owners, environmental agencies, health departments and, ultimately, the taxpayers are additionally burdened by the larger site-



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remediation costs.

The portion of the toxic waste cleanup that law enforcement currently conducts is typically referred to as gross contaminant removal; that is, getting the big chunks, laboratory apparatus and major, contained chemicals away from the site. While this is expensive, the remediation or long-term cleanup—which often entails removal of soil, sheetrock, carpeting and wall coverings—is typically even more costly. The approximate cost to do the initial gross contaminant removal at a clandestine drug lab is about \$6,000. The DEA allocated \$2 million during fiscal year 1995 for this purpose. In California alone, where most of the nation's methamphetamine labs must be cleaned up, over \$1.5 million in additional state funding was allocated for clandestine laboratory cleanup by the BNE. This year, state resources dedicated to this problem will be increased to \$3 million, although even that amount may still be insufficient to pay for the cleanup of all laboratories.

DEA, along with the Environmental Protection Agency and the U.S. Coast Guard, has developed a program to assist law enforcement in the cleanup and disposal of hazardous wastes produced by clandestine drug laboratories, since clan-

destine laboratories often expose law enforcement personnel to solvents, reagents, precursors, by-products and drug products that can cause health problems if not handled in an appropriate manner. Guidelines developed to ensure proper cleanup of hazardous waste sites are

IT IS ENCOURAGING THAT ENFORCEMENT ACTIONS AGAINST U.S. CHEMICAL COMPANIES HAVE APPARENTLY LED TO AN INCREASE IN THE PRICE OF METHAMPHETAMINE OVER THE PAST SEVERAL MONTHS, ROUGHLY DOUBLING THE PRICE IN SOME LOCATIONS.

available to all law enforcement personnel by writing DEA, Office of Science and Technology, Washington, DC 20537.

Chemical Companies

Since May of 1995, DEA has seized over 25 metric tons of ephedrine and pseudoephedrine from three major "rogue" chemical companies. Because the companies had reason to believe that these chemicals would be used to manufacture methamphetamine, they are subject to criminal prosecution.

DEA is working closely with chemical companies in an effort to educate them about the seriousness of the methamphetamine problem, and enlist their support for controlling chemical supplies. Based on the authority granted by Congress, DEA has recently published a notice of proposed rulemaking in the Federal Register to remove the exemption for certain pseudoephedrine products from the Chemical Diversion and Trafficking Act regulations. Additionally, several states now have programs within their environmental or law enforcement agencies that monitor, on a state level, the distribution retail sales of precursor chemicals and solvents. In fact, in California there is a stringent regulation

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... policy and procedures development from three ... of policies and procedures is explored in the ... ing strategies and evolving trends to include com ... solving. Second, the course examines the legal ... ty development using high-risk police topics and ... to identify common problems in policy develop ... al tips for avoiding typical policy shortcomings. Fr ... ticipants through the practical process of develop ... res again using practical examples to illustrate ... viding techniques for researching, writing, organ ... alities and procedures.

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and tracking process within the Bureau of Narcotic Enforcement that complements the national-level work on chemical precursors currently being accomplished by the DEA.

We are encouraged that enforcement actions against U.S. chemical companies have apparently led to an increase in the price of methamphetamine over the past several months. In some places, the price has gone up to \$9,000 or \$10,000, from a low of \$4,000 to \$5,000. We hope that this trend continues and that through sustained law enforcement actions, the prevalence of methamphetamine across the country will be reduced. However, this is not a total solution to the problem. As mentioned previously, a significant international trade problem exists in which precursor chemicals manufactured in other countries are smuggled into the country illegally, bypassing legitimate chemical wholesalers entirely. DEA's continued vigilance in tracking the international flow of precursors and facilitating their interdiction with other federal and state/local agencies where they enter the country is still necessary.

The domestic production of clandestine drug laboratories of methamphetamine and, to a much lesser degree, LSD and PCP, is perhaps the most complex emerging drug problem faced by the United States today. Not only does it have the impact of such other drug groups as heroin, cocaine, and the hallucinogens, but it also poses a clear and present danger to the environment through the contamination of natural and agricultural resources; in fact, urban clandestine laboratory sites have resulted in the exposure of entire communities to toxic wastes and explosions.

We can no longer point our collective law enforcement fingers at other countries as the sole source of our drug problem, since the United States has itself become a source country. With the recent growth of Mexican national drug cartels, we have the worst of both worlds: not only are U.S. citizens exposed to one of the more lethal drugs on the books, but our environment is being contaminated through its production by persons who reside in this country and take the profits elsewhere. Every American citizen feels the pain of the methamphetamine manufacturing trade in the form of decreased public safety, a damaged environment, impaired public health and the financial drain that drug manufacturing, distribution and abuse place on social and governmental systems. Although the last thing we in law enforcement need is another major front on which to wage the war on drugs, it exists nonetheless, and we must rise to the challenge of fighting it efficiently and effectively, with few—if any—resources.

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THINKING ABOUT GUIDELINES AS A CRIMINAL CODE

Professor Gerard Lynch sees the guideline system displacing congressionally-enacted criminal statutes by "rendering the offense of conviction ordinarily insignificant for sentencing purposes." He asks "is not [the defining of crimes] a matter for the democratic process—for public legislation rather than anonymous regulation?"

Guest Editor's Observations, Page 112.

Professor Frank Remington finds that the guidelines lack "the virtues of the Model Penal Code," which opted for the "exercise of discretion in the open, guided by appropriate but flexible standards." Page 116

Robert Joost demonstrates that the guidelines are a product of the federal criminal code reform effort of the 1970s and serve as a sort of limited criminal code. But federal code reform, he asserts, is still necessary. Page 118

Judge Jack Weinstein and Fred Bernstein show how drug sentencing under the guidelines denigrates mens rea and observe that "[i]t is precisely at sentencing that mens rea is most crucial." Page 121

James Felman argues that the inherent breadth of current federal criminal statutes assumes that prosecutors and judges will distinguish offenders of varying culpability through the exercise of discretion, while the guidelines treat dissimilar offenders as if they are alike. Page 125

Judge Vincent Broderick explains how the safety valve in Title Eight of the Violent Crime Control Act of 1994, which allows courts to disregard mandatory minimums if five criteria are met, "constitutes the first step toward eliminating the monumental error of mandatory minimums as an anti-crime weapon." Page 128

Former U.S. Attorney William Braniff urges that the Department of Justice openly acknowledge and guide prosecutorial discretion in making investigatory, charging and declination decisions. Page 133

1993 Annual Report

Judge Avem Cohn, reviewing the 1993 Annual Report, suggests that "the availability . . . of judge identifiers" in sentencing data would do much to illuminate the operation of the guidelines and provide a true measure of unwarranted disparity. Page 137

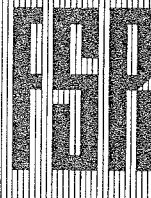
Douglas Berman, considering the Commission's role as "Guidelines Supreme Court" when it resolves circuit splits, urges that it follow procedures that will give judges greater confidence in its decisions. Page 142

Federal Judicial Center polls federal judges about guidelines, mandatory sentencing and federal criminal jurisdiction. Page 151

United States v. Lara (2d Cir. Feb. 2, 1995), sustains downward departure where "aggregate quantity of narcotics attributable to defendant, assessed in light of the time period during which the quantity was distributed . . . overstates the defendant's culpability." Page 159

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FEDERAL SENTENCING REPORTER

Volume 7,

Number 3

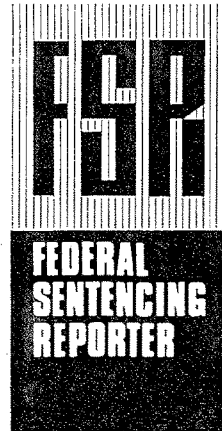
NOVEMBER /

DECEMBER 1994

EDITORS

Marc Miller

Daniel J. Freed

**SUBSCRIPTIONS:**

Federal Sentencing Reporter (ISSN 1053-9867) is published six times a year (August, October, December, February, April, and June) by the University of California Press, 2120 Berkeley Way, Berkeley, CA, 94720, for the Vera Institute of Justice. Subscription rates per year are \$108 for individuals and institutions, \$70 for academics; additional postage charges are \$6 per year outside the U.S. Single copy/back issue price is \$21. Postage paid at Berkeley, CA, and additional mailing offices.

POSTMASTER: Send all address changes to *Federal Sentencing Reporter*, University of California Press, 2120 Berkeley Way, Berkeley, CA, 94720.

ARTICLES: Please send articles and other editorial material to:

Federal Sentencing Reporter
377 Broadway
New York, New York 10013
Phone: (212) 334-1300
Fax: (212) 941-9407
e-mail: slyon@vera.org

THINKING ABOUT GUIDELINES AS A CRIMINAL CODE

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**PUBLISHED FOR THE VERA INSTITUTE OF JUSTICE
BY THE UNIVERSITY OF CALIFORNIA PRESS**

A NOT SO MODEL CODE

THE SENTENCING GUIDELINES AS A NOT-SO-MODEL PENAL CODE

Gerard E. Lynch*

We are accustomed to thinking about the criminal law, and the procedures for enforcing it, as divided into two separate stages. The first stage—the subject of penal codes and jury trials—concerns the definition of culpable conduct and the adjudication of guilt. The second stage—sentencing—concerns the consequences of conviction for the offender. Only rarely do we acknowledge that the conventional separation of these stages into compartments is highly misleading.

The articles in this Issue of FSR address, in one way or another, the extent to which the concerns of the substantive criminal law and the law of sentencing are in fact closely integrated. To a substantial extent, the federal sentencing guidelines can be seen as a continuation, from a very different philosophical perspective, of the effort to reform the federal criminal code. How successfully do the guidelines accomplish this end?

I. THE MODEL PENAL CODE

We begin with a critical bit of history. In 1951, the American Law Institute undertook the daunting task of creating a model penal code. The MPC was an effort to rationalize and codify the confusing mass of common law, statutes embodying common law terms or principles, and statutes enacted from time to time to reform or supplement the common law. These three sources made up the criminal law of most American jurisdictions at that time.

But as Frank Remington reminds us in his article, a critical issue faced early in the drafting process was the degree of elaboration the code should contain. Within broad categories of anti-social activity—homicide, theft, sexual misconduct—traditional law made numerous distinctions. Murder, for example, was defined as a separate crime from manslaughter, and was divided by most states into separate crimes of first and second degree. How many of these distinctions should be carried over into the new law?

In effect, the issue involved drawing the line between the two stages of criminal law and procedure. Professor Remington points out that the framers of the MPC made a deliberate decision to streamline the categories of offenses. Major levels of culpability, defined in broad strokes, were formally distinguished in the penal code, and recognized in the labels attached to offenders. But most of the finer gradations in culpability, it was agreed, did not need to be reflected in the Code: they concerned only

“treatment or penalty consequences.” Consequently, these distinctions were necessarily relegated to the discretion of prosecutors and judges. The decision to adopt a “simpler penal code ... rather than a more elaborate one” represented a conscious choice for discretion as against prescription with respect to penalties.¹

In opting for discretion over prescription, the Model Penal Code reflected the prevailing sentencing ideology of its time, embracing the rehabilitationist rhetoric and indeterminate sentencing regime that dominated the first half of this century. The sentencing provisions of the MPC are directly influenced by this choice. They adopt a highly indeterminate sentencing regime, leaving very broad discretion to the sentencing judge and to parole authorities, very much a product of their time.

But as Professor Remington's historical research makes clear, this approach did not merely influence those MPC provisions that explicitly addressed sentencing. Rather, the drafters' preference for broad sentencing discretion affected the very structure of the Code's highly-influential substantive definitions of particular crimes. If it had been thought desirable to control judicial discretion in sentencing more rigidly, or to define more precisely the penalties attaching to different kinds of acts, the decision to adopt a “simpler penal code” with fewer categories of offense would likely have been reversed. If matters going only to “treatment or penalty consequences” were not to be left to case-by-case judicial discretion, but were believed capable of legislative determination on the basis of general rules, the MPC's drafters would have written many more “discriminations that have ultimately treatment or penalty consequences” directly into the Code itself.

Beginning in the mid-1960s, about two thirds of the states revised their penal codes under the influence of the MPC. A massive effort to codify the anarchic mass of federal criminal law along the same lines, however, foundered on the political rocks of the death penalty and the protection of classified information.² Bob Joost's article ably chronicles the failure of this project. As he points out, comprehensive penal code reform was in large part a victim of congressional procedure. Complex and controversial legislation can be blocked in too many power centers in Congress, and different portions of the penal code reform had too many enemies occupying too many of those centers. Federal penal law remained uncoded, unsystematic and illogical.

II. THE NEXT STEP

By the time the federal penal code reform effort was pronounced dead, a new generation of reformers had turned to sentencing as the next reform project.³ Influenced by Marvin Frankel's attack on the “lawlessness” of sentencing discretion and disparity,⁴ by despair over the apparent failure of the penal system

*Professor of Law, Columbia University.

A NOT SO MODEL CODE

to effect rehabilitation,⁵ and by a resurgent philosophical defense of retribution and "just deserts" sentencing,⁶ reformers concerned themselves less with revising the substantive law of crimes, and more with creating a determinate sentencing regime.

The sentencing reformers of the 1970s and 1980s, however, failed to see that their project was continuous with that of the MPC, and in significant ways inconsistent with its approach. Instead, they appear to have regarded penal code reform as a completed project—the MPC is still taught in law schools as the culmination of modern thinking on substantive criminal law—and to have seen their effort as limited to the separate second stage of the proceedings: sentencing.

Like their predecessors, the new reformers treated sentencing as a separate and discontinuous stage of the justice system from the definition of crimes or determination of guilt. The idea was to take what judges did at sentencing—after guilt for particular defined offenses had been determined—and to rationalize it. Any implications for the penal code were disregarded.

Federal criminal law in particular posed a further challenge. Because of the failure of code reform, the drafters of the federal sentencing guidelines did not merely face the task of elaborating and refining the broad categories of offense conduct proscribed in the MPC and its state progeny. They were also faced with the task of rationalizing the buzzing confusion of the federal criminal "code," which by then had added to the dense jungle of common-law distinctions and traditional statutes any number of novel genetically-engineered products of the mad legislator's laboratory—RICO, money laundering, carjacking, and a host of jurisdictionally warped variants involving mail, travel and the high seas.

As Bob Joost demonstrates, the resulting guidelines bear all the formal attributes of a penal code. Splitting some offenses into what are in effect multiple degrees (often following the general outlines of the failed Brown Commission proposals), and combining others under the same guideline provision, the guidelines create, in effect, a simplified codification of the behavior criminalized by federal law. By rendering the offense of conviction ordinarily insignificant for sentencing purposes, and replacing the code offenses for these purposes with comprehensive codified guidelines, the new federal sentencing regime to a considerable extent rationalizes and displaces congressionally-enacted criminal statutes.

III. ARE THE GUIDELINES A GOOD CODE?

Once the intimate connection between the sentencing guidelines and penal code reform is understood, two huge sets of questions emerge. One set of questions, addressed in several of the articles that follow, asks how well the Sentencing Commission, considered as a code drafter, has performed its task. It is not surprising, perhaps, that the consensus

of our commentators appears to be, "Not too well." Not perceiving its task for what, in large part, it was, the Sentencing Commission seems not to have gone back to the experience of the ALI, the Brown Commission, and others who had puzzled over questions of penal code reform to learn the lessons to be found there. And so, as Judge Jack Weinstein and Fred Bernstein point out in their article, the guidelines significantly muddle questions of mens rea as applied to factors that can have a dramatic effect on culpability.

To a much greater degree than any state penal law, the guidelines have turned gradations of culpability on rather crude quantifiable factors: the common law's rich stratification of property offenses, for example, is overwhelmed by the importance of the sheer number of dollars stolen; narcotics offenses are graded principally in terms of the quantity of narcotics sold. Yet, unlike many state statutes that make similar distinctions in defining degrees of crime,⁷ the guidelines make a defendant's mental state largely irrelevant to his level of punishment. Professor Remington argues, more fundamentally, that the entire enterprise is misguided, because the MPC drafters were right in the first place to have left these myriad distinctions of degree to discretion rather than rule.

But even accepting the premise that guideline sentencing of some sort is desirable, the existing federal guidelines have weaknesses that stem directly from their failure to address traditional concerns of penal code drafters. Weinstein and Bernstein document a principal problem: the lack of attention to mens rea issues. As they point out, the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases. This has left courts free to take the extreme position that neither knowledge nor even reasonable foreseeability of the quantities being transported is required in order to augment a drug courier's sentence significantly.⁸

It is not unprecedented for grading distinctions in penal codes to be made based on strict liability elements; even the Model Penal Code, despite its general aversion to strict liability,⁹ contains some grading distinctions that appear not to require culpability.¹⁰ But it is difficult to imagine that guideline drafters who understood their role to be analogous to drafting a general penal code would have failed to define culpability terms, and to make conscious decisions as to the kind of culpability required with respect to aggravating circumstances that can have a substantial effect on the degree of crime.

IV. INSTITUTIONAL IMPLICATIONS

My own primary concern, however, is with a second set of questions, institutional and procedural rather than substantive. If the Sentencing Reform Act represents a reversal of the MPC's preference for

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discretion, that decision may be unwise, but it is surely within Congress' power to make. The tension between rule and discretion will always be with us, and the balance point between their respective virtues and vices will never be stable. The pendulum has swung before, and it will swing again. But if Congress wants a penal code that, unlike Wechsler's, opts for elaboration and prescription over simplicity and discretion, doesn't it have the obligation to write one, rather than to farm out its work to an unelected commission? And if crimes are to be divided into more rather than fewer degrees, shouldn't defendants have the traditional right to have a jury of their peers decide the level of their guilt?

As both Bob Joost and Jim Felman point out, the guidelines are no real substitute for an effective penal code reform. While the guidelines render the offense of conviction largely irrelevant for sentencing purposes, Joost reminds us that prosecutors, judges and juries nevertheless must still struggle with a host of archaic and arcane distinctions among the confused and overlapping statutes that the Brown Commission was trying to eliminate, with significant costs to efficiency and fairness. And as Felman persuasively demonstrates, in some areas the awkward fit between guideline simplification and statutory overbreadth can cause remarkably unjust results that would surely be avoided by judicial discretion. Statutes such as those prohibiting money laundering require substantive overhaul; the guidelines inadequately address the fact that the statutes simply cover too broad a range of conduct. Moreover, by eliminating judicial sentencing discretion, they compound the resulting injustices.

We live, as we all recognize, in an administrative state, in which Congress does and must delegate all manner of technical policymaking responsibility to administrative agencies. But the distinctions being written into law by the Sentencing Commission are not technical matters of how many parts per million of particulate matter are necessary to render the air unfit to breathe. The substantive criminal law concerns some of the most fundamental, and least specialized, questions to be decided in any society, and if it is deemed important to specify more precisely the shades of society's condemnation of different species of crime, is that not a matter for the democratic process—for public legislation, rather than anonymous regulation?

As Bob Joost reminds us, federal penal code reform failed because the legislative process involved too many procedural hurdles for a truly comprehensive criminal code bill to pass. Yet the guidelines (and their periodic amendments), which accomplish as a practical matter an equally sweeping restructuring of substantive criminal law, swept through Congress without a vote, because under the Sentencing Reform Act of 1984 guidelines become law unless Congress enacts legislation to veto them. The

Supreme Court, long since retired from any effort to create an effective delegation doctrine, brushed off the argument that the Constitution *required* more active congressional involvement,¹¹ but a delegation that is constitutional is not necessarily responsible.

Perhaps this concern is naive: watching Congress' biennial exercise in finger-painting a "comprehensive crime bill" to tout to their constituents does not inspire one to stand firm for the principle that these folks should play a larger role in sentencing policy. But whether or not Congress would do a better job, making federal criminal law is Congress' job to do.

My second concern, however, is anything but theoretical. By retaining a penal code built for broad discretion while sponsoring the creation of a more rigid and prescriptive code of sentencing, the guideline regime has pushed what are now perceived to be critical issues of culpability into a second-string fact-finding process. Accepting a rehabilitationist sentencing policy, Professor Wechsler and his colleagues necessarily relegated sentencing decisions into a world of discretion and loose fact-finding.¹² But if today's conventional wisdom rejects Wechsler's approach, and seeks a "just deserts" prescriptive penal code that draws more moral distinctions and leaves less to social scientific guesswork, why mustn't the jury—the traditional voice of the community for passing moral judgment on citizens—decide, by the conventional standard of proof beyond a reasonable doubt, the moral category into which a defendant should be placed?

I do not mean to say that no fact relevant to punishment can be found by a judge. A penal code far more elaborate than the MPC could still leave room for many even finer distinctions that might well be left to less rigorous fact-finding. But as Felman points out, the criminal code on which the guidelines are superimposed leaves vast ranges of culpability within a single offense, and vast ranges of treatment alternatives to the sentencing authority. Absent the rehabilitationist philosophy, the code would never have looked like that. If that philosophy is to be rejected, and a different set of rules created for the sentencing stage, it should be recognized that this change of policy has profound consequences for the way the laws themselves should be written, and for the procedural rules that implement those laws. Failing to see these consequences, Congress has lazily declined to rewrite its laws, and the courts have blindly applied procedural precedents decided in a different universe.

There is ground for hope that the Sentencing Commission might begin to do a better job of penal code drafting. Critical articles (like those of Joost, Felman and Weinstein & Bernstein in this issue) will point out practical or moral flaws in its structuring of particular offenses; the commissioners themselves will recognize the rigidity of some of their catego-

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ries;¹³ perhaps the Commission might even reconsider the degree of discretion that can safely be allowed to judges, and treat departures by concerned district judges as useful advice rather than as signs of rebellion.

But I am more pessimistic about the procedural and institutional issues. Congress has shown no inclination to take penal code drafting seriously; its only involvement in the process seems to be to expand federal criminal jurisdiction, create unnecessarily duplicative crimes and double the odd penalty. And far from recognizing that at least some types of sentencing factors are too important to be left to sentencing procedure, the federal courts seem inclined to reduce even distinctions that are created legislatively, and that affect not merely guideline ranges but maximum and mandatory minimum sentences, to mere "sentencing factors" that can be decided by judges, on hearsay evidence, by a preponderance of the evidence standard.¹⁴

Perhaps a growing recognition that the work of the Sentencing Commission is more than just setting guideposts for discretion, but in large part constitutes the creation of a new federal criminal code, will force more and more of us to ask whether it is wise, or even constitutional, to take the most fundamental moral ordering performed by law away from our most democratic institutions—Congress and the jury.

FOOTNOTES

¹ See the remarkably prescient dialogue between Herbert Wechsler and Jerome Michael unearthed by Professor Remington and discussed in his article.

² See National Commission on Reform of Federal Criminal Law, Study Draft—Federal Criminal Code, and associated workpapers (1970).

³ The federal penal code effort stands at the cusp of the two phases of reform. As Bob Joost points out, the Brown Commission had adopted the traditional sentencing

approach of the MPC. But by the time that bills incorporating its recommendations were actually introduced, they incorporated proposals for sentencing guidelines. These proposals, representing the dawn of a new phase of reform, were the only part of the code bills eventually to become law.

⁴ Marvin Frankel, *Criminal Sentences: Law Without Order* (1972).

⁵ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, [Spring 1974] *Public Interest* 22 (1974), a powerfully influential article that answered its title question with the simple reply, "Nothing."

⁶ See in particular, Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976).

⁷ See, e.g., *People v. Ryan*, 605 N.Y.S. 2d 253 (1993).

⁸ See *United States v. DeVelasquez*, 28 F.2d 2 (2d Cir. 1994), discussed in Weinstein & Bernstein, *infra*.

⁹ See MFC §2.02(1), 2.02(3), 2.05.

¹⁰ See, e.g., §221.1(2) (burglary graded higher "if it is perpetrated in the dwelling of another at night"; no culpability apparently required with respect to whether the building constitutes a dwelling or it is "night" within the technical definition in the statute.)

¹¹ *United States v. Mistretta*, 488 U.S. 361 (1989).

¹² The *locus classicus* for the connection between rehabilitationism, indeterminate sentencing and casual fact-finding procedures is *Williams v. New York*, 337 U.S. 241 (1949).

¹³ The Commission has several times indicated some dismay about its rules for classifying drug offenders, has already introduced some greater flexibility into those rules (see §2D1.1, application note 16), and may yet alter the basic quantity-driven scheme.

¹⁴ See, e.g., *United States v. Cole*, 32 F.3d 16 (2d Cir. 1994) (immigration offenses; aggravating factor interpreted as sentencing factor rather than as creation of separate degree of crime); *United States v. Reyes*, 13 F.3d 638 (2d Cir. 1994) (nature and amount of controlled substances not an element of the offense of distribution); *United States v. Monk*, 15 F.3d 25 (2d Cir. 1994) (same rule as to possession offense under 21 U.S.C. §844).

Senator THURMOND. I would like to place into the record copies of the articles by Professor Lynch that I referenced in my questions.

[The articles follows:]

Lynch

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February 22, 1998, Sunday, Final Edition

SECTION: OUTLOOK; Pg. C03

LENGTH: 1365 words

HEADLINE: A LOOK AT...The of Independent Counsel; The Problem Isn't in the
Starrs But in a Misguided Law

BYLINE: Gerard E. Lynch

BODY:

The independent counsel seemed like a good idea at the time, and still seems right to many people. Because the prosecutors of the Department of Justice report to the attorney general, and ultimately to the president, the assumption is they have a conflict of interest when a criminal investigation implicates the president's closest advisers, or even the president himself. So Congress's solution was to take that investigation away from the professional prosecutors, and create instead an independent lawyer -- who will hold the big shots to the same standards as other people, avoid the appearance of partisanship, get out the whole truth and purify the government of corruption. The problem is it doesn't, and can't, work.

In fact, the routine use of independent prosecutors undermines the equal enforcement of criminal law rather than promotes it, without eliminating the appearance of political motivation. And no prosecutor should be asked to perform the essentially political tasks of exposing scandals and purging bad public officials. Criminal justice is supposed to punish those who violate fundamental rules and to protect the public from dangerous people -- not to decide who should be president.

To see why independent counsel investigations work so badly, we have to understand how criminal prosecution really works. Enforcing criminal law is not a technical process in which lawyers simply size up the evidence and decide whether a person has violated a statute. Our criminal laws extend well beyond basic crimes such as murder, rape and armed robbery, where everyone would agree that all the guilty who can be caught should be prosecuted. Some criminal laws involve the violation of administrative regulations, such as those involving election finance, the environment or banking. Some (like the mail fraud statute) are deliberately vague or very broad. To make sure that crooks can't glide through the loopholes, they cover far more behavior than we really think worthy of jail. Some (simple possession of marijuana) are politically controversial. Others (unauthorized commercial use of Smokey Bear) are just silly. We don't really expect all these laws to be enforced to the hilt.

Deciding when to invoke criminal law involves discretion and sensitivity to community norms. Such decisions are driven, in the world of ordinary prosecutors, by severe resource constraints. The question is not whether the business executive who lies in a civil lawsuit is, in the abstract, worthy of



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prosecution: It's a question of how much time police, lawyer and judge can devote to such cases, as compared with violent crimes. Ultimately, how prosecutors answer these questions are political judgments, for which they are accountable to the public (directly for elected district attorneys; via the elected president for appointed federal prosecutors).

Independent counsels are not accountable to anyone. Their judgments float free of resource constraints, of the constant comparison of varied cases and of electoral checks. Given the full investigative power of the state, a broad statute book and unlimited resources, a prosecutor can develop at least the suspicion of a criminal case against just about anyone. And the isolated and politicized context of an independent counsel investigation provides an incentive to do just that. If an alleged crime (a young woman lying about her sex life in a civil trial that has nothing to do with her?) seems too trivial to pursue, an independent counsel cannot simply turn his attention to more serious matters without seeming to condone illegal behavior. Thus, political figures subject to the independent counsel law are not held to the same standard as others, but are vigorously pursued in matters that in other circumstances would be unlikely to merit prosecutorial attention.

Maintaining the appearance of nonpartisanship is equally problematic. Ordinary defendants and representatives of alleged victims frequently charge prosecutors with political motivation. We usually assess such accusations by looking at the ordinary prosecutor's entire record. If the complaint is legitimate, we will see a pattern of overzealousness or timidity in particular matters. The prosecutor, moreover, can make tough decisions, knowing that they can be judged across many prosecutions.

But the special prosecutor has no record to protect him. There's only this one case. And since the case is surrounded by partisan enmity, he will necessarily be accused of partisanship. The appearance of political motivation is generated not by the identity of the prosecutor, but by the identity of the target. As the experience of both Iran-contra counsel Lawrence Walsh and Kenneth Starr demonstrates, an aggressive investigation of the president ensures that evaluation of one's performance will divide along party lines. A reputation among elite lawyers and judges for integrity and good judgment is no protection in a political war.

Getting out the whole truth, on the other hand, is not the business of a criminal prosecutor at all. Our criminal justice system is not designed for political exposes but to determine whether particular people have violated specific laws. Investigations proceed in secrecy, to protect the reputations of those who are not charged. Even when this system works at its best, it is ill-suited to doing the work of journalists and congressional committees in exposing broad patterns of abuse of power.

The effort to fill that role distorts the criminal process. An ordinary prosecutor would be unlikely to use the intrusive powers of the grand jury (calling a mother to testify about her daughter, for example) to establish the facts about a case that may possibly prove unworthy of prosecution. An independent counsel is under pressure to do so, since a decision not to prosecute will only appear justified if he can say he left no stone unturned. A regular prosecutor would be justifiably criticized if he accompanied a decision not to bring charges with a report of personal opinion that the suspect was



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actually guilty but the crime could not be proven. The independent counsel law encourages prosecutors to do exactly that.

Finally, the independent counsel law contributes to our regrettable tendency to turn political housecleaning into a matter of criminal law. Whether the president should be turned out of office is, in the deepest sense, a political judgment, to be made by the people and their representatives. It is not a question of technical guilt under criminal law, to be decided by lawyers.

The present controversy is a perfect example of this tendency. Some may believe that a politician's sex life is his business, and that to lie about it is somewhere between a forgivable natural response and an admirable defiance of an improper inquiry. Others may think a president should uphold the highest standards of personal morality. But neither group should care whether, under the stringent standards of criminal law, a technical perjury can be proved. Who should go to jail and who should hold high office are correctly decided by different standards.

We could, of course, just leave all this to our regular agencies of law enforcement and political scandal. The Justice Department's professional prosecutors have a pretty good record of pursuing serious crimes even by high officials, and if they are hampered by partisan intervention from the White House, the normal political and journalistic process will almost always expose the scandal. Wrongdoing that is too trivial -- or too important -- for the cops and prosecutors is best left to the ordinary process of democracy. In the rare cases that require an independent prosecutor, the political process can generate one. But a law that triggers unaccountable prosecutors wielding infinite resources whenever there is a plausible allegation of a technical crime is misguided.

Ken Starr isn't the problem. The sorry record of independent counsels past and present shows that the institution itself is unnecessary and counterproductive.

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LANGUAGE: ENGLISH

LOAD-DATE: February 22, 1998



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Columbia Law Review
 October, 1997

In Memoriam

*1603 WILLIAM J. BRENNAN, JR., AMERICAN

Gerard E. Lynch [FN1]

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Gerard E. Lynch

At Justice Brennan's funeral, President Clinton spoke of the Justice's enormous impact on our country's law--thirty-four years on the Supreme Court, over 1300 opinions authored, many of them landmarks: Baker v. Carr, [FN1] opening the way to one person, one vote; Craig v. Boren, [FN2] wielding the Equal Protection Clause to strike down discrimination on the basis of sex; Goldberg v. Kelly, [FN3] insisting on the right of the poorest citizens of the administrative state to be heard in the face of an arbitrary bureaucracy; New York Times Co. v. Sullivan, [FN4] articulating the modern rationale for a free press; and so many more.

It was all true, but to those of us who were privileged to know and work for the man, it seemed somehow beside the point--and even, in one way, a little too much like what the Justice's detractors would have said. The powerful force in American law perhaps resembled too closely the man who "imposed his values on the Constitution," the legal colossus who remade the Constitution in his own image. Of course, we understood Justice Brennan's great influence on the law; some of us had even worked on some of those opinions. But what did all that have to do with the modest little man with the big grin and the bigger heart, that wonderfully warm gentleman who seemed to remember the name of everyone he'd ever met (and their spouses and children), who bestowed his love and interest as freely on the security guards at the Court as on the senators and foreign dignitaries he met? Was this towering figure the same humble fellow who said upon being sworn in that he felt like a "mule in the Kentucky Derby"? [FN5] The Justice we knew, despite close involvement in the most divisive and difficult legal issues of our time, and despite taking an enormous amount of public, editorial, and scholarly praise and abuse, never played the great man and never had an ungenerous word to say even about his most committed intellectual adversaries. It was always *1604 hard, in the Justice's presence, to put this incredibly decent and unassuming man together with his public role as perhaps the most influential associate justice of all time.

Justice Souter, the next eulogist, came a lot closer to capturing the person we knew. "'Get in here, pal,' he'd say to me." [FN6] Oh yes, we'd all heard that, and we all remembered what followed, just as Justice Souter described it: the two-handed handclasp, the hug, the pulling you over by the elbow for a confidential conference, and--if you perhaps had some good news about yourself--"well, isn't that just lovely." There was the man himself, and now came the tears of remembrance.

But even this view of Justice Brennan is susceptible to a misleading spin. All that personal charm and warmth, snarls the critic, was the very vehicle by which the behind-the-scenes operator, the master manipulator of majorities, the crafty coalition builder, somehow managed to work his will on his colleagues, despite the weakness of his arguments and the wrongheadedness of his philosophy. And even if the friendliness was sincere (because no one who came remotely within the orbit of the Brennan warmth could fail to admit the total genuineness of the man), wasn't all that personal warmth, that compassion, quite literally the heart of the problem? It was his heart, his sense of justice, his love for humanity that led him away from the plain meaning and original intent of the Constitution. To speak of the greatness of the man, and the love we bore him, in the chilly context of academic debate, invites professorial condescension: "A wonderful man, I'm sure, but not much of a theorist, eh? Not really an intellectual of the law?" (The Justice was never that popular with law professors, even in his heyday.

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One early clerk recalled that he had been primed by his professors not to expect much from his clerkship: "You see, I went to Harvard, as did the Justice. And the Justice was not on the Law Review.")

So for all the eulogies, for all the praise, for all the recognition that this was a person both of great influence and of great humanity, there is, for me, an important question that is not really being addressed by the Justice's many admirers. The notion that Justice Brennan's judicial philosophy was one that illegitimately imposed his own values on the country is very widespread, in this more conservative age, among legal scholars as well as among politicians and the public. And that notion is not often contested by his defenders. Lawyers, judges, and legal scholars who may admire Justice Brennan's conclusions nevertheless feel a certain insecurity about his methods--or, perhaps, with an eye on possible future confirmation hearings or election campaigns, find it more prudent to avoid association with anything that could be called "liberalism" or "judicial activism."

*1605 The charge that Justice Brennan confused his own values with those of the Constitution does capture one piece of the truth. As far as I could see, the Justice was totally, absolutely, fervently devoted to the ideals that America and the Constitution, as he understood them, represented. He did not have the slightest doubt that America is the greatest country in the world, and that its greatness resided in institutions that were committed to freedom and equality, to human dignity, and to openness to all who chose to commit themselves to those ideals. He believed that his ideals were the ideals of the American polity, not because he thought that his beliefs ought to be imposed on the nation, but because he had been taught from an early age, in the best American immigrant tradition, to commit himself to the values that the nation professed.

Of course, one might say, we all do believe in the same values at some level of generality--but that's not what the debate over the role of the Supreme Court is about. Fair enough, but let me linger a moment before descending from the heights of patriotic abstraction. For not everybody does believe, even at this level of generality, in the American values that Justice Brennan accepted so fervently. Since many of those who do not are on the left, and many of those who criticize the Brennan legacy associate him with a certain kind of leftism, it is important to take the time to understand Justice Brennan's patriotism.

One of the uglier consequences of the Vietnam War was the blow it dealt to simple patriotism. Too many of the generation that came of age during the civil rights struggle and the movement to protest what they saw as an unjust imperial war came to identify their country with oppression, unfairness, and destruction, rather than with the defense of freedom and equality. Perceiving the failure of the United States to live up to its most profound aspirations, they associated their country with the failures, and located the aspirations against which they measured the nation somewhere outside of, rather than at the heart of, American institutions. Some of those people went so far as to burn their country's flag, in protest of those failures. A majority of Americans, particularly those of an older generation, saw such protests, not always inaccurately, as a failure of patriotism. Many of them supported laws to prohibit such conduct.

In *Texas v. Johnson*, [FN7] Justice Brennan wrote an opinion for the Court holding such laws unconstitutional. Those--both among the flag burners and among their would-be prosecutors--who would associate Justice Brennan with the protesters whose rights he defended would no doubt be surprised at the love of the flag and the nation it stands for that he expressed in that opinion:

[T]here is a special place reserved for the flag in this Nation

*1606 Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag

. . . We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns . . . [FN8] Justice Brennan believed that. He served that flag in war; he was buried under it. Justice Brennan's "own values" had little enough to do with those of the flag burners, but he did not seek to impose his values on them by law. Instead, he put his faith in the values of tolerance. He thought these values were not only his, but America's.

But yes, believing in free speech and individual liberty in general does not automatically dictate toleration of flag burning. The problem, and here is the heart of the argument against Brennanism, is that there will always be different interpretations of what those core shared values mean in particular situations. We all agree, and the text of the Constitution proclaims, that all of us are entitled to be equally protected by the laws. Does that equality imply a principle of government color-blindness with respect to elementary school assignment? If it does, does that principle extend so far as to prohibit "remedial" or "diversity-seeking" race consciousness in graduate school admissions? Doesn't a judge impose his own interpretation of our collective values when he answers these questions differently than a political majority?

At this more specific level, too, however, it is an oversimplification to speak of a judge's imposing her "own" values. Justice Brennan would have said that he was put on the bench, through a politically responsible process, precisely for the purpose of deciding, in the light of the nation's traditions and values, how the generalities of the constitutional language should best be applied to the contemporary problems that come before the Court. This is surely not a simple process of deciding that "school desegregation [or affirmative action, or whatever] is, in my opinion, a good policy, so it ought to be found to be constitutionally compelled." A complex calculus of text, historical evidence of framers' intent, history, precedent, institutional competence, and philosophy may lead to the conclusion that the Constitution does not adopt the solution the judge would prefer. Most of the time, the usual techniques of legal analysis lead to answers most lawyers will agree with, regardless of their own policy preferences or governmental philosophies. But those are the cases that usually get resolved without a close vote on the Supreme Court. When the going gets tough—precisely because textual or precedential analysis *1607 doesn't yield clear signals—the judge is left, I'm afraid, with his own ability to articulate, as persuasively as possible, his best understanding of the true meaning of the broad value to which the Constitution requires adherence.

This is not, simplistic political arguments to the contrary notwithstanding, a question of degrees of judicial "activism." The late twentieth-century "liberal" position favors school integration (an "activist" position that struck down policies adopted by the political branches of southern state governments) but would permit affirmative action (a more "deferential" posture that declines to upset programs put in place by Congress or state legislatures). "Conservatives" in 1954 argued for judicial restraint, while today many of their ideological successors seem prepared to strike down race-conscious programs adopted by the more politically responsive organs of government. The argument is about what our commitment to equality should be held to entail, and judges in our system, liberal or conservative, "activist" or "restrained," must examine our texts and traditions for answers.

Nor is it a matter of respect for "original meaning." The framers and ratifiers of the Fourteenth Amendment probably did not believe that the principle they were enshrining in the Constitution required integrated public schools, nor that it would prohibit race-conscious remedial actions. There is little reason, in any case, to assume that those who drafted and adopted broad and general principles to govern our polity believed or intended that those principles should always and forever be interpreted as they might have expected, even when the social conditions that shaped their own understandings had long since passed from the scene. Justice Brennan's belief that the Constitution must be given meaning for the present seems to me a simple necessity; his long and untiring labor to articulate the principles of fairness, liberty, and equality found in the Constitution in the way that he believed made most sense today seems far more honest and honorable than the pretense that the meaning of those principles can be found in eighteenth- or nineteenth-century dictionaries.

But just as passionately as Justice Brennan interpreted those principles to make sense for his generation, his

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successors must do so in light of their own wisdom and experience, and in light of the conditions of American society today. The aspirations to justice and liberty in which Justice Brennan so fervently believed must surely transcend his time, but his particular applications of those principles grew out of his own time. Justice Brennan's version of American values grew from the experience of an immigrant generation's love for the America they taught their children to revere, from a depression generation's experience of poverty and of an activist government's attempt to ameliorate it, from a warrior generation's commitment not to let bigotry at home lead to the horrors they had fought to defeat abroad, from a Red-scared generation's understanding that suppressing freedom to save it from its enemies is a dangerous *1608 game. Succeeding generations have had different formative experiences, and face different problems, which will inevitably put a different spin on the norms of human dignity about which our constitutional law is a continuing dialogue. While many of the specific commitments and interpretations supported by Justice Brennan will surely survive and influence legal dispositions for generations, others will just as surely be overruled, or simply become irrelevant. None of this should surprise anyone. Nor will the continuing revision of constitutional understandings-- whether or not disguised as a restoration of original meanings--mean that Justice Brennan's conclusions were wrong for his time, or that the provisional understandings arrived at in the 1990s will be any more enduring than those of the 1960s, as yet other generations take up the dialogue.

We can hope, however, that those who are called to that task today and tomorrow, and whose values will inevitably inform (not be "imposed on") our constitutional arrangements, will possess Justice Brennan's humanity, and his deep love of the law, the Constitution, and the country.

I suppose there are some who were surprised that Justice Brennan--vilified by many on account of his support for *Roe v. Wade* [FN9]--went to his burial from a Roman Catholic funeral mass (and a rather traditional liturgy at that, including, at his express request, some hymns in Latin), and that the last song played at his graveside, by a military band, was *America the Beautiful*. But they should not be. The values for which Justice Brennan stood are not, I suppose, the only values that can be found within the American tradition, but it is precisely from that tradition that he derived them. His interpretations of those values were the unique product of his own experience, his own intellect, and his own generous spirit, but the values themselves came from, and I hope will continue to animate, the country he loved.

We'll miss you, boss.

[FN1]. Paul J. Kellner Professor of Law, Columbia University School of Law; Law Clerk to Justice Brennan, 1976-1977.

[FN1]. 369 U.S. 186 (1962).

[FN2]. 429 U.S. 190 (1976).

[FN3]. 397 U.S. 254 (1970).

[FN4]. 376 U.S. 254 (1964).

[FN5]. Kim I. Eisler, *A Justice for All: William J. Brennan, Jr. and the Decisions That Transformed America* 99 (1993).

[FN6]. Justice David Souter, *Remarks at the Funeral Mass for Justice Brennan (July 29, 1997)* (transcript on file with the Columbia Law Review).

[FN7]. 491 U.S. 397 (1989).

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97 CLMLR 1603
(Cite as: 97 Colum. L. Rev. 1603, *1608)

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[FN8]. Id. at 418-20.

[FN9]. 410 U.S. 113 (1973).

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Yale Law Journal
June, 1992

Symposium: Punishment
Conference Summary

CONFERENCE ON THE FEDERAL SENTENCING GUIDELINES:
SUMMARY OF PROCEEDINGS

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(Cite as: 101 Yale L.J. 2053)

*2066 PANEL 3: THE ALLOCATION OF DISCRETION UNDER THE GUIDELINES

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The guidelines have shifted the locus of discretion from the judge to the prosecutor. This transfer has drastically changed sentencing because the prosecutor's role is very different from the judge's role.

Before the guidelines, the prosecutor's role in sentencing was minimal. The prosecutor could put a cap on the sentence by accepting a plea to a charge with a low maximum, but there was virtually no instance in which the charge would put a floor under the judge's sentence. The judge, on the other hand, could sentence however he liked. Not only was the judge's decision correct because it was final—there was no appellate review of sentences within the statutory maximum—it was correct because there was no law by which it could be called incorrect. Absent a few factors that were statutorily excluded from consideration, the judge could take into account any factor he thought relevant, and weigh it to whatever degree he thought it counted. The judge could be harsh or lenient, a retributivist or a utilitarian, a believer in deterrence or rehabilitation.

The guidelines have put an end to the judge's discretion. Instead, they have enhanced the power of the prosecutor. The factors that count for the guidelines are factual issues, and the prosecutor is more or less the master of the facts in a criminal case. The prosecutor knows more about the legally provable facts than anybody else, and the prosecutor has legal control over what facts will be asserted. However, it is not the case that the prosecutor has the same discretion, or as significant discretion, as judges had under the ancien regime. By moving the locus of the discretion, the guidelines have changed the nature of the discretion, the constraints under which it is exercised, and the issues with which that discretion will be concerned.

The discretion accorded to sentencing judges under pre-guidelines law was explicitly and intentionally sentencing discretion. Its purpose was to determine the appropriate sentence for the particular individual convicted of a crime; it was clearly correctional and punitive. In contrast, the prosecutor's discretion under the guidelines regime is intimately bound up with the traditional charging discretion of the prosecutor, a discretion that has its own logic and purposes. The prosecutor is not expressly or overtly entrusted with any discretion at all over sentencing; rather, he is given the authority to charge or not to charge particular offenses, to assert or omit particular facts or arguments. While the power to influence sentencing does not disappear because it is not expressly acknowledged, there is a critical difference between having acknowledged, authorized, and legitimated discretion and having covert discretion. Prosecutors are not only interested in obtaining a particular sentence for the defendant; they are also interested in making a formal record of the results of governmental investigations.

A prosecutor today, under the guidelines, may have the effective power to reduce a sentence by underselling the charge, but such an act may well be at odds with the prosecutor's other objectives in determining the charges. This intrinsic distinction between overt and covert sentencing discretion profoundly affects the nature of the decision that will be made. The guidelines have done more than merely shift the locus of the discretion to a different decisionmaker; they have turned the nature of decisionmaking from a pure sentencing decision into something else.

The prosecutor is not free to dispense mercy at will. The judge has the power to thwart unwarranted leniency, to order the prosecutor to put on facts, and to reject a plea agreement. According to the guidelines, a judge may only accept a plea agreement if she is convinced that the sentence is within the applicable guidelines range or if "the agreed sentence departs from the applicable guideline range for justifiable reasons." U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6B1.2(c)(2) (1992). In other words, a judge is not supposed to approve a plea bargain unless the agreed-upon sentence is a guideline sentence. We have not yet seen judges moving against prosecutorial seizure of authority, but the tool is there.

More importantly, the issues that will principally determine the prosecutor's choice will often have more to do with the strength of the prosecutor's case than with abstract arguments of justice and mercy. Although some prosecutors, gauging appropriate sentence length by what they are used to, find the guidelines draconian, future prosecutors will inevitably come (as will future judges) to internalize the guideline sentences as presumptively correct. While circumstances will occasionally warrant overt or covert departures, the most significant motivator of agreement will be the existence of bona fide factual disputes about the applicable facts (both as to guilt and guidelines issues), the perceived likelihood of success in proving one side of the dispute version, and the resources necessary to be expended to accomplish that. To move the sentence up imposes costs on the prosecutor that were not borne by a judge sentencing under a non-guidelines regime—costs that the prosecutor might well choose not to bear. This is indeed an inevitable part of a guidelines system. By making the sentence turn on specified factual and legal issues, the guidelines invite the prosecutor and defense lawyer to estimate the likelihood of prevailing on the merits of those issues and consider the expected value of the sentence in light of those estimates. In such an atmosphere, what is likely to drive leniency is

not considered judgment about appropriate sentences (whether right or wrong), but judgments about whether compromise is forced by the strength of the prosecutor's litigation position.

By constraining the judge's sentencing discretion, guidelines and mandatory minimum sentences have enhanced the prosecutor's influence over the sentence. But to say that this has somehow shifted the judge's sentencing discretion to a different actor (who may or may not be less wise in its use) is an oversimplification. What the prosecutor now has is a discretion significantly different, more complicated, and more constrained than the discretion formerly exercised by judges.

Senator THURMOND. I ask that any follow-up questions be submitted to the committee by close of business on Friday of this week.

If there is nothing else to come before the committee, the committee is now adjourned.

[Whereupon, at 3:21 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF KENT J. DAWSON TO QUESTIONS FROM SENATOR SMITH

Question 1. Are there any questions that you feel are off limits for a Senator to ask?

Answer 1. No, a Senator may ask any question he or she believes is consistent with his or her Constitutional role of Advice and Consent.

Question 2. If a U.S. District Court Judge or U.S. Court of Appeals Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply the precedent to the case before him or her?

Answer 2. No, a District Court Judge and Judge and U.S. Court of Appeals Judge should always follow Supreme Court precedent no matter what his or her personal opinion.

Question 3. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, U.S. (19 How.) 393?

Answer 3. It would be difficult to say how I would have ruled in *Dred Sciott* if I were a Supreme Court Justice, without being present at the time, having the benefit of briefs, hearing oral argument, reviewing all of the evidence and consulting with other judges.

Question 4. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separated opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 4. *Dred Scott* was overturned by the 13th and 14th Amendments and is no longer considered binding precedent.

Question 5. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 H02.) 393 (1856)?

Answer 5. Yes, a District Court Judge is always bound to follow precedent.

Question 6. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 6. It would be difficult to say how I would have ruled in *Plessy v. Ferguson* if I were a Supreme Court Justice, without being present at the time, have the benefit of briefs, hearing oral argument, reviewing all of the evidence and consulting with other judges.

Question 7. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 7. The case is not considered good precedent, because it was overturned or distinguished in several cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954).

Question 8. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 8. It would be difficult to say how I would have ruled in *Brown v. Board of Education* if I were a Supreme Court Justice, without being present at the time, having the benefit of briefs, hearing oral argument, reviewing all of the evidence and consulting with other judges.

Question 9. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the

protections contained within the Fourteenth Amendment to the Constitution. How should the precedent be treated by the Courts?

Answer 9. This case is still good precedent and must be followed.

Question 10. If you were a Supreme court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 10. It would be difficult to say how I would have ruled in *Roe v. Wade* if I were a Supreme Court Justice, without being present at the time, having the benefit of briefs, hearing oral argument, reviewing all of the evidence and consulting with other judges.

Question 11. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Renquist dissent in that case?

Answer 11. Lower court judges are obligated to follow the holding in *Roe v. Wade*, majority opinion as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Question 12. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 12. I would follow the law and precedent and decide cases on the facts before me without regard to personal views, and I have no personal views that would interfere with my obligation to follow the law.

Question 13. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 13. The Supreme Court has found the death penalty to be constitutional, and I have no personal views which prevent me from following this precedent or any other precedent of the Supreme Court.

Question 14. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 14. The Second Amendment to the Constitution addresses the right to bear arms. If faced with a Second Amendment question as a District Court Judge, I would interpret it as I would any other Constitutional provision by looking to its plain language and examining relevant precedent, without regard to any personal views, and I have no personal views that would interfere with my obligation to follow the law.

Question 15. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 15. *Casey* provides that state regulations cannot create undue burdens on a woman's right to choose. As a district Court Judge, I would be bound to follow *Casey* and I have no personal views that would interfere with my obligation to follow the law.

Question 16. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 16. I do not have any opinion on this issue which would interfere with my ability to consider all of the facts and law in reaching a decision.

Question 17. Do you believe that the death penalty is constitutional?

Answer 17. Yes, the Constitution contemplates and provides for the death penalty and the Supreme Court has found it constitutional.

Question 18. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 18. The Supreme Court in *Planned Parenthood v. Casey*, explains the circumstances under which it will consider overruling a prior decision. Those factors include, among others, an evaluation of whether the prior ruling has proved to be unworkable, whether reliance has been formed which would create a hardship and whether passage of time or changes in legal principles have robbed the old rule of significant application or justification.

Question 19. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 19. In interpreting a statutory provision, a judge should begin with the plain language of the statute, followed by a review of precedent and analogous decisions. Legislative intent may be considered in cases where a statute is ambiguous. However, judges should be skeptical of legislative history because it is hard to deter-

mine whether the legislative history accounts for all of the reasons or considerations which went into passage of an enactment.

RESPONSES OF KENT J. DAWSON TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes, I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I personally disagree with such precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision of your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boeme v. Flores*¹ where the Court struck down the Religious Freedom Restoration Act.

Answer 2. Yes, a District Court Judge is committed to following precedent of higher courts even if the judge personally disagree with such precedent.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer 3. *Adarand v. Pena*,² requires application of the "strict scrutiny" standard of review, a compelling state interest and a narrowly tailored remedy in order for such preferences to be sustained.

Question 4. Are you aware of the Court's decision in *Adarand v. Pena* [supra], and the Court's earlier decision in *Richmond v. J.A. Croson Co.*?³ If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government or hiring decisions.

Answer 4. Yes, I am aware of these decisions. I understand those cases to require that on the federal and state level, strict scrutiny be applied to race conscious affirmative action programs, and thus, to survive such scrutiny, must be narrowly tailored and further a compelling government interest.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 5. Yes, I am committed to follow the precedent of higher courts on equal protection issues.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 6. No, I have no legal or moral beliefs which would inhibit or prevent me from imposing or upholding the death sentence.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases daily and expeditiously?

Answer 7. Yes, these sorts of delays are too long. The federal courts should focus their resources on resolving capital cases fairly and expeditiously.

Question 8. What authorities may a federal judge ultimately use in determining the legal effect of a statute of constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 8. The Constitution, plain language of the statute, precedent, analogous cases and, as a last resort, legislative history may be used to determine such legal effect. A presumption of constitutionality must be given to such arts by Article III judges.

¹ 521 U.S. 507 (1997).

² 515 U.S. 200 (1995).

³ 488 U.S. 469 (1989).

Question 9. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 9. In my view, approaches (1) and (3) are legitimate. If by his comments Justice Brennan meant that we need to look to popular public opinion in establishing a right not previously upheld, I respectfully disagree with the approach suggested by (2).

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 10. I would review and follow precedent for a case not of first impression. In a case of first impression, I would give the presumption of constitutionality, review the plain language of the statute, applicable precedent and analogous cases, and as a last resort, legislative history and based on those authorities and that review, attempt to arrive at a decision that would be affirmed on appeal.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgement in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 749 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 11. *Griswold*, involved a state statute which made it unlawful to use any drug, article or instrument to prevent conception, and in that case the Court held that the statute was invalid because it infringed on the constitutionally protected right to privacy. To reach that result, the Court looked at “penumbras” and “emanations” of express guaranties in the Bill of Rights.

In *Alden v. Maine*, the Court held that congressional legislation under Article I could not abrogate state sovereign immunity under the Eleventh Amendment. To reach that result, the Court looked at “fundamental postulates” implicit in the constitutional design.

In each of the foregoing cases, the Constitution and notions of fundamental rights not expressly enumerated in the Bill of Rights were used in reaching the Court’s judgment. The use of such sources has been criticized as an expansion of the power of the court.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress’s power and on the federal government’s power compared with the power of state governments.

Answer 12. A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

In *Wickard v. Filburn*, the Court held that the Second Agricultural Adjustment Act, which imposed penalties for unauthorized planting of wheat which Filburn used on his own farm, was constitutional pursuant to provisions of the Constitution permitting Congress to regulate commerce among the states.

In *United States v. Lopez*, the court held that the Gun Free School Zones Act, which made it a federal offense to possess a firearm in a school zone, was unconstitutional on the ground that it exceeded the authority of Congress under the commerce Clause of the Constitution.

Wickard appears to have limited judicial power vis-a-vis congressional power and increased federal power vis-a-vis state power, and *Lopez* appears to have limited somewhat congressional power vis-a-vis state prerogatives.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

D. *Baker v. Carr*, 369 U.S. 186 (1962).

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 13. The Constitution provides that, under the Tenth Amendment, powers not delegated to the United States by the Constitution respectively, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In *United States v. Lopez*, the Court held that the Gun Free School Zones Act, which made it a federal offense to possess a firearm in a school zone, was unconstitutional on the ground that it exceeded the authority of Congress under the Commerce Clause of the Constitution.

In *Printz v. United States*, the Court held that the Brady Handgun Violence Prevention Act was unconstitutional because it imposed an undue burden on local law enforcement officials.

In *Alden v. Maine*, the Court sustained the right of States to sovereign immunity under the Eleventh Amendment from suits brought by citizens of their own State and found that it was beyond congressional power to abrogate that immunity in the exercise of Article I powers.

In *Baker v. Carr*, the Court found that Article III courts had jurisdiction over challenges to apportionment and that the questions presented were not non-justifiable.

In *Shaw v. Reno*, the Supreme Court applied a strict scrutiny standard of review for redistricting plans which rely on race and thus required a showing of compelling state interest for a state to treat some of its citizens differently from others on the basis of race.

In each of these cases the exercise of the power of judicial review had some effect on the division of power between the national and state governments with *Lopez*, *Printz*, *Alden* and *Baker* appearing to place limits on state apportionment by providing for judicial review of claims involving the right to vote.

Question 14. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of the prisons, schools, or state agencies?

Answer 14. No, federal district courts should rule on actual cases or controversies, and then in a very limited way; they simply do not have the institutional role or expertise in the administration of prisons, schools or state agencies.

NICHOLAS G. GARAUFGIS TO RESPONSES OF FOLLOW-UP QUESTIONS FROM SENATOR SMITH

Questions 1. Are there any questions that you feel are off limits for a Senator to ask?

Answer 1. No. Senators may ask any questions in the exercise of their responsibilities under the "advice and consent" clause.

Question 2. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 2. No District Court judges and Circuit Court judges are obligated to follow the precedent established by decisions of the Supreme Court.

Question 3. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 3. The *Dred Scott* decision was overruled by the Thirteenth and Fourteenth Amendments to the Constitution. I cannot say without benefit of the briefs, arguments and court deliberations how I would have decided the case at the time.

Question 4. In *Dred Scott v. Sanford* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 4. The *Dred Scott* decision is no longer precedent because it was nullified by subsequent constitutional amendment, which the federal courts are obligated to follow.

Question 5. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 5. In 1857, as a District Court judge, I would have been obligated to follow the *Dred Scott* decision as binding precedent.

Question 6. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 6. *Plessy v. Ferguson* was specifically overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), which is now binding precedent. District Court judges are obligated to follow *Brown v. Board of Education*. I cannot say without

the benefit of the briefs, arguments and court deliberations how I would have decided the case at the time.

Question 7. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide “equal but separate accommodations” for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 7. *Plessy v. Ferguson* has been overruled and has no precedential effect.

Question 8. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 8. It is impossible to conjecture as to how I might have voted as a Supreme Court Justice in 1954, but I would like to believe that I would have ruled as the unanimous Court did. I cannot say without benefit of the briefs, arguments and court deliberations how I would have decided the case at the time.

Question 9. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 9. The courts must give *Brown v. Board of Education* and all other Supreme Court decisions which have not been overruled or modified full force and effect in applicable cases that come before them.

Question 10. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 10. It is impossible to know how I would have ruled in *Roe v. Wade* without the benefit of the briefs, argument and conference with my judicial colleagues.

Question 11. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or to the Justice Rehnquist dissent in that case?

Answer 11. The lower courts are obligated to give the holding of *Roe v. Wade*, as modified to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and all other Supreme Court decisions that have not been overruled or modified, full force and effect in applicable cases that come before them.

Question 12. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 12. If I were confirmed as a District Court judge, I would be obligated to follow the precedent of the Supreme Court and the federal appellate courts irrespective of any personal views on this or any other subject that may properly come before me.

Question 13. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 13. I have no personal views that would interfere with my obligation to follow the Supreme Court’s precedents upholding the death penalty.

Question 14. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 14. I have no personal views that would interfere with my ability to follow precedent on Second Amendment or other cases. A District Court judge’s only role is to apply the Constitution, statutes and case law of the Supreme Court and the Court of Appeals.

Question 15. In *Planned Parenthood v. Casey*, (505) U.S. 833 (1992) the Supreme Court held that the government interest in preserving life must be balanced against a mother’s right of privacy and access to abortion which may not be unduly burdened. Do you believe the “right to privacy” includes the right to take away the life of an unborn child?

Answer 15. I have no personal views that would interfere with my ability to follow precedent including the Supreme Court’s holding in *Casey*, where the Court held that State restrictions on abortions are permitted as long as those restrictions do not impose an “undue burden” on a woman’s right.

Question 16. Again, I understand the state of the law on the Supreme Court’s interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 16. I would be obligated to follow the precedent of the Supreme Court and the federal appellate courts irrespective of any personal views on this or any other subject that may properly come before me if I am confirmed as a District Court Judge.

Question 17. Do you believe that the death penalty is Constitutional?

Answer 17. Yes, in *Greg v. Georgia* the Supreme Court found the death penalty to be Constitutional. District Court Judges are obligated to follow that precedent and have no beliefs that would prevent me from following that precedent.

Question 18. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 18. Under the rule of *stare decisis*, the Supreme Court ordinarily gives its prior decisions full precedential deference. Factors that the Supreme Court applies when considering overruling a prior decision include: whether the rule has proven to be intolerable by defying practical workability; whether special hardship would result if the case were overruled; whether related principles of law have developed such that the old rule is no more than a remnant of an abandoned doctrine; and whether facts have so changed as to have robbed the old rule of significance, applicability or justification.

Question 19. Do you consider legislative intent and the testimony of elected officials in debate leading up to passage of an act? And what weight do you give legislative intent?

Answer 19. When a court is required to interpret a statute to decide a case properly before it, should first look to the specific statutory language to ascertain the enactment's meaning and effect. If further assistance is needed in determining the statute's meaning and effect, it may be helpful to search the legislative record. As part of that process, a court should examine all the legislative activities that led the legislature to the statute's enactment. However, it is important to do that with caution since the legislative record may reflect only the views of one or a handful of legislators. It is also critical to consider the decisions of the federal and state appellate courts regarding statutory construction so that a court's actions will be procedurally consistent with precedent.

RESPONSES OF NICHOLAS G. GARAFIS TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes. I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I were to disagree with such precedent.

Question 2. How would you rule if you believe the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores*, 521 U.S. 507 (1997), where the Court struck down the Religious Freedom Restoration Act.

Answer 2. A District Court judge is obligated to follow precedent even if he or she believes that the Supreme Court or the Court of Appeals erred, and if confirmed I would do so.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring promotion, layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer 3. The Supreme Court has established the Constitutional standards by which the use of race or national origin-based preferences in such areas as employment decisions, college admissions and scholarship awards and the awarding of government contracts shall be tested. If confirmed by the Senate as a federal District Court judge, I will follow the precedent established by the Supreme Court in any case that properly comes before me for adjudication. The standard imposed by the Supreme Court for such cases was decided in *Adarand v. Peña*, 515 U.S. 200 (1995). The Court imposed the "strict scrutiny" test, requiring that such programs be narrowly tailored to advance a compelling governmental interest. The Supreme Court

has also established that gender-based preferences are subject to intermediate scrutiny.

Question 4. Are you aware of the Supreme Court's decision in *Adarand v. Peña*, 515 U.S. 200 (1995), and the Court's earlier decision in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer 4. I am aware of the Supreme Court's decision regarding the use of race to distribute government benefits or to make government contracting or hiring decisions in *Adarand v. Peña* and *Richmond v. J.A. Croson Co.* In *Croson*, the Supreme Court held that the Fourteenth Amendment requires strict scrutiny of a race-based action by state and local governments. *Adarand* extended the strict scrutiny requirement to all race-based programs (federal, state and local). Under the "strict scrutiny" test, the Court mandated that any such programs would have to be narrowly tailored to advance a compelling governmental interest.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer. Yes, I am committed to following the precedent of higher courts on equal protection issue.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer. I have no legal or moral beliefs that would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal judge.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the Federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer. Yes, to both questions. I believe that federal courts should focus their resources on cases that properly come before them in a fair and expeditious manner, including capital cases.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 8. A federal judge should follow precedent in determining the legal effect of a statute or constitutional provision and should examine the provision to determine its meaning. Precedent requires that statutes be presumed to be constitutional. To the extent that a provision's application to a specific factual situation is not clear from its language, a federal judge may look to the provision's legislative history to federal and state court decisions interpreting similar provisions and all other means of constitutional and statutory construction authorized by the Supreme Court and appellate courts.

Question 9. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of Constitution; (2) discernment of the "community's interpretation" of constitution text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 9. Federal judges are required to look to the Constitution itself for instruction, including the plain meaning of the text and the original intent of the Framers. Rather than relying on the views of any particular commentator on constitutional construction, federal judges should look to the decisions of the Supreme Court and the federal appellate courts for guidance when interpreting the Constitution. Should a constitutional provision be ratified pursuant to Article V, federal judge should give it the deference and effect to which all constitutional provisions are entitled. To the extent that Justice Brennan is advocating "community interpretation" of constitutional text as a legitimate basis to establish a right not in the Constitution, to the extent he believes it is a valid basis for establishing a right, I believe it is not appropriate for judges to take such an approach to establish such a right.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of the first impression? In a case of the first impression?

Answer. All statutes are entitled to the presumption of constitutionality. Consistent with that principle, a judge should analyze cases involving statutes as follows. In a case that is not one of first impression, a judge should apply precedent of the Supreme Court and the federal and state appellate courts. In a case of first impression, a judge should, consistent with the presumption of constitutionality of legislative enactments, examine the statute by applying the analysis used by federal and state appellate courts in analyzing statutes with similar construction provide analogous precedent.

Question 11. In your view, what are the source of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965),

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 11. In these cases, the Supreme Court has interpreted the Constitution to protect rights or immunities that are not specifically enumerated in the Constitution. The Supreme Court ruled in *Griswold v. Connecticut* that the implied right of privacy was entitled to full constitutional status. The Supreme Court has addressed the scope of Eleventh Amendment protection of sovereign immunity in *Alden v. Maine*. In that case, the Court looked to history, precedent, practice and the structure of the Constitution to find no compelling justification for a statute limiting a state's immunity from suit in its own courts. A District Court judge is obligated to follow these precedents when they are applicable.

Question 12. Compare the following cases with respect to the fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer. These two cases demonstrate the sensitivity of the Supreme Court to federal legislation, premised on the Commerce Clause, that affects or eliminates state and local control. In *United States v. Lopez* the Court recognized the limited local nature of the activity which Congress sought to regulate (carrying a gun in a school zone) and found it not to be an economic activity that could be regulated under the Commerce Clause. But in *Wickard v. Filburn*, the Court decided that the local conduct at issue (overproduction of wheat in violation of a federal statute) could in the aggregate substantially affect interstate commerce and therefore could be the subject of federal legislation under the Commerce Clause. If confirmed as a District Court judge, I would follow the precedent as set forth those cases when applicable.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

E. *Baker v. Carr*, 369 U.S. 186 (1962).

F. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 13. These cases recognize that the division of powers is critical to the governance relationship between the States and the federal government. The Supreme Court has noted that the States' proximity to their citizens places them in a unique position to address historically local concerns. If confirmed as a federal district judge, I would exercise great care and sensitivity in observing the rules articulate in these cases and would follow any applicable precedent.

In *United States v. Lopez*, the Supreme Court struck down a federal statute which interfered with an area historically left to the States to regulate. The Court found insufficient evidence that the conduct that it prohibited (possessing and carrying concealed handgun into a school zone) was of sufficient economic importance to be a valid exercise of federal legislative authority under the Commerce Clause.

In *Printz v. United States*, the Supreme Court reaffirmed the Constitution's structural principle of dual sovereignty. The Court struck down a provision of the Brady Handgun Violence Prevention Act that obligated local law enforcement officers of each jurisdiction to conduct background checks for gun purchasers until a

nationwide system became operative. The Court's decision limited the ability of the federal government to control the activities of state and local officials in an area historically left to state and local control.

Alden v. Maine addressed the question of whether Congress has the authority under Article I to abrogate the sovereign immunity of the States in their own courts. The Court concluded that there was no compelling evidence to permit such a Congressional act abrogating the States' immunity.

Baker v. Carr is early in a long line of cases interpreting the "one person, one vote" principle in legislative districting cases. The Court found the apportionment of state legislative districts to be a justiciable issue and subject to the federal courts' subject matter jurisdiction. This decision allowed courts to review claim of individual citizens about state and federal reapportionments.

In *Shaw v. Reno*, the Supreme Court ruled that where it is alleged that a reapportionment scheme distinguishes voters solely on the basis of race, it is subject to review under the "strict scrutiny" test. Under this decision, districting enactments whose sole purpose is to address racial discrimination must be narrowly tailored to advance a compelling governmental interest.

Question 14. Do you believe that federal district court has the institutional expertise to set rule for and oversee the administration of prisons, schools, or state governments?

Answer 14. In our system of government, the executive and legislative branches have the special expertise and authority to administer such governmental entities as prisons, schools and government agencies. The executive branch operates such governmental entities, and the legislative branch provides funds and oversight. Courts do not have such expertise.

RESPONSES OF PHYLLIS J. HAMILTON TO QUESTIONS FROM SENATOR SMITH

Question 1. Are there any questions that you feel are off limits for a Senator to ask?

Answer 1. No, a Senator may ask any question.

Question 2. If a U.S. District Court Judge or a U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 2. No, a judge may not refuse to apply precedent established by the Supreme Court.

Question 3. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393?

Answer 3. It is impossible to say without the benefit of having read the briefs and reviewed the record of this case and without the ability to place myself in the shoes of people living in 1856, what I would have held as a Supreme Court Justice in *Dred Scott v. Sandford*.

Question 4. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you will know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 4. *Dred Scott v. Sandford*, is no longer good precedent in light of the abolition of slavery by the Thirteenth Amendment and the Fourteenth Amendment's extension of citizenship to all persons born or naturalized in the United States.

Question 5. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

Answer 5. Yes, I would be bound by the oath and mandated to follow Supreme Court precedent.

Question 6. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 6. It is impossible to say without the benefit of having read the briefs and reviewed the record of this case and without the ability to place myself in the shoes of people living in 1896, what I would have held as a Supreme Court Justice in *Plessy v. Ferguson*.

Question 7. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties

for violations by railway officials. How should that precedent be treated by the Courts?

Answer 7. *Plessy v. Ferguson*, is no longer good precedent in light of the Supreme Court's subsequent determination in *Brown v. Board of Education* that separate but equal educational opportunities are unconstitutional.

Question 8. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education* 347 U.S. 483 (1954)?

Answer 8. It is impossible to say without the benefit of having read the briefs and reviewed the record of this case, what I would have held as a Supreme Court Justice in *Brown v. Board of Education*.

Question 9. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 9. *Brown* is still good precedent and should be treated as such by the lower courts.

Question 10. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*. 410 U.S. 113 (1973).

Answer 10. It is impossible to say without the benefit of having read the briefs and reviewed the record of this case, what I would have held as a Supreme Court Justice in *Roe v. Wade*.

Question 11. In *Roe v. Wade*, 410, U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Renquist dissent in that case?

Answer 11. The Supreme Court's holding in *Roe v. Wade*, was modified by *Planned Parenthood v. Casey*, is binding precedent on the lower courts. I would follow *Roe*, as modified by *Casey*, in deciding any case before me on this question.

Question 12. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 12. I have no personal view on the issue of abortion that would affect in any way my ability to apply Supreme Court precedent in any case involving this issue.

Question 13. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 13. I have no personal view on the death penalty that would in any way affect my ability to impose or uphold the death penalty in any case before me.

Question 14. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 14. I have no personal view on the Second Amendment that would in any way affect my ability to decide issues arising under that amendment.

Question 15. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 15. the Supreme Court's holding in *Casey* is the law of the land, and I would follow it faithfully in reviewing any case on this issue.

Question 16. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being.

Answer 16. I have no personal beliefs on the issue of abortion that would in any way affect my ability to follow the law handed down by the Supreme Court.

Question 17. Do you believe that the death penalty is Constitutional?

Answer 17. Yes, and the Supreme Court so held in *Gregg v. Georgia*.

Question 18. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the court?

Answer 18. If I were a Supreme Court Justice, I would vote to overrule a Supreme Court precedent only rarely and only after examination of the following prudential and pragmatic considerations that have been articulated by the Supreme Court: whether the prior decision's central rule has been found to be unworkable; whether the rule's limitation on state power could be removed without serious inequity to

those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has rendered the rule a doctrinal anachronism; and whether the facts have so changed, or come to be seen so differently, as to have rendered the rule irrelevant or unjustifiable.

Question 19. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent.

Answer 19. Where the language of a statute is plain and unambiguous, resort to legislative history is unnecessary. When a statute is not clear legislative intent can be useful. However, a judge must be cautious when relying upon legislative history, because the reported history may not reflect the intent of all of the legislators or the entirety of the debate.

RESPONSES OF PHYLLIS J. HAMILTON TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes, I am committed to following the precedents of the higher courts even if I may personally disagree with them.

Question 2. How would you rule if you believed the Supreme Court of the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer 2. If I believed that the Supreme Court or the Court of Appeals had erred in rendering a decision, I would nevertheless apply that decision because judges are obligated to follow precedent.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the Fourteenth Amendment and federal Civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promoting, or layoffs), college admissions, and scholarships awards and the awarding of government contracts.

Answer 3. My best legal judgment on the lawfulness of race-based preferences under the Equal Protection Clause, based upon my understanding of the Supreme Court's decision in *Adarand v. Peña*, is that such preferences based on race or national origin are subject to the strict scrutiny test and thus, cannot survive unless they are found to serve a compelling state interest and are narrowly tailored to further that interest. The Supreme Court has found that gender-based preferences are subject to intermediate scrutiny.

Question 4. Are you aware of the Supreme Court's decision in *Adarand v. Penal*, and the Court's earlier decision in *Richmond v. J.A. Croson Co.*? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer 4. The Supreme Court held in *Adarand v. Penal*, 515 U.S. 200 (1995), that the federal government's race-based set aside program for awarding highway construction contracts is unconstitutional when it is design to remedy broad-based social discrimination rather than clearly identifiable discrimination perpetuated by a government entity. Therefore, under *Adaraand* the strict scrutiny test must be applied to all government affirmative action programs and racial classifications upon which they are based. Under the strict scrutiny test such programs may survive only if supported by a compelling state interest and if they are narrowly tailored to further that interest. In *Richomond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court held that the Fourteenth Amendment requires the strict scrutiny test to be applied to any race-based action by state and local governments.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 5. Yes, I am committed to following the precedents of the higher courts on equal protection issues regardless of any personal views I may have.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 6. I have no legal or moral beliefs that would inhibit or prevent me from imposing or upholding a death sentence.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously? Yes, I believe that a delay of ten years or more between conviction of a capital offender and execution is too long and that the federal courts should focus their resources on resolving capital cases fairly and expeditiously.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 8. In determining the validity of a statute or constitutional provision, judges may legitimately use, consistent with the exercise of Article III judicial power, the statutes and constitutional provisions themselves, precedent established by the higher courts, and legislative history to the extent that the intent of the legislature can be discerned from that history.

Question 9. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 9. Article III extends judicial power to all cases arising under the Constitution, the laws and treaties of the United States and limits judicial power to actual cases and controversies. Thus, in a case in which there is an attempt to establish a constitutional right not previously upheld by a court, the plain meaning of the text of the Constitution and its Amendments and the original intent of the Framers are legitimate sources of authority. It is not entirely clear to me what Justice Brennan contemplated as the community’s role in constitutional interpretation. If what he meant is that judges should decide cases in accordance with popular thought on a given subject, I would not view that as a legitimate source of authority. An amendment to the Constitution, ratified as required by Article V, however, would provide a legitimate source of authority.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 10. In a case that was not one of first impression, I would analyze the plain language of the statute and review precedent established by the Court of Appeals for my circuit and other circuits if none existed in my circuit and by the Supreme Court on that statute. I would also examine the constitutional provision that was implicated and the interpretations of that provision by the higher courts to determine if the original intent of the Framers could be ascertained. If the statute was not clear on its face, I would also look at its legislative history. Cases of first impression are rare. However, in such a case, I would look in addition at analogous statutes and precedent thereon.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III.

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 11. The Supreme Court held in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy which the Court found in a penumbra of the First Amendment. In *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Supreme Court held that states’ immunity from suit is a fundamental aspect of sovereignty they enjoyed even before the Constitution’s ratification. The Supreme Court did not rely on the actual language of the Eleventh Amendment, but instead found that sovereign immunity derives not from the Eleventh Amendment, but from the structure of the original Constitution. In both cases, the Supreme Court found rights that were not expressly enumerated in the Constitution. Although the sources of the rights differed in these two cases, they both remain valid precedent that as a district judge, I would be obligated to follow.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1995).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 12. *Wickard v. Filburn*, 317 U.S. 111 (1942), concerned a challenge to the constitutionality of the amendment to the Agricultural Adjustment Act of 1938, which regulated production and consumption of homegrown wheat. The amendments provided for the assessment of a penalty on any farmer who harvested more than this allotment permitted under the Act, regardless of whether the wheat was consumed locally or shipped out of the state. The Supreme Court held that the enactment of the amendments to the Act constituted a valid exercise of the power of Congress to regulate interstate commerce because the purpose and effect of the Act was to regulate the amount of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages. The Court held that even local activity can be regulated by Congress "if it exerts a substantial economic effect on interstate commerce."

United States v. Lopez, 514 U.S. 549 (1995), involved a challenge to the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone. The Supreme Court reiterated its holding in *Wickard*—that the test for determining whether an activity is within Congress' power to regulate under the Commerce Clause is whether it substantially affects interstate commerce. Applying this test, the Court found that possession of a gun in a school zone is not an economic activity that substantially affects any sort of interstate commerce. Moreover, the Court noted that the matter of possession of guns in local areas is a matter to be left to the states because the states possess the primary authority for defining and enforcing criminal law.

The power of both Congress and the federal courts is as set forth in the Constitution. The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Because powers not delegated to the federal government are reserved to the states, the power to regulate wholly intrastate commerce belongs to the individual states.

As the Supreme court recognized in *Lopez*, the effect of the decision in *Wickard* was to expand the previously defined authority of Congress under the Commerce Clause, partly in recognition of the changes that had occurred in the way business was carried on in the United States, while still maintaining the original intent of the Farmers that a balance of power be maintained between the state and federal government. In these cases, the Supreme Court has provided the lower federal courts with the standard—substantial effect on interstate commerce—for resolving challenges to Congressional power under the Commerce Clause.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

D. *Baker v. Carr*, 369 U.S. 186 (1962).

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 13. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court ruled that the test for determining whether an activity is within Congress' power to regulate under the Commerce Clause is whether it "substantially affects interstate commerce." The Court ruled that the enactment of the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause because the States possess the primary authority for defining and enforcing criminal law, and possession of a gun in a school zone is not an economic activity that substantially affects any sort of interstate commerce.

In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court ruled that the Commerce Clause does not authorize Congress to enact legislation compelling state governments to regulate interstate commerce. Thus, the federal government may not compel the States to execute or implement federal regulatory programs.

In *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Supreme Court ruled that the powers delegated to Congress under the Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts. The States' immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the ratification of the Constitution.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court ruled that a federal district court had subject matter jurisdiction over a case alleging that a Tennessee statute effected an apportionment that deprived Tennessee citizens of equal protection of the laws in violation of the fourteenth Amendment. The Court ruled that the claim was justifiable because it rested on an alleged denial of equal protection, and the right to relief was not diminished by the fact that the alleged discrimination was related to political rights.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court ruled that an allegation that North Carolina's redistricting legislation constituted an effort to segregate the races for purposes of voting was sufficient to state a claim under the Equal Protection Clause of the Fourteenth Amendment. The court remanded the case and ordered the district court to apply the strict scrutiny test under which race-based redistricting could not survive unless narrowly tailored to further a compelling government interest.

Under the federal system established by the United States Constitution, the federal government is a government of enumerated powers; the powers not delegated to the United States by the Constitution are reserved to the States and to the people. Because the power of the federal government is limited, Congress may not enact legislation that exceeds its authority under the Constitution, and the jurisdiction of the federal courts is similarly limited by the provisions of Article III.

Under the federal system established by the United States Constitution, the states retain the dignity of sovereignty, and may not be subjected to private suits in their own courts without their consent. However, the States are bound by obligations imposed by the Constitution and by federal statutes that comport with the Constitutional design. In ratifying the Fourteenth Amendment, the people imposed some limits on the power of the States, and granted Congress the power to enact appropriate legislation to enforce the Amendment.

Question 14. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies?

Answer 14. The ability of the federal courts to fashion remedies for statutory or constitutional violations, is limited by the case and controversy requirement of Article III. Any remedy should be fashioned as narrowly as possible within the limits of Article III. And beyond the Constitutional limitations, courts are neither designed nor equipped for the administration of prisons, schools or state agencies.

RESPONSE OF ROGER L. HUNT TO QUESTIONS FROM SENATOR SMITH

Question 1. Are there any questions that you feel are off limits for a Senator to ask?

Answer 1. No, a Senator may ask any question necessary to fulfill his or her obligation to exercise the advice and consent power of the Senate.

Question 2. If a U.S. District Court Judge or a U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 2. No, even if I believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, I would nevertheless be obligated to follow the established precedent when considering an issue controlled by that precedent.

Question 3. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 3. I do not know what I would have held in the *Dred Scott case*, without the benefit of the legal briefs filed in connection therewith, the arguments of counsel, and the deliberations of the Justices.

Question 4. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 4. *Dred Scott* was overruled by the Thirteenth and Fourteenth Amendments to the Constitution and is no longer precedent to be followed by the courts.

Question 5. If you were a judge in 1857, would you have been bound by your Oath and would you have mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 5. Yes, I would have been bound, in 1857, to follow the case inasmuch as it was legal and binding precedent at that time, until it was overruled.

Question 6. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 6. I do not know what I would have held in *Plessy v. Ferguson*, without the benefit of the legal briefs filed in connection therewith, the arguments of counsel, and the deliberations of the Justices.

Question 7. In *Plessy v. Ferguson*, 163 U.S. (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide “equal but separate accommodations” for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 7. *Plessy v. Ferguson* was overruled by *Brown v. Board of Education*, and its progeny and is no longer binding precedent.

Question 8. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 583 (1954)?

Answer 8. I do not know what I would have held in *Brown v. Board of Education*, without the benefit of the legal briefs filed in connection therewith, the arguments of counsel, and the deliberations of the Justices.

Question 9. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment of the Constitution. How should the precedent be treated by the Courts?

Answer 9. *Brown v. Board of Education* is still valid precedent as interpreted by subsequent cases and, if confirmed as a District Court Judge, I would be obligated to follow that precedent.

Question 10. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 510 U.S. 113 (1973)?

Answer 10. I do not know what I would have held in *Roe v. Wade*, without the benefit of the legal briefs filed in connection therewith, the arguments of counsel, and the deliberations of the Justices.

Question 11. In *Roe v. Wade*, 510 U.S. 113 (1973), the court held that a Texas Statute which proscribed an abortion except when necessary to save the life of the mother was a violation [of the] due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 11. As modified by *Planned Parenthood v. Casey*, the majority opinion is still binding precedent and I would be obligated to follow the precedent as a District Court Judge.

Question 12. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 12. I am obligated to follow the precedent established by the Supreme Court and I have no personal views that would interfere with my ability to do so.

Question 13. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 13. I have no personal view that would preclude me from following Supreme Court precedent with respect to the death penalty.

Question 14. W[e] understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 14. I have no personal views that would prevent me from following the precedent of higher courts on the meaning of the Second Amendment.

Question 15. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother’s right of privacy and access to abortion which may not be unduly burdened. Do you believe the “right to privacy” includes the right to take away the life [of] an unborn child?

Answer 15. As *Casey* reflects the current law of the land on this issue, it is my duty to abide by that precedent until or unless it is changed. I would abide by my obligation to follow precedent on this issue, as with any other issue, which has been established by the Supreme Court.

Question 16. Again I understand the state of the law on the Supreme Court’s interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 16. I understand my obligation to be, with respect to matters involving the unborn, as with all issues, to follow the Constitution, statutes, and the case law

of the Supreme Court and Circuit Court. I have no personal beliefs that would prevent me from following established precedent on this issue.

Question 17. Do you believe that the death penalty is Constitutional?

Answer 17. Yes, and the Supreme Court has found the death penalty to be constitutional. Both in my current position as a U.S. Magistrate Judge and, if I am fortunate enough to be confirmed, as a District Judge, I am committed to follow the precedents established by higher courts.

Question 18. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 18. It is difficult to be sure that one could identify all the circumstances which might cause a Supreme Court Justice to consider overruling a precedent, given the importance of stare decisis. The Supreme Court identified several in its decision in *Planned Parenthood v. Casey*, including: whether overruling a prior decision would be consistent with the rule of law; the court must gauge what the respective costs are of reaffirming or overruling a prior case; whether the existing rule has proved intolerable or unworkable; whether there would be a hardship because of reliance on the prior existing law; and, whether the principles of law have developed, or the facts have changed, which leave the old rule merely an abandoned doctrine.

Question 19. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 19. Where the language of a statute is unclear, and there is no guiding precedent, it is appropriate for the court to consider legislative intent to the extent that the court can determine what the intent is of the legislative body. A judge must be careful not to confuse evidence of the intent of the legislative body with that of merely one of its members.

RESPONSES OF ROGER L. HUNT'S TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I were to personally disagree with a precedent.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for Example, the Supreme Court's recent decision in the *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer 2. Both in my current position as a U.S. Magistrate Judge and, if I am fortunate enough to be confirmed, as a District Judge, I am committed to following the precedents established by higher courts, regardless of whether I believed the court had seriously erred.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer 3. The Supreme Court has ruled that race and national-origin based preferences are inherently suspect and could not be used without strict scrutiny and can only survive such scrutiny if narrowly tailored to achieve a compelling state interest. The Court has also ruled that gender-based preferences are subject to the intermediate scrutiny test. There is nothing in my legal judgment that would dissuade me from following that established precedent.

Question 4. Are you aware of the Supreme Court's decision in *Adarand v. Pena*, and the Court's earlier decision in *Richmond v. J.A. Croson Co.*? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer 4. I am familiar with *Adarand v. Pena* and *Richmond v. J.A. Croson Co.*, and my understanding of those decisions is that such preferences are inherently suspect and cannot be used without strict scrutiny of such preferences, and thus

cannot be sustained unless justified by a compelling state interest and narrowly tailored to further that interest.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 5. I am committed to following the precedent of higher courts on equal protection issues, and any issue that would come before the court.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 6. I have neither legal nor moral beliefs which would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a District Judge.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 7. I believe that delays of 10 years or more between conviction of a capital offender and execution are too long, and the courts should make every effort to resolve all cases fairly and expeditiously.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 8. In determining the legal effect of a statute or constitutional provisions, one must begin with the presumption of constitutionality each duly enacted statute enjoys and then look to the text of the statute, or the text of the constitutional provision. A judge must then look to any established precedent in interpreting the statute or constitutional provision. If there are no precedents dealing with specific language, the court may look to interpretations of similar language in other statutes for guidance, by way of analogy or analysis. When dealing with interpretation of the meaning of a constitutional provision, the court can also look to the intent of the framers. Furthermore, when dealing with interpretation of a statute, the court can attempt to discern the intent of the legislature, although great care must be taken in attempting to determine what the intent was of the majority who passed the statute as opposed to the expressions of intent of individual legislators. These approaches serve to limit Article III judicial power.

Question 9. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the "community interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*. Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 9. Article III of the Constitution provides that the judicial power of the federal courts shall extend to all cases arising under the Constitution and the laws of the United States. Where the Supreme Court has spoken, the precedent established thereby is the law of the land and a District Judge is obligated to follow it. Where a right has not previously been upheld under the Constitution, the interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution is an appropriate and legitimate approach to understanding the Constitution. Attempting to discern a proper interpretation of the Constitution by reference to the current community's interpretations of the text is fraught with the danger of placing in the hands of one person, or a small group of persons, the task of accurately gauging the ever-changing mood of the public. The court is not suited institutionally to accurately determine the current community interpretation. The practical effect would be to affect through the judiciary what should properly be done through amendment to the Constitution. Ratification of amendments through Article V of the Constitution is the legitimate procedure for ensuring that the Constitution meets the changing, or unanticipated, needs of our developing society. The Framers displayed great foresight in providing for amendment after due deliberation by those duly designated to make such a decision, and not on the whim of a single person or a small group of persons.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 10. Analyzing a challenge to the constitutionality of a statute begins with the presumption that the statute is constitutional, an analysis of the text of the Constitution and adherence to the precedents already established, with the appropriate application of *stare decisis*. In a case of first impression, which is rare, the court may also look to analogous precedents. In determining the legal effect of a statute or constitutional provision, one must begin with the presumption of constitutionality each duly enacted statute enjoys and then look to the text of the statute, or the text of the constitutional provision. A judge must then look to any established precedent in interpreting the statute or constitutional provision. If there are no precedents dealing with specific language, the court may look to interpretations of similar language in other statutes for guidance, by way of analogy or analysis. When dealing with interpretation of the meaning of a constitutional provision, the court can also look to the intent of the framers. And, when dealing with interpretation of a statute, the court can attempt to discern the intent of the legislature, although great care must be taken in attempting to determine what the intent was of the majority who passed the statute as opposed to the expressions of intent of individual legislators.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 11. *Griswold v. Connecticut* found a peripheral right of privacy within the "pneumbra" of the First Amendment, even though a "right of privacy" is not found in the text of the Constitution. Likewise, *Alden v. Maine* looked beyond the language of the Eleventh Amendment to find that a State's sovereign immunity existed historically and independently of the language of the Amendment. The first case appears to enhance private rights against the government. The second appears to preserve a State's sovereign protection against certain suits by private citizens.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 12. The *Wickard* case applied a broad interpretation of the federal government's powers of regulation under the Commerce Clause of the Constitution to affect the price of grain through control of production, holding that it was not the nature of the activity, but the ultimate economic effect which controlled. The *Lopez* case applied a more narrow interpretation of the Commerce Clause when it found that the possession of a gun in a local school zone did not involve economic activity that substantially affected interstate commerce. The case found that there must be a "substantial effect" on interstate commerce before the power to regulate shifts from the state to the federal realm. Conceivably, *Lopez* gives the courts a comparatively larger role in examining the scope of the Commerce Clause. It would appear to reserve to the States certain actions which do not substantially affect interstate commerce.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

D. *Baker v. Carr*, 369 U.S. 186 (1962).

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 13. The concept of dual sovereignty is designed to protect individual rights and liberty. In *Lopez* the Supreme Court held that the federal government cannot preempt a state government's duty to establish criminal restrictions under the auspices of the Commerce Clause without there being a substantial impact on interstate commerce. In *Printz* it held the federal government could not place an undue burden on local law enforcement officials to carry out federal laws. In *Alden* the

court looked beyond the language of the Eleventh Amendment to find that a State's sovereign immunity existed historically and independently of the language of the Amendment, and held that Congress could not subject non-consenting States to private suits in federal courts under certain circumstances. In *Baker v. Carr* the court held that States cannot deny citizens constitutionally mandated equal protection in their voting rights as affected by voting districts, finding that such equal protection presented a justifiable issue authorizing the courts to examine States' redistricting. *Shaw* clarifies that redistricting cannot be based solely on race, without regard to traditional districting principles, and that any race-related consideration must be subject to strict scrutiny and thus narrowly tailored to further a compelling government interest. The foregoing cases could effectively increase the court's oversight responsibilities, but restrict its ability to act in any way which would invade or diminish the powers of the two sovereignties. *Baker* appears to give the federal government more power *vis a vis* the states, while *Lopez*, *Printz*, *Alden* and *Shaw* appear to limit federal power *vis a vis* the states.

Question 14. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prison, schools, or state agencies?

Answer 14. There has been criticism of some courts' efforts to implement judgments by effectively administering state agencies rather than relying on the responsiveness and institutional expertise of the executive and legislative branches of government. It is a judge's obligation to only decide cases before it by following established precedent. I am committed to following any higher court precedent if called upon to address this issue, and to avoid attempting to reach beyond the issues presented in a specific case, or to undertake a function for which other entities are available and better suited.

RESPONSES OF GERARD E. LYNCH TO QUESTIONS FROM SENATOR SMITH

Question 1. Are there any questions that you feel are off limits for a Senator to Ask?

Answer 1. The Constitution vests the Senate with the power and responsibility to advise and consent with respect to nominations to the federal judiciary. Every Senator has the right and indeed the obligation to ask any question he or she feels is relevant in determining how to exercise the Senate's prerogatives in this matter.

Question 2. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply the precedent to the case before him or her?

Answer 2. No. Under our system of law, if a precedent applies to the case before the court, it would be inappropriate for a judge not to apply it.

Question 3. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 3. When later generations have arrived at a virtually unanimous consensus, based on a thorough study of the historical and legal materials underlying the decision, the disastrous historical consequences of the decision, and the moral views of society, that the decision was disastrously wrong, it is tempting to take advantage of the privilege of hindsight, and proclaim that one would surely have decided the case otherwise. We would all like to think that we would not have made such a mistake as we now all agree the court made in *Dred Scott*. But I would be reluctant to claim that, had I been a member of the Court in 1856, confronting the materials before the Court in light of the understandings of the time, I would have had more wisdom than Chief Justice Taney, who was by all accounts a learned and honorable judge.

Question 4. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 4. The decision is no longer binding precedent, having been specifically overruled by the first sentence of the Fourteenth Amendment.

Question 5. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 5. Yes. It is a judge's obligation to follow the law, including the relevant precedents of the Supreme Court. If a judge cannot in good conscience apply the law of the land to the case at hand, he or she should not sit as a judge in that case.

Question 6. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 6. I would have to answer similarly to #3 above. I have always admired Justice Harlan's dissent in that case, and would like to believe that, had I been in the same position, I would have seen the case as he did. Once again, however, I have the benefit of 100 years of history that have vindicated his views. He and his colleagues did not.

Question 7. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 7. *Plessy* has been overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), and the public accommodations cases that followed it, and is no longer good law.

Question 8. If you were a Supreme Court Justice in 1954, what would have have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 8. As with other cases that have stood the verdict of history, I would like to believe that I would have reached the decision the Supreme Court reached in *Brown*. In this instance, since the Court was unanimous, it is easier to believe that, though in fact the case was clearly controversial at the time and some justices appear initially to have disagreed with the eventual decision.

Question 9. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 9. It remains the law of the land, and must be followed by the court.

Question 10. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 10. Unlike the cases discussed above, no clear consensus has emerged about *Roe*, which remains controversial to this day. Having grown up as a lawyer with *Roe* the law of the land, it is difficult to put oneself back to a time when the issue was a matter of first impression, and to attempt to consider the issue afresh. I do not know what I would have decided had I been a Justice in 1973. I do know that *Roe*, as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is the law of the land today. A district court judge is required to follow that precedent.

Question 11. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 11. The Court in *Roe* faced a difficult decision in light of its precedents about the meaning of the due process clause in its "substantive" aspect. Very few opinions on this subject, including those in *Roe*, are entirely satisfying or persuasive in reconciling those precedents with the outcomes reached by the writers. The majority opinion, however, as modified by *Caset*, is binding precedent, and must be followed by lower court judges regardless of any personal views.

Question 12. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 12. A judge's only role with respect to the abortion issue, as with respect to any issue that comes before him or her, is to apply the law, and not to promote any personal views. I hold no personal view that would interfere with my ability to do so.

Question 13. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 13. With respect to capital punishment, as with other issues, a judge's role is to apply the law. Whether capital punishment is desirable as a matter of policy is a matter for the legislature, not for the courts, and I have no moral scruple that would prevent me from imposing a death sentence in a case where that was the appropriate judgment under the law.

Question 14. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 14. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms

shall not be infringed.” If confirmed, and presented with a case implicating the Amendment, I would be required to look to the text of the Amendment, the relevant materials concerning the intentions of the framers, and governing precedent to determine its effect.

Question 15. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother’s right of privacy and access to abortion which may not be unduly burdened. Do you believe the “right to privacy” includes the right to take away the life of an unborn child?

Answer 15. *Casey* holds that the state has an interest in preserving life from the outset, but that interest must be balanced against the mother’s liberty protected by the Constitution, which may not be unduly burdened. A judge is obligated to follow that precedent.

Question 16. Again, I understand the state of law on the Supreme Court’s interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 16. A judge’s role with respect to this issue is to enforce the law, regardless of any personal beliefs. If confirmed, I would be required to do that. I hold no views that would prevent me from faithfully following applicable precedent.

Question 17. Do you believe that the death penalty is Constitutional?

Answer 17. Yes The Supreme Court held in *Gregg v. Georgia*, 428 U.S. 153 (1976), that the death penalty is constitutional when applied in accordance with the principles announced in that case.

Question 18. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 18. The principle of stare decisis is fundamental to the rule of law. The Supreme Court should rarely overrule precedents on non-constitutional matters, where any errors can be corrected by legislation if that is thought desirable by Congress. On constitutional matters, a Justice should vote to overrule precedents only when it is completely clear to him or her both that the precedent was wrongly decided, and that further experience has shown it to be unworkable, or that its results are seriously harmful or inconsistent with public morality.

Question 19. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 19. The primary consideration in determining the meaning of a statute is its language, for it is only the language (not committee reports or comments of individual legislators in debate) that is enacted by the Congress and signed by the President. Where the language is susceptible of different interpretations, a careful examination of the history surrounding its adoption may put the language into a context that will help clarify its meaning. Materials from the legislative process may help provide such a context, but such material must be used with caution and has no independent authority.

Question 20. You are an active member, American Civil Liberties Union, and obviously membership in any group is not a disqualifying factor to be confirmed as a federal judge. Do you subscribe to the ACLU’s opposition to the death penalty?

Answer 20. I believe the ACLU has taken the position that the death penalty is unconstitutional. To the extent the ACLU has taken that position, its views are contrary to the governing case law. As stated above, I have no moral or constitutional objection to the death penalty that would prevent my applying the established law.

Question 21. Again, membership in any group is not a factor to be considered to be confirmed to the federal bench, but judicial philosophy is a valid factor. Are you active in the ACLU’s Lesbian and Gay Rights Project, which promotes laws that provide special protections for homosexual individuals?

Answer 21. I have not played any part in establishing or elaborating the policies of that Project, or been active in it in any way.

Question 22. Do you support or oppose the ACLU’s opposition to prayer in public schools?

Answer 22. I understand the Supreme Court’s precedents to provide that the state may not prevent students from praying in schools, but that the state may not endorse or establish religion by officially-sponsoring prayer. The role of a judge is to apply that principle, and I hold no view that would prevent me from doing that. To the extent that the ACLU has taken a position on these issues that is inconsistent with the Supreme Court’s precedents, that position does not represent the law.

Question 23. Do you subscribe to the ACLU position on abortion?

Answer 23. My understanding of the law on abortion is that *Roe*, as modified by *Casey*, constitutes the law of the land. That is the law that a judge is bound to apply. To the extent that the ACLU has taken positions inconsistent with that understanding, its position does not represent the law.

Question 24. Have you done any pro-bono work, any speeches, or any advocacy for the ACLU?

Answer 24. I have never done any speeches, public advocacy, political activities or lobbying for the ACLU. I have participated in briefing five cases in the Supreme Court on behalf of the ACLU, or of clients who were referred to me by the organization. In each case I was asked by someone at the ACLU to take on the case. Each case involved criminal defendants with limited financial resources, in which significant legal issues were before the Court. The cases, my role in them, the issues on which I worked, and the results are set forth below:

1. *United States v. Koecher*, Docket No. 84-1922. Decided February 25, 1986. Reported at 475 U.S. 133. (Counsel of record for respondent; whether the Court should create a "co-conspirator" exception to the marital testimonial privilege; case was dismissed as moot.)

2. *United States v. Albertini*, Docket No. 83-1624. Decided June 24, 1985. Reported at 472 U.S. 675. (Participated in briefing for respondents; whether, as a matter of statutory interpretation, respondent's good faith belief that his attendance at public open house at military bases was not prohibited by an earlier order barring him from the base, constituted a defense to a charge of re-entering the base in violation of 18 U.S.C. 1382; the Court held that the conduct was covered by the statute.)

3. *Austin v. United States*, Docket No. 92-6073. Decided June 28, 1993. Reported at 509 U.S. 602. (Counsel of record on brief of ACLU as amicus curiae; whether the Eighth Amendment's excessive fines clause applies to civil forfeiture proceedings; the Court held that it does.)

4. *United States v. Ursery*, Docket No. 95-345. Decided June 24, 1996. Reported at 518 U.S. 267. (Participated in brief on behalf of ACLU as amicus curiae; whether successive criminal and civil in rem forfeiture proceedings violate the double jeopardy clause; the Court held that they do not.)

5. *New York v. Burger*, Docket No. 86-60. Decided June 19, 1987. Reported at 482 U.S. 691. (Counsel of record on brief of ACLU and NYCLU as amici curiae; whether state statute authorizing searches of scrap dealers' premises without probable cause was consistent with the Fourth Amendment; the Court held that the statute came within the administrative search exception.)

Copies of these briefs are being provided along with these answers. As the Committee is aware, in addition to these cases I have represented the United States as a prosecutor or supervising prosecutor in literally hundreds of cases in the district court and the courts of appeals, as well as a number of cases for private clients.

Question 25. It was reported that you, in an editorial, suggest in passing that laws criminalizing possession of marijuana are "politically controversial" and that people "don't really expect all these laws to be enforced to the hilt." See Gerard E. Lynch, "The Independent Counsel: The Problem Isn't in the Starrs but in a Misguided Law," *Was. Post* at C3 (Feb. 22, 1998). Do you still subscribe to that idea or has your position changed on the issue?

Answer 25. The article to which you refer argued that the Independent Counsel statute, which Congress has since allowed to expire, was a bad idea. The remark in question was part of a short discussion of the discretion of the Executive Branch with respect to investigating and prosecuting crimes. The article does not advocate any particular law enforcement strategy, with respect to marijuana or any other crime. It simply makes a descriptive statement: At least in the jurisdictions with which I am familiar, police devote great efforts to detect and arrest all violent criminals and drug traffickers, and in these cases prosecutors usually bring whatever criminal charges are sustainable. The authorities generally do not devote similar resources to detecting all cases of simple possession of marijuana (among many other crimes, some of which I also chose as examples), and prosecutors quite often allow offenders to be diverted from the criminal justice process altogether, or advocate sentences well below the maximum provided by law. This is what I meant by not enforcing those statutes "to the hilt." The discretion to which I referred is purely a function of the Executive branch of government. Judges, in contrast, have no discretion to enforce or not to enforce laws. They must apply the laws as they exist to the cases that prosecutors choose to bring. That is what I expected judges to do in the five years I served as a federal prosecutor, and that is what I would expect to do as a judge.

RESPONSES OF GERARD E. LYNCH TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes, that is my understanding of the role of a district court judge.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer 2. In this case, as in any other, a lower court judge simply has no authority to do anything other than to apply the decision of the Supreme Court, whether or not he or she agreed with the precedent or considered it erroneous.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotions, or layoffs), college admissions, and scholarship awards and the awarding of government contracts?

Answer 3. Legal judgment, and our understanding of legal principles, grows from precedent. In this case, for example, the strength of the argument against the constitutionality of government-imposed race-based or national origin-based preferences in employment draws powerful support from the ideal of a color-blind government proclaimed in such cases as *Brown v. Board of Education*. The governing precedents today clearly hold that racial preferences in hiring or contracting, like other racial classifications, are unconstitutional unless necessary, and narrowly tailored, to accomplish a compelling government interest. Judges are required to follow those precedents. Similarly, gender-based preferences are subject to the intermediate scrutiny described in *Craig v. Boren*.

Question 4. Are you aware of the Supreme Court's decision in *Adarand v. Peña*, and the Court's earlier decision in *Richmond v. J.A. Croson Co.*? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer 4. These cases hold that the government's use of race in such matters is subject to strict scrutiny, and can only be sustained where necessary and narrowly tailored to accomplish a compelling governmental interest. These are precedents that judges are required to follow.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 5. Yes.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge.

Answer 6. No, I have no legal or moral beliefs that would inhibit me from imposing or upholding a death sentence in any criminal case in which the death penalty is appropriate under the governing statutes and constitutional precedents.

Question 7. Do you believe that 10, 15 or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 7. Yes. I agree with both statements.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III power.

Answer 8. In interpreting any statute or constitutional provision, the language of the provision is the controlling consideration and the first place to look. It is only the language of the provision that was voted by the Congress and signed by the President, or proposed and ratified. Where the language is susceptible to different interpretations, it is appropriate to resort to evidence of its meaning that can be found in the history surrounding its adoption, for this context may help us to understand what the words were intended to mean. But such materials must be treated

with great care. They are not themselves legal authority. Where the legislative history of a given provision suggests a highly specific outcome that might or might not be consistent with the most reasonable reading of the words, particular care should be taken. All those who voted for or ratified a particular provision may not have been aware of or agreed with the particular interpretation placed on it by some supporters or opponents in earlier debates. Indeed, the more general or ambiguous language may have been chosen because the proponents of the more specific outcome could not succeed in enacting that outcome in specific terms, or because the enactors expected the language to be interpreted flexibly by future courts or agencies. Finally, precedent must be consulted and followed. In our system of law, courts are not permitted or required to revisit every issue *de novo*. Once a provision has been authoritatively interpreted by the Supreme court, lower courts must always, and the Supreme Court itself should ordinarily, follow that interpretation.

Question 9. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of the constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 9. As I understand the Article III judicial power, courts have no authority to do anything other than interpret the Constitution as it is written. As stated in my previous answer, this is primarily a matter of reading the language of the Constitution, including any amendments duly ratified under Article V. Unenacted “legislative history” must be used with great care in trying to determine the intended meaning of a provision. The framers and ratifiers of a particular provision voted on the words of the provision, and not on a particular viewpoint expressed by one of its drafters. If Justice Brennan meant that a Court may simply consult current public opinion in order to read new ideas into the Constitution, he was clearly wrong, for neither courts nor public opinion has the power to do this.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 10. In a case not of first impression, one would have to follow the governing precedent. Even in a case of first impression, precedent would ordinarily be the first recourse, because it is very rare that cases present entirely novel issues. Even if a case is not directly controlled by precedent, precedent sets the boundaries of decision. Analogous cases and non-binding authority from other circuits might provide insight toward the decision of the case. In the rare case in which a district court judge had to reason absolutely from scratch, the starting point would be to interpret the language of the statute, applying a presumption of constitutionality. Only if the language of the Constitution, properly interpreted, clearly required invalidation of the statute, should a lower court judge find that presumption overcome.

Question 11. In your view, what are the sources and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 11. In these cases, the Court seems to find its result not in the words of the constitutional provisions at issue, but in broader principles that the court finds underlying the provisions. In *Griswold*, the Court holds that there is a right privacy that can be found not in the actual language of, for example, the Fourth Amendment, but in the “penumbras” or background principles underlying a number of constitutional provisions. In *Alden*, the Court appears to find a principle of state sovereign immunity, not in the actual language of the Eleventh Amendment, but in structural principles underlying that Amendment. District judges are obligated to follow these precedents where they are applicable.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress’s power and on the federal government’s power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 12. These cases provide an example of the tensions between applying a strong presumption of the constitutionality of acts of Congress, promoting early understandings of the meanings of the Constitution, and defending states' rights. In *Wickard*, the Court applied a presumption of constitutionality, and upheld an expansive interpretation of Congress's power under the commerce clause. The constitutional text does not give a very clear meaning to the regulation of interstate commerce, and to have struck down the legislation would have risked asserting the power of unelected judges to invalidate Congress's considered judgment of its power. In *Lopez*, the Court applied a narrower view of the commerce power, emphasizing the balance of authority between the federal government and the reserved power of the states. District judges are bound to follow these precedents where they are applicable.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

- A. *United States v. Lopez*, 514 U.S. 549 (1995).
- B. *Printz v. United States*, 521 U.S. 898 (1997).
- C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).
- D. *Baker v. Carr*, 369 U.S. 186 (1962).
- E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 13. The division of power between the national government and the state governments plays several roles in our federal system. The states have an independent sovereign constitutional existence in their own right, that must be respected for its own sake. The framers of the original Constitution also believed that the separate existence of the states would protect individual liberty, since they feared that a national government would be too remote from the people, and therefore too oppressive. The framers of the post-Civil War amendments apparently believed that the federal government could also have a role in protecting the rights of citizens when state governments interfered with their rights. This complex constitutional structure creates a complex balance among federal power, state power and individual rights (Alden). The Supreme Court is sometimes put in the difficult position of having to reconcile the original Constitution's vision of a limited federal government with the power given to the federal government by the Fourteenth Amendment. The specific cases cited exemplify this tension in various ways. In some, the Court seems to have interpreted the Constitution to limit the power of the federal government, thus protecting state sovereignty and the liberty of people against federal criminal authority (*Lopez*, *Printz*), at the expense of invalidating acts of Congress. In others, the Court interpreted the constitution to allow federal courts to protect individual rights to equality at the expense of the authority of states to control their own government rights to equality at the expense of the authority of states to control their own government structures (*Baker*, *Shaw*). These precedents must all be followed by lower courts.

Question 14. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools or state agencies?

Answer 14. No. Federal judges are not selected or trained for their expertise in these areas, do not have the institutional resources to set policies for these institutions, and do not have constitutional authority to administer such institutions. Policy-making for these institutions belongs to various executive, legislative and administrative agencies. The judicial role is limited to enforcing relevant laws.

Question 15. You have written that you believe Justice Brennan's attempts to articulate constitutional principles "in the way that he believed made most sense today seems far more honest and honorable than the pretense that the meaning of those principles can be found in eighteenth- or nineteenth-century dictionaries." Can you explain what you mean by this statement? Do you believe that judicial attempts to discern the original intent of the Framers of the Constitution is dishonest and dishonorable "pretense"?

Answer 15. The statement quoted comes from a eulogy for Justice Brennan on the occasion of his death. I do not believe that good faith attempts to discern the original intent of the framers are dishonest or dishonorable. Judges and historians daily make honorable and honest attempts to understand the thoughts of the framers. Too often, however, the history that lawyers present to courts is deliberately or inadvertently biased by the position that lawyers as advocates would like to reach, and such resort to partial and limited sources can be used to support results that accord with policy preferences. While Justice Brennan took positions that can be

criticized as activist, it is generally agreed that he was forthright in stating his approach.

Question 16. You have written that the Supreme Court “is better placed [than the legislature] to decide whether a proposed course of action that meets short-term political objectives is consistent with the fundamental moral values to which our society considers itself pledged.” Can you explain what you mean by this statement?

Answer 16. The quoted statement comes from a book review in which I sharply criticize a book that makes the claim that courts have authority to enforce moral principles of its own choosing, a position I do not share. In the quoted passage, I was attempting to explain why the Supreme Court is given power to enforce the text of a written Constitution. Although this power is universally accepted in the United States today, and has become a model for other democratic countries as well, it was hardly obvious at the time of *Marbury v. Madison*, 1 Cranch 137 (1803), that courts should have the power to declare that acts of the legislature that it found inconsistent with the written Constitution are void. The framers adopted a written Constitution, and allowed the courts to enforce it, as part of a system of checks and balances. They were concerned that without a judicially-enforceable Constitution, legislatures might on occasion, in the understandable and laudable desire to accomplish good objectives, focus on the near-term benefits of a course of action, at the expense of the commands of the Constitution. The Supreme Court is not given this power because it has greater wisdom or skill in interpretation than the Congress. Legislators are at least wise and just and patriotic as judges, they take the same oath to uphold the Constitution, and they have the further advantage of democratic legitimacy. Rather, this task is assigned to the Supreme Court because of its institutional advantages. Because its members do not face re-election, they are freer from the pressure for immediate results. Because problems usually do not reach the Supreme Court until after the passage of time, the Court can often consider an issue with the luxury of some hindsight, after an apparent crisis has passed. If the Court had no such advantages, there would be little advantage to judicial review.

Question 17. If following established precedent in a particular case would cause a judge to reach an unjust result, and deviation from established precedent would achieve a just result, would the judge ever be correct in refusing to follow established precedent?

Answer 17. No. The judge’s role is to apply the law, not to make it.

RESPONSES OF DONNIE R. MARSHALL TO QUESTIONS FROM SENATOR HATCH

YOUTH DRUG USE

Question 1. Rise in youth drug use in rural areas: The Administration has been crowing that teen drug use since 1997 has decreased by 13 percent and appears to be “leveling off” for the first time since it began to increase in 1992. However, use among this age group remains markedly higher than it was in 1992. For me, the problem is, and I hope that you agree, that even if teen use is leveling off, it is leveling off at unacceptably high rates. For instance, use amongst eighth graders since 1992 has increased by 129 percent for marijuana, by 80 percent for cocaine, and by 100 percent for both crack and heroin.

Additionally, the perception that youth drug use is confined to our nation’s urban areas is proving to be mistaken. According to a recent report funded by the DEA, illegal drug use among teens is notably higher in rural America than in urban and suburban areas. The report found that eighth graders living in rural areas, as compared to eighth graders living in urban areas, are 104 percent likelier to smoke marijuana, and 83 percent likelier to use crack cocaine. This is particularly troubling to me and my constituents from the mostly rural state of Utah.

What do you think accounts for this drastic increase and do you have a strategy for bringing these numbers down?

Specifically, what can I tell my constituents back home that the DEA is doing to protect children living in rural areas from becoming victims of illegal drug trafficking and use?

Are you taking a different approach from that used in urban and suburban areas? If so, what is different?

Answer 1. One of the most worrisome trends to appear on the American drug scene is the spread of drug trafficking and its related violence into small rural towns and communities. Accounting for this, I believe, is a combination of criminal, societal, and economic factors. Among them are: an intentional effort by drug cartels and their cells to exploit new rural drug markets; changing demographics and migration patterns in the Midwest; increased reliance on the highway system to trans-

port drugs into and through the Midwest; a lack of parental involvement in the lives of their children; a lack of research on rural drug abuse, as well as law enforcement resources in rural America; and the glorification of drugs and reckless living in movies, television, and music that target youth.

During the last five years, drugs, gangs and international drug traffickers have spread into small American towns and suburban rural communities. As a result, these areas are now experiencing the same levels of drug abuse and drug related violence, crime and fear that major urban areas have witnessed over the years. The drug problems of smaller cities and rural areas have also been exacerbated by the emergence of methamphetamine trafficking and the violence associated with meth production and use.

To focus national attention to this threat to mid size American communities, DEA hosted a conference in February of 1999 which was attended by over 200 senior officials from law enforcement, prevention, and treatment agencies at the federal, state, and local levels. This conference resulted in specific recommendations to address the problems of increased drug trafficking and violence in rural and smaller cities.

In conjunction with this and as a follow-up to the Methamphetamine Interagency Task Force Report, DEA has worked with other Department of Justice components, as well as the Departments of Education and Health and Human Services to establish demonstration projects around the country. The purpose of these projects is to saturate a small area with aggressive enforcement action, as well as prevention, treatment, and targeted Federal funding in respond to increased drug trafficking and abuse.

One of our most successful domestic initiatives in assisting small communities in this country is DEA's Mobile Enforcement Team. The Mobile Enforcement Team (MET) was specifically designed to support state and local police agencies in identifying and dismantling violent drug trafficking groups operating in our communities. As of March 31, 2000 these MET deployments throughout U.S. communities have resulted in 9,894 arrests. The DEA has twenty-five MET Teams totaling approximately 260 agents who are highly mobile and specially equipped and able to operate anywhere in the United States. Once such MET team is currently deployed to Midvale, Utah. The MET is working with local authorities to collect intelligence and launch an investigation of a drug gang based out of one of the town's public housing projects.

In addition to the MET teams, the DEA established Regional Enforcement Teams (RET) to assist DEA Field Divisions and respond to selected investigations which cannot be addressed by law enforcement agencies in those areas. Currently two RET teams located in Charlotte, North Carolina and Des Moines, Iowa are fully operational. A third RET team located in Las Vegas, Nevada will be operational as of September 2000.

DEA's Demand Reduction Section, in conjunction with the National Crime Prevention Council, has conducted several three-day working group sessions, as follow-up to DEA's successful MET Program. This MET "Phase II" training is offered to selected community leaders where MET investigations have recently concluded. The training is intended to provide community leaders with instruction in community mobilization and drug demand reduction issues.

DEA is committed to recognizing and responding swiftly to the emerging drug trafficking threat in our smaller and mid-sized cities. In our budget submission request for 2000, we requested an increase for Domestic Enforcement Initiatives for mid-sized cities. However, this request was not included in the Administration's budget proposal. I hope to renew this request in our submission of our 2002 budget.

As you are well aware, for the past five years methamphetamine use and abuse has spread throughout Utah. Clandestine laboratory seizures have increased from 37 in 1995 to over 200 last year. In responding to this threat, DEA staffing in Utah has increased over 50 percent, from 12 Special Agents in 1996 to 19 Special Agents, 2 Intelligence Analysts, and 4 Diversion Investigators, which has enabled DEA to participate more fully in state-wide task force operations. The Metro Task Force now involves 24 Task Force Officers, along with 17 DEA Agents in the Salt Lake City Office.

In addition, DEA recently opened a Post of Duty in St. George, Utah and has provided specialized training to over 100 state and local officers to help them manage clandestine laboratories and investigate methamphetamine traffickers.

Finally, with your support, DEA intends to elevate its Salt Lake City Resident Office to a full District Office in the near future.

Question 2. Club Drugs: Recent studies show that teen use of highly potent and toxic so-called "club drugs" or "designer drugs," such as Ecstasy and GHB, is soaring out of control. Many teens do not perceive these drugs as harmful or dangerous and are using them at all-night dance parties called raves, which occur every weekend

across the country. Ecstasy is marketed to teens as a "feel good" drug and is widely known at raves as the "hug drug." In the last few years, seizures of Ecstasy alone have risen drastically and its allure to teens doesn't appear to be waning. Indeed, between 1998 and 1999, use of Ecstasy among twelfth graders increased by 56 percent and use among tenth graders increased by 33 percent. While GHB has received recently more negative attention due to several teen deaths attributed to its ingestion, its use also remains ubiquitous at these parties.

Is there any truth to the assertion that law enforcement is not targeting these drugs because of the fact that their distribution and use are not generally linked to violence and crime?

What action is the DEA taking to target these new drugs that apparently are being marketed to teens? Is the DEA working with other law enforcement agencies, specifically the Customs Service, to address the drastic rise in the importation of Ecstasy?"

Answer 2. The perception that the distribution and use of Ecstasy does not appear to be associated with violence and crime, in no way determines law enforcement's pursuit of targeting the manufacture, importation and distribution of this drug. Ecstasy, also known as MDMA, is a clandestinely manufactured Schedule I controlled substance, possessing stimulant and mild hallucinogenic properties whose production and trafficking has become a major problem for law enforcement across the nation and around the world. Ecstasy's attraction is due largely to the false perception as being safe and non-addictive. However, research conducted by the National Institute of Mental Health indicate that recreational MDMA users risk permanent brain damage that may manifest itself in depression, anxiety, memory loss, learning difficulties, and other neuropsychiatric disorders. The number of nationwide hospital emergency room mentions, particularly those involving MDMA have more than quadrupled from 1994 to 1999.

While MDMA is mostly produced in the Netherlands, Germany and Belgium, there has been a recent increase in the rise of clandestine MDMA laboratories in the United States. In response to this threat, the Drug Enforcement Administration has established several Special Enforcement Programs designed to provide specific resources and assets for MDMA investigations around the country as well as in our foreign offices around the world. DEA has not only partnered with our State and Local counterparts but we are coordinating our international investigations with the US Customs Service in order to target and dismantle the command and control aspects of these large scale trafficking organizations. In addition, DEA is coordinating international MDMA investigations with our foreign counterparts in these source countries. These multi-faceted cooperative law enforcement efforts have resulted in the identification of several large-scale MDMA trafficking organizations currently under investigation in the United States and abroad. In Fiscal Year 1999, DEA New York seized over two million tablets of MDMA as a result of such cooperative investigations.

Additionally, DEA has immediate plans to work with law enforcement and community leaders to focus greater attention on this problem and find more effective ways to combat this growing problem.

Finally, while our principal response to this threat requires a law enforcement approach, DEA is committed to working with communities and civic organizations across our nation in order to establish programs, which will assist in reducing the demand for these types of drugs among our young people today.

II. METHAMPHETAMINE

Question 1. Methamphetamine strategy: As I am sure you are acutely aware, methamphetamine is fast becoming one of our nation's preeminent drug problems. Laboratory seizures continue to rise dramatically, increasing amounts of the drug are pouring into the United States from Mexico, and what was once a problem largely confined to the southwestern part of the country is now rolling across the heartland on its way to the East Coast. In my state alone, DEA lab seizures have risen from 29 in 1995 to over 200 last year-and that number does not even account for seizures by State and local officers. This is occurring despite the fact that I and several others on this Committee have worked hard over the past few years to pass legislation that provides additional tools specifically directed at the methamphetamine problem.

What is your strategy for confronting this growing problem? Does your strategy include a plan designed to stop the spread of methamphetamine to States that have, until now, been largely unaffected? If so, can you describe this plan?

Answer 1. Methamphetamine use and trafficking, traditionally concentrated in the western United States, has spread throughout the Midwest to the southeastern

United States. Mexico-based poly drug trafficking organizations dominate wholesale methamphetamine trafficking using large-scale laboratories in Mexico and the southwestern United States to produce the drug. DEA estimates 70% of the U.S. methamphetamine production and distribution is controlled by Mexico based crime groups out of Mexico and California.

Statistics indicate two distinct components to the overall methamphetamine problem. One involves the emergence of the Mexico based traffickers while the other involves the identification and clean up of the growing number of smaller producing "mom and pop" laboratories. As a result of the emergence of the Mexico based methamphetamine trafficking organizations as the primary sources of methamphetamine distributed within the United States, the DEA Special Operations Division (SOD) formulated a strategy in the summer of 1999, targeting these organizations production, transportation and distribution components nationally. These organizations have expanded their bases of operations to numerous cities from California to the heart of the Midwest and beyond. These Mexican national traffickers have placed organizational members within existing, established, law-abiding Hispanic communities in these areas in an attempt to thwart local law enforcement efforts to identify and immobilize these methamphetamine organizations.

Traditionally, local law enforcement efforts in these areas, while effective in the short run, have not attacked these investigations on a national scale as has been done with traditional cocaine investigations. As a result, an overall enforcement strategy to include production, transportation and distribution of methamphetamine/precursor chemicals, as well as rogue suppliers of diverted precursor chemicals, was developed and is currently being implemented. This strategy includes targeting command and control communication apparatus, identifying methods of narcotics proceeds transfers and asset forfeitures. Traditional law enforcement efforts and techniques produced periodic successes, but never identified nor eliminated the organizational structure. Numerous Title III court authorized wire interceptions targeting these organizations has resulted in the dismantling of the organizations in their entirety and the identification of transportation and production components.

We are cautiously optimistic that this strategy, combined with precursor chemical controls and aggressive state and local police efforts combating methamphetamine have produced some very positive results. The average purity of methamphetamine exhibits seized by DEA has dropped from 71.9% in CY-1994 to 31.1% in CY-1999. The average purity of amphetamine exhibits seized by DEA has dropped from 56.9% in CY-1997 to only 20.8% in CY-1999. Arrests in DEA methamphetamine investigations increased in Fiscal Year 1999, to 8,680, a 10% percent increase from the 7,888 arrests in Fiscal Year 1998, but a 41% increase over the 6,145 arrests in FY-1997, and a significant 113% increase over the 4,069 arrests in FY-1996.

Another method which the DEA utilizes to disrupt and dismantle methamphetamine manufacturing and distribution organizations is through its highly successful Mobile Enforcement Team (MET) Program. Since the program's inception in early 1995, approximately 27 distinct methamphetamine trafficking organizations have been targeted and disrupted. Of the ten deployments which took place within the San Francisco Division, all targeted methamphetamine distribution organizations. Of the deployments which occurred in the Seattle, San Diego, and Phoenix Divisions, the preponderance of MET deployments targeted methamphetamine trafficking organizations. The Dallas and Denver Divisions each targeted two specific methamphetamine distribution organizations during their MET deployments. However, it is important to note the majority of MET deployments in the United States target polydrug trafficking organizations which traffic in methamphetamine to varying degrees.

DEA has also dramatically increased its efforts in providing the specialized training and equipment, mandated by federal regulations, for state and local law enforcement officers who participate in raiding methamphetamine laboratories. We conservatively estimate at least 80% of the state and local law enforcement officers in the nation who are "safety certified" to process methamphetamine laboratories received their initial one week training certification from the DEA Clandestine Laboratory Training Unit. In FY-1995, DEA trained and "certified" 118 law enforcement officers to raid clandestine drug labs. In FY-1999, 1,366 students graduated from the DEA Clandestine Laboratory Safety School. Each of these officers was issued over \$2,000 in specialized clandestine laboratory safety equipment. Plans have been formulated to conduct training programs for 1,968 law enforcement officers in FY-2000. These figures do not include the thousands of law enforcement officers and civilian personnel who have received DEA training in shorter classes and seminars on clandestine lab awareness, investigations, and/or annual recertification training in conferences across the country.

The significantly larger number of officers/agents who have been "safety certified" to raid clandestine laboratories, as well as the recent significant national drop in methamphetamine purity (71.9% in 1994 compared to 31.1% in 1999), have been a factor in the dramatic rise in clandestine laboratory seizures. Obviously, the more officers/agents who are trained to investigate clandestine labs will have a significant impact on the number of labs seized.

In response to the portion of your question regarding DEA planning to "stop the spread of methamphetamine to States that have, until now, been largely unaffected", I would point out the previously cited statistics on the dramatic increases in DEA training efforts for state/local police also included a significant portion of training for states which have not yet experienced, or are only now beginning to experience, an increase in methamphetamine lab seizures.

In the enforcement/operations arena, DEA is on the forefront of efforts to combat methamphetamine production, but the role DEA plays in some regions of the country may be different from others, depending on the nature of the methamphetamine problem in that region. DEA Clandestine Laboratory Enforcement Teams in the Midwest U.S. have traditionally been very active in the seizure of the small "mom and pop" operations because of the lower numbers of local/state police officers who are trained to conduct methamphetamine laboratory raids. The number of clandestine laboratory seizures in which DEA participated has increased from 362 in CY-1995 (327 methamphetamine) to 2,021 in CY-1999 (1,986 methamphetamine). This is a 458 percent increase in only five years. The combined DEA and state/local police clandestine lab seizures for CY-1999, reported to the National Clandestine Laboratory Database at EPIC, was 7,010 laboratories (6,793 methamphetamine), and reports for CY-1999 lab seizures are still coming in from state and local police agencies across the country.

DEA efforts in California are primarily focused on the investigations of the larger lab production operations, which produce the vast majority of the methamphetamine in the U.S., and the command and control structure of the significant Mexican drug trafficking organizations who operate them. In addition, DEA's Special Operations Division and Office of Diversion Control area actively involved with state and local police in chemical interdiction operations.

In many Midwest and Eastern U.S. states, clandestine laboratory operations are a relatively new phenomenon, and DEA lab teams are therefore more actively involved in the seizure of small production lab operations in these regions. This is because of the lower numbers of state/local police officers who are trained and do not have the adequate equipment to respond to the growing number of small production lab seizures.

DEA has also provided much needed assistance to state/local policy agencies in the cleanup of clandestine laboratories through the COPS program. In 1999, DEA conducted more than 3,800 clandestine laboratory cleanup operations—the majority of which were state or local policy agency requests for assistance. The average cleanup cost of approximately \$4,000, varies by region, by DEA has facilitated the cleanup of clandestine laboratories which cost in excess of \$100,000. It is noted the seizure of a large lab or multiple small lab operations could easily bankrupt a small policy department or rural sheriff's office.

DEA has formulated plans to establish a "Dangerous Drug Desk" to further enhance and coordinate the current programs and limited resources in the DEA Methamphetamine Program. The "Dangerous Drug Desk" at DEA Headquarters will upgrade the DEA Methamphetamine Program for a collateral duty of the Domestic Operations West Section to a primary component of the new Desk. In view of the unique nature and challenge of synthetic drug production operations (methamphetamine, MDMA, GHM, etc.), the investigation of these synthetic production and trafficking operations, as well as the specialized training, equipment, chemical interdiction, and investigative techniques required to combat them, will become the coordination responsibility of this new Desk.

DEA was allocated \$1,975,000 from a Congressional Appropriation for FY-2000 for the purchase of specialized lab raid safety equipment. In view of the dramatic increase in clandestine laboratory seizures in recent years, coupled with related fires, explosions, and toxic chemical injuries associated with these laboratories, a Clandestine Laboratory Safety Equipment funding site has been established within the DEA Methamphetamine Program. This funding is essential for officer safety and security.

This funding is being utilized to purchase and distribute a variety of specialized safety equipment, ranging from air monitors to chemical protection suits, to every domestic DEA field division to ensure agents and local police officers in DEA task force operations engaging in the high risk activity of executing raids on clandestine drug laboratories, have the essential tools to process these laboratories in a safe and

prudent manner. The funding allocation for clandestine laboratory safety equipment is now a DEA recurring budget item. These funds may be used for safety equipment and/or the purchase and repair of laboratory safety vehicles/trucks. DEA has also utilized other funding to purchase and distribute nine new specialized Clandestine Laboratory Safety Vehicles (trucks) to the field divisions.

Plans have been formulated for the continued distribution of this funding to the DEA Clandestine Laboratory Coordinators for the purchase of safety equipment and/or future raid truck repairs. The percentage distributed to each field division is based primarily upon the number of clandestine laboratories which are seized in each respective region. Some of this funding will be forwarded to the DEA laboratories to provide safety equipment to the DEA chemists who also participate in the hazard assessment and processing stages of clandestine laboratory seizures.

In addition to plans to streamline DEA Headquarters and field enforcement efforts to combat methamphetamine, DEA has formulated plans to enhance DEA training programs for state and local police involved in clandestine laboratory investigations. In Calendar Year (CY) 2000, the DEA Office of Training has planned programs for the implementation of three additional courses designed for state and local officers. These additional courses will assist state and local law enforcement agencies by providing advanced clandestine laboratory training, specialized tactical raid training, and a new clandestine laboratory awareness training course, in addition to the one week certification schools currently provided to officers nationwide. This program is designed to provide training to a pool of state and local law enforcement instructors in clandestine laboratory awareness and safety. Once trained, these police instructors will be provided with training material that can be utilized by them to conduct recertification training and awareness seminars throughout their respective states.

The DEA Office of Training has met with the executive board of the International Association of Directors of Law Enforcement Standards and Training (IADLEST) who have set up a seven member board consisting of regional directors to meet with the DEA Office of Training and assist in the implementation of the above mentioned training programs.

Question 2. Cleanup Funding: Another pressing issue on this topic concerns the cleanup of seized methamphetamine laboratories. With the record number of lab seizures, States and the DEA itself are running out of resources to handle lab cleanup. In light of this I was amazed to learn that the Clinton Administration rejected your request in this year's budget for \$21 million dollars for lab cleanup.

Do you know why your request was rejected? AND, What are you doing to address this problem?

Answer 2. I would like to assure you, Senator Hatch, that I too share your concern over the current lack of resources for methamphetamine related clandestine laboratory cleanup. The growing national problem of methamphetamine trafficking, use and abuse continues to place a tremendous burden on federal, state and local law enforcement personnel across the country.

In Fiscal Years 1998 and 1999, DEA received funding for state and local clandestine laboratory cleanup through the Department of Justice's (DOJ) Community Oriented Police Services (COPS) program. In Fiscal Year 2000, no additional funding was provided to DEA, through the COPS program, for this purpose. Instead, funding was provided through COPS to 14 states to cover the cost of methamphetamine-related cleanup, training and enforcement programs.

DEA began Fiscal Year 2000 with a total of \$7.9 million in its budget for state and local clandestine laboratory cleanup. Through the first half of the year, we continued to provide our cleanup services to state and local law enforcement organizations across the country on a first come, first serve basis. These services were provided through the use of residual COPS program funding, which we carried over from previous years' appropriations, and a small reserve of directly appropriated resources.

However, by mid-March, due to the spiraling increase in methamphetamine laboratory seizures across the country, we completely exhausted our existing cleanup resources. We now find ourselves in a position where we are unable to continue to provide cleanup services to state and local law enforcement upon request.

In addition, as you have noted, DEA did request an additional 10 positions and \$21.8 million in funding for methamphetamine related cleanup programs in the Department of Justice's Fiscal Year 2001 budget request to the Office of Management and Budget (OMB). Unfortunately this request was subsequently denied by OMB due to the limited availability of enhancement resources. This being the case, no additional DEA cleanup resources are included in the President's Fiscal Year 2001 budget request which currently sits before the Congress.

In an effort to address the current lack of cleanup funding, DEA is continuing to work closely with DOJ, OMB and the Congress to secure additional Fiscal Year 2000 resources for state and local clandestine laboratory cleanup. I understand that The Department of Justice (DOJ) has received approval from OMB to reprogram 10 million of DOJ funds to DEA and that this request has been sent to the Congress.

I am hopeful that through our continued efforts, we can find a solution that will work to alleviate some of the strain that the nation's methamphetamine crisis has placed on law enforcement personnel across the country. I would also like to assure you that we will continue to work with the President and Congress toward a long-term solution to methamphetamine problem, and more specifically the clandestine laboratory cleanup problem, in Fiscal Year 2001 and beyond.

III. ADMINISTRATIVE ISSUES

Question 1. Administrator Independence: Mr. Marshall, you have devoted your entire career to working as a law enforcement agent in the area of narcotics enforcement. Indeed, you began your law enforcement career in 1969 as a special agent for the DEA's predecessor agency, the Bureau of Narcotics and Dangerous Drugs. I commend you for your contribution and dedication to combating the illegal drug plague that has consumed America and continues to target our children. It is my understanding that if you are confirmed, which I expect you will be, you will be the first career DEA agent to rise through the ranks to Administrator. Understandably, you have received full support from current and former DEA agents, as well as from various federal and State law enforcement agencies.

I think everyone will agree that your background has prepared you to take on the enormously important duties and responsibilities that are inherent in the job of the Administrator of the DEA. I have spoken with you previously about concerns that have been raised regarding your ability appropriately to place public policy interests and affairs over the individual or collective interests of career DEA agents.

Can you assure me that as Administrator of the lead federal law enforcement agency in charge of domestic drug enforcement, you will be faithful in carrying out your duties to the public, even when doing so may conflict with the interests or desires of career DEA agents?

Answer 1. My first and foremost responsibility is to the American people. For more than 31 years I have lived my life in the service of the American people as a narcotics law enforcement officer. In this capacity I have taken an oath to protect and serve the citizens of this great country. With this oath attaches a tremendous responsibility and dedication to duty. I fully recognize the necessity of maintaining the public trust as a prerequisite to the effective performance of this responsibility and duty.

If confirmed, I will be the first career DEA Special Agent to rise through the ranks to Administrator. Over the course of my career and in my capacity as both Deputy Administrator and Acting Administrator, I have made, at times, decisions that may have conflicted with the interests or desires of career agents because it was in the best interest of the American people. I realize that first and foremost, my priority is to serve the American public to the best of my ability while providing the leadership necessary to ensure that DEA provides the best possible drug law enforcement to the people we serve. Each and every decision has been and must be done in an objective, impartial and fair manner, regardless of the issue or potential ramifications. I can assure you that we are a value-based institution where loyalty, duty, respect, honesty and integrity are the cornerstone of all that we do today. Without reservation, I can assure you that I will be faithful in carrying out the duties as the Administrator of the DEA, irrespective of the specific interests of others.

IV. MARIJUANA

Question 1. Trafficking in the District of Columbia: Recent news reports have caused me concern about the enforcement of marijuana trafficking laws in the District of Columbia. One article late last year in the Washington Post described the case of a woman who, despite being apprehended with fourteen pounds of marijuana, was charged only with a misdemeanor and, upon conviction, received a sentence that did not include any time in prison. Although the U.S. Attorney could have brought the case under tougher Federal laws, she chose to prosecute the woman under lenient District of Columbia laws. The result of this approach is not surprising: according to the Assistant U.S. Attorney who prosecuted the case mentioned in the article, "people come down to D.C. because they know marijuana is a misdemeanor." And the U.S. Attorney herself acknowledged that "[m]arijuana trafficking [in the District] is a highly lucrative, low-risk enterprise." I have attempted to look into this issue, but inexplicably, the Department of Justice has re-

fused to provide a copy of the marijuana prosecution guidelines used by the U.S. Attorney here in the District. One is left wondering why the U.S. Attorney does not exercise her discretion to prosecute marijuana cases under Federal law. After all, under Federal law a person possessing fourteen pounds of marijuana would face a felony conviction and a prison sentence of 15–21 months under Sentencing Guidelines.

Do you know anything about the marijuana problem here in the District? Would you agree that the certainty of felony convictions and prison sentences under Federal law undoubtedly would act as a greater deterrent to those who would sell marijuana in our nation's capital?

Answer 1. Marijuana is the most common drug of abuse in Washington, D.C. and is readily available in retail and wholesale amounts. In Washington, D.C., street level marijuana is often distributed and consumed in “blunts”—hollowed-out cigar wrappings containing marijuana, or marijuana and tobacco.

Marijuana trafficking organizations operating in the Washington, D.C. area are comprised of Jamaican trafficking organizations and local gangs. These organizations utilize a variety of means to import bulk amounts of marijuana into the Washington Metropolitan area. Smaller, multi-pound quantities of marijuana are routinely smuggled into the area by couriers or are mailed in express delivery parcels. For the past three years the Washington Division Office of the Drug Enforcement Administration, which covers Washington, D.C., Virginia, Maryland and West Virginia, has initiated over 102 marijuana cases which resulted in the arrests of over 280 suspects.

As a career Drug Enforcement Agent, I have seen the ravages of drug trafficking throughout our cities and towns in this nation and have witnessed the results of weak drug laws, which have led to increased use, and abuse of illegal drugs. I strongly believe that aggressive pro-active drug law enforcement coupled with severe penalties for drug trafficking is in fact a deterrent to drug related crime.

Question 2. Medical Marijuana: Currently, 18 states have passed laws or propositions allowing for the use of marijuana purportedly for medical purposes. As we all know, the campaigns for these laws and propositions have been fueled by pro-drug organizations that exploit the unfortunate medical conditions of some to further their ultimate goal of legalizing marijuana and other illicit drugs. In 1996, California voters approved Proposition 215, the medical marijuana initiative, which grants people, with the recommendation of their physician, the right to obtain and use marijuana for medical purposes. After this initiative was approved in California, former Attorney General Dan Lungren, along with the federal government, continued to prosecute under federal law cases where people were growing, selling, or using marijuana, regardless of the purpose for engaging in such activities. However, the current Attorney General, Bill Lockyer, vowed to implement guidelines that would make marijuana available pursuant to Proposition 215. Some California cities have resorted to passing ordinances allowing for the medical use of marijuana due to the uncertainty and vagueness of the State initiative. As a result of the initiative and ordinances, so-called cannabis clubs have popped up all over California. In fact, a “bed, bud and breakfast” is due to open soon in California, which caters to, and I quote, “medical marijuana users and all people who are seeking like expanding opportunities.” To smoke marijuana at this inn with impunity, one will need only have a note from a physician stating that he has a condition for which marijuana is considered helpful. This is obviously contrary to federal drug laws which regulate the distribution and possession of Controlled Substances, including marijuana.

What is the DEA doing to address the obvious conflict between federal marijuana laws and State laws, which allow for the distribution and use of marijuana?

What action, if any, is the DEA taking against physicians who prescribe or distribute marijuana to patients?

Will the DEA take action against physicians who recommend, as opposed to prescribe marijuana for patients? If so, how will the DEA keep track of these physicians?

Answer 2. As the question indicates, State laws that purport to authorize the use of marijuana for “medical” purposes directly conflict with federal law. Under the Controlled Substances Act (CSA), marijuana is classified as a schedule I controlled substance. By definition, schedule I controlled substances have “no currently accepted medical use in treatment in the United States” and a “lack of accepted safety for use . . . under medical supervision.” The CSA therefore prohibits the use of marijuana outside of research that has been approved by the Food and Drug Administration and registered with DEA. It is impossible for any citizen to use marijuana contemplated by State laws such as California Proposition 215 without violating the CSA. Furthermore, such State laws promote unlawful drug use, which frustrates the

purpose of the CSA and interferes with the United States meeting its obligations under international drug control treaties.

To address this situation, DEA has drafted legislation to amend the CSA to make clear that such State laws are preempted by the CSA. This draft legislation has been forwarded to the Department of Justice for review.

In addition, from an operational perspective, DEA continues to carry out its statutory mandate to suppress marijuana trafficking, with particular focus on investigating and dismantling major trafficking organizations. Where the Department elected to seek civil injunctions against several California "cannabis clubs," which claimed to be distributing marijuana under the guise of Proposition 215, DEA agents gathered evidence against the clubs, which provided the factual basis for the issuance of injunctions that ordered the clubs to cease their trafficking activities.

Question 3. What action, if any, is the DEA taking against physicians who prescribe or distribute marijuana to patients?

Answer 3. Because marijuana is a schedule I controlled substance, it is a criminal violation of the CSA for any physician to prescribe or distribute it to anyone. If DEA learns that any physician has prescribed or distributed marijuana, we will investigate the matter fully and, as the evidence dictates, seek the appropriate criminal prosecution or administrative action to revoke the physician's DEA registration.

Question 4. Will the DEA take action against physicians who recommend, as opposed to prescribe, marijuana use for patients? If so, how will DEA keep track of these physicians?

Answer 4. If a physician "recommends" marijuana with intent to facilitate the patient's unlawful manufacture, distribution, or possession of marijuana, this constitutes aiding and abetting a CSA violation, which is a criminal offense. In such circumstances, DEA will seek criminal prosecution and take administrative action to revoke the physician's DEA registration.

Where the physician "recommends" marijuana without criminal intent to facilitate a violation of the CSA, the situation is more complicated. On December 30, 1996, the Attorney General and the Director of the Office of National Drug Control Policy announced at a press conference that a practitioner's action of recommending a schedule I controlled substance is not consistent with the "public interest" (as that phrase is used in the CSA) and will lead to administrative action by DEA to revoke the practitioner's registration. Based on this statement, the United States was sued by a group of Californians who claimed that doctors have a "free speech" right to recommend that their patients violate the CSA by using marijuana. As a result of this lawsuit (*Conant v. McCaffrey*), the United States has been preliminarily enjoined from taking administrative action against California physicians who "recommend" marijuana to their patients unless the physician engages in conduct that "rise[s] to the level of a criminal offense."

Although DEA and the Department believe that the *Conant* preliminary injunction was issued without legal basis and should be reversed, DEA has abided by the court's order and will continue to do so while it remains in effect.

Federally maintained databases such as NADDIS provide information on whether an individual has been investigated, arrested, prosecuted, or convicted for violating the CSA. DEA also maintains a database indicating the registration status of DEA registrants.

V. MEXICO

Question 1. Mexican Trafficking: Recent news reports that Mexico, long a transshipment country for cocaine and a source country for marijuana, heroin and, increasingly, methamphetamine, has slipped backward in its effort to root out and dismantle powerful drug cartels. According to news reports, cocaine and marijuana seizures in the southwestern U.S. and along Mexico's pacific coast have escalated dramatically in the past two years. Seventy percent of all illicit drugs enter the U.S. from Mexico along the southwestern border, and between 1991 and 1998 seizures of marijuana have increased from 113 tons to 720 tons. At the same time, cocaine loads off Mexico's Pacific coast have increased dramatically. For example, on August 13, 1999, the Coast Guard stopped a Mexican fishing vessel stuffed with 10.5 tons of cocaine. In short, according to DEA, "Mexico-based trafficking organizations . . . have enhanced and strengthened their production, smuggling and distribution capabilities to ensure a continuous supply of drugs to U.S. communities."

Do you agree with this assessment? AND, What is your strategy to address this problem?

Answer 1. Yes, Mexican drug trafficking organizations continue to grow exponentially in their power and influence over the illicit drug market. Over the past several years these organizations have been responsible for the vast majority of cocaine,

marijuana and methamphetamine entering this country. Intelligence indicates that during 1999, there was a detected shift in drug smuggling activity from the Atlantic coast of the Yucatan peninsula to the Pacific coast of Mexico.

In an effort to strengthen DEA's efforts along the Southwest Border, DEA has developed a three-pronged approach: maintain a coordinated presence in Mexico, along the border; establish "off site" locations in the U.S. where agents from both sides of the border can meet and discuss ongoing investigations; and, to encourage and enhance the Vetted Units Program in Mexico. The following three steps have been implemented to enhance binational cooperation between the United States Government (USG) and Mexico in combating the shared threat posed by international drug trafficking:

1. First, in 1997, DEA, through the Department of State, petitioned the Government of Mexico (GOM) to increase the DEA's agent personnel by six in order to establish the Tijuana and Ciudad Juarez Resident Offices. These two offices, which became operational in January 1998, were designed to collect intelligence and work closely with the Bilateral Task Forces (BTF) in the two most active drug smuggling corridors along the Southwest Border, controlled by the Arellano-Felix Organization and the Amado Carrillo-Fuentes Organization, respectively. The BTFs, however, remain insufficiently staffed and funded by the GOM. Although originally envisioned to have an investigate staff of eighty-four GOM drug agents assigned to the BTFs, to date the GOM has not met that goal.

2. Second, in an effort to enhance coordination of U.S. law enforcement and the BTFs, as well as to improve bilateral investigations, DEA has acquired office space in three U.S. cities—San Diego, California; and El Paso and McAllen, Texas. These sites serve as investigative coordination sites. In that capacity, they afford agents from the BTFs, DEA's Mexico Resident Offices (ROs) and domestic field offices from DEA, the FBI, and the U.S. Customs Service, a location to meet on a regular basis and exchange information on defined trafficking organizations operating along the southwest border.

3. Third, the results to date have been very disappointing. Nonetheless, I believe that the vetting process is our best chance at ensuring integrity with our counterparts in Mexico. DEA will remain actively engaged with GOM counterparts, and will continue to sensitize them to the realities of the vetting process. To that end, a Vetted Unit Program survey report was recently completed pursuant to bilateral survey conducted in November and December 1999. Although the report reflects weaknesses in the overall Program, it was mutually agreed by the GOM and USG to meet several objectives which would improve the effectiveness of the Program in Mexico.

As part of the GOM commitment to improving the Vetted Unit Program, at the recent International Drug Enforcement Conference (IDEC), the Mexican Drug Czar, Mariano Herran-Salvatti, informed DEA that he requested that an additional 50 FEADS Agents be assigned to the vetted program in May 2000. Many of these new agents will be deployed to the northern border of Mexico and support the BTFs targeting transnational drug trafficking.

In addition to USG establishment and supporting the development of the Vetted Units Program, DEA participating with the U.S. Department of Defense, and the U.S. Customs Service (USCS) to support GOM interdiction efforts by providing "real time" leads on air, sea, and overland smuggling events detected by the Intelligence and Analytical Center (IAC) which is housed and supervised by the DEA Mexico City Country Office.

Question 2. Mexican Cartels: With respect to Mexican cartels, what strategic plan do you have for dismantling their operations in the United States? How extensive are their operations here? Is it still the case that the Mexican government refuses to extradite to the United States high level drug traffickers who are Mexican citizens?

Answer 2. DEA, in concert with other federal agencies, has established an integrated, coordinated law enforcement effort designed to attack the command and control structure of these Mexican drug trafficking organizations. This strategy focuses on intelligence and enforcement efforts, which target drug distribution systems with the U.S. and directs resources toward the disruption of those principal drug trafficking organizations. Its mission is to coordinate and support regional and national criminal investigations and prosecutions against the members of these organizations.

The DEA, the FBI and the U.S. Customs Service, along with many of our state and local counterparts across the country have been very successful and very effective at that strategy over the last several years. We have repeatedly conducted major operations inside the United States that have wiped out Mexican-controlled cells operating here in this country. However, until we can reach the leaders of

these organizations who operate safely outside the U.S., these organizations will continue to flourish.

Extradition: The aforementioned major organizations based in Mexico have a demonstrable negative impact on the United States. U.S. law enforcement routinely obtains indictments in U.S. judicial districts against the leaders of these groups. Yet, no major drug traffickers were extradited to the U.S. in 1999. The GOM did extradite 10 lower level fugitives on narcotics or money laundering offenses in 1999—eight U.S. citizens and two Mexican citizens. In 1999, 35 persons, 20 of which are considered major drug traffickers by DEA, were in Mexican custody and subject to extradition proceedings based on U.S. provisional arrest warrants and extradition requests. A flawed Mexican judicial system protects traffickers through the appeals process. Additionally, some Mexican Courts have held that life imprisonment is unconstitutional. If other courts followed this rationale, extraditable Mexican drug traffickers who face life sentences in the United States will not be extradited by the GOM. Extradition is a key element, perhaps the most important element at the present time, in breaking the cycle of corruption and intimidation in Mexico.

Question 3. Mexican cooperation with law enforcement: As a result of the power of Mexican drug cartels, many of our border regions are becoming low-intensity war zones. In recent weeks, Tijuana, Mexico has seen another police chief assassinated, three Federal narcotics investigators kidnapped, brutally tortured, and murdered, and an epidemic of lesser drug-related killings. Things have gotten so bad that, according to recently published reports, the DEA is considering pulling its agents out of Mexico.

What is the current state of affairs in Mexico? Do you feel comfortable working with the Mexican government on investigations of major Mexican trafficking organizations? And, are you considering removing your agents from that country? What steps short of that could be taken to ensure the safety of our agents who work there?

Answer 3. State of affairs in Mexico: Drug-related violence has long been commonplace in Mexico. Within the last year, however, drug-related violence has increased in intensity and visibility. In addition to the increasing violence that is manifested by trafficking rivalries within and between trafficking organizations, of particular concern is the increasing violence that has manifested itself through the execution of GOM officials as well as threats and assaults directed against U.S. Government personnel by Mexican drug trafficking organizations.

Working with the Government of Mexico: DEA is supplying support and assistance in the FEAD's investigation of major trafficking organizations. In spite of problems with understaffing, inadequate allocation of funds, vetting and corruption issues, DEA continues to support the Mexican Vetted United Program. DEA fully believes that the Vetted Unit Program is the best strategy to continue to develop a work force necessary to adequately combat major Mexican drug trafficking syndicates responsible for smuggling the majority of cocaine into the U.S. Until the GOM addresses and rectifies the aforementioned problems, however, DEA has no alternative other than to proceed with extreme caution before sharing information in bilateral investigations with any GOM law enforcement entity. DEA will remain actively engaged with GOM counterparts, and will continue to sensitize them to the realities of the vetting process, but will continue to proceed with extreme caution.

Removal of DEA Agents from Mexico: The safety of DEA personnel assigned to Mexico is an issue of tremendous concern for DEA today. I would be happy to brief you and the Senate Judiciary Committee in closed session to discuss the full range of security options we employ and are considering to protect our Special Agents in Mexico.

Question 4. Extradition: Your predecessor, Thomas A. Constantine, was critical of the drug interdiction efforts of both the Clinton Administration and the Mexican government. In comments to the New York Times, he criticized President Clinton for refusing to heed DEA's analysis of the Mexico situation and paying scant attention to interdiction efforts along the border. In Mr. Constantine's words, "I watched [the Mexico] situation for five and a half years, and every year it became worse . . . [w]e were not adequately protecting the citizens of the United States from these organized crime figures." Constantine also commented on the rampant corruption in Mexico: "Every time we had a major case involving a criminal organization from Mexico operating in the United States, there was a significant allegation of corruption involving the Mexican Attorney General's office, a Mexican state police force, or the highway police." On a Nightline appearance last year, Constantine suggested that we provide the Mexican government a list of 30 major traffickers we want arrested and extradited, and then pressure them to meet the goal.

Do you agree with Mr. Constantine's assessment?

Answer 4. I substantially agree with Mr. Constantine's assessment of the situation in Mexico. Corruption is a critical problem in Mexico's effort to arrest major drug traffickers. No major drug traffickers were extradited to the United States in 1999.

At the end of 1999, there were 35 persons, 20 of which are considered major drug traffickers by DEA, in Mexican custody and subject to extradition proceedings based on U.S. provisional arrest warrants and extradition requests. Not one major drug trafficker has been extradited to the United States. The DEA, FBI and the Department of Justice are in the process of finalizing a list of priority extraditions of Mexican drug traffickers in which a reasonable expectation of a successful prosecution in the United States exists.

Question 5. Mexican corruption: The pervasive corruption in Mexican law enforcement is especially troubling in view of a recent information-sharing agreement reached between the Clinton Administration and Mexico. The agreement, known as the "Brownsville Agreement," grew out of Mexico's anger over Operation Casablanca, a long-term U.S. Customs undercover operation that was active in Mexico and that targeted Mexican banks and bankers involved in laundering drug money. The Mexican government was incensed upon learning of the investigation in 1998, and pursuant to our agreement with them, we have agreed to provide the Mexicans with written notice in advance of operational activities in Mexico by our federal law enforcement agencies. Given the corruption among Mexican authorities, there is substantial concern among our law enforcement community that this policy will endanger lives and undermine interdiction efforts.

What is your view of this agreement with the Mexican government?

Answer 5. In September 1999, DOJ completed the implementation of the Brownsville/Merida Agreement. Mechanisms are in place for each country to contact the other when cross border investigative activity is to physically occur in the country. In support of this agreement, the MCCO Attaché has implemented a policy for all U.S. Law Enforcement Agencies to better coordinate bilateral investigative activities emanating from the U.S. We coordinate our general activities with the GOM authorities and we have thus far been able to make this approach work.

DEA remains concerned about corruption in Mexico. This is best illustrated by the December 1999 statement in which the GOM reported that since April 1997 through 1999 more than 1,400 of the 3,500 federal police officers had been fired for corruption. However, only 357 of these officers have been prosecuted. Therefore, DEA limits its information sharing to Mexican officials who are either vetted or at the highest levels of the Mexican law enforcement community.

VI. HEROIN

Question 1. Heroin strategy: Throughout the past 8 years we have seen the troubling developments concerning the price and purity of heroin, perhaps the most insidious of controlled substances. The price, both that paid by users for small amounts and that paid by dealers for larger amounts, has dropped significantly. The purity, which tends to decrease when supply is reduced, has increased to its highest level in the past twenty years. Unfortunately, this does not surprise me, for throughout the term of this Administration I have been urging the President—often to no avail—to devote sufficient attention and resources to drug interdiction.

Where is the heroin coming from? What is your strategy to stanch the flow of this drug into our country? And, will you pledge that your voice will be insistent and, if necessary, loud in convincing this Administration that a drug policy that gives short shrift to interdiction is doomed to failure?

Answer 1. According to CIA estimates, total illicit worldwide opium poppy cultivation in 1999 was 176,305 hectares (435,650 acres). Approximately 64 percent were located in Southeast Asia; 30 percent in Southwest Asia; and 6 percent in Latin America. There is no single set of numbers to express how much of this cultivation ends up as heroin coming into the United States. However, DEA believes that the overwhelming majority of the heroin entering the United States comes from Latin America.

A recent draft interagency study on global heroin estimated current U.S. demand for heroin at about 18 metric tons. Estimates more commonly range between 12 and 14 metric tons. The heroin consumption estimates vary due to the high degree of variability in patterns of use, as well as inconsistencies in reporting and the imprecision of available data, particularly addict populations, dosage levels, and frequency of use.

While not all of the world's illicit opium production is converted into heroin, if it were all converted, the total potential 1999 crop could have produced 287 metric tons. Of this amount, in Latin America, potential heroin production was divided be-

tween Colombia (8 metric tons) and Mexico (4 metric tons). DEA believes the vast bulk of Colombian and Mexican heroin is destined for the United States. The heroin from Colombia and Mexico could, therefore, account for anywhere from two-thirds to essentially all of the U.S. heroin consumption, depending on the consumption estimate used.

There are a set of measures and estimates which DEA uses to indicate the sources of heroin. While there are no formal, interagency flows estimates for heroin, similar to the formal, interagency flows methodology for cocaine presented in the Interagency Assessment of Cocaine Movement [IACM], the measures used by DEA tend to confirm Mexico and Colombia as the sources for the heroin coming into the United States. The Heroin Signature Program [HSP] samples seizures at U.S. ports of entry and a random selection of seizures and purchases in the United States. According to the HSP, in 1998 [the most recent year for which information has been calculated], 65% of the heroin seized is from South America. The Domestic Monitor Program [DMP] makes purchases in 23 major U.S. cities. According to the samples for 1998 [the most recent year for which data has been calculated], 99.6% of the heroin in the retail markets west of the Mississippi river was from Mexico; 83% of the heroin east of the Mississippi was from South America.

Heroin trafficking is more geographically dispersed than trafficking of any other illegal drug. Heroin originating in one area has a separate and distinct supply mechanism than heroin originating in another area. The trafficking of heroin from Colombia, Mexico, Southeast Asia, and Southwest Asia involves numerous ethnic groups, transportation modes and methods, as well as numerous countries of transit. The four source areas have completely different producers, processors, transporters, organizers, financiers, and distributors. In addition, the many languages and cultural differences present tremendous communications barriers.

The upper echelons of the major trafficking organizations have been extremely resourceful in resisting and even thwarting traditional intelligence collection and enforcement efforts. Events of recent years have shown, however, that success can be achieved through well-coordinated international enforcement efforts, prosecution, and, when applicable, extradition. At the same time, DEA remains alert to the emergence of key figures to fill the voids created by the immobilization of their former leaders.

As such, DEA's strategy in attacking heroin trafficking from source countries into the United States provides prioritized operational emphasis for all DEA elements—domestic, foreign and Headquarters—to disrupt and destroy major heroin trafficking organizations by focusing operational efforts against heroin production and refining; the transporters, brokers, and bankers; and U.S. domestic distributors. This strategy encompasses well-coordinated national and international investigations that combine the operational and intelligence resources of the United States, working in concert with host country law enforcement authorities to identify, target, arrest and prosecute the major figures in the international heroin traffic. Specific initiatives included within this strategy for each source area include increased intelligence collection on major regional and interstate heroin trafficking organizations, increased use of pen registers and Title III communications interceptions, and expanding and enhancing cooperative efforts with state, local and other Federal law enforcement agencies.

Undoubtedly, interdiction is a vital component of any law enforcement strategy that attempts to diminish the flow of illicit drugs into the United States. Interdiction in the transit and arrival zones disrupts drug flow, increases risks to traffickers, drives them to less efficient routes and methods, and prevents significant amounts of drugs from reaching the United States. As such, I strongly support and recognize the necessity of a comprehensive interdiction strategy that is intelligence driven and can be effectively managed and controlled.

Currently, in response to a tasking in the 1999 National Drug Control Strategy, the Interdiction Committee (TIC) chartered the development of an Arrival Zone Interdiction Plan. To develop the Plan, the TIC appointed an Arrival Zone Interdiction Coordinator, supported by a staff of agency representatives, to include the DEA. Primarily, this staff would develop and coordinate national interdiction plans and operations, coordinate national analysis and research on strategic areas and promote information sharing among Federal, state and local law enforcement agencies.

Question 2. Needle exchange. You may recall that during last year's negotiations concerning appropriations for the District of Columbia, there was a pitched battle over whether entities in the District could devote taxpayers money to a needle exchange program for drug addicts. The Republican Congress, to its credit, took the view that money could not be used, directly or indirectly, to subsidize such morally repugnant activity. Allowing money to be used that way would also, in my view, undermine the message we must be sending to our youth: that drug use is always,

without exception, harmful. Unfortunately, the Clinton Administration took a slightly different view, and that view prevailed in the debate. As a result, at least one facility here in the District is handing out needles to drug addicts.

Do you support the idea of needle exchanges? Should there be a strict ban on using taxpayer money, directly or indirectly for such programs?

Answer 2. I am opposed to needle exchange programs because I believe that providing needles to addicts normalizes drug use and is a first step towards legalization. While stopping the spread of AIDS is certainly a laudable goal, providing needles to addicts sends a terrible message to the children of America who are all at risk for drug use. Good government consistently protects public safety, security and health. Needle exchange programs violate that principle by facilitating drug use and overdose deaths. I oppose the use of taxpayer money, both directly and indirectly, for needle exchange programs, anywhere in the United States.

VII. INTERAGENCY COOPERATION

Question 1. In recent years federal law enforcement agencies other than the DEA, including the FBI, Customs Service, and the Coast Guard, have all taken more prominent roles in investigating drug trafficking. This has reportedly created some tension, and turf battles in some cases, between and among some of these federal agencies. The American public should benefit from having more law enforcement agents, regardless of what agency they work for, working to combat the flow of illegal drugs into this country. Federal agencies should be cooperating, not competing, with one another to obtain what should be everyone's ultimate goal, which is to stop illegal drugs from entering this country and keep drugs that are on the streets out of the reach of our youth.

What challenges has this interagency approach presented to the DEA? Do you have any specific ideas that you plan to implement to ensure that the DEA works efficiently and effectively with other federal agencies, such as the FBI, to target drug trafficking?

Answer 1. First, I view drug trafficking as nothing less than a threat to United States national security. Thus, I strongly believe that leveraging the entire United States Government in a sustained, cooperative, and coordinated fashion is the surest way to protect Americans and American interests from the threat posed by international drug trafficking.

Over the past decade, the nature and extent of drug trafficking has changed significantly. Consequently, investigations that in previous years would have been confined solely to drug violations, now frequently crosscut terrorism, money laundering, alien smuggling, and arms trafficking. Criminal and terrorist organizations that had no previous history of drug involvement, now turn to the drug trade in order to raise vast amounts of cash for their criminal and political agendas.

The changing nature of the drug trade has necessitated an inter-agency approach to these new challenges. Just as the drug trafficking organizations DEA investigates have become more sophisticated, so must our government's responses.

DEA fully supports the inter-agency approach to counter-narcotics investigations. We believe such an approach to be essential to effectively combating operationally sophisticated, well financed drug trafficking groups. DEA believes that cooperation has improved and is continuing to improve among Federal law enforcement agencies. I am not alone in this opinion; in fact, the 1998 Review of the U.S. Counterdrug Intelligence Architecture, states that information sharing has improved in the last five years, according to hundreds of Federal, state, and local officials interviewed.

DEA is engaged in a number of programs in which interagency cooperation is critical. The following are several of these DEA programs.

Special Operations Division: SOD is a joint national coordinating and support entity comprised of agents, analysts, and prosecutors from DOJ, Customs, FBI, and DEA. SOD performs seamlessly across both investigative agency and jurisdictional boundaries, providing field offices with sanitized, real-time analysis and synthesis of law enforcement information about targeted criminal organizations and also provides actionable "tips and leads" drawn from other sources for investigative action. Within SOD no distinction is made among the participating investigative agencies. Where appropriate, state and local authorities are fully integrated into SOD-coordinated operations. Without question, SOD is one of the most effective and innovative developments in U.S. drug enforcement.

Linkage & Linear: For several years, DEA and the CIA have jointly chaired the Linkage and Linear programs, both of which are comprised of over a dozen Federal agencies from the law enforcement and intelligence communities. Linkage concentrates primarily on heroin trafficking in Southeast and Southwest Asia, while

Linear targets organizations that traffic cocaine and heroin in the Western Hemisphere. Both Linear and Linkage regional hold regional meetings, bringing together senior and working-level experts throughout the Intelligence and Law Enforcement Communities. This cross-fertilization of these two programs has contributed markedly to their success and promoting cooperation.

Interagency Exchange Programs: DEA has made excellent progress toward bridging the gaps that separate many Federal agencies. DEA has exchanged personnel, in the field and at headquarters, at the supervisory and SES levels in order to improve agency cooperation, break down cultural barriers, and carry lessons back to their respective agencies. Under DIAP Resolution Six, the FBI, and DEA have exchanged personnel in select foreign offices to improve information sharing and pass time-critical leads between foreign and domestic field offices.

Counterdrug Intelligence Executive Secretariat (CDX): Perhaps one of the most significant developments in counternarcotics is a reformed drug intelligence architecture. DEA holds leadership roles in the new Counterdrug Intelligence Executive Secretariat (CDX) and the Counterdrug Intelligence Coordinating Group. These newly formed groups will greatly facilitate the smooth, timely, and efficient sharing of inter-agency intelligence drug related intelligence information across federal, state, and local agencies.

RESPONSES OF DONNIE R. MARSHALL TO QUESTIONS FROM SENATOR THURMOND

Question 1. Funding for the DEA increased by about 50% in the past decade. What growth do you anticipate will be needed over the next five years for it to carry out its mission, including the need for special agents, support personnel and other resources?

Answer 1. My overarching goal as the Administrator of the Drug Enforcement Administration will be to provide the leadership to ensure the DEA enter the 21st Century as the preeminent drug law enforcement organization in the world.

I am personally committed to a DEA that will lead U.S. drug law enforcement by implementing intelligence-driven targeting and investigations through the increased collection and analysis of human and technical intelligence that identify the major drug threats. Attached is a copy of my vision statement which articulates the principles and goals that I am establishing as Administrator. This document was disseminated to all DEA employees several months ago.

As Administrator, I will develop a clear, long-term strategy to execute enforcement tactics that target and attack the leadership and infrastructure of major drug syndicates, organizations, and gangs that are trafficking in illicit and illicit drugs that threaten this nation at the international, national, regional, and local levels.

I will recruit, hire and train the work force needed to bring the strategy into reality. Hand in hand with growing the work force, I will develop leaders who are flexible and innovative to manage the highly technical and complex programs that will take DEA into the 21st Century.

DEA's strategic goals for the next century will embrace multi-jurisdictional operations, and will coherently integrate organization, resource allocation, leadership development, interagency and international cooperation. Our strategic plan directs DEA efforts towards identifying and targeting three levels of narcotics violators: the powerful international drug traffickers who are responsible for all of the cocaine and heroin, and most of the methamphetamine and marijuana available in the United States; traffickers operating on a national and regional basis within the United States; and violent local drug traffickers who erode the quality of life in American communities. To fulfill our strategic goals, DEA will work in the new Century to achieve the following:

1. Strategic targeting at international organizations' command and control: Drug trafficking in the United States is controlled by organized international criminal syndicates headquartered mainly in Colombia and Mexico. Through increased funding for enforcement manpower and special support programs, DEA will identify and target the leadership of all of these organized crime groups in the U.S., including the surrogates who act as their wholesale outlets in the United States, and will seek provisional warrants for the arrest for extradition of the organizations leadership operating in foreign countries. With this strategy of targeting the command and control functions of organized crime, DEA will disrupt the ability of the organizations to conduct business and impede their ability to import drugs into the United States. This strategy will also facilitate the intelligence collection process which is critical to the interdiction of drugs. DEA will gain vital intelligence about the rest of the organization to use both in further disruption and dismantlement and in increasing the accuracy of information provided to interdiction operations.

2. A hemispheric strategy for DEA: Independent cocaine and heroin trafficking organizations in Colombia, and the splinter groups from the Cali organization, are supplying the majority of cocaine and heroin to the Eastern United States. Many of these groups are returning to traditional smuggling routes in the Caribbean corridor to smuggle cocaine and heroin into the United States. DEA will continue to complement the Southwest Border Strategy with aggressive strategies in the Caribbean theater, targeting traffickers who use both regions to traffic drugs to the United States. While building cases against these criminal groups, DEA will employ intelligence gained from its investigations in coordination with Coast Guard, Treasury Department, and DoD assets, to substantially step up interdiction of smuggled drugs at geographic and transportation choke points. The concentration of the communications and ports of entry will amplify our ability to substantially increase the total amounts now seized at the international border and before reaching United States territory.

3. Suppression of violent crime: DEA is committed to reducing violent crime in America by targeting the most violent drug traffickers and removing them from communities across the nation. Through an integrated approach using DEA's Mobile Enforcement teams and our Regional Enforcement Team, along with state and local task forces, DEA will continue to conduct criminal investigations, and follow-on demand reduction programs to measurably improve the quality of life for citizens in communities around the country.

4. Strategic campaign against methamphetamine: Organized criminal organizations, based in Mexico, produce as much as 80 percent of the methamphetamine sold in the United States. The remainder is produced by smaller, and dangerous "mom and pop" operations throughout regions of the country. DEA will continue to identify, target, and break up the major methamphetamine production and distribution networks in the United States. Using comprehensive controls against the diversion of precursor and essential chemicals, aggressive law enforcement on the Southwest Border, and cooperative enforcement with state and local authorities directed against clandestine labs in the United States, DEA is committed to eliminating methamphetamine production and trafficking. This methamphetamine strategy will target and immobilize the command and control of the international criminal organizations distributing methamphetamine from Mexico as well as domestic producers of methamphetamine. The reduction of methamphetamine labs in the United States will have a measurable effect on the environment and the safety of citizens and public safety officers who live and work in areas that are now flooded with these laboratories, and decrease the amount of methamphetamine manufactured in the United States.

5. Proactive heroin investigations: Through an enhanced presence overseas, in the Caribbean and in South Florida, DEA will continue to target Colombian heroin trafficking organizations responsible for the more than 60 percent of the heroin seized in the U.S. last year. By aggressively identifying and targeting major heroin traffickers, DEA will have a significant impact on reducing heroin trafficking in the United States.

6. Intelligence support to strategic and tactical operations: In support of operations against command and control functions of criminal drug trafficking organizations, DEA will increase resources devoted to Intelligence Specialists and support systems—the MERLIN backbone and sensitive programs. These actions are planned to increase the flow of actionable intelligence to enforcement elements in the field by 50 percent each year. These additional resources will leverage existing infrastructure, and make use of information gained during criminal investigations and operations against command and control elements of organized crime groups, making readily available in the field the critical intelligence needed to target the sophisticated elements of organized international criminal syndicates.

7. Manpower for the next century: To support the enforcement needs articulated in these goals, DEA will recruit, hire, and train outstanding candidates to meet the requirement of a Special Agent force of 6,500—and associated infrastructure and support positions including Intelligence Analysts—by the year 2003.

In order to meet these ambitious goals, I intend to work with Congress to identify and obtain the necessary resources to meet these goals. It is critical that DEA's Special Agent force increase during the next five years, along with intelligence, infrastructure and technological assets that will enable us to serve the American public in an outstanding manner. Currently, Plan Colombia, which is pending before the Senate, contains critical resources, primarily in the intelligence area, which will assist DEA in meeting some of our challenges in the Andean region.

Question 2. How can we build stronger ties with other nations involved in the fight against drugs? More specifically, I am interested in what we can do to assist

nations such as Mexico and Colombia, who are on the front lines of the drug interdiction and suppression effort, and are paying a heavy price for their participation.

Answer 2. In continued support to foreign nations assisting the United States in combating illegal drug trafficking, an extremely valuable approach is the strengthening of those nation's abilities to prosecute the leaders who wield command and control of powerful drug cartels located in countries such as Mexico and Colombia. One of the means by which to achieve this goal has been the Congressionally mandated vetted Sensitive Investigative Unit program, which was initiated several years ago.

In 1996 the Attorney General directed the Drug Enforcement Administration to approach the Government of Mexico (GOM) and open a dialogue in order to ascertain the willingness of the GOM in forming well-trained, well-equipped vetted units. The discussions were successful and utilizing Department of State and DEA funds the first vetted unit began to take shape. Simultaneously, the Congress became interested in the approach and through the FY 1997 Appropriations Act directed DEA to continue the implementation of the vetted unit program in Mexico and also establish units in Bolivia, Colombia, and Peru. Along with this mandate came funds in the amount of \$20 million to execute this directive.

The Vetted Units Program concept has proved extremely valuable to DEA in initiating and conducting high-level international drug trafficking investigations internal and external to our borders. The fact that in the majority of countries where vetted units operate, our Special Agents work hand in hand with trustworthy, well-trained host nation Anti-Drug Federal Police Officers that has created an atmosphere that enables us to fully exploit all United States drug law enforcement and intelligence resources in an open and mutually beneficial environment.

COUNTER DRUG EFFORTS IN MEXICO

With regards to the USG Strategy to work with the Government of Mexico, the DEA is supplying support and assistance in the FEADS investigation of major trafficking organizations. The FEADS Vetted Units, and Sensitive Investigative Unit (SIU), within the Organized Crime Unit (OCU), and the Bilateral Task Forces (BTFs) are the two primary investigative components conducting joint investigations. In addition to the BTFs and the SIU, the GOM has created FEADS "floater" task forces, which in some cases consist of FEADS agents who are vetted under standards approved by the USG, referred to as supervetted agents. Several of these supervetted FEADS agents are assigned to the Mexico City International Airport Interdiction Unit and the Arellano-Felix Apprehension Task Force. These "floater" units consist of a mixture of both supervetted units and non-supervetted personnel, such as the OCU and special deployment units, i.e., Operation Impunity and Operation Millennium responses forces.

In an effort to strengthen DEA's efforts along the Southwest Border, DEA has developed a three-pronged approach: maintain a coordinated presence in Mexico, along the border; establish "off site" locations in the U.S. where agents from both sides of the border can meet and discuss ongoing investigations; and, to encourage and enhance the Vetted Units Program in Mexico. The following three steps have been implemented to enhance binational cooperation between the USG and Mexico in combating the shared threat posed by international drug trafficking:

First, in 1997, DEA, through the Department of State, petitioned the GOM to increase the DEA's agent personnel by six in order to establish the Tijuana and Ciudad Juarez Resident Offices. These two offices, which became operational in January 1998, were designed to collect intelligence and work closely with the BTFs in the two most active drug smuggling corridors along the Southwest Border, controlled by the Arellano-Felix Organization and the Amado Carrillo-Fuentes Organization, respectively. The BTFs, however, remain insufficiently staffed and funded by the GOM. Although originally envisioned to have an investigative staff of eighty-four GOM drug agents assigned to the BTFs, to date the GOM has not met that goal.

Second, in an effort to enhance coordination of U.S. law enforcement and the BTFs, as well as to improve bilateral investigations, DEA has acquired office space in three U.S. cities—San Diego, California; and El Paso and McAllen, Texas. These sites serve as investigative coordination sites. In that capacity, they afford agents from the BTFs, DEA's Mexico Resident Offices (ROs) and domestic field offices from DEA, the FBI, and the U.S. Customs Service, a location to meet on a regular basis and exchange information on defined trafficking organizations operating along the southwest border.

Third, although the results to date have been disappointing, DEA believes that the vetting process is our best chance at ensuring integrity with our counterparts

in Mexico. DEA will remain actively engaged with GOM counterparts, and will continue to sensitize them to the realities of the vetting process. To that end, a Vetted Unit Program survey report was recently completed pursuant to a bilateral survey conducted in November and December 1999. Although the report reflects weaknesses in the overall Program, it was mutually agreed by the GOM and USG to meet several objectives, which would positively impact the effectiveness of the Program in Mexico.

As part of the GOM commitment to improving the Vetted Unit Program, at the recent International Drug Enforcement Conference (IDEC), the Mexican Drug Czar, Mariano Herran-Salvatti, informed DEA that he requested that an additional 50 FEADS Agents be assigned to the vetted program in May 2000. Many of these new agents will be deployed to the northern border of Mexico and support the BTFs targeting transnational drug trafficking.

COUNTER DRUG EFFORTS IN COLOMBIA: THE VETTED UNITS PROGRAM

Over the last three years, the DEA, in cooperation with Colombian law enforcement counterparts, has developed what is now recognized as the vetted unit or sensitive investigation unit (SIU) program. This program employs qualified law enforcement officials who have passed a U.S. established vetting process (i.e., personal interviews, background investigations, urinalysis testing, polygraph examination) and subsequently, participated in a 5-week DEA sponsored investigative course of study in the U.S. Additionally, many of these foreign agents receive more specialized training in the area of electronic surveillance and information systems management.

The progress of the vetted unit program in Colombia has been tremendous. Many of the international investigative successes (i.e., Operation Millennium, Operation Atlantico, the Asprilla-Perea investigation and the Caracol investigation) over the last three years have been accomplished as a direct result of the significant contributions and capabilities of the SIU's.

DEA has incorporated regionalization as an integral part of the vetted unit program. Representatives from the Colombian SIU units meet with their counterparts from other nations in the region with parallel programs on a semi-annual basis, set an agenda and discuss new techniques, strategies and issues of importance. Additionally, the units exchange ideas with the DEA on targeting major drug trafficking organizations operating throughout particular regions and the U.S.

DEA anticipates a continued emphasis by the vetted units in providing direct support to U.S. based investigations and exploiting the ever changing vulnerabilities of major international drug trafficking organizations.

Colombian National Police DIJIN Sensitive Investigations Unit

This is the oldest and most successful of all the Bogota Country Office Sensitive Investigations Units (SIU). This unit is comprised of 57 Colombian National Police Officers from the DIJIN, the investigative branch of the Colombian National Police, along with selected vetted prosecutors. This unit is headquartered in Bogota and maintains satellite offices in Medellin, Cali, and Barranquilla.

This unit was established to target major drug trafficking organizations throughout Colombia. This SIU enjoyed an outstanding rate of success during 1998 and 1999. Several significant organizations were pursued and either dismantled or severely disrupted as a result of aggressive complex investigative efforts. Similarly, a number of associated traffickers at the highest levels of these organizations were arrested. Many were arrested as a result of provisional warrants based on U.S. charges and are pending extradition. In support of bilateral initiatives, the SIU unit frequently provided evidence obtained from judicially authorized telephone intercepts to domestic DEA offices that led to the initiation of major investigations in the U.S.

During 2000, additional personnel will be added to the unit in order to accommodate attrition and transfers, and to establish another satellite office in Cartagena, Colombia. The DEA will also upgrade and enhance the technical intelligence capability of this unit during FY-00.

Colombian National Police Intelligence Division Sensitive Investigations Unit

This SIU is responsible for managing the day-to-day operational requirements of Operation Papagayo. Operation Papagayo is a communications intercept program conducted jointly with the DEA with logistical and technical support provided by DoD.

The program has implemented five (5) collection sites dedicated to the identification of major manufacturing, transportation, chemical and drug trafficking organizations operating primarily in the Colombian Source Zone. This SIU also provides intelligence support relative to the movement of aircraft used to transport cocaine in

the source zone and monitors the drug related activities of insurgents supporting drug traffickers in southern Colombia.

This operation suffered several logistical and funding delays in 1999, which prevented the program from becoming fully operational. These issues are being addressed and it is anticipated that the program will continue to develop towards full operational capability.

The DEA will continue to provide technical training and equipment to the members of this SIU in order to enhance their ability to collect counter drug intelligence.

Colombian National Police Chemical Control Sensitive Investigations Unit

In June 1998, the DEA converted the CNP Chemical Control Unit into a Sensitive Investigations Unit. This unit, which is comprised of 30 individuals operating on a national level, is tasked with identifying those individuals and/or chemical companies that are handling controlled chemicals, and that may be actively involved in diverting chemicals for the processing of cocaine and heroin. The unit is further charged with taking corrective actions as necessary to include the seizure of controlled chemicals, the arrest of persons found to be in complicity, and to make recommendations to annul or revoke chemical permits.

During Fiscal Year 1999 this SIU was responsible for the seizure of approximately 123,203 kilograms (123 tons) of assorted controlled chemicals including 4.6 tons of potassium permanganate, the revocation of the chemical permits for at least 7 major chemical deviators, and the arrest of sixteen (16) individuals for their involvement in chemical trafficking. These figures represent investigations conducted jointly with the DEA. CNP unilateral investigations exceeded these figures.

Departamento Administrativo de Seguridad (DAS) Sensitive Investigations Unit

During late 1998, the DEA established a fourth SIU with the DAS and selected assigned prosecutors. This unit targets major money laundering organizations operating in Colombia. This unit consists of sixteen (16) agents and one supervisor based in the cities of Bogota and Cali, Colombia.

During Fiscal Year 2000, the unit will continue to target major money laundering organizations operating in Colombia and abroad. Having provided significant support to several DEA domestic divisions since inception, this SIU will continue to support bilateral, and multi-national initiatives targeting major money laundering organizations.

Besides the obvious case related results, another benefit has emerged in the open exchange of information between the nations participating in the program. This is especially true throughout Latin America. An offshoot of the program has been the formation of a professional association composed of the working level supervisors of the vetted Sensitive Investigative Units in Mexico and South America. The association has semi-annual meetings and the participants do not hesitate to communicate with each other about ongoing investigations in their respective jurisdictions. This had opened doors as never before and has set the stage for future cross border and multi-national operations.

Some of the success of this program has recently come to light through media attention, testimony before various Congressional Committees, and GAO reports. In November of 1997 acting on the initial accomplishments of the original four country programs my predecessor approached the committee staff of the House Commerce, Justice, State and Judiciary Appropriations Subcommittee, to inquire into the potential expansion of this ever promising project. Through our Congressional Affairs Section, DEA was informed that expansion within the confines of the original fiscal appropriation into the countries of Brazil, Chile, Pakistan and Thailand would be a prudent measure. With this approval, we set about conducting country assessments and developing an implementation plan for the above countries. Today, we have fully operational units in Brazil, Pakistan and Thailand. The program in Chile is currently under review. We have maintained an open dialogue with representatives of the Chilean government in respect to this project and the possibility exists that a unit may be operational by early 2001.

In order to capitalize on the momentum and successes of the program DEA has recently undertaken the establishment of two more units in the countries of Ecuador and Nigeria. The Ecuadorian group became operational in January 2000 and the Nigerian unit is projected to be in place by this coming winter. I have been advised that the U.S. Ambassadors and executive level law enforcement officials in Panama, Venezuela, Dominican Republic and the Bahamas are very interested in obtaining information about the program with the expressed desire of obtaining a vetted enforcement group. More recently, senior level DEA management answered inquiries from both the House and Senate Appropriations Committee as to how best to expand the program in the future.

At this point in time and with the tremendous accomplishments this program has lent itself to, DEA is still within the spirit, intent and scope of the original congressional directive. DEA and its foreign law enforcement counterparts are making great strides in international narcotics enforcement through the vetted units and we will maintain the pressure on high level traffickers that this program brings to bare. In order to keep pace with the changing trends in international drug smuggling it is necessary for the program to grow in relation to the problem.

Question 3. What efforts can the DEA and the Bureau of Prisons take to reduce drug dealing in federal penitentiaries, whether it be inmate to inmate drug trafficking and other related criminal offenses conducted via the Internet?

Answer 3. The DEA continues to pursue new and innovative ways to reduce drug trafficking networks that operate within and from federal and state prisons. Although the Bureau of Prisons routinely refer their inmate drug trafficking cases to the Federal Bureau of Investigation, in recent years, DEA has had a number of high-profile investigations of involving prison drug operations. One of them was the 1995 investigation of Chicago's Black Gangster Disciple Nation, one of the nation's most dangerous criminal organizations. The August 1995 investigation, which was carried out in conjunction with other federal, state, and local law enforcement and prison officials, resulted in the arrest of 22 BGDN members. Among those convicted in the investigation was BGDN leader Larry Hoover who reportedly ordered more than 500 killings, oversaw extortion and witness intimidation, and controlled much of the city's drug market—all from prison. Since the mid-1970s, Hoover has been in Illinois state prisons serving a 200-year sentence for murder. Moreover, the intelligence generated from this and other investigations is extraordinarily valuable in developing other investigations.

It is widely agreed—within the U.S. law enforcement and intelligence communities—that the Internet and technology are reshaping crime, particularly the U.S. and international drug trades. Increasingly, traffickers are turning to the Internet, computers, and other technology in order to protect and expand their criminal operations. Consequently, DEA operations and intelligence are being drawn into new areas of “digital evidence, analysis, and investigations.”

DEA has defined narco-cybercrime as the unlawful use of the Internet, computers and other technology in furtherance of the illicit drug trade and the criminal activities of drug traffickers and their organizations. DEA will leverage its investigative and intelligence assets to target: the electronic communication of traffickers, the banking and financing of the drug trade; the unlawful online distribution of controlled substances and pharmaceuticals, listed chemicals, and drug paraphernalia; the recovery of digital evidence; and any other technology sectors that are exploited to promote the spread of controlled substances and drug-related violence.

To maximize its resources and expertise, DEA created an Internet Technologies Unit. Headed by a Criminal Investigator, the unit will involve DEA's Computer Forensic Program and elements of the Advanced Telephony Unit. Working with other DEA offices, the new unit will monitor the Internet sale of illicit drugs, pharmaceuticals and controlled chemicals. Also, the Internet Technologies Unit will provide direct surveillance, interception and computer forensic analysis of digital data and communications resulting from illicit drug-related activity conducted over the Internet, Public Switched Telephone Network (PSTN), Cellular Network, or a combination of services.

DEA created the Internet Technologies Unit based on the findings of a February 2000 internal study of the agency's capacity to keep pace with the rise of technology in the illicit drug trade. Having formed the Internet Technology Unit, the next step is for DEA to develop a strategic technology plan—which will leverage DEA's operational and intelligence capabilities—and enable DEA to stay ahead of the drug trade's technology into the years ahead.

Question 4. Opium is the key ingredient in the production of morphine. The authorized producers of morphine are required to purchase 80 percent of the opium they use to manufacture the substance from India and Turkey. This requirement was instituted as a measure to combat illegal narcotics trafficking. According to my understanding, many American drug companies would like to see this restriction relaxed. In knowledge of this, the Drug Enforcement Administration is reviewing this long standing requirement. I am curious if you feel the time has come to amend the “80/20” rule, and if so, what effect do you think this will have? Furthermore, if American pharmaceutical companies turn to new sources for opium, will this mean that opium farmers in India and Turkey will begin supplying the black market, as they once did?

Answer 4. The U.S. relies entirely on the importation of licitly produced narcotic raw material (NRM) (opium, poppy straw and concentrate of poppy straw (CPS)) for

the manufacture of narcotic medicines such as morphine, codeine and their derivatives. In light of the illicit demand for and risk of diversion of NRM, particularly opium (which only India legitimately produces for export), a balance between global production and consumption of NRM is critical and the ultimate goal of international policy in this area. As the world's largest importer and consumer of NRM, the U.S. is in a position to significantly affect this balance. Consequently the U.S. has fully supported United Nations efforts to prevent the proliferation of countries cultivating licit opium for export and the overproduction of these materials by supplier countries. A critical part of the U.S. policy on NRM is the "80/20" Rule. This is a Drug Enforcement Administration regulation enacted in 1981 which allocates the importation of NRM between traditional suppliers (India and Turkey) and non-traditional suppliers (Australia, France, Hungary, Poland and the former Yugoslavia). Consistent with the annual United Nations' Economic and Social Council Resolutions (ECOSOC), the "80/20" rule favors the traditional suppliers, requiring U.S. companies to import at least 80 percent of the NRM from India and Turkey. No more than 20 percent of the NRM can be imported from the nontraditional suppliers and no NRM can be imported from any other country. The U.S. is the only country, which has adopted such a regulation in response to the ECOSOC resolutions. The DEA, in consultation with the Department of State, Bureau for International Narcotics and Law Enforcement Affairs (INL), has periodically assessed this longstanding policy. Each time, the conclusion was that this rule was successfully provided the U.S. pharmaceutical industry with adequate supplies of NRM to satisfy the narcotic requirements of the U.S. population while supporting the international objectives of discouraging overproduction and potential diversion. U.S. importers have routinely purchased approximately 90 percent of the NRM from India and Turkey.

Recent events, however, at both the national and international levels, and major concerns by the two current U.S. importers, have prompted the DEA to conduct another evaluation of this regulation. Domestic and international demands for NRM for medicines to treat pain continue to increase. For example, global consumption of opiates increased from 217 MT in 1990 to 240 MT in 1999. Aggressive treatment of pain and an aging global population will ensure continued increasing demands for narcotic medicines. Uncertain production levels of opium in India and CPS in Turkey in recent years due to climatic conditions have led to concerns over global stocks. India's poor crop in 1998 resulted in an elimination of their stocks of opium. They increased the acreage planted in 1999 and had a good crop, which enabled them to somewhat replenish stocks. The increased production, without increased security measures, however, apparently led to significant levels of diversion, estimated by some Indian officials to be as high as 30 percent of the crop. An extremely important development has been the dramatic and continuing increase in demand for and consumption of thebaine based opiates, particularly oxycodone and buprenorphine, in the U.S. and elsewhere. Turkish CPS contains no thebaine and Indian opium yields a little more than 1 percent thebaine. U.S. demand for thebaine has increased from roughly six MT in the early and mid 1990s to more than 30 MT in 1999. Australian and French CPS contain significantly higher levels of thebaine Indian opium and Turkish CPS cannot supply the U.S. needs for thebaine.

Since a prime consideration in U.S. NRM policy is to ensure an adequate supply of NRM to satisfy U.S. health needs, the DEA is considering modifying the "80/20" rule. Specifically, the DEA is evaluating an industry proposal to change the required allocation from traditional suppliers and to allow more of the NRM to be imported from nontraditional suppliers. The basic concepts of the policy would remain the same and the traditional suppliers would continue to be favored and could compete for the entire market. If this were enacted it is anticipated that the U.S. purchases of opium from India and CPS from Turkey would remain the same due to increasing demand for morphine based medicines. Most likely, importation of higher thebaine CPS from France and Australia would increase to meet U.S. needs for thebaine derived medicines.

Notwithstanding the above, the "80/20" Rule is primarily a control regulation to discourage overproduction of NRM and the proliferation of countries cultivating and exporting opium. The DEA continues to evaluate the impact of any change in the "80/20" rule on potential diversion, particularly of Indian opium. As noted above, increased cultivation of Indian opium without a corresponding increase in security measures led to significant levels of diversion. Consequently, there is concern about the domestic diversion of Indian opium under current conditions. France and Australia, as well as Turkey, produce CPS that is not sought after by illicit traffickers. The DEA is continuing to review this regulation in an attempt to ensure a continued adequate supply of NRM in light of changing demands for the production of narcotic medicines needed by the American public while continuing to promote the nec-

essary controls to discourage overproduction and diversion. Prior to implementing any change, the DEA would publish it as a proposal in the Federal Register, and provide ample opportunity for comment before a final decision is made.

Question 5. Tracking the precursors used in making methamphetamine has been an effective tool for law enforcement. Has this approach been adopted by other nations around the world, where "meth" is a popular drug? Are there any other drugs where tracking the precursors would help us in our drug suppression efforts?

Answer 5. Other nations are either experiencing methamphetamine abuse or are aware of it. Shipments of the precursor chemicals have been stopped in a number of nations they were destined for, such as, Mongolia, Samoa, Australia, Brazil, South Africa, Guatemala, Mexico, and Switzerland.

DEA has also established Operation Purple, aimed at denying drug traffickers access to potassium permanganate, a chemical oxidizer used to remove impurities from cocaine base. Currently, 23 countries, the United Nations International Narcotics Control Board, ICPO-Interpol, and the World Customs Organization are actively participating in this effort.

Between April 15, 1999 and January 31, 2000, Operation Purple has tracked 248 shipments of potassium permanganate totaling nearly 8 million kilograms. Thirty-two shipments (2,225,843 kilograms) were stopped/seized as a result of this operation. Thirty-one reported arrests worldwide have been reported since the operation began.

DEA's Special Testing and Research Laboratory's in-house cocaine signature program to examine trends in cocaine processing indicates that the percentage of highly oxidized samples is now at an all time low and the percentage of minimally or not oxidized samples is at an all time high. The use of an oxidizing reagent is directly related to its availability and cost on the black market.

Question 6. A recent New York Times article discusses plans to open an inn in Santa Cruz, California, for medical marijuana users. Should the federal government permit these types of operations, and how should authorities respond to them?

Answer 6. Under the Controlled Substances Act (CSA), marijuana is classified as a schedule I controlled substance. By definition, schedule I controlled substances have "no currently accepted medical use in treatment in the United States" and a "lack of accepted safety for use * * * under medical supervision." The CSA therefore prohibits the use of marijuana outside of research that has been approved by the Food and Drug Administration and registered with DEA. Accordingly, it is a criminal violation of the CSA for any person to manufacture or distribute marijuana outside of federally authorized research. It is also a criminal violation of the CSA to open, maintain, or manage any place for the purpose of manufacturing, distributing, or using any controlled substance.

Using any premises to manufacture or distribute marijuana, or to allow persons to smoke marijuana, clearly violates the CSA and endangers the public health and safety. To address such premises, DEA supports utilizing the full range of legal options provided under the CSA, including criminal prosecution of the operators, forfeiture of the premises, and seizure of the marijuana and related contraband.

Question 7. The DEA has a very extensive screening process to evaluate candidates prior to employment. What program or procedures does the DEA have to assure the integrity of current employees?

Answer 7. DEA's very existence and success as a law enforcement agency rests upon the public's perception of our honesty, credibility and integrity. For those reasons, the public's trust and confidence in DEA is paramount and goes to the deepest core of our ability to carry out the agency's mission. To that end, I believe that it is absolutely imperative that every action possible is taken to ensure that only those candidates who pass stringent screening processes are hired, and that there are established mechanisms in place to ensure that once these individuals are on board that they clearly understand throughout their career what is considered to be ethical behavior.

In order to attain and retain the public's trust and support, we must constantly strive to ensure that our personal and professional integrity is beyond reproach and that unethical behavior is immediately investigated and dealt with in an appropriate manner. This is reinforced continually in that once an individual has passed all required screening processes and has been hired by DEA, he or she must certify annually in writing that he or she has read and understood DEA's standards of conduct.

Integrity is stressed to DEA's supervisors and managers since they play an integral role in an effective integrity program. Every supervisor and manager is responsible for assuring that his/her subordinates are fully aware of and understand the standards of conduct and all DEA regulations and policies applicable to the perform-

ance of his/her duties. Supervisors and managers are also accountable for monitoring their subordinates' compliance with regulations and policies and when necessary, for taking appropriate action to correct deficiencies and/or reporting misconduct through the chain of command to DEA's Office of Professional Responsibility (OPR).

Further, memoranda are continually issued that address the basic tenets of the responsibilities of DEA employees, supervisors, and managers. I have personally issued many such memoranda in which I stress that we should be very proud of DEA's record in this area and our overall public image, but that DEA employees must continue to maintain the highest standards of personal integrity and judgment, both on and off duty, to avoid conduct which may undermine that trust. For example, I issued a cable that spoke only to alcohol-related incidents in which I stressed that such behavior erodes the respect for and trust among agents and betrays the privilege that has been entrusted to them to protect and serve the public. I am also in the process of preparing a video, to be distributed DEA-wide, which will reiterate the agency's policies on integrity, ethics and conduct, and will specifically address the use of alcohol by employees and the penalties for violating established policies.

I also believe that the agency's philosophy must be consistently carried out by those entities involved in DEA's investigative and disciplinary process. Accordingly, I have personally met with members of the disciplinary and investigative process to explain the agency's philosophy and to instruct them that proven severe misconduct, to include alcohol-related misconduct, should be dealt with in a harsh manner.

Since becoming acting administrator, I have named a new Chief Inspector. I have requested that the new Chief Inspector review our current investigative process to see if there are procedures that could be implemented to expedite the process in that we want to address these issues in the most efficient manner.

Further, the system in place to address issues of wrongdoing are formalized into the DEA system of discipline, which is distinguished by being centralized and three-tiered. Specifically, DEA has an investigative body, a proposing body, and a deciding body. This system allows for a normal check and balance and encourages consistency. I have also made adjustments in the personnel involved in the adjudication of discipline to ensure that the agency's philosophy is carried out, and I have created a new executive level position and requested a slot for it to oversee the disciplinary process.

I believe that discipline must be fair and equitable for all employees. At the same time, the system has to ensure that the agency's integrity remains intact and that the faith of the public is maintained. When misconduct occurs that erodes public faith and or the integrity of the agency, it must be dealt with swiftly and appropriately.

In addition to the effort in the discipline areas, the agency has, within the last two years, instituted a vigorous suitability review process to ensure that our agency and investigative work force is fit to carry out their duties. This review is fully described in the attached suitability section.

Another vital aspect of an agency's integrity program is the provision of ethics training throughout an employee's career. Accordingly, applicants selected for core positions attend a basic training program during which they receive extensive ethics training strategically dispersed throughout the course. The program has been redesigned to stress this critical dimension of law enforcement and emphasizes the positive aspects of integrity and police ethics.

Furthermore, the curricula for other internal training programs have been revised to incorporate and/or expand the coverage of ethics and integrity issues. This includes refresher training for all core series employees and supervisory and managerial training. For supervisory training programs, emphasis has been added to integrity issues and the supervisors' responsibility and accountability for the enforcement of integrity issues at their levels. Additionally, OPR and the components of the disciplinary review process make presentations at internal training sessions for employees at all levels and at management conferences.

Finally, DEA employees are subject to random drug screening. If an employee refuses to undergo this screen, removal action is initiated. Further, if an employee has a confirmed positive drug test result, by executive order, he or she must be immediately "removed" from his or her position. The positive test result is immediately reported to OPR and the case is forwarded through the disciplinary process. To date, all employees who have tested positive for an illicit drug have either resigned or have been removed from DEA and the federal service.

In summary, I remain completely committed in ensuring that DEA represents itself in the most ethical and trustworthy manner possible. That is why I contin-

ually urge all employees to use restraint and sound judgment at all times, and to remember the special privileges that they hold and the responsibilities which accompany those privileges.

Question 8. What procedures are in place for DEA to dismantle, transport, store, and dispose of waste products from clandestine methamphetamine production?

Answer 8. DEA has established effective procedures for the seizure of all clandestine drug laboratories, including methamphetamine. Dismantling, transporting, storing and disposing of the seized chemicals and contaminated apparatus are part of a comprehensive plan to ensure officer safety and protection of the environment.

There are seven steps associated with the dismantling, transporting, storing and disposing of the seized chemicals and contaminated apparatus of a clandestine drug laboratory:

Planning the Raid: Step 1

In planning the raid, the case agent first makes an assessment of the hazards likely to be encountered and determines who needs to be notified before the raid (*i.e.*, local police, fire department, emergency rooms, and hazardous waste contractor). Once the potential hazards have been considered, the case agent assigns certified teams to conduct the raid. These teams include a forensic chemist and a site safety agent who are trained and equipped with requisite safety equipment. During the raid planning, consideration is given to when to call the hazardous waste contractor.

Initial Entry: Step 2

The purpose of the initial entry is to apprehend and remove the operators and to secure the laboratory.

DEA protocol calls for the initial entry team to employ ballistic protection equipment and fire retardant clothing. The initial entry team does not use respiratory protection [*i.e.*, Scientifically Controlled Breathing Apparatus (SCBA)] because it may restrict an agent's vision and mobility. This may significantly interfere with an agent's ability to defend against armed suspects. This protocol was adopted after careful consideration of the pros and cons and is based largely on the experiences of field agents. The protocol does, however, require that at least one person be on stand-by, suited-up in protective clothing and respiratory protection, as a precautionary measure.

Assessment: Step 3

After securing the premises, everyone is evacuated. Then a specially trained and certified agent and forensic chemist with OSHA Level B protective equipment conduct a thorough assessment to determine what, if any, immediate health and safety risks (*i.e.*, potential for fire and explosion, toxic vapors, booby-traps, *etc.*) exist. The team then takes appropriate steps to reduce imminent risks (*i.e.*, properly shutting down active "cooking" processes, ventilating the premises, *etc.*). After the assessment team determines the level of risk and establishes the appropriate level of protection required, the processing phase can begin.

Processing: Step 4

During the processing phase, agents photograph and/or videotape everything in the laboratory and then gather evidence. No materials or apparatus are moved until the certified chemist and agent have inspected and inventoried each piece of evidence. The certified chemist, in consultation with the agent, takes samples as needed for evidence. All samples are labeled, initialed, packaged, and sealed for transportation to a DEA laboratory. The recommended one-ounce sample size is typically sufficient for DEA drug analysis and, if necessary, a reanalysis. It is after all evidence is taken that the processing team dismantles the clandestine drug laboratory. The team does not take possession of, or transport any chemicals, glassware, or apparatus used in the laboratory other than the samples taken for evidence. (These tasks are discussed below.) Depending on the size of the seized laboratory and safety considerations, qualified members of the team may remove the chemicals and contaminated apparatus from inside a building to a consolidation point outside the structure. Upon arrival at the clandestine drug site, the hazardous waste contractor can then, more quickly, prepare the waste for shipment. A qualified hazardous waste disposal contractor is used to remove all remaining chemicals (liquids and powders), and laboratory glassware and equipment from the site.

DEA considers all of these materials to be contaminated and, therefore, manages them as hazardous waste. When the processing has been completed, the case agent authorizes the disposal contractor to remove and dispose of all hazardous waste. The case agent verifies and accounts for all hazardous wastes to be removed. For safety and security reasons, a DEA agent remains at the site until the disposal contractor

has completely removed the hazardous waste. The disposal contractor removes any contaminated protective clothing and equipment that cannot be decontaminated and reused. Decontamination of equipment is not a requirement of the DEA contract, however, removal and disposal of contaminated equipment and "decon water" is part of the DEA contract requirements.

Exit: Step 5

When the removal of these hazardous wastes has been completed, the case agent conducts a final inspection of the premises, ensures that a DEA representative signs a Receipt for Services and other documents pertaining to the site and, posts a prominent warning sign on the premises.

Follow-up: Step 6

The Special Agent in Charge (SAC) of the DEA division sends notification letters to the property owner, with copies to appropriate health and regulatory agencies. All of these letters are sent by certified mail, return receipt requested.

Transportation, storage and disposal: Step 7

For the last ten years, DEA has contracted with qualified hazardous waste, emergency response and removal contractors. These companies provide the trained personnel and equipment to properly characterize the seized chemicals according to the Environmental Protection Agency's Resource Conservation and Recovery Act (RCRA). The DEA contractors also ensure that all federal, state and local regulations associated with the transportation, storage and disposal are met. Only RCRA permitted facilities are used for the treatment, storage and disposal of hazardous waste seized by DEA.

Response times are critical to the efficient removal of the seized chemicals and contaminated apparatus. DEA's contracts have improved response times to minimize overtime associated with waiting for the contractors. In addition to an early "call-out" to position the contractor near the suspect site, the current contract has nearly three-times as many contract areas (29) as the original contract (10) thereby reducing the response times. Since the DEA contractors are in the emergency response, hazardous waste removal business, they are accustomed to meeting DEA response-time contract requirements. These requirements include returning an initial phone call within 15 minutes, mobilizing a crew and responding within the legal speed limit and road conditions.

Experience gained by DEA in preparing hazardous waste contracts has improved the efficiency and helped lower the cost. Ten years ago, the average cost per cleanup was approximately \$17,000. Today, the average cost of a clandestine drug laboratory cleanup is approximately \$4,000. Some jurisdictions have claimed the cost of cleanup is exorbitant. But closer examination has revealed that labor costs for state/local employees often are not considered. Also, in many instances, wastes are not managed in strict adherence to established standards. On at least two occasions, disposal costs were not fully taken into consideration because the state/local contractor was working under a "no-cost" or "reduced cost" arrangement as part of a penalty for previous environmental crimes.

Question 9. How far along is DEA in establishing the Clandestine Laboratory Database? How will the information in the database be compiled and what efforts if any are being established to share this information with other members of the law enforcement community?

Answer 9. I am very happy to report that the Clandestine Laboratory Seizure System (CLSS) which is maintained at the El Paso Intelligence Center (EPIC), was completed at the end of March 2000. This system is completely operational and has connectivity to the Western States Information Network (WSIN), the West Texas HIDTA, and the Midwest HIDTA. There are presently over 22,000 CLS records provided by DEA and WSIN in this new database. In addition, the Midwest HIDTA, which has approximately 5,000 records, is presently inputting records into the database. Our counterparts at WSIN have indicated that they will begin sending records to be input into the database on a quarterly basis.

CLS telecommunication links presently exist to WSIN, the Midwest HIDTA and the West Texas HIDTA through a secure dial-up communication network. Efforts are presently underway to establish a telecommunication link with the Regional Information Sharing System (RISS) central switching center that has the possibility of providing connectivity to an additional 5,000 users who are a part of the RISS community. Furthermore, efforts are also underway to provide a telecommunication link to the remaining 29 HIDTA's and other Federal agencies to include DEA. All of the envisioned connections will provide for interactive query and reporting of the data in the CLS database.

Finally, EPIC is in the process of providing a minimum pointer index query capability to the National Law Enforcement Telecommunications System (NLETS) user community. This avenue will have the capability of providing restricted CLS access to an additional 58,800 state and local agencies.

Question 10. Does DEA offer assistance to other federal, state, and local law enforcement agencies in investigating and dismantling clandestine methamphetamine trafficking operations? If so how?

Answer 10. Yes, especially in the area of providing the specialized training and equipment, mandated by federal regulations, for state and local law enforcement officers who participate in raiding these hazardous locations. We conservatively estimate at least 80 percent of the state and local law enforcement officers in the nation who are "safety certified" to process methamphetamine laboratories received their initial one week training certification from the DEA Clandestine Laboratory Training Unit. In FY-1995, DEA trained and "certified" 118 law enforcement officers to raid clandestine drug labs. In FY-1999, 1,366 students graduated from the DEA Clandestine Laboratory Safety School. Each of these officers were issued over \$2,000 in specialized clandestine laboratory safety equipment. Plans have been formulated to provide clandestine laboratory training to 1,968 law enforcement officers in FY-2000. These figures do not include the thousands of law enforcement officers and civilian personnel who have received DEA training in shorter classes and seminars on clandestine lab awareness, investigations, and/or annual recertification training in conferences across the country.

The significantly larger number of officers/agents who have been "safety certified" to raid clandestine laboratories, as well as the recent significant national drop in methamphetamine purity (71.9 percent in 1994 compared to 31.1 percent in 1999), have been a factor in the dramatic rise in clandestine laboratory seizures. Obviously, the more officers/agents who are trained to investigate clandestine labs will have a significant impact on the number of labs seized.

In the enforcement/operations arena, DEA is also on the forefront of efforts to combat methamphetamine production, but the role DEA plays in some regions of the country may be different than others, depending on the nature of the methamphetamine problem in that region. DEA Clandestine Laboratory Enforcement Teams in the Midwest U.S. have traditionally been very active in the seizure of the small "mom and pop" operations because of the lower numbers of local/state police officers who are trained to conduct methamphetamine laboratory raids. The number of clandestine laboratory seizures in which DEA participated has increased from 362 in CY-1995 (327 methamphetamine) to 2,021 in CY-1999 (1,986 methamphetamine). This is a 458 percent increase in only five years. The combined DEA and state/local police clandestine lab seizures for CY-1999, reported to the National Clandestine Laboratory Database at EPIC, was 7,010 laboratories (6,793 methamphetamine), and reports for CY-1999 lab seizures are still coming in from state and local police agencies across the country.

In contrast to the Midwest states, California's methamphetamine problem is longstanding and that state has developed an expertise in dealing with this serious problem. The state of California does not require federal assistance in the seizure of the smaller production laboratory operations since there are a significant number of local and state police who are trained to perform this role. DEA efforts in California are primarily focused on the investigations of the larger lab production operations which produce the vast majority of the methamphetamine in the U.S. and the command and control structure of the significant Mexican drug trafficking organizations who operate them. In addition, DEA's Special Operations Division and Office of Diversion Control are actively involved with state and local police in chemical interdiction operations.

In many Midwest and eastern U.S. states, clandestine laboratory operations are a relatively new phenomenon, and DEA lab teams are therefore more actively involved in the seizure of small production lab operations in these regions. This is because of the lower numbers of state/local police officers who are trained and do not have the adequate equipment to respond to the growing number of small production lab seizures.

Another method which the DEA utilizes to disrupt and dismantle methamphetamine manufacturing and distribution organizations is through its highly successful Mobile Enforcement Team (MET) Program. Since the program's inception in early 1995, approximately 27 distinct methamphetamine trafficking organizations have been targeted and disrupted. All ten deployments which took place within the San Francisco Division, targeted methamphetamine distribution organizations. Of the deployments which occurred in the Seattle, San Diego, and Phoenix Divisions, the preponderance of MET deployments targeted methamphetamine trafficking organizations. The Dallas and Denver Divisions each targeted two specific methamphet-

amine distribution organizations during their MET deployments. The majority of MET deployments in the United States target polydrug trafficking organizations, many of which traffic in methamphetamine to varying degrees.

DEA has also provided much needed assistance to state/local police agencies in the cleanup of clandestine laboratories through the COPS program. In 1999, DEA conducted more than 3,800 clandestine laboratory cleanup operations—the majority of which were state or local police agency requests for assistance. The average cleanup cost of approximately \$4,000, varies by region, but DEA in some cases has facilitated the cleanup of clandestine laboratories which cost in excess of \$100,000. The seizure of a large lab or multiple small lab operations could easily bankrupt a small police department or rural sheriff's office, and it is critical for the federal government to assist these smaller departments as they address the methamphetamine problem.

Question 11. What other initiatives are being implemented to enhance the methamphetamine program?

Answer 11. DEA has formulated plans to establish a "Dangerous Drug Desk" to further enhance and coordinate the current programs and limited resources in DEA Methamphetamine Program. The "Dangerous Drug Desk" at DEA Headquarters would upgrade the DEA Methamphetamine Program from a collateral duty of the Domestic Operations West Section to a primary component of the new Desk. In view of the unique nature and challenge of synthetic drug production operations (methamphetamine, MDMA, GHB, etc.), the investigation of these synthetic production and trafficking operations, as well as the specialized training, equipment, chemical interdiction, and investigative techniques required to combat them, would become the coordination responsibility of this new Desk.

DEA was allocated \$1,975,000 from a Congressional Appropriation for FY-2000 for the purchase of specialized lab raid safety equipment. In view of the dramatic increase in clandestine laboratory seizures in recent years, coupled with related fires, explosions, and toxic chemical injuries associated with these laboratories, a Clandestine Laboratory Safety Equipment funding site has been established within the DEA Methamphetamine Program. This funding is essential for officer safety and security. I understand that the Department of Justice (DOJ) has received approval from OMB to reprogram 10 million of DOJ funds to DEA and that this request has been sent to the Congress.

This funding is being utilized to purchase and distribute a variety of specialized safety equipment, ranging from air monitors to chemical protection suits, to every domestic DEA field division to ensure agents and local police officers in DEA task force operations engaging in the high risk activity of executing raids on clandestine drug laboratories, have the essential tools to process these laboratories in a safe and prudent manner. The funding allocation for clandestine laboratory safety equipment is now a DEA recurring budget item. These funds may be used for both safety equipment and/or the purchase and repair of laboratory safety vehicles/trucks. DEA has also utilized other funding to purchase and distribute nine new specialized Clandestine Laboratory Safety Vehicles (trucks) to the field divisions.

Plans have been formulated for the continued distribution of this funding to the DEA Clandestine Laboratory Coordinators for the purchase of safety equipment and/or future raid truck repairs. The percentage distributed to each field division is based primarily upon the number of clandestine laboratories which are seized in its respective region. Some of this funding will be forwarded to the DEA laboratories to provide safety equipment to the DEA chemists who also participate in the hazard assessment and processing stages of clandestine laboratory seizures.

In addition to plans to streamline DEA Headquarters and field enforcement efforts to combat methamphetamine, DEA has formulated plans to enhance DEA training programs for state and local police involved in clandestine laboratory investigations. In Calendar Year (CY) 2000, the DEA Office of Training has formulated programs for the implementation of three additional courses designed for state and local officers. These additional courses will assist state and local law enforcement agencies by providing advanced clandestine laboratory training, specialized tactical raid training, and a new clandestine laboratory awareness training course, in addition to the one week certification schools currently provided to officers nationwide. This program is designed to provide training to a pool of state and local law enforcement instructors in clandestine laboratory awareness and safety. Once trained, these police instructors will be provided with training material that can be utilized by them to conduct recertification training and awareness seminars throughout their respective states.

The DEA Office of Training has met with the executive board of the International Association of Directors of Law Enforcement Standards and Training (IADLEST) who have set up a seven member board consisting of regional directors to meet with

the DEA Office of Training and assist in the implementation of the above mentioned training programs.

As mandated in Section 504 of Public law 104-237, known as the Comprehensive Methamphetamine Control Act of 1996, DEA established the Suspicious Orders Task Force. The task force was established on September 3, 1997. It was represented by law enforcement at the federal and state level and by different aspects of the chemical industry. The task force developed proposals for identifying indicators of suspicious orders in the various segments of industry. It considered payment practices and unusual business practices in attempting to identify prima facie suspicious orders. They developed recommendations at the retail level for recognizing suspicious transactions and suggested voluntary actions.

Within the Office of Diversion, the following initiatives were established:

The Letter of No Objection (LONO)—Initiated in 1994 at the request of the people's Republic of China. Subsequently, the governments of the Czech Republic and India requested that the United States provide LONOs for proposed imports of ephedrine and pseudoephedrine. The Chinese government requests LONOs for all List I chemicals exported from China and Hong Kong. As a result of the LONO program, in 1999, 156.11 metric tons of ephedrine and pseudoephedrine were not imported.

The Warning Letter Program—In every instance involved the seizure of precursor tablets at either clandestine lab sites or in cases where they have been dumped, letters are sent to the manufacturer and distribution, if it is known, stating the date of occurrence, the amount of bottles seized, the lot number of the drug product, and the name of the state and city where the seizure occurred.

Operation Back-Track—A DEA-run operation consisting of 150 investigation in 45 offices. As of February 15, 2000, there have been 224 arrests, 137.3 million dosage units of precursor chemical seized, and \$10,811,396 in seized assets.

Question 12. The report of the Commission on the Advancement of Federal Law Enforcement said that both the DEA and FBI consider themselves to have the same drug enforcement mission, and the Commission recommended that the DEA should be lodged within the FBI. What is your view regarding this recommendation?

Answer 12. I strongly oppose a DEA-FBI merger. In the last 20 years, the illicit drug trade has risen from a cottage industry into the world's most powerful and corruptive criminal enterprise. Simply, the drug trade is too large and complex to be led by an agency with numerous and competing jurisdictions. Today, more than ever, the power and sophistication of the drug trade require the United States to have a single-mission agency to lead drug investigations, as well as to collect, analyze, and disseminate valuable drug intelligence to other U.S. agencies.

The DEA has proven its ability to target international cartels and domestic gangs, because of its single-mission focus. DEA enables the U.S. Government to carry out long-term and sustained drug investigations without diverting its resources to other investigations, such as bombings and cyber attacks. Overseas, DEA is widely accepted by foreign counterparts as the lead U.S. drug enforcement agency with no other investigative or intelligence jurisdiction. This trust enables DEA to build lasting foreign relationships that produce drug investigations, arrests, and extraditions of drug traffickers that threaten Americans. Equally important, DEA's single-mission has enabled it to build a cadre of Agents and Analysts with unique expertise that enable them to penetrate and understand the complexity of drug trade.

Additionally, over the past five years, cooperation between the DEA and the FBI has increased significantly, leading to enhanced collaboration in our Special Operations Division and field divisions around the country.

In short, I strongly believe that a merger would dilute the nation's successful anti-drug effort, cause a significant loss of momentum in enforcement activities, and send mixed signals to the American public and drug organizations about U.S. commitment to fight drugs at a time when powerful internationally-based drug trafficking organizations abound and drug use among young people has increased.

Question 13. A few weeks ago, the DEA dismantled a drug smuggling ring that used FedEx employees to transport marijuana around the nation for a Mexican drug cartel. FedEx has stated that its security system first detected the activity. Is drug smuggling through package delivery services a growing problem? Also, do other carriers, both private and the U.S. Postal Service, have security standards that are equal to or better than FedEx in detecting drug smuggling?

Answer 13. Historically, DEA has worked in conjunction with the various commercial delivery services with outstanding success. As you know, DEA, in cooperation with Federal Express (FedEx), just recently culminated an 18-month nationwide investigation resulting in the arrests of over 100 individuals, the seizure of 34,000 pounds of marijuana and \$4.2 million in U.S. currency and assets. Those charged

include 25 employees of FedEx Corporation, including a FedEx security official in New York City, customer service representatives and drivers. Federal complaints and indictments charge various members of the organization with the importation and distribution of more than 100 tons of marijuana. Furthermore, several of the defendants were charged with using FedEx Corporation airplanes, trucks and facilities across the country to ship the marijuana with an estimated wholesale value of \$140 million. This ongoing investigation is just one example of the cooperation between private delivery services and DEA in relation to narcotics trafficking. In addition, DEA routinely coordinates various investigative efforts with the U.S. Postal Service and U.S. Customs Service.

Furthermore, it should be noted that while DEA supports and cooperates with the various package delivery services, DEA is not privy to or in control of the security standards set by private industry. It is my intention, however, to direct the DEA Operations Division to coordinate meetings with the respective heads of the various commercial package delivery services. It is my expectation that these meetings will be the impetus for a more cohesive strategy between DEA and private industry relative to the problem of drug smuggling through these services.

For your information, I have included statistics from DEA's Operation Jetway, which includes mail/parcel seizures reported to the El Paso Intelligence Center (EPIC) by Federal, state and local law enforcement agencies from calendar year 1995 through the first quarter of calendar year 2000.

- Current Year 95: 988 total seizure incidents accounting for 6,134 kilograms of marijuana; 275 kilograms of Cocaine; 6 kilograms of Heroin; over \$2.3 million in currency and 18 weapons.
- Current Year 96: 1,993 total seizure incidents accounting for 12,505 kilograms of Marijuana; 240 kilograms of Cocaine; 4 kilograms of Heroin; over \$2.8 million in currency and 17 weapons.
- Current Year 97: 1,697 total seizures accounting for 11,870 kilograms of Marijuana; 1897 kilograms of Cocaine; 19 kilograms of Heroin; over \$3.2 million in currency and 31 weapons.
- Current Year 98: 1,432 total seizure incidents accounting for 15,475 kilograms of Marijuana; 278 kilograms of Cocaine; 5 kilograms of Heroin; over \$2.3 million in currency and 18 weapons.
- Current Year 99: 1,557 total seizure incidents accounting for \$9,843 kilograms of Marijuana; 303 kilograms of Cocaine; 1 kilogram of Heroin; over \$3.4 million in currency and 61 weapons.
- Current Year 00 (1st Quarter): 575 total seizure incidents accounting for 4,362 kilograms of Marijuana; 67 kilograms of Cocaine; 1 kilogram of Heroin; over \$.5 million in currency and 14 weapons. Of particular note is the seizure of weapons associated with the various drug seizures.



Vision

Drug Enforcement Administration

The challenges America faces today from drug trafficking, illegal drug use and abuse, and violent crime are enormous. I believe that the men and women of the Drug Enforcement Administration (DEA) have the talent, dedication, and strength to make a significant difference in our society by reducing drug availability and related crime, thus making this nation a safer place to live. Therefore, my overarching goal as the Acting Administrator of the Drug Enforcement Administration is to provide the leadership to ensure the DEA is the preeminent drug law enforcement organization in the world. We will continue to be the most esteemed and effective drug law enforcement organization in this country and the most respected and knowledgeable drug intelligence organization in the world. Objectives for this overarching goal that will receive my personal attention are:

- ◆ Leading U.S. drug law enforcement intelligence initiatives by implementing intelligence-driven targeting;
- ◆ Developing a clear, long-term strategy to execute enforcement tactics that target and attack the leadership and infrastructure of major drug syndicates/organizations, and gangs that are trafficking in licit and illicit drugs that threaten this nation at the international, national, regional, and local levels;
- ◆ Developing leaders who are flexible and innovative to manage the highly technical and complex programs that will take DEA into the 21st century;
- ◆ Maintaining a management philosophy that recognizes the necessity of maintaining the public trust as a prerequisite to effective performance of our mission and that, therefore, emphasizes absolute integrity of both the individual employees and the organization;
- ◆ Recognizing that our greatest strength is our workforce we will work to empower our employees, encouraging and rewarding creativity, initiative, and teamwork while providing for their safety, welfare and morale. These qualities are a prerequisite for success and every employee should constantly strive to maintain them.

The worldwide drug situation demands that DEA be strategically responsive. DEA's core competency remains targeting and attacking the leadership of major drug trafficking organizations. We must lead U.S. drug law enforcement by implementing intelligence-driven targeting and investigations through the increased collection and analysis of human and technical intelligence that identify the major drug threats. We must track and shut down all investigative efforts against all of the major international trafficking organizations at every juncture in their operations. And in cooperation and coordination with our foreign, federal, state, and local partners, we will continue to lead a balanced attack against encroachments made by drug traffickers and help maintain peace and the rule of law in our communities.

We will develop a consistent, clearly stated strategy for the next century that embraces commitment to operations – and by extension multijurisdictional operations – that will be reflected in our approach to principle, integrity, training, and technology. The strategy will coherently integrate organization,

**NOMINATIONS OF ALLEN R. SNYDER (U.S. CIRCUIT JUDGE);
JAMES J. BRADY, BERLE M. SCHILLER, PETRESE B. TUCKER,
R. BARCLAY SURRICK, AND MARY A. McLAUGHLIN (U.S. DIS-
TRICT JUDGES)**

WEDNESDAY, MAY 10, 2000

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

The committee met, pursuant to notice, at 3:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter, presiding.

Also present: Senators Biden and Smith.

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

Senator SPECTER. [presiding]. Good afternoon, ladies and gentlemen. We are going to proceed with the Judiciary Committee hearing on confirmation of six nominees for the Federal bench.

My comments are going to be somewhat more extensive than customary. So I would yield at this time to Senator Breaux, who is here to present a nominee, to economize on his time. He probably has other matters to attend to after he makes his introductory comments.

Senator Breaux, thank you for joining us. I welcome you here and look forward to your comments on James. J. Brady.

**STATEMENT OF HON. JOHN B. BREAU, A U.S. SENATOR FROM
THE STATE OF LOUISIANA**

Senator BREAU. Thank you very much, Mr. Chairman, and, Senator Biden, thank you very much for both being here at the hearing.

I am very pleased to be here today to introduce Jim Brady. In fact, you have no idea how pleased I am to be here today to introduce Jim Brady, perhaps only exceeded by the pleasure of the nominee for having an opportunity to come before the committee.

Before I mention Jim Brady, I would just say, Mr. Chairman, that this is a vacancy in East Baton Rouge, Louisiana, in the Middle District of Louisiana, but just as an idea of how desperately needed is this nominee, back in September of 1998, which is the last number we had, there were 8,860 cases pending in this Middle District. The district is second in the United States in terms of pending cases per judgeship.

As an example, there are almost 3,000 cases per judge in this district, and it is absolutely, I think, impossible to do justice when

you have a caseload of that magnitude. So the committee does a real service today on moving on the President's nominee of Jim Brady.

Let me just say a word or two about Jim Brady. I think that we often have opportunities to recommend to this committee distinguished students of the law, professors of law, people who have written eloquently about the Constitution and about the laws of our land, and these nominees always bring something very special to the committee.

I think also it is important when you have the opportunity to bring a person before this committee who is a person of the people, who understands the daily workings of a trial court lawyer, who has practiced law in large cities in Louisiana, but also in relatively small communities, who really knows and understands what it is like to be in a Federal court before a Federal judge, and to be on this side of the bench when you have a client who is very unsure of what might happen. So I think it is good that we have opportunities to have different types of people serve in these very important positions.

Certainly, Jim Brady with his background as a distinguished graduate of law in Louisiana, receiving his bachelor's degree from Southeastern University, his jurisdoctorate from Louisiana State University, and all of the other extracurricular activities that he has participated in, it certainly qualifies from the standpoint of knowing the law and doing a good job in that regard. But he brings something that I think is even equally as important and that is the high regard of his colleagues, those who have practiced law with him in the small towns and the small courtrooms throughout the State of Louisiana.

He is now practicing with the law firm of Gordon, Arata, McCollam, Duplatnis & Eagan. He has been there since 1997 and has been a member of distinguished firms throughout his career in the State of Louisiana.

He has served on the Board of Tax Appeals, and he is an adjunct professor of law for Louisiana State University. He has participated in the trials in all courts in our land.

So this is the type of person, I think, that knows people and knows the law and can serve with great distinction in this very honorable profession.

So, both myself and Mary Landrieu, who has a statement, Mr. Chairman, that I will ask to be made part of the record, are in support of this nominee, and we urge that the committee look favorable upon his confirmation by this distinguished panel.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Breaux.

We have four nominees from the Eastern District of Pennsylvania who will be presented to the committee by both Senator Santorum and myself. These are four distinguished individuals, two who are currently serving on the Court of Common Pleas, one in Philadelphia County and one in Delaware County, one who is a former judge of the Superior Court of Pennsylvania, and the fourth, a very distinguished Philadelphia lawyer.

The nomination hearings today in a sense break a logjam where we have had some seven vacancies, and a determination has been made to move four forward to confirmation at this time.

There is, as is widely known, some difference of opinion as to the confirmation of judges so close to an election, and it was the judgment on the consensus basis that this would be a good accommodation to move four judges at the present time.

There are candidly some in the Republican Caucus, not that it is a secret, who would like to move no judges at all in an election year. We have broken that logjam in a number of matters.

With my concurrence, we recently confirmed Judge Paez and Judge Berzon in the Court of Appeals for the Ninth Circuit. There had been occasions when my distinguished colleague, Senator Biden, chaired this committee when in an election year there were limits as to how many judges were to be confirmed.

I mention that only by way of background, and to say that there are two other very distinguished individuals who have been nominated by the President, Judge Lagrone Davis, of Common Pleas Court, and Mr. David Fineman who is on the board of the Postal system. I had talked to both of them to tell them what the considerations were. It is still possible the logjam could be broken further. It is perhaps doubtful, but I think it is fair to say that they are very highly regarded. Their names are in the public domain because their nominations have been submitted.

I am personally committed to supporting them, as are others, and we will see what events will occur with respect to those nominees.

Candidly, if a Democrat is elected to the Presidency, all the nominations will move through as rapidly as possible. If a Republican is nominated, then there ought to be some choice there.

In selecting the number of four, I personally consulted with a chief judge of the U.S. District Court, Judge Giles, who said he would be happy to see four judges confirmed. Of course, he would be happier to see seven judges confirmed, but this is looking at a complex picture.

I also conferred with Chief Judge Edward Becker of the Court of Appeals for the Third Circuit who also thought that four confirmations could accommodate the work of the Eastern District Court.

Our nominees are Berle M. Schiller, who has a very distinguished record as a Philadelphia lawyer, and having served on the Superior Court of Pennsylvania for 4 years. He graduated from New York University School of Law in 1968, bachelor's from Bowdoin College, was an associate with Blank, Rome firm in Philadelphia, was a Deputy Attorney General, was a partner in Astor, Weiss, served as chief counsel to the Federal Transit administration, and as I say was a Superior Court judge in Pennsylvania.

Petrese B. Tucker, Judge Tucker, is now a Court of Common Pleas judge in Philadelphia County where she has had a distinguished record since 1987, having served now almost 13 years. She is a graduate of Temple University, 1976, from the law school and a bachelor's degree from Temple University in 1973. She clerked to a very distinguished Philadelphia judge, Judge Lawrence Prattis. She was in the Philadelphia District Attorney's Office as an assistant District Attorney. She served as an adjunct professor part time

to the Great Lakes College Association, and she was a senior trial attorney with the Southeastern Pennsylvania Transit Authority.

Judge R. Barclay Surrick comes to this nomination, having been a judge on the Court of Common Pleas for Delaware County for some 22 years. He is a graduate of Dickinson College in 1960, Dickinson Law School in 1965, and a master's degree from the University of Virginia.

He served as a public defender. He served in private practice, was an associate with Lutz, Fronfield, and, as I say, has been a judge on the Common Pleas Court for 22 years.

Mary McLaughlin, Esquire, is a partner in the law firm of Dechert, Price & Rhoads, has her bachelor's degree from Gwynedd-Mercy College, a master's from Bryn Mawr, and a law degree from the University of Pennsylvania, 1976, Magna Cum Laude.

She served as a law clerk to Judge Brotman in the Federal Court of New Jersey, was an associate with Arnold & Porter, was an assistant professor of law at Vanderbilt University School of Law, adjunct professor at the University of Pennsylvania, was an adjunct professor at Rutgers in 1989, and did distinguished service for the Judiciary Committee on the investigation into Ruby Ridge in 1995. For some 14 years, she has been a partner at Dechert, Price & Rhoads.

Before yielding to my distinguished colleague from Pennsylvania, let me yield to my good friend from Delaware who was chairman of this committee, Senator Biden.

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you very much.

I am happy we are finally moving on the Eastern District the way we are, and I know that you have been pushing. My view is, and maybe I am wrong, that if you had your way, all seven vacancies would be filled now.

I do want the record to note, though, that when I was chairman of this committee, not only did we confirm a lot more judges, we confirmed 66 judges when the last year Bush was President. You can ask Phil Gramm this of Texas. I confirmed five judges over the objection of my colleagues, with 4 hours left to go in the last day, the last hours in the evening, which prompted Phil Gramm to come up and thank me and say something complimentary. He said, "By the way, I just want you to know, I would never do it for you." That is why I like him. He is straightforward. It is true. You all are not doing it for us, and it is a shame that we are not.

I must also point out, and I admit that I am not representative of my caucus, that during the Reagan years, I am the guy that introduced the bill to add 88 additional District Court judges during a Republican administration, over the objection of my entire caucus. So we did not slow them up like now.

Unfortunately, I think the Democrats will have learned the wrong lesson from the conduct of the caucus this last 4 years. If President Bush is elected, I can assure you, and not with my concurrence, you will see most of the judges stopped who are Republican judges, and it is a shame because the judges should be above politics in this.

There are certain things where there are clear disagreements about the ideology of a judge, and that is worth fighting over and we should fight over it. We should identify those judges if there is a problem and just go to battle on them, but, if not, we should move the judges that are not controversial.

I am hopeful that we will not learn the lesson, but my experience after 28 years here is that whatever the Democrats do to the Republicans, the next group will come along, learn the lesson, and take it to a higher grade level.

It used to be when I was Ranking Member and Strom Thurmond was chairman, he would say no judges would be confirmed after the conventions, and that is what was done. When I became chairman, I said no, we are not going to have that rule, we will go straight up to the time we adjourn. After I lost the chairmanship, we went back to initially the summer. Now we are even back to something that starts at 4 years out, and I think we have set a terrible precedent and I think we are going to pay for it.

I will conclude by saying this. There was a recent article written by a national columnist that was shown to me. I will tell you. It was by Kamen. There was a line in there saying the Democrats say the Republicans are holding up judges, and that when Biden was chairman, they let through—and they named all the judges let through. He said, in parentheses, “Biden has a quaint notion”—that is the quote—“a quaint notion that qualified judges for the District and Circuit Court should be above the political fray in an election year.” He went on to say, “Too bad Kennedy and Leahy could not have gotten Biden in a dark alley and changed his mind about that back then,” meaning if I had done what you have done, we would not have had the Republican judges.

I am no longer chairman. Others are. I promise you, they do not have to get me in a back alley. They are already in a back alley, and they are waiting and it is a shame. It is a shame. We have set a horrible precedent.

But with that, we are here today and we have got four distinguished people who both you guys are supporting, and I am proud of that, that you are doing it. They will help the caseload on the Eastern District. We have a Circuit Court of Appeals judge for the District Court Circuit, and we have a Louisiana judge. So, hopefully, we can move through and gentleman these six and maybe get a few more before this year is over, but I have told everyone, and I want to tell the press, if the Republican Party lets through more than 30 judges this year, I will buy you all dinner. And by the way, there are 90 vacancies.

Senator SPECTER. Thank you very much, Senator Biden.

Senator SANTORUM. I am very happy you let him go first.

Senator SPECTER. Senator Biden and I, as has been noted, have a very congenial relationship from having taken more train rides together from Philadelphia to Wilmington over the past 20 years than I think any two Senators in history, at least we know of none—

Senator BIDEN. That is true.

Senator SPECTER [continuing]. Who can compare with that kind of a conversation record, and record of general agreement.

Senator Santorum, thank you for your diligent work on bringing the four nominees to the fore today, and the floor is yours.

STATEMENT OF HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman.

I just first want to associate myself with all of your remarks. I think you stated first off their qualifications and the process that we have been going through here the last couple of years to try to fill vacancies here in Philadelphia, in the Eastern District.

We do have seven vacancies, but I will remind the committee that it was not until just last month that we only had two of those seven vacancies where there were nominations.

I think Senator Specter and I can come to this committee with clean hands saying we were trying to move nominations, but it is hard to move nominations when we do not have nominees.

Senator BIDEN. I was not speaking of either one of you individually.

Senator SANTORUM. I know you were not, but I just want to make it clear for those who may sort of cast this all in the same pot. Senator Specter and I have been very anxious to fill not only these vacancies in the Eastern District, but, frankly, we have two vacancies in the Western District which only one has been nominated and we were hoping for another nominee so we could move both of those.

We do now have six. Senator Specter laid out the case that we believe four is an achievable number. We think that is going to be a very tough thing to accomplish, but we feel that the qualifications of the four candidates that we have moved forward are impeccable and they will stand up very, very well. I am not going to go through those qualifications. Senator Specter did a more than adequate job in doing so, but I just want to lend my support for all four nominees.

I believe it is, again, four very distinguished people, three of whom have records of judicial experience that are quite admirable, one on the Superior Court, one with over 20 years in the Common Pleas Court, and one with over 10 years on the Common Pleas Court, and someone who is known on this committee very well for her excellent work on the subcommittee dealing with Ruby Ridge, all of which have fine resumes here. I think from my personal interaction with them, they have the kind of temperament and record that I think will meet with success not just in this committee, but I am hopeful will meet with success in getting them scheduled on the floor and then passed in an expeditious manner.

So, with that, Mr. Chairman, I thank you for the opportunity.

Senator SPECTER. Thank you very much, Senator Santorum.

We now welcome our distinguished colleague, Senator John Warner.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, my good friend, Senator Biden, and Senator Smith.

Senator Biden, on your subject, I did not hear the opening comments of our distinguished chairman, Mr. Specter, but—

Senator SPECTER. I would be glad to repeat them for you, Senator.

Senator WARNER. Oh, that is all right, but I hope you had the benefit of the statistics that we shared with a luncheon group today, the usual Wednesday luncheon group. We discussed this subject for a half-hour, and I must say Senator Hatch spoke up very eloquently and said how hard and courageous he is trying to be on this issue.

Senator BIDEN. Do you think you will get more than 30 judges for the whole year, John?

Senator WARNER. Well, I am just telling you what occurred.

Senator BIDEN. I understand. I am just curious.

Senator WARNER. I was commenting on his leadership.

Senator SPECTER. Do you want the witness to be sworn? [Laughter.]

Senator WARNER. So there are some very interesting statistics out there going back over the various administrations. At first glance, I do not think we are too far apart from the norm of what has been done through the years.

Nevertheless, gentlemen, I am here today, and I am really privileged and honored to be here to introduce this very outstanding nominee to serve on the Circuit Court of Appeals to the District of Columbia.

I must say, if I could add a personal note, following my graduation from the University of Virginia Law School in 1953, I was privileged to serve as law clerk to Judge E. Barrett Prettyman, the United States Circuit Court of Appeals for the D.C. Circuit. Judge Prettyman later became chief judge, and with the help of my 99 colleagues in the United States Senate, I was privileged to name the Federal Courthouse in honor of Judge Prettyman.

I must say, today, in this room, sits Judge Prettyman's son, my lifelong friend, E. Barrett Prettyman, Jr., who brought to my attention this eminent and extraordinarily well-qualified nominee to go on that bench.

Today, almost 47 years after having served as law clerk for the now-late Judge Prettyman on this Federal Appeals Court, I am pleased to support the nomination of Allen Snyder to the same court on which Judge Prettyman once served.

Mr. Snyder has received the top ranking—I repeat the top ranking—of the ABA Standing Committee on the Federal Judiciary, and his record indicates that he will serve certainly as an excellent jurist.

After graduating Phi Beta Kappa from George Washington University in 1967, Mr. Snyder went to Harvard Law School where he served as editor of the Harvard Law Review and graduated with an A average, Magna Cum Laude. All of these achievements, I never reached that pinnacle, and that is why, I guess, I am here and not on the court.

Mr. Snyder then had the honor to serve as the law clerk to two United States Supreme Court Justices, as did Judge Prettyman's son, I may add, at the time I served his father. Having clerked for Justice John Harlan and later clerking for the current Chief Jus-

tice of the United States Supreme Court, Chief Justice William Rehnquist.

After completing his clerkship, Mr. Snyder worked as an associate for the law firm of Williams & Connolly and later became a partner of my old law firm, Hogan & Hartson. Mr. Snyder has been a partner with Hogan & Hartson since 1979 and is currently chair of the firm's litigation practice area.

In addition to Mr. Snyder's strong academic background and practice experience, I am quite impressed by a particular statement given by Mr. Snyder in response to the Judiciary Committee questionnaire. In the 22 years I have been privileged to serve in the Senate and numerous times I have sat at this bench introducing candidates, I have never seen a more profound statement than this one. Listen carefully, colleagues.

When asked to discuss his view of "judicial activism," Mr. Snyder referred to himself as a jurisprudential conservative. That is pretty good. I had never heard of the word before, but, anyway, it must be there, meaning he would decide cases properly in front of him without looking for causes and without reaching for issues not properly presented to the court. Now, that is the very essence of what we strive to do here is to find that type of individual.

Mr. Snyder stated that he would not decide cases based on personal agenda, but would rather "recognize his role as one of faithfully interpreting and implementing the Constitution and the law of the land." I am sure that the members of this committee will agree with me that Mr. Snyder's philosophy on the role of the judiciary in our domestic system of government is the appropriate one and the standard that we have sought for so many years.

Mr. Snyder is obviously a very accomplished American. He is well qualified to serve as a judge on this very important court, and I am certain that he will in his position serve with honor, integrity, and distinction.

I am pleased to add that bit of support. Thanks very much.

Senator SPECTER. We are very pleased to have you here, Senator Warner.

Senator WARNER. I wonder if he might introduce his family who came with him for the record.

Senator SPECTER. Please do.

Mr. SNYDER. Thank you, Mr. Chairman.

I am very pleased to have here with me today my wife of 30 years, Susan Snyder, and we have two wonderful daughters, our daughter Carolyn Snyder who is a freshman at Amherst College and flew in today in the middle of her final exams to be here, our other—

Senator BIDEN. We are going to make it worthwhile for you, kiddo. [Laughter.]

Mr. SNYDER. Our other wonderful daughter is a graduate student and is in Wyoming right now where she has some teaching responsibilities and could not join us today.

I am also very pleased to have here and to introduce to the panel my father, Henry Snyder, who is 91 years young and who has been a great inspiration to me throughout my life, as well as having here my sister, Charlotte Zuckman, who is there, and her husband,

my brother-in-law, Harvey Zuckman is here, and their daughter and my niece, Jill Zuckman.

Finally, I would like to introduce to the committee my secretary of almost 27 years, Linda Heimple who has been a tremendous help and inspiration to me as well.

I am pleased to have many other friends and family here today. I will not take further time of the committee, but thank you, Mr. Chairman, and thank you very much, Senator Warner, for your gracious remarks and courtesy.

Senator SPECTER. Senator Warner, before you go, you had made a comment about clerking for Judge Prettyman.

Senator WARNER. Yes.

Senator SPECTER. And you also made a comment that your academic record was not quite as distinguished as Mr. Snyder's.

Senator WARNER. That is correct.

Senator SPECTER. I will not ask you what your academic record was.

Senator BIDEN. Do not ask me either.

Senator SPECTER. I still will not ask you, but I will ask you a question to which I know the answer in accordance with the dictums for trial lawyers.

Senator WARNER. Which both of us here, I, Assistant U.S. Attorney, and you, the top—

Senator SPECTER. But I think people would be interested in hearing the short story as to how you got the clerkship for Judge Prettyman, notwithstanding your record was not as good as Mr. Snyder's.

Senator WARNER. I have never revealed that story publicly before. [Laughter.]

Senator SPECTER. Well, you have a right to remain silent.

Senator WARNER. Well, very briefly, His Honor had never engaged his law clerk, anyone who was not a Law Review editor or stood one or two in his class. That, I had not done. I had my law school interrupted by a tour of duty in the Marines in Korea and, therefore, somewhat disjointed, but, nevertheless, I came back and the wonderful dean of the law school at that time, Dean Ribble, tried to discourage me in every way for seeking the position. But I finally made a deal with him. I said if you get me the appointment, I will get the job, and he got me the appointment and now I had to figure out how I got the job.

My recollection, Judge Prettyman had been on the bench for 8 or 9 years at that time, and I took 2 months and memorized every opinion he had ever written. When I went in to see him, he inquired as to how I got there because I was not in the cut normally and there were nine other students out there in that top rank. I said, "Your Honor, if I cannot answer any question you may ask about any decision you have ever written, I would not suggest you engaging me." He never blinked an eye, asked a series of questions, said, "Excuse yourself and invite the next student."

And in my office is a short letter dated 1953, two paragraphs. "I am designating you as my law clerk for the year of 1953-54. Your salary is \$3,100. You will report for duty on the 1st of September." That was the beginning of my public service career. I thank you.

Senator SPECTER. Thank you, Senator Warner.

Senator SMITH. Senator Specter, could I just make a clarification to my friend from Delaware on his numbers, 30 seconds?

Senator SPECTER. Senator Smith, you are entitled to whatever time you want.

Senator SMITH. Senator Biden, you said there were 90 vacancies. In fact, there are 80, and out of the 80, 36 do not have a nominee which means there are 44 vacancies not acted on. So I think that is a lot different than saying—

Senator BIDEN. Let me be precise. There are 80 vacancies, and there are 8 future vacancies that will come up within the next 6 weeks to 8 weeks. I predict there will be another 6 to 8 after that. There will be well over 90 before the year is over. I have been doing this too long. I assumed you knew that as well as I did, but my mistake. I am just saying what the vacancies are.

Senator SMITH. There is no nominee for 36 of those. In fairness, we ought to at least be fair.

Senator SPECTER. I would like to acknowledge the presence here today of Thomas Klein of the distinguished law firm of Klein & Specter, who is the chairman of the Pennsylvania Nominating Panel for the Eastern District who goes through a merit bipartisan selection process.

Tom, if you would stand, we would appreciate it, to be acknowledged.

Mr. Snyder, if you step forward, we will take your nomination first for the Circuit Court. Would you raise your right hand.

Do you solemnly swear that the testimony you will give before the Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SNYDER. I do.

Senator SPECTER. Welcome, Mr. Snyder. We would be pleased to hear any opening statement you might care to make before submitting to questions.

TESTIMONY OF ALLEN R. SNYDER, OF MARYLAND, TO BE U.S. CIRCUIT COURT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. SNYDER. Thank you, Mr. Chairman.

I do not have any opening statement. I do want to thank the chairman and the committee for giving me the honor of being here for this hearing, and I stand ready to answer any questions that the committee may have.

Senator SPECTER. Mr. Snyder, you had talked, as Senator Warner pointed out, about jurisprudential conservatism. How would you define jurisprudential conservatism?

Mr. SNYDER. Mr. Chairman, I think a jurisprudential conservative is a judge who decides the cases in front of him or her, does not reach out for issues that are not properly before them, decides those cases based upon the facts in the record in that case and based upon the law and precedent rather than trying to implement his or her own personal views or personal agenda.

In my view, the role of a judge is to follow the law as it is laid down by the elected officials. Judges are not elected in our Federal system, and in my view, they do not have the right to implement their own views of public policy. The elected branches of Govern-

ment are there to deal with public policy issues. A jurisprudential conservative looks at precedent to follow those precedents and to follow the will of the people as expressed by the elected representatives.

Senator SPECTER. Well, that answer comprehends, Mr. Snyder, enactments of Congress or statutory enactments. It does not encompass the Constitution. What about jurisprudential conservatism with respect to the Constitution?

Mr. SNYDER. I think that courts interpreting the Constitution essentially should approach the task in the same way that they look at statutory issues, and that is that they should first look at the plain language of the Constitution, and where there is any doubt as to what the Constitution means, I think they should then look to the intent of the framers of the Constitution.

Obviously, a lower court judge must also look and must be bound by the precedence of the higher courts.

Senator SPECTER. This committee had considerable inquiry into the doctrine of original intent in some of our confirmation hearings. Do you believe that the Supreme Court of the United States—now, this is not your court, but you might have a matter which is a matter of first impression—should be bound by the doctrine of original intent? You mentioned that in your answer.

Mr. SNYDER. Fundamentally, I believe that the court should look at the language of the Constitution and at the intent of the Framers, yes, sir, because I do not believe that judges should be reaching out for policy ideas even in the constitutional area that do not emanate from the Constitution.

Since the Constitution is broadly phrased, much more broadly than most statutes, there are issues where to apply those phrases to present-day circumstances, one has to go beyond pure original intent.

For example, in the First Amendment, we have to apply the First Amendment to radio, television, and the internet, and there are issues where the literal original intent simply would not provide you the answer, but I think the basic concept of what was intended by the constitutional Framers should be critical. Yes, sir.

Senator SPECTER. Let's take that specific case, and perhaps as famous a case as there is in the Supreme Court lexicon, *Brown v. Board of Education*. There are two dimensions that I would appreciate your comments on. One is *Brown v. Board of Education* was controlled by *Plessy v. Ferguson*, where the Supreme Court of the United States had held before the turn of the 20th century that separate but equal satisfied the equal protection clause.

Then, as a matter of original intent, the Supreme Court of the United States in 1954 looked at the intent of the Framers of the Fourteenth Amendment, the equal protection clause, due process clause.

The balconies of the United States Senate were segregated when the Fourteenth Amendment, equal protection clause, was adopted or ratified later. What considerations were present? I am sure you agree with *Brown v. Board of Education*.

May the record show a nod in the affirmative.

Mr. SNYDER. Yes, sir.

Senator SPECTER. I do not want to assume too much here.

What considerations would justify disregarding original intent where obviously the Congress had supported segregation and a 50-year-plus precedent for segregation?

Mr. SNYDER. Mr. Chairman, I think the court in *Brown* looked at the intent of the Fourteenth Amendment and the equal protection in a broader context that included, for example, the language of the Fourteenth Amendment which calls for the equal protection of the laws, and the court looked at the practical effects of segregation in the United States and determined as a matter of fact, as well as constitutional law, that separate but equal was not equal. They found, therefore, that the condition of segregation violated the basic intent of the Fourteenth Amendment for in fact providing equal protection of the laws to all our citizens.

I assume that the court looked at the records of the adoption of the Fourteenth Amendment to try to determine what was in fact the broader intent in that amendment, and obviously they looked at the record in front of them which included extensive expert and other factual analysis of what was in fact the effect in this country and the effect on our citizens of segregation. The Supreme Court obviously has the luxury that lower courts do not, Mr. Chairman. They can overrule prior Supreme Court precedent and found that *Plessy v. Ferguson* was wrongly decided in their opinion.

Senator SPECTER. Well, I take from your answer the key words of practical fact as being—would you say the practical facts were the critical issues which led appropriately to *Brown v. Board of Education* in disregarding the intent of the Congress and the ratifiers and the precedent?

Mr. SNYDER. Mr. Chairman, frankly, I am not familiar enough with the record that was in front of the Supreme Court in 1954 in terms, for example, of the historical record of the intent of the Framers of the Fourteenth Amendment. I do not know exactly what was in that record and exactly what the court reviewed.

I do believe that all courts in looking at constitutional issues should look at the language of the Constitution which in this case called for the equal protection of the laws which is a fairly straightforward phrase, and they should look at the intent of the Framers and they should look to see whether on the record in front of them that constitutional protection is being met.

Senator SPECTER. Mr. Snyder, if you had a question of first impression where you did not have the guidance of the Supreme Court of the United States, what methods would you employ in deciding such issues of first impression?

Mr. SNYDER. Well, in addition to looking obviously at the factual issues and the record in the case, I would look at the precedence in other courts or in analogous cases.

Mr. Chairman, in my almost 30 years of litigating, it has been very rare that there has been a case that is truly completely one of first impression. All of us lawyers that it is a case of first impression when we don't like the precedents that are out there, and frequently there is no case directly in point, but as a lower-court judge, there are usually cases from the higher courts that, while not direct holdings that are precisely on point, do point the way doctrinally that the Supreme Court is asking the lower courts to follow. So there are analogous cases. There are cases that help a

lower court to make a determination. There may be cases in other jurisdictions. I would look at those precedents as well as looking at the record and the individual case.

Senator SPECTER. Before yielding to Senator Biden and then to Senator Smith, I want to repeat to you a comment which was made by Senator Thurmond at the first nominating hearing that I attended in 1981, and this is for you, Mr. Snyder, Mr. Brady, Ms. McLaughlin, Judge Schiller, Judge Surrick, and Judge Tucker.

Senator Thurmond asked the nominee, "If confirmed, do you promise to be courteous?" translated to if confirmed, do you promise to be courteous. And I thought to myself, what an absurd question, what do they expect the nominee to say, no, not to be courteous? Be courteous even if you are not confirmed.

The nominee said yes, and Senator Thurmond then said, "The more power a person has, the more courteous the person should be," more power a person has, the more courteous the person should be. I have considered that the most profound statement I have heard in this room, not much competition perhaps in the last 20 years, but the most profound statement I have heard. I always repeat that to nominees, and many have come back to me and have said, "I have thought about that," and there are, I think, a lot of occurrences.

I consider myself a practicing lawyer, and have noted many, many times that once those robes are donned, there is an aura of a difference. It may be impatience. You may have some lawyers who are unresponsive, and I do not think you are going to have too many lawyers who are as astute as you are, certainly very few who will have your record.

So I suggest that you think of Senator Thurmond if on any occasion you become short or quick or have the inclination not to be courteous.

Senator Biden.

Senator BIDEN. I concur with the notion of the profundity of the Senator's remarks. It really is. It is amazing.

We know it is a lifetime appointment, and we often joke that someone we appoint to the court, prior to their appointment, they are accessible and they are friendly and they are actually grateful to the President for having appointed them. After they are appointed, they wonder what in the hell took so long, why wasn't I here all the time, and I guess I was born to be here. Not all, but some do, and I am confident from looking at your background that you do not fall in that category in any case.

I just have two questions. One, why do you want to be a judge?

Mr. SNYDER. Senator, I have felt very privileged for about 28 years to be participating in our legal and judicial system as a lawyer and an officer of the court. I really am proud of our system and have been proud to be part of it. We have a legal system that I think is second to none in the world, a system where the will of the people and policy issues are decided by ballots rather than bullets, which is not the case in many countries around the world, and where disputes among people are generally decided in a civilized fashion in courtrooms where people can have some confidence that it is being decided in accordance with the law and based on impar-

tial decisions and not based on power or prestige or the identity of the parties.

I would be greatly honored to be a judge and to contribute further in the administration of justice in trying to give people the sense that coming into a courtroom is a place where they will be treated fairly, where the law will be followed, and I would like to contribute to that process.

Senator BIDEN. With regard to the questions that Senator Specter had asked you about defining what you mean by your definition of being conservative, as I listened to what you had to say, basically what you are saying is those judgments on constitutional issues where the Supreme Court has spoken are above your pay grade. You have no choice, right?

Mr. SNYDER. Yes, sir, that is correct.

Senator BIDEN. So your reading of *stare decisis* is that you are bound by the precedents that are on point of the Supreme Court decisions that you must look to. Is that correct?

Mr. SNYDER. That is absolutely legally correct, and I think morally correct, Senator.

Senator BIDEN. But as a Supreme Court Justice, a Supreme Court Justice is not so bound.

Mr. SNYDER. Yes, sir.

Senator BIDEN. I have no further questions.

Senator SPECTER. Thank you very much, Senator Biden.
Senator Smith.

QUESTIONING BY SENATOR SMITH

Senator SMITH. Thank you, Senator Specter.

Good afternoon, Mr. Snyder.

Mr. SNYDER. How are you, sir?

Senator SMITH. I have a question that goes to the issue of advise and consent, and it picks up on what Senator Biden said. It is not directed at any specific case that you had. It is more generic, and it would apply to the other nominees as well. Unfortunately, I have to leave at 4:00, and I will not get the opportunity to question others.

You mentioned the *Plessy v. Ferguson* case. Obviously, I think as we would also agree with the *Dred Scott* decision which was never challenged, but the issue being in *Dred Scott* that an individual because he was black and was a slave, was property and therefore could not sue. I think we would all accept that that was wrong. However, had we been on the court then, we would have had to follow precedent until it was overturned.

If you were on something under the Supreme Court level, at one of the lower-court levels, *Plessy v. Ferguson*, I think applies that way. There would be many differences with me on this, but I would also apply the *Roe v. Wade* case there.

In any case, not going into that, but just on the issue of advise and consent, if you have a nominee where we are trying to legitimately determine whether or not a person would in fact be an activist judge who might make an outrageous decision if he or she were ever to get to the Supreme Court, it is true we do have another opportunity. If you are ever nominated to the Supreme Court after this, we get a chance to question you again, but sometimes

the water is running pretty fast and it is hard to stop it at that point. You may be rushed into the nomination.

In judicial activism, we have seen many epic battles. Senator Biden and Senator Specter have been involved in them. I remember the issue of Robert Bork, a conservative who was considered to be an activist judge basically because he answered questions before the hearing. If you answer the questions, you get in trouble on either side. So you do not answer the questions. It would just seem to me that without knowing that kind of information, and I am not saying you do, but if a judge has an activist record on the bench in some of the decisions or an activist record prior to coming to the bench on some of his decisions, if we cannot ask you questions about that, how can we advise and consent in a way that would be meaningful to the process? I am speaking as a Senator. How do we do that? How can we advise and consent if we do not know what your views are on issues, not what your views are on a particular decision that might come up? You obviously cannot give us that, but your views on issues of importance?

Mr. SNYDER. Well, Senator, obviously I would not presume to advise the Senate on how to perform its constitutional duty, and the advise-and-consent duty is entrusted to the Senate in the Constitution with no provisos and no process of review. So it is obviously an important function, and I understand the question you are raising, Senator.

My sense is from my limited experience is that this committee has quite an elaborate process for reviewing candidates' records, and there is an extensive review process as to what people have done over their entire career. There is a review by the ABA as well as by the committee's investigative staff that asks questions about demeanor, about public statements, writings, what people have said to their neighbors, and I think that the committee does collect a great deal of information that probably gives you a pretty good sense of what kind of people you have in front of you and what they have done over the last 20 or 30 years which hopefully will allow you to make the kinds of judgments that you are referring to, Senator.

Senator SMITH. But, generally, if I asked you today if separate but equal education was wrong, would you answer that question?

Mr. SNYDER. Well, as you know, Senator, one of the difficulties in this process—and I know you have looked at this question quite a bit and I understand the concern—the Senate is trying to get at all of the issues that you need to know in order to make the decision. The witnesses are trying their best to answer your questions, but obviously are constrained to some extent by the canons of judicial ethics which prohibit people from expressing personal points of view on issues that might come before them on the bench, and indeed, a judge who is doing his or her job properly would not in fact apply that personal point of view in ruling from the bench, whatever it was. They would apply the precedence in the case, but I do understand your concern.

If you could get every candidate to lay out their point of view on every issue of public policy, it would probably give you a further rounded picture of the candidate. Unfortunately, it might make the candidate unable to serve on the bench if they laid that out.

Senator SMITH. A final question, Mr. Chairman.

Again, I think you are answering it honestly, but, again, from my perspective, if we were back prior to *Brown v. Board of Education* and we had the *Plessy v. Ferguson* decision and you were now coming to us as a nominee on the Circuit Court, however the decision has been made, if I were to ask you back then, do you agree with that precedent, I assume you have to say according to judicial ethics—your point is you have to say I cannot answer that question because I might be on the Supreme Court. But my problem with that is, if that is the way you would answer it—and maybe you would not—my problem with that is, okay, when you get on the Supreme Court, I would like to know whether or not you view that precedent as being valid or not, and if you do not, then that might impact how I might want to vote on your nomination.

Mr. SNYDER. Senator, I do not think I would have answered your question precisely that way if I had been before this committee 50 years ago.

I think I would have answered it the same way I am answering it today which is if I were nominated for a lower court, I would have said in answer to any question about whether I agree with *Plessy v. Ferguson* or any Supreme Court decision—I would have said if I were confirmed for this lower-court position, it would be my legal duty and I would in fact follow the Supreme Court precedent whether I liked it or not.

I do think that the question you are raising, Senator, is a harder question with regard to a Supreme Court nominee who has the right and power to overrule a prior Supreme Court decision. I think that may suggest that the standards and the questions perhaps raise different issues for Supreme Court nominees.

I am extremely honored to be here as a Circuit Court nominee, and I am trying my best to answer in that context, Senator.

Senator SMITH. I understand. I am not trying to pin you, but my frustration is that is the way the Supreme Court nominees answer as well. They do not answer it either. So we do not know when we put somebody on the court, when we approve somebody. We do not know what they are going to do, which means it makes the advise-and-consent process very difficult, if not irrelevant. That is the point. It has nothing to do with you personally. I want to make that clear.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much.

Senator BIDEN. May I—

Senator SPECTER. Senator Biden.

Senator BIDEN. I want the record to show, and I want the press to observe this, I agree with the Senator from New Hampshire. That will ruin his reputation, but I agree with you.

Senator SMITH. Both of our reputations are gone.

Senator BIDEN. I absolutely agree. He is dead right.

I have had the misfortune or my students have had the misfortune of my teaching the advise and consent clause in the separation of powers course for the last 8 years in a law school in my State, and I have read, I think, everything that has been published and everything that has not been published on advise and consent. The Senator is absolutely correct. It is totally within his power,

and, Judge—and I hope you will be a judge—you would not be—no bar association, no judicial organization could keep you from going to the bench if you answered every question specifically. The canons of ethics are no bar whatsoever for you answering any question asked as a Supreme Court Justice.

Now, you have a right not to answer what you do not want to answer, and we have a right if you do not answer just to vote against you because we do not like your answer. That is how all of it gets resolved.

So I think we would all be better served in the Senate by saying if they will not answer our questions, you just want to put them on notice at that time you are going to vote no.

Senator SMITH. I have done that a few times.

Senator BIDEN. But, again, hopefully you will have that problem and have time to think about it before you come back.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. One final question which comes to mind—your questioning will be a little longer than the district court judges. You are going to a very, very important court. Circuit courts are important because they have really the final word absent review by the U.S. Supreme Court which is very rare, and the District of Columbia Circuit is especially important because you get the government cases.

It is, I think, the most important of the circuits. Next to a Supreme Court nomination, your nomination is that important.

When Chief Justice Rehnquist appeared before the committee, and you used to clerk for him, I had a very extensive dialog with him about the power of Congress to limit the jurisdiction of the court on constitutional issues. I ask you this question to test the doctrine of subordinate courts following Supreme Court.

If the case came before you, Congress had taken away the jurisdiction of the Supreme Court to decide constitutional questions involving First Amendment, freedom of speech, and the case of *Ex Parte McCardle* decided shortly after the Civil War upheld the power of Congress to take away the jurisdiction of the Federal courts on habeas corpus, would you follow *Ex Parte McCardle*?

Mr. SNYDER. Well, Senator, I pause because I really do not feel that I am a scholar in that particular area.

I actually—I remember taking Federal courts in law school, and I remember reading a lot of cases that dealt with the related issue. It seemed to me at the time to be a somewhat unclear area of the law, and it has not become clear in my mind in the last 30 years not having studied it further.

If that issue did come before me, obviously what I would do first is to look at all the precedents from the Supreme Court. The Constitution, of course, does specifically give the Supreme Court certain specified jurisdiction and then talks about such inferior courts as the Congress shall establish.

Senator SPECTER. Does the Constitution give the Supreme Court the authority to overrule acts of Congress?

Mr. SNYDER. Not explicitly in the Constitution. The *Marbury v. Madison* decision obviously was where that power first was declared.

I am not trying to not answer your question, Senator. I think the kind of question——

Senator SPECTER. This is one question you cannot answer without having your confirmation in any jeopardy.

Mr. SNYDER. What I am saying is I am trying my best to honestly state that I do not know the answer without looking carefully at all the precedents which I just do not have in my mind, but if I did have a case raising that issue, I would look at the language of the Constitution. I would look at the precedence of the Supreme Court, and I would try to follow them.

I am not sure I can answer the question any better than that sitting here today.

Senator SPECTER. If you want to find Chief Judge Rehnquist's answer, check the record.

Mr. SNYDER. I am sure it was a good answer.

Senator SPECTER. I will not tell you what it is. His answer to that question was a good answer, but his answer to the question as to whether Congress had the authority to take away the jurisdiction of the Supreme Court on Fourth Amendment issues was not quite so good, nor was his answer to the question as to why he would answer the questions to the First Amendment, but not the Fourth Amendment.

Well, we have kept you a long time, but I think that you are heading for a very important court. While prediction is not my business generally, I think you will be confirmed, and we wish you the very best.

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

Senator SPECTER. I know your family is very proud of you, especially your 91-year-old father who is sitting beside you. If Senator Thurmond were here, I know he would say that young fellows like your father have a lot to be proud of.

Mr. SNYDER. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Mr. Snyder.

[The questionnaire follows:]

ALLEN ROGER SNYDER

Birth: Jan. 26, 1946 Washington, DC
 Legal Residence: Maryland
 Marital Status: Married Susan Port Snyder
 2 children
 Education: 1963-1967 George Washington University
 B.A. degree, with distinction
 1967-1968 Harvard Law School
 1969-1971 J.D. degree, *magna cum laude*
 Bar: 1973 District of Columbia
 Experience 1971 The Hon. John Marshall Harlan
 U.S. Supreme Court
 Law Clerk
 1971 The Hon. William H. Rehnquist
 U.S. Supreme Court
 Law Clerk
 1972-Present Hogan & Hartson, LLP
 Associate, '72-'78
 Partner, '79-Present
 Office: Hogan & Hartson, LLP
 555 Thirteenth Street, NW
 Washington, DC 20004

To be United States Circuit Judge for the District of Columbia Circuit

SENATE QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Allen Roger Snyder

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

Home: Bethesda, MD 20817

**Office: Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004**

3. Date and Place of birth.

January 26, 1946, Washington, DC

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

married to Susan Port Snyder, formerly Susan Diane Port

spouse's occupation:

**Head, K-8 Section
Division of Elementary, Secondary
and Informal Education
National Science Foundation
4201 Wilson Blvd.
Arlington, Virginia 22230**

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

George Washington University, 1963-1967, B.A. (with distinction)

Harvard Law School, 1967-1968, 1969-1971, J.D. (*magna cum laude*)

6. Employment Record: (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.

Hogan & Hartson, L.L.P. – associate, 1972-1978, partner, 1979-present; member, executive committee, 1987-89, 91-93, 94-96; chair, litigation practice area, 1987-present
The Hon. William H. Rehnquist, U.S. Supreme Court,
January - July 1972, Law Clerk

The Hon. John Marshall Harlan, U.S. Supreme Court,
August - December 1971, Law Clerk

Williams Connolly & Califano, temporary associate,
June - August 1971

Hale & Dorr, summer associate and law clerk, June-August 1970, January-August 1969

Ohio Bell Telephone Co., member, management consulting team, June-August 1968

Bureau of Indian Affairs, research analyst, June-August 1967

In addition, I have a limited partnership investment interest in GWD, L.P. and Topeka Housing Associates, L.P.

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

Yes. 1968-1974, USAR, SP/5, ER [REDACTED] 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.

President, *Harvard Law Review*
Phi Beta Kappa, Academic Honorary Society
Omicron Delta Kappa, Leadership Honorary Society
Psi Chi, Psychology Honorary 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.

Chairperson, 1982-84; Vice Chairperson, 1979-82; Member, Board on Professional Responsibility, District of Columbia Court of Appeals, 1978-84

Chairperson, 1989-90; Member, Committee on Admissions and Grievances, United States Court of Appeals for the District of Columbia Circuit, 1984-90

Member, Advisory Committee on Procedures, United States Court of Appeals for the District of Columbia Circuit, 1986-92

Secretary; Member, Board of Governors, and Member, Executive Committee, District of Columbia Bar (unified), 1977-78

Chairperson, 1975-77, Member, Steering Committee, D.C. Bar (unified) Division on Courts, Lawyers and the Administration of Justice, 1974-77

Board of Directors, Washington Council of Lawyers, 1976-92

Member, Committee on Pro Se Litigation, United States District Court for the District of Columbia, 1991-present

Member, D.C. Bar Lawyer Practice Assistance Committee, 1995-present

Member, American Academy of Appellate Lawyers

Faculty Member, National Institute on Appellate Advocacy, 1980

Arbitrator, D.C. Superior Court, Mandatory Arbitration Program 1987-89

Member, American Judicature Society

Member, Supreme Court Historical Society

10. Other Memberships:

(a) List all organizations to which you belong that are active in lobbying before public bodies.

American Association of Retired Persons (AARP)

(b) Please list all other organizations to which you belong.

**Washington Council of Lawyers
Lawyers' Club of Washington
D.C. Chapter, Society for the Preservation and Encouragement
of Barbershop Quartet Singing in America, Inc.
Tenley Sport & Health Club
Bradley Boulevard Citizens Association
Lake of the Woods 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.

U.S. Supreme Court	4/6/76
U.S. Court of Appeals, D.C. Circuit	2/6/73
U.S. Court of Appeals, 4th Circuit	3/10/77
U.S. Court of Appeals, 5th Circuit	11/9/81
U.S. Court of Appeals, 6th Circuit	4/10/74
U.S. Court of Appeals, 8th Circuit	10/29/81
U.S. Court of Appeals, 11th Circuit	11/9/81
U.S. District Court for the District of Columbia	2/5/73

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.

A. Note, "*Defiance of Unlawful Authority*," 83 Harvard Law Review 626 (1970);

B. Note, "*Setting Effective Dates for Tax Legislation: A Rule of Prospectivity*," 84 Harvard Law Review 436 (1970);

C. Co-Author (with John M. Ferren), "*The Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules*," 7 Real. Prop., Prob. & Tr. J. 726 (1972);

D. Co-Author (with E. Barrett Prettyman, Jr.), "*Breaching Secrecy at The Supreme Court—An Institutional or Individual Decision?*," Legal Times, June 12, 1978.

E. Co-Author (with E. Barrett Prettyman, Jr.), "*Are Specific Guidelines Needed to Protect Justices' Confidentiality at Supreme Court?*," Legal Times, June 19, 1978;

F. Co-Author (with E. Barrett Prettyman, Jr.), "*Perishing Oral Arguments—Would Q & A Be Better?*," Legal Times, July 31, 1978;

G. Co-Author (with E. Barrett Prettyman, Jr.), "*Short Oral Arguments Problem: A Possible Solution from Germany*," Legal Times, August 21, 1978;

H. Co-Author (with E. Barrett Prettyman, Jr.), "*Unpublished Opinions Raise Questions*," Legal Times, September 18, 1978; and

I. Co-Author (with E. Barrett Prettyman, Jr.), "*Federal Bar Admissions Tangle Raises Questions*," Legal Times, February 5, 1979.

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

Excellent. June 29, 1999

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.

The Hon. John Marshall Harlan, U.S. Supreme Court, Aug-Dec. 1971

The Hon. William H. Rehnquist, U.S. Supreme Court, Jan-Jul. 1972

2. whether you practice alone, and if so, the addresses and dates:

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each:

Hogan & Hartson, L.L.P., 555 Thirteenth Street, NW,
Washington, DC 20004 (associate, 1972-78; partner, 1979-;
member, executive committee, 1987-89, 91-93, 94-96; chair,

litigation practice area, 1987-)

**Williams Connolly & Califano (now Williams & Connolly),
725 Twelfth Street, NW, Washington, DC 20005 (June-August
1971), Temporary Associate**

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

I specialize in complex civil litigation, including constitutional law, professional responsibility/ethics, school desegregation law, and antitrust and trade regulation

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

Most of my clients are and have been: law firms and/or individual attorneys whom I represent in the area of professional responsibility and ethics; school districts that I represent in the area of desegregation and school finance; or corporations and trade associations which I represent in commercial or constitutional 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 appear in court frequently.

2. What percentage of these appearances was in:

(a) federal courts;

85%

(b) state courts of record;

10%

(c) other courts.

5%

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 tried to verdict approximately 30 cases as chief counsel; approximately 5 as associate counsel; and 3 as sole counsel

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 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. *City of Los Angeles v. U.S. Dept. of Transportation, 165 F.3d 972 (D.C. Cir. 1999)* – I represented Air Transport Association of America, a trade association of the nation's scheduled air carriers, in litigation against Los Angeles Airport, alleging an unlawful policy of increasing airport landing fees and diverting airport revenues to city government, in violation of federal law. There were two separate trials (regarding challenges to two different years' plans) before Administrative Law Judges of the Department of Transportation. The ALJ's decisions awarding refunds to the airlines were recently affirmed by the D.C. Circuit, resulting in significant savings to the air traveling public.

a. Trial period: 1995, 1996

b. Administrative Law Judges John Mathias and Burton Kolko, Department of Transportation; Chief Judge Edwards and Judges Ginsburg, Randolph, Sentelle, Silberman and Williams, United States Court of Appeals for the D.C. Circuit

c. Opposing Counsel: G. Brian Busey, Esq., Morrison & Foerster, 2000 Pennsylvania Avenue, NW, Suite 5500, Washington, D.C., (202) 887-1500

ii. *United States of America v. Microsoft Corporation, United States District Court, D.C., Civil Action No. 98-1232 and State of New York, et al. v. Microsoft Corp., United States District Court, D.C., Civil Action No. 98-1233* – I represent Netscape Communications Corporation as a non-party witness in connection with this ongoing government antitrust action against Microsoft. Extensive discovery has been obtained from Netscape, including approximately 10 depositions, and I represented its CEO who appeared as a trial witness.

a. Trial period: September 1998 -

b. United States District Court for the District of Columbia, Hon. Thomas Penfield Jackson

c. Plaintiffs' counsel: Joel Klein, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, 10th Street and Constitution Avenue, N.W., Washington, DC 20530, (202) 514-2041

Defendants' counsel: Michael Lacovara, Esq., Sullivan & Cromwell, 125 Broad Street, New York, New York 10004, (212)558-4000

iii. *Berlex Laboratories, Inc. v. FDA, et al.*, 942 F. Supp. 19(D.D.C. 1996) – I represented Biogen, Inc. in successfully defending FDA approval of Avonex, Biogen's new treatment for multiple sclerosis, against a challenge by a competitor claiming that FDA laws and procedures precluded approval of this new drug. The primary significance of this case is to protect the FDA approval process from interference by a competitor and to make available to multiple sclerosis patients an important new treatment.

a. Trial period: None

b. United States District Court for the District of Columbia, Hon. James Robertson

c. Opposing Counsel: James R. Phelps, Hyman, Phelps & McNamara, P.C., 700 Thirteenth Street, NW, Suite 1200, Washington, DC 20005, (202) 737-7541

Defendants' Counsel: Drake Cutini, Office of Consumer Litigation, U.S. Department of Justice, Washington, D.C., (202) 307-3009

iv. *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998) – I represented Petitioner at the Supreme Court and obtained reversal of the decision below, preventing manufacturers from using the copyright laws to bar from import into this country goods that the manufacturer had already sold overseas for lower prices.

a. Trial period: 1997

b. United States Supreme Court

c. Co-counsel: J. Larson Jaenicke, Esq., Rintala, Smoot, Jaenicke & Rees, 10351 Santa Monica Boulevard, Suite 400, Los Angeles, California 90025, (310) 203-0935

Opposing Counsel: Raymond H. Goettsch, Esq., LaTorraca and Goettsch, 211 East Ocean Boulevard, Suite 400, Long Beach, California 90801, (562) 436-1887

Opposing Counsel (for U.S. as amicus curiae): Lawrence G. Walsh, Deputy Solicitor General, Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. (202) 514-2211

v. Jenkins v. Missouri, 495 U.S. 33 (1990) – I represented the Kansas City, Missouri School District (“KCMSD”) in this school desegregation case. KCMSD initially filed this case as a plaintiff, seeking a broad desegregation remedy and assistance from the State to help desegregate KCMSD, a predominantly African-American school district that by State law historically was segregated. I handled dozens of separate trials and appeals in this matter, resulting in the court approving KCMSD’s request for a comprehensive magnet school plan and other remedial programs designed to help desegregate the District. The additional educational programs and resources made available to the District as a result of the various court orders totaled over \$1.5 billion and assisted substantially in desegregating the schools and providing quality education for all KCMSD students. I argued in the United States Supreme Court in this matter and won a ruling in the above-cited decision.

a. Trial periods: There were over 400 court orders in this case, and over 40 separate appeals, during my representation, 1986-96. Approximately 15 separate trials were held on different disputes. A few which I handled personally were July 22, 1994; November 15-17, 1993; June 9-12, 1992; June, 1990.

b. United States District Court for the Western District of Missouri, Hon. Russell G. Clark

c. Co counsel: Shirley W. Keeler, 2300 Main Street, Suite 1000, Kansas City, Missouri 64108, (816) 983-8000

Opposing Counsel: H. Bartow Farr, III, 1850 M Street, N.W., Washington, D.C. 20036, (202-775-0184); and Michael J. Fields, Assistant Attorney General, Office of the Attorney General, 1700 Jefferson Street, Jefferson City, Missouri 65109 (573-751-0531)

vi. *Welch v. American Psychoanalytic Ass'n*, 1986 W.L. 4537 (S.D.N.Y. 1986) – I represented a plaintiff class of Ph.D. clinical psychologists who brought a successful antitrust challenge to the American Psychoanalytic Association's policy of refusing to allow non-M.D.s to obtain training in psychoanalysis. After extensive discovery and motions practice, defendant agreed to a settlement that for the first time allowed clinical psychologists to receive psychoanalytic training under the auspices of the association. The primary significance of this case is to limit the artificial barriers imposed by a professional association that would for anti-competitive reasons limit the public's ability to have access to quality professional assistance.

a. Trial period: None

b. United States District Court, Southern District of New York, John F. Keenan

c. Opposing Counsel: Joel Klein, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, 10th Street and Constitution Avenue, N.W., Washington, DC 20530, (202) 514-2041

vii. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) – I represented the States of Alabama and Nevada in challenging the federal government's determination that federal funds should be cut off from states that refuse to apply the federal unemployment compensation laws to employees of church schools. I tried this case in front of an administrative law judge in the United States Department of Labor, and the ruling in favor of my clients was upheld on appeals to the Fifth Circuit and to the Supreme Court, each of which I argued. The primary significance of the case is to maintain the separation between church and state so that complex regulatory regimes are not applied unnecessarily to church operations, thereby entangling the government in sensitive religious matters.

a. Trial period: 1979 (records to show precise date not available)

b. Administrative Law Judge, U.S. Department of Labor

c. Opposing Counsel: Lois Williams, U.S. Dept. of Labor

viii. *Liddell v. Missouri*, 677 F.2d 626 (8th Cir. 1982) – I represented the St. Louis School District in this interdistrict desegregation case, where we alleged that the state’s historic *de jure* school segregation policies (including a prohibition on the maintenance of schools for African Americans in certain school districts) resulted in African-American citizens being forced to live and attend school in the city school district, while the surrounding suburban districts were predominantly white. On the eve of trial the suburban districts agreed to a settlement that allowed approximately 14,000 minority school children from St. Louis to transfer voluntarily to attend the predominantly white schools in the suburban school districts, while white suburban students were allowed to transfer voluntarily to attend magnet schools to be developed within the city.

a. Trial period: 1981

b. United States District Court for the Eastern District of Missouri, Judge William Hungate

c. Opposing Counsel: Larry R. Marshall, Jefferson City, MO

ix. *Florida Dept. of Health and Rehabilitative Services v. Califano*, 585 F.2d 150 (5th Cir. 1978) – I represented the National Rehabilitation Association in a successful challenge to the State of Florida’s attempt to “reorganize” its method of delivery of services to individuals in need of rehabilitative care, in violation of the National Rehabilitation Act. The case was tried before an ALJ, with significant facts in dispute. Client’s victory at the administrative trial was affirmed by the Court of Appeals. The primary significance of this case was to protect the interest of poor and disabled individuals in not having their federally guaranteed benefits reduced or made more inaccessible as a result of a state’s efforts to seek administrative efficiencies, where federal law conditioned receipt of federal funds on the State’s guarantee of a certain quality and level of care for those individuals.

a. Trial period: 1977 (records currently unavailable to show precise date)

b. Administrative Law Judge

c. Opposing Counsel: Charles A. Miller, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 662-6000

x. Faw, Casson & Co. v. Everngam, 616 A.2d 426 (Md. App., Nov. 30, 1992) – I represented an accounting firm, Faw, Casson & Co. in an action brought by a former partner, involving reciprocal allegations of breach of partnership agreement and breach of covenant not to compete. This case was resolved by a jury verdict, followed by an appellate decision resolving several unsettled legal issues in this area.

a. Trial period: 1991

b. Judge Horne, Talbot County Circuit Court, Maryland
Court of Special Appeals of Maryland

c. Co-counsel: Sally D. Adkins, Esq., Adkins, Potts & Smethurst, L.L.P., P. O. Box 4247, Suite 600, One Plaza East, Salisbury, Maryland 21803-4247, (410) 749-0161

Opposing Counsel: David F. Albright, Esq., Albright Brown & Goertemiller, LLC, 120 East Baltimore Street, Suite 2150, Baltimore, Maryland 21202

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

In addition to the cases listed in response to No. 18 above:

(a) I represented the House Ethics Committee in connection with the investigation and “prosecution” of Congressmen implicated in “Abscam”;

(b) I represented Elizabeth Taylor in an action to enjoin a television network from producing a “docu-drama” purportedly based on her life but containing clearly false information;

(c) I represented Bruce Lindsey in connection with Congressional and Independent Counsel investigations of "Whitewater" matters;

(d) I have counseled and represented dozens of attorneys and law firms regarding legal ethics issues;

(e) I represented the National Register of Health Service Providers in Psychology in defense of an antitrust challenge by individuals who did not meet the credentials required for inclusion in the Register;

(f) I represented the association of the nation's scheduled airlines in litigation against PATCO to recover the contempt of court fines levied as a result of the union's illegal strike;

(g) I represented the Wayne County Road Commission in defending against an environmental (noise pollution) complaint challenging its plan to construct a new runway at the Detroit metropolitan airport; and

(h) I represent a group of urban school districts claiming that the North Carolina state education funding system violates the state constitutional guarantee of a "sound basic education" for all students.

(i) I counseled and assisted then-Justice William H. Rehnquist in connection with his preparation for hearings before the Senate Judiciary Committee concerning his confirmation as Chief Justice of the United States.

**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 termination of my partnership at Hogan & Hartson, I would promptly receive my capital account and a one-time payment based on a formula set out in the firm's partnership agreement to compensate me for my share of firm receivables, unfinished business, etc. I would then have no ongoing relationship or anticipated income from the firm or any other entity.

My wife has a vested interest in pension plans from her present and former government employers, and we both have 401(k) and related retirement accounts.

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

I would recuse myself for at least five years from any case involving, or handled by, my former law firm. I would prepare a list of any investments I have, and the names of close friends, so my staff and I could initially screen for recusal any case that comes before me involving those companies or individuals. I would follow the Code of Judicial Conduct and also consult with the Court's ethics advisors regarding any other appropriate procedures they would recommend.

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 statements.

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.

ALLEN R. SNYDER - SENATE QUESTIONNAIRE

Attachment 2 - Re Section II, Question #4

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Mr. Allen R.		2. Court or Organization U.S. Ct. App. (DC Cir.)	3. Date of Report 09/22/1999
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Circuit Judge (Nominee)		5. Report Type (check type) X Nomination, Date 09/22/99 Initial Annual Final	6. Reporting Period 01/01/1998 to 09/01/1999
7. Chambers or Office Address Hogan & Hartson 555 Thirteenth Street, 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 _____	

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. 9-12 of Instructions.)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions)	
1 Partner	Hogan & Hartson L.L.P.
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 1979--	Hogan & Hartson Partnership Agreement - payout formula for departing partners (expect lump sum payment of present value to be agreed upon at departure)
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 --99	National Science Foundation (S)	
2 1997	Hogan & Hartson - Law Partnership Income	\$ 712,875.00
3 1998	Hogan & Hartson - Law Partnership Income	\$ 744,896.00
4 --5/99	Hogan & Hartson - Law Partnership Income (approximate)	\$ 480,000.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Snyder, Allen R.	09/22/1999

IV. REIMBURSEMENTS - transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 23-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
1	NONE	EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
1	NONE	EXEMPT	
2			
3			

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE
1	NONE		
2			
3			
4			
5			
6			

* VAL. CATEGORIES: J=\$15,000 or less S=\$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 None of Person Reporting
Snyder, Allen R. 09/22/1999

VII Page 1 INVESTMENTS and TRUSTS— income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-34 of Instructions.)*

A Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "J" for joint ownership of reporting individual and spouse, "S" for separate ownership by spouse, "DC" for ownership by dependent child. Place "X" after each asset exempt from prior disclosure.</i>	B Income during reporting period		C Cost 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: (I-P)	(4) Gain: Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
1 First Nat'l Bank of MD Checking/Saving Acct - Joint	B	Interest	J	T					
2 Strong Municipal Adv. Fund	D	Dividend	L	T					
3 Schwab 1000 Fund	D	Dividend	O	T					
4 Schwab Intl Index Fd	C	Dividend	M	T					
5 Schwab S&P 500 Fund	A	Dividend	L	T					
6 Schwab Money Market Fund	A	Dividend	V	T					
7 Maryland State Bond	C	Interest	L	T					
8 BECO Common Stock (J)	B	Dividend	K	T					
9 Mylan Labs Common Stock		None	J	T					
10 PepsiCo Common Stock	A	Dividend	J	T					
11 Tricon Global Rest Common Stock		None	J	T					
12 NV Pharmaceutical Common Stock		None	C	T					
13 PMA Money Market Fund	A	Dividend	J	T					
14 Paradan, Inc. Pref. Stock (J)	C	Dividend	K	T					
15 Hogan & Hartson Cap. Acc't		None	H	U					
16 Hogan & Hartson Telogy Trust (Sale Pending)		None	H	U					
17 Tapco Housing Associates, L.P.		None	J	W					
1 Income 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 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more 2 Codes: I=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 (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
Snyder, Allen R. LEAD ID NUMBER
09/22/1999

(Include those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII Page 3 INVESTMENTS and TRUSTS-- income, value, transactions

A. Description of Assets <small>Indicate where applicable, owner of the asset by using the parenthetical "(S)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.</small>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
			(1) Value	(2) Value	(1) Type		If not exempt from disclosure			
	(1) Amount Code (A-I)	(2) Type (e.g., dividend, rent or interest)	(1) Code (A-P)	(2) Method Code (Q-W)			(2) Date: Month/Day	(3) Value	(4) Gain Code (X-Y)	(5) Identity of buyer/seller (A-H)
NONE (No reportable income, assets, or transactions.)										
35 GRD, I, F.	None		J	W						
36										
37										
38										
39										
40										
41										
42										
43										
44										
45										
46										
47										
48										
49										
50										
51										

Line Item 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
 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H=\$1,000,001-\$5,000,000 I=\$5,000,001 or more

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. D3) O=\$500,001-\$1,000,000 P=\$1,000,001-\$5,000,000 Q=\$5,000,001-\$25,000,000 R=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

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 Snyder, Allen R.	09/22/1999
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date Reported
	Snyder, Allen R.	09/22/1999


IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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

Sept. 23, 1999

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. 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

ALLEN R. SNYDER - SENATE QUESTIONNAIRE

Attachment 3 - Re Section II, Question #5

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	12,488	Notes payable to banks—secured	0
U.S. Government securities—add schedule	0	Notes payable to banks—unsecured	0
Listed securities—add schedule	3,115,998.43 (plus children's accounts)	Notes payable to relatives	0
Unlisted securities—add schedule		Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid tax and interest	0
Doubtful	0	Real estate mortgages payable—add schedule	323,000
Real estate owned—add schedule	1,084,650	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts—itemize:	0
Autos and other personal property	29,000		
Cash value—life insurance	231,873		
Other assets—itemize:			
H&H Capital Account	127,200		

ASSETS		LIABILITIES	
GWD LP	1,000	Total liabilities	323,000
Topeka Housing Associates	5,000	Net Worth	4,539,604.43
Escrow Account - Potential Inv't in Sudley Manor, L.P.	92,000		
H&H Tology Trust (Texas Instr. Stock) - Sale Pending	163,395		
Total Assets	4,862,604.43	Total liabilities and net worth	4,862,604.43
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker 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		

Statement of Net Worth - Allen and Susan Snyder

9/1/99

AssetsBank Accounts and Equities

Check/Sav. Acct - Joint	\$ 12,488.00
Strong Muni.Adv.Fund	58,862.00
Escrow Account - Potential Inv't in Sudley Manor, L.P.	92,000.00
Schwab 1000 Fund	755,613.00
Schwab Intl Index Fd	204,144.00
Schwab S&P 500 Fund	67,517.00
Schwab Mon. Market Fund	1,468.00
Md. State Bond	52,932.00
PECO Stock	36,578.75
Mylan Labs Stock	10,995.94
Pepsico Stock	11,261.25
Tricon Global Rest	1,340.62
KV Pharmaceutical	12,796.87
RMA Money Mkt Fund	4,501.00
Paradim, Inc. Pref. Stock	<u>20,000.00</u>
<i>Total Bank Accounts and Equities</i>	<u>\$1,342,498.43</u>

Limited Partnerships

H&H Cap. Acct	\$ 127,200.00
H&H Tology Trust (Sale order of Tex. Instr. stock pending)	163,395.00
GWD L.P.	1,000.00
Topeka Housing Assoc's	<u>5,000.00</u>
<i>Total Limited Partnerships</i>	<u>\$296,595.00</u>

Real Estate

House-Locust Grove, Va.	\$ 150,000.00
House-Bethesda	700,000.00
1/2 interest, Farm-Shenandoah County, Va.	150,000.00
1/2 interest, Condo Unit-Fla.	29,650.00
Lot 80/13, L.O.W.	<u>55,000.00</u>
<i>Total Real Estate</i>	<u>\$1,084,650.00</u>

Retirement AccountsARS Retirement Acc'ts

IRA		
Euro-Pacific Growth Fund	\$	30,344.00
Growth Fund of America		40,182.00
Keogh Account		
Fidelity Overseas Fund		576,401.00
Fidelity Low Price Fund		373,158.00
Fidelity US Equity Index Fund		456,427.00
401(k)		
Fidelity US Equity Index Fund		<u>66,377.00</u>
Total ARS Retirement Acc'ts		<u>\$1,542,889.00</u>
<u>SPS Retirement Acc'ts</u>		
Gov't. 401(k)	\$	335,099.00
Total SPS Retirement Acc'ts	\$	335,099.00
Total Retirement Accounts		<u>\$1,877,988.00</u>

Life Insurance

Pacific Life Var. Life	\$	231,873.00
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Automobiles

1998 Buick LeSabre	\$	15,000.00
1991 Dodge Minivan		4,000.00
1996 Buick Regal		<u>10,000.00</u>
Total Automobiles	\$	<u>29,000.00</u>

Total Assets		<u>\$4,862,604.43</u>
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Liabilities

House Mortgage	\$	323,000.00
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Total Liabilities		<u>\$ 323,000.00</u>
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TOTAL NET WORTH - 9/1/99		<u>\$4,539,604.43</u>
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Statement of Net Worth

9/1/99

JOANNA SNYDER (age 21) - ASSETS

Pub. Svc. N.M. Stock	\$ 7,412.12
PECO Energy Co Stock	83,565.62
Sav. Acc't - First Nat'l	5,284.00
Total Joanna Snyder - Assets	<u>\$96,261.74</u>

CAROLYN SNYDER (age 17) - ASSETS

McDonald's Stock	\$ 41,209.50
Mylan Labs Stock	20,803.12
Walmart Stores Stock	44,312.50
Waste Mgmt Stock	3,171.87
KV Pharmaceutical Stock	1,911.00
RMA Money Market Fund	1,425.00
Sav. Acc't - First Nat'l	1,075.00
Amer Gp Ltd - Finland	17,800.00
Schwab S&P 500 Fund	<u>8,634.00</u>
Total Carolyn Snyder - Assets	<u>\$140,341.99</u>

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 devoted many thousands of hours over the years to *pro bono* legal representation, including such cases as *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *Boyd v. Gullett*, 64 F.R.D. 169 (D.Md., 1974); and *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974).

I also spent many thousands of hours, over a 12-year period, serving as a member and as chair of the attorney disciplinary system for both the D.C. Court of Appeals and the United States Court of Appeals for the D.C. Circuit, seeking to encourage and enforce the highest standards of ethics among members of the bar, which I believe is an important community service.

I have also worked personally through community organizations to provide assistance to the homeless and low income citizens by assisting at shelters and helping with low income housing renovation work.

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

I have never belonged to such an organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? 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 commission for the United States Court of Appeals for the District of Columbia Circuit. I was interviewed for this position in June 1999 by five attorneys from the Department of Justice and the White House Counsel's Office. I then was interviewed in July 1999 by an agent of the FBI, and in August by a member of the Standing Committee on Federal Judiciary of the ABA.

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 most important fact for any federal judge to remember in deciding cases is that he or she was not elected to office. The President, Senators, and Representatives have the consent of the electorate to apply their judgments and views of public policy. Judges do not.

Too often federal judges act as if donning black robes allows them to decide what is wise public policy and to interfere with the judgments of elected executive or legislative officials. Judges should not simply defer to elected officials; the judges' job, generally, is to determine what those officials intended, and to enforce that intent, absent a clear violation of the Constitution or other controlling legal principles.

When I had the honor and privilege to clerk for Justice Harlan and for then-Justice Rehnquist, the issues being considered in the Chambers did not turn on the Justices' personal views on policy, but on a studied attempt to discern Congressional intent, or the meaning of precedent. Thus, whether judges are "liberal" or "conservative" on policy issues should make little difference to their performance on the bench, especially in the "inferior" courts. What does matter is whether they are jurisprudential conservatives, which I consider myself to be.

Jurisprudential conservatives decide the cases properly in front of them, no more and no less. They do not look for causes or reach for issues not properly presented by the parties before the court with standing to raise those issues. Jurisprudential conservatives do not reach constitutional issues if a non-constitutional ground is dispositive. They respect stare decisis as a fundamental basis of judges' moral authority and accountability. They seek honestly to determine the meaning of the legislative language in statutory cases, or the parties' intent in a contract dispute, or the meaning of a Supreme Court precedent on point – all without regard to their personal preferences or philosophies. They seek to dispose of cases on narrow grounds, where possible. They try to avoid complex remedies requiring judicial intervention in ongoing governance issues, a role judges are ill-equipped to perform.

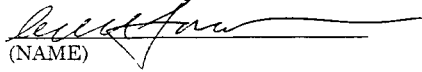
A "judicial activist" is a judge who decides cases based on a personal agenda. In my opinion, whether that agenda is liberal or

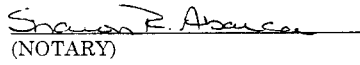
conservative it has no place on the bench. A jurisprudential conservative, whether liberal or conservative in personal policy views, does not carry that agenda onto the bench, but recognizes his or her role as one of faithfully interpreting and implementing the Constitution and laws of the land.

AFFIDAVIT

I, Allen Roger Snyder, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 22, 1999
(DATE)


(NAME)


(NOTARY)

Sharon R. Abarca
My Commission Expires June 14, 2004

Senator SPECTER. We will take now Mr. James J. Brady. Step forward, please.

Mr. Brady, will you raise your right hand. Do you swear that the testimony you will give before this Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BRADY. I do.

TESTIMONY OF JAMES J. BRADY, OF LOUISIANA, TO BE U.S. DISTRICT COURT JUDGE FOR THE MIDDLE DISTRICT OF LOUISIANA

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Mr. Brady, if you are confirmed as a Federal judge, do you promise to be courteous?

Mr. BRADY. Yes, sir. I take Senator Thurmond's thoughts very seriously.

Senator SPECTER. Mr. Brady, would you classify yourself as a judicial prudential activist?

Mr. BRADY. I would, you know, go along with what the previous panel member, Mr. Snyder, said and—

Senator SPECTER. Well, we did not ask him that question.

Mr. BRADY. I'm sorry?

Senator SPECTER. We did not ask him whether he considered himself a jurisprudential activist. We took him up on jurisprudential conservative.

Mr. BRADY. Conservative.

No, I'm not a jurisprudential activist. I believe in following precedent as set forth by the Supreme Court and by, in my instance, the Fifth Circuit Court of Appeals, and will do that if I am fortunate enough to be—

Senator SPECTER. When you face issues which have not yet been decided and you have a matter where there are no precedents really close enough to give you guidance, what factors would you consider in deciding such a case?

Mr. BRADY. Well, the statutes come before you with a presumption that they are constitutionally valid. I would look at the plain language of the statute, the Constitution. I would look for analogous precedents. I agree with some of the statements that were said here that very rarely are there cases that are actually of first impression, and if there are not any cases of law, I would try to, you know, determine what the Supreme Court would like to see happen in those instances or the Fifth Circuit, where—if I could determine where they were heading in other areas.

Senator SPECTER. Are you familiar with the recent case argued in the Supreme Court of the United States to overturn *Miranda* and establish the standard as articulated by the Omnibus Crime Control Act of 1968 to judge a confession on the totality of the circumstances?

Mr. BRADY. I have seen news reports and articles of the arguments before the court in that area.

Senator SPECTER. I believe the Court of Appeals for the Fourth Circuit found that was the prevailing—the appropriate standard. Assuming that they did, and I believe that they did, what would

be the justification for the Court of Appeals doing that in the face of existing law of *Miranda* requiring specific warnings and waivers above and beyond the totality of the circumstances test?

Mr. BRADY. I don't know other than I believe they based that there was a statutory enactment that legislatively overruled the holding of *Miranda*, if I have my facts correct about that, and I may not, but they would, I think, look at that aspect of it and felt that there was a later, you know—

Senator SPECTER. But the Supreme Court of the United States had decided many cases upholding *Miranda* subsequent to the 1968 statute.

Mr. BRADY. Yes. If you are asking me would I follow the precedent of the Supreme Court, I would. I would—

Senator SPECTER. Would you have followed *Miranda* and not—

Mr. BRADY. I would have followed *Miranda*, yes.

Senator SPECTER. What is there in your own background, Mr. Brady, which you would cite as establishing your qualifications to be a Federal judge?

Mr. BRADY. Well, I think that in general that I have had experience in very many different jurisdictions, you know, Federal, State, appellate courts on both the State and Federal level. I have had a variety of cases throughout the years. I have done a variety of practice aspects. I have been plaintiff counsel. I have been a defense counsel. I have had, you know, a varied practice, and I think that is something that would help me be a good trial judge on the Federal level if I am confirmed.

Senator SPECTER. I am going to ask you a question now which appears in the prepared questions by the committee. Please state in detail your best independent legal judgment, irrespective of existing judicial precedence, of the lawfulness under the equal protection clause of the Fourteenth Amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions, hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of Government contracts.

Mr. BRADY. Well, most of those were answered, Mr. Chairman, by the *Adarand* case, and they provide for strict scrutiny, a very narrow focus on a compelling State interest, and that is the interpretation that the Supreme Court has on most of those cases and that is the precedent that I would follow.

Senator SPECTER. Well, that is a very good answer. Do you read the slip opinions of the Supreme Court or the advance sheets, or how did you happen to know *Adarand*?

Mr. BRADY. I had seen some comments on it and had one occasion to look at it in relation to a matter that I have had, and then I have seen other materials on it.

Senator SPECTER. Would you tell us what matter you had that brought the *Adarand* case to your attention?

Mr. BRADY. It was a discrimination case, employment discrimination case.

Senator SPECTER. What would you do—and this is another question from the standard questions. What would you do if you believe the Supreme Court or the Court of Appeals had seriously erred in

rendering a decision? Would you nevertheless apply that decision with your own best judgment of the merits?

Take, for example, the Supreme Court's recent decision in *City of Boerne v. Flores* where the court struck down the Religious Freedom Restoration Act.

Mr. BRADY. I would follow the precedent of the court.

Senator SPECTER. Senator Biden is otherwise engaged. So I will ask you his question. Why do you want to be a Federal judge?

Mr. BRADY. Well, I think—thank you, Mr. Chairman. I believe that public service is a very high calling. I also believe that the legal profession is a very high calling, and I think that this is the best way that I could serve both of those at this point. And I think that it is a very noble thing. If I am confirmed by the Senate, I think that I could best serve the people in my State in that capacity.

Senator SPECTER. Do you know how much a Federal District judge makes?

Mr. BRADY. I think it is 130-some-odd thousand per year.

Senator SPECTER. Are you interested in what your salary would be?

Mr. BRADY. That has not been the overriding concern.

Senator SPECTER. Are you interested in what your salary would be?

Mr. BRADY. Yes, yes.

Senator SPECTER. But you did not check that.

Mr. BRADY. I did not.

Senator SPECTER. You know *Adarand*, but you do not know your salary.

Mr. BRADY. I did not.

Senator SPECTER. Do you know that Circuit judges make more than District judges?

Mr. BRADY. I did not know that.

Senator SPECTER. Do you know that Circuit judges make more than Senators?

Mr. BRADY. I did not know that.

Senator SPECTER. Mr. Snyder, did you know that?

Mr. SNYDER. Clearly inappropriate, Mr. Chairman. [Laughter.]

Senator SPECTER. There would have been applause, Joe, on your coming back, but we asked everybody to exercise decorum.

Mr. Chairman, how are you? I am for him.

Thank you very much, Mr. Brady. That concludes your questioning.

Mr. BRADY. Thank you, Mr. Chairman.

Senator SPECTER. We appreciate your coming today.

Senator BIDEN. Now, there is a good lawyer. He got up real quick. I said I am for him, and he was not going to sit there and take any chances that I may change my mind. You did the right thing. He is going to make a fine judge.

Senator SPECTER. I concur with Senator Biden on that, Mr. Brady. I think, again, without being in the prediction business, that you will be confirmed.

Senator Biden reminds me to ask you to introduce your family, Mr. Brady. I should have done that at the outset. If you have family here and care to introduce anyone?

Mr. BRADY. I have my nephew, Kevin Brady, who lives in this area who is present with me.

Senator SPECTER. OK, thank you very much.

Senator BIDEN. I do have one request of the judge. I have a daughter who is a freshman at Tulane University, and I realize you are a little further up the road, but I just want to know can she call you if she has a problem. Because I got a lot of problems, my daughter, a northern girl down in New Orleans. It worries the hell out of me. I just want you to know that.

Mr. BRADY. Where did she go wrong?

Senator BIDEN. She decided she did not want to go to either of her brothers' schools. So she headed South, but she is having a great time. New Orleans is—I like to think—I know that is not your hometown, but New Orleans is the only city in America out of America. It is the most fascinating city in the world, I think, but at any rate, it is nice to have you here, Judge. Thank you for bringing along your nephew.

[The questionnaire follows:]

JAMES J. BRADY

2-50

Birth: February 19, 1944 St. Louis, Missouri

Legal Residence: Louisiana

Marital Status: Married Karen Nix Brady
2 children

Education: 1962 - 1966 Southeastern Louisiana College
B.A. degree

1966 - 1969 Louisiana State University
Law School
J.D. degree

Bar: 1969 Louisiana

Experience: 1969 - 1980 Gravel, Roy and Burnes
Associate

1975 - 1980 Louisiana Board of Tax Appeals
(Part-time) Member of the Board

1980 - 1982 Gravel, Robertson and Brady
Partner

1983 - 1988 Gravel and Brady
Partner

1985, 1987 & 1990 Louisiana State University
Adjunct Professor

1989 - 1992 Gravel, Brady and Berrigan
Partner

1993 - 1995 Dyer, Ellis, Joseph and Mills
Partner

1996 - 1997 Sullivan, Stolier, Daigle and Resor
Partner

1997 - present Gordon, Arata, McCollam, Duplantis
and Eagan, LLP
Partner

Office: 1400 One American Place
Baton Rouge, LA 70825

To be United States District Judge for the Middle District of Louisiana

Questionnaire For Judicial Nominee
United States Senate Committee on the Judiciary

JAMES J. BRADY

I. BIOGRAPHICAL INFORMATION

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

James Joseph Brady

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

Place of Residence:
Baton Rouge, LA 70810

Office Address:
1400 One American Place
Baton Rouge, LA 70825

3. Date and place of birth.

February 29, 1944
St. Louis, MO

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 Karen Nix Brady - My wife is not employed outside the home.

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

Southeastern Louisiana College,
Now Southeastern Louisiana University,
Hammond, LA.
September 1962 - May 1966
B.A., June 4, 1966

Louisiana State University Law School,
 Now Paul M. Hebert Law Center
 September 1966 - May 1969
 Juris Doctor May 31, 1969

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

May 1966 - August 1966:
 Prestress Concrete Products Co.
 Monroe Street
 Mandeville, LA
 Laborer

June 1967 - August 1967:
 Southern Seating Corp.
 Baton Rouge, LA
 Welder

October 1967 - May 1969:
 Coxe, Coxe and Smith
 North Foster Drive
 Baton Rouge, LA
 Law Clerk

July 1969 - January 1980:
 Gravel, Roy and Burnes
 611 Murray St. and 711 Washington St.
 Alexandria, LA 71301
 Attorney

January 1980 - December 1982:
 Gravel, Robertson and Brady
 711 Washington St.
 Alexandria, LA 71301
 Attorney

January 1983 - December 1988:
 Gravel and Brady
 711 Washington Street
 Alexandria, LA 71301
 Attorney

January 1989 - December 1992:
Gravel, Brady and Berrigan
711 Washington Street
Alexandria, LA 71301
Attorney - Partner

January 1993 - October 1995:
Dyer, Ellis, Joseph and Mills
600 New Hampshire Avenue, NW
Washington, D.C. 20037
Attorney - Partner

March 1996 - June 1996:
Sullivan, Stolier and Daigle
5555 Hilton Avenue, Suite 325
Baton Rouge, LA 70808
Attorney - Partner

June 1996 - July 1997:
Sullivan, Stolier, Daigle and Resor
5555 Hilton Avenue, Suite 325
Baton Rouge, LA 70808
Attorney - Partner

August 1997 - Present
Gordon, Arata, McCollam, Duplantis
and Eagan, L.L.P.
1400 One American Place
Baton Rouge, LA 70825
Attorney - Partner

Democratic State Central Committee of Louisiana:

1974 - 1985: Vice-Chairman
1985 - 1986: Chairman
May 1996 - Present: Member, Executive Committee

1990 - 1996:
Vice Chair, Democratic National Committee

1990 - 1996:
President, Association of State
Democratic Chairs

April 1975 - October 24, 1980:
Member, Louisiana State Board of Tax Appeals

1985; 1987; 1990:
Louisiana State University at Alexandria
Adjunct Instructor

1994 - Present:

Member, Board of Directors
Catalyst Vidalia Corporation
Two Greenwich Plaza, Suite 100
Greenwich, CT 06830

Louisiana State Bar Association
Member of House of Delegates
1973-1974 and 1980
Member, Nominating Committee (1977-78)

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.

None.

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

Louisiana State Bar Association
Member of House of Delegates
1973-1974 and 1980
Member, Nominating Committee (1977-78)

Alexandria Bar Association
Member, Executive Committee 1970

American Bar Association

Bar Association of the Fifth Circuit

American Trial Lawyers' Association

Federal Bar Association

Louisiana Trial Lawyers' Association

Louisiana Association of Criminal Defense Lawyers

Baton Rouge Bar Association: Chairman of Subcommittee
of Court Liaison Committee, on Federal Court (1998)

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

Organizations that Lobby:

Louisiana State Bar Association
Louisiana Trial Lawyers' Association
Louisiana State University Alumni Association
Ducks Unlimited

Organizations to which I belong in addition to those above are:

Democratic National Committee
Democratic State Central Committee of Louisiana
Association of State Democratic Chairs
Louisiana State University Alumni Association
Louisiana State University Law School Alumni Association
Friends of Louisiana Public Broadcasting

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

Louisiana Supreme Court
September 5, 1969

United States District Court, Western District of LA
January 25, 1972

United States Court of Appeal for the Fifth Circuit
March 3, 1972

United States Supreme Court
March 24, 1975

United States District Court, Middle District of LA
April 4, 1975

United States Court of Federal Claims
November 26, 1976

United States District Court, Eastern District of
Louisiana
April 22, 1981

United States Court of Appeals, Fifth Circuit
October 1, 1981

United States Court of Appeals, Eleventh Circuit
October 1, 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.

A. Writings:

1. Op-Ed Column, co-authored with Joseph E. Sandler, Washington Post, February 13, 1992.
2. Readers' Views, Baton Rouge Advocate, May 23, 1995.

B. Speeches:

I have made a number of speeches to various groups, mainly political, and I may have submitted some minor writings such as letters to the editors of newspapers, for which I do not have copies, drafts, or notes. I have made a concerted effort and diligent search to find such items or newspaper accounts of them. I have attached all that such a search has produced.

1. Democratic State Central Committee, April 20, 1996.
2. Democratic National Convention, August 25, 1996.
3. U.S. House of Representatives, House Oversight Committee, December 12, 1995. This same testimony was read and/or given to the Rules Committee of the U.S. Senate on April 17, 1996.

4. Wyoming Democratic party, Gillette, Wyoming, State Convention, May 7, 1994.
5. Orange County Democratic Convention, Anaheim, California, March 5, 1994.
6. Speech to group honoring Michael Sacco, 1992.
7. Speech to Democratic National Convention, July 13, 1992.
8. Article in Baton Rouge Advocate, May 20, 1996, regarding speech before the Press Club of Baton Rouge.

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

Excellent -- January 5, 1999.

14. **Judicial Office:** State (chronologically) any judicial office 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 never been a judge. Nevertheless, as a member of the Louisiana State Board of Tax appeals, the Board issued judgments that were, under Louisiana law, appealable to a state district court and from that court to the state court of appeals. I did not write opinions as a member of the Louisiana Board of Tax Appeals, nor did I write any significant opinions on federal or state constitutional issues. I have made a search of the records of the Board during my tenure and found the following matters which were reversed or

amended on appeal. I may not have authored any of these judgments. All judgments were signed by the chairperson, a position I never held. These matters are as follows:

11. *Sperry Rand Corporation vs. Collector of Revenue*
Involved the authority of the Board of Tax Appeals to order a refund of a tax paid without protest when the statute requiring the tax rule was invalid.
11. *Canterbury Corporation vs. Secretary, Department of Revenue and Taxation*
Involved, on appeal, a question of whether the Board correctly calculated how interest should be determined.
11. *Gillette Tire Distributors, Inc. vs. Collector of Revenue*
Involved the interpretation of prescription (time limitations).
11. *Bunge Corporation vs. Secretary, Department of Revenue and Taxation*
Involved the application of prescription (time limitation) by the Board.
11. *Bean Contracting Company vs. Secretary, Department of Revenue and Taxation*
Involved legal interpretation of when a sale is final.
11. *James Hingle Used Car Lot, Inc. vs. Secretary of Revenue*
Involved issue of what constitutes "suitable records" under a particular statute.

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

Member, Louisiana State Board of Tax Appeals
 Appointed April 24, 1975
 Resigned October 24, 1980

This position does not require Senate confirmation of an appointed member, thus may not technically be a "public office" under Louisiana law.

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 judicial clerk.

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

I have not practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

July 1969 - January 1980:
 Gravel, Roy and Burnes
 611 Murray St. and 711 Washington St.
 Alexandria, LA 71301
 (Attorney)

April 24, 1975 - October 24, 1980:
 Member, Louisiana State Board of Tax Appeals
 1111 South Foster Drive
 Baton Rouge, LA 70806

January 1980 - December 1982:
Gravel, Robertson and Brady
711 Washington St.
Alexandria, LA 71301
(Attorney)

January 1983 - December 1988:
Gravel and Brady
711 Washington Street
Alexandria, LA 71301
(Attorney)

January 1989 - December 1992:
Gravel, Brady and Berrigan
711 Washington Street
Alexandria, LA 71301
(Partner)

January 1993 - October 1995:
Dyer, Ellis, Joseph and Mills
600 New Hampshire Avenue, NW
Washington, D.C. 20037
(Partner)

March 1996 - June 1996:
Sullivan, Stolier and Daigle
5555 Hilton Avenue, Suite 325
Baton Rouge, LA 70808
(Partner)

June 1996 - August 1997:
Sullivan, Stolier, Daigle and Resor
5555 Hilton Avenue, Suite 325
Baton Rouge, LA 70808
(Partner)

August 1997 - Present:
Gordon, Arata, McCollam, Duplantis
and Eagan, L.L.P.
1400 One American Place
Baton Rouge, LA 70825
(Partner)

I also taught a course at Louisiana State
University at Alexandria for a semester
in 1984, 1987 and 1990.
8100 Highway 71 South
Alexandria, LA 71302

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

From July 1969 to January 1980, I worked at the firm of Gravel, Roy and Burnes, 611 Murray Street, Alexandria, LA 71301. The firm was headed by Camille F. Gravel, Jr., a nationally recognized trial attorney. My practice was comprised of Workers' Compensation matters; plaintiff personal injury claims, primarily automobile accident cases; criminal law defense; and domestic relation cases in the state district courts. I tried many of these cases by myself. On some of the larger cases, I would participate in the trial with a more senior attorney. Most of these cases were non-jury cases except for criminal felony cases and an occasional civil matter. I did litigate some matters in federal court as well. I also performed some criminal post-conviction relief work, including representing clients before the State Pardon and Parole Boards. I performed this type of practice until the mid-1970s. I normally would handle my cases from the initial client interview through the settlement or trial. This involved preparing and filing pleadings; conducting discovery; and participating in hearings on motions.

In approximately 1976, I began to concentrate on civil cases, mostly plaintiff personal injury matters. I continued to appear on a frequent basis in state court and also appeared quite often in federal court. My practice expanded into the areas of tort defense litigation and a small insurance defense practice.

In the mid 1980s, I began to emphasize civil tort defense work, primarily for the State of Louisiana. I represented the state in the defense of medical malpractice and related matters. I also performed tort defense work for the Louisiana Department of Transportation and the Louisiana State Police. All of these matters involved litigation, and I continued to appear in court on a frequent basis.

At various times from 1976-1992, I also represented school teachers and school employees in matters relating to their employment, including

matters that were appealed and argued in the state district court or the courts of appeal.

In the early 1970s, I began to represent persons desiring to reapportion public bodies, particularly parish school boards and police juries (the Louisiana equivalent of a county commission) to bring them into compliance with the United States Supreme Court's one-person, one-vote decree. These cases, because of court rulings and federal legislation, often involved minority voting dilution issues. I tried a number of these cases, all in federal court, and became identified as a person with substantial expertise in this area. As a result, I began to defend governmental bodies in such actions as well.

In 1975, I was appointed to the Louisiana State Board of Tax Appeals. This is a statutorily created tribunal consisting of three persons who hear appeals from aggrieved state taxpayers. This board acts much like a court. It receives evidence, hears witnesses, makes decisions, and issues rulings. I served on this board until 1980.

On January 1, 1989, Camille F. Gravel and I formed a partnership and practiced law as Gravel, Brady and Berrigan until December 31, 1992. During this period, I had more responsibility for the administration of the law firm than I had in the past. I continued to litigate matters and continued my representation of state agencies.

In January 1993, I joined the firm of Dyer, Ellis, Joseph and Mills in their Washington, D.C. office. I did not do any trial work with that firm. Rather, I engaged in regulatory and legislative representation of clients, primarily in the maritime and health care areas.

In late 1995, I left Dyer, Ellis, Joseph and Mills and moved back to Louisiana. I joined the New Orleans firm of Sullivan, Stolier and Daigle (now Sullivan, Stolier and Resor) and opened a Baton Rouge office for the firm. My work with that firm consisted primarily of legislative representation of clients in the health care industry. In addition, I represented some clients in litigation and represented one client in a

federal criminal matter which was resolved with a plea.

In August 1997, Sullivan, Stolier and Resor closed their Baton Rouge office and I joined the New Orleans firm of Gordon, Arata, McCollam and Duplantis (now Gordon, Arata, McCollam, Duplantis & Eagan). I manage the firm's Baton Rouge, Louisiana office, and am primarily representing clients in regulatory and legislative matters. I have participated in one state court trial, and have represented a client in federal court litigation, which settled shortly before trial. I am currently representing clients in litigation in federal and state court.

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

From 1969 to the mid 1970s, my typical clients were individuals seeking representation in personal injury, workers compensation, domestic relations, or criminal defense matters.

Beginning in the mid-seventies through the mid-eighties, I began to emphasize civil tort defense work. My clients were institutions and agencies of the State of Louisiana. The State owns and operates several medical or quasi-medical institutions in the Central Louisiana area. I also represented such entities as the State Department of Transportation and Development and the Louisiana State Police.

From 1979-1992, the Gulf States Underwriters of Louisiana, Inc., an insurance company which was headquartered near Alexandria, Louisiana, was also a major client. This company operated in several states other than Louisiana. I handled all of the company's litigation in Louisiana as well as any matters relating to their contract, payment of premiums, and some regulatory matters. I coordinated with other attorneys or in-house personnel company litigation and matters in other states.

My education law clients were school teachers or school employees, primarily in Rapides Parish, who had a grievance with the parish school board or who were being subjected to disciplinary action by the school board. As a result of some of my

successes before school boards on behalf of employees, I was hired to represent some of the school boards in actions brought by the board against employees or vice-versa. I represented these types of clients from 1976-1992.

From 1970-1985, I represented persons or groups who sought to make governmental bodies comply with the U.S. Supreme Court's one-person, one-vote decisions. Most clients were urban voters whose votes were diluted under state law, or minority persons or groups wanting to have governmental bodies devise redistricting plans to allow greater opportunity for minority members to be elected. While I did not specialize in these cases, I did acquire a reputation throughout the state as an expert in this area. I also represented the governing body in several cases of this type.

My clients at Dyer, Ellis, Joseph and Mills in Washington, D.C. during 1993-1995 included Avondale Shipyards, Diabetes Treatment Centers of America, Liberty Maritime, Arco Marine, and Bender Shipyards.

At Sullivan, Stolier & Daigle, during 1996-1997, my clients included the Louisiana Rural Hospital Coalition, the Louisiana Long-Term Hospital Association, and some of its individual members, including University Rehabilitation Hospital, and LifeCare Management.

At Gordon, Arata, McCollam & Duplantis, L.L.P. (now Gordon, Arata, McCollam, Duplantis & Eagan, L.L.P.), for 1997-present, my clients include LifeCare Management, Weatherby Health Care, Weatherby Locums, Inc., the Louisiana Rural Hospital Coalition, and AT&T.

- 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 1969-1992, I appeared in court frequently. From 1993-1995, I did not appear in court at all. From 1996-present, I have appeared in court occasionally.

(2) What percentage of these appearances was in:

- | | |
|----------------------------|------------|
| 1. federal courts? | <u>10%</u> |
| 2. state courts of record? | <u>90%</u> |
| 3. other courts? | <u>n/a</u> |

(3) What percentage of your litigation was

- | | |
|--------------|------------|
| 1. civil? | <u>80%</u> |
| 2. criminal? | <u>20%</u> |

(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 conservatively estimate that since 1969, I have tried over 200 cases to verdict either as sole counsel, or chief counsel. I have also participated in a number of cases tried to verdict as associate counsel or co-counsel.

(5) What percentage of these trials was:

- | | |
|--------------|---------------|
| 1. jury? | <u>5-10%</u> |
| 2. non-jury? | <u>90-95%</u> |

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; described in detail the nature of your participation in the litigation and the final disposition of the case. Also date as to each case:
- The date of the representation;
 - The name of the court and 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.

Answers

1. Richard Sanders v. Placid Oil Company,
861 F.2d 1374 (5th Cir. 1988),
611 F.Supp. 841.

I represented the plaintiff, Richard Sanders, a duck hunter, who was injured when his boat struck a submerged, unmarked pipe driven into Lake Catahoula by the defendant. I tried this case in federal district court and handled all aspects from filing suit to verdict and through the appeal for Mr. Sanders. A co-plaintiff, Mr. Wilder, settled his claim prior to trial. His counsel examined one witness at the trial. This case is significant in that it established Lake Catahoula as a navigable water of the United States, thus conferring federal jurisdiction for claims occurring on this lake. The case culminated in a bench trial. This matter involved extensive investigation and discovery in order to prove that Catahoula Lake fit the legal definition of a navigable water. The jurisdictional issue was decided in favor of my client on a motion for summary judgment. After the trial, this decision was appealed by the defendants and the trial court's decision on all issues was affirmed by the appellate court. I wrote the appellate brief and orally argued this matter in the court of appeals. The defendant was found liable and my client was awarded damages.

- a. June 13, 1985 - Trial date
 - b. United States District Court, Western District of Louisiana, Honorable F.A. Little, Jr., Judge
 - c. John P. Napolitani, Jr.
400 Lafayette Street
New Orleans, LA 70130
Phone: (504) 568-9393
Attorney for the defendant, Placid Oil.
- Wilbert Saucier, Jr.
826 Main Street
Pineville, LA 71360
(318) 473-4146
Counsel for co-plaintiff, Wilder

- (b) State of Louisiana Department of Transportation and Development v. Pine Bluff Sand and Gravel Company
 Civil Docket No. 150,574
 9th Judicial District Court
 Rapides Parish, Louisiana
 Case Not Reported
 Judgment Rendered 1990.

My client, Pine Bluff Sand and Gravel Company, an Arkansas-based corporation, had conducted a multi-state search for a site for a distribution facility. The site they sought needed to have rail, navigable water, and highway access. The company determined the best site would be north of Alexandria, Louisiana on the Red River adjacent to the Kansas City Southern Railroad and Louisiana Highway One. Several months after acquiring this site and constructing their facility, a portion of the site was expropriated by the State of Louisiana for Interstate Highway 49. The State refused to consider in its payment proposal the uniqueness of this site to my client and the dispute went into litigation.

I was lead counsel in the litigation of this matter, which involved pretrial discovery, securing expert appraisals, and negotiating with the attorneys for the State. After a jury had been picked, the case was settled on a basis favorable to my client.

- a. Matter settled in 1990.
 - b. Ninth Judicial District Court, Rapides Parish, Louisiana. Honorable Richard Lee, Judge
 - c. Honorable J. Bertrand
 600 East Perrodin Street
 P.O. Box 5
 Rayne, Louisiana 70578
 Phone: (318) 334-2139
 Attorney for the State of Louisiana
3. State of Louisiana v. Abe Jones, Jr.,
 282 So.2d 422 (La. 1973)

This was a jury trial of a defendant charged with murder. I represented, along with co-counsel, J. Michael Small, the defendant, Abe Jones, Jr., who was convicted by the jury. This case is significant because of the Louisiana Supreme Court decision holding that the trial

judge severely restricted the right of the defendant to voir dire prospective jurors. Mr. Small and I both participated in the hearings on pretrial motions, as well as the trial. We both asked questions on voir dire; presented and cross-examined witnesses; made objections; and presented evidence.

After the denial of post-trial motions, we appealed to the Louisiana Supreme Court. Mr. Small and I equally participated in the post-trial motions and in the preparation of the brief to the Supreme Court. We jointly presented oral argument to the Supreme Court. Initially, the Supreme Court affirmed the conviction. Mr. Small and I prepared and filed an application for a rehearing and, on rehearing, the Supreme Court reversed the conviction.

In its opinion, the Supreme Court clearly set forth that under the laws and jurisprudence of Louisiana, a defendant is allowed wide latitude on voir dire. This principle still stands in Louisiana case law.

- a. 1970 - 1973 (Exact date of trial unknown)
- b. Ninth Judicial District Court, Rapides Parish, Louisiana. Honorable Field V. Gremillion, Judge (Judge Gremillion is deceased)
- c. J. Michael Small
One Center Court
Alexandria, LA 71301
Phone: (318) 487-8963
Co-counsel

Honorable Robert P. Jackson
4708 Whitefield Boulevard
Alexandria, LA 71303
Phone: (318) 473-9552
Assistant District Attorney

Alfred B. Shapiro
5420 Corporate Boulevard
Baton Rouge, LA 70808
Phone: (225) 928-4193
Assistant District Attorney

4. Long v. Gremillion, Unreported Civil Action No. 142,389
On the docket of the Ninth Judicial District
Court, Parish of Rapides, State of Louisiana
September 1986

I represented Congresswoman Cathy Long and others in this litigation. In 1986, several persons engaged in a process that we alleged was designed to remove several thousand African-American voters from the voting rolls in Louisiana. The proposed scheme involved the filing of thousands of voter challenges with the parish registrars of voters based on mailing samples that had been returned, supposedly proving the voter did not live at the address where the person was registered to vote. Congresswoman Long, although properly registered to vote, was going to be purged because she had all of her mail addressed to her Louisiana home forwarded to her Washington, D.C. office. The purge scheme was based on not forwarding the mail. Thousands of legally registered voters likewise got their mail at addresses other than their home, which was the address given on their voter registration.

I filed a suit on behalf of the class of voters who were to be purged and obtained a temporary restraining order halting the purge effort. This matter was tried for two days to a judge on a motion for a preliminary injunction. After the trial was concluded, the judge issued the preliminary injunction, and barred any further attempt to purge voters under this scheme. The defendants appealed and after the matter had been briefed, but before the scheduled oral argument in the court of appeal, the matter was dismissed by joint motion with the defendants paying the costs of court. By this time, some months after the attempted purge, it was felt by all parties that the matter was moot. I was sole counsel in this matter; filed all pleadings; tried the case; and opposed the appeal.

This case is significant in that it preserved the franchise rights of thousands of voters.

- a. September 23 and 24, 1986 - Trial dates.
- b. Ninth Judicial District Court, Parish of Rapides.
Honorable Richard Lee, Judge

c. Michael R. Connelly
6157 Antioch Boulevard
Baton Rouge, LA 70817
Phone: (225) 753-2286
Attorney for Defendants.

5. State of Louisiana v. Bryan L. Brown,
496 So.2d 261 (La. 1986)

I was appointed along with attorney David Hughes by the Ninth Judicial District Court to defend Bryan L. Brown, an indigent teenager, on a charge of capital murder. We replaced Mr. Brown's initial court-appointed attorney who had been relieved of representation in this matter due to his moving to another state.

The victim was a young lady who was a high school cheerleader and homecoming queen. She died in her father's arms from multiple stab wounds inflicted by the defendant. These facts generated substantial press, television, and radio commentary, which aroused great animosity and prejudice against the defendant.

I tried the pretrial motion for a change of venue based on the heavy volume of adverse pretrial publicity. The trial of this motion was a trial within a trial, and required a strong presentation of evidence in an adverse climate. My name is not mentioned in the reported case, but the district court record reflects my participation. The court denied the change of venue.

After the trial of the motion for change of venue, Mr. Hughes and I were ethically compelled to withdraw when it became obvious that we might have to appear at the trial as prosecution witnesses.

Mr. Brown's initial attorney had placed the murder weapon in the file that was subsequently given to me and Mr. Hughes. When we realized this fact, we considered how to deal with this dilemma and concluded that we could not represent the defendant and be potential links in a chain of custody. After a hearing we were permitted by the court to withdraw.

After our withdrawal, another attorney was appointed to defend Mr. Brown. Brown was tried, convicted, and sentenced to receive the death penalty.

His conviction was appealed to the Louisiana Supreme Court. The Supreme Court reversed the conviction and sentence, and one of the reasons given for the reversal was the denial of the motion for change of venue, which I had tried.

The court, in reversing the conviction, ordered a change of venue. When the jury was being picked in the retrial in a different venue, the state accepted a plea of guilty without capital punishment. The defendant was sentenced to imprisonment for life without benefit of parole.

- a. 1983 - 1985 (Exact hearing date unknown)
- b. Ninth Judicial District Court, Rapides Parish, Louisiana. Honorable Robert P. Jackson, Judge
- c. David Hughes, Attorney at Law
801 Johnston Street
Alexandria, LA 71301
Phone: (318) 448-1632
Co-counsel

G. Earl Humphries, III
Rapides Parish Courthouse
700 Murray Street
Alexandria, LA 71301
Phone: (318) 473-6650
Assistant District Attorney

These were the participants in the trial of the motion for change of venue.

- 6. Daniels v. Conn,
378 So.2d 451 (La. App. 3rd Cir. 1979)
382 So.2d 845 (La. 1980)
(Exact trial date unknown)

I represented the defendant, Halcott Conn, in this civil action arising out of an automobile/pedestrian accident which resulted in the death of a resident at a state institution. Mr. Conn, by the time of trial, was unemployed and impoverished, and could not respond in judgment.

The State of Louisiana was sued as a joint tortfeasor. The trial court made an award of damages to the plaintiff of \$35,000 but limited Mr. Conn's liability to \$6,000 under the "inability to pay doctrine" of Louisiana law. This case was appealed by the State of Louisiana to the court of appeals. The court of appeals affirmed the trial court's finding of liability and the amount of damages awarded. The court of appeals reversed the trial court on the applicability of the "inability to pay doctrine" where there is an impecunious defendant liable in solido with a solvent defendant. Both my client and the State of Louisiana applied to the Louisiana Supreme Court for writs of certiorari. Both writ applications were granted. After receiving briefs and hearing oral argument, the Supreme Court affirmed the decision of the court of appeals. This case is significant in that it clearly established in Louisiana law that the "inability to pay doctrine" does not apply when joint defendants are liable in solido.

I was sole counsel for Mr. Conn. I tried the case, wrote the briefs for the court of appeal, prepared the writ application and brief in the Supreme Court, and orally argued the case in both appellate courts.

- a. 1977 - 1980 (Exact date of trial unknown)
- b. Ninth Judicial District Court, Parish of Rapides, State of Louisiana. Honorable Jimmy Stoker, Judge
- c. Steven R. Giglio, Attorney at Law
2900 Westfork Drive, Suite 200
Baton Rouge, LA 70827
Phone: (225) 926-6729
Attorney for the State of Louisiana

Joseph T. Dalrymple
5208 Jackson St. Extension
Alexandria, LA 71303
Phone: (318) 445-6581
Attorney for plaintiff Daniels

James M. Buck
700 Murray Street
Alexandria, LA 71301
Phone: (318) 473-6650
Attorney for plaintiff Daniels

7. Reginald Seastrunk v. Gerald Burns,
774 F.2d 143 (5th Cir. 1985)

I represented the defendant, Gerald Burns, the Superintendent of the Vernon Parish School Board, and the Vernon Parish School Board in this federal civil action involving the redistricting of the Vernon Parish School Board. The case is significant because it demonstrated in what manner a public body could establish multi-member representative districts and still be in compliance with the U.S. Supreme Court's one-person, one-vote principle and the federal voting rights act. In almost every redistricting case which involved an area subject to the Voting Rights Act, the U.S. Justice Department or a U.S. District Court would not approve any redistricting plan unless the plan provided for single-member districts. In this case, both the Justice Department and the federal district court allowed the plan. I was the sole counsel for the defendants. I tried this case, and wrote the brief for and presented oral argument in the U.S. Court of Appeals for the Fifth Circuit.

The plaintiffs appealed the district court decision to the court of appeals. And after receiving briefs and hearing oral arguments, the court of appeals affirmed the district court.

- a. Trial date: January 19, 1983
 - b. U.S. District Court, Western District of Louisiana, Honorable Nauman Scott, Judge.
 - c. Louis Berry, the counsel for the plaintiffs, is deceased.
8. James Domico v. Rapides Parish School Board,
675 F.2d 100 (5th Cir. 1982)

I represented the plaintiff, Mr. Domico, and several school bus drivers employed by the Rapides Parish, Louisiana School Board. In the fall of each hunting season, the plaintiffs had customarily grown neatly groomed beards. In 1980, the school board issued a policy that its student dress code banning beards would apply to all of the board's employees, and directed that the bus drivers shave or be terminated. The plaintiffs

brought this federal court civil suit alleging violations of their civil rights. The case was tried, and the district court ruled that the plaintiffs had no constitutionally protected right and dismissed the case. My clients appealed to the United States Court of Appeals for the Fifth Circuit, and after receiving briefs and hearing oral argument, the court of appeals affirmed the district court. It is significant because on appeal, the appellate panel held that the plaintiffs did have a constitutional right to assert. The court also established more clearly that there was a different standard for a high school as opposed to a college setting as to how the right may be asserted. I was sole counsel for the plaintiffs in both the trial court and court of appeals. I tried the matter, prepared the appellate brief and orally argued the case in the Fifth Circuit.

- a. April 27, 1981
- b. United States District Court, Western District of Louisiana, Honorable Nauman Scott, Judge
- c. Gus Voltz, Jr.
515 Johnston Street
Alexandria, LA 71301
Phone: (318) 442-5574
Attorney for the Rapides Parish School Board

9. Crowley v. Hermitage Health and Life Insurance Company,
391 So. 2d 53 (La. App. 3rd Cir. 1980)

My client, Hermitage Health and Life Insurance Company, had, prior to my representation of it, been defaulted in the state district court. As a result of the default judgment entered against it, this company was ordered to pay several thousand dollars in benefits. Upon assuming representation of this entity, I filed an appeal; wrote an appellate brief; and presented oral argument. As a result, the Louisiana Court of Appeal reversed the district court judgment. The case involved the interpretation of my client's policy provisions for the first time by a Louisiana court. It was significant that this came about in the appeal of a default judgment.

I was the sole attorney for my clients in this matter.

- a. November 1980. Trial date unknown.
 - b. Court of Appeal of Louisiana, Third Circuit.
Honorable P.J. LaBorde, Circuit Judge.
 - c. Monty L. Doggett (now Judge Doggett)
10th Judicial District Court
Natchitoches Parish, Louisiana
Natchitoches, LA 71457
Phone: (318) 357-2209
Attorney for Plaintiffs
10. James R. Byrd and Thomas Matthews v. Rapides Golf and Country Club of Alexandria, et al.,
CV85-1143, U.S. District Court,
Western District of Louisiana
(Unreported)

My clients in this federal court suit were the plaintiffs, James Byrd and Thomas Matthews. For many years, the City of Alexandria, Louisiana had leased city-owned land to the defendant, Rapides Parish Golf and Country Club, for a nominal rent of a few dollars per year. The defendant, as its name implies, operated a country club with a golf course on the leased land. The plaintiffs, African-Americans who loved to play golf (Mr. Matthews was once on a P.G.A. tour), wanted to play at defendant's club as members. There was no public golf course within a hundred miles of the defendant's course on which plaintiffs could play. Both plaintiffs applied for membership in the defendant's club and were denied admission by secret vote. Investigation revealed that the club had never had an African-American member in the club's history. Of all the eleven African-Americans who had applied, not one was admitted. In contrast, only a few white applicants out of several hundred who had applied were not admitted.

This suit alleged that the lease between a public body and the defendant provided enough nexus for there to be a violation of the plaintiffs' civil rights by a private organization and the plaintiffs also sought a writ of mandamus ordering the city to annul the lease due to the apparent unwritten racial policies of the club.

This case was tried before a judge who dismissed the plaintiffs' case. The plaintiffs chose not to appeal.

I was the sole counsel and handled all aspects of the plaintiffs' case.

- a. August 27, 1986 - trial date.
- b. United States District Court,
Western District of Louisiana;
Honorable F.A. Little, Jr., Judge
- c. Howard B. Gist, Jr. and
George C. Gaiennie, III
803 Johnston Street
Alexandria, LA 71301
Phone: (318) 448-1632
Attorneys for Defendant
Rapides Golf and Country Club of
Alexandria, Inc.

Charles F. Nunnally, III
915 3rd Street
Alexandria, LA 71301
Phone: (318) 449-5015
Attorney for the City of Alexandria

J. Marc Lampert
526 Murray Street
Alexandria, LA 71301
Phone: (3128) 445-4528
Attorney for the City of Alexandria

The following members of the legal community have had contact with me recently:

Teanna W. Neskora
1400 One American Place
Baton Rouge, LA 70825
(225) 381-9643

Daniel J. Shapiro
1400 One American Place
Baton Rouge, LA 70825
(225) 381-9643

Guy Wall
 201 St. Charles Avenue
 40th Floor
 New Orleans, LA 70170
 (504) 582-1111

Cathy C. Kojis
 5353 Florida Boulevard
 Baton Rouge, LA 70806
 (225) 928-0360

Robert C. Lowther, Jr.
 404 East Gibson Street
 Covington, LA 70434
 (504) 893-2650

G. Michael Canaday
 914 Hodges Street
 Lake Charles, LA 70601
 (318) 436-3165

William Flannigan
 3201 Federal Building
 300 Fannin Street
 Shreveport, LA 7101
 (318) 676-3600

Camille F. Gravel
 711 Washington Street
 Alexandria, LA 71301
 (318) 487-4501

Celia R. Cangelosi
 Suite 101
 918 Government Street
 Baton Rouge, LA 70821
 (504) 387-0511

I have supervised Daniel Shapiro and Teanna Neskora (addresses listed above).

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 years, I have pursued numerous significant non-litigation matters, as well as litigation matters that did not proceed to trial. For example, I was involved in a project in which our law firm represented a major employer in Louisiana which was competing with other U.S. and foreign companies for the most significant construction contract of its kind in over two decades. In order for our client to succeed, it had to demonstrate that it could finance a construction project in an amount of over one hundred million dollars. I worked with other members of the firm in the contract and transactional work involved and devised a plan whereby the State of Louisiana would guarantee the amount needed for the project. This involved a thorough understanding of relevant Louisiana tax laws and constitutional provisions. I also assisted in persuading the Louisiana Legislature to pass the necessary legislation permitting this guarantee. I also was involved in presenting the merits of this plan to banking institutions involved.

After working on this matter and having the plan ready to go, the principal involved decided, for business reasons unrelated to our proposal, not to undertake the project.

I have over the years participated in state and local bar activities. I have handled Law Day events, planned the opening of court ceremonies, served on the local executive committee, served at various times on the State Bar's House of Delegates, and served one term on the State Bar's nominating committee. Within the last few months, I served as the chair of a subcommittee of the Baton Rouge Bar Association's Court Liaison Committee in a complete review of the local rules of court of the U.S. District Court for the Middle District of Louisiana. This committee analyzed the current rules, offered revisions and critiques, and submitted our proposal to the judges of the court for consideration and action. This activity is ongoing.

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 participated in a 401(k) plan through the law firm of Dyer, Ellis, Joseph and Mills from 1993-1995. I still have approximately \$37,000 in that plan. I intend to roll this amount into another similar plan. I began to participate in a 401(k) plan through my current law firm as of January 1, 1999. I have less than \$600.00 in that plan as of this date.

I have no future benefits and will have no buyout, nor will I be compensated in the future for any financial or business interest.

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 not hear cases involving any member of my current law firm or past law firms for a set period of time. I would likewise not hear any case involving any client represented by me for a period of time consistent with all appropriate judicial ethics. I know of no other matters likely to post a conflict of interest. Nevertheless, for all matters, I intend to comply with the Code of Conduct for United States Judges and applicable statutes.

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

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current

calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Statement Form A0-10.

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

See completed Net Worth statement, attached hereto.

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

I have played a role in numerous political campaigns beginning with volunteer work as a teenager in 1960. In 1964, I worked as a volunteer in Southeastern Louisiana for Johnson-Humphrey and in 1968 in Baton Rouge, Louisiana for Humphrey-Muskie. I primarily made speeches on behalf of the candidates, passed out campaign materials, canvassed voters, and worked in local campaign offices.

In 1971, I was elected to the Democratic State Central Committee of Louisiana, which operates as the Louisiana Democratic Party. I became a vice-chairman of the committee in 1974 and the Chairman of the committee in 1985. In 1985, I also became a member, by virtue of my being State Party Chair, of the Democratic National Committee. In 1990, I was elected President of the Association of State Democratic Chairs and, by virtue thereof, became a Vice Chair and Executive Committee member of the Democratic National Committee.

In all of the above capacities, I played a role in every Louisiana federal election; Louisiana major state elections, and numerous Louisiana local elections. My duties included the recruitment of candidates, the planning and implementation of campaign strategy, coordinating campaign activities, party fund raising, polling, media development and promotion, and the activities normally related to campaigns from a party standpoint.

Some significant campaigns include the congressional campaign of Congressman Gillis Long; the senate campaigns of Senator J. Bennett Johnston in 1972, 1970, and 1990;

the senate campaign of John Breaux in 1986; Mary Landrieu in 1996; and Governor Clinton, now president, in the presidential primaries and general elections of 1992 and 1996.

I have never been a paid staff member of any campaign.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From 1969-1992, I accepted every appointment assigned to me by the Indigent Defender Board of the Ninth Judicial District Court, Rapides Parish, Louisiana. In these appointments, I would represent indigents charged with committing a criminal offenses of all types and magnitude of penalties. I would receive a dozen or more of these cases per year and many of the serious felonies required many hours of defense preparation. From time to time, I would also be asked by the court to represent an indigent in a civil matter. I do not remember ever declining such an assignment.

I also worked in assisting in youth baseball and football for several summers and falls. Many of the participants were disadvantaged.

Since 1996, I have accepted every pro bono case sent to me from the Baton Rouge Bar Association.

I have assisted Senators Johnston, Breaux, and Landrieu in vetting potential judicial nominees over the last six 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 have you done to try to change these policies?

From 1967-1969, while I was in law school at Louisiana State University, I was a member of the Phi Alpha Delta Legal Fraternity. At that time, the fraternity did not admit women as members.

The Alexandria Jaycees, when I was a member (approximately 1969-1971), had no female members and had a corresponding organization, the Jaycee Janes, which had no male members.

As I recall, in the late 1970's or maybe the early 1980's, for 2-3 years, either the law firm which employed me or I had a non-resident, non-voting membership in the City Club of Baton Rouge, 355 North Blvd., Baton Rouge, Louisiana, 70801, 225-387-5767. The Club advises me that they do not have records dating to the period when I utilized the Club. At the time I was involved with this club, one eating area of the Club was restricted to men only. From press accounts appearing long after I ceased any relationship with the Club, I learned that there were other restrictions on women members. I was not aware of these restrictions as I was not a full fledged member of the Club. I brought women to the Club with me and experienced no problems in doing so. Whatever basis on which I was a member was ended in the 1980s.

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. I expressed an interest in being appointed a Federal District Judge to Senators Johnston and Breaux in 1995 and to Senator Landrieu in 1997. In 1998, when rumors were circulating that a Middle District Judge would soon take senior status, I renewed my interest with the Senators. Senator Breaux and I were in law school for a year at the same time. He knows of my legal ability, and in 1998 told me he would send my name to the President for consideration for nomination to the vacant Middle District position.

I have had interviews with Senators Breaux and Landrieu and members of their staffs. I was also interviewed by members of the White House Counsel's office and the Department of Justice. I have been interviewed, as well, by Special Agents of the Federal Bureau of Investigation and a representative of 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.

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 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 the "judicial activism" have been said to include:

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

I feel that the role of the Federal District Judge is to apply the United States Constitution and statutes as interpreted by the appropriate appellate court and the U.S. Supreme Court. District Judges should not make law.

I feel that the constitutional separation of powers should be fully respected. Federal District courts should not be expected to solve every problem and as such should only order remedies consistent with the limitations of their

constitutional or statutory authority. District courts are and should be restricted by such doctrines as ripeness, mootness, and stare decisis as contemplated by Article III of the United States Constitution.

NET WORTH: JAMES J. BRADY (07/14/99)

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	51,837	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
Due from relatives and friends	-0-	Unpaid income tax	-0-
Due from others	-0-	Other unpaid tax and interest	-0-
Doubtful	-0-	Real estate mortgages payable - add schedule	360,000
Real estate owned - add schedule	435,000	Chattel mortgages and other liens payable	-0-
Real estate mortgages receivable	-0-	Other debts - itemize:	
Autos and other personal property	240,300		
Cash value - life insurance	4,643		
Other assets - itemize			
• 401(k) Dyer, Ellis and Joseph	40,439		
• 401(k) Gordon, Arata, et al.	401		
• IRA Equitable	3,918		
		Total Liabilities	378,760
		Net Worth	397,778
Total Assets	776,538		
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker 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	17,400		
Other special debt (Provision for state income tax)	360		

James J. Brady, SS# [REDACTED]
Net Worth

REAL ESTATE OWNED

1103 East Lakeside Oaks Drive
Baton Rouge, LA 70810
Personal Residence

James J. Brady, SS# [REDACTED]
Net Worth

REAL ESTATE MORTGAGES

Payable to Hibernia Bank, secured by
1103 East Lakeside Oaks Drive
Baton Rouge, LA 70810
Personal Residence

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Brady, James J.	2. Court or Organization USDC Louisiana, Middle District	3. Date of Report 07/14/1999
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) X Nomination, Date / / Initial Annual Final	6. Reporting Period 01/01/1998 to 07/14/1999
7. Chambers or Office Address 1400 One American Place Baton Rouge, LA 70825	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 Partner	Gordon, Arata, McCollam, Duplantis & Eagan, L.L.P.
2 Director	Catalyst Vidalia Corporation
3	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1999	Dyer, Ellis and Joseph: 401(k) plan with former law firm. No control.
2 1999	Gordon, Arata, McCollam, Duplantis & Eagan, L.L.P.: 401(k) plan. No control.
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 1998-99	Gordon, Arata, McCollam, Duplantis & Eagan, L.L.P.	\$ 185,001.00
2 1998-99	Catalyst Vidalia Corporation	\$ 31,481.00
3 1999	Gravel, Cepiva and Wilkerson	\$ 25,000.00
4		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Brady, James J.	07/14/1999

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input type="checkbox"/>	NONE	
1	EXEMPT.	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE		
1	EXEMPT.		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE		
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 Brady, James J.	Date of Report 07/14/1999
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS— income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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 Union Planters Bank (J)	A	Interest	J	T	EXEMPT				
2 Union Planters Bank (J)	A	Interest	J	T	EXEMPT				
3 Union Planters Bank (J)	A	Interest	K	T	EXEMPT				
4 Trust Mark Bank (S)	A	Interest	J	T	EXEMPT				
5 Bank of Mississippi (S)	A	Interest	J	T	EXEMPT				
6 Dyer, Ellis: 401(k)	A	Interest	K	T	EXEMPT				
7 Gordon, Arata: 401(k)	A	Interest	J	T	EXEMPT				
8 Equitable Insurance IRA	A	Interest	J	T	EXEMPT				
9									
10									
11									
12									
13									
14									
15									
16									
17									
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more									
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 Brady, James J.	Date of Report 07/14/1999
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Brady, James J.	07/14/1999

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 7-14-99

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

Senator SPECTER. Judge Schiller, would you step forward, please. I take it, you know Senator Biden.

Will you raise your right hand. Do you solemnly swear that the testimony you will give before this Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SCHILLER. I do.

Senator SPECTER. You may be seated, Mr. Schiller. Would you care to make an opening statement or just go direct to questions?

TESTIMONY OF BERLE M. SCHILLER, OF PENNSYLVANIA, TO BE U.S. DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge SCHILLER. I have no opening statement, but I would like to make reference to some people here, if I may.

Senator SPECTER. Would you please introduce your guests.

Judge SCHILLER. I have some representatives from the Legal Department of the Federal Transit Administration who worked with me when I was there.

I have my cousin who is a senior—

Senator SPECTER. Would they stand so we can recognize them.

Judge SCHILLER. I have my cousin, Mark Kreitman, who is a senior litigator at the Securities and Exchange Commission.

I have the Federal Railroad Administrator, Jolene Molitoris who is a good friend.

And my family, I have my son, Jonathan. Unfortunately, my other son, Joseph, and my daughters, Abigail and Maggie, could not make it. And my wife, Jo Ann.

Senator BIDEN. Welcome to all.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Schiller. We welcome your family and all of your guests who have come here to join you.

Mr. Schiller, how would you categorize yourself as a philosophical approach to judging?

Judge SCHILLER. I always considered myself a moderate, and interestingly enough, I have been referred to as someone who was not blinded by political ideology when I served as a judge on the Superior Court so that—

Senator SPECTER. What role does political ideology have to play on the Superior Court of Pennsylvania?

Judge SCHILLER. None, and that is why I was proud of that.

Senator SPECTER. Are there moderates, conservatives, and liberals on the Superior Court of Pennsylvania?

Judge SCHILLER. I guess it would depend on the issue, Senator. Sometimes someone could be a conservative on economic issues. Sometimes they could be a liberal on social issues. It really depends on the matter that is before the court and how someone else would characterize that.

Senator SPECTER. What would views as a conservative or moderate or liberal have to do with the business of judging?

Judge SCHILLER. It shouldn't on the Federal District Court level. On the Appellate Court level, we are sometimes called upon to

make judgments on those kinds of issues where philosophy may come into it.

Senator SPECTER. Give us an illustration of that kind of a judgment which you have had from your experience on the Pennsylvania Superior Court.

Judge SCHILLER. There was a question that arose a couple of years ago regarding whether or not as a matter of public policy—if someone applied for worker's comp, whether or not an employer could fire them claiming that person was an at-will employee and, therefore, the public policy exception would not apply to him because of the countervailing policy of employee at will.

Senator SPECTER. Of employees what?

Judge SCHILLER. Employee at will which in Pennsylvania, as you know, Senator, says that an employer does not have to give a reason to fire somebody, and there are some exceptions, very limited, and one of them is the public policy exception.

This case arose. I wrote a dissent claiming that since there already was legislative and constitutional authority for worker's comp in Pennsylvania that that was an expression of the legislature and public policy, and, therefore, it should override the employee at will.

The Supreme Court took the case and reversed my court and adopted my dissent.

Senator SPECTER. Well, in what respect would you categorize that based on philosophical grounds of moderate, liberal, or conservative?

Judge SCHILLER. I don't think it has any designation there. I just decided on the law. I saw that the conflict between public policy and employee-at-will standards bumped into one another, and I made a judgment that one should prevail over the other.

Senator SPECTER. Well, in common law, you can fire an at-will employee without any reason, but the cases have held that you cannot fire them for a bad reason, exercising First Amendment rights, for example.

Judge Schiller, what in your background beyond the service you had as a Superior Court judge would you say especially qualifies you for a Federal judicial appointment?

Judge SCHILLER. Thank you, Senator. I have had extensive background in litigation trying cases on all levels from the lowest court in magistrate's court all the way to the Supreme Court of Pennsylvania. I have tried cases in the Federal court. I have tried cases in about 10 different counties of Pennsylvania in various areas of the law. So that, I have had an extensive background in litigation, meeting with clients.

I have also been involved in community activities and in public service. Prior to becoming a Superior Court judge, as you know, I was the chief counsel of the Federal Transit Administration. So that, public service has been a major part of my life.

Senator SPECTER. Judge Schiller, do you think that the Pennsylvania legislature could take away the jurisdiction of the Pennsylvania Supreme Court to decide constitutional issues?

Judge SCHILLER. That question, of course, never came up. I do believe in the separation of powers, and it would be an interesting constitutional crisis, I assume, if something like that happened. I

don't know where it would go because the Constitution seems to lay out various powers to each—what is supposed to be co-equal branches of government, and I think that that would try to be avoided.

The closest that happened in Pennsylvania a couple of years ago on reforming the court system—and ultimately there was a meeting and people were able to work it out because no one knew where that was going to go. So I have a real concern if one branch of government tried to usurp powers of another branch of government. I don't know what would happen.

Senator SPECTER. Well, if you use the word “usurp,” you pretty well decided that, haven't you?

Judge SCHILLER. Maybe that was a wrong word to use.

Senator SPECTER. Does the legislature of Pennsylvania have the legal authority to—before the matter was put on the ballot for a constitutional change, did the Pennsylvania legislature have the legal authority to give the district attorney the right to demand a jury in a criminal case?

Judge SCHILLER. I understand that that was a constitutional amendment that had to be proposed, and the population at large voted on it. So that, evidently, the legislature decided that that would have to be a special constitutional amendment rather than a statute.

Senator SPECTER. That is why I asked the question before the constitutional amendment was proposed.

Judge SCHILLER. I think they decided that they could not do it by legislation.

Senator SPECTER. Where the defendant has a constitutional right to a jury trial, wouldn't there be a concomitant right in the Commonwealth absent the constitutional amendment and absent legislation to have a right to a jury trial as a party before the court?

Judge SCHILLER. I don't know. I don't know whether there is any precedent for that.

I just think that over the course of the 200 years, that issue, if it had been decided, I am not aware of it.

Senator SPECTER. There was precedent. The Commonwealth had the right to a jury trial when I was district attorney, and I used it too often and the Supreme Court took the right away, which raised the issue.

Judge SCHILLER. You have always been a catalyst of change.

Senator SPECTER. Let the record show that Senator Biden thinks that is funny, unlike my reaction when it happened.

Then the question came up about having legislation to give me back—give the District Attorney back the right to demand a jury trial, and it was finally resolved, as you know, by constitutional amendment, but I am still interested in your opinion as to whether you think the legislature could have reinstated the District Attorney's right to a jury trial.

Judge SCHILLER. I don't—I don't know. I—that is a tough question, and I think that's why the legislation—

Senator SPECTER. We are not here to ask you easy questions, Judge Schiller.

Judge SCHILLER. I can't—I have not thought that one through.

Senator SPECTER. With respect to the imposition of the death penalty, do you have any legal or moral scruples which would inhibit or prevent you from proposing or upholding a death sentence in a criminal case?

Judge SCHILLER. No, I do not.

Senator SPECTER. Do you believe that 10-, 15-, or even 20-year delays between conviction of a capital offender and execution is too long? The International Court of Justice held that a 6-year delay was too long for the imposition of the death penalty in a European case. Do you think that a delay of 10, 15, or 20 years is too long to execute someone on a death penalty case?

Judge SCHILLER. I don't think there should be a time limit on how long it should be before someone is executed, especially if that person is the one who has taken all the appeals and strung it out that long.

Senator SPECTER. Senator Biden.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. Let me ask you about a different subject. Tell me about what pro bono work you have done in your career.

Judge SCHILLER. If I could be a little flip about it, sometimes my cases started out with paying clients and they ended up pro bono. Those were not my best.

I have worked with the Bar Association over the years. I was the first student delegate elected to the House of Delegates.

I was also active with the Philadelphia Bar Association's Law Day Committee setting up seminars on public service for lawyers, and I served on the Disciplinary Board of the Supreme Court of Pennsylvania for 6 years which took about 30 hours a month reviewing files and cases of lawyers who ran afoul of the rules of professional conduct, for which, of course, you receive no remuneration.

I have also been active in the community with education, and I was very involved with the mentally ill and mentally retarded, having set up a mental health center and serving as its president at one time.

Senator BIDEN. Thank you.

When Senator Specter asked you what qualified you to be a judge, one of the reasons why I think—and I have known you for a long time, almost 30 years—is not only your academic and legal background, but the fact that you have been involved in an awful lot of public-interest questions.

I remember the first time—you will not remember—that you sought to get me involved outside of my State, in Philadelphia, was for mental health. I do not remember what the event was, but I remember you asking me to participate. I think that is an important component. I think it is an obligation of lawyers that is too often not met. It is not a legal requirement. I think it is an obligation that is too often not met.

I will ask you the same question I asked the other witness. Why do you want to be on the Federal bench?

Judge SCHILLER. I have always thought that public service is the highest calling you can have in a society. My training and background in law leads me inexorably towards something in public

service and the law, and to me, there is no higher calling than becoming a judge.

Senator BIDEN. On the Superior Court of Pennsylvania which is the Appellate Court, not the court of original jurisdiction—

Judge SCHILLER. That is correct.

Senator BIDEN. In my State, the Superior Court is the court of general jurisdiction.

On that court, that is obviously—for the record, that is a full-time judge. You are not still associated as a partner in any law firm?

Judge SCHILLER. Oh, no. No.

Senator BIDEN. So you have been on the Superior Court in the State of Pennsylvania since 1996?

Judge SCHILLER. My term expired January of this year.

Senator BIDEN. Now, is that an appointed or elected office?

Judge SCHILLER. It is elected. However, I was appointed twice by Governor Ridge to fill successive vacancies that occurred on the court.

Senator BIDEN. So you have never stood for that office?

Judge SCHILLER. I did, and I lost.

Senator BIDEN. And then you were appointed after or before?

Judge SCHILLER. I was appointed in 1996, stood for election for the Pennsylvania Supreme Court and lost, and then Governor Ridge reappointed me to the Superior Court—

Senator BIDEN. To fill a vacancy.

Judge SCHILLER [continuing]. To fill another vacancy, and I was defeated in 1999 for a full term, and my term expired in January of this year.

Senator BIDEN. And have you enjoyed the work on the bench? That sounds like a silly question to ask since you sought to stay in the bench, but have you enjoyed your work in the bench?

Judge SCHILLER. It is a wonderfully challenging exercise, intellectual exercise, as well as a terrific opportunity to help the administration of justice which is what I want to do.

Senator BIDEN. You are going to be in a trial court, and you are in a very busy district. What is your attitude about appellate court versus a trial court in terms of your desire to serve on a court? Do you think you will find one more interesting than the other?

Judge SCHILLER. I think they are both going to be very interesting and exciting in different ways. I was a trial lawyer, and I yearn to get back to that, not that I have had the experience of an appellate court. It gives me a different perspective.

Senator BIDEN. Thank you very much, Mr. Schiller. I wish you luck on the bench, and I am hopeful that—the truth of the matter is, the reason why you are here and the others are here is because of the persistence of this man right here. I want to make it clear. My comments about the relative treatment of nominees in a timely fashion between administrations was not in any way directed towards the chairman here this afternoon, but I wish you luck. I hope it meets your expectations. I have no doubt you will serve honorably, and I have no doubt you will serve well.

Judge SCHILLER. Thank you, Senator.

Senator SPECTER. Thank you very much, Judge Schiller, and I would concur with what Senator Biden said about your background

and your capabilities, and again not in the prognostication business, I, too, am optimistic of your confirmation.

Judge SCHILLER. Thank you very much for all your help and consideration.

[The questionnaire follows:]

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

I. Biographical Information (Public)

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

Berle M. Schiller

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

Home: Merion, PA

Mailing address: 331 Cherry Bend Merion, PA 19066

3. Date and place of birth.

June 17, 1944; Brooklyn, NY.

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

Married; JoAnn Malmud Schiller, 10/9/83.

Independent Consultant (human resources/organizational development)

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

Bowdoin College, 1961-1965, B.A. (1965)

**New York University School of Law – 1965-1968,
J.D. (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.

**Blank, Rome, Comisky, McCauley, LLP, Associate–
1968-1969.**

**Southeast Pennsylvania Coordinator for Shapp for
Governor campaign-1969-1970.**

**Pennsylvania Department of Justice, Deputy
Attorney General – 1971.**

**President, Board of Directors of People Acting To
Help (PATH). A community mental health center-
1972-1974.**

**Member, Board of Directors, Northeast Mental
Health/Mental Retardation Center-1974-1986.**

**Astor, Weiss, Kaplan & Rosenblum, Partner– 1972-
1993.**

**Disciplinary Board of the Supreme Court of
Pennsylvania, member 1989-1995.**

**Best Health Care, Inc., member, Board of Directors-
1993-1996.**

**Federal Transit Administration, Chief Counsel –
1994-1996.**

**Superior Court of Pennsylvania, Appellate Judge–
1996-2000.**

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

**Yes – Honorable Discharge, [XXXXXXXXXX] Captain,
Judge Advocate General (JAG).**

United States Army Reserve – 1969-1971

Pennsylvania National Guard – 1971-1975.

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

Dean's List, Bowdoin College
American Jurisprudence Prize in Unfair Trade Practices New York University Law School, Fall 1967
Arthur Vanderbilt Medal, New York University Law School Graduation, 1968
John F. Kennedy Award for Mental Health, 1996
Superior Achievement Award presented by Administrator of Federal Transit Administration, 1996.

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

American Bar Association, first student delegate elected to House of Delegates, 1967-1968
Pennsylvania Bar Association
Philadelphia Bar Association Executive Committee, the Family Law section of the Philadelphia Bar Association, 1984-1986
Philadelphia Trial Lawyers Association
National Association of Defense Counsel

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. Organizations which lobby
AARP
B. Organizations which do not lobby
Audobon Society
Merion Civic Association
Philadelphia Zoo
Schuylkill Valley Nature Center
North American Hunting Club
Union Fire Association of Lower Merion
Philadelphia Museum of Art
Philadelphia Natural History Museum

11. Court Admission: List all court 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.

**Common Pleas Court of Pennsylvania – 1968
U.S. District Court Eastern District of Pennsylvania –
1968
Superior Court of Pennsylvania – 1968
United States Court of Appeals for the Third Circuit – 1981**

12. Publications 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) Commentary, "Superior Court Important As 'Court Of Last Resort,'" *The Times Leader*, Wilkes Barre, PA, July 1999.

(2) "Selected Legal Aspects of Medical Treatment of Performing Artists," *Textbook of Performing Arts Medicine*, edited by R.T. Sataloff, A. Brandfonbrener, and R. Lederman, Raven Press, Ltd., New York, 1991.

(3) Contributor, "Student Conduct and Discipline Proceedings in a University Setting, Proposed Code with Commentary," New York University School of Law, August 1968.

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

Good. December 1999.

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.

**Appellate Judge, Superior Court of Pennsylvania
Appointed**

May 1996 – January 1998

February 1998 – January 2000

The Superior Court has exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are reserved by statute to the exclusive jurisdiction of the Supreme Court or the Commonwealth Court. 42 Pa.C.S.A. § 742.

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 to Most Significant Opinions:

1. *Commonwealth v. Blasioli*, 685 A.2d 151 (Pa. Super. 1996), affirmed, 552 Pa. 149, 713 A.2d 1117 (1998).

2. *Stonehedge Square Ltd. Ptshp. v. Movie Merchants, Inc.*, 685 A.2d 1019 (Pa. Super. 1996), affirmed, 552 Pa. 412, 715 A.2d 1082 (1998).

3. *All-Pak, Inc. v. Johnston*, 694 A.2d 347 (Pa. Super. 1997).

4. *Power v. Tomarchio*, 701 A.2d 1371 (Pa. Super. 1997).

5. ***Commonwealth v. Alcorn***, 703 A.2d 1054 (Pa. Super. 1997, *appeal denied*, 555 Pa. 711, 724 A.2d 348 (1998)).

6. ***Commonwealth v. Harris***, 719 A.2d 1049 (Pa. Super. 1998).

7. ***Pantoja v. Sprott***, 721 A.2d 382 (Pa. Super. 1998).

8. ***Baker v. AC&S, Inc.***, 729 A.2d 1140 (Pa. Super. 1999), *en banc*, *appeal granted*, 1999 Pa. Lexis 2569 (1999).

9. ***Bailey v. Storlazzi***, 729 A.2d 1206 (Pa. Super. 1999).

10. ***Stewart v. Stewart***, 1999 PA Super 322.

(2) Summary and citations of opinions which were reversed or criticized.

1. ***Doyle v. Tesauro***, 551 Pa. 430, 710 A.2d 1138 (1998) *reversing* ***Doyle v. Tesauro***, 694 A.2d 626 (Pa. Super. 1997).

This case involved a lawsuit on behalf of a plaintiff who drowned in a swimming pool owned by defendant. Approximately two and one half years elapsed after the taking of depositions and defendants filed a petition to dismiss because of a lack of docket activity. The trial court granted the motion.

My decision reversed the judgment of the trial court and allowed the Plaintiff's complaint to proceed since any delay was caused by the defendant. The Supreme Court of Pennsylvania subsequently established a new rule that applied equitable principles in order to assess whether the failure to pursue a filed action should be dismissed.

The Supreme Court vacated both the order of the trial court granting a judgment of *Non Pros* and our order reversing the trial court and recognized that equitable principles must be applied in a judgment of *Non Pros*.

2. ***In re J.M.***, 685 A.2d 185 (Pa. Super. 1996), *rev'd*, 556 Pa. 63, 726 A.2d 1041 (1999).

A majority of the Superior Court panel held that the warrant for a mental health examination issued pursuant to 50 P.S. Section 7302 was procedurally defective because it did not satisfy the standard of probable cause applicable to arrest warrants. The Pennsylvania Supreme Court reversed finding that a Section 7302 warrant should not be judged by the same standards employed in reviewing the validity of a criminal arrest warrant. Specifically, the Court held that the plain language of the Mental Health Procedures Act (MHPA) indicates that the legislature intended to employ a different standard for the issuance of warrants for emergency mental health evaluations. The Court also reasoned that mental health evaluations and commitment proceedings are civil and not criminal in nature and the intent of the MHPA is to provide treatment, not punishment, to those in need.

(3) Significant opinions on federal or state constitutional issues

Commonwealth v. Hill, 737 A.2d 255 (PA Super. 1999).

In a case of first impression, I determined that criminal trials *in absentia* are permissible under the Pennsylvania Constitution. This case involved a drug dealer who after receiving notice of his trial date, failed to appear for trial. The defendant was tried *in absentia* after assurances of a reasonable effort by the District Attorney to locate the defendant. Subsequently this same defendant was arrested on a new drug charge at which time he was immediately incarcerated as a result of the conviction *in absentia* before proceeding to trial on the new charge. The case is important because drug dealers will continue to sell drugs as long as they are out on the street.

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

**Disciplinary Board of the Supreme Court of Pennsylvania, 1989-1995, Appointed.
Federal Transit Administration 1994-1996 Chief Counsel, Appointed.**

**Unsuccessful Candidacies:
Pennsylvania State Senate – 1972
Common Pleas Court of Philadelphia – 1975
School Board Lower Merion Township – 1989
Pennsylvania Supreme Court – 1997
Pennsylvania Superior Court – 1999.**

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 judge, the court, and the dates of the period you were a clerk;

I never served as a law clerk.

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;

**Blank, Rome, Comisky, McCauley, LLP
One Logan Square
Philadelphia, PA 19103
Associate– 1968-1969.**

**Pennsylvania Department of Justice
State Capitol
Harrisburg, Pennsylvania
Deputy Attorney General 1971.**

**Astor, Weiss, Kaplan & Rosenblum
6th Floor, The Bellevue
Broad Street at Walnut Street
Philadelphia, PA 19102
Partner– 1972-1993.**

**Federal Transit Administration
400 7th Street, S.W.
Washington, D.C. 20590
Chief Counsel – 1994-1996.**

**Superior Court of Pennsylvania
530 Walnut Street
Philadelphia, PA 19106
Appellate Judge–1996-2000.**

- 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?

1968-1969. As an associate I worked in the litigation department assisting senior partners in all aspects of trial work, including research, brief writing, document review and preparing for trial.

1971-1972. As a Deputy Attorney General I created a narcotics strike force. At the time no single state agency was responsible for intrastate narcotics violations. I combined the efforts of the Attorney General, State Police and Health Department investigators into one organization.

1972-1993. I participated as a senior partner in general litigation of all kinds in State and Federal Courts, administrative hearings before boards, commissions and hearing examiners. I was also a member of the law firm's Management Committee and was in charge of recruiting and interviewing summer law clerks.

1994-May 1996. Chief Counsel, Federal Transit Administration. This position required me to advise the Administrator about the law governing all transit-related activities and decisions, participate in litigation affecting the Agency, and be a senior policy advisor on all decisions made by the Agency.

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

As a general litigator, the nature and character of the clients were varied. I represented individuals, corporations and insurance companies. The cases ran the full gamut—criminal, personal injury, insurance defense, estates, administrative agency, health and domestic relations. In the final few years, before becoming Chief Counsel to the Federal Transit Administration, my emphasis was on domestic relations and medical malpractice.

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

I appeared in court on a regular basis.

2. What percentage of these appearances was in:

- (a) federal courts: **5%;**
 (b) state courts of record: **80%;**
 (c) other courts: **15%.**

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.

In the area of domestic relations, which includes matters of custody, support, divorce and equitable distribution, an active practitioner is constantly in court attending bench trials, arguments and hearings on motions. Aside from my normal civil practice, the number of judgments resulting from bench trials and hearings I attended could easily approach 1,000.

5. What percentage of these trials was:
- (a) Jury-1%
 - (b) Non-jury-99%

Although I cannot recall the number of cases tried to verdict I am sure that only a small percentage were tried by jury. This is because most cases were settled and almost no cases in domestic relations have juries.

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) ***Town of Secaucus v. U.S. Dept. of Transportation*, 889 F. Supp. 779 (D.N.J. 1995), *aff'd.*, 79 F.3d 1139 (3rd Cir. 1996). Honorable Dickinson R. Debevoise, Senior United States District Judge for the District of New Jersey, presided at trial.**

I represented the Federal Transit Administration (FTA) in my capacity as Chief Counsel. The plaintiffs sought to enjoin the disbursement of \$15.7 million in federal funds to subsidize development under an agreement between Allied Junction Corporation and New Jersey Transit; their complaint was dismissed. This case was a prime example of a collaborative effort on the part of the Department of Justice and the FTA. The issue in this case was the interpretation of the Inter-Model Surface Transportation Efficiency Act

("ISTEA"); I was responsible for the portion of the litigation addressing the right of the government and private enterprise jointly to develop mass transit sites.

Co-Counsel: Cindy Nan Vogelman, Esq., Chasan, Leyner, Tarrant & Lamparello, Jersey City, NJ 201-348-6000; Counsel of record for the U.S. Department of Transportation and Gordon J. Linton: Robert M. Hanna, Esq., Assistant United States Attorney, Newark, NJ 973-645-6103.

Opposing Counsel: Hackensack Meadowlands Development Commission and New Jersey Transit Corporation: E. Philip Isaac, Esq., Deputy Attorney General, Newark, NJ 973-491-7019; Attorneys for Defendant, Allied Junction Corporation: Edward Paul Alper, Esq., Joseph & Feldman, Fort Lee, NJ. I have attempted to locate Mr. Alper, through several methods, but have been unsuccessful. He is not listed in Martindale-Hubbell or the West Law Legal Directory, his former law firm no longer exists, and the Feldmans I called in New Jersey do not know him.

- (2) ***Anderson v. Slater*, EEOC Appeal No. 01962960, Agency No. DOT-940248, Hearing No. 100-95-7170X. Administrative Judge Adria Zeldin from Washington, D.C. presided.**

This was a discrimination case filed by a Federal Transit Administration (FTA) employee who claimed that she was not promoted because of race and gender. I personally tried the case before the Hearing Examiner and was the first Chief Counsel to appear as lead counsel for the FTA. The hearing lasted several days, and the charge was dismissed. This decision was affirmed on appeal.

Opposing Counsel: Diana Veilleux, Esq. Shaw Bransford, Veilleux and Roth. Suite 900, 1100 Connecticut Avenue, N.W. Washington D.C. 20036. Tel: 202-464-8400.

- (3) *City of Philadelphia, Department of Revenue v. Tax Review Board of the City of Philadelphia to the Use of Sawin Systems, Inc.*, 157 Pa. Commw. 43, 628 A.2d 1220 (1993). Honorable Craig Lord, a former judge in the Court of Common Pleas of Philadelphia County and now in private practice, presided in the trial court.

I represented the appellee, Sawin Systems, in this case involving its classification as a "manufacturer" for purposes of assessing Mercantile License Tax (MLT) and Business Privilege Tax (BPT). The City took the position that Sawin was not a manufacturer as defined under the MLT and BPT ordinances and regulations, thereby enabling it to exclude from taxable receipts the product it delivered to customers outside city limits. The trial court affirmed the decision of the Tax Review Board that Sawin was a manufacturer for this purpose, and that decision was affirmed by the Commonwealth Court of Pennsylvania.

Opposing Counsel: Joseph F. Lynch, Assistant City Solicitor, 1101 Market Street, Philadelphia, PA Tel: 215-592-5314.

- (4) *Cills v. Cills*, 23 Phila. 537, 1992 Phila. Cty. Rptr. Lexis 44 (1992). Honorable Allan L. Tereshko, then of Philadelphia Family Court and now of the Trial Division, presided over the hearing.

I represented the defendant-husband in this case involving a petition seeking to rescind an agreement to transfer real estate. The plaintiff alleged that at the time she transferred the properties to her husband she was suffering from hepatitis and had no recollection of signing the deed; she sought to rescind them on the basis of incapacity. After hearing, the court rejected plaintiff's petition for relief, finding that she had not established the requisite incapacity.

Opposing Counsel: Dorothy K. Phillips, Esquire,
1818 Market Street, Suite 3535, Philadelphia,
PA 19103-3638. Tel: 215-568-7757.

- (5) *Anderson v. Pennsylvania Hospital and Misericordia Hospital*, 22 Phila. 436, 1991 Phila. Cty. Rptr. Lexis 52 (1991). Honorable Murray Goldman, then a judge in the Philadelphia Trial Division, now retired presided.

I represented the defendant in this medical malpractice case. Plaintiff alleged that the hospitals engaged in malpractice by leaving a catheter in her arm. I was successful in arguing that her claim was barred by the applicable statute of limitations.

Opposing Counsel: Frank M. McClellan, Esq.,
Eaton & McLellan, 230 S. Broad St., Third Floor,
Philadelphia, PA 19102. Tel: 215-875-0600.

- (6) *Siviglia v. Siviglia*, 138 F.R.D. 452, 1991 U.S. Dist. Lexis 4703 (1991). Honorable Daniel H. Huyett, United States District Judge for the Eastern District of Pennsylvania, presided.

I represented the plaintiff in this case involving repressed memory of sexual abuse alleged to have been committed against her by her father. The reported decision is on a motion to compel her father to answer questions concerning the sexual abuse based on his privilege against self-incrimination. I was successful in arguing that the father could not avoid testifying because the threat of prosecution was not substantial or real due to the passing of the statute of limitations. Following this favorable ruling on discovery and defendant's deposition testimony, defendant settled the case.

Opposing Counsel: James S. Sorrentino, Esq.,
Stevens & Lee, 339 N. Duke Street, Lancaster,
PA 17602. Tel: 717-392-2481.

- (7) ***Frank v. Frank*, 587 A.2d 340 (Pa. Super. 1991). Honorable Edward Rosenberg now retired, presided.**

I represented the appellee-mother in this case involving higher educational expenses in a divorce context. The parties entered a property settlement agreement in 1981 providing that father would bear these expenses for the parties' three children. In 1986, the mother's family established a trust which by its terms would pay a set amount toward the children's educational expenses. The father thereafter sought to avoid his obligation under the agreement. The trial court denied his request for relief and the Superior Court of Pennsylvania affirmed.

**Opposing Counsel: Lynne Z. Gold-Bikin, Esq., Wolf, Block, Schorr & Solis-Cohen, LLP. 1650 Arch Street, Philadelphia, PA 19103
Tel: 610-278-1511.**

- (8) ***Catanoso v. Dr. Kramer et. al.* May Term 1988, No. 3971, Philadelphia (not reported). Judge *Pro Tem* Daniel J. Ryan Esq. Presided.**

I represented Dr. Kramer as lead counsel in this medical malpractice case. The defendant erroneously administered radiation to the wrong ear causing deafness in the plaintiff. I urged settlement which was refused by my client. A jury trial resulted in a verdict in favor of the plaintiff. The case is a very good example of the risks clients run in failing to take counsel's advice.

Opposing Counsel: Gerald A. McHugh, Jr., Esq., Litvin, Blumberg, Matusow & Young, The Widener Building, 18th Floor, 1339 Chestnut Street, Philadelphia, PA 19107. Tel:215-557-3309.

- (9) ***Van de Beek, a/k/a Carolyn E. Braun v. Van de Beek*, 14 Phila. 492, 1986 Phila. Cty. Rptr. Lexis 64 (1986). Honorable Vito Canuso, now retired, presided.**

I represented the defendant in this unusual case. The plaintiff filed for divorce against the defendant, and the defendant filed a petition for declaratory judgment that there was no common law marriage, as alleged by plaintiff. After a several day trial, the court granted the petition and dismissed the complaint.

Opposing Counsel: Norman A. Oshtry, Esq., 1819 JFK Blvd., Suite 433, Philadelphia, PA 19103. Tel:215-568-4040.

- (10) ***Commonwealth v. Martin*, 336 A.2d 290 (Pa. 1975). Honorable Armand Della Porta now retired, presided.**

I represented the defendant in this criminal case at trial and on appeal. The significant issue was the claim that the prosecutor had exercised its peremptory challenges improperly to exclude blacks from sitting on the jury. While the Pennsylvania Supreme Court denied the claim (with two justices dissenting), I was gratified that about eleven years later, the United States Supreme Court agreed with my position in the case of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Opposing Counsel: F. Emmett Fitzpatrick, 926 Public Ledger Building, 610 Chestnut Street, Philadelphia, PA 19106. Tel: 215-925-5200.

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.)
- (1) Disciplinary Board of the Supreme Court of Pennsylvania. I was appointed as a Board member by the Supreme Court of Pennsylvania and served two successive terms on a pro bono basis from 1989-1995. This Board administers the rules of professional conduct for lawyers in Pennsylvania. This fifteen-member Board hears all cases for lawyer discipline in the Commonwealth of Pennsylvania. It is responsible for recommending to the Pennsylvania Supreme Court changes in the Rules of Professional Conduct for all attorneys licensed to practice law in Pennsylvania.**
 - (2) I served as a member of the Executive Committee of the Family Law Section of the Philadelphia Bar Association. This role enabled me to comment on legislation and rules affecting divorce, custody and support issues. 1984-1986.**
 - (3) I served as co-chairperson and panel moderator of a seminar for the Philadelphia Bar Association in 1975. The seminar concerned itself with the need and the duty of lawyers to participate in public service efforts.**

II. Financial Data and Conflict of Interest

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.

As a former Appellate Judge my potential conflicts of interest were governed by the Code of Judicial Conduct and as a result of my membership on the Disciplinary Board, I am ever aware and mindful of my obligation to resolve any actual or apparent conflicts of interests. I would be similarly guided by the Code of Judicial Conduct for Federal Judges if I am confirmed as a Federal Judge.

There are no areas of law nor financial arrangements which are likely to present any such conflicts for me.

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

I have no plans to pursue any outside employment during my service with the Court.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be submitted here.)

Please see attached Financial Disclosure Report.

5. Please complete that 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.

- a. **In 1970 I served as Southeast Pennsylvania coordinator for the Shapp for Governor Committee.**
- b. **I was a member of the Pennsylvania Clinton-Gore Finance Committee in 1991-1992.**

AO-10
Rev. 1/98

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1999**

*Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C. App. 4, 101-112)*

1. Person Reporting (Last name, first, middle initial) Schiller, Berle M.	2. Court or Organization Federal District Court, ED. PA	3. Date of Report 4-12-00
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="checkbox"/> Nomination, Date <u>4-11-00</u> Initial ___ Annual ___ Final ___	6. Reporting Period 1-1-99 thru 3-31-00
7. Chambers or Office Address Merion, PA	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 checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
2	
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		
1998	Admin. Office of PA Courts	\$ 109,608
2		
1999	Admin. Office of PA Courts	\$ 113,000
3		
1998	Spouse-Self-Employed Consultant	\$ 65,200
4		
1999	Spouse-Self-Employed Consultant	\$ 45,000
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Berle M. Schiller	4-12-00

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 23-28 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; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Student Loan Servicing Center	College Loan for Son	J
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

Name of Person Reporting Date of Report

FINANCIAL DISCLOSURE REPORT Berle M. Schiller 4-12-00

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of instructions.)

A. Description of Assets (including trust assets) <i>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <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) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-F)	(2) Value Method Code3 (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code2 (J-F)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
1 Bristol Myers Stock	A	div.	K	T					EXEMPT
2 Peco Energy Stock	A	div.	J	T					"
3 Allergan Stock	A	div.	J	T					"
4 Smith Kline Stock	A	div.	J	T					"
5 SBC Communications Stock	A	div.	J	T					"
6 Archer Daniels Stock	A	div.	J	T					"
7 Vodafon Stock	A	div.	J	T					"
8 Ematron Stock		none	J	T					"
9 So. Pac. Pet. Stock		none	J	T					"
10 PA. Savings Bank Stock		none	J	T					"
11 Data Broad Stock		none	J	T					"
12 At Home Stock		none	J	T					"
13 FKLN-PA Tax Free	D	int.	N	T					"
14 Righttime Fund	B	div.	J	T					"
15 Righttime Mid Cap.	B	div.	J	T					"
16 Righttime IRA	C	div.	M	T					"
17 First Trust Corp. IRA (J)	C	div.	L	T					"
18 Fidelity Mag. IRA	B	div.	K	T					"
1. Income/Gain Codes: A=\$1,000 or less; B=\$1,001-\$2,500; C=\$2,501-\$5,000; D=\$5,001-\$15,000; E=\$15,001-\$50,000; F=\$50,001-\$100,000; G=\$100,001-\$1,000,000; H=\$1,000,001-\$5,000,000; I=\$5,000,001-\$5,000,000; J=More than \$5,000,000 2. Value Codes: A=\$15,000 or less; B=\$15,001-\$50,000; C=\$50,001-\$100,000; D=\$100,001-\$250,000; E=\$250,001-\$500,000; F=\$500,001-\$1,000,000; G=\$1,000,001-\$5,000,000; H=\$5,000,001-\$25,000,000; I=\$25,000,001-\$50,000,000; J=More than \$50,000,000 3. Value Method Codes: Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book value; V=Other; W=Estimated									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Berle M. Schiller	Date of Report 4-12-00
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VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 16-54 of instructions.)

A Description of Assets (including trust assets) <i>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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)	(2)	(1)	(2)	(1)	If not exempt from disclosure:			
	Amt. 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)
NONE (No reportable income, assets, or transactions.)									
1 Fidelity Growth IRA	B	div.	K	T		EXEMPT			
2 Disney Stock (D.C.)	A	div.	J	T		"			
3 Wenfield Corp. (D.C.)	A	div.	J	T		"			
4 Vanguard Fund(D.C.)	A	div.	K	T		"			
5 Phoenix Fund (D.C.)	A	div.	J	T		"			
6 First Union Bank (J)	B	int.	K	T		"			
7 PA State Retirement Sys.	C	div.	L	T		"			
8									
9									
10									
11									
12									
13									
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16									
17									
18									

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

Value Codes: A=\$15,000 or less; B=\$15,001-\$50,000; C=\$50,001-\$100,000; D=\$100,001-\$250,000; E=\$250,001-\$500,000; F=\$500,001-\$1,000,000; G=\$1,000,001-\$5,000,000; H=\$5,000,001-\$25,000,000; I=\$25,000,001-\$50,000,000; J=More than \$50,000,000.

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Berle M. Schiller	4-12-00

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

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Berle M. Schiller Date 4-12-00

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, § 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	43,000	Notes payable to banks—secured	0
U.S. Government securities—add schedule	0	Notes payable to banks—unsecured	0
Listed securities—add schedule	82,000	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 tax and interest	0
Doubtful	0	Real estate mortgage payable—add schedule Harris, First Union	132,000
Real estate owned—add schedule	412,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts—itemize:	
Auto and other personal property	100,000 (est.)	College loan for son	14,000
Cash value—life insurance	5,000	VISA	3,000
Other assets—itemize:			
Pensions - I.R.A.'s	271,500		
Mutual Funds	281,000		
		Total Liabilities	149,000
		Net Worth	1,046,300
Total Assets	1,495,300	Total Liabilities and net worth	1,495,300
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor co-maker w/son for med. school	40,000	Are any assets pledged? (Add schedule)	0
On leases or contracts	0	Are you deforced 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		

NET WORTH ASSETS

SECURITIES	# OF SHARES	Apprx. VALUE
Bristol Myers (BMY)	400	24,100
Peco Energy (PE)	100	4,100
Allergan (Agn)	25	1,300
Smith Kline (SBH)	200	13,500
SBC Comm (SBC)	73	3,350
Archer Daniels Midland (ADM)	217	2,400
Vodafone Air (VOD)	250	13,500
Imatron (IMAT)	1300	4,200
So. Pacific Petroleum (SPPTY)	2000	4,500
Pa Savings Bank (PSBI)	1000	5,000
Data Broad (DBCC)	200	1,400
At Home (ATHM)	200	6,000
	TOTAL	\$83,350 (est)
REAL ESTATE		
331 Cherry Bend, Merion PA		400,000
Share-Little Kings Gap Hunting/Fishing Assc.		6000
Time Shares-Hilton Head South Carolina & Shawnee, Pennsylvania		6000
MUTUAL FUNDS		
Franklin Tax Free Fund	26,900	260,000
Righttime Fund	368	12,500
Righttime Mid Cap Fund	250	8,500
PENSIONS/IRA's		
Righttime Fund	3085	104,600
Fidelity Magellan	190	28,000
Fidelity Growth Income	46	17,000
First Trust Corp.		47,400 (husband)
		20,300 (wife)
Pa. State Retirement System		54,000
CASH ON HAND		
Savings-First Trust	40,000	
Checking-First trust	3,000	

NET WORTH LIABILITIES

MORTGAGES PAYABLE	
Harris Savings Bank	107,000
First Union National Bank	25,000
OTHER DEBTS	
Student Loan Servicing Center (college loan for son)	14,000
Visa	3,000

III. General (Public)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I served on the Disciplinary Board of the Supreme Court of Pennsylvania from 1989-1995. The Board reviewed and investigated complaints of attorney violations of the Rules of Professional Conduct. The Board imposed non-public sanctions and recommended more severe sanctions for consideration by the Pennsylvania Supreme Court. In my capacity as Board member, I spent approximately 20-30 hours per month, reviewing records, attending meetings, and holding hearings.

I served as President of the Home and School Association for the local public high school for two terms, approx. 1989-1991.

I helped to establish PATH, Inc. ("People Acting to Help"), a community mental health center and served as its president in 1972. I remained active in mental health and mental retardation, until becoming a judge 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, I have never belonged to any organization which discriminates on the basis of race, sex or religion.

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

The Federal Judicial Nominating Commission of Pennsylvania, established by Senators Specter and Santorum, interviewed and approved my candidacy for nomination to the Federal District Court for the Eastern District of Pennsylvania in February, 2000.

I was interviewed by attorneys from the Department of Justice in Washington, D.C., agents of the Federal Bureau Of Investigation and a representative of 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 a 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 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 years on Pennsylvania's first line appellate court have sharpened my appreciation for the value of judicial hierarchy and the role of each judge in the incremental functioning of that system. In our constitutional form of government that respects the Separation of Powers, a trial judge does not substitute his/her opinion as to the laws passed by Congress. These value judgments are not the subject for a trial judge's determination. Moreover, if I am confirmed as a trial judge, I will be bound by the Constitution of the United States, judicial rulings of the Supreme Court and the United States Court of Appeals for the Third Circuit.

It has long been understood that trial judges must make determinations as to whether there is an "actual case or controversy", whether the litigant has standing and how the current law either by statute or appellate decision controls each particular case.

Senator SPECTER. Judge Petrese Tucker, would you step forward, please. Judge Tucker, would you raise your right hand. Do you solemnly swear that the testimony you will give before this Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge TUCKER. I do.

Senator SPECTER. You may be seated.

I know you have your father here. Your daughter is here, and your husband is here.

**TESTIMONY OF HON. PETRESE B. TUCKER, OF PENNSYLVANIA,
TO BE U. S. DISTRICT COURT JUDGE FOR THE EASTERN DIS-
TRICT OF PENNSYLVANIA**

Judge TUCKER. Yes.

Senator SPECTER. Would you introduce all of your guests, please.

Judge TUCKER. Yes. Thank you very much.

I would like to introduce my father who is here with me, Albert Brown.

Senator BIDEN. Welcome, Mr. Brown. You must be pretty proud today.

Judge TUCKER. And my two daughters, Leah and Lindsay Tucker.

I also have with me a good personal friend who is presently the vice president of the school district of Philadelphia, Dorothy Sumner Rush.

Also, I have two representatives from the Barristers Association in Philadelphia, Elizabeth Jackson and Ronald Harper.

I would also like to mention that my husband is not here because he is presently incapacitated, having shattered his ankle about 2 weeks ago. So he is literally laid up with pins in his ankle and unable to be here, but I am sure he is with me here in spirit.

Thank you for the opportunity.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Judge Tucker, you have served on the Common Pleas Court in Philadelphia for some 12, 13 years. What experience have you had there which you think would—if any, which would particularly well qualify you for the Federal trial bench?

Judge TUCKER. Well, I've had the opportunity to sit in every division of the Court of Common Pleas in Philadelphia County. So that, I've handled civil, criminal, family cases. So I am very familiar with all kinds of cases.

I have also had an opportunity to have administrative responsibilities while in the Common Pleas Court, and I think that my trial experience before the bench, while on the bench, and joined with the administrative responsibilities that I have had while sitting as an administrative judge presently in the Orphans Court would assist me in my duties and responsibilities on the Federal bench.

Senator SPECTER. What would be an example of some of the most difficult legal issues you have faced on the Common Pleas Court, any opinions you have written on matters taken on appeal?

Judge TUCKER. Yes; well, one of the earlier cases that I had was a case where there was an issue as to freedom of religion and the

rights of parents to raise their children in the manner in which they wanted.

It involved a young girl who was a victim of sickle cell anemia and needed to be treated by blood transfusions. There was extensive litigation at my level as well as the Appellate Court, and the Appellate Court upheld my decision to have the child—have a guardian appointed for the child and to order blood transfusions for her. That was very early on in my career and perhaps one of the most notable cases where the issue was really an issue of well-established Federal right and how that conflicts with what the child needed.

Senator SPECTER. Have you presided over a great many jury trials in your 13 years on the Common Pleas Court?

Judge TUCKER. I have. Most of my jury trials have been criminal jury trials. I have had some civil jury trials, but I was in the Criminal Division for 5 years, and during that time, I have had—I would say 60 to 70 percent of my cases were jury trials.

Senator SPECTER. Had you ever tried a first-degree murder case?

Judge TUCKER. I have not.

Senator SPECTER. Do you have any conscientious scruples about the imposition of the death penalty?

Judge TUCKER. I do not.

Senator SPECTER. When you were an Assistant District Attorney, did you have occasion to try any first-degree murder cases?

Judge TUCKER. I did not. I was in every unit but the homicide unit, and I spent most of my time doing sexual assault for both adults and child victims.

Senator SPECTER. As an Assistant D.A., did you have occasion to try many jury cases?

Judge TUCKER. I did. Most of the cases that I did, especially the sexual assault cases, were jury trials.

Senator SPECTER. Did you ever face a waiver where the defendant waived his right to a jury trial, where you thought there should have been a jury trial?

Judge TUCKER. There was none that I could think of at this time.

Senator SPECTER. Did you ever feel restricted with the fact that the District Attorney of Philadelphia did not have the right to demand a jury trial?

Judge TUCKER. At that time, yes.

Senator SPECTER. What were the circumstances?

Judge TUCKER. Well, I think that clearly—especially, I can only really speak for the judges on the State level and the city level—have certain reputations that certain judges are waiver judges and certain judges are jury judges.

As a prosecutor, I was an advocate, and it was my duty and responsibility to make sure there was a fair trial, and that if the evidence was appropriate that there would be a conviction.

Sometimes in certain kinds of cases, if the case is a waiver trial instead of a jury trial, that was not always the case, but I would think for the most part, it was not compromised in any way.

Senator SPECTER. Did you ever have occasion to be the trial prosecutor in a case involving alleged political corruption?

Judge TUCKER. No.

Senator SPECTER. Those were the cases which I have problems on waivers in the Philadelphia Court of Common Pleas.

Senator BIDEN. Somehow that does not surprise me, Senator.

Senator SPECTER. Well, you get the Inquirer, Joe, all about Philadelphia.

Judge TUCKER, in your view, is the proper rule of a Federal judge when interpreting a statute with the Constitution to accept the balance struck by conquerors of the people or to rebalance with your own views the competing moral, economic, and political considerations?

Judge TUCKER. If I was fortunate enough to be confirmed and I sat as a District Court judge, my personal views and social and moral views would not be what would lead me in making the decision. What would lead me in making the decision would be the precedent that has been set, and I would apply that precedent to the facts of the case that was in front of me at the time.

Senator SPECTER. We have heard the term "jurisprudential conservative" used here today. How would you categorize yourself?

Judge TUCKER. I don't know that I could categorize myself anything other than saying that I would continue to be a fair and impartial judge as I have been for 13 years in the State bench.

Senator SPECTER. If confirmed, do you promise to be courteous?

Judge TUCKER. Yes, sir.

Senator SPECTER. Judge Schiller, I do not think I asked you that question. If confirmed, do you promise to be courteous?

Judge SCHILLER. Courteous and civil.

Senator SPECTER. Judge Tucker, what is your view as to how the scourge of drugs in our criminal trial courts should be handled? You have had experience in the system as D.A., although you do not necessarily try them. As a Common Pleas judge, did you ever try drug cases?

Judge TUCKER. I did, yes, many, hundreds of drug cases.

Senator SPECTER. What is your view on sentencing of, say, contrasting an addict, a user, to street-corner seller to a better organized seller or a more organized seller? There is no better organized seller, but a more organized seller.

Judge TUCKER. As a judge in the Criminal Division of the Court of Common Pleas, I handled hundreds of drug cases, and the issue usually was not whether or not one was a user or one was a seller. By the time the matter got to the major trial division, which is where I sat, the issue was whether or not the facts were appropriate and that person should be convicted of the crime.

As you know, we have in Pennsylvania mandatory minimums and sentencing guidelines, and I was bound and did apply those guidelines and the mandatory minimums to the appropriate cases.

Senator SPECTER. You could deviate, though, to some extent from those guidelines, could you not?

Judge TUCKER. Yes. The guidelines in Pennsylvania are advisory. They are not mandatory, as they are in the Federal level. However, the mandatory minimums are mandatory, and if one is convicted of possession a certain amount, you receive a mandatory sentence.

Senator SPECTER. You always had some flexibility, or at least on some occasions, didn't you, to find the defendant guilty of a lesser amount?

Judge TUCKER. I may have had the flexibility, but I don't recall that there was any case in which that was done. If one is convicted and the fact is you had the X-amount of drugs, that is what you are convicted of.

Senator SPECTER. This is the standard question. Give me your best independent legal judgment, irrespective of existing judicial precedent on the lawfulness under the equal protection clause of the Fourteenth Amendment and the Federal civil rights laws of the use of race, gender, or national origin based preferences in such areas as employment decisions, hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of governmental contracts.

Judge TUCKER. My understanding of the state of the law presently, while there is some flux as it relates to gender issues, as it relates to race issues and other issues, there is a certain level of scrutiny, strict scrutiny that as a trial judge, I would have to review. It was a long time since I reviewed strict scrutiny, compelling interest in least-restrictive standard, but in reading the cases and comparing the cases and contrasting the cases, the development is such that at this point, any race-based Government action, strict scrutiny applies, and the least restrictive means of obtaining a compelling interest is a standard that I would use as a U.S. District Court judge.

Senator SPECTER. Strict scrutiny and the compelling governmental interest?

Judge TUCKER. Yes, sir.

Senator SPECTER. Do you exclude gender cases?

Judge TUCKER. Well, I am excluding them only because there is some disagreement at this point as to what level of scrutiny—

Senator SPECTER. What is your understanding of the law as to gender cases?

Judge TUCKER. Some gender cases have said strict scrutiny, while others have said intermediate scrutiny.

Senator SPECTER. How would you distinguish strict scrutiny from intermediate scrutiny?

Judge TUCKER. When it is necessary?

Senator SPECTER. Yes.

Judge TUCKER. I believe at this point that the appellate courts have not yet decided which it is, and that I am not familiar with what circuit, where we stand, but I would have to review and see which was the appropriate or the most appropriate level of scrutiny that would apply to the case that was in front of me.

Senator SPECTER. Do you think the Judiciary Committee is subject to the rules of strict scrutiny on having sufficient numbers of women on the Federal bench?

Judge TUCKER. I would have no opinion on that.

Senator SPECTER. I do.

We have only one woman, as I believe, on the Federal bench today, Judge Anita Brody, and—

Judge TUCKER. Yes, sir.

Senator SPECTER (continuing). Judge Norma Shapiro took senior status, and at one time, Judge Shapiro complained to me that there were more people named Kelly on the Federal court than there were women on the Federal court.

Senator Biden.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. Mr. Chairman, you know, people wonder why you and I are friends sometimes. One of the reasons why I have such respect for you is your certain core principles, and one of them is that unlike many in both political parties, the actions you have taken are consistent with the assertions, verbal assertions, you have made.

You have tried before to make sure that an African American was on the District Court, and you insisted; in effect, again, that happened. I happen to think that is important, probably more important than Judge Tucker thinks it is, and I mean that sincerely.

Judge Tucker may feel some sense of obligation to take the appointment to be on the court. I appointed someone recently to the Circuit Court, an African American from Delaware who was reluctant to take the appointment, but felt an obligation to take it. I do think it matters. I think it matters that women, and women and men of color, are on the court. I think there is an obligation to it in some broad way to reflect society, assuming they are qualified, and the way you have answered the questions, you are not only obviously very bright, Judge, you are very cool.

One of the things that we sometimes forget up here is sometimes you may forget as a judge. We are sitting up here in this elevated platform asking you questions that you are required to answer, and you know your fate depends upon how you answer them. It is not easy to be sitting where you are sitting, and I applaud your answers.

You are absolutely correct about strict scrutiny versus intermediate scrutiny. There is no case that I can think of where the Supreme Court has made a judgment that—well, there is an exception. Strict scrutiny applies to gender.

So I just think that the way you conduct yourself is illustrative of, I suspect, how you are on the bench, and that gives me some reason for a sense of confidence about you going on the bench, but I do want to state that I admire—this guy is tenacious. Whatever he sees that he thinks is right, he persists, even sometimes when he is wrong, but one of the things he has insisted upon is that that court reflect more appropriately the makeup of the community. That is not always the case.

So he would not like this, but that is something he and the President have in common, and I think it is very, very, very, very important.

I was going to ask you when I read your biographical information about pro bono work. I assume that as a judge, you do not conclude that that means that your pro bono work in the community ends. I hope it does not.

Judge TUCKER. I do not, Senator.

Senator BIDEN. Because with this job, I think, quite frankly—presumptuous of me to say this—goes an additional obligation, and quite frankly, it is going to be harder for you because I think you have not a legal, not a political, but I think probably in the sense a personal obligation to let not only your daughters, but all the daughters who do not have mothers in your situation know that

anything is possible; that women on the bench should be as normal a process as men on the bench, and African Americans and Hispanic Americans and all others, Asian Americans, should be as commonplace as anything else.

We have not reached that point yet. You are clearly no trail-blazer in the sense that this is a first-ever, but I think it is important. I think it is important, and I think, and I predict, you will find yourself under a little more scrutiny than most will find themselves under. People will look up to you, and people will look to mistakes that they will want to wonder whether you will make.

I thought your answer, quite frankly, about what kind of judge you will be is the exact right answer. You could have said it another way, it is nobody's business, but that is a little like asking us to categorize ourselves what we are because no single categorization fits.

The way you have conducted yourself on the bench for the last 13 years in a court that is more like a free-for-all—I mean, you are—you try more cases in the Pennsylvania Court of Common Pleas, criminal felonies, in one year than the entire Federal system tries in one year. You try over 26,000 cases, as last time I looked which was about 18 months ago.

So I think your work on that court qualifies you very well, assuming one has the reputation you have, and you have a stellar reputation on that court. It qualifies you very well to sit on the Federal bench.

As a matter of fact, I think the Federal bench can use, as it always can, a dose of real reality of someone who has been there and seen the kind of caseload that you all have had, compared to what you will have on the Federal bench.

You are going to think you have been on vacation when you go on the Federal bench, and they work like hell. They work like hell, but nothing like the kinds of life-and-death decisions you have to make on just simple things like continuances. They are tough decisions.

I have a friend of mine who says the most difficult decision a public official makes is deciding what not to do, not what to do, and so I think you are going to find your tenure on the court to be, quite frankly, more orderly and less pressure than you found on the Court of Common Pleas.

I am not in any way belittling the significance of the Federal court. I think it is the single greatest bulwark to our freedoms that exist in all three branches of government in my view, but having said that, I do not have any questions for you because I know of your reputation. I am delighted that the President chose to pick you, and I am delighted that Arlen Specter chose to champion your nomination. I think it is good for the court. I think it is good for the community. I think it is good for Philadelphia. I think it is good for the State, and I look forward to you having many successful years on the bench dispensing justice from a perspective that other people may not have, both as a consequence of you being an African American, as a consequence of you having sat 13 years on a trial court in the fourth-largest city in the United States of America.

So I do not know whether he has any further questions of you. I have none except to wish you luck, and thank you for being willing to take the job.

Judge TUCKER. Thank you, Senator.

Senator BIDEN. Thank you for being willing to take the job.

Judge TUCKER. Thank you very much for your kind remarks. Thank you.

[The questionnaire follows:]

A. 82

PETRESE B. TUCKER

Birth: May 17, 1951 Philadelphia, Pennsylvania
 Legal Residence: Pennsylvania
 Marital Status: Married Leon W. Tucker
 2 children
 Education: 1969 - 1973 Temple University
 B.A. degree
 1973 - 1976 Temple University School of Law
 J.D. degree
 Bar: 1976 Pennsylvania
 Experience: 1976 - 1978 Law Clerk to Hon. Lawrence Prattis
 Common Pleas Court
 1977 - 1978 sole practitioner
 1978 - 1986 Philadelphia District Attorney Office
 Assistant District Attorney
 1984 - 1985 Great Lakes Colleges Association
 (part-time) Adjunct Professor
 1986 - 1987 Southeastern Transportation Authority
 Legal Department
 Senior Trial Attorney
 1987 - present Judge, Court of Common Pleas
 Commonwealth of Pennsylvania
 Office: 304 City Hall
 Philadelphia, PA 19107

To be U.S. District Judge for the Eastern District of Pennsylvania

1. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Petrese Brown Tucker
formerly Petrese Debré Brown
2. Address: List current place of residence and office address (es).

Home: Philadelphia, Pennsylvania

Office: 304 City Hall
Philadelphia, Pennsylvania 19107
3. Date and place of birth.

May 27, 1951, Philadelphia, Pennsylvania
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 Leon Wilbert Tucker, December 16, 1978.
Leon Tucker is self-employed as an Attorney at The Robinson Building, 42 South 15th Street, Suite 1300, Philadelphia, Pennsylvania 19102, (215) 568-8040
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Temple University - September, 1969 to May, 1973, BA Political Science, May, 1973.

Temple University School of Law - September, 1973 to May, 1976, J.D., May, 1976.
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.

Full Time Positions:

 - a. 5/73 - 6/73 - Substitute Teacher, School District of Philadelphia
 - b. 6/74 - 5/75 - Legal Intern, Temple Legal Aid Society

- c. 9/74 - 5/75 - Research Assistant, Temple University School of Law
- d. 5/75 - 5/76 - Law Clerk, Internal Revenue Service, Estate and Gift Tax Division
- e. 7/75 - 7/78 - Law Clerk to the Honorable Lawrence Prattis, Judge, Court of Common Pleas, Philadelphia County
- f. 7/78 - 1/86 - Assistant District Attorney, District Attorney's Office, City of Philadelphia
- g. 10/86 - 4/87 - Southeastern Pennsylvania Transportation Authority, Senior Trial Attorney
- h. 1987 - present - Judge, Court of Common Pleas, Philadelphia County

Part Time Positions:

- a. 7/77 - 7/78 - Affiliated with the Law Offices of Ronald J. Harper, Esquire
- b. 9/84 - 12/88 Great Lakes College Association, Adjunct Professor
- c. Spring Semesters 1991, 1992, 1993 - Temple University School of Law, Adjunct Professor

Board Positions:

1991 to present - Big Sisters of Philadelphia Board member; Board President since 1997

1981 to 1982 - YWCA of Germantown, Board member

- 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.

1990 - Philadelphia Bar Association, Family Law Section for Distinguished Service.

1990 - Temple University Appreciation Award and University Mentor.

1992 - Philadelphia Municipal Court, Women Against Abuse and Victims of Domestic Violence, Certificate of Appreciation.

1996 - Philadelphia Volunteers for the Indigent, Certificate of Appreciation.

1998 - Philadelphia Bar Association, Outstanding service as Administrative Judge for the Orphans' Court Division.

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.

Philadelphia Bar Association, 1977 to present.
National Bar Association, Women's Division, 1977 to 1987.
National Bar Association, Judicial Council, 1991 to present.
National Probate Judges, 1997 to present.
Pennsylvania Conference of State Trial Judges, 1987 to present.
Barristers Association, 1977 to 1987.

Judicial Committees of the First Judicial District:

Judicial Accountability, 1996 to present.
Judicial Education, 1997 to 1998.
Board of Revision of Taxes and View, 1998 to present.
Fairmount Park Commission, 1997 to present.
Orphans' Court Issues, 1996 to present - Chair.
Administrative Governing Board, 1996 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.

Big Sisters of Philadelphia - Board member since 1991 and Board President since 1997.
The Links Incorporated since 1993. Chair, National Trends and Services Committee, 1997 to present.
Jack and Jill of America, Philadelphia Chapter, member since 1997.

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.

Commonwealth of Pennsylvania, October, 1976.
United States Court of Appeals, Third Circuit, 1977.

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 conjunction with a continuing legal education course for which I was a faculty member, I prepared an outline entitled Philadelphia Orphans' Court. The Course was sponsored by the Pennsylvania Bar Institute - Elder Law Institute in 1977. My outline was published along with other course material in a two volume work that was provided to all course participants and others interested in purchasing the books from the Pennsylvania Bar Institute as resource materials for their legal practice. A copy of the outline is attached.

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

The present state of my health is excellent. My last physical examination was April 14, 1999.

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 am presently a Judge of the Court of Common Pleas for the First Judicial District, Philadelphia County. I was appointed by Governor Robert Casey in 1987 and elected in November, 1989 to a ten-year term expiring in January, 2000. I am presently a candidate for retention to another ten year term in November, 1999.

The Court of Common Pleas is a Court of General Jurisdiction. I have served in all divisions of the Court during my tenure. My service has been as follows:

1987 - 1991 - Family Court Division-Juvenile, dependency and delinquent;
Domestic Relations; support, custody and protection from
abuse.

1991 - 1996 - Trial Division, Criminal.

January, 1996 - April, 1996 - Trial Division, Civil.

April, 1996 to present - Orphans' Court Division, Administrative Judge.

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

(1) Citations for the ten most significant opinions written.

1. In the Matter of Tara Cabrera, a Minor
No. Juvenile Misc. 88-0001
2. Commonwealth v. Richard Bryson
December Term, 1992 No. 1091-1096
3. Commonwealth v. Tyrone Hightower
May Term, 1992 No. 4221 - 4231
4. Commonwealth v. Kevin Boatwright
September Term, 1992 No. 2935 - 2937
5. Commonwealth v. Antonio Marriott
April Term, 1993 No. 0638
6. Commonwealth v. Larry Fluellen
August Term, 1993 No. 2684 - 2709
7. Commonwealth v. Cornelius Harold
November Term, 1993 No. 0292
8. Edward and Lenora Lubin v. City of Philadelphia
February Term, 1995 No. 0405
9. Estate of Dorothy Ayers, Deceased
Orphans' Court No. 1351 of 1996

10. Estate of Edward Kravitz, Deceased
Orphans' Court No. 245 of 1993

Copies of the above opinions are attached.

- (2) Summary of and citations for all appellate opinions where my decisions were reversed or affirmed with significant criticism of my substantive or procedural rulings.

1. Commonwealth v. Gilberto Martinez
No. 3814 Philadelphia 1994

This was an appeal by the Commonwealth to the Pennsylvania Superior Court from an order of the trial court granting a motion to suppress physical evidence. The Pennsylvania Superior Court reversed the suppression order. As a judge sitting in the Philadelphia Common Pleas Court, I granted a motion to suppress physical evidence, to wit, controlled substances. The legal issues involved were "abandonment" and "seizure". At the time of the reversal, the Pennsylvania Superior Court and the Pennsylvania Supreme Court differed on its interpretation of these legal concepts. My decision at the trial level was in line with the interpretation of the Pennsylvania Supreme Court.

No further appeals were taken. The matter was disposed as a bench trial before me, wherein the defendant was convicted.

2. Commonwealth v. Jeffrey Lewis
No. 3923 Philadelphia 1995

This was an appeal by a defendant from my sentence imposed as trial judge. The Pennsylvania Superior Court vacated my sentence and remanded for resentencing.

As trial judge, I corrected a sentence three years after it was imposed, citing a clerical error. In 1992, the defendant entered a negotiated guilty plea to the charge of Robbery. According to a written guilty plea colloquy, signed by the defendant and recorded in the official record, the defendant entered into a negotiation for a sentence of three (3) to twenty-three (23) months. The transcript for the sentence reflects the sentence imposed as three (3) to twenty three (23) months. Despite the language of the negotiations, the clerical file shows a sentence of three (3) to six (6) months.

Defendant was released on parole in 1992.

Subsequently, the defendant was convicted of another robbery which was listed as a direct violation of my parole, if the three (3) to twenty-three (23) months sentence was observed. If the shorter sentence was recognized there would have been no violation; as my period of parole supervision would have expired. I found the dispute to have been caused by a clerical error and found the defendant in violation of my parole and sentenced the defendant to serve twenty (20) months back time. My position was the sentence imposed was the sentence the defendant "bargained for" by his plea negotiations. The Pennsylvania Superior Court disagreed, finding the disparity in sentence was a latent error and subject to strict time considerations. Upon remand to the trial court, the defendant was released without further penalty.

3. Commonwealth v. Thomas Chadwick
No. 04389 Philadelphia 1994

This was an appeal by the defendant from the judgment of the trial court to refuse to hear additional evidence and make a specific determination in regard to the amount of contraband possessed and whether possessed with the intent to deliver. The Pennsylvania Superior Court vacated my judgment and remanded for further proceedings.

The defendant was found guilty by a jury of possession of a controlled substance with intent to deliver, namely, cocaine base and crack cocaine. As trial judge I imposed a sentence consistent with the mandatory minimum for the amount found in his possession. The defendant sought to establish at sentencing that while he possessed in excess of 10 grams of cocaine, less than 10 grams were possessed with the intent to deliver, since a portion was held for his personal use; thus escaping imposition of a mandatory sentence. I refused to consider such evidence. The Pennsylvania Superior Court found this to be an error and remanded to the trial court for further proceedings.

On remand, a hearing was held and additional evidence presented. After that hearing the original mandatory sentence was imposed.

4. Estate of Evelyn H. Britton, Deceased
No. 745 Philadelphia 1998

This appeal from Order of Orphans' Court en banc dismissing appellant's exception for failure to comply with the Philadelphia Orphans' Court Rule 1.2(d), which sets forth time requirements for filing a brief. The Pennsylvania Superior Court reversed and remanded for proceedings on the merits.

This estate matter is of several years duration. Our local rules outlining time requirements are to insure that matters are disposed of in a timely fashion and rules requiring briefs are to insure that they are disposed of efficiently and effectively.

The Pennsylvania Superior Court held under Pennsylvania Rule of Civil Procedure 239(F) dismissal of actions for failure to comply with local Rules is prohibited. This matter is still pending.

5. Estate of Nick Yiambilis, a/k/a Nicholas Yiambilis, Deceased
No. 5174 Philadelphia 1997

This appeal to the Pennsylvania Superior Court from a final decree in the Orphans' Court en banc dismissing appellant's exceptions for lack of prosecution. The Pennsylvania Superior Court vacated the decree of the Court en banc and remanded for further proceedings. This matter was dismissed by the Court en banc after the failure by counsel to properly request a continuance of a matter before the Court. The Pennsylvania Superior Court held that since counsel for the appellees was seriously ill and the Court was so notified by the administrator, that notice was sufficient despite the local Rules and practice in the Philadelphia Orphans' Court to the contrary.

This estate matter is still pending.

6. Commonwealth of Pennsylvania v. Eva Medina
Commonwealth of Pennsylvania v. Jose Medina
453 PA Super 684 (1996)

This was a Commonwealth appeal from an order of the trial Court granting the motion of the defendants for a new trial. The Pennsylvania Superior Court vacated the order for a new trial and remanded for an evidentiary hearing. After a conviction by a jury

of possession with the intent to deliver, the defendants' filed a motion for a new trial based on ineffective assistance of counsel. As trial judge, I granted defendants' motion. The Pennsylvania Superior Court held that an evidentiary hearing had to be held before any determination on the effectiveness of counsel.

Upon remand I held an evidentiary hearing. A new trial was granted on ineffective assistance of counsel. The Commonwealth appealed my order of new trial. The Pennsylvania Superior Court at No. 4388 and No. 4389 Philadelphia 1997 affirmed my order.

- (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 Tara Cabrera, A Minor
No. Juvenile Misc. 88-0001

Cross appeals to Pennsylvania Superior Court at 522 A.2d 1114

2. Commonwealth of Pennsylvania v. Eva Medina
Commonwealth of Pennsylvania v. Jose Medina

Appeal to Pennsylvania Superior Court at No. 4388 and 4389 Philadelphia 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. I have never been an unsuccessful candidate for elective office.

17. Legal Career:

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

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

Upon graduation from law school in 1976, I served as law clerk to the Honorable Lawrence Prattis, Judge of the Common

Pleas Court of Philadelphia County. That clerkship lasted two years, from July, 1976 to July, 1978. Judge Prattis is now retired and may be reached at (215) 877-1046, 5209 Woodbine Avenue, Philadelphia, Pennsylvania, 19131.

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

From July, 1977 to July, 1978, I was affiliated with Ronald J. Harper, Esquire. Mr. Harper provided me with office space to interview clients and an office address and telephone number to receive correspondence. I had my individual clients and did not receive any compensation from Mr. Harper. I paid his secretary for her services. Mr. Harper is located at 140 Maplewood Avenue, Philadelphia, Pennsylvania 19144 at (215) 844-4848. This was part time during the time of my Judicial clerkship with the Philadelphia Court of Common Pleas.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- a. Office of the District Attorney, Philadelphia County
1421 Arch Street
Philadelphia, Pennsylvania 19102
(215) 686-8000

In July, 1978, I became an Assistant District Attorney in Philadelphia County. I remained in this position until January, 1986. At the time, Edward G. Rendell was Philadelphia District Attorney; he is now Mayor of Philadelphia, located in Room 215 City Hall, Philadelphia, Pennsylvania 19107, (215) 686-2181

- b. Southeastern Transportation Authority (SEPTA)
1234 Market Street, 5th floor
Philadelphia, Pennsylvania 19107

From October, 1986 until April, 1987, I was a senior trial attorney in the legal department of the Southeastern Pennsylvania Transportation Authority (SEPTA) where I concentrated in civil defense litigation. This is a quasi-governmental agency

responsible for transportation in the Philadelphia area. My supervisors at the time were Norman Hegge, Esquire and Eileen Katz, Esquire, both at (215) 580-7455

- c. On April 8, 1987, I was appointed Judge of the Court of Common Pleas in the Commonwealth of Pennsylvania, Philadelphia County, and I continue to serve in that position.
- 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 - 1978 Law Clerk Court of Common Pleas, Philadelphia County. The Judge for whom I clerked was assigned to the Trial Division, one year criminal and one year civil.
- 1977 - 1978 Private Practice. At this time I maintained a solo practice and received criminal matters from the appointment list of the Philadelphia Courts. I represented defendants in criminal matters, both misdemeanors and felonies. During this time I handled two (2) criminal jury trials as defense counsel.
- 1978 - 1986 Assistant District Attorney, Philadelphia County. I went through several divisions of the District Attorney's Office. I started my rotation in the Family Court Division where first I handled matters involving paternity issues and then juvenile delinquency cases. I next transferred to the Trial Division where I started in the Waiver Program, which is prosecution of defendants charged with misdemeanors and less serious felonies. In the Waiver Program all trials are bench trials and several trials are conducted daily. I was subsequently transferred to the Rape Unit and the Child Abuse Unit where I handled bench and jury trials. Prior to leaving the Office of the District Attorney, I served as both the Assistant Chief of the Child Abuse Unit and the Assistant Chief of the Rape Unit.

1986 - 1987 Civil Defense Litigation. SEPTA is the regional agency responsible for providing transportation in and around Philadelphia. As a member of the legal department, I defended SEPTA against personal injury actions brought by plaintiffs alleging injury as a result of collisions with SEPTA vehicles or as a result of being passengers in SEPTA vehicles involved in collisions.

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

In my private practice, I represented persons charged with various crimes both misdemeanors and felonies.

As an Assistant District Attorney, I represented the Commonwealth of Pennsylvania prosecuting persons charged with various crimes, especially those accused of sexual assault against adult and child victims.

As a civil litigator, I represented SEPTA in Philadelphia County, against personal injury 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.

In private practice, I appeared in criminal court occasionally. As a prosecutor, from 1978 to 1986, I appeared in court daily for both bench and jury trials. As a civil litigator, I was in court at least weekly, with various Motions.

2. What percentage of these appearances was in:

(a) federal courts;

0%

(b) state courts of record;

100%

(c) other courts.

0%

3. What percentage of your litigation was:

(a) civil;

1986-1987 - 100%

(b) criminal.

1977-1986 - 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.

In private practice I tried four ((4) or five (5) bench trials and two (2) jury trials, all criminal.

As a prosecutor from 1978 to 1986, I tried several hundred cases to verdict, both bench and jury trials.

At SEPTA my work was mostly civil motions in the state court system.

5. What percentage of these trials was:

(a) jury - 60%

(b) non jury - 40%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citation, 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. Commonwealth v. Nicholas Rhodes
 CP 8205-1471
 Judge Alfred J. DiBona, Common Pleas Court
 Defense Attorney-Alexander Hemphill, Esquire (Deceased)
 1610 Two Penn Center
 Philadelphia, Pennsylvania 19102
 (215) 563-5740

I was the sole prosecutor in this bench trial in Philadelphia Common Pleas Court before the Honorable Alfred J. DiBona on August 11, 1982. On October 18, 1982, the defendant was sentenced to six (6) to twenty (20) years in prison for his convictions of rape, statutory rape and related charges. The case is significant because it established additional standards for the trial court to consider to determine whether the elements of the charge of rape have been established. In this case, an adult defendant had been charged with sexually assaulting an eight (8) year old neighbor. The issue was whether there was sufficient force or threat thereof to convict the defendant of the charge of rape. This case made clear that there need not be physical force, but where there is superior force, either physical, moral, intellectual or psychological used to compel a person to do a thing against the person's will and/or volition, that force is sufficient.

This case was appealed to the Pennsylvania Supreme Court and remains the law in Pennsylvania.

2. Commonwealth v. Stephen Lloyd
 C.P. 8407-3363
 Judge Ricardo Jackson, Court of Common Pleas
 Defense Attorney - Thurgood Matthews, Esquire
 70 N. 17th Street
 Philadelphia, PA 19103
 (215) 568-3190

This was a jury trial in Common Pleas Court before the Honorable Ricardo Jackson. The trial was from July 30, 1985 to August 2, 1985. On August 2, 1985, the defendant was convicted of rape, statutory rape and related charges. The significance of the case were the issues of whether the defendant's constitutional rights to confront witnesses against him outweighed the victim's right to confidentiality of psychiatric records and whether the admission of defendant's history of venereal disease was relevant and probative to charges of sexual assault.

The Pennsylvania Superior Court affirmed the defendant's

conviction. The Pennsylvania Supreme Court reversed the conviction on the ground that defendant's right to confrontation had been violated, and a new trial was ordered.

3. Commonwealth v. Andre Dantzler
 CP 8102-0476
 Judge Abraham Gafni
 Judge Angelo Guarino (Deceased)
 Defense Attorney - Edward Ohlbaum, Esquire
 Temple University School of Law
 1719 North Broad Street
 Philadelphia, PA 19122
 (215) 204-1856

This defendant was tried two times in Common Pleas Court; both times I was the sole prosecutor. The first trial was a bench trial before the Honorable Abraham Gafni on August 13, 1991. The defendant was convicted by the trial judge, a new trial was granted based upon an error committed by the pretrial judge in admitting defendant's statement. The defendant was tried, without the statement, by a jury before the Honorable Angelo Guarino from July 15, 1982 to July 19, 1982. The defendant was convicted of rape and related charges. This conviction was affirmed on appeal.

4. Commonwealth v. Marvin Miles
 CP 8103-2757
 Judge Stanley Kubacki
 Defense Attorney - William Bachman, Esquire
 70 N. 17th Street
 Philadelphia, PA 19103
 (215) 568-3190

This was a Motion to Suppress and jury trial before the Honorable Stanley Kubacki from June 1, 1981 to June 3, 1981. The defendant was convicted of rape and related charges. I was the sole prosecutor for the motion and the jury trial.

On March 10, 1982, the defendant was sentenced to 4 to 15 years in the State Correctional Institution. The case was significant because identification was at issue even though the victim shot the defendant with his own gun during the assault.

5. Commonwealth v. Marshall Hale
CP 8403-2657
Judge Eugene Maier
Defense Attorney - Ronald Smith, Esquire
1617 JFK Boulevard, Suite 124
Philadelphia, PA 19103
(215) 567-1200

I was the sole prosecutor in this matter involving a Motion to Suppress and a jury trial before the Honorable Eugene Maier from September 18, 1984 to September 26, 1984. The defendant was found guilty of rape and related charges and on April 5, 1985, was sentenced to 21 to 42 years. The case was significant because of the level of violence involved and the young age of the victim. The victim was on her way to school when she was dragged off the street by the defendant who then physically and sexually assaulted her.

6. Commonwealth v. Walter L. Bryant
CP 8207-2754
Judge Thomas Shimos (Deceased)
Defense Attorney - Thomas Moore, Esquire
1315 Walnut Street, Suite 1632
Philadelphia, P A 19107
(215) 732-5836

This case was representative of the "date rape" type of cases where the defendant and complainant were known to each other and were out socially together before the sexual assault. I was the sole prosecutor in this case. The case was a one-day bench trial where the defendant was convicted of rape and related charges.

7. Commonwealth v. James Jackson
CP 7701-2548
Judge Murray Goldman
Assistant District Attorney - Ronald Castille, Esquire, now Justice of the Pennsylvania Supreme Court
1818 Market Street, Suite 3730
Philadelphia, PA 19103
(215) 560-5663

I was the defense attorney for the defendant who was one of three co-defendants charged with robbery and related charges. The case involved a home invasion robbery at point of gun of a Philadelphia family.

The case was significant because it was my first jury trial. The trial lasted several days. On November 7, 1977, all of the defendants were convicted.

8. Commonwealth v. Maximo Maduro
CP 8409-1002 to 1008
Judge Lois Forer, Court of Common Pleas (Deceased)
Defense Attorney - Harry Siegel, Esquire (Retired)

This was a two-day bench trial before the Honorable Lois Forer. I was the sole prosecutor. The defendant was convicted on December 31, 1984, of rape and indecent assault. The case is significant as it was the first case in Philadelphia where a defendant was convicted where the victim testified on closed circuit television due to her fear of being in the same courtroom as the defendant. The complainant, age 10, testified in a separate room while the defendant watched her testimony from outside the courtroom on television. On December 17, 1985 the defendant was sentenced to three to six years in the State Correctional Institution.

9. Commonwealth v. Eugene Watson
CP 8111-0367 to 0380
Judge Stanley Kubacki, Court of Common Pleas (Retired)
Defense Attorney - George H. Newman, Esquire
834 Chestnut Street, Suite 206
Philadelphia, PA 19102
(215) 592-9400

This was a Motion to Suppress and jury trial before the Honorable Stanley Kubacki. In the trial, which lasted for two days, I was the sole prosecutor. The defendant was convicted of rape, robbery and burglary and sentenced to fifteen to thirty years in prison. At the time of his arrest for the instant rape charge, the defendant had been on bail following his earlier convictions for rape. These rapes were committed within a period of eight months at the same apartment building.

The defendants conviction was affirmed on appeal.

10. Commonwealth v. Warren Evans
CP 8011-0314 to 0322
Judge Angelo Guarino (Deceased)
Defense Attorney - Ronald Morrison, Esquire (Deceased)

I was the sole prosecutor in this jury trial before the Honorable Angelo Guarino. The trial was conducted from May 21, 1981 to May 27,

1981, and resulted in a conviction on the charges of involuntary deviate sexual intercourse, robbery and possession of an instrument of crime. The case involved the knifepoint sexual assault of a university college student on the property of the City's Transportation Authority.

The defendant's conviction was affirmed on appeal.

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

Since I have been a judge I have had the opportunity to be involved in numerous activities which have enhanced my legal career.

I have had the opportunity to participate in the Accountability Committee of the First Judicial District. The Accountability Committee was created to develop tools to measure the work product of the Judges of the Trial Division of the Common Pleas Court. The measure was seen as a management tool for not only the Administrative and Scheduling Judges, but for the trial judges themselves where the statistics indicated some improvement was dictated. Once the formula was developed the Administrative and Scheduling Judges have been able to evaluate the productivity of various judges and make changes and recommendations where necessary.

As the Administrative Judge of the Orphans' Court, I have been a member of the Administrative Governing Board (AGB). The AGB was established by the Pennsylvania Supreme Court and has extensive responsibilities for overall management of the First Judicial District. The AGB is composed of nine (9) members; three (3) President and five (5) Administrative Judges and the Court Administrator for Pennsylvania. The AGB has had many accomplishments including overhaul of personal regulations and bringing counsel fees for representation of indigent defendants in line with budget allowances. I have been proud to be a member of the AGB.

When I became the Administrative Judge of Orphans' Court, I began a dialogue with the Probate Section of the Philadelphia Bar Association which has resulted in several changes to the benefit of the Philadelphia Probate Bar and Bench. Together, we have been able to secure amendments to the Orphans Court Rules which include new Guardianship Rules and a renumbering scheme consistent with the Pennsylvania Supreme Rules.

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.

State Employees Retirement System
Estimated Retirement Benefits as of December 31, 1998 - \$1,260.40 monthly pension for life

2. Explain how you will resolve any potential conflict of interests, 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 positions to which you have been nominated.

I do not anticipate any categories of litigation or financial arrangements that are likely to present potential conflicts-of-interest during my service in the position to which I have been nominated. If such potential conflicts-of-interest arise, I will make full disclosure to the interested parties and where needed, recuse myself from the proceedings. In any event I will follow the guidelines of the Code of Judicial Conduct

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

I would like to continue as a Board member or officer of Big Sisters of Philadelphia. My position on this non-profit board is without compensation

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 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 candidates, dates of the campaign, your title and responsibilities.

The only political campaign in which I have been involved was my own campaign in 1989 for the judicial office I presently hold.

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Tucker, Petrese B.		2. Court or Organization US Dist. Ct., Estn Dist. of PA	3. Date of Report 07/15/1999
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) X Nomination, Date 07/27/1999 ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1998 to 07/15/1999
7. Chambers or Office Address 304 City Hall Philadelphia, PA 19107		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 _____	
<i>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>			

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Director	Big Sisters of Philadelphia
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 1999	PA State Retirement Benefits at age 60
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 1998	Administrative Office of the Pennsylvania Courts	\$ 109,913.00
2 1999	Administrative Office of the Pennsylvania Courts - to date received	\$ 55,829.00
3 1998	Law Offices of Leon W. Tucker, Esquire (Self-employed)	
4 1999	Law Offices of Leon W. Tucker, Esquire (S) (Self-employed)	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tucker, Petrese B.	07/15/1999

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input type="checkbox"/>	NONE	
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE		
1	Exempt		
2			
3			

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(D)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE		
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 Tucker, Petrese B.	Date of Report 07/15/1999
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS— income, value, transactions

A Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <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-J)	(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-F)	(4) Gain Code (A-I)	(5) Identity of buyer/seller (private transaction)
NONE (No reportable income, assets, or transactions.)									
1 FMC Bank (S)	D	Interest	L	W					
2 Acc'ts receivable from clients of Law Office of L.W. Tucker (S)		None	M	W					
3 AIM Cap Development Fund (S)	B	None	J	T					
4 AIM Global Aggressive Growth Fund (S)	A	None	J	T					
5 Aim Global Growth and Income Fund (S)	C	None	J	T					
6 Merrill Lynch Global Allocation Fund (S)	A	None	J	T					
7 Nicholas Applegate Balance Growth Fund (S)	B	None	J	T					
8 Oppenheimer Main Street Income & Growth Fund (S)	D	None	K	T					
9 Putnam Voyager Fund (S)	C	None	K	T					
10 TIGER Series 12, 5/12/99 (S)		None	J	T					
11 TIGER Series 14, 8/15/99 (S)		None	J	T					
12 TIGER Series 15, 2/15/08 (S)		None	K	T					
13 TIGER Series 12, 5/15/08 (S)		None	K	T					
14 U.S. Treasury Strips 5/15/08 (S)		None	L	T					
15 Resolution Funding Corp. 4/15/13 (S)		None	K	T					
16 U.S. Treasury Strips 2/15/14 (S)		None	K	T					
17 TIGER Series 18, 2/15/07 (S)		None	L	T					

1 Ino/Am 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
 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$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 Tucker, Petrese B.	Date of Report 07/15/1999
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VII. Page 2 INVESTMENTS and TRUSTS-- income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets <small>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "X" after each asset exempt from prior disclosure.</small>	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-I)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
18 U.S. Treasury Strips 5/15/09 (S)		None	L	T					
19 U.S. Treasury Strips 2/15/11 (S)		None	L	T					
20 Resolution Funding Corp 1/15/12 (S)		None	J	T					
21 U.S. Treasury Strips 5/15/15 (S)		None	K	T					
22 TIGER Series 12 5/15/08		None	J	T					
23 AIM Value Fund, Class B	A	None	J	T					
24 Fidelity Advance Balance Fund (S)	C	None	K	T					
25 John Hancock Special Equities Fund (S)		None	J	T					
26 Merrill Lynch Global Allocation B (S)		None	J	T					
27 Putnam OCT Emerging Class B (S)		None	J	T					
28 Putnam Voyager Fund (S)	B	None	J	T					
29 Seligman Global Smaller Fund (S)		None	K	T					
30 AIM Charter Fund (S)	A	Dividend	J	T					
31 AIM Global Aggressive Growth Fund (S)	A	None	J	T					
32 AIM Growth Fund (S)	D	None	K	T					
33 AIM International Equity Fund (S)	B	None	J	T					
34 AIM Value Fund (S)	C	None	J	T					
1 Inq/ain 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 (Col B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$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 Tucker, Petrese B.	Date of Report 07/15/1999
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 3 INVESTMENTS and TRUSTS— income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <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-E)	(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)									
35 AIM Value Fund Class A (S)	C	None	J	T					
36 Davis New York Venture Fund (S)	D	None	K	T					
37 PA Turnpike Fund Class A (S)		None	K	T					
38 North Hills PA School District Bonds (S)		None	J	T					
39 Phila. Water & Sewer Bonds (S)		None	J	T					
40 MARS, PA Area School District Bonds (S)		None	J	T					
41 Central Dauphin PA. School District Bonds (S)		None	K	T					
42 Pittsburgh PA School District Bonds (S)		None	K	T					
43 Moon Area School District Bonds (S)		None	J	T					
44 Allentown PA School District Bonds (S)		None	K	T					
45 Caterpillar (S)	A	Dividend	J	T					
46 Parlex(S)	C	None	J	T					
47 Isuzu Motors (S)		None	J	T					
48 TIGER Series 12, 5/15/08 (S)		None	K	T					
49 U.S. Treasury Strips 5/15/10 (S)		None	L	T					
50 Resolution Funding Corp. 4/15/13 (S)		None	K	T					
51 Resolution Funding Corp. 4/15/13 (S)		None	J	T					
1 Inco/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) O=\$500,001-\$1,000,000 K=\$15,001-\$50,000 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 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 3 Val Meth 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 Tucker, Petrese B.	Date of Report 07/15/1999
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 4 INVESTMENTS and TRUSTS— income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <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)											
52 U.S. Treasury Strips 2/15/14 (S)		None		K	T						
53 PECO Energy (S)	A	Dividend	J	T							
54 TII Industries, Inc. (S)		None	J	T							
55 Minnesota Power (S)	A	Dividend	J	T							
56 PECO Energy (DC)	A	Dividend	J	W							
57 PECO Energy (DC)	A	Dividend	J	W							
58 PA State Retirement Benefits		None	M	W							
59 Nuveen Rittenhouse Growth		None	J	T							
60 Davis N.Y. Venture		None	J	T							
61 AIM Small Cap		None	J	T							
62 AIM International Equity Fund		None	J	T							
63 ML Global Value		None	J	T							
64 Munder NetNet		None	J	T							
65 Davis N.Y. Venture	B	None	K	T							
66 AIM Small Cap	B	None	J	T							
67 ML Global Value		None	J	T							
68 Bye Creek Farms, Inc		None	J	T							

1 Incl/Gain Codes: A=\$1,000 or less (Col. B1, 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=\$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 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
3 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 Tucker, Petrese B.	Date of Report 07/15/1999
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

*Unrealized gain since purchase, no annual income reported.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tucker, Petrese B.	07/15/1999

SECTION HEADING. (Indicate part of report.)
Information continued from Parts I through VI, inclusive.

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5			0.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tucker, Petrese B.	07/15/1999

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 Petrese B. Tucker Date 8/10/99

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. 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

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	75,000	00	Notes payable to banks—secured	85,000	00
U.S. Government securities—add schedule	467,388	00	Notes payable to banks—unsecured	00	00
Listed securities—add schedule	510,083	00	Notes payable to relatives	00	00
Unlisted securities—add schedule	000	00	Notes payable to others	00	00
Accounts and notes receivable:	000	00	Accounts and bills due	00	00
Due from relatives and friends	000	00	Unpaid income tax	00	00
Due from others	127,532	00	Other unpaid tax and interest	00	00
Doubtful	13,95	00	Real estate mortgages payable—add schedule	152,789	23
Real estate owned—add schedule	377,000	00	Chattel mortgages and other liens payable	00	00
Real estate mortgages receivable	00	00	Other debts—itemize:	00	00
Autos and other personal property	105,000	00	Autos	22,245	00
Cash value—life insurance	10,000	00	Credit Cards	10,700	00
Other assets—itemize:	00	00			
			Total Liabilities	270,729	23
			Net Worth	1,45,241	77
Total Assets	1,685,974	00	Total Liabilities and net worth	1,685,974	00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	00	00	Are any assets pledged? (Add schedule.)	No	
On leases or contracts	00	00	Are you defendant in any suits or legal actions?	No	
Legal Claims	00	00	Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	00	00			
Other special debt	00	00			

874

SCHEDULE

REAL ESTATE

1.	Residence - Philadelphia, Pennsylvania 19119	\$250,000.00
2.	Vacation - Lake Ariel, Pennsylvania	80,000.00
3.	Family Homestead - Java, Virginia	47,000.00
	Total	<u>\$377,000.00</u>

875

SCHEDULE

REAL ESTATE MORTGAGES

1.	GMAC Mortgage Comopany - Residence	\$ 75,789.23
2.	Regions, Inc. - Vacation	47,000.00
3.	Roanoke Farm Credit - Family Homestead	30,000.00
	Total	<hr/> \$152,789.23

SCHEDULE

LISTED SECURITIES

Moon Area School District	\$ 8,092.
Pennsylvania Turnpike Commission 12/1/01	22,219.
North Hills, Pennsylvania School District 7/15/03	12,643.
Philadelphia Water and Sewer 10/1/03	8,356.
Mars Area School District 3/04	12,245.
Central Dauphin Pennsylvania School District 6/1/05	19,224.
Pittsburgh School District 8/1/06	18,140.
Allentown School District 7/1/07	17,275.
TIGER Series 14-8/99	4,949.
TIGER Series 12-5/15/99	13,000.
TIGER Series 15-2/15/08	28,120.
Minnesota Power	3,010.
TIGER Series 12-5/15/08	29,927.
U.S. Treasury Strips - 5/15/10	51,806.
Resolution Funding Corp - 4/15/13	29,292.
Resolution Funding Corp - 4/15/13	12,553.
U.S. Treasury Strips - 2/15/14	40,065.
Caterpillar	2,195.
TH Industries, Inc.	1,843.
Isuzu Motors	958.
TIGER Series 18-2/15/07	62,414.
U.S. Treasury Strips - 5/15/09	55,251.
U.S. Treasury Strips - 5/15/11	49,346.
Resolution Funding Corp 1/15/12	45,374.
U.S. Treasury Strips 5/15/15	37,346.
PECO Energy	5,627.
TH Industries, Inc.	2,303.
TIGER Series 12-5/15/08	7,481.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
 - a) 1981-1982 YWCA of Germantown, Board member. This organization provides services to a community in Northwest Philadelphia.
 - b) 1991-present Big Sisters of Philadelphia, Board member and board president since 1997. This organization is an affiliate of Big Brothers, Big Sisters of America and provides services to youth at risk, especially adolescent girls. I spend about five (5) hours a week on board activities.
 - c) 1999 Philadelphia Reads Program. For thirty (30) minutes weekly, I tutor a third grade student from the Philadelphia public schools in reading. The program is a city wide program designed to increase literacy in Philadelphia.

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 belong to no organization that invidiously discriminates on the basis of race, sex or religion.

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

There is a Federal Judicial Nomination Commission in Philadelphia. An announcement by the Commission soliciting interested candidates to request and complete questionnaires appeared in our local legal newspaper. I requested an application and submitted same completed by the due date. The next step in the process was to schedule an interview with the Commission. My first interview was held before a panel of four members of the Commission. My second interview was before the entire Commission. I

was subsequently notified by the Commission Co-chair that I had been recommended for nomination. I have completed questionnaires and have been interviewed by representatives of The Department of Justice, The American Bar Association and The Federal Bureau of Investigation.

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

No one involved in the selection process has discussed with me any specific case, legal issue or question in any manner.

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

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

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

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

I have been a state judge for twelve years. During that time I have acted in a clear and unambiguous manner regarding my duties and responsibilities as a member of the judiciary. My record reflects my position against "judicial activism." From the hundreds of trials before me, both bench and jury trials, I have had only a few reversed or remanded by the appellate court. My responsibility is not make the law but to know the law, and apply the law to the facts of the case before me and to reach a decision on that case.

As basic as it seems, there are three separate branches of government each with certain responsibilities and checks and balances to insure each branch adheres to its place. I have been aware of my judicial responsibilities on the State level and intend to continue that awareness if given the opportunity to preside on the Federal level.

Senator BIDEN. It has been a long time since I have been able to be chairman of this committee. So you are before he gets back—I was about to excuse you. And I am going to excuse myself because I have a 5:00 appointment. I do not mean that as a reflection on the remaining two nominees, both of whom I have read their records extensively and I support wholeheartedly, but, again, thank you, Mr. Chairman, for your tenacity in pushing.

I would like to ask unanimous consent, Mr. Chairman, that I put a statement by Senator Leahy in the record and also a letter that we received from—if I can find it—I beg your pardon here. I cannot find it. There is a second item.

[The prepared statement of Senator Leahy follows:]

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

I am glad to see the Committee holding a hearing for judicial nominees today. The Committee has been woefully slow in acting on nominees to federal courts across the country and, in particular, on nominees to the Courts of Appeals. The Committee has reported only 6 nominees all year and held the equivalent of only 2 previous hearings all year on judicial nominations. There is growing frustration around the country with this partisan stall.

The vacancies on the courts of appeals around the country are particularly acute. Vacancies on the courts of appeals are continuing to rob these courts of more than 12 percent of their authorized active strength, as they have for the last several years. The Fourth Circuit, the Fifth Circuit, the Sixth Circuit, the Ninth Circuit, the Tenth Circuit and the District of Columbia Circuit continue to have multiple vacancies.

President Clinton nominated Judge James Wynn to one of the longstanding vacancies on the Fourth Circuit. If confirmed, Judge Wynn would be the first African-American judge appointed to the Fourth Circuit in its history. We will not be hearing from Judge Wynn today despite the strong support of Senator Edwards.

The Fifth Circuit continues to labor under a circuit emergency declared last year by Chief Judge Carolyn Dineen King. The Senate continues to pass over the two outstanding nominees for vacancies on that court. One of those well qualified nominees is Enrique Moreno. Mr. Moreno received the ABA's highest rating and was rated as one of the three top trial lawyers in El Paso by Texas judges. He is the son of Mexican-American immigrants and the second Hispanic President Clinton has nominated, without Senate action, to this Fifth Circuit vacancy over the last several years.

The Sixth Circuit has vacancies in 25 percent of its authorized judgeships. The Senate has three nominations pending to that court. Among them are Helene White, whose nomination has been pending for more than 3 years, since January 1997, and Kathleen McCree Lewis, one of the outstanding minority nominees on whom I have been seeking action for many months.

This year I received a copy of a letter from the former Chief Judge of the Sixth Circuit, in which Judge Merritt noted:

[W]e have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the Senate "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or fractional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

Fortunately, there is included today at least one nominee to one of our appellate courts, Allen Snyder, one of the two pending nominees to the Court of Appeals for the District of Columbia Circuit. Unfortunately, we are not hearing from Elena Kagen, the nominee for the other vacancy on that court.

The Senate should consider the effect of its perpetuation of longstanding judicial vacancies on drug cases. The Criminal Justice Oversight Subcommittee held a hearing this week on the drug smuggling problem in the Caribbean, with particular attention to the activity in Puerto Rico. The Commander of the Coast Guard Atlantic Area testified that his "primary counterdrug focus . . . for the upcoming year is on Puerto Rico, where the smuggling infrastructure is well developed, entrenched, and historically successful" with "one-quarter of all cocaine destined for the United States . . . being shipped via the 110-mile long island of Puerto Rico."

Yet the District Court vacancy in Puerto Rico has been perpetuated since June 1994, almost 6 years ago. In the meantime, the time from filing to disposition for criminal felony cases continues to increase—now to almost twice as long as it was in 1994—and criminal felony filings jumped almost 70 percent last year alone. This district now has more criminal filings than any court in its circuit. By far the greatest number of criminal cases in Puerto Rico are drug cases, more than 40 percent of all its federal criminal cases. The President has nominated qualified people to fill the vacancy for years but to no avail. I hope that as the Committee considers its reaction to yesterday's hearing on drug trafficking activity through Puerto Rico, it will at long last act to fill the vacancy in the district court there.

The vacancies in the District Courts in Pennsylvania are astounding, especially in light of the efforts that the Senior Senator from Pennsylvania has made over the years to be responsive to judicial vacancies. I commend Senator Specter for his efforts in working to fill these vacancies. Ten of the 80 current federal court vacancies are in Pennsylvania. These include vacancies that arose years ago. Lynette Norton's nomination has been pending since April 1998, for over two years. Judge Legrome Davis' nomination has been pending since July 1998. The Senate has seven qualified nominations currently pending before it for these Pennsylvania vacancies. Unfortunately, only four of them are being included in the Committee's hearing today. I am disappointed that all of the Pennsylvania nominees have not been accorded a hearing.

This year we will again be facing 100 vacancies. Already we have seen 87 vacancies and have so far responded with the confirmation of only 7 judges. By this time in 1992, the Senate had confirmed 25 judges and the Committee had held 6 confirmation hearings for judicial nominees. By this date in 1988, the Senate had confirmed 21 judges and the Committee had held 7 hearings. By this time in 1998, the Senate had confirmed 17 judges and the Committee had held 5 hearings. This year we remain leagues behind any responsible pace. The Senate continues to fail in its responsibility to the American people and the federal courts to take action on judicial nominations. This stall has been evident since 1996, with brief bursts of activity when the spotlight of public attention is focused on this shameful record of obstruction and partisanship.

I have challenged the Judiciary Committee and the full Senate to return to the pace they met in 1998 when we held 13 confirmation hearings and confirmed 65 judges. That approximates the pace in 1992, when a Democratic majority in the Senate acted to confirm 66 judges during President Bush's final year in office. There is myth that judges are not traditionally confirmed in Presidential election years. That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed 42 judges nominated by President Reagan and, as I have noted, 66 in 1992 when a Democratic majority in the Senate confirmed 66 judges nominated by President Bush.

Our federal judiciary cannot afford another unproductive election-year session like 1996 when a Republican majority in the Senate confirmed only 17 judges. Since then we have had years of slower and slower confirmations and heavy backlogs in many federal courts.

I look forward to prompt and favorable action by the Committee on the nominees included in today's hearing and look forward to the next hearing, which I hope will be scheduled before the Senate takes another vacation.

Senator SPECTER. We will take it, Senator Biden, whenever you find it.

Senator BIDEN. Here is the letter. It is a letter from Allyson Schwartz of the State of Pennsylvania.

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

[The letter follows:]

SENATE OF PENNSYLVANIA
Harrisburg, PA, May 10, 2000.

Senator JOSEPH BIDEN,
Senate Russell Building,
Washington, DC.

DEAR SENATOR BIDEN: I am writing in support of the nominations Judge Petrese B. Tucker, Berle M. Schiller, and Mary A. McLaughlin, to the federal bench.

I have the pleasure to personally know each of these candidates. Each one has the intellect and temperament to serve with distinction on the federal bench. I applaud the action of the Judiciary Committee in moving these excellent nominees forward.

Thank you for your consideration.
Sincerely,

ALLYSON Y. SCHWARTZ.

Judge TUCKER. May I be excused, Mr. Chairman?

Senator SPECTER. No, I do not think so. I think I have some more questions for you, Judge Tucker. [Laughter.]

Thank you very much for joining us, and as with the other nominees, we are optimistic.

I might say for the record that I am really sorry you will not be joining Judge Frederica Messiah Jackson on the Federal bench. I think she would have made a fine Federal judge. She was not treated properly by this committee. She had questions put to her on cases. She walked in and had prepared answers to some 50 cases, and she got 25 new cases.

I was sitting here and my colleague, Senator DeWine, had faxes from the Philadelphia District Attorney's Office on new information. It was not a proud day for the U.S. Senate as to what happened to Judge Frederica Messiah Jackson, but stay tuned.

Judge TUCKER. Thank you.

Senator SPECTER. I am confident you will be confirmed as judge.

Judge TUCKER. Thank you, Mr. Chairman.

Senator SPECTER. Thank you.

Judge R. Barclay Surrick, would you step forward, please. Judge Surrick, would you raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth before this Judiciary Committee of the U.S. Senate, so help you God?

Judge SURRECK. I do.

Senator SPECTER. Judge Surrick, are there any in the audience whom you would care to introduce?

TESTIMONY OF HON. R. BARCLAY SURRECK, OF PENNSYLVANIA, TO BE U.S. DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge SURRECK. Yes, there are, Senator Specter. There is a number of my family and friends here I would like to introduce. My wife, Pat, is with my, my daughter, Maryann, who is going to graduate from Penn Law School in about a week, she is here with my, her friend Dan Garodnick. Dan is graduating from Penn Law School in a week, also. My daughter, Kelly, who will be starting at Penn Law School in August, her friend, Jeff Edwards, who works at Dechert, Price & Rhoads, my brother, Jack, who lives over in Annapolis, his wife, Betsy, and Kelly's friend, Lisa Volpe.

Did I miss anyone? I hope not.

Senator SPECTER. Well, you are all very welcome here.

Judge, be seated. If you care to make an opening statement, you are welcome to. Our general practice is to just go to Q&A.

Judge SURRECK. Yes, indeed. I appreciate the fact that I have been invited for this hearing, and I do not have any opening statement.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Judge Surrick, why with 22 years of experience on the Common Pleas Court in Delaware County in that beautiful community and beautiful county do you want to travel into the City of Philadelphia to sit on the Federal bench?

Judge SURRECK. Well, Senator, I have enjoyed being on the bench in Delaware County for the last 23 years. It has been a very exciting, very interesting experience. I think it would be a tremendous honor to be able to sit on the Federal District Court in Philadelphia.

For the last 6 or 7 years, I have been handling probably almost exclusively complex litigation for our court, asbestos mass tort litigation, the diet drug litigation, and I think that that experience, I have enjoyed, also. I think that I would get additional opportunity to do that kind of work on the Federal bench. So I think it would just be a tremendous honor.

Senator SPECTER. What kinds of complex litigation have you had which would be applicable as an experience basis for the Federal District Court?

Judge SURRECK. Well, I have handled—for our court, I was the only judge who handled the asbestos litigation for the Delaware County Court. We determined that one judge would be assigned to handle that litigation, and it was me. And over a period of about 4 or 5 years, I was able to take care of a tremendous backlog.

Senator SPECTER. That is more a matter of case management as opposed to complicated legal issues, though.

Judge SURRECK. Well, in some respects, that is certainly true, Senator, but there is a number of complicated issues in the asbestos litigation.

I have also handled some toxic tort cases. I have a case at the present time involving methylbromide poisoning which involves some 50 defendants. So that kind of litigation that I have been dealing with for the last few years, I think, would give me good experience for the—

Senator SPECTER. Have you had occasion to try first-degree murder cases, Judge Surrick?

Judge SURRECK. I have tried first-degree murder cases. I tried one first-degree murder case with capital implications, but I have tried first-degree murder cases.

Senator SPECTER. Have you ever had the responsibility to impose the death penalty after a jury returned a verdict of guilty of murder in the first degree and the death penalty?

Judge SURRECK. I have never had the opportunity to impose the death penalty.

Senator SPECTER. Would you have any conscientious scruples about doing so?

Judge SURRECK. No, none.

Senator SPECTER. You have heard a fair amount of talk today about jurisprudential conservatism, judicial activism. Give us your judicial philosophy about the appropriate role of a judge with respect to those considerations.

Judge SURRECK. Well, I think that a judge's job is simply to take the law as it is given to the judge by either the legislature or the appellate courts and to apply the law.

I do not think it is the job of the judge to go on follies of their own based upon their own perception of what the law should be. So I guess to that extent, I would be—I guess as Mr. Snyder said earlier, jurisprudentially conservative. Is that the term is used?

Senator SPECTER. Jurisprudential.

Judge SURRECK. Jurisprudentially conservative, yes.

Senator SPECTER. Are you aware of the Supreme Court decisions in *Adarand* and the court's earlier decision in *Richmond v. Crawson*?

Judge SURRECK. I am aware of the *Adarand* case. I can't say that I've ever come into contact with the matter in my court that required me to use it. I know of its existence. I know generally what it involved.

Senator SPECTER. What is your independent legal judgment of the lawfulness under the equal protection clause and the Federal civil rights law of the use of race-, gender-, or national-based preferences in such areas as employment decisions, hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of Government contracts?

Judge SURRECK. Senator Specter, I think the present state of the law on that issue is that any race-based policy is subject to strict scrutiny and must satisfy a compelling State interest. It must be very restrictively circumscribed.

Senator SPECTER. Have you in your capacity as a Common Pleas judge had any discrimination cases before you?

Judge SURRECK. No, I haven't. I have never had that kind of case in my inventory.

Senator SPECTER. Could you give us an estimate of how many cases you have presided over where there were jury trials?

Judge SURRECK. Thousands. In 23 years, Senator Specter, I have handled—I have been a trial judge for almost that entire 23 years. I have handled both civil and criminal trials, and every week that we go into court and try cases. So I have never sat down and tried to figure out what the count was, but it is many, many cases.

Senator SPECTER. The drug problem is a major problem facing most State and Federal judges. Have you had extensive experience in the handling of drugs cases, trials, and sentencing?

Judge SURRECK. I have had a great deal of experience when I was sitting in criminal court handling drug matters, yes, indeed.

Senator SPECTER. How do you approach the sentencing issue of the users versus sellers?

Judge SURRECK. Well, we do have sentencing guidelines in Pennsylvania, and we have mandatory minimum sentencing in Pennsylvania for drug offenses depending on the facts of the case.

And my sentencing has generally been to follow the sentencing guidelines, and certainly, if it is a mandatory minimum, that is what is imposed.

Senator SPECTER. Sometimes a judge will make a fact-finding of a lesser amount in order to avoid the strictures and mandates of mandatory sentences. Not with you necessarily, but have you ever known that to be the case?

Judge SURRECK. I have never known any judge to do that. I have never had a judge tell me that they did that. I certainly do not approve of that kind of an approach to judging.

I think the facts are the facts. You deal with them. And the law is the law, and you apply the facts to the law.

Senator SPECTER. When you face a case of first impression, Judge Surrick, without any precedence or guiding close cases, what standards do you apply in trying to reach a decision on constitutional issues?

Judge SURRECK. Well, on constitutional issues, I think when you face a case of first impression, initially if you are looking at a constitutional matter or a statutory matter, you would have to look at the Constitution, the wording of the Constitution. You would have to review the facts of the situation to see how they fit into the plain language of the Constitution. If you are not sure once you look at the language exactly what should have been done, there is some ambiguity in your mind in any event, I think that your next step would be to try to take a look at the history, legislative history or constitutional history to determine just exactly what was meant by that provision.

I would say, Senator, that in my experience in 23 years, you very infrequently run into matters of first impression, at least in the Common Pleas court.

Senator SPECTER. Just Surrick, have you ever had a litigant, a lawyer before you who did not follow your instructions and tempt you to violate Senator Thurmond's maxim of always being courteous, ever in your 22-plus years?

Judge SURRECK. I think, Senator Specter, certainly if I look back over 22 or 23 years, I have undoubtedly run into an attorney or two along the way who has, I guess, pushed it to the limit. It doesn't change my view of my job as a judge.

Senator SPECTER. I am not saying you have ever been discourteous, but have you ever been tempted to be discourteous?

Judge SURRECK. Well, I am human. You may be tempted, but you don't move forward with that temptation.

Senator SPECTER. Well, you are going to be a Federal judge, Judge Surrick, and you have had a lot of experience and you are going to be wearing those robes. Keep Strom Thurmond's admonition in mind. Of all the rules I know, that is number one.

Judge SURRECK. Sounds like a good rule, Senator.

Senator SPECTER. OK; again, I am confident of your confirmation, and I thank you for joining us today.

Judge SURRECK. Thank you.

[The questionnaire follows:]

R. Barclay Surrick

Birth:	December 18, 1937	Media, Pennsylvania
Legal Residence:	Pennsylvania	
Marital Status:	Married	Patricia K. Surrick 3 children
Education:	1955 - 1960	Dickinson College B.A. degree
	1962 - 1965	Dickinson School of Law J.D. degree
	1980 - 1982	University of Virginia School of Law LL.M. degree
Bar:	1966	Pennsylvania
Experience:	1965 - 1966	Basil C. Clare, Esq. Associate
	1965 - 1974 (part-time)	Office of the Public Defender of Delaware County Chief Of Appellate Division
	1966 - 1967	sole practitioner
	1967 - 1969	Lutz Fronfield Labrum & Knapp Associate
	1969 - 1977	Cramp D'Iorio McConchie & Surrick Associate
	1978 - present	Court of Common Pleas of Delaware County Judge
Office:	Delaware County Court House Media, Pennsylvania 19063	

To be United States District Judge for the Eastern District of Pennsylvania

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Richard Barclay Surrick

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

Place of Residence: Media, PA

Office Address: Delaware County Court House
Media, PA 19063

3. Date and place of birth.

Date: 12/18/37

Place: Media, PA

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

Married to Patricia Kelly Surrick (maiden name Kelly).

Occupation: Secondary school teacher
The Concept School
P.O. Box 54
Westtown, PA 19395

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

Dickinson College, 1955-1960
 B.A., Political Science, 1960

Dickinson School of Law, 1962 – 1965
 J.D., 1965

University of Virginia School of Law, 1980-1982
 LL.M., Judicial Process, 1982

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

8/60 to 2/61	Pennsylvania National Guard (Active Duty) Fort Knox, KY (Basic Training) Fort Dix, NJ (Advanced Infantry Training) <i>Private First Class</i>
3/61 to 12/61	Buckley Ford Inc. Carlisle, PA <i>Salesman</i>
12/61 to 9/62	F.W. Woolworth Company Carlisle, PA <i>Worked in stock room</i>
6/64 to 9/64	Carlisle Hospital Carlisle, PA <i>Orderly (Part time)</i>
9/65 to 12/66	Basil C. Clare, Esq. (sole practitioner engaged in general practice - now retired) Chester, Pennsylvania <i>Preceptorship / Associate</i>

10/65 to 12/74	Office of the Public Defender of Delaware County, Media, Pennsylvania <i>Trial / Appellate Attorney (part time)</i>
12/66 to 9/69	Lutz Fronfield Labrum & Knapp (now Fronfield & DeFuria) Media, Pennsylvania <i>Associate</i>
9/69 to 12/77	Cramp D'Iorio McConchie & Surrick (now Beatty Cramp Kauffman & Lincke) Media, Pennsylvania <i>Independent Contractor / Associate</i>
1/78 to present	Judge, Court of Common Pleas of Delaware County (32 nd Judicial District of Pennsylvania) Court House, Media, PA
1981	Villanova University Villanova, Pennsylvania <i>Adjunct Professor, Business Law</i>
1986 to 1990	Widener Law School Wilmington, Delaware <i>Adjunct Professor, Trial Advocacy</i>
<u>Boards of Directors</u>	
1971 to 1975	Chester-Wallingford Chapter of the American Red Cross
1974 to 1978	Helen Kate Furness Free Library
1981 to 1984	Media Little League
1985 to 1990	Media Youth Center
<u>Public Office</u>	
1974 to 1978	Commissioner of Nether Providence Township Delaware County, Pennsylvania Elected in 1973 - took office in January 1974. Served until becoming a judge in 1978.

Political Campaigns

- 1974 Treasurer, McEwen for Congress Committee.
 (Stephen J. McEwen was a candidate for Congress from the Seventh Congressional District of Pennsylvania).
- 1975 Treasurer, Labrum Prescott Kelly Judicial Campaign Committee.
 (Joseph Labrum, Rita Prescott and Robert Kelly were all candidates for Judge of the Court of Common Pleas of Delaware County, Pennsylvania).

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.

- 1960: Enlisted - Private E-2 - Pennsylvania National Guard
 Serial Number **XXXXXXXXXX**
- 1963: Honorable Discharge - Sergeant E-5
- 1963: Officer Candidate School - Pennsylvania National Guard
- 1963-67: Executive Officer Company B, 28th Division Headquarters
 Harrisburg, PA
- 7/2/67: Honorable Discharge - Second Lieutenant

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

- 1991: Past Presidents Award - The Media Youth Center
 (For outstanding leadership and service to the community).
- 1995: The Donald J. Orlowsky Memorial Award - Delaware County
 Bar Association
 (Presented annually to the individual who has contributed the most to the improvement and fostering of good Bench-Bar relations).

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.

Delaware County Criminal Justice Advisory Committee (*Chairman, 1994 - present*)

Pennsylvania Conference of State Trial Judges (*1978 - present*)

American Judicature Society (*1970 - present*)

American Bar Association (*1966 - present*)

Pennsylvania Bar Association (*1965 - present*)

Delaware County Bar Association (*1965 - present*)

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

I do not belong to any country club, dining club, athletic facility, fraternal organization, or any other group that requires membership, nor do I belong to any organizations that are active in lobbying before political 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.

Supreme Court of the United States – May 19, 1969

Supreme Court of Pennsylvania – April 25, 1966

Superior Court of Pennsylvania – March 17, 1969

Commonwealth Court of Pennsylvania – November 13, 1970

U.S. District Court for the Eastern District of Pennsylvania – May 2, 1972

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.

Law Review Article:

R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 DICK. L. REV. 265 (1983).

Although I have given a number of speeches over the years, none have involved constitutional law or legal policy. Attached are copies of several of the speeches that I have delivered.

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

The present state of my physical health is excellent. I jog at least four times per week, approximately two miles each time.

My last physical examination was March 24, 2000.

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 such court.

Judge – Court of Common Pleas of Delaware County
 (32nd Judicial District of PA)
 Elected – November 1977
 Re-elected – November 1987 and November 1997

Trial Court - General Jurisdiction (unlimited original jurisdiction in all actions and proceedings arising within the Commonwealth).

I have not held another judicial office.

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

(1) *Citations for the ten most significant opinions I have written:*

1. Tenaglia v. Proctor & Gamble, 40 Pa. D. & C.4th 284 (1999), *aff'd*, 737 A.2d 306 (Pa. Super. Ct. 1999).
2. Zucker v. Doherty, 86 Del. Co. Rep. 98 (1999), *aff'd*, No. 694 (Pa. Super. Ct. 1998).
3. Romano v. Commonwealth, No. 90-17701 (1999) (not yet published).
4. Smolens v. Estate of Murray, 86 Del. Co. Rep. 50 (1998), *aff'd*, No. 313 (Pa. Super. Ct. 1998).
5. Whitehall v. Matthews, 40 Pa. D. & C.4th 58 (1998), *appeal dismissed for failure of plaintiff to file brief*, No. 3052 (Pa. Super. Ct. 1997).
6. Commonwealth v. Merker, 80 Del. Co. Rep. 399 (1993), *aff'd*, 643 A.2d 706 (Pa. Super. Ct. 1994), *appeal denied*, 647 A.2d 899 (Pa. 1994).
7. Buggy v. Upper Providence Township, 43 Pa. D. & C.3d 70 (1985), *aff'd*, 514 A.2d 991 (Pa. Commw. Ct. 1986).
8. Devlin v. Shearson Hayden Stone, Inc., 21 Pa. D. & C.3d 213 (1981). [*The appeal to the Superior Court was withdrawn after our opinion was filed*].
9. Rodgers v. Broadbents Spray Rentals, 22 Pa. D. & C.3d 617 (1981). [*The appeal to the Superior Court was withdrawn after our opinion was filed*].
10. Commonwealth v. Crocetto, 68 Del. Co. Rep. 606 (1981), *aff'd*, 448 A.2d 1152 (Pa. Super. Ct. 1982).

- (2) *Summary of appellate opinions where my decisions were reversed or where my judgment was affirmed with significant criticism of my substantive or procedural rulings:*

I have been on the bench for almost twenty-three years. During that time I have made thousands of decisions and written several hundred opinions. I have never received significant criticism from an appellate court in any case, whether I have been reversed or affirmed.

I have found the following cases on Westlaw where I have been reversed:

1. Commonwealth v. Bryant, 82 Del. Co. Rep. 64 (1996), *rev'd and remanded*, 675 A.2d 749 (Pa. Super. Ct. 1996).
The twenty-four year old defendant, Timothy Bryant, successfully completed an Accelerated Rehabilitation Disposition program (ARD) and filed a petition to have his criminal record expunged because he wanted to seek employment in law enforcement. The Commonwealth objected, citing among other things the fact that Bryant had been arrested while in the ARD program. After a hearing on the petition, I concluded that the Commonwealth's interest in retaining Bryant's criminal record outweighed the defendant's interest in expungement. In balancing these competing interests, I considered the seriousness of the charges against Bryant, the overwhelming proof of his guilt, and Bryant's subsequent arrest. The Superior Court found that the fact that Bryant had successfully completed the ARD program and the fact that the subsequent charges against him had been dismissed shifted the balance in favor of the defendant and directed that the defendant's record be expunged.
2. Commonwealth v. Dickerson, No. 9159-86 and 76 Del. Co. Rep. 195 (1989), *remanded for resentencing*, 590 A.2d 766 (1991).
The defendant, Eric Dickerson, was charged with two separate rapes. A jury found him guilty of one rape and he entered a plea of guilty on the other. I sentence Dickerson to an aggregate term of incarceration of not less than fifteen years nor more than thirty years in prison. In structuring the sentence, I used a section of the Sentencing Code that provided for mandatory minimum sentences for recidivist perpetrators of certain violent crimes, including rape. The

Superior Court concluded that the mandatory sentencing provision should not have been used and remanded for resentencing. I restructured the sentence in accordance with the directive of the Superior Court; however, the total aggregate sentence remained not less than fifteen years nor more than thirty years. The defendant is currently serving that sentence.

3. Commonwealth v. Smagala, 75 Del. Co. Rep. 471 (1988), *aff'd in part, vacated in part, and remanded for resentencing*, 557 A.2d 25 (Pa. Super. Ct. 1989).

The defendant, John Smagala, was charged with possession of cocaine and possession with intent to deliver cocaine. At trial by judge sitting without a jury, the Commonwealth presented evidence and testimony that established that Smagala was in possession of: (1) a glassine bag containing 0.8 grams of cocaine, (2) \$834.00 in U.S. currency, (3) four index cards approximately 3x5 inches in size containing names with numerical values next to the names, (4) a rolled up \$20.00 bill, and (5) a razor blade. The Commonwealth also presented expert testimony that possession of these items under the circumstances was more consistent with possession with intent to deliver cocaine than with simple possession of cocaine. I found the expert's testimony credible and convicted Smagala of possession with intent to deliver cocaine. The Superior Court concluded that the evidence was insufficient to prove beyond a reasonable doubt the inference of the defendant's intent to deliver and remanded with instructions to sentence only on the charge of simple possession of cocaine.

4. Commonwealth v. Melnyk, 75 Del. Co. Rep. 188 (1988), *rev'd*, 548 A.2d 266 (Pa. Super. Ct. 1988), *appeal denied*, 562 A.2d 319 (Pa. 1989).

The defendant, Barbara Jane Melnyk, was charged with two counts of welfare fraud. The Office of the District Attorney had a policy of excluding defendants from the Accelerated Rehabilitative Disposition program (ARD) unless they agreed to make restitution. Although Melnyk indicated a willingness to make restitution, the District Attorney refused to offer her ARD because she could not demonstrate a present ability to pay. The defendant was found guilty on both counts of welfare fraud in a non-jury trial based upon

stipulated facts. The facts stipulated were designed to preserve the issue of the District Attorney's denial of ARD to defendant. Defendant was sentenced to probation. Based upon the broad discretion of the District Attorney, I concluded that the law permitted him to set conditions for ARD, such as the requirement that there be a reasonable expectation that the defendant will be able to make full restitution within the maximum period of time for the program. Because the condition applied to all cases, not just welfare cases, I concluded that this was a reasonable condition within the discretion of the District Attorney. On appeal, the Superior Court determined that the District Attorney could not deny entrance to the ARD program because of an inability to make restitution.

5. Commonwealth v. Stevens, [opinion not published and unavailable], remanded for resentencing, 503 A.2d 14 (Pa. Super. Ct. 1986).
The defendant, Everett Scott Stevens, was convicted by a jury of retail theft and conspiracy. I imposed a sentence of two and one half to five years on the retail theft charge and a concurrent one to two year sentence on the conspiracy charge. The sentence of two and one half to five on the retail theft charge was outside of the Sentencing Guidelines. I sentenced outside of the Sentencing Guidelines because of the defendant's significant prior criminal record. The Superior Court remanded for resentencing on the retail theft charge stating that I should not have considered the defendant's long criminal record because it had already been taken into consideration in the Sentencing Guidelines calculation.

6. Commonwealth v. Lacy, [opinion not published and unavailable], *aff'd in part, rev'd in part*, 496 A.2d 1256 (Pa. Super. Ct. 1985).
The defendants owned a tobacco shop. After observing the merchandise in the shop, detectives obtained a search warrant. Certain items of merchandise were seized as drug paraphernalia and the defendants were charged with possession with intent to deliver drug paraphernalia and possession with intent to use drug paraphernalia. After a preliminary hearing, the defendants were held for court. The defendants filed a petition for writ of habeas corpus. The matter was submitted to the Court on the notes of testimony from the preliminary hearing and briefs. I concluded that the Commonwealth had failed to present a prima facie case and

the charges were dismissed. Specifically, I concluded that the evidence presented at the preliminary hearing failed to support a finding of the specific intent required by the statute. The Superior Court concluded that an inference of specific intent could be drawn from the evidence presented and the matter was remanded for trial.

7. Commonwealth v. Madden, [opinion not published and unavailable], *rev'd and remanded*, 492 A.2d 420 (Pa. Super. Ct. 1985).

The defendant, sixteen year-old John Madden, was charged with drug offenses in Juvenile Court. He was certified for trial as an adult. At the certification hearing, the probation officer testified that Madden was not amendable to treatment in the juvenile system. This testimony was given without the benefit of a study to determine Madden's amenability to treatment. Madden had no prior record. The case was assigned to me for trial, and the defendant filed a petition for decertification. At the decertification hearing, expert testimony from a psychologist was offered. The psychologist testified that Madden was amendable to treatment in the juvenile system. Based on this testimony, I granted the petition and sent the matter back to the Juvenile Court. The District Attorney appealed, contending that this court improperly sent the matter back to Juvenile Court. The Superior Court concluded that one judge may not pass upon the decision of another co-equal judge in an interlocutory matter and quashed the decertification order.

8. Commonwealth v. Puchalski, [opinion not published and unavailable], *conviction aff'd, remanded for resentencing*, 456 A.2d 569 (Pa. Super. Ct. 1983).

The nineteen year old defendant, Joseph Puchalski, was convicted by a jury of involuntary deviate sexual intercourse and other related offenses. Puchalski steadfastly maintained his innocence. At the time of sentencing, I asked the defendant if he would agree to undergo a polygraph test. Both the District Attorney and defense counsel objected. The defendant agreed to take the test but failed it. On appeal, Puchalski raised the question of the propriety of the polygraph test. The Superior Court concluded that a sentencing judge should neither request nor consider the results of a polygraph test when sentencing and remanded for resentencing.

9. Commonwealth v. DePearl Corporation, [opinion not published and unavailable], *rev'd*, 442 A.2d 1 (Pa. Commw. Ct. 1982).

After a hearing, the Pennsylvania Liquor Control Board revoked DePearl's liquor license and forfeited the bond filed with the license application. The appeal to this court was heard de novo. At the hearing, I admitted into evidence a Memorandum of Understanding between the U.S. Attorney and Frank H. Miller, a principal of DePearl, regarding Miller's guilty plea to a federal indictment for racketeering activities. The ruling to admit this evidence was based upon several exceptions to the hearsay rule. On appeal, the Commonwealth Court held that the Memorandum of Understanding was not properly authenticated and therefore should not have been admitted.

10. Michigan Millers Mutual Insurance Co. v. U.S. Fidelity and Guarantee Corp., [opinion not published and unavailable], *rev'd*, 452 A.2d 16 (Pa. Super. Ct. 1982).

The plaintiff insurance company was the insurer for Timothy Malloy. The defendant insurance company was the insurer for Dan Malloy Company. Timothy Malloy was a defendant and Dan Malloy Company was an additional defendant in a lawsuit that resulted in a verdict against both Timothy Malloy and Dan Malloy Company. The verdict also resulted in liability over from defendant Timothy Malloy to additional defendant Dan Malloy Company. The plaintiff insurance company paid the full verdict when the defendant insurance company refused. The plaintiff insurance company then sought contribution or indemnification from the defendant insurance company. Cross-motions for summary judgment were filed. I concluded that the plaintiff insurance company had no duty to satisfy the verdict and in doing so acted as a mere volunteer. The Superior Court held that because the plaintiff insurance company had a moral duty and a secondary legal duty to protect its insured upon the failure of the defendant insurance company to pay, the plaintiff insurance company was not acting as a mere volunteer and was entitled to relief.

- (3) *Significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions:*
1. Commonwealth v. Soderland, No. 3022-95, *aff'd*, 715 A.2d 508 (Pa. Super. Ct. 1998).
 2. Commonwealth v. Brodeur, No. 118-96, *aff'd*, 723 A.2d 228 (Pa. Super. Ct. 1998), *appeal denied*, 736 A.2d 602 (Pa. 1998).
 3. Commonwealth v. Wilmore, 83 Del. Co. Rep. 324 (1996), *aff'd*, 687 A.2d 863 (Pa. Super. Ct. 1996), *appeal denied*, 692 A.2d 565 (Pa. 1997).
 4. Commonwealth v. Merker, 80 Del. Co. Rep. 399 (1993), *aff'd*, 643 A.2d 706 (Pa. Super. Ct. 1994), *appeal denied*, 647 A.2d 899 (Pa. 1994).
 5. Commonwealth v. Dietz, *aff'd*, 611 A.2d 710 (Pa. Super. Ct. 1992).
 6. Commonwealth v. Morgan, 12 Pa. D.&C.4th 555 (1991), *aff'd*, 606 A.2d 467 (1992), *appeal granted*, 644 A.2d 1198 (Pa. 1994), *order aff'd*, 652 A.2d 295 (Pa. 1994).
 7. Commonwealth v. Ishkanian, No. 9511-90, *aff'd*, 625 A.2d 90 (Pa. Super. Ct. 1992), *appeal denied*, 639 A.2d 25 (Pa. 1994).
 8. Commonwealth v. Cook, No. 3489-89, *aff'd*, 606 A.2d 1226 (Pa. Super. Ct. 1991), *appeal denied*, 614 A.2d 1138 (Pa. 1992).
 9. Commonwealth v. Osborne, 76 Del. Co. Rep. 49 (1988), *aff'd*, 563 A.2d 193 (Pa. Super. Ct. 1989), *appeal denied*, 575 A.2d 564 (Pa. 1990).
 10. Commonwealth v. Viera, 74 Del. Co. Rep. 473 (1987).
 11. Devlin v. Shearson Hayden Stone, Inc., 21 Pa. D. & C.3d 213 (1981).
 12. Commonwealth v. Bedsaul, 68 Del. Co. Rep. 299 (1981), *aff'd*, 444 A.2d 717 (Pa. Super. Ct. 1982).
 13. Commonwealth v. Wischusen, 12 Pa. D. & C.3d 40 (1979).

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.

Commissioner of Nether Providence Township, Delaware County
 Elected: 1974
 Served until becoming a judge in 1978.

This is the only elective public office for which I have been a candidate other than judicial office.

17. Legal Career:

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

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

I have never clerked for a judge.

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

I practiced alone in Delaware County, Pennsylvania in 1966 and 1967. However, during this time I shared office space with Bell Pugh Sinclair & Prodoehl at Court House Square North, 3rd and Olive Streets, Media, PA 19063.

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. Basil C. Clare, Esq. (sole practitioner engaged in general practice - now retired)
 Preceptorship / Associate (1965-1966)
 Chester, Pennsylvania
2. Office of the Public Defender of Delaware County
 Trial / Appellate Attorney (1965-1974) (part time)
 Court House
 Media, Pennsylvania.

3. Lutz Fronfield Labrum & Knapp (now Fronfield & DeFuria)
Associate (1967-1969)
216 Orange Street
Media, Pennsylvania.
4. Cramp D'Iorio McConchie & Surrick (now Beatty Cramp
Kauffman & Lincke)
Independent Contractor / Associate (1969-1977)
216 Orange Street
Media, Pennsylvania.
5. Judge, Court of Common Pleas of Delaware County
(32nd Judicial District of Pennsylvania) (1/78 - present)
Court House
Media, PA 19063
6. Villanova University
Adjunct Professor, Business Law (1981)
Villanova, Pennsylvania
7. Widener Law School
Adjunct Professor, Trial Advocacy (1986-1990)
Wilmington, Delaware

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

For the period of approximately ten years prior to becoming a judge in 1978, I was with the law firms of Lutz Fronfield Labrum & Knapp and Cramp D'Iorio McConchie & Surrick. At these firms, my practice was predominately personal injury defense litigation. Both firms represented a number of insurance companies, and most of my practice consisted of pretrial discovery and trial of civil cases. During this time, I continued to develop my own practice which was general in nature and included criminal matters, some plaintiffs' personal injury matters and some real estate and zoning matters.

From 1965 to 1974, I also did part time work for the Office of the Public Defender of Delaware County, representing indigent defendants in criminal matters. This involved extensive trial work. In addition, I was the Chief of the Appeals Division for the Office of the Public Defender for several years during this period.

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

During the thirteen years that I was in private practice before becoming a judge, my typical clients were (1) defendants in personal injury lawsuits through their insurance companies, and (2) criminal defendants. I also represented clients at real estate settlements, zoning hearings, support and custody hearings, and in matters related to wills and estates.

- 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 regularly during the entire time that I practiced.

2. What percentage of these appearances was in:

- | | | |
|-----|-------------------------|-----|
| (a) | federal courts: | 1% |
| (b) | state courts of record: | 89% |
| (c) | other courts: | 10% |

3. What percentage of your litigation was:

- | | | |
|-----|-----------|-----|
| (a) | civil: | 65% |
| (b) | criminal: | 35% |

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 would estimate that I tried at least 75 to 100 cases to verdict. In most instances I was sole counsel. In addition, many cases settled or resulted in guilty pleas after trial commenced but before verdict.

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 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.

Over the past two decades, records and files have been lost and destroyed, making it very difficult for me to reconstruct my practice. The following are cases that I remember or for which I was able to find limited records:

1. Montgomery Estate v. Wallingford Pharmacy
No. 4785-1971
Court of Common Pleas of Delaware County, PA.
Judge: The Honorable Jack Brian (retired)
Opposing Counsel: Francis A. Ferrara, Esq.
Chesley Office Campus
Media, PA 19063
610-627-9777

This was a wrongful death and survival action. I represented the defendant. Seventeen year old Mark Montgomery was killed when struck by a vehicle while riding his bicycle. The driver of the vehicle was employed by the defendant and was driving the defendant's automobile in the course of his employment at the time of the accident. The trial was emotionally charged and the jury returned a verdict in favor of the plaintiff for \$250,000. I filed and successfully argued

post-trial motions. A new trial was granted based upon error of the trial judge in applying the Dead Man's Act. After the new trial was granted I was successful in negotiating a settlement.

2. Commonwealth v. Scoggins

No. 55-58 December 1969

Court of Common Pleas of Delaware County, PA.

Judge: The Honorable Howard F. Reed (deceased)

Assistant District Attorney: John R. Graham, Esq. (deceased)

The defendant, David Scoggins, was charged with murder. Ida Pettrey, the defendant's seventeen year-old girlfriend, was present when the murder occurred and had participated in certain events leading up to and after the murder. Pettrey was arrested in Washington, DC and returned to Delaware County, Pennsylvania. I represented Pettrey and was successful in convincing the District Attorney not to indict. I also obtained immunity for Pettrey, in return for which she testified against Scoggins at trial. Scoggins was convicted of first degree murder and was sentenced to death.

3. Commonwealth v. Warfel

No. 248 September 1969

Court of Common Pleas of Delaware County, PA.

Judge: The Honorable Howard F. Reed

Assistant District Attorney: John A. Reilly, Esq. (deceased)

The defendant, a twenty year-old student at Drexel University, was accused of stabbing his mother to death and bludgeoning his father with a baseball bat. The defendant's father retained me to represent the defendant's interests. I retained a prominent psychiatrist who concluded that the defendant was seriously mentally ill. I petitioned the Court requesting trial on the issue of the defendant's sanity, as permitted under the then-existing rules. The defendant was found insane. As a result, the defendant was transferred from Delaware County Prison to Farview State Hospital for the Criminally Insane.

4. Mozino v. Swayne
No. 9814-1970
Court of Common Pleas of Delaware County, PA.
Judge: The Honorable Louis Bloom (deceased)
Opposing Counsel: Bernard Edelson, Esq.
401 City Avenue, Suite 122
Bala Cynwyd, PA 19004
610-664-6776

The plaintiff was rendered unconscious after his stationary automobile was struck from behind by a vehicle operated by the defendant. I represented the defendant. The plaintiff alleged serious injuries as a result of the accident, including a permanent loss of hearing. The defendant admitted negligence but contended that the injuries complained of were not caused by the accident. The defendant presented no witnesses and the defense was based on cross-examination of the plaintiff's witnesses. The jury returned a modest verdict in favor of the plaintiff.

5. Commonwealth v. Smith
No. 200 May 1973
Court of Common Pleas of Chester County, PA.
Judge: The Honorable John Wajert (deceased)
Assistant District Attorney: James R. Freeman, Esq.
606 Main Street
Phoenixville, PA 19460
610-935-7744

The defendant was a member of the Warlocks motorcycle gang. He was charged with rape and related offenses in Chester County, Pennsylvania. The case received significant publicity. The alleged victim and several of her female friends had accepted an invitation to a party from the defendant and several of his fellow gang-members. The alleged victim did not know the defendant or his friends but she did know that they were Warlocks. The crime allegedly occurred at the party. After a four-day trial, the defendant was found not guilty of rape but guilty of a lesser offense.

6. Cosgrove v. Britt
64 Del. Co. Rep. 212 (1977)
Court of Common Pleas of Delaware County, PA
Judge: The Honorable Clement McGovern
Opposing Counsel: Maxwell Gorson, Esq.
1700 Sansom Street
Philadelphia, PA 19103
215-569-4661

I represented the defendant in this lawsuit that resulted from a rear end automobile accident on a bridge outside Ocean City, New Jersey. The jury found in favor of the defendant. The plaintiff filed post-trial motions, but the plaintiff's counsel took no action on these motions. After a considerable period of time, I filed a petition to strike the post-trial motions. The petition was granted after submission of briefs and oral argument.

7. Commonwealth v. Home
57 Del. Co. Rep. 298 (1969); 59 Del. Co. Rep. 177 (1971)
Court of Common Pleas of Delaware County, PA.
Judges: The Honorable Howard F. Reed (deceased)
The Honorable James Gorby (deceased)
The Honorable Henry G. Sweeney (deceased)
Assistant District Attorney: John A. Reilly, Esq. (deceased)

In 1966 and 1967, there were a series of rapes in communities along the waterfront in Delaware County. Peter Home, a resident of one of the waterfront communities, was arrested and charged with these crimes. I was appointed to represent Home. A motion to suppress identification testimony based upon unconstitutional identification procedures was denied. A motion for change of venue because of pervasive pretrial publicity was denied. There were three separate trials. Each presented its own set of interesting and challenging problems. After being convicted, the defendant received significant jail sentences.

8. Latch v. Reyburn
58 Del. Co. Rep. (1970)
Court of Common Pleas of Delaware County, PA
Judge: The Honorable Joseph Defuria (deceased)
Opposing Counsel: John P. Curran, Esq.
1500 Walnut Street
Philadelphia, PA 19102
215-238-1800

I represented the defendant in this premises liability case. The plaintiff fell into a pit in the defendant's automobile repair garage. At the conclusion of the evidence, I moved for a directed verdict. This motion was granted. The plaintiff's motion for a new trial was denied.

9. Commonwealth v. Wesley
58 Del. Co. Rep. 139 (1970)
Court of Common Pleas of Delaware County, PA
Judge: Joseph Defuria (deceased)
Assistant District Attorney: Harold Hughes, Esq. (deceased)

The defendant was charged with armed robbery. The Assistant District Attorney asked a question of one of the Commonwealth's witnesses that implied that the defendant had a criminal record. My objection was overruled and the defendant was convicted. On post-trial review, the trial judge accepted my argument that the defendant had been prejudiced by the question and a new trial was granted.

10. Commonwealth v. Vann
54 Del. Co. Rep. 123 (1966)
Court of Common Pleas of Delaware County
Judge: John V. Diggins (deceased)
Assistant District Attorney: John Graham, Esq., (deceased)

I represented one defendant who, along with several co-defendants, was charged with four separate armed robberies. At the close of the Commonwealth's case after a somewhat lengthy trial, I negotiated a guilty plea on behalf of my defendant to one count of armed robbery.

In addition, the following are attorneys or judges who know of my abilities in the courtroom:

William Cornell Archbold Jr., Esq.
214 N. Jackson Street
Media, PA 19063
610-565-3800

Jon J. Auritt, Esq.
130 W. Front Street
Media, PA 19063
610-565-7530

Lee B. Balefsky, Esq.
1500 Walnut Street
Philadelphia, PA 19103
215-893-0100

John S. J. Brooks, Esq.
2nd and Plum Streets
Media, PA 19063
610-565-4800

Hon. Francis J. Catania
Suite 114
Rose Tree Corporate Center
Media, PA 19063
610-892-0224

Esther F. Clark, Esq.
207 Knoll Road
Wallingford, PA 19086
610-565-3319

Michael P. Dignazio, Esq.
30 W. Third Street
Media, PA 19063
610-565-8535

Francis A. Ferrara, Esq.
Chesley Office Campus
Media, PA 19063
610-627-9777

M. Scott Gemberling, Esq.
18 Campus Avenue, Suite 250
Newtown Square, PA 19073
610-325-2210

Edward Kassab, Esq.
214 N. Jackson Street
Media, PA 19063
610-565-3800

Francis R. Lord, Esq.
218 W. Front Street
Media, PA 19063
610-565-7500

Suzanne Noble, Esq.
410 Welsh Street
Chester, PA 19013
610-874-8421

John Churchman Smith, Esq.
117-119 N. Olive Street
Media, PA 19063
610-565-6999

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

I have been the chairman of the Delaware County Criminal Justice Advisory Committee since its creation in 1994. Members of the Committee are the key decision-makers in the administration of criminal justice in the county. The Committee's accomplishments have been significant. For example, the Committee was primarily responsible for the planning and implementation of a video conferencing program in Delaware County that is being used as a model by other counties in Pennsylvania.

In 1991, I took over a 3100 asbestos case backlog. I was the only judge assigned to handle these matters. By scheduling large numbers of cases for trial each month and consolidating them for purposes of trial, by reverse bifurcating and trying cases in phases, and by creating an inactive docket for non-compensable asbestos-related disease cases, in five years I was able to dispose of the backlog.

Recently, I was assigned all of the diet drug (fen-phen) litigation in Delaware County. Our court is experiencing an increasing number of filings in this area and it is my responsibility to deal with the cases in the context of the recent class action settlement reached in the United States District Court for the Eastern District of Pennsylvania Multi-District Litigation.

I have worked to maximize my effectiveness as a trial judge through continuing education. In 1978, I attended the National Judicial College in Reno, NV. In 1980, I was one of 28 judges from across the nation selected to pursue an LL.M. in the Judicial Process at the University of Virginia Law School. I was awarded this degree in May 1982. In 1984, I spent three weeks in England studying the English legal system with other judges from the masters program at Virginia. This program involved a week of sitting on the bench with British judges in London and study for two weeks at Oxford University. At Oxford, we attended a series of lectures by judges and legal scholars covering in depth the English justice system and the role of the judge in that system.

My experience with asbestos litigation has prompted me to attend a number of seminars on the subject of mass torts. In November 1994, I attended, by invitation, the National Mass Tort Conference in Cincinnati. In 1998 and 1999, I attended the Mass Tort Litigation Institute at the Georgetown Law Center in Washington, D.C. I also have attended several conferences dealing specifically with asbestos litigation and fen-phen litigation and in 1992, I took a course at the National Judicial College on complex litigation.

Finally, from 1986 through 1990, I was an adjunct professor at Widener Law School teaching Trial Advocacy. In 1981, I taught Business Law at Villanova University.

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 member of the Commonwealth of Pennsylvania State Employees' Retirement System. Under this system, I am eligible for pension benefits upon my retirement as a state trial judge. The present value of my pension as of December 31, 1999 was \$1,173,111.37. The amount of pension benefits payable monthly will depend upon the retirement option selected at the time of retirement.

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 a potential conflict arises, I will review the provisions of the Code of Judicial Conduct and recuse when appropriate.

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. However, I enjoyed teaching at the Widener School of Law and can envision teaching a course at one of the local law schools but only after seeking permission from the 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.)

Please see attached Financial Disclosure Report (AO-10).

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

Please 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.

In 1974, I acted as Treasurer of the McEwen for Congress Committee. Stephen J. McEwen was a candidate for Congress from the Seventh Congressional District of Pennsylvania.

In 1975, I acted as Treasurer for the Labrum Prescott Kelly Judicial Campaign Committee. Joseph Labrum, Rita Prescott and Robert Kelly were all candidates for Judge of the Court of Common Pleas of Delaware County, Pennsylvania.

My job as Treasurer of these campaign committees was to see that a proper record was kept of all campaign contributions, to write checks for campaign expenditures, and to file the required campaign finance reports. I did not actively solicit campaign contributions.

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.

Before becoming a judge twenty-two years ago, I frequently represented criminal defendants without compensation when they were unable to pay for my services.

Since becoming a judge, I have been asked on many occasions to speak at elementary and high schools and to civic groups about our court system.

As Chairman of the Delaware County Criminal Justice Advisory Committee, I have given a number of speeches to groups like the State Trial Judges Association and the National Criminal Justice Association on the creation and successes of the Criminal Justice Advisory Committee.

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 do not presently nor have I ever belonged to any organization that discriminates on the basis of race, sex, or religion.

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

The Federal Judicial Nominating Commission of Pennsylvania recommends candidates for nomination to the federal courts. Initially, I filed an application with and was interviewed by the Commission. The Commission recommended my nomination. I have also been interviewed by a representative of the American Bar Association and representatives of the United States Department of Justice. In addition, the Federal Bureau of Investigation and the American Bar Association conducted an investigation of my background and my professional life.

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 of 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 a trial judge is to resolve only those grievances that are properly before the court. This has been my job for the past 22 years as a trial judge on the Delaware County Court of Common Pleas. Article III courts should not be in the business of fashioning broad, structural remedies to fix ongoing societal problems. That is best left to the legislature and its duly elected representatives, not the courts. State legislatures and Congress have the power to address and correct problems through a process of deliberate fact-finding, debate, and compromise. In contrast, Article III courts should limit their role to adjudicating cases within the specific jurisdiction afforded to them.

Jurisdictional requirements cannot be relaxed to facilitate access to federal forums where not mandated by statute or the Constitution. Federalism requires a sharing of responsibility between federal and state governments.

AO-10
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1998

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial) Surrick, Richard B.	2. Court or Organization U.S. District Court Eastern District of PA	3. Date of Report 4/12/00
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) X Nomination, Date 4/11/00 ___ Initial ___ Annual ___ Final	6. Reporting Period 1/1/99 to 3/30/00
7. Chambers or Office Address Delaware County Court House 201 West Front Street Media, PA 19063	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 checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
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	
2	1999 Commonwealth of PA State Employees' Retirement System - no contro
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		
2	2000 Administrative Office of Pennsylvania Courts	\$113,729.00
3	1999 Administrative Office of Pennsylvania Courts	\$111,122.00
4	1998 Administrative Office of Pennsylvania Courts	\$109,386.39
5	1999 The Concept School (S)	\$
	2000 The Concept School (S)	\$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting Surrick, Richard B.	Date of Report 4/12/00
---	---------------------------

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
2	Exempt	
3		
4		
5		
6		
7		

V. GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 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; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	PNC Bank (J)	Line of Credit	K
2	AMS Education Loan Trust	Education Loans	K
3	Academic Financial Services Assoc.	Education Loan	J
4			
5			
6			

*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-\$1,000,000,000; P=\$1,000,000,001-\$5,000,000,000; Q=\$5,000,000,001-\$25,000,000,000; R=\$25,000,000,001-\$50,000,000,000; S=\$50,000,000,000 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting Surrick, Richard B.	Date of Report 4/12/00
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 is 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, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature *Richard B. Surrick* Date 4/12/00

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. 4, § 104.)

MAILING INSTRUCTIONS:

Mail signed original and 2 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 (4/1/00)

ASSETS		LIABILITIES	
Cash on hand and in banks (PNC Checking Account)	7,306.36	Notes payable to banks -- secured	None
U.S. Government securities -- add schedule	None	Notes payable to banks -- unsecured PNC Bank	24,500.00
Listed securities -- add schedule	None	Notes payable to relatives	None
Unlisted securities -- add schedule	None	Notes payable to others	45,351.39
		-Sallie Mae -- AMS Education Loan Trust (as of 7/11/99)	13,641.59
		-Columbia University	
Accounts and notes receivables	None	Accounts and bills due	
Due from relatives and friends	--	-Franklin Mint (auto loan)	3,929.26
Due from others	--	-First USA Credit Card	3,856.75
Doubtful	--	-PNC Credit Card	1,910.56
		-American Express	2,272.62
Real estate owned -- add schedule	346,880.00	Unpaid income tax	None
Real estate mortgages receivable	None	Other unpaid tax and interest	None
Autos and other personal property	25,000.00	Real estate mortgages payable -- add schedule (Franklin Mint Federal Credit Union)	231,103.74
Cash value -- life insurance	None	Chattel mortgages and other liens payable	None
Other assets -- itemize:	None	Other debts -- itemize:	None
Total Assets:	379,186.36	Total Liabilities:	326,565.91
		Net Worth:	52,620.45
		Total liabilities and net worth:	379,186.36
CONTINGENT LIABILITIES			
As endorser, co-maker 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		

Senator SPECTER. Ms. Mary McLaughlin, will you step forward, please. Would you raise your right hand. Do you solemnly swear that the testimony you will give before this Senate Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. McLAUGHLIN. I do.

Senator SPECTER. Ms. McLaughlin, do you have anyone with you whom you would care to introduce?

TESTIMONY OF MARY A. McLAUGHLIN, OF PENNSYLVANIA, TO BE U.S. DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Ms. McLAUGHLIN. Yes, I do, Mr. Chairman. Thank you very much.

I would like to introduce them perhaps in three groups. First, my family. I have with me three of my four sisters, Joan, Kay, and Lori, and Lori's brother—excuse me—husband, my brother-in-law, Robert McDonald.

Senator SPECTER. Joan, Kay, and Lori. I only see two women standing.

Ms. McLAUGHLIN. Stand up.

Senator SPECTER. And your brother-in-law?

Ms. McLAUGHLIN. Yes.

I also have with me two of my partners and friends from Dechert, Price & Rhoads, Steve Feirson and Jennifer Clarke.

Senator SPECTER. Welcome, welcome.

Ms. McLAUGHLIN. And finally, two of my very dear friends, Mary Woodford and Donna Franchetti. There they are.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. How will your partners at Dechert, Price & Rhoads handle their timesheets today, Mr. Feirson? How will you handle that?

Ms. McLaughlin, have you ever been discourteous?

Ms. McLAUGHLIN. Oh, perhaps on occasion, Senator, but I certainly take your admonition and believe absolutely that courtesy and respect for everyone who comes into the courtroom is critical for a judge.

You know, as you think back to the very best judges you have been before, they have been people who have been at all times courteous and respectful of everyone before them.

Senator SPECTER. Do you promise to follow Senator Thurmond's admonition to be courteous at all times?

Ms. McLAUGHLIN. I certainly do.

Senator SPECTER. You served with distinction as counsel to the Senate Judiciary Committee on Terrorism, investigating the incident Ruby Ridge. How would you contrast that assignment with the assignment of being a Federal judge?

Ms. McLAUGHLIN. Well, I think that when I had the privilege of being counsel to the Senate Subcommittee that did Ruby Ridge, what we were doing there, as, of course, Mr. Chairman, you know better than anyone, was trying to discover the facts of what happened. I suppose to that extent, trial judges, if they are the trier of fact, will do that, and then to evaluate and give guidance to the

law enforcement agencies, make some judgments as to whether or not they had acted properly or not.

A trial judge, of course, does no such thing. I mean, a trial judge's job is simply to take the case before her, decide it on the basis of the law from above. In my case, if I would be so honored as to be confirmed, that would be the Third Circuit in the Supreme Court. So you are not in any way doing legislating, and, of course, in Ruby Ridge, what the subcommittee had to do was evaluate the situation and try to determine whether or not there were certain decisions to be made legislatively perhaps or in the committee's oversight capacity that was required.

Senator SPECTER. Ms. McLaughlin, you heard the characterizations of jurisprudential conservative and activism. How would you articulate your own philosophy in approaching the responsibilities of a Federal judge?

Ms. McLAUGHLIN. Well, certainly, Mr. Chairman, I would not approach them in any way as a judicial activist. I think—I may be repeating myself, but I think what a trial judge needs to do is simply decide the case before her and not to reach out, decide issues that are not presented, and to do that by paying very close respect, attention, and following precedent, whether that be Third Circuit, Supreme Court, or following the statute at issue.

Senator SPECTER. Are you aware of the Supreme Court decision in both *Adarand v. Pena* and *Richmond v. Crowson*?

Ms. McLAUGHLIN. I'm generally aware of *Crowson*, Mr. Chairman. I don't think I have actually read that. I have read and am familiar with *Adarand v. Pena*, yes.

Senator SPECTER. What is your best legal judgment of the lawfulness under the equal protection clause and Federal civil rights law of the use of race-, gender-, or national origin-based preferences on hiring, promotion, layoffs?

Ms. McLAUGHLIN. Well, certainly with respect to race and national origin, I think the Supreme Court made it clear in *Adarand* that what a judge, if a judge is evaluating such a classification would have to do is to apply strict scrutiny, meaning that there would have to be a compelling governmental interest to justify the classification, and that it would have to be tailored. The statute or program at issue would have to be tailored very narrowly to meet that compelling governmental interest.

With respect to gender, my understanding is similar to what Judge Tucker's is that the Supreme Court at the moment has used an intermediate scrutiny test.

Senator SPECTER. What is there in your background as a practicing lawyer which you think would especially qualify you for a Federal judgeship?

Ms. McLAUGHLIN. Mr. Chairman, I think the breadth of my experience is a very positive factor in that regard. I had the privilege of being an Assistant U.S. Attorney right here in the District of Columbia for 3½ years.

Senator SPECTER. How many cases did you try, roughly, when you were an assistant U.S. attorney?

Ms. McLAUGHLIN. Fifty, Mr. Chairman.

Senator SPECTER. Fifty?

Ms. McLAUGHLIN. Yes.

Senator SPECTER. How many of those were jury trials?

Ms. McLAUGHLIN. They were all jury trials. Here in the District of Columbia under that system, there is not a waiver system that there is in Philadelphia, for example. So they were all jury trials.

Senator SPECTER. And what kinds of cases did you try?

Ms. McLAUGHLIN. Mr. Chairman, because in D.C., as, of course, I know you know, the U.S. Attorney's Office does both the serious, what we would call State crimes, as well as Federal. A lot of my crimes were on the Superior Court—my trials were on the Superior Court side, a lot of drug cases, armed robberies.

Senator SPECTER. Did you ever try a murder case?

Ms. McLAUGHLIN. I did not. No, Mr. Chairman.

Senator SPECTER. Do you have any conscientious scruple against the imposition of the death penalty in a proper case?

Ms. McLAUGHLIN. None at all.

Senator SPECTER. Do you think there is any outside limit as to constitutional process for keeping a person in detention after the imposition of the death penalty and the time of execution?

Ms. McLAUGHLIN. I know of none, Mr. Chairman.

Senator SPECTER. So, if that issue came before you in a writ of habeas corpus, what would your response be?

Ms. McLAUGHLIN. Well, Mr. Chairman, what I would have to do is really look at precedent. When I said I know of none, I mean I am not fully familiar with all the precedent in the area. Obviously, I would look to what the Third Circuit and Supreme Court have said in regard to that and follow that.

Senator SPECTER. What have your experiences been in the civil trial law and private practice?

Ms. McLAUGHLIN. I have done civil trial for about 17 years both at Arnold & Porter and now, of course, for the last 14 years at Dechert, Price & Rhoads, mainly large corporate cases, securities, anti-trust, takeover, general commercial cases.

Senator SPECTER. Did any of those involve jury cases?

Ms. McLAUGHLIN. Yes.

Senator SPECTER. How many?

Ms. McLAUGHLIN. Actual jury trials, Mr. Chairman, that I have had?

Senator SPECTER. Yes.

Ms. McLAUGHLIN. I have had one jury trial since I have been back at Dechert in private practice. I have had many arbitrations.

Senator SPECTER. What kind of a case was that?

Ms. McLAUGHLIN. It was a breach-of-contract case.

I have had many arbitrations.

Senator SPECTER. How long did the case last?

Ms. McLAUGHLIN. A week.

Senator SPECTER. There was a verdict?

Ms. McLAUGHLIN. Yes.

Senator SPECTER. Did you win?

Ms. McLAUGHLIN. Sort of.

Senator SPECTER. It is more important to compete than to have the experience of winning, but I did not want to keep everybody in suspense, although the crowd has dwindled substantially. You have had the great misfortune, Ms. McLaughlin, of being last. So that, your questioning is much more limited without Senator Biden and

Senator Smith, but that is just one of the vicissitudes you will have to put up with.

Ms. McLAUGHLIN. I will not complain, Mr. Chairman.

Senator SPECTER. I did not think you were.

You were mentioning arbitrations. Those are trials as well, presentation of witnesses, putting on witnesses, evidence.

Ms. McLAUGHLIN. And a lot of injunction hearings.

A lot of my practice, because I have done a lot of takeover situations, have been long and involved injunction hearings.

Senator SPECTER. Do you know how much a Federal District judge earns?

Ms. McLAUGHLIN. I think the newspaper said \$141,000.

Senator SPECTER. Do you believe everything you read in the newspaper?

Ms. McLAUGHLIN. Absolutely not, Mr. Chairman.

Senator SPECTER. Do you know what the retirement benefits are of a Federal judge?

Ms. McLAUGHLIN. I believe, Mr. Chairman, you told all of us on Friday that it was——

Senator SPECTER. So do you remember? This is only Wednesday.

Ms. McLAUGHLIN. That it is the same as the \$141,000. I thought that is what you said, that it was the same as the regular salary.

Senator SPECTER. Retirement is the same as your pay. That is correct.

The judge's pay is tied to the Congress pay, and on one occasion, the congressional pay was changed by an act of Congress before midnight on September 30th. And the bill went down to President Ford then, who signed it, putting the pay level back at the same spot, and the judges sued in Federal court claiming that they could not have their pay reduced because their pay was in effect from midnight on September 30th until 9:00 a.m. on October 1st when the President signed the order eliminating the pay increase.

Number one, do you know how that case was decided?

Ms. McLAUGHLIN. I can sort of make a good guess.

Senator SPECTER. Go ahead.

Ms. McLAUGHLIN. Again, Mr. Chairman, in fairness, you did tell me that, also.

Senator SPECTER. It looks like I have talked——

Ms. McLAUGHLIN. I'm sorry, Mr. Chairman.

But it was—it was overturned. In other words——

Senator SPECTER. The pay was overturned?

Ms. McLAUGHLIN. It was held that it was too late to make the change. I believe that was the result.

Senator SPECTER. It had been in effect for 9 hours——

Ms. McLAUGHLIN. That's right.

Senator SPECTER[continuing]. And, therefore, the Constitution prohibited reducing the rate of pay.

Ms. McLAUGHLIN. I think that's what you told us.

Senator SPECTER. That's what I told you, and that's what the court did. Do you think that was a proper decision or judicial activism or conflict of self-interest?

Ms. McLAUGHLIN. Senator, not knowing the precedent, I would hesitate to——

Senator SPECTER. There was on precedent. The case of first impression.

Ms. McLAUGHLIN. Not having heard the arguments and read the briefs, I would be reluctant to enter into that.

Senator SPECTER. That is what Justice Scalia said most of the time when we asked him questions.

Well, thank you very much, Ms. McLaughlin. I am optimistic with your nomination, as with others, that you will be confirmed.

[The questionnaire follows:]

MARY A. McLAUGHLIN

Birth:	November 18, 1946	Philadelphia, Pennsylvania
Legal Residence:	Pennsylvania	
Marital Status:	Divorced	
Education:	1964 - 1968	Gwynedd-Mercy College B.A. degree, <i>magna cum laude</i>
	1968 - 1969	Bryn Mawr College M.A. degree
	1973 - 1976	University of Pennsylvania Law School J.D. degree, <i>magna cum laude</i>
Bar:	1977	Pennsylvania
	1978	District of Columbia
Experience:	1976 - 1977	Law Clerk to the Hon. Stanley Brotman, U.S. District Court District of New Jersey
	1977 - 1980	Arnold & Porter Associate
	1980 - 1984	Assistant U.S. Attorney U.S. Attorney's office for the District of Columbia
	1984 - 1986	Vanderbilt University School of Law Assistant Professor of Law
	1988	University of Pennsylvania Law School Adjunct Professor
	1989	Rutgers University School of Law Adjunct Professor
	1995	United States Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Government Information Chief Counsel
	1986 - present	Dechert Price & Rhoads Partner
Office:	4000 Bell Atlantic tower 1717 Arch Street Philadelphia, PA 19103	

To be United States District Judge for the Eastern District of Pennsylvania

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name: (including any former names used)
 Mary Agnes McLaughlin
 Used Mary A. Matthews from January 1972 through approximately June 1974. Matthews is the name of my former husband.
2. Address: List current place of residence and office address(es).
 Office: Dechert Price & Rhoads, 4000 Bell Atlantic Tower, 1717 Arch Street,
 Philadelphia, PA 19103
 (215) 994-2958
 Home: 1941 Panama Street
 Philadelphia, PA 19103
 xxxxxxxxxxxxxx
3. Date and place of birth:
 November 18, 1946; Philadelphia, PA
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Divorced
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
 1973-76 UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
 J.D., Magna cum Laude, 1976
Honors:
 Editor of Law Review: 1975-1976
 Associate Editor of Law Review: 1974-1975
 Order of the Coif
 1968-69 BRYN MAWR COLLEGE
 M.A., Latin, 1969
 1964-68 GWYNEDD-MERCY COLLEGE
 B.A., Latin, Magna cum Laude, 1968

Honors:

Member of Sigma Phi Sigma and Kappa Gamma Pi Honor Societies
Included in "Who's Who Among Students in American Colleges and Universities"

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

Summer IBM Corporation
1968 16th & J.F. Kennedy Boulevard
Philadelphia, PA

Summer Longport Inn
1969 Longport, New Jersey

1975 Summer Associate, Dechert Price & Rhoads
4000 Bell Atlantic Tower, 1717 Arch Street
Philadelphia, PA 19103

1976-1977 Law Clerk, Honorable Stanley S. Brotman
United States District Court for the District of New Jersey
U.S. District Courthouse
1 John F. Gerry Plaza, P.O. Box 1029
Camden, NJ 08101

1977-1980 Associate, Arnold & Porter
555 12th Street, NW
Washington, D.C. 20004

1980-1984 Assistant United States Attorney
United States Attorney's Office
555 4th Street, NW
Washington, D.C. 20001

1984-1986 Assistant Professor of Law
Vanderbilt University School of Law
131 21st Avenue South, Suite 207
Nashville, TN 37203-1181

- 1986-present Dechert Price & Rhoads (Partner since 1988)
4000 Bell Atlantic Tower, 1717 Arch Street
Philadelphia, PA 19103
- 1988 University of Pennsylvania Law School
(Teacher of Appellate Advocacy)
3400 Chestnut Street
Philadelphia, PA 19104
- 1989 Rutgers University School of Law
(Teacher of Evidence)
217 North 5th Street
Camden, NJ 08102
- 1995 Chief Counsel, Subcommittee on Terrorism, Technology
and Government Information of the Senate Committee on
the Judiciary in connection with Ruby Ridge Hearings.

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.

Attorney General Special Achievement Award while in the United States Attorney's Office

Paul J. Hartmann Award for Outstanding Teaching while at Vanderbilt Law School (Voted by the students)

ACLU 1998 Civil Liberties Award presented by the American Civil Liberties Union Foundation of Pennsylvania

1998 Women of Distinction Award presented jointly by the Philadelphia Business Journal, the Forum of Executive Women, and the National Association of Women Business Owners

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 American Law Institute
Philadelphia Bar Association

Pennsylvania Bar Association
 D.C. Bar Association
 Federal Courts Committee - - Eastern District of Pennsylvania
 Acted as Historian for Federal Courts 200 Inc. in 1989, which celebrated the founding of
 the Federal Courts and their role in American history
 American Bar Association
 Litigation and Antitrust Law Sections
 Delegate to the Third Circuit Judicial Conference
 The Lawyer's Club of Philadelphia
 American Judicature Society

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

Women's Way
 The Forum of Executive Women
 The Penn Club of New York

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 for the Eastern District of Pennsylvania - Admitted: 12/14/95
 United States District Court for the District of Nebraska - Admitted: 1/6/93
 United States Tax Court - Admitted: 2/22/89
 United States Court of Appeals for the District of Columbia Circuit - Admitted: 1/12/83
 United States District Court for the District of Columbia - Admitted: 4/2/79
 District of Columbia Bar - Admitted: 1/27/78
 United States Court of Appeals for the Third Circuit - Admitted: 6/9/77
 Supreme Court of Pennsylvania - Admitted: 1/17/77

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.

Comment, "Implementing Title IX: The HEW Regulations," 124 U. Pa. L. Rev. 806 (1976).

McLaughlin, Mary A., *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 Vand. L. Rev. 1003 (1999).

Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary (1996).

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

Excellent; July, 1999
14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.
15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

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

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:

1976-1977 Law Clerk, Honorable Stanley S. Brotman
United States District Court for the District of New Jersey
U.S. District Courthouse
1 John F. Gerry Plaza, P.O. Box 1029
Camden, NJ 08101

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:

- 1977-1980 Associate, Arnold & Porter
555 12th Street, NW
Washington, D.C. 20004
- 1980-1984 Assistant United States Attorney
United States Attorney's Office
555 4th Street, NW
Washington, D.C. 20001
- 1984-1986 Assistant Professor of Law
Vanderbilt University School of Law
131 21st Avenue South, Suite 207
Nashville, TN 37203-1181
- 1986-present Associate/Partner (since 1988), Dechert Price & Rhoads
Philadelphia, PA
- Fall University of Pennsylvania Law School
1988 (Teacher of Appellate Advocacy)
3400 Chestnut Street
Philadelphia, PA 19104
- Spring Rutgers University School of Law
1989 (Teacher of Evidence)
217 North 5th Street
Camden, NJ 08102
- 1995 Chief Counsel, Subcommittee on Terrorism, Technology
and Government Information of the Senate Committee on
the Judiciary in connection with Ruby Ridge Hearings.
711 Hart Senate Building
Washington, D.C. 20510

- 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.

My legal practice since graduating from law school in 1976 can be divided into three main areas: criminal prosecution; corporate litigation; and law teaching. I worked for the United States Attorney's Office in Washington, D.C. from 1980 until 1984 as an Assistant United States Attorney. While in that office, I spent time in the misdemeanor trial, grand jury, appellate, and felony trial sections. I had a total of 50 jury trials, argued 14 appeals, and investigated over 100 cases. The nature of the cases tried were varied: from drugs and robberies to burglaries and a homicide.

At both Arnold & Porter and Dechert Price & Rhoads, I have handled a wide variety of corporate litigation matters in the substantive areas of securities, antitrust, tort, white collar crime, and general commercial. My clients generally have been corporations. I also have done a substantial amount of pro bono litigation.

I was an Assistant Professor at Vanderbilt Law School for two years where I taught criminal law, criminal procedure, antitrust, and evidence. I also taught as an adjunct at Rutgers Law School (Evidence) and the University of Pennsylvania Law School (Appellate Advocacy). Finally, in the fall of 1995, I served for four months as Chief Counsel to the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary in connection with the Ruby Ridge Hearings.

- 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 during my time in the United States Attorney's office and at Dechert Price & Rhoads.

2. What percentage of these appearances was in:
 - (a) federal courts; - 80%
 - (b) state courts of record; - 20%
 - (c) other courts.

3. What percentage of your litigation was:
- | | |
|---------------|-------|
| (a) civil; | - 70% |
| (b) criminal. | - 30% |
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 51; sole or chief counsel for all. (I have not included in this number the injunction hearings, arbitrations, and bench trials I have had. See answer to question 19.)

5. What percentage of these trials was:
- | | |
|---------------|-------|
| (a) jury; | 100%. |
| (b) non-jury. | 0% |

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:
- the date of representation;
 - the name of the court and 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.

- (1) AlliedSignal v. AMP; AMP v. AlliedSignal, 1998 WL 967579 (E.D.Pa. 1998), 1998 WL 778348 (E.D.Pa. 1998)

I represented AlliedSignal Inc. in takeover litigation in the fall of 1998 against AMP Incorporated before the Honorable James T. Giles in the Eastern District of Pennsylvania. AlliedSignal tried to effect a hostile takeover of AMP. I was co-counsel with Arthur Fleischer and Alexander Sussman of Fried, Frank, Harris, Shriver & Jacobson, One New York Plaza, New York, NY 10004, (212) 859-8000. I wrote many of the briefs in both the United States District Court for the Eastern District of Pennsylvania and the Third Circuit and did much of the courtroom work, which involved an evidentiary hearing. Judge Giles issued a preliminary injunction, enjoining AlliedSignal from going forward with its consent solicitation of the shareholders of AMP until AlliedSignal made certain additional disclosures. The District Court then dissolved the injunction against AlliedSignal.

The litigation became moot when the shareholders of AMP approved a merger between AMP and Tyco International Ltd.

Opposing counsel were John Harkins, Harkins Cunningham, 1800 One Commerce Square, 2005 Market Street, Philadelphia, PA 19103, (215) 851-6701; and Jon Baughman, Pepper Hamilton, LLP, 3000 Two Logan Square, 18th & Arch Streets, Philadelphia, PA 19103, (215) 981-4069. Also involved in the litigation, representing AMP shareholders in a separate lawsuit, was Stuart Savett, Savett, Frutkin, Podell & Ryan, 325 Chestnut Street, Suite 700, Philadelphia, PA 19106, (215) 923-5400.

- (2) Maldonado v. Houstoun, 177 F.R.D. 311 (E.D. Pa. 1997), aff'd, 157 F.3d 179 (3d Cir. 1998), cert. denied, 119 S. Ct. 11802 (1999).

I was lead counsel for the plaintiffs in Maldonado v. Houstoun, a class action that was filed in the Eastern District of Pennsylvania in June 1997 before the Honorable Clarence C. Newcomer and challenged the durational residence requirement of the new Pennsylvania welfare law. At issue in the lawsuit was whether the Commonwealth of Pennsylvania could pay bona fide Pennsylvania residents who resided in the Commonwealth for less than 12 months smaller welfare benefits than residents who have lived in Pennsylvania for more than 12 months. The District Court granted a preliminary injunction, enjoining the differential treatment. The Third Circuit (Judges Stapleton, Rosenn and Restanti) affirmed. Certiorari was denied by the Supreme Court, after the Supreme court decided the identical issue in Saenz v. Roe, 119 S.Ct. 1518 (1999).

I worked on this case with the following lawyers from public interest organizations: Susan Frietsche, The Women's Law Project, 125 South 9th Street, Suite 300, Philadelphia, PA 19107, (215) 928-9801; Richard Weishaupt, Community Legal Services, Law Center North Central, 3638 North Broad Street, Philadelphia, PA 19140, (215) 981-3773; and Professor Seth Kreimer, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, PA 19104, (215) 898-7447. The lawyer for the Commonwealth was Joel M. Ressler, Senior Deputy Attorney General, Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120, (717) 783-1471.

- (3) Local 56, United Food and Commercial Workers Union et al v. Campbell Soup Company et al, 898 F. Supp. 1118 (D.N.J. 1995).

I was chief counsel to Campbell Soup Company in a series of class actions that were filed around the country in 1995 and sent by the Multi-District Litigation Panel to Judge Stanley S. Brotman in the District of New Jersey. These cases challenged a change that Campbell made to its retiree medical benefits. Judge

Brotman granted summary judgment in favor of my client, Campbell Soup Company, on the ERISA contract claim and we started the trial of the fiduciary duty claim; the case settled after two days of trial. The lead counsel for the plaintiffs was Alan Sandals, Sandals, Langer & Taylor, LLP, One Liberty Place, 50th Floor, 1650 Market Street, Philadelphia, PA 19103, (215) 419-6505.

- (4) Huhta v. The Children's Hospital of Philadelphia, et al., C.A. No. 93-2765 (Fullam, J. 1994), Appeal No. 94-1685 (affirmed 1995)

I represented the Children's Hospital of Philadelphia in an antitrust action brought by a former physician who challenged the hospital's decision to allow only staff physicians to perform certain procedures in some of the laboratories. Also named as defendants were several physicians and administrators of the hospital and the Trustees of the University of Pennsylvania. I was lead counsel for all of the defendants. Judge John P. Fullam granted Children's Hospital summary judgment and the Third Circuit (Judges Greenberg, Nygaard, and McKee) affirmed that decision.

Counsel for the plaintiff was Robert Bray, Stevens & Lee, 1818 Market Street, Philadelphia, PA 19103, (215) 575-0100. Counsel for the codefendants were William J. O'Brien and Howard Klein, Conrad, O'Brien, Gellman & Rohn, 1515 Market Street, 16th Floor, Philadelphia, PA 19102, (215) 864-9600 (Dr. Elias Schwartz); Michael Baylson, and Wayne Mack, Duane, Morris & Heckscher, One Liberty Place, Suite 4200, Philadelphia, PA 19103, (215) 979-1152 (Trustees of the University of Pennsylvania); Edward Mengel, White and Williams, 1800 One Liberty Place, Philadelphia, PA 19103; (215) 864-7154 (Dr. Chin); and Edward Schwabenland, Schwabenland & Ryan, 995 Old Eagle School Road, Suite 306, Wayne, PA 19087, (610) 971-9200 (Dr. Clark).

- (5) Commonwealth of Pennsylvania v. Philip Morris, Inc. et al., C.A. No. 2443, April Term 1997

I represented Philip Morris in the case brought against the tobacco industry by the Attorney General of Pennsylvania. That case settled as part of a nationwide settlement with state Attorneys General. I handled the two days of settlement hearings before Judge John W. Herron of the Court of Common Pleas of Philadelphia County. Judge Herron approved the settlement on February 26, 1999. An anti-smoking activist has appealed Judge Herron's approval to the Commonwealth Court. The appeal is pending. Lawyers for the Attorney General were: Reeder Fox and Mark Lipowicz, Duane, Morris & Heckscher, One Liberty Place, Suite 4200, Philadelphia, PA 19103, (215) 979-1270; and Stanley Yorsz, Buchanan Ingersoll, 1 Oxford Center, 20th Floor, 301 Grant Street, Pittsburgh, PA 15219, (412) 562-8800.

- (6) Weinstein v. Bell Atlantic Corp., et al., C.A. No. 02131, Court of Common Pleas, (Phila.).

I represented Bell Atlantic in a consumer fraud class action pending in the Court of Common Pleas before the Honorable Stephen E. Levin. The lawyer representing the plaintiff is Joseph Kohn, Esq., Kohn, Swift & Graft, P.C., Suite 2400, 1101 Market Street, Philadelphia, PA, 19107, (215) 238-1700. Judge Levin refused to certify a class action as to the fraud count of the complaint and the multi-state aspect of the complaint but did certify a class as to the Pennsylvania breach of contract claim. The Court approved a settlement of the action in December, 1999.

- (7) Skipworth v. Atlantic Richfield, 547 Pa. 224, 690 A2d 169 (1997); 544 Pa. 613, 674 A2d 1075 (1996); 445 Pa. Super 610, 665 A2d 1228 (1995).

This was one of a series of cases brought in state and federal courts in the Philadelphia area against lead paint manufacturers and successors in interest to lead paint manufacturers. Robert Heim and I represented Atlantic Richfield Company. Arnold & Porter was co-counsel with us. My role was to conduct the depositions in the case, coordinate the litigation among all of the defendants, and be involved in the brief writing and strategy. The three primary lawyers for Arnold & Porter were Otis Pearsall and Philip Curtis of Arnold & Porter's New York Office: 399 Park Avenue, New York, NY 10022, (212) 715-1000; and Larry Stein who at the time was a partner in the D.C. office of Arnold & Porter. Mr. Stein is currently the general counsel of Wyeth Laboratories in Radnor, Pennsylvania (610) 971-5836. Summary judgment was granted and the Superior and Supreme Courts of Pennsylvania affirmed.

The plaintiff's lawyers were Lawrence Cohan and Colleen Hickey of Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, 1900 Delancey Place, Philadelphia, PA 19103, (215) 735-1130. Colleen Hickey is no longer at Anapol, Schwartz. She is currently working at Rhone-Poulenc Rorer Inc., 500 Arcola Road, PA 19426, (610) 454-8000. There were many lawyers for the codefendants. The ones I had most contact with were William J. O'Brien and Howard Klein, Conrad, O'Brien, Gellman & Rohn, 1515 Market Street, 16th Floor, Philadelphia, PA 19102, (215) 864-9600.

- (8) Pennwalt Corp. v. Centaur Partners, 710 Supp. 111 (E.D. Pa.1989).

We represented Pennwalt Corporation in 1989 in a lawsuit against Centaur Partners which had announced a hostile tender offer for Pennwalt Corporation. The litigation was in the Eastern District of Pennsylvania before Judge Robert S. Gawthrop. Pennwalt attempted to enjoin Centaur Partners from conducting a

proxy solicitation on the ground that Centaur had committed various securities violations. There was an evidentiary injunction hearing with witnesses. Matthew Broderick, a now retired Dechert partner, and I split the witnesses. Judge Gawthrop denied the preliminary injunction. We then filed a second request for a preliminary injunction based on actions of Centaur Partners during the proxy solicitation. Judge Gawthrop granted that preliminary injunction. The case ended at that point because Pennwalt agreed to be bought by Elf Aquitaine, a French company.

Representing Centaur Partners were Judge Bruce W. Kauffman and David H. Pittinsky, Ballard, Spahr, Andrews & Ingersoll, 1735 Market Street, 51st Floor, 19103, (215) 665-8500. Also involved in the litigation on behalf of Pennwalt Shareholders was Stuart Savett, Savett, Frutkin, Podell & Ryan, 325 Chestnut Street, Suite 700, Philadelphia, PA 19106, (215) 923-5400.

- (9) Bell Atlantic Corp. v. Bolger, et al., 2 F.3d 1304 (3d Cir. 1993)

This case was brought as a class and derivative action against Bell Atlantic Corporation as a nominal defendant and the directors of Bell Atlantic. Robert Heim and I represented the defendants. The class allegation was that the directors had violated the securities law in failing to disclose certain facts in the proxy material filed by Bell Atlantic Corporation. The derivative allegation was that the directors had breached their fiduciary duty to the company by failing to prevent certain conduct by a Bell Atlantic Corporation subsidiary that had led to the payment of a fine to the Pennsylvania Attorney General. The case was before Judge Marvin Katz of the Eastern District of Pennsylvania. Judge Katz granted partial summary judgment to Bell Atlantic Corporation. The case then settled. The settlement resolved both the derivative claim and the class action claim. An individual who had sued Bell Atlantic in Pennsylvania State Court objected to the settlement but Judge Katz approved it. The objector then appealed to the Third Circuit and the Third Circuit affirmed. (Judges Scirica, Mansmann, and Feinberg).

The plaintiff was represented by C. Oliver Burt, III and James R. Malone, Jr. of Chimicles & Tikellis, One Haverford Centre, 361 West Lancaster Avenue, Haverford, Pa. 19041, (610) 642-8500.

- (10) Hawkins v. United States, 461 A. 2d 1025 (D.C. Ct. of App. 1983)

This case involved an appeal of a murder conviction that I handled in the D.C. Court of Appeals while an Assistant United States Attorney. It involved significant issues with respect to a defendant's Miranda rights. The defendant-appellant was represented by Scott Howe of the Public Defender Service, 633 Indiana Avenue, Washington, D.C. 20004, (202) 628-1200.

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 practice at Dechert has involved many large class actions concerning the substantive areas of securities, mergers/acquisitions, antitrust, products liability, etc. I have also done a lot of high impact pro bono litigation as well as general commercial litigation. Most of my cases have involved injunction hearings, trials that settled before verdict, matters that were dismissed before trial, or arbitrations. I was chief counsel in approximately eight injunction hearings, co-counsel in two additional injunction hearings, and chief counsel in three arbitrations. I started trial in an ERISA class action that settled after two days of witnesses.

I also spent several months in the fall of 1995 as Chief Counsel to the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary in connection with the Ruby Ridge Hearings. I represented all the Senators on the Subcommittee (Democrats and Republicans). I also taught in a tenure track position at Vanderbilt Law School for two years and as an adjunct at Rutgers Law School and the University of Pennsylvania Law School.

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 withdrawal from Dechert Price & Rhoads, I would be entitled to my cumulative percentage interest in the profits of the firm for the year in which I withdrew less profit distributions made before withdrawal.

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 try to comply scrupulously with the requirements of 28 U.S.C. § 455, which governs the disqualification of judges. In terms of procedure, I would review promptly every new case assigned to me for any personal connection to the plaintiff's lawyer or the parties as well as any financial interest in either of the parties. I would similarly review entries of appearance of defense counsel. I would also have my law clerks review incoming cases to verify that they, too, were free from any conflicts of interest. During initial service as a District Court Judge, and for an appropriate time thereafter, I would recuse myself from any cases involving my law firm, Dechert Price & Rhoads, and from certain clients I have represented regularly as well as organizations on whose Boards I served.

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, I plan not to pursue outside employment.

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

See financial disclosure report, attached hereto.

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

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

I have served on host and/or finance committees for Senator Arlen Specter (1997-1998), State Senator Allyson Schwartz (1990-1999), and City Councilwoman Happy Fernandez (1998-1999).

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 bank	238,318.50	Notes payable to banks-secured	0
U.S. Government securities - add schedule		Notes payable to banks - unsecured	0
Listed securities - add schedule	240,195.18	Notes payable to relatives	0
Unlisted securities - add schedule	6,745.78	Notes payable to others	0
Accounts and notes receivable:		Accounts and bills due	0
Due from relatives and friends		Unpaid income tax	0
Due from others		Other unpaid tax and interest	0
Doubtful		Real estate mortgages payable - add schedule	150,000.00
Real estate owned - add schedule	250,000.00	Chattel mortgages and other liens payable	0
Real estate mortgages receivable		Other debts - itemize:	0
Autos and other personal property			
Cash value - life insurance			
Other assets - itemize: see attached schedule	840,355.10		
		Total Liabilities	150,000.00
		Net Worth	1,425,614.56
Total Assets	1,575,614.56	Total liabilities and net worth	1,575,614.56
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker 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		

Mary A. McLaughlin

LISTED/UNLISTED SECURITIESI. Listed Securities.

	<u>Value</u>
Vanguard Index Trust 500	\$78,606.79
Vanguard Windsor II Fund	<u>61,848.39</u>
	\$140,455.18

I have invested in an investment partnership set up by the partners of Dechert Price & Rhoads. The investment partnership holds in my account listed securities as follows:

	<u>Value</u>
Internet Capital Group, Inc.	\$49,740.00
Intersil Corporation	\$50,000.00

II. Unlisted Securities.

The investment partnership holds in my account unlisted securities as follows:

	<u>Value*</u>
Adolor Corporation Series G Preferred Stock	\$1,588.75
Idealab! Series D Preferred Stock	3,934.11
United Internet Artists Corp. (Z.com) Series C Preferred Stock	<u>1,222.92</u>
	\$6,745.78

* The acquisition of these shares has occurred within the last sixty (60) days so I have valued them at cost.

SCHEDULE OF OTHER ASSETS

1.	<u>Funds in DP&R HR10 Plan.</u>	
		<u>Value</u>
	Harbor Capital Appreciation	\$82,670.14
	Harbor International Fund	21,452.71
	MAS Small Capitalization Value	31,368.25
	MAS Value Portfolio	32,830.42
	PIMCO Low-Duration Fund II	26,693.11
	PIMCO Total Return-Inst Class	56,683.56
	Scudder International Fund	25,096.81
	Strong Common Stock Fund	27,956.57
	Vanguard Index Trust 500 Portfolio	137,033.81
	Fidelity Spartan Money Market	13.64
	Brinson U.S. Equity	<u>17,209.80</u>
		\$459,008.82
2.	<u>Funds in DP&R 401(k) Plan.</u>	
	Windsor	\$26,191.52
	Retirement Savings Trust Fund	<u>128,497.51</u>
		\$154,689.03

3.	<u>Morgan Stanley Dean Witter Mutual Funds (IRA).</u>	
		<u>Value</u>
	MSDW Global Div Grow B	\$14,773.03
	MSDW Developing Growth B	17,429.65
	MSDW American Opportunities B	<u>17,292.81</u>
		\$49,465.42
4.	<u>Mellon Bank.</u>	
	Medical Savings Account	\$1,442.00
5.	<u>DP&R Capital Account.</u>	\$167,449.83
6.	Interest in Deed of Trust regarding participation rights under lease with Bell Atlantic Properties, Inc. (my interest ceases if I withdraw from DP&R).	\$8,300.00

Mary A. McLaughlin

REAL ESTATE SCHEDULE

Real Estate Owned (Private Residence)	1941 Panama Street Philadelphia, PA 19103
Estimated Market Value	\$400,000.00
Outstanding Mortgage	<u>150,000.00</u>
Equity	\$250,000.00

AO-10 (w)
Rev. 1/98

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) McLaughlin, Mary A.	2. Court or Organization U.S. District Court, E.D. PA	3. Date of Report 03/13/2000
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Nominee - U.S. District Judge	5. Report Type (check type) X Nomination, Date 03/09/2000 Initial _____ Annual _____ Final _____	6. Reporting Period 01/01/1999 to 03/10/2000
7. Chambers or Office Address Dechert Price & Rhoads ("DP&R") 1717 Arch Street Philadelphia, PA 19103	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 Partner	Dechert Price & Rhoads
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 1995	DP&R Partnership Agreement re: payments made on withdrawal from partnership: paid in capital and cumulative percentage interest in the profits of (cont'd. Part 8)
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 1998	Share of firm profits as Partner of DP&R	\$ 516,071.00
2 1999	Share of firm profits as Partner of DP&R	\$ 592,625.00
3 2000	Draw against firm profits as Partner of DP&R	\$ 35,625.00
4		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	McLaughlin, Mary A.	03/13/2000

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	<input type="checkbox"/> NONE (No such reportable reimbursements.)	SOURCE	DESCRIPTION
1	EXEMPT		
2			
3			
4			
5			
6			
7			

V. GIFTS
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	<input type="checkbox"/> NONE (No such reportable gifts.)	SOURCE	DESCRIPTION	VALUE
1	EXEMPT			
2				
3				

VI. LIABILITIES
(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(C)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	<input checked="" type="checkbox"/> NONE (No reportable liabilities.)	CREDITOR	DESCRIPTION	VALUE CODE*
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 McLaughlin, Mary A.	Date of Report 03/13/2000
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(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS— income, value, transactions

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(C)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i> <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-F)	(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-F)	(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 DP&R Capital Account	E	Interest	M	T					
2 First Union Cap Account	A	Interest	K	T					
3 First Union Checking Account		None	K	T					
4 First Union Savings Account	A	Interest	J	T					
5 Harbor Capital Appreciation (HR10)	D	Dividend	L	T					
6 Harbor International Fund (HR10)	B	Dividend	K	T					
7 MAS Small Capitalization Value (HR10)	B	Dividend	K	T					
8 MAS Value Portfolio (HR10)	D	Dividend	K	T					
9 FIMCO Low-Duration Fund II (HR10)	B	Dividend	K	T					
10 FIMCO Total Return-Inst Class (HR10)	C	Dividend	L	T					
11 Scudder International Fund (HR10)	B	Dividend	K	T					
12 Strong Common Stock Fund (HR10)	C	Dividend	K	T					
13 Vanguard Index Trust 500 Portfolio (HR10)	B	Dividend	M	T					
14 Fidelity Spartan Money Market (HR10)	A	Dividend	J	T					
15 Brinson U.S. Equity (HR10)	B	Dividend	K	T					
16 Windsor - 401(k)		None	K	T					
17 Retirement Savings Trust Fund (401(k))	D	Dividend	M	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)	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
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 McLaughlin, Mary A.	Date of Report 03/13/2000
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VII Page 2 INVESTMENTS and TRUSTS-- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. 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				
					If not exempt from disclosure				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-F)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	(2) Date: Month/Day	(3) Value Code (J-F)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
18 MSWM Global Div Grow B (IRA)	A	Dividend	J	T					
19 MSWM Developing Growth B (IRA)	A	Dividend	K	T					
20 MSWM American Opportunities B (IRA)	A	Dividend	K	T					
21 Mellon Bank - Medical Savings Account	A	Interest	J	T					
22 Interest in Deed of Trust (Bell Atlantic Properties)	B	Interest	J	T					
23 Vanguard Index Trust 500	A	Dividend	L	T					
24 Vanguard Windsor II Fund	B	Dividend	L	T					
25 Internet Capital Group, Inc. - Stock		None	K	T					
26 Intersil Corporation - Stock		None	K	T					
27 Adolor Corporation-Series G Preferred Stock		None	J	U					
28 Idealab1-Series D Preferred Stock		None	J	U					
29 United Internet Artists Corp. (8.com) Series C Preferred		None	J	U					
30 Schwab - Money Market Fund	C	Interest	M	T					
31									
32									
33									
34									
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) B=\$1,001-\$2,500 G=\$2,501-\$5,000 H1=\$5,001-\$10,000 H2=\$10,001-\$25,000 I=\$25,001-\$50,000 J=\$50,001-\$100,000 K=\$100,001-\$500,000 L=\$500,001-\$1,000,000 M=\$1,000,001-\$5,000,000 N=\$5,000,001-\$15,000,000 O=\$15,000,001-\$50,000,000 P=\$50,000,001-\$100,000,000 Q=\$100,000,001-\$500,000,000 R=\$500,000,001-\$1,000,000,000 S=\$1,000,000,001-\$5,000,000,000 T=\$5,000,000,001 or more 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) R=Cost (real estate only) V=Other S=Assessment W=Estimated T=Cash/Market									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	McLaughlin, Mary A.	03/13/2000

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report)

(PART 2: Parties and Terms - Continued) ...the firm for the year in which partner withdraws less profit distributions made before withdrawal.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	McLaughlin, Mary A.	03/13/2000

IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 Mary A. McLaughlin Date 3/13/2000

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 have spent hundreds of hours since I came to Dechert Price & Rhoads in 1986 working on pro bono litigation. Most of my work has been on behalf of poor women living in the Commonwealth of Pennsylvania. I have also served on the board and was chair of the board of the Women's Law Project, a public interest law firm in Philadelphia that concentrates on providing services to women, especially poor women.

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 am a member of the Forum of Executive Women (1991 to present) and the Cosmopolitan Club (1996 to 1999). Although the bylaws do not limit membership to women, all members of each organization are women. I have not done anything to try to change that fact.

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 my jurisdiction to recommend candidates for nomination to the federal courts – the Federal Judicial Nominating Commission of Pennsylvania. I requested an application from the Commission, filled it out and sent it to the Commission. I was called in for a day of interviews. In the morning, I interviewed with approximately seven members of the Commission. I was then called back in the afternoon for a second interview before the entire commission. Since my selection by the Commission, I have spoken with various officials of the White House 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 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.

Any discussion of “judicial activism” should start with the principle of the separation of powers - - the bedrock of our constitutional form of government. Judges neither make nor execute the laws. They interpret them in the context of a specific controversy that requires adjudication. A judge must decide the case before the Court under the applicable substantive and procedural law. Standing and ripeness are important jurisprudential principles that should be carefully applied by judges to ensure that a judge acts only when necessary to resolve a specific dispute.

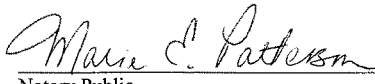
AFFIDAVIT

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

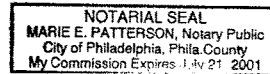
March 13, 2000



MARY A. McLAUGHLIN



Notary Public



Senator SPECTER. Senator Kohl has asked that his statement be placed in the record commending you for the work you did with Ruby Ridge. He was the Ranking Democrat and noted your very considerable intellectual and legal talents and judicial temperament. So that will be made a part of the record.

[The prepared statement of Senator Kohl follows:]

PREPARED STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE
OF WISCONSIN

I am pleased that we are holding this judicial nominations hearing, and, in particular, that we are considering the nomination of Mary McLaughlin to the U.S. District Court for the Eastern District of Pennsylvania. We all know Ms. McLaughlin from her superior work as Special Counsel for our Terrorism Subcommittee during the Ruby Ridge investigation. During that process, Ms. McLaughlin demonstrated precisely the qualities required of a federal judge—she is intelligent, fair-minded, tough, possesses a judicial temperament, and is deeply committed to the cause of justice—in sum, extraordinarily capable of handling the responsibilities of this position. She widely deserves the strong support she has obtained from both sides of the aisle, within the Committee and in the Senate as a whole. I want to commend the Administration and Senators Specter and Santorum for supporting her nomination and urge my colleagues to swiftly confirm her to this position.

Senator SPECTER. That concludes the hearing.

Ms. McLAUGHLIN. Thank you, Mr. Chairman.

[Whereupon, at 5:19 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF ALLEN R. SNYDER TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer 2. I believe a lower court judge is legally and ethically required to follow binding Supreme Court precedent, regardless of his or her personal views. I would do so in all cases.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. Yes.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 4. No.

Question 5. [a] Do you believe that 10, 15, or even 20 year delays between conviction of a capital offender and execution is too long? [b] Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. a. Yes.

b. Yes.

Question 6. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. In interpreting and applying both statutes and constitutional provisions, judges should be determining the intent of the drafters/framers regarding the meaning of the provisions in question, and applying that intent to the facts of the particular case. In doing so, judges should look at the plain language of the statute/constitutional provision and, if it is ambiguous, at the legislative history. In the case of lower court judges, they should look at higher court precedent that is binding on them, and apply it. In the event there is no binding precedent, but there are analogous precedents that provide relevant guides, lower court judges should try to fit their decisions into the framework of those cases. These sources and methods of decision-making are most consistent with Article III judicial power, as they recognize that under our constitutional system judges are not elected and have no proper role in setting policy, but should defer to the other branches in that regard. The role of judges is to apply the legislative/constitutional provisions in an impartial and reasoned way to the facts before them.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the

impact of each approach on the judicial power established by Article III of the Constitution.

Answer 7. I believe that following the text of the Constitution and assessing and applying the Framers' intent to the facts and circumstances before the court is the proper role of the courts. I do not agree that the "community's interpretation" of constitutional provisions is a proper consideration, as suggested by the second approach listed in this question. Regarding the third approach, the Constitution provides for a method of amendment. If that is done, then courts should interpret and apply the constitutional provisions as amended.

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 8. If there were a binding precedent (from the same Circuit or the Supreme Court) on the constitutionality of a statute, I would follow that precedent. If there were no binding precedent, I would look to analogous precedents from the Circuit or the Supreme Court and attempt to fit this case into a logical framework of those cases. If neither the Circuit nor the Supreme Court had decided a case of any relevance, I would look to precedents of other courts for useful guidance. In addition, absent any binding precedent, I would look at the plain language of the constitutional text, or if it were ambiguous, at the intent of the Framers as determined by its "legislative history" (materials like the Constitutional Convention debates and the Federalist Papers), and determine whether the statute violated the Constitutional provision, recognizing that all legislative enactments come to the courts with a presumption of constitutionality.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 9. In *Griswold*, the Court held that a Connecticut statute making it a crime for any person to use any drug or article to prevent conception violated a constitutional right of privacy. The Court indicated that the sources of that right are "penumbras, formed by emanations" from several provisions of the Bill of Rights and that the "right of privacy (is) older than the Bill of Rights." In *Alden*, the Court held that the powers delegated to Congress under Article I of the Constitution do not include the power to subject non-consenting states to private suits for damages in state courts. The source of that holding was not the Eleventh Amendment, but rather a "residuary and inviolable sovereignty" of the states, which the Court held was consistent with the history and intent of the Framers of the original Constitution. Both decisions have been criticized by some because they strike down legislative enactments, absent any particular constitutional text that the Court found required that result.

Question 10. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 10. In *Wickard*, The Court held that certain provisions of the Agricultural Adjustment Act were constitutional because authorized by a broad reading of Congress' powers under the Commerce Clause. In *Lopez*, the Court held that provisions of the Gun-Free School Zones Act were unconstitutional because there were insufficient Congressional findings and legislative history to demonstrate that the subject of the Act was within Congress' power under Commerce Clause. The *Lopez* the decision would appear to place a greater burden on Congress to justify its action under the Commerce Clause, and appear to call for a larger judicial role in reviewing Congressional enactments under that standard. To the extent that the federal power under the Commerce Clause is constrained by *Lopez*, there would be a broader area of state governmental discretion to act without federal preemption of the field.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

D. *Baker v. Carr*, 369 U.S. 186 (1962).

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 11. The Constitution makes clear that the federal government is one of enumerated powers, and that all powers not delegated to the federal government are reserved for the states and the people. The Supreme Court has interpreted this concept of federalism to mean that American citizens must look to their state government and state judges to protect certain rights, while the federal government and federal judges are limited to actions within the spheres set forth in the Constitution for federal law. In *Lopez*, as discussed above, the Court set forth a standard for review of Congressional determinations that a matter is within the Constitution's Commerce Clause, potentially limiting to some extent the sphere of federal government authority and correspondingly increasing the sphere of allowable state government authority. In *Printz*, the Court held unconstitutional certain provisions of the Brady Act, which commanded that the chief law enforcement officer of each local jurisdiction conduct certain background checks regarding handgun purchases. The Court held that such a federal statutory requirement imposed on state officials violated principles of state sovereignty, thus further delineating the distinction between the federal government's power and authority, and state governments' power and authority. In *Alden*, the Court held that Congress could not subject a state to private suits for damages in state court without its consent, further limiting Congressional power that might interfere with state sovereignty. In *Baker v. Carr*, the Court held that there is federal court jurisdiction under federal civil rights statutes to review allegations that a state apportionment plan violates the Equal Protection Clause. This opinion opened the way for much greater federal review of state apportionment issues and, to that extent, increased the power of the federal government, as opposed to the state governments, with regard to apportionment issues. Finally, in *Shaw v. Reno*, the Court held that allegations of racial gerrymandering can state a valid claim under the Equal Protection Clause, even where allegedly done to benefit a minority group. While focusing on a very different type of state action, *Shaw v. Reno*, to some extent, takes *Baker v. Carr* a further step in the direction of federal court review and state apportionment issues.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies?

Answer 12. No.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. The existence of a statute both before and after adoption of a constitutional amendment may be relevant to determining the intent of the Framers of that amendment. In deciding such a case in the absence of binding precedent, I would look first at the plain language of the constitutional provision. If the language were ambiguous, a court should look at the Framers' intent. In deciding whether the constitutional amendment should be construed to have been intended to strike down the statute, it might be relevant to know whether the statute had been subject to judicial review prior to the constitutional amendment or whether that statute otherwise was a focus of the Framers of the amendment (either positively or negatively).

RESPONSES OF ALLEN R. SNYDER TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. I believe that is entirely within the discretion of the Senators reviewing the nominee. I assume the Senators would, individually and collectively, make a judgment, among other factors, on whether the nominee had a legitimate basis for declining to answer the question.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. I agree that the more fully candidates answer pertinent questions about constitutional issues, the more useful it is to the Senate in fulfilling its constitutional prerogative of advice and consent.

Question 3. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer 3. My understanding is that it is to obtain additional information from the candidates that may be helpful to the Senators in fulfilling their constitutional prerogative of advice and consent.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. No, I believe there are no constitutional or other limits on what a Senator can ask (subject only to any rules or rulings from the full Judiciary Committee or the Senate). There are, however, certain types of questions which the Code of Judicial Conduct would indicate nominees should decline to answer.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. No.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 6. It is extremely difficult for me to answer a hypothetical question regarding how I would have ruled if I were on the Supreme Court at a different time, when the prior precedents were different from today, at least without reviewing the briefs and record in the particular case and knowing all the precedents that were controlling then, as opposed to now. Nevertheless, I firmly believe that it is (and was) the duty of judges to give statutes a presumption of constitutionality and to interpret the Constitution based on the plain language of the text or, given ambiguity, based on the intent of its framers.

Question 7. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. That decision has been effectively overruled by the Thirteenth and Fourteenth Amendments to the Constitution and has no effect today.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. Yes.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 9. It is extremely difficult for me to answer a hypothetical question regarding how I would have ruled if I were on the Supreme Court at a different time, when the prior precedents were different from today, at least without reviewing the briefs and record in the particular case and knowing all the precedents that were controlling then, as opposed to now. Nevertheless, I firmly believe that it is (and was) the duty of judges to give statutes a presumption of constitutionality and to interpret the Constitution based on the plain language of the text or, given ambiguity, based on the intent of its framers.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 10. That precedent was overruled by the Supreme Court in *Brown v. Board of Education*, and has no effect today.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. It is extremely difficult for me to answer a hypothetical question regarding how I would have ruled if I were on the Supreme Court at a different time, when the prior precedents were different from today, at least without reviewing the briefs and record in the particular case and knowing all the precedents that were controlling then, as opposed to now. Nevertheless, I firmly believe that it is (and was) the duty of judges to give statutes a presumption of constitutionality and to

interpret the Constitution based on the plain language of the text or, given ambiguity, based on the intent of its framers.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 12. That precedent of the Supreme Court has not been overruled and thus should be followed by lower courts today.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. It is extremely difficult for me to answer a hypothetical question regarding how I would have ruled if I were on the Supreme Court at a different time, when the prior precedents were different from today, at least without reviewing the briefs and record in particular case and knowing all the precedents that were controlling then, as opposed to now. Nevertheless, I firmly believe that it is (and was) the duty of judges to give statutes a presumption of constitutionality and to interpret the Constitution based on the plain language of the text or, given ambiguity, based on the intent of its framers.

Question 14. In *Rew v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which prescribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 14. I believe that lower court judges are required to follow the holdings and reasoning of the Supreme Court's binding precedents in cases that come before them. Thus, unless the Supreme Court overruled or modified this precedent and its subsequent ruling in *Casey* (or there were a constitutional amendment), I would be obligated to follow the majority's holding, and not the reasoning of the dissent, were I to be confirmed for a lower court judgeship.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. I have no personal view on abortion that would interfere in anyway with my following the binding precedents of the Supreme Court, whatever they may be at the time, to a case that might come before me if I were confirmed.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. I have no personal view on the death penalty that would interfere in any way with my following the binding precedents of the Supreme Court, whatever they may be at the time, to a case that might come before me if I were to be confirmed.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 17. I have no personal view on issues relating to the right to bear arms that would interfere in any way with my following the binding precedents of the Supreme Court, whatever they may be at the time, to a case that might come before me if I were to be confirmed.

Question 18. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 18. My understanding of the Supreme Court's decision in *Casey* is that it held, among other things, that states could prohibit, with certain exceptions, abortions of viable fetuses, and could regulate abortion prior to the point of viability so long as they didn't unduly interfere with the rights recognized by the Court in *Casey*.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. I have no personal view on the question of whether an unborn child should be viewed as a human being (whether that question is viewed as a biological, moral, or legal question) that would interfere in any way with my following the binding precedents of the Supreme Court, whatever they may be at the time, to a case that might come before me if I were to be confirmed.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes, the Supreme Court has so held.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 21. I believe that Supreme Court Justices should overrule their prior precedents rarely, as there are substantial institutional and jurisprudential benefits of *stare decisis*. In the area of statutory construction, for example, even if a prior ruling may have been in error, the legislature is free to correct that error by further legislative action, and society benefits from a degree of stability and predictability in the law. The Supreme Court has ruled in cases like *Agostini v. Felton*. that *stare decisis* principles are at their weakest when the Court considers prior constitutional rulings, since, absent a constitutional amendment, they can not be overturned by anyone but the Justices. In that area, the Court has held that it should overrule a prior precedent when intervening precedents demonstrate clearly that the prior precedent erroneously interpreted the language and intent of the constitutional provision involved.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 22. I believe that judges should not consider legislative intent when the plain language of the statute is clear. When the language is ambiguous, it is proper to consider legislative history, although I do believe great care must be taken not to assume that an isolated statement from an individual legislator is necessarily the intent of the legislative body as a whole.

Question 23. You argued before the Supreme Court in *Missouri v. Jenkins*, 5155 U.S. 1139, and the Supreme Court adopted your position that Kansas City School Board could constitutionally raise local taxes without a vote to remedy segregation in its schools. Why do you think that it is constitutional for judges to order tax hikes without a vote of a deliberative body?

Answer 23. In this case, I took the position for a paying client in the District Court that the courts should *not* adopt a tax increase proposal made by another party in the case, but rather should adopt an alternative approach to funding the remedy the court had found was constitutionally required. The District Court did not accept my client's position. In the Court of Appeals, my client took the position that the District Court had the discretion to adopt the position it took, but we suggested that it consider the alternative approach that we had urged in the District Court instead. In a 2-1 vote, the Court of Appeals rejected our alternative approach and ruled that it was not unconstitutional for a federal judge to enjoin a state law that had prevented the elected school board from adopting a tax increase that the elected officials wished to adopt, where such an injunction is necessary to fund a constitutionally required remedy. In the Supreme Court, I argued on behalf of my client that this lower court decision was within the discretion of the court and thus constitutionally allowable, and the Court adopted that position. The Supreme Court has made clear in *Jenkins* and cases like *Monell v. New York City*, 436 U.S. 658 (1978), that court orders affecting taxes should be used only as a last resort when absolutely necessary to enforce a constitutional requirement.

Question 24. Your firm, Hogan & Hartson represented Parents, Families and Friends of Lesbians and Gays as a pro bono client in a case against the Christian Broadcasting Network. What was your involvement in the case and what was the ultimate resolution of this manner?

Answer 24. My role in this matter was to consult within my firm on the First Amendment/defamation issues and advise the attorney principally handling the matter. In that matter, the Christian Broadcasting Network (CBN) sent a letter to a number of broadcast stations threatening to initiate defamation proceedings against them because of television advertisements the stations had run or were considering running, which PFLAG had sponsored and which showed actual videotape of statements made by CBN officials (and others), juxtaposed with images which CBN felt made the accurate quotations defamatory. On behalf of PFLAG, my firm wrote a letter to CBN reviewing the law of defamation and arguing that it was not defamatory to show accurate quotations from CBN officials in an advertisement on an issue of public policy. The letter also indicated that PFLAG had contractual rights with the broadcast stations to have these advertisements aired, and it viewed the threat of litigation by CBN to be unwarranted and an interference with those rights. The ultimate outcome of the matter is that there was no litigation by either party. I believe that some stations chose to air the ad and others did not.

Question 25. Netscape is one of your clients and I would assume that you would recuse yourself from any cases involving Microsoft. Would that be an accurate assumption?

Answer 25. I would certainly recuse myself from any cases that had any significant relationship to the work I handled that was adverse to Microsoft. If there were a completely unrelated lawsuit (e.g., a slip-and-fall-case) against Microsoft by a third party whom I had never represented, I do not believe that my prior representation of Netscape on antitrust issues would in fact affect my impartiality in such a hypothetical case. I would have to review the Code of Judicial Conduct, and possibly consult with ethics authorities to determine whether recusal would be warranted in such a case.

Question: 26. In 1999, in an interview with the Morning Star of Wilmington, North Carolina, you argued that officials had failed to achieve racial balance in the school system. You were quoted as saying, "Many tough decisions were not made because they would have been politically unpopular. Since 1979, there has been a steady and substantial worsening of the problem." Please explain how the problem of racial imbalance in the schools is "worsening."

Answer 26. This quotation is from a statement I made in open court on behalf of the Charlotte-Mecklenburg School District (CMS), which my firm represented in the *Swann* litigation, which went to trial in April 1999. In that case, CMS, which was under a continuing court order to desegregate its schools, took the position that data presented and analyzed by CMS and other parties' expert witnesses showed that the level of desegregation in CMS schools had actually worsened since 1979, during a period when there had been no active court supervision. Thus, CMS argued that the court should not declare the district unitary but should continue (and modify) certain court orders until the vestiges of desegregation had been eliminated to the extent practicable.

RESPONSES OF ALLEN R. SYNDER TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Snyder, in *Missouri v. Jenkins*, the Supreme Court concluded that it was not unconstitutional for a federal judge to order a tax increase to remedy a constitutional violation. You argued this case on behalf of the respondents and in opposition to the state. (A) Do you believe this conclusion was dicta in the opinion? (B) Do you believe that the Constitution permits judges to order tax increases?

Answer 1. In this case, I took the position for a paying client in the District Court that the court should *not* adopt a tax increase proposal made by another party in the case, but rather should adopt an alternative approach to funding the remedy the court had found was constitutionally required. The District Court did not accept my client's position. In the Court of Appeals my client took the position that the District Court had the discretion to adopt the position it took, but we suggested that it consider the alternative approach that we had urged in the District Court instead. In a 2-1 vote the Court of Appeals rejected our alternative approach and ruled that it was not unconstitutional for a federal judge to enjoin a state law that had prevented the elected school board from adopting a tax increase that it wished to adopt, where such an injunction is necessary to fund a constitutionally required remedy. In the Supreme Court, I argued on behalf of my client that this lower court decision was within the discretion of the court and thus constitutionally allowable, and the Court adopted that position as described above.

(A) I believe the holding of the opinion is as described above. I do not believe the Supreme Court held or suggested in dicta that federal courts have the power generally to order tax increases.

(B). The holding of the Supreme Court does not appear to permit judges to order tax increases but rather, in exceptional circumstances where there are no other alternative ways to implement a constitutionally required remedy, to enjoin a state law that otherwise prevents the implementation of a constitutionally required remedy.

Question 2. Have you been involved in other cases, either before or since *Missouri v. Jenkins*, where the party or parties you represented encouraged the court to impose a tax increase as a potential remedy for a constitutional violation? If so, please explain.

Answer 2. No, I have not been involved in such a case.

Question 3. Assuming a federal judge has the constitutional power to raise taxes, do you believe it is wise and appropriate in some circumstances for a judge to raise taxes to remedy a constitutional violation?

Answer 3. I find it extremely difficult to imagine such circumstances.

Question 4. Assuming a Federal judge has the constitutional power to raise taxes, do you believe that Congress has the power to limit the jurisdiction of the lower Federal courts to prevent them from having the authority to order a tax increase?

Answer 4. I have never researched that issue and do not know the answer to this question. If I were ever to face such an issue as a judge, I would review carefully the relevant constitutional provisions and all the prior precedents that bear on Congressional withdrawal or modification of court jurisdiction over particular types of substantive rulings, and would follow any binding precedents on this point.

Question 5. Are there practical and/or legal limits to the nature and extent of relief a judge may order in a given case?

Answer 5. Yes. There are well recognized and important limitations on the equitable powers of a Federal judge in fashioning relief, including due deference to the powers of the other branches of government and separate sovereigns, and consideration of the practical ability of the judge, rather than elected officials to implement complex remedies.

Question 6. We frequently hear the argument that the courts act in response to various social problems because the legislatures failed to act on important issues. What is your view of courts acting in this manner?

Answer 6. Courts do not have the responsibility or authority, and it is not their role in our form of government, to "solve" social problems, but rather it is the role of courts to hear and decide only the cases that come before them, applying applicable Constitutional provisions, statutes, and legal precedents to the facts of the case.

Question 7. Do you have personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 7. No.

Question 8. What is your view of mandatory minimum sentences, and would you have any reluctance to impose or uphold them as a Federal judge?

Answer 8. Mandatory minimum criminal sentences reflect determinations by the elected branches of government as to the proper sentencing in particular cases. Where the elected branches have made such determinations, as a judge I would have no reluctance to impose or uphold such sentences.

Question 9. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while others say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 9. The Federal Sentencing Guidelines reflect a legislative balance between the need for consistency in judicial sentencing and the need for flexibility to consider the circumstances of each case. I would have no reluctance to uphold application of those Guidelines.

RESPONSES OF BERLE M. SCHILLER TO QUESTIONS FROM SENATOR THURMOND

Question 1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act on important issues. What is your view of courts acting in this manner?

Answer 1. Judges should not reach out to solve social problems and should not act when a legislature has failed to take action. The Constitution confines the jurisdiction and authority of the Federal courts to actual "cases and controversies" properly before them. District courts are bound by decisions of the Supreme Court and the Court of Appeals for their circuit.

Question 2. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 2. I have no personal objections that would cause me to be unable to impose or uphold a death sentence.

Question 3. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose or uphold them as a Federal Judge?

Answer 3. Congress has determined when mandatory minimum criminal sentences are appropriate and courts are obligated to apply those laws. I would have no reluctance to impose or uphold the imposition of mandatory minimum criminal sentences if I am fortunate enough to be confirmed as a Federal judge.

Question 4. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while oth-

ers say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 4. The Federal Sentencing Guidelines have been upheld by the courts, and I will apply them to the criminal cases that are tried before me.

RESPONSES OF BERLE M. SCHILLER TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes, I am committed to following all precedents of the Supreme Court and Third Circuit Court of Appeals.

Question 2. How would you rule if the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* (521 U.S. 507 (1997)) where the Court struck down the Religious Freedom Restoration Act.

Answer 2. I would follow the precedent of the Supreme Court and Third Circuit even if I felt that they had erred.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. I am committed to following the precedents of the Supreme Court and Third Circuit Court of Appeals on equal protection issues, regardless of any personal feelings I may have.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Answer 4. I have no legal or moral beliefs which inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me.

Question 5. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. The long delays between conviction of a capital offender and execution can be very frustrating to the justice system. Once Congress or a state legislature makes a policy decision that capital punishment is appropriate, the duty of a Federal judge is to carry out the law fairly and expeditiously.

Question 6. What authorities may a federal judge use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. A federal judge should first look to the plain language of the statute or constitutional provision and then to the Supreme Court precedent and then the Circuit Court. If neither answers the question, then a judge should examine analogous decisions from other jurisdictions. As a final authority one could look to legislative history, but should view committee reports as more reliable than comments of individual legislators. The use of these authorities is consistent with the exercise of the Article III judicial power because they serve to confine the exercise of judicial power and respect the powers committed to the other branches of government.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by the court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the "community interpretation" of constitutional text, see William J. Brennan, the Constitution of the United States: Contemporary ratification, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the constitution.

Answer 7. It is certainly legitimate for a judge to look to the plain meaning of the text of a statute and original intent of the Framers of the Constitution in considering claims of a constitutional right not previously upheld by the court. Similarly, it is just as legitimate for the ratification of an Amendment under Article V of the Constitution to establish a constitutional right not previously upheld by the court.

I do not believe that assessing or trying to discern the “community’s Interpretation” of a constitutional text is a legitimate approach in establishing or interpreting constitutional rights.

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of the first impression? In a case of first impression?

Answer 8. A constitutional challenge that was *not* one of first impression would be disposed of by following the precedent of the Supreme Court and the Third Circuit Court of Appeals.

In the rare constitutional challenge which was clearly first impression I would employ the following methodology. First, I would acknowledge that there is a presumption of constitutionality of any statute. Second, I would look to the plain meaning of the statute. Third, I would search for any analogous Supreme Court rulings concerning similar statutes. Fourth, I would look to the Third Circuit for decisions concerning similar statutes in the absence of Supreme Court holdings. Fifth, I would look to rulings concerning similar statutes in other jurisdictions and review the legislative history of the statute by looking at committee reports rather than the individual comments of legislators.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government power under Article III.

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 9. In *Griswold v. Connecticut*, the Supreme Court found a right to privacy, not based on specific language in the text of the Constitution but based on “penumbras, formed by emanations from those guarantees that help give them life and substance”. Similarly, in *Alden v. Maine* the Supreme Court looked not to the text of the Eleventh Amendment, but to the structure and history of the Constitution to find that states have “sovereign immunity” from private rights of action absent a waiver of that immunity.

Question 10. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress’s power and on the federal government’s power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 10. Both cases involve the question of the extent to which Congress can legislate on issues said to affect interstate commerce under the commerce clause of the Constitution (Article I, Section 8). The Supreme Court found that wheat production (even for personal consumption) affected interstate commerce (*Wickard v. Filburn*), but that creating “Gun Free School Zones” was not sufficiently related to interstate commerce (*United States v. Lopez*). In *Wickard*, the Supreme Court sustained Congress’s right to regulate interstate commerce thus increasing the power of the Federal government compared to the states. In *Lopez*, the Supreme Court found that documentation of the regulated activity’s affect on interstate commerce was lacking and thus limited the Federal government’s power in an area traditionally reserved to the states. In both cases, the Supreme Court exercised judicial power to review congressional power.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

D. *Baker v. Carr*, 369 U.S. 186 (1962).

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 11. Clearly the cases referred to in the question are examples of the nature and quality of the limits on state and federal power in different contexts. In *Baker v. Carr* and *Shaw v. Reno* the Federal court asserted jurisdiction over redistricting and apportionment cases even though they involved state political decision. However in *Shaw*, the Supreme Court held that “racial gerrymandering” for any reason was subject to strict scrutiny by the courts.

In *Alden v. Maine*, the Supreme Court found that Congress could not subject the state of Maine to private lawsuits without its consent, thereby allowing the state

to assert its “sovereign immunity”. Thus, the court indicated that its interpretation preserved state sovereignty from federal intrusion.

In *United States v. Lopez*, the Supreme Court found that Congress failed to specify how the criminal statute affected interstate commerce and in *Printz v. United States* the Supreme Court found that Congress did not have power to mandate the states to carry out a program legislated by Congress.

The respective roles of the state and federal government in our federal system has been a source of strength for our country. As these cases illustrate, the Constitution creates a healthy tension as to the limits of power each has with respect to the other. The Constitution’s division of power helps preserve the liberty of the individual from the concentration of power in one sovereign or one branch of government. Consequently, federal judges are limited to a certain degree, by the power or lack of it that may derive from the impact of federalism.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or other state agencies?

Answer 2. No, a Federal district court does not have the expertise to set such rules and should avoid taking on administrative responsibilities for prisons, schools or state agencies.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. A federal district court judge must try to give both the statute and the constitutional amendment effect. Since all statutes are presumed to be constitutional, and the question says that the Constitutional amendment at issue “implies” a created right a District judge should proceed very cautiously in considering any claim that such a statute is unconstitutional. A Federal District Court is obligated to follow any precedent of the Supreme Court or Court of Appeals interpreting the constitutional amendment or the statute.

RESPONSES OF BERLE M. SCHILLER TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. A nominee for the District Court should answer all questions to the best of his/her ability, within the confines of the Judicial Canons of Ethics and not in any way that would indicate or suggest a fixed view on any issue. A judge is obligated to follow the law despite any personal beliefs he or she might have about a constitutional issue.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. I think a Federal Judicial nominee may answer any question on constitutional law as far as what the Supreme Court or Court of Appeals has held in particular cases, what the Constitution provides or what the nominee himself may have said on a constitutional issue. Beyond that a candidate must be careful not to undermine his partiality or fairness by addressing particular facts or issues, real or hypothetical.

Question 3. What is the purpose of the United States Senate in holding hearing on nominees for the federal bench?

Answer 3. The purpose for a Senate hearing for district court nominees is to assess whether the nominee has the integrity, learning, impartially and commitment to follow the law and decisions of the Supreme Court and that nominee’s Circuit Court of Appeals.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. No, I do not think there are any questions that bear on a nominees’ qualifications that are off limits. However, a nominee may not be able, pursuant to the Canon of Judicial Ethics, and the candidate’s legitimate concern for the appearance and reality of fairness and impartiality to answer some of the questions.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are

there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. There is no scenario under which a district court or a United States Court of Appeals judge can refuse to follow a precedent of the Supreme Court of the United States.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393?

Answer 6. It is hard to put myself in the life and times of a Justice of the Supreme Court in 1856. Without the benefit of the briefs and the evidentiary material I do not know how I would have decided the case.

Question 7. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. After the ratification of the Thirteenth and Fourteenth Amendments to the Constitution, the holding in *Dred Scott v. Sanford* is no longer applicable.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. Yes, as a judge in 1857, I would have been bound by the decision of the Supreme Court in *Dred Scott v. Sanford*.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 9. Again, it is hard to put myself as a Justice on the Supreme Court in 1896. Without the benefit of the briefs and evidentiary material I do not know how I would have decided *Plessy v. Ferguson*.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the courts?

Answer 10. The precedent of *Plessy v. Ferguson* was overruled in 1954 by the case of *Brown v. Board of Education* and therefore the courts no longer are bound by the holding of *Plessy v. Ferguson*.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. Again, without the benefit of briefs and evidentiary materials it is difficult how to say how I would have ruled in *Brown v. Board of Education*.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the fourteenth Amendment to the Constitution. How should that precedent be treated by the courts?

Answer 12. As a District court judge, I am bound by the holding of *Brown v. Board of Education* which continues to be good law.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in the *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. Again, it is difficult to say how I would have ruled in *Roe v. Wade* without the benefit of all the trial and appellate materials.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that law?

Answer 14. As a District court judge, I would be bound by the holding in *Roe v. Wade* as modified by *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) whether or not I had any personal opinions to the contrary.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. I have no personal views on the issue of abortion that would prevent me from following the Supreme Court opinions in *Roe v. Wade* and *Planned Parenthood v. Casey*, and any other precedents.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. The Supreme Court has ruled that the death penalty is constitutional. I am bound by that decision and have no personal opinions that would cause me to be unable to impose or uphold a death sentence.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the constitution?

Answer 17. The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed". I will be bound by the language of the Second Amendment, the precedent of the Supreme Court and the Third Circuit Court of Appeals. I have no personal opinions that would have any bearing on any decisions to be made in cases that come before me.

Question 18. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 18. If I am fortunate enough to be confirmed as a District court judge, I would be bound by the holding in *Planned Parenthood v. Casey*. I hold no opinion that would interfere with my obligation to follow the law.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. On any legal issue presented regarding abortion rights I am bound by *Planned Parenthood v. Casey* and other precedents of the Supreme Court and the Third Circuit Court of Appeals. I have no personal views that would interfere with my obligation to follow precedent.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes, the Supreme Court has declared the death penalty constitutional. I am bound by that decision and have no personal opinions that would cause me to be unable to impose or uphold a death sentence.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 21. The Supreme Court in *Planned Parenthood v. Casey* discusses in a general way when and how a precedent of the Supreme Court may be overruled. If I were a Supreme Court Justice I would employ many considerations such as whether any prior holding is intolerable because it defies "practical workability", whether any rule works a particular hardship to the "consequences of overruling it and add inequity to the cost of repudiation", whether principles of law have developed so that the old rule is no longer relevant, or whether the facts are so "changed" as to have robbed the old rule of significant application or justification."

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to a passage of an act? And what weight do you give legislative intent?

Answer 22. In the limited circumstances where there is an absence of legal precedent and if the language of a statute is unclear, judges can, as a last resort consider legislative history as a source for the meaning of a statute. A judge must be careful when looking at legislative history and may look to committee reports that are more reliable than comments of individual legislators.

RESPONSES OF R. BARCLAY SURRECK TO QUESTIONS FROM SENATOR THURMOND

Question 1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act on important issues. What is your view of courts acting in this manner?

Answer 1. In our representative democracy it is the function of elected representatives to attempt to resolve social problems. It is not the function of the Federal Courts to act in response to such problems when the legislature has failed to do so. Federal Courts may deal only with the specific cases or controversies before them and should not act as legislatures of last resort.

Question 2. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 2. No. The death penalty has been declared constitutional by the Supreme Court of the United States. As a trial judge my job is to apply the law. I have no

personal objection that would make me reluctant to uphold or impose a death sentence.

Question 3. What is your view of mandatory minimum criminal sentences and would you have any reluctance to impose or uphold them as a Federal judge?

Answer 3. When Congress or a State Legislature determines that a mandatory sentence is appropriate in certain circumstances, a judge is obligated to apply that mandatory sentence in those circumstances. As a state trial judge for the past 23 years, I have imposed mandatory minimum sentences on many occasions. I have no reluctance to impose or uphold mandatory minimum criminal sentences.

Question 4. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while others say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 4. We have sentencing guidelines in Pennsylvania, and I have applied those guidelines in sentencing criminal defendants. Congress and State Legislatures have determined that sentencing guidelines are desirable in that they provide consistency and predictability in the sentencing process. Although I have never worked under the Federal Sentencing Guidelines, I would have no difficulty applying them.

RESPONSES OF R. BARCLAY SURRICK TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional decision, should that individual be confirmed?

Answer 1. I have been a state trial judge for the past 23 years. The litigants who come into my court have a right to expect that they will get fair and impartial justice from a completely neutral judge. If I were to be asked questions on a matter, constitutional or otherwise, that is before my court or which may come before my court, except to state holdings in well settled areas of the law, I would be compelled to indicate that I could not answer the questions. Answering questions concerning my personal views on issued that I may have to decide would call into question my ability to be fair and impartial.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. If I were a United States Senator, I would like to have as much information about a nominee as possible before voting on that nominee. Clearly, the more information a Senator has about a nominee, the less difficult it is to perform “the advice and consent” function. When considering a federal district court nominee, it is most important for a Senator to determine a nominee’s understanding of the role of the judiciary in our system of federalism.

Question 3. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer 3. The United States Senate holds hearings on nominees for the federal bench so that Senators may gather additional information about the background of each nominee. It also gives the Senators an opportunity to observe and talk with each nominee to assist in determining whether he or she has the personal and professional qualifications to be a federal judge.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. A United States Senator should be permitted to ask any question that he or she feels necessary to enable him or her to make an intelligent decision in performing the “advice and consent” function. However, because of the Code of Judicial Conduct, it may be inappropriate for a nominee to respond to a Senator’s question, no matter how helpful an answer would be to the Senator as he or she decides whether to support the nominee.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals, Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. It is the obligation of a U.S. District Court Judge or a U.S. Court of Appeals Judge to follow precedent. It would be improper for a trial judge or an ap-

pellate court judge to refuse to follow Supreme Court precedent because he or she believes that the precedent is contrary to the Constitution.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856)?

Answer 6. Not having had the benefit of participating in the proceeding or of reviewing, hearing, and discussing the matter with my contemporary Justices, it is impossible for me to speculate as to how I would have ruled as a Supreme Court Justice in this case.

Question 7. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. The Thirteenth, and Fourteenth Amendments abrogated the Court's decision in *Dred Scott v. Sanford*. Therefore, *Dred Scott v. Sanford* has no precedential value in courts today.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. A judge is required by his or her oath to follow binding precedent from the Supreme Court. Until the Civil War Amendments were passed, I would have been required to follow the precedent of *Dred Scott v. Sanford*, regardless of my personal view of the matter.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896).

Answer 9. Not having had the benefit of participating in the proceeding or of reviewing, hearing, and discussing the matter with my contemporary Justices, it is impossible for me to speculate as to how I would have ruled as a Supreme Court Justice in this case.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 10. The Supreme Court's reasoning in *Plessy v. Ferguson* was rejected in *Brown v. Board of Education*. Therefore, *Plessy v. Ferguson* has no precedential value today.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. Not having had the benefits of participating in the proceeding or of reviewing, hearing, and discussing the matter with my contemporary Justices, it is impossible for me to speculate as to how I would have ruled as a Supreme Court Justice in this case.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 12. The precedent of *Brown v. Board of Education* has not been overruled and thus is binding on all trial and appellate courts.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. Not having had the benefit of participating in the proceeding or of reviewing, hearing, and discussing the matter with my contemporary Justices, it is impossible for me to speculate as to how I would have ruled as a Supreme Court Justice in this case.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding of the Justice Rehnquist dissent in that case?

Answer 14. As a federal judge I would be bound by the majority opinion of the Court in *Roe v. Wade* as modified by *Planned Parenthood v. Casey*.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. As a United States District Court Judge, I would be obligated to apply Supreme Court precedent in the area of abortion regardless of whether I personally agreed with that precedent. If I become a District Court judge, I will fulfill my obligation. As a state trial judge, I am called upon almost daily to decide cases based upon the law given to me by the legislature and the appellate courts and not based upon my personal view of what the law should be. Litigants in my courtroom have a right to expect me to be fair, impartial and neutral. It would be inappropriate for me to announce my personal view on matters on which I may have to rule. Any pronouncement of my personal views would bring into question my ability to be fair and impartial.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. As a United States District Court Judge, I would be obligated to apply Supreme Court precedent in the area of the death penalty regardless of whether I personally agreed with that precedent. If I become a District Court judge, I will fulfill my obligation. As a state trial judge, I am called upon almost daily to decide cases based upon the law given to me by the legislature and the appellate courts and not based upon my personal view of what the law should be. Litigants in my courtroom have a right to expect me to be fair, impartial and neutral. It would be inappropriate for me to announce my personal view of matters on which I may have to rule. Any pronouncement of my personal views would bring into question my ability to be fair and impartial.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 17. As a United States District Court Judge, I would be obligated to apply Supreme Court precedent in the area of the Second Amendment regardless of whether I personally agreed with that precedent. If I became a District Court judge, I will fulfill my obligation. As a state trial judge, I am called upon almost daily to decide cases based upon the law given to me by the legislature and the appellate courts and not based upon my personal view of what the law should be. Litigants in my courtroom have a right to expect me to be fair, impartial and neutral. It would be inappropriate for me to announce my personal view on matters on which I may have to rule. Any pronouncement of my personal views would bring into question my ability to be fair and impartial.

Question 18. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 18. As a United States District Court Judge, I would be obligated to apply Supreme Court precedent on the right to privacy regardless of whether I personally agreed with that precedent. If I become a District Court judge, I will fulfill my obligation. As a state trial judge, I am called upon almost daily to decide cases based upon the law given to me by the legislature and the appellate courts and not based upon my personal view of what the law should be. Litigants in my courtroom have a right to expect me to be fair, impartial and neutral. It would be inappropriate for me to announce my personal view on matters on which I may have to rule. Any pronouncement of my personal views would bring into question my ability to be fair and impartial.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. As a United States District Court Judge, I would be obligated to apply Supreme Court precedent on this issue regardless of whether I personally agreed with that precedent. If I become a District Court judge, I will fulfill my obligation. As a state trial judge, I am called upon almost daily to decide cases based upon the law given to me by the legislature and the appellate courts and not based upon my personal view of what the law should be. Litigants in my courtroom have a right to expect me to be fair, impartial and neutral. It would be inappropriate for me to announce my personal view on matters on which I may have to rule. Any pronouncement of my personal views would bring into question my ability to be fair and impartial.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes. The Supreme Court has determined the death penalty to be Constitutional.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 21. Stability and certainty in the law are desirable. Stare decisis provides that certainty and stability. Precedent should be overruled only in those limited situations where existing precedent has proven to be intolerable and unworkable, where the precedent is no more than an old remnant of an abandoned doctrine, or where facts have so changed as to have robbed the old rule of significant application or justification.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 22. When dealing with a statute, the Court tries to determine the intended application of the statute. If the language of the statute is clear, the court need look no further. If the language of the statute is ambiguous, the Court should attempt to determine what was intended by the legislature. The rules of statutory construction may be helpful in making this determination. The legislative history and Committee Reports may also be helpful. If the legislative debates and Committee Reports are such that the Court can get a clear picture of what the legislature intended, then this should be considered in the Court's determination. On the other hand, if there was little or no debate or if the debate and Committee Reports were equivocal, they would be of little value.

RESPONSES OF R. BARCLAY SURRICK TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes. As a judge on the Federal District Court for the Eastern District of Pennsylvania, my duty would be to give full force and effect to the decisions of the United States Supreme Court and to the United States Court of Appeals for the Third Circuit, regardless of any personal views on a particular issue. I am committed to following the precedents of higher courts. As a state trial judge for the last 23 years, I have faithfully followed precedent from the higher courts.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores*, where the Court struck down the Religious Freedom Restoration Act.

Answer 2. Even if I believed that the United States Supreme Court or the United States Court of Appeals for the Third Circuit had seriously erred in rendering a decision, as a District Court Judge I would be bound to follow the precedent of the courts above me.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. Yes. I am committed to following precedent of higher courts on all issues, including any equal protection matters, that may come before me.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 4. No. I have no legal or moral beliefs that would prevent me from imposing a death sentence if the law called for such a punishment.

Question 5. Do you believe that 10, 15, or even 20-year delays between convictions of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. Long delays between conviction of a capital offender and execution are not desirable and should be avoided. Once Congress or a state legislature has made a policy decision that capital punishment is appropriate, federal courts should focus their resources on resolving capital cases fairly and expeditiously.

Question 6. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. Assuming that there is no appellate court precedent on point, when determining the effect of a statute or constitutional provision, a federal judge should

first look to the language of the statute or constitutional provision. If the language of the statute or constitutional provision is clear, the judge should give effect to the plain meaning. If the language is ambiguous, the judge should attempt to determine what the drafters intended. The legislative history of the provision may be helpful in determining this intent. Rules of statutory construction may also be used to try to determine the intended effect to be given to a statute. If the intended effect is still unclear after considering the foregoing, decisions in analogous situations may be consulted.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of constitutional text, see William J. Brennan, *The Constitution of the United States; Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 7. In interpreting any Constitutional provision, judges should first look to the plain meaning of the text and the Framers’ original intent. A Court should also look to precedent interpreting a provision. If the text and intent are unclear, the Court should not act. There are legitimate concerns about adhering to Justice Brennan’s views on “community interpretation” of constitutional text. To the extent that Justice Brennan means that courts should create rights and remedies out of judicial wholecloth, I disagree. A vehicle exists in Article V of the Constitution for the creation of Constitutional rights not already existing in the document. Article V of the Constitution provides for amendments to the Constitution, initiated either by both houses of Congress, or by the legislatures of two thirds of the states. Such amendments, if ratified, are valid to “all intents and purposes, as part of this Constitution.” If an amendment to the Constitution that affords new constitutional right(s) is ratified, it is within the power of Article III judges to consider those new rights from the plain meaning of the text, as if it were part of the original Constitution. Amendment of the Constitution, while cumbersome, has been accomplished twenty-five times in the history of this democracy. It is the most legitimate approach to creating a constitutional right.

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 8. If I were called upon to analyze a challenge to the constitutionality of a statute in a case that is not one of first impression, I would look to precedent from the United States Supreme Court and the United States Court of Appeals for my Circuit, and I would be bound by that precedent. If such a question were to arise in a case of first impression, I would look to the words of the applicable constitutional provision, to existing precedent analogous to the case before me, and to the intent of the Framers in drafting that constitutional provision.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S.Ct. 2240 (1999).

Answer 9. *Griswold v. Connecticut* addressed the constitutionality of a Connecticut law forbidding the use of contraceptives. While the particular right to contraceptive use was not mentioned in the Constitution or Bill of Rights, the Court found that certain guarantees of the Bill of Rights have “penumbras” that help give them life and substance. The *Griswold* Court considered the right to privacy in marriage to be one of these guarantees.

At issue in *Alden v. Maine* was a suit under the Fair Labor Standards Act against the state of Maine in state court. The Supreme Court previously had ruled in *Seminole Tribe v. Florida* that Congress lacked the power under Article I, § 8 to abrogate States’ sovereign immunity in federal court even when the intent of Congress was clear. The question of whether a non-consenting state could be subject to federal suits in state court was, however, a case of first impression. The Court held that non-consenting states would not be subject to federal suits in their own state courts. In reaching this decision, the Supreme Court looked to the history and structure of the Constitution and concluded that the States’ immunity from suit was part of a “residual and inviolable sovereignty” which existed prior to and was unaffected by the Constitution. It looked to principles of federalism in determining that this par-

ticular exercise of Congressional power was inconsistent with the constitutional structure and the dignity and respect due a sovereign state. The Founders' silence on States' immunity from suit in their own courts suggested to the Court that this proposition was so well established at the time of ratification that no one conceived that the Constitution has altered it.

In both cases, the Court looked beyond of the literal text of the Constitution to make its conclusions. *Alden* had the effect of limiting Congressional power to subject States to suits arising under federal law. *Griswold* was a broad use of judicial power to find rights in the Constitution that were not expressly articulated.

Question 10. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress' power, and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 10. Each of these cases concerns the breadth of Congress' authority to regulate under its Commerce power as derived from Article I, §8 of the United States Constitution.

Wickard v. Filburn represents a high-water mark in judicial deference to Congress. At issue in *Wickard* was a fine assessed by the Secretary of Agriculture against an individual wheat farmer who had harvested more wheat than he was permitted under the Agricultural Adjustment Act of 1938. The Act aimed to avoid fluctuation in wheat prices by eliminating surpluses and shortages through regulation of the volume of wheat moving in interstate and foreign commerce. The Court upheld the penalty based on its belief that Congress could regulate wholly intrastate activities as long as, in the aggregate, they had a "substantial effect" on interstate commerce.

In *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act, marking the first time in more than 50 years that legislation was invalidated on the basis that Congress had exceeded its Commerce power. The *Lopez* Court distinguished *Wickard*, holding that while the production of wheat was commercial in nature, the Gun-Free School Act "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."

Wickard and *Lopez* represent divergent views of the deference accorded Congress by the judiciary, and of the relationship of the federal government to the several States. The *Wickard* Court allowed Congress significant latitude in drafting legislation under the authority of Article I, §8, while the *Lopez* Court was far less deferential to Congress's expressed purpose. Writing for the majority in *Lopez*, Chief Justice Rehnquist asserted that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."

Wickard suggests an expansive view of Congress' authority, allowing federal regulation of anything that could possibly be conceived of as affecting the economy. Conversely, in *Lopez*, the Court limited to some extent Congressional reach under the Commerce Clause.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state government.

Answer 11A. United States v. Lopez: Striking down the Gun-Free Schools Act, the Court held that in order for Congress to exercise its rights under the Commerce Clause, Congress must demonstrate that there is more than a tenuous connection between the activity restricted and the impact on commerce. Under *Lopez* Congressional legislation in the area of a traditional state function appears to have been limited.

B. *Printz v. United States:* This case struck down the Brady Handgun Violence Prevention Act provisions that required the chief law enforcement office of local jurisdictions to perform background checks on prospective handgun purchasers. Relying on the concept of "dual sovereignty" between the federal government and the states, the Brady Bill was viewed as an unconstitutional shifting of federal executive powers to state executives. According to the *Printz* Court, Congress may not transfer the President's responsibility to administer Congress's laws to State Executives who would implement the program without meaningful presidential control.

C. *Alden v. Maine:* The Court held that Congress may not subject non-consenting States to a lawsuit arising under the Fair Labor Standards Act of 1938, passed pur-

suant to Congress's power under the Commerce Clause. *Alden* appears to protect state sovereignty against federal abrogation of that sovereignty.

D. *Baker v. Carr*: The Court held that challenges under the Equal Protection Clause to apportionment of voting districts were judicable in federal courts. This was a landmark case allowing federal courts to exercise jurisdiction over districting questions regarding equality between voters of various districts, an area which had traditionally been in the exclusive province of the States.

E. *Shaw v. Reno*: The Court found the 12th Congressional District in North Carolina to be an "unconstitutional racial gerrymander," because it could not be understood as anything other than an effort to separate voters into different districts on the basis of race and would be subject to strict scrutiny. This case established that federal courts may strike down state districting plans where race was the "predominant factor." It is unclear whether Shaw had a significant effect on the division of power between state and federal governments.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools or state agencies?

Answer 12. No. The fashioning of broad, structural remedies to fix ongoing problems in the administration of entities like prisons, schools, or state agencies is best left to the legislature and its duly elected representatives, not the courts. State legislatures and Congress have the institutional expertise to address and correct problems through a process of deliberate fact-finding, debate, and compromise. In contrast, Article III courts should limit their role to adjudicating cases within the specific jurisdiction afforded to them. A Federal District Court does not have the institutional expertise required to administer prisons, schools and state agencies.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. It is not the role of a United States District Court judge to strike down statutes on the basis of "implied rights," unless directed to do so by the United States Supreme Court or Circuit Court of Appeals precedent. Statutes have a presumption of constitutionality. If a statute is in conflict with the express rights contained in a Constitutional Amendment, the statute must fall.

RESPONSES OF MARY A. McLAUGHLIN TO QUESTIONS FROM SENATOR THURMOND

Question 1. Ms. McLaughlin, you have written that "Title IX's general prohibition of sex discrimination in education should be construed broadly * * * in order to effect the remedial purpose of the statute." Do you believe that Title IX mandates quotas for schools to equate the number of men's athletic teams to the number of women's athletic teams, or do you believe that a school should offer men's and women's athletics according to factors such as the interests of its students? Please explain.

Answer 1. This question quotes from a law review comment I wrote while in law school 25 years ago: "Implementing Title IX: The HEW Regulations", 124 U. Penn. L. Rev. 806 (1976). I wrote the article to fulfill my writing requirement as a member of the university of Pennsylvania Law Review. The article describes the HEW regulations that became effective July 21, 1975, implementing Title IX of the Education Amendments of 1972. Although I have never litigated a Title IX case, I understand that in *Williams v. The School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993), the Third Circuit stated that "the obligation of an educational institution in complying with the requirements of title IX in interscholastic athletics cannot be measured simply by comparing the number of teams available to each sex, but instead must turn on [w]hether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole." *Id.* at 175. If I am fortunate enough to be confirmed by the Senate, I will adhere faithfully to all Third Circuit and Supreme Court precedent on Title IX as in every other area of the law.

Question 2. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act on important issues. What is your view of courts acting in this manner?

Answer 2. It is not the role of federal courts to act in response to various social problems because the legislature has not acted on important issues. It is the role of a district court to apply the law as given to it by Congress, and in certain circumstances the state legislature, as that law has been interpreted by the Court of Appeals and the Supreme Court. The federal courts are courts of limited jurisdiction

and a federal district court has no authority or discretion to review any issue in the absence of a specific grant of jurisdiction.

Question 3. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 3. No, I have no personal objections to the death penalty that would cause me to be reluctant to impose or uphold a death sentence.

Question 4. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose or uphold them as a Federal judge?

Answer 4. I would have no reluctance to impose mandatory minimum criminal sentences. It is my understanding that mandatory minimum criminal sentences have been found constitutional. I was an Assistant United States Attorney for three-and-a-half years and I never had any problem or reluctance in enforcing the applicable substantive and penalty criminal laws.

Question 5. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while others say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 5. When I was an Assistant United States Attorney, there were no sentencing guidelines. During my time as an Assistant, I was often concerned when defendants convicted of the same crime and from similar backgrounds would be given divergent sentences from one court to another. I appreciate the goals of predictability, uniformity, and fairness that Congress sought in enacting the Federal Sentencing Guidelines. I am fully prepared to follow and apply the sentencing guidelines completely and without reservation.

RESPONSES OF MARY A. McLAUGHLIN TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. I am fully committed to following the precedents of the Third Circuit and the Supreme Court faithfully and giving them full force and effect, even if I were to disagree with such precedents.

Question 2. How would you rule if you believe the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer 2. I would apply the Supreme Court's and the Court of Appeals' decisions even if I believe that a higher Court had erred.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. Yes, I am fully committed to following the precedents of the Third Circuit and the Supreme Court on equal protection issues.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 4. No, I have no legal or moral beliefs that would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal judge.

Question 5. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. Delays of 10, 15 or 20 years between conviction of a capital offender and exhaustion of all remedies seem excessive. I am fully committed to applying the precedents of the Third Circuit and the Supreme Court on this issue and any other issue. I agree that the federal courts should focus their resources on resolving capital cases fairly and expeditiously, in accordance with the applicable law, as interpreted by the Supreme Court and Courts of Appeals.

Question 6. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. When reviewing a statute or constitutional provision, a court should apply the plain language of the statute or constitutional provision. A district court judge should also apply the precedents of the Court of Appeals and the Supreme Court interpreting the statute or constitutional provision. When reviewing a statute, a court should also apply statutory rules of construction, for example, the presumption of constitutionality and the obligation to interpret a statute to avoid constitutional infirmity. If the words of the statute are ambiguous and there is no precedent on point, one may look at legislative history but a court must be very cautious in doing so because it may not be reliable. Committee reports are probably the most reliable source of legislative history. The statements of elected officials in debates leading up to the passage of an act may be less reliable because the statements may not reflect any legislative consensus.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 7. The first approach—interpreting the plain meaning of the text—is consistent with the limited judicial power established by Article III of the Constitution. With respect to the third approach, the Constitution clearly provides for ratification of an amendment under Article V. This approach would not implicate Article III unless and until the amendment came before a court for interpretation. Justice Brennan’s approach of discerning the “community’s interpretation” of a constitutional text exceeds the separation of powers of the Constitution because it presents the possibility of recognizing a right that was not intended by the original framers of the Constitution.

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 8. If I am fortunate enough to be confirmed by the Senate, I would analyze a challenge to the constitutionality of a statute in a case that was not one of first impression as follows. I would look to the precedents of the Third Circuit and the Supreme Court with respect to the statute, and faithfully follow that precedent. If the case were one of first impression, I would start with a presumption of constitutionality. If neither the Third Circuit nor the Supreme Court had ever ruled on the statute, I would look to decisions of other circuits and other district courts for guidance. Although the statute might not have been considered before, it is likely that there will be Third Circuit and Supreme Court precedent on the type of challenge that is being made to the constitutionality of the statute. At all times, I would presume the constitutionality of the statute and follow the rules of statutory construction, for example, that a court has an obligation to interpret a statute to avoid constitutional infirmity.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S.Ct. 2240 (1999).

Answer 9. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that a Connecticut statute forbidding use of contraceptives violated a “right of marital privacy” which the Court found to be within the “penumbra” of specific guarantees of the Bill of Rights. In *Alden v. Maine*, 119 S.Ct. 2240 (1999), the Supreme Court dismissed a lawsuit brought by State employees under the Federal Fair Labor Standards Act on the ground that “sovereign immunity derives not from the Eleventh Amendment text but from the structure of the original Constitution itself.” *Id.* at 2254. The Court restricted the power of Congress in *Alden*, thereby leaving more power to the States. In *Griswold*, the Supreme Court exercised judicial power in a way that limited State power.

Question 10. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial

power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 10. *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Lopez*, 514 U.S. 549 (1995) are two of a long line of Supreme Court cases exploring the reach of Congress's power under the Commerce Clause. Under Article I, Section 8, Congress has the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." In these two cases, coming more than 50 years apart, the Supreme Court explored the meaning of the Commerce Clause. In *Wickard v. Filburn*, the Supreme Court upheld the application of the Agricultural Adjustment Act of 1938 to the production and consumption of home grown wheat. In *United States v. Lopez*, the Supreme Court struck down the Gun-free School Zone Act of 1990 which forbade "any individual knowingly to possess a firearm at a place that [he] knows * * * is a school zone."

In *Wickard*, the Supreme Court applied an expansive view of the Commerce Clause, upholding a federal law that prevented individual farmers from growing more than a pre-determined amount of wheat because overproduction by individual farmers, in the aggregate, could affect the interstate wheat market. In *U.S. v. Lopez*, the Supreme Court placed limits on Congress' commerce power. In striking down the Gun-free School Zone Act as not having a sufficient effect on interstate commerce, the Court found that the Act had no jurisdictional requirement that the firearm at issue had traveled across State lines, and that Congress had not made sufficient findings about the interstate effects of the criminal act at issue.

An expansive view of the Commerce Clause as reflected in *Wickard* increases Congress' power versus the judicial power and the federal government's power compared with the power of state governments. In *Lopez*, 1 the Supreme Court cut back on Congress' power under the Commerce Clause, thus leaving more power with the states.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S.Ct. 2240 (1999).

E. *Baker v. Carr*, 369 U.S. 186 (1962).

F. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 11. Under the Constitution, the Federal Government is a government of limited powers. The Constitution thus protects the liberty of the individual by limiting the power of all three branches of government. The powers of Congress are set forth in Article I of the Constitution. The Tenth Amendment states that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. Article III limits the judicial power to cases arising under the Constitution or federal law.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down the Gun-free School Zone Act of 1990 which forbade "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone." The Court found that the Act had no jurisdictional requirement that the firearm at issue had traveled across State lines, and that Congress had not made sufficient findings about the interstate effects of the criminal act at issue. In *Alden v. Maine*, 119 S.Ct. 2240 (1999), the Supreme Court dismissed a lawsuit brought by State employees under the Federal Fair Labor Standards Act on the ground of the Eleventh Amendment. The Court went beyond the plain text of the Amendment by noting that "sovereign immunity derives not from the Eleventh Amendment text but from the structure of the original Constitution itself." *Id.* at 2254. *Printz v. United States*, 521 U.S. 898 (1997), is an example of a case in which the Supreme Court has placed greater limits on Congress' power to enact legislation that affects only States and commands them to take certain actions. In *Printz*, the Court struck down the Brady Handgun Violence Prevention Act, which required state law enforcement officers to run background checks on prospective gun buyers and perform other related duties. *Lopez*, *Alden*, and *Printz* each left more authority to the States.

At issue in *Baker v. Carr*, 369 U.S. 186 (1962), was a claim that a 1901 statute of Tennessee apportioning the members of the General Assembly among the state's 95 counties denied the plaintiffs the equal protection of the laws by virtue of the debasement of their votes. The Supreme Court held that the state's apportionment did not present a non-justifiable political question. In *Shaw v. Reno*, 509 U.S. 630

(1993), the Supreme Court reviewed a North Carolina reapportionment plan that was challenged as an unconstitutional racial gerrymander. The Supreme Court held that districting based on race was subject to strict scrutiny and remanded the case to the district court to determine whether the plan was narrowly tailored to further a compelling governmental interest. In these cases, the Supreme Court exercised judicial power in a way that limited state authority with respect to apportionments.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies?

Answer 12. No, I do not believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. If I am fortunate enough to be confirmed by the Senate and this issue came before me as a case not of first impression, I would faithfully apply the precedents from the Third Circuit and the Supreme Court. If it were a case of first impression, I would start my analysis with a presumption of the statute's constitutionality. I would also look to analogous Third Circuit and Supreme Court precedent in evaluating the arguments of the parties.

Question 14. In 1988, you were the recipient of the ACLU Civil Liberties Award, presented by the ACLU of Pennsylvania. Presumably, this award is given to individuals who share some of the same beliefs as the organization making the award. I would like to know whether you agree or disagree with the following positions advocated by the ACLU, and the reasons for your agreement or disagreement with those positions.

Answer 14. It is my understanding that I received the award from the ACLU because of pro bono litigation I had done. I and another partner at a big firm were given this award to encourage the big firms in Philadelphia to participate in pro bono litigation. I am not, and have never been, a member of ACLU. The ACLU could not have known anything about my beliefs on any issues. I am not aware of the ACLU's position on any of the issues discussed in question 14; but I will do my best to respond to each of the sections of question 14.

A. "The ACLU has opposed the outright criminalization of drugs since 1968, believing that the best way to deal with drugs is regulation, not incarceration." Do you agree or disagree with this approach to the drug problem? Please explain your answer.

The question of the criminalization of drugs is a policy decision that belongs to Congress. I do not agree with the ACLU's view on this issue. When I was an Assistant United States Attorney for the District of Columbia for three-and-a-half years, I prosecuted numerous drug cases. I have no personal views whatsoever that would prevent me from applying the drug laws fully and completely including sentencing guidelines and mandatory minimums.

B. "Capital punishment . . . is a costly, irreversible, and barbaric practice, the epitome of cruel and unusual punishment. It does not deter crime, and the way it is implemented is grotesquely unfair." Do you agree or disagree with this assessment of capital punishment? Please explain your answer.

The question of when capital punishment is appropriate for a crime is a policy decision for the legislature. I disagree with the view expressed in B. The Supreme Court has clearly ruled that the death penalty is constitutional. I have no personal views that would prevent me from fully and completely imposing or upholding a death sentence in any criminal case that might come before me as a federal judge.

C. "The ACLU believes that since we have attached such enormous social consequences to marriage, it violates equal protection of the law to deny lesbian and gay couples the right to wed." Do you agree or disagree with this position? Please explain your answer.

The definition of marriage has traditionally been left to the legislature. To the extent that this question may call for a legal conclusion on issues that are currently being litigated in courts, commenting on whether such an issue violates the Constitution might constitute an advisory opinion not permitted by the Code of Judicial Conduct. I do understand, however, that in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court held that the state of Georgia could criminalize private, consensual homosexual conduct. That decision has not been overruled. I have no personal views that would prevent me from faithfully following Supreme Court and Third Circuit precedent in this area or on any other issue.

D. "Requirements that teenagers notify their parents or get their consent before obtaining contraception endanger the public health and violate the law . . . [C]onditioning a teenager's access to contraception on parental consent or notification is unconstitutional, as well as contrary to the confidentiality mandates of certain federal statutes." Do you agree or disagree with this position? Please explain your answer.

The question of parental consent in connection with teenagers' use of contraception, like the other three issues, has also been an area for state legislation. If I am fortunate enough to be confirmed by the Senate and am faced with a case such as D, I would apply the precedents from the Supreme Court and the Third Circuit. I have no personal views whatsoever that would prevent me from faithfully following Supreme Court and Third Circuit precedent in this area or on any other issue.

RESPONSES OF MARY A. McLAUGHLIN TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with the "advice and consent" of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. Every nominee for a federal judgeship should answer all questions from the Senate to the best of his or her ability, honestly, and in good faith. Nominees may at times be constrained in answering questions by legitimate concerns not to appear to be prejudging cases or offering advisory opinions.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with the "advice and consent" of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. I agree that it may be difficult to advise and consent to a nominee who refuses completely to answer questions on Constitutional issues. A nominee must be careful, however, not to appear to be prejudging any case or issue, or otherwise to compromise the reality and appearance of fairness.

Question 3. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer 3. I believe that the purpose of the United States Senate in holding hearings on nominees for the federal bench is so that the Senate may assess the nominee's qualifications for the job, such as a commitment to be fair and impartial; a commitment to be respectful of and courteous to all who appear before him or her; the legal experience to be able to handle the complex civil and criminal matters with which a federal judge is faced; the intellectual/analytical ability to apply the precedents of the Court of Appeals and the Supreme Court; and the commitment to follow precedent, without regard to any personal views.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. No, there are no questions that are off limits for a Senator to ask.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. No, I do not think that there are any circumstances under which a United States District Court Judge or United States Court of Appeals Judge may refuse to apply a Supreme Court precedent to a case before him or her.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 6. It is very difficult for me to say what I would have done had I been a Supreme Court Justice at the time of the *Dred Scott* decision. I would have read the briefs, studied all the precedents in the area, listened to the arguments, and listened to the views of my colleagues. Because I cannot recreate that situation, I am not able to say specifically how I would have decided that case.

Question 7. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. It is my understanding that the *Dred Scott* decision has been overruled by the passage of the 13th and 14th amendments to the Constitution.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to following the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. Yes, if I had been a judge in 1857, I would have been bound by my oath and mandated to follow the binding precedent of *Dred Scott*.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 9. It is very difficult for me to say what I would have done had I been a Supreme Court Justice at the time of the *Plessy v. Ferguson* case. I would have read the briefs, studied all the precedents in the area, listened to the arguments, and listened to the views of my colleagues. Because I cannot recreate that situation, I am not able to say specifically how I would have decided that case.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 10. My understanding is that *Plessy v. Ferguson* was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. It is very difficult for me to say what I would have done had I been a Supreme Court Justice at the time of the *Brown v. Board of Education* case. I would have read the briefs, studied all the precedents in the area, listened to the arguments, and listened to the views of my colleagues. Because I cannot recreate that situation, I am not able to say specifically how I would have decided that case.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 12. District Court judges and judges of Courts of Appeals must faithfully apply the decision of *Brown v. Board of Education* as they would any other binding Supreme Court precedent.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. It is very difficult for me to say what I would have done had I been a Supreme Court Justice at the time of the *Roe v. Wade* case. I would have read the briefs, studied all the precedents in the area, listened to the arguments, and listened to the views of my colleagues. Because I cannot recreate that situation, I am not able to say specifically how I would have decided that case.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 14. It has not been my practice to read Supreme Court cases with a view to determining whether they are right or wrong or whether I agree or disagree with them. I try to understand them and their application. I have no personal views that would prevent me from following the precedent of *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, and any subsequent Supreme Court precedent in the area.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. The Supreme Court has held in *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, that a state may put restrictions on a woman's right to terminate a pregnancy pre-viability, so long as the restrictions are not an undue burden or a substantial obstacle to the woman's right. I have no personal view on the issue of abortion that would prevent me from fully and faithfully following the current and any subsequent precedents of the Supreme Court and the Third Circuit.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. The Supreme Court has held the death penalty constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). I have no personal view on the issue of the death

penalty that would prevent me from fully and faithfully following *Gregg v. Georgia* and any subsequent Supreme Court and Third Circuit precedent in the area.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 17. If I am fortunate enough to be confirmed by the Senate, and if I were assigned a case involving the Second Amendment to the Constitution, I would look to the plain language of the Constitution and all relevant precedent. I have no personal view on the Second Amendment to the Constitution that would prevent me from fully and faithfully following Supreme Court and Third Circuit precedent in the area.

Question 18. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life [of] an unborn child?

Answer 18. I understand *Planned Parenthood v. Casey* to mean that a state may put restrictions on a woman's right to terminate a pregnancy pre-viability, so long as the restrictions are not an undue burden or a substantial obstacle to the woman's right. I have no personal views on this issue that would prevent me from following faithfully current and any subsequent Supreme Court or Third Circuit precedent.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. I do not have any personal beliefs or views that would prevent me or hinder me from applying current and subsequent Supreme Court and Third Circuit precedent on this issue.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes, the Supreme Court has held that the death penalty is constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976).

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 21. If I were a Supreme Court justice, I would very carefully review the law on *stare decisis* and other related concepts. The Supreme Court has set forth factors it considers when it is asked to overrule a prior decision. They include: whether the prior decision has proven unworkable; whether the prior decision could be overruled without serious inequity to people who have relied on it; whether legal principle has evolved so that the prior decision is a doctrinal anachronism discounted by society; and whether the factual underpinning of the rule has changed so that the central holding of the prior decision has become obsolete.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 22. When reviewing a statute, a court should apply the literal language of the statute. A district court judge should also apply the precedents of the Court of Appeals and the Supreme Court interpreting the statute. A court should also apply statutory rules of construction, for example, the presumption of constitutionality and the obligation to interpret a statute to avoid constitutional infirmity. If the words of the statute are ambiguous and there is no precedent on point, one may look at legislative history but a court must be very cautious in doing so because it may not be reliable, for example, committee reports may be more reliable than the floor debates.

Question 23. If a nominee proves to be an activist lawyer, to the point where that lawyer receives awards celebrating his/her activism in a controversial area, do you believe that a proven activist lawyer would be qualified to be a federal judge?

Answer 23. I believe that to be qualified as a federal district court judge, any lawyer must have the following qualities: a commitment to be fair and impartial and to comply strictly with the oath of office; a commitment to follow precedent, without regard to any personal views; a commitment to be respectful and be courteous to all who come before the Court; the breadth of experience to deal with the complicated civil and criminal issues that come before the Court; the intellectual and analytical ability to analyze and understand the Constitution, the Court's binding precedents, and the statutes that he or she will have to apply.

Respectfully, I do not consider myself to be an activist lawyer. I would think that the fact that a lawyer may receive an award from any group for his or her legal work does not make the lawyer an activist. During my 24 years of practice, I have been involved in less than a half dozen pro bono cases. For most of my career, I

have represented corporate defendants. I have always had to struggle to find the time out of my busy corporate practice to fulfill what I believe is every practicing lawyer's obligation to do pro bono work.

In the 24 years since graduation from law school, I have worked for the United States as a criminal prosecutor, taught law at three distinguished law schools, acted as Chief Counsel to a Senate Judiciary Subcommittee, and been a civil litigator at two big firms. I have been honored with awards for my work as an Assistant United States Attorney and as a Law School Professor: the Attorney General Special Achievement Award; and an outstanding teaching award voted by the students of Vanderbilt Law School.

In my civil practice, I have worked for a wide variety of corporations, such as Philip Morris, Campbell Soup Company, Bell Atlantic Corporation, and Allied Signal, and for individuals and non-profit entities, such as 79 members of the House of Representatives, and poor women on welfare. In each instance, I tried my best to act in accordance with the highest standards of professionalism.

While at Dechert Price & Rhoads I also spent thousands of hours on the administration and management of the firm. I was two times elected to the firm's Policy Committee, Assistant Chair of the Trial Team, a member of the Professional Resources Committee that evaluates all associates in the firm, a member and then chair of the firm's Hiring Committee and, the chair of many important committees like the committee that nominated our current chairman. My pro bono work has been a very small part of my 24 year legal career.

I think that there may be a misunderstanding about the ACLU award I received. I am not and never have been a member of the ACLU. It is my understanding that the ACLU gave the award to me and another big firm partner to encourage the partners of big firms in Philadelphia to participate in pro bono litigation. The ACLU did not give the award to me because of any personal views I hold because the ACLU could not have known my personal views on any issue.

Question 24. In 1988 you were involved in the case *Jane Roe, et al. v. Operation Rescue*, where you represented on a pro-bono basis the interest of Planned Parenthood, NARAL, and a physician who did late term abortions. This was initially a class action lawsuit using racketeering statutes against pro-life protestors. What drew you to this case and why did you feel it necessary to get involved in this case?

Answer 24. I became involved in this case in 1988 at the request of a senior partner in my firm. Prior to my involvement in this case, I had had no contact with the Women's Law Project or any of the plaintiffs in the case. I had never before been involved in the issue of abortion either in litigation or in any kind of political activity.

The factual situation prior to the filing of the case was that Operation Rescue had announced it was coming into Philadelphia (and other cities around the country) to "blockade" women's health centers in the area. Several women's health centers had asked the Women's Law Project for its assistance in stopping the centers from being shut down. The Women's Law Project then asked for assistance from one of my firm's senior partners, who asked me to work on the case. The plaintiffs obtained an injunction to prevent the blockading of the health centers. The injunction was narrowly limited to allow the individuals to protest but not to prevent women from getting into the centers. This case went on for some years but my assistance to the Women's Law Project ended after the grant of summary judgment to the plaintiffs and affirmance by the Third Circuit.

Question 25. You were involved in a successful challenge to Pennsylvania's restrictions on Medicaid abortions in the *Blackwell Health Center* case. What was your involvement in that cause and how much money did the Women's Law Center receive as a result of your lawsuit? Also, why did you feel it necessary to become involved in this case?

Answer 25. I became involved in the Blackwell Health Center case at the request of an attorney at the Women's Law Project who had previously been an associate at Dechert Price & Rhoads. At issue in this case were two provisions of a state statute that did not provide medicaid payments to women (1) who were pregnant as a result of rape or incest and wanted to terminate their pregnancy unless they had reported the rape or incest to the police, or (2) who wanted to terminate their pregnancy because their life was in danger unless two doctors had certified that their life was in danger. On behalf of the clients, we argued that these provisions were inconsistent with the Hyde Amendment and, therefore, violative of the Supremacy Clause. The district court granted summary judgment in favor of the plaintiffs and the Third Circuit affirmed.

I took the case for the following reasons. First, before agreeing to act as co-counsel, I reviewed the law and learned that in 1980, the Third Circuit had ruled that

the federal medicaid statute, as modified by the Hyde Amendment, required participating states to fund those abortions for which federal reimbursement is available. In addition, the Department of Health and Human Services had issued regulations, stating (a) that the states could impose reasonable reporting requirements on the victims of rape or incest only if the state had a waiver provision for those reporting requirements; and (b) that the states could not require more than one physician to certify that the woman's life was in danger. Secondly, the plaintiffs in the case were poor women who had been raped or were the victims of incest. I thought of this case as one about the rights of poor women who had been the victims of violence. The third reason I took the case is that it presented interesting legal issues.

The court ordered that attorneys' fees be paid to the Women's Law Project for the hours they spent litigating successfully this case in the amount of \$58,546.00.

Question 26. Obviously membership in any group is not a disqualifying factor to being confirmed by the Senate to be a federal judge. In 1998 you received an award from the ACLU celebrating your activism in the area of abortion rights. Do you agree with the ACLU's position on abortion rights?

Answer 26. I am not, and have never been a member of the ACLU. I do not know the ACLU's specific position on abortion rights, and am not in a position to agree or disagree. If I am fortunate enough to be confirmed by the Senate, I would faithfully follow the Supreme Court precedent with respect to abortion.

Question 27. Considering your history of being extremely active in the abortion rights movement, would you pledge to recuse yourself from any cases that involve abortion rights, if confirmed as a federal judge?

Answer 27. I do not feel that I have been active in the abortion rights movement. During my 24 years of practice, I have litigated two cases touching on abortion. If I am fortunate enough to be confirmed by the Senate, I would adhere to the following procedure if I were assigned a case relating to abortion.

1. I would fully disclose to the litigants the two cases I worked on in this area with the Women's Law Project.

2. I would solicit the views of the litigants on the question of recusal. I think that it is very important that the litigants in any case feel that the judge is fair and impartial. A party's request that I recuse myself would be a very important factor in my consideration.

3. I would carefully consider recusal if any party was a former client of mine or an opposing party in any case I litigated.

4. I would carefully consider recusal if the Women's Law Project were representing any party.

5. In all cases, I would comply scrupulously with 28 U.S.C. § 455 and Canon 3 of the Code of Conduct for United States Judges. If there were any doubt, I would err on the side of recusal.

RESPONSE OF PETRESE B. TUCKER TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. The Constitution commits the power to confirm a nominee to the Senate; and it is for the Senate to determine how to exercise that power. Nominees should attempt to answer the questions of a Senator, however a nominee may not be able to answer some questions about constitutional issues based on the code of judicial conduct and the limitation on rendering adversary opinions. If a nominee were to refuse to affirm that he or she would, notwithstanding any personal opinion, apply precedent of higher courts to cases that may come before him or her that would be problematic.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with the "advice and consent" of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. Yes, however a nominee may not be able to answer some questions about constitutional issues based on the code of judicial conduct and the limitation on rendering advisory opinions. In addition, a nominee may not be able to answer questions which would put into question the fairness and impartiality of the courts.

Question 3. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer 3. I understand that the purpose of the United States in holding hearings on nominees for the federal bench is to exercise the power of advice and consent under Article II Section 2 of the Constitution.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. No, a Senator may ask any question he or she wants.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. A United States District Court Judge or U.S. Court of Appeals Judge must follow the precedent of the United States Supreme Court.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393?

Answer 6. It would only be speculation for me to comment upon what decision I would have made in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). I do not have the benefit of all briefs, arguments and deliberations of the associated justices available at the time of the decision. As an African American woman, I am thankful that I am a nominee to the United States District Court in this century.

Question 7. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the court apparently held as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), has been abrogated by the Thirteenth and Fourteenth Amendment and is not binding precedent.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. If I were a judge in 1857, I would be bound by my oath to follow the binding precedent of *Dred Scott v. Sandford*.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 9. I could not speculate on what I would have done as a Supreme Court Justice in *Plessy v. Ferguson*, 163 U.S. 539 (1896), without having all the information, briefs and exhibits and deliberations of other justices available at the time of the decision.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 10. *Plessy v. Ferguson*, 163 U.S. 539 (1896), has been overruled and is not binding precedent.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. I cannot speculate on what I would have done as a Court Justice in 1954 in *Brown v. Board of Education*, 347 U.S. 483 without having all information, briefs, exhibits and deliberations of the associate justices available at the time of the decision.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 12. The precedent set by *Brown v. Board of Education*, 347 U.S. 483 (1954), has not been overruled and is the law to be followed by the courts today in any applicable cases.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. It would only be speculation to comment upon what I would have held in *Roe v. Wade*, 410 U.S. 113 (1973), without the benefit of all information, briefs, exhibits and deliberations of associate justices in the case.

Question 14. In *Roe v. Wade*, 419 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 14. As a United States District Court Judge I would be obliged to follow the holding of *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. I have no personal view of abortion which would interfere with my following the Supreme Court precedent and precedent of Court of Appeals for the Third Circuit.

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. I have no personal view of the death penalty which would interfere with my following Supreme Court precedent which has established the death penalty is constitutional.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 17. I have no personal view which would interfere with my following the precedent of higher courts interpreting the Second Amendment to the Constitution.

Question 18. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 18. I have no personal view regarding the balancing of these rights, and would follow the Supreme Court precedent of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and any other applicable precedent of Supreme Court and Court of Appeals for the Third Circuit.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. I have no personal opinion about this issue that would interfere with my responsibility to follow Supreme Court precedent and the precedent of the Court of Appeals for the Third Circuit.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes, the United States Supreme Court has so held.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 21. I cannot speculate on the circumstances under which I would vote to overrule a precedent of the Court if I were a Supreme Court Justice, but I would follow the Court's precedent on this issue. Recognizing the importance of stare decisis, the Supreme Court has delineated the following factors as relevant to this issue: whether the rule has proved to be impractical in workability; what are the respective costs of reaffirming and overruling the prior case; whether related principles of law have so far developed that the old doctrine is ineffective; and whether the facts have so changed that the old rule is no longer significant or justified.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer 22. In matters of statutory interpretation, a statute is given the presumption of constitutionality. The rules of statutory construction require that the Court look to the plain language of the statute. If there is some ambiguity, it may be necessary to look further to legislative intent. While it may be difficult to ascertain legislative intent committee reports may be helpful but statements of individual legislators should be viewed with caution as they may not reflect the views of a legislative body.

RESPONSES OF PETRESE B. TUCKER TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and

giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes, I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I were to disagree with them.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores*,¹ where the Courts struck down the Religious Freedom Restoration Act.

Answer 2. If fortunate to be confirmed as a United States District Court Judge, I am committed to following decisions of the Supreme Court and the Court of Appeals, not any personal view I might have on an issue.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. Yes, I am committed to following the precedent of higher courts on equal protection issues.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 4. I have no legal or moral beliefs which would prevent me from imposing or upholding a death sentence in an applicable criminal case that might come before me as a federal judge.

Question 5. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. Delays of more than 10 years seem excessive, but policy decisions, including the process for appeals regarding capital punishment are appropriately made by Congress or State Legislatures, not the Courts. The federal courts have the responsibility to resolve capital cases fairly and expeditiously consistent with established precedent.

Question 6. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. It is the responsibility of a Federal judge to apply the plain language and meaning of the Constitution and the laws of the United States, legal precedent of the United States Supreme Court and United States Court of Appeals construing them, and if necessary, legislative history. Reliance on these authorities is consistent with the limited jurisdiction of the federal court in our Constitutional system of separation of powers. It would be my responsibility in resolving the matters which would come before me to apply the established precedent under the Constitution and Laws of the United States.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 7. Under the limited judicial power established by Article III of the Constitution, it is legitimate for courts to look to the plain meaning of the text and the original intent of the Framers of the Constitution, and, other amendments. In considering claims of constitutional rights courts must look to precedent interpreting the constitutional provision at issue. If Justice Brennan meant by discernment of the "community interpretation" of the constitutional text, that such an assessment of communities views is committed to the courts and not to the political branches, then that approach is not legitimate under our system of separation of powers. The Constitution does, however, expressly provide a legitimate avenue for establishment of new constitutional rights through the ratification of an amendment under Article V of the Constitution.

¹521 U.S. 507 (1997).

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 8. If fortunate to be confirmed as a United States District Court Judge and faced with a challenge to the constitutionality of a statute, I would be bound by the presumption of constitutionality and any and all precedent established in the Circuit in which I was sitting and by the United States Supreme Court. In cases of first impression, I would first look to the plain language of the Constitution, the statute and analogous precedent, and if necessary, legislative history.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

A. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

Answer 9. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court invalidated a Connecticut law restricting access to birth control on the basis of a "right to privacy" that the court found to exist in the "penumbras" of the plain text of the Constitution. The Supreme Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999), held that State Sovereign Immunity extends beyond that conferred by the Eleventh Amendment, and barred lawsuits against a State in State court without consent to suit. The Supreme Court in both cases looked beyond the Constitutional text in resolving the issues presented. As a United States District Court Judge however, I would be compelled to follow these precedents and any other precedents of the higher court.

Question 10. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

B. *United States v. Lopez*, 514 U.S. 549 (1995).

Answer 10. These two cases illustrate the Supreme Court's interpretation of the Commerce Clause in different contexts. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld a federal law that prevented individual farmers from growing more than the pre-determined amount of wheat because that over production by individual farmers, in the aggregate, could affect the interstate wheat market. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down the federal Gun-Free School Zone Act as not having a sufficient effect on interstate commerce. *Wickard* appears to expand Congress's power to legislate on matters also regulated by the states.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States v. Lopez*, 514 U.S. 549 (1995).

B. *Printz v. United States*, 521 U.S. 898 (1997).

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

E. *Baker v. Carr*, 369 U.S. 186 (1962).

F. *Shaw v. Reno*, 509 U.S. 630 (1993).

Answer 11. In each of these cases the Supreme Court has addressed the division of power between the national and the state governments under the United States Constitution. In *United States v. Lopez*, 514 U.S. 549 (1995), the federal Gun-free School Zone Act was struck down as not having a sufficient effect on interstate commerce. The Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997), held that Congress was without authority to "commandeer" a States' executive officer to run background checks on prospective gun buyers under the Brady Handgun Violence Prevention Act. In both *Printz* and *Lopez* the Supreme Court held that federal legislation exceeded the power of Congress. In *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Supreme Court applied the doctrine of sovereign immunity underlying the Eleventh Amendment to prohibit lawsuits against a nominating State in State Court. In both *Baker v. Carr*, 369 U.S. 186 (1962), and *Shaw v. Reno*, 519 U.S. 630 (1993), the Supreme Court held that a Federal District Court could hear an action alleging that a state reapportionment statute violated the Equal Protection Clause of the United States Constitution. While *Lopez*, *Printz*, and *Alden* appear to preserve state power as against national power, *Baker* and *Shaw* established a federal judicial role

in reviewing state exercise of power as that power effects individuals in state re-apportionment cases.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies?

Answer 12. No, the federal district courts do not have the institutional expertise to set rules for and oversee the administration of prisons, schools or state agencies.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. As a United States District Court Judge, I would begin any statutory analysis with the presumption that the statute was constitutional. It would be appropriate to look to the plain language of the new amendment. If some ambiguity still existed, I would look to the legislative debates for legislative history on the matter. However, if a higher court had interpreted the preexisting statute and resolved any conflicts with the new amendment, I would be compelled to follow the precedent established by the higher court.

RESPONSES OF PETRESE B. TUCKER TO QUESTIONS FROM SENATOR THURMOND

Question 1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act on important issues. What is your view of courts acting in this manner?

Answer 1. The federal courts are a separate and distinct branch of government under the Constitution. The jurisdiction of the Federal court is to apply the Constitution, the laws that have been enacted by Congress, and precedent in the context of "cases and controversies." It is not the court's function to act in response to various social problems where the legislature has not acted on an important issue.

Question 2. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 2. I have no personal objections to the death penalty which would interfere with my responsibility in an applicable case to impose or uphold a death sentence.

Question 3. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose or uphold them as a Federal judge?

Answer 3. As a state trial judge, I have imposed mandatory minimum criminal sentences pursuant to the Pennsylvania statutes. I would have no reluctance to impose or uphold mandatory minimum criminal sentences as a United States District Court Judge.

Question 4. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while others say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 4. I understand the Federal Sentencing Guidelines are mandatory and, if fortunate enough to be confirmed as a United States District Court Judge, I will follow those guidelines.

RESPONSES OF JAMES J. BRADY TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Brady, you have long been active in partisan politics. What would be your policy regarding recusal in cases involving partisan litigants?

Answer 1. I would strictly adhere to the letter and the spirit of the ethical guidelines set forth in the *Code of Conduct for United States Judges* and the statutory provisions relating to disqualification and recusal, including Canon 3.C of the *Code of Conduct* requiring recusal in all cases in which a judge's impartiality might reasonably be questioned.

Question 2. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act on important issues. What is your view of courts acting in this manner?

Answer 2. I do not subscribe to the view that the courts should act in response to various social problems even when the legislature has not acted.

Question 3. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer 3. No, I do not have any personal objections to the death penalty that would cause me to be reluctant to impose or uphold a death sentence in the appropriate case.

Question 4. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose or uphold them as a Federal judge?

Answer 4. Congress has enacted such sentences and I would impose them without any reluctance.

Question 5. As you are well aware, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge, while others say the Guidelines provided needed consistency. What is your view of the Federal Sentencing Guidelines and their application?

Answer 5. Congress has enacted such guidelines as striking the appropriate balance between consistency and flexibility. If I were fortunate enough to be confirmed as a district judge, I would follow the Sentencing Guidelines without any reservations.

RESPONSES OF JAMES J. BRADY TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If a nominee for any federal judgeship refuses to answer questions about a Constitutional issue, should that individual be confirmed?

Answer 1. I cannot properly answer this question with a yes or no answer. There are questions about Constitutional issues that may be answered and some that cannot be answered consistent with the Code of Conduct for United States judges. Any question that might be understood to call for a nominee to prejudge a matter that might come before that nominee as a sitting judge would be problematic, as the Code of Conduct prohibits advisory opinions.

Question 2. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with “the advice and consent” of the Senate. If you were a member of the United States Senate, would you agree that it is difficult to advise and consent to a nominee when a candidate refuses to answer questions on Constitutional issues?

Answer 2. I believe that there are many means of determining the fitness of a nominee, including the way that a nominee responds to the questions of the United States Senate. I believe that nominees should respond to questions regarding Constitutional issues, so long as responding to these questions does not conflict with the Code of Conduct or appear to be an indication that the nominee may have prejudged a matter.

Question 3. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer 3. I believe that the purpose is to assist the United States Senate in fulfilling its constitutional role of “advice and consent.”

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer 4. No. However, there are some questions to which a judicial nominee may not be able to respond in full, because of the dictates of the Code of Conduct for United States judges.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 5. No. There are no circumstances under which a United States District Court Judge or United States Court of Appeals Judge may refuse to apply Supreme Court precedent to the case before him or her.

Question 6. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393?

Answer 6. I cannot speculate how I, as a Supreme Court Justice, would have voted in the *Dred Scott*, case in 1856. I do not know what the record contained, nor can I place myself in a role of a judge presiding over a case more than a century ago. I do know that the *Dred Scott* case is not good law today.

Question 7. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case that

black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer 7. *Dred, Scott v. Sanford* is not precedent to be followed by the courts of today, as a result of the adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution.

Question 8. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856)?

Answer 8. Yes, I would have been bound to follow this binding precedent.

Question 9. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy v. Ferguson*, 163 U.S. 539 (1896)?

Answer 9. I cannot speculate how I, as a Supreme Court Justice, would have voted in the *Plessy v. Ferguson* case in 1896. I do not know what the record contained, nor can I place myself in a role of a judge presiding over a case approximately a century ago. I do know that the *Plessy v. Ferguson* case is not good law today.

Question 10. In *Plessy v. Ferguson*, 163 U.S. 539 (1896) a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer 10. *Plessy v. Ferguson* is not a precedent for today's court. It was overruled by *Brown v. Board of Education* (347 U.S. 483) in 1954.

Question 11. If you were a Supreme Court Justice in 1954, what would you have held in *Brown v. Board of Education*, 347 U.S. 483 (1954)?

Answer 11. I cannot speculate how I, as a Supreme Court Justice, would have voted in the *Brown v. Board of Education* case in 1954. I do not know what the record contained, nor can I place myself in a role of a judge presiding over a case decades ago. I do know that the *Brown v. Board of Education* case remains binding precedent today.

Question 12. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer 12. As a district court judge, I would be required to follow the holding of the United States Supreme Court in *Brown v. Board of Education*.

Question 13. If you were a Supreme Court Justice in 1973, what would you have held in *Roe v. Wade*, 410 U.S. 113 (1973)?

Answer 13. I cannot speculate how I, as a Supreme Court Justice, would have voted in the *Roe v. Wade* case in 1973. I do not know what the record contained, nor can I place myself in a role of a judge presiding over a case decades ago. I do know that *Roe v. Wade*, as amended by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), remains binding precedent today.

Question 14. In *Roe v. Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer 14. As a district court judge, I would be required to follow the precedent as decided by the United States Supreme Court. I would not be permitted to adopt a dissent in this or any case as a precedent. As a district court judge, whether I agree or disagree with a holding or a dissent in a case decided by the United States Supreme Court, I must and will follow the prevailing precedent regardless of my personal view.

Question 15. We understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer 15. I do not have any personal view regarding abortion that would prevent me from following Supreme Court precedent in this area. The current Supreme Court precedent on this issue is set forth in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Question 16. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer 16. The United States Constitution provides for the imposition of the death penalty, and the United States Supreme Court has upheld the death penalty on numerous occasions. I have no reservations or reluctance in following the Constitution and the holdings of the Supreme Court.

Question 17. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer 17. The Second Amendment provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

I will follow this amendment and any and all precedent of the United States Supreme Court and the Fifth Circuit on this matter, without regard to any personal view I may have.

Question 18. In *Planned Parenthood v. Casey*, (505 U.S. 833 (1992)), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer 18. As a district court judge, I would follow the holdings of the United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of any personal view I may have.

Question 19. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer 19. As a district court judge, any personal views I may have cannot play a role. I will follow the precedent of the United States Supreme Court and of the United States Court of Appeals for the Fifth Circuit.

Question 20. Do you believe that the death penalty is Constitutional?

Answer 20. Yes. The United States Supreme Court has clearly held that the death penalty is Constitutional, and as a district court judge, I would follow the precedent.

Question 21. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the court?

Answer 21. If I were a Supreme Court justice, I would follow the Supreme Court guidance on this issue. *Planned Parenthood v. Casey* (505 U.S. 383 (1992)) and other cases give guidance setting forth the rare circumstances under which the United States Supreme Court may overrule one of its precedents.

Question 22. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight to you give legislative intent?

Answer 22. Interpreting a statute, the court's analysis should begin, and frequently end, with the language of the statute. Only if the language of the statute is ambiguous can a court consider legislative intent. Legislative history should always be viewed with caution, and official committee reports should be afforded greater weight than the individual testimony of elected officials.

Question 23. On September 3, 1995, it was reported in the Advocate of Baton Rouge, Louisiana, that, "the FBI is looking into the Louisiana Democratic Party's campaign finance activities in connection with the federal probe of alleged corrupt gambling influence on the Louisiana legislature. The FBI probe has alleged that state Sen. Larry Bankston, D-Port Hudson, laundered contributions from gambling interest through the Louisiana Democratic Party." You were the Chairman of the Democratic Party during that controversy. What was the ultimate resolution of the controversy?

Answer 23. No action was ever taken by any law enforcement agency or other entity against the Louisiana Democratic party, its officers or employees. The Louisiana Democratic Party was served with a subpoena from a federal grand jury requesting certain documents. At my direction, the Party responded fully to the subpoena and cooperated fully with the United States Attorney's office in the response. I was never questioned by an investigative entity regarding this matter. To the best of my knowledge, once the response to the subpoena was made, no one connected with the party ever heard any more from the F.B.I., the Grand Jury, or the U.S. Attorney's office about this matter. To my knowledge, none of the documents provided to the Grand Jury by the party were ever used in the indictment of anyone, nor were they ever used in any trial or other proceeding.

Question 24. In 1995 in the Baton Rouge Advocate you discussed the Oklahoma City bombing and stated the following: "There are those who seek to divide us by blaming (or at least implying blame for) this tragedy on law enforcement agencies.

This is a preposterous thought that fuels organizations led by right-wing extremists, whose mission is to encourage hatred and promote violence in our society. And it encourages Republicans to keep these extremists in their fold." What did you mean by this and do you still subscribe to this philosophy?

Answer 24. These statements are excerpted from a letter to the editor submitted in the aftermath of the Oklahoma City bombing. I was outraged that some individuals had made statements attempting to lay the blame for the Oklahoma City bombing on law enforcement agencies. My intent in submitting the letter to the newspaper was to support our law enforcement agents, many of whom lost their lives in the Oklahoma City tragedy. In retrospect, my language was unclear, especially to the extent my statements could be read to suggest that this abhorrent view—that law enforcement was to blame for the bombing—was shared by mainstream Republicans. I certainly do not and did not attribute this sentiment to Republicans. To the contrary, the entire nation joined together in mourning this tragedy.

Question 25. Judges are supposed to project an image of being impartial. You held an officer's position with the Democratic Party of Louisiana since 1974. Do you think that being a chairman of a state political party gives the perception that you are a partisan and too political a nominee for the federal bench?

Answer 25. No. I would note that my position with the Democratic Party is just one component of my life experience. For more than thirty years I have been a lawyer representing many different clients, including Republican elected officials. As a judge, I would take my oath to be impartial very seriously. Although I can understand that others might be concerned about the impression created by one who held past positions in a political party, this impression has been overcome successfully by others who have served on the bench. I certainly do not believe that my party affiliation or past party position should disqualify me from the federal bench.

Question 26. Would you recuse yourself from any cases involving either the Republican or Democratic party?

Answer 26. If confirmed, I would strictly adhere to the letter and the spirit of the ethical guidelines set forth in the *Code of Conduct for United States Judges* and the statutory provisions relating to disqualification and recusal, including Canon 3.C of the *Code of Conduct* requiring recusal in all cases in which a judge's impartiality might reasonably be questioned.

RESPONSES OF JAMES J. BRADY TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer 1. Yes. I am fully committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I personally disagree with any such precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores*¹ where the Court struck down the Religious Freedom Restoration Act.

Answer 2. I would apply any decision of the Supreme Court and of the Fifth Circuit Court of Appeals.

Question 3. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer 3. Yes. I am committed to following precedent of higher courts on equal protection issues, regardless of any feelings I may have on the matter.

Question 4. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer 4. No. I do not have any legal or moral beliefs which would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal judge.

¹ 521 U.S. 507 (1997).

Question 5. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer 5. Yes, I believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution are too long. I believe that the federal courts should resolve capital cases fairly and expeditiously in accordance with the law, the decisions of the United States Supreme Court and the Circuit Court of Appeals.

Question 6. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer 6. I believe that a federal district court judge should look to the plain language of the constitutional provision or statute; the decisions of the United States Supreme Court and of the Circuit Court of Appeals touching on the statute or provision; and in some rare instances, legislative history reflecting the intent of the drafters of the statute or constitutional provision.

Question 7. Please assess the legitimacy of the following three approaches to establishing a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and the original intent of the Framers of the Constitution; (2) discernment of the “community’s interpretation” of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power established by Article III of the Constitution.

Answer 7. The plain language of the United States Constitution is a legitimate approach and should be the starting point. Original intent is a legitimate source if the original intent can be specifically and clearly determined, but should not outweigh the plain language. “[C]ommunity’s interpretation” is not a legitimate source. Ratification of an amendment is a legitimate approach and is the one method that the Constitution clearly provides for the adoption of any right.

The first approach would be consistent with the judicial power established under Article III of the Constitution, and would constrain the powers of the courts. The second approach would greatly enhance the power of the courts in a manner not envisioned by Article III. The third approach is set forth in the Constitution as the appropriate method for amending the Constitution.

Question 8. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in case that was not one of first impression? In a case of first impression?

Answer 8. Should such a statute come before me as a district court judge, I would afford it the presumption of constitutionality. If a challenge to the statute had been brought before, I would be governed by the decisions affecting it rendered by the United States Supreme Court or United States Court of Appeals for the Fifth Circuit, and I would hold consistent with those decisions.

If it were a case of first impression, I would look to the plain language of the statute; seek any analogous precedents in similar areas of the law that may give an indication as to how the United States Supreme Court or the United States Court of Appeals for the Fifth Circuit would rule on the issue and apply that ruling. In some limited instances, I would look to the intent of the legislative body which enacted the statute.

Question 9. In your view, what are the sources of law and methods of interpretation used in reaching the Court’s judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government’s power under Article III?

Answer 9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

According to the United States Supreme Court, the sources of law and the method used in *Griswold v. Connecticut*, 381 U.S. 479 (1965) were “. . . that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance: various guarantees create zones of privacy.”

B. Alden v. Maine, 119 S. Ct. 2240 (1999).

In *Alden v. Maine*, 119 S. Ct. 2240 (1999), the court reached its decision on “the Constitution’s structure and its history, [which] made it clear [that] the state’s immunity from suit is a fundamental aspect of the sovereignty which states enjoyed before ratification of the Constitution, and which they retain today.” Critics have

noted that, in these cases, the Supreme Court looked beyond the plain language of the Constitution in rendering its decisions.

Question 10. Compare the following cases with respect to the fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress' power and on the federal government's power compared with the power of state governments.

Answer 10. A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the item in question, wheat, was not "in commerce" but was being utilized for the owner's own use. The court found that regardless of the seemingly small impact which the grower's activities might have had on interstate commerce, it was this grower's action, taken together with thousands of other like growers, that would substantially affect interstate commerce, and therefore the seemingly trivial activity of one wheat grower could be regulated.

B. *United States v. Lopez*, 514 U.S. 549 (1995).

In *United States v. Lopez*, 514 U.S. 549 (1995), the court found that there was no basis for Congress to enact the Gun-Free Zones Act of 1990 under the commerce clause of the Constitution. The majority opinion quotes the Framers of the Constitution and requires that the effect of the regulated activity on interstate commerce must be substantial and in this case, found it not to be so.

Wickard would require that courts uphold statutes that have a minimal effect, if any, on interstate commerce. If it is shown that the cumulative effects of the regulated activity could impact interstate commerce, this would enhance the power of Congress.

The *Lopez* case, on the other hand, would require that the courts find that the activity sought to be regulated must have a substantial effect on interstate commerce, particularly if the activity sought to be regulated is not a commercial one. The holding of *Lopez*, therefore, constrains the powers of the courts and of Congress.

Wickard would place more power in the federal government and less in the state, whereas *Lopez* would have the reverse effect.

Question 11. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

Answer 11. A. *United States v. Lopez*, 514 U.S. 549 (1995).

Lopez restricts the power of the federal government by limiting the use of the commerce power by Congress. The holding in this case would seemingly reserve the activity Congress sought to regulate to the state.

B. *Printz v. United States*, 521 U.S. 898 (1997).

In this case, the Supreme Court decided the issue of whether or not the Congress can "force the participation of the states' executive in the actual administration of a federal program . . ." The court held that Congress could not. This case restricts the power of the Congress, thus reserving the sovereignty of the states to be free from such federal dictates.

C. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

The United States Supreme Court in this case held that Congress, in the exercising of its powers under Article I of the Constitution, cannot abrogate the sovereign immunity of a state in lawsuits by citizens of that state where the state has not consented to such suits. The court held that such immunity ". . . is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." This case diminishes the power of the federal government and enhances the power of the state.

D. *Baker v. Carr*, 369 U.S. 186 (1962).

By determining that a challenge to a state apportionment plan is not a "political question" and is "justiciable," the United States Supreme Court determined in this decision that such an apportionment plan must comply with the Fourteenth Amendment's equal protection clause. This decision, therefore, enhanced the power of the federal system in that federal courts could hear challenges to such acts and to consider their compliance with the Fourteenth Amendment. This lessens the impact that a state has in determining the manner in which it may wish to apportion its legislature and enhances the power of the court to review such decisions.

E. *Shaw v. Reno*, 509 U.S. 630 (1993).

In this case, the Court held that a challenge to a state congressional apportionment plan which appeared to be race-neutral on its face, but which could not rationally be understood as anything other than an effort to separate voters on the basis of race, can be challenged under the equal protection clause of the Fourteenth Amendment and must withstand the strict scrutiny test. This case enhances the

power of the federal government (the courts) by authorizing such challenges to state enactments. This limits the power of the states to act in such areas.

Question 12. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies?

Answer 12. No. I do not believe that a federal district court has the institutional expertise to set rules for and oversee the administration of prisons, schools, or state agencies.

Question 13. Would it be appropriate for a court to hold unconstitutional a statute which existed before and after the ratification of a constitutional amendment, based on an interpretation of that amendment which creates an implied right conflicting with the preexisting statute?

Answer 13. If I were presented with this unusual set of circumstances in an actual case or controversy, I would look to the text of the Constitution and any Supreme Court and Fifth Circuit case law. If the text of a constitutional amendment were to conflict with the statute, the text of the amendment would take precedence.

