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BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MAY 9, MAY 23, JUNE 13, JUNE 27, AND JULY 23, 2002

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NOMINATION OF RICHARD CLIFTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT; CHRISTOPHER C. CONNER, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA; JOY FLOWERS CONTI, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA; AND JOHN E. JONES, III, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THURSDAY, MAY 9, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Maria Cantwell presiding.

Present: Senators Cantwell, Leahy, and Specter.

OPENING STATEMENT OF HON. MARIA CANTWELL, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator CANTWELL. The Senate Judiciary Committee will come to order.

Good afternoon. I would like to welcome everyone here to the Judiciary Committee's 16th nomination hearing of 2002. We are here to consider the nominations of four individuals to the Federal bench, one nominee for the Ninth Circuit Court of Appeals, and three nominees to the district courts in Pennsylvania.

We are fortunate to have a talented group of nominees with us, and I would like to extend a welcome to them and to their families who are here, and the friends that may have joined them as well.

I am pleased to be able to chair this hearing today. Moving 57 judicial nominees through the confirmation process and on to the Federal courts around the country over the past 10 months has required that all the members assist the chairman, and I am happy to take part in that as well as today's hearing.

The nominees here today all have strong records that have demonstrated the ability to analyze complex and important legal concepts in a manner befitting a Federal judge. Their records reflect a commitment to our fundamental constitutional protections and

rights, including the advancement and protection of civil rights and liberties for everyone.

Some of the nominees have the support of bipartisan delegations, and all are here with the support of both of their home state Senators. We take that support and sponsorship seriously. As Federal judges, the nominees before us will have a vital role to play at very difficult times in our Nation's history. But with their individual records of public service, I am confident that they will take this role seriously, take the responsibility to heart, and ensure that the decisions that they make demonstrate the fairmindedness that we rely up on and that have been a part of our rich history and judicial precedent.

I would like to make a special note that Mr. Clifton, the nominee for the Ninth Circuit Court of Appeals, is a long-time resident of Hawaii, and upon his confirmation he will be the first member of the Ninth Circuit Court actually from Hawaii, since 1984. My stae of Washington, is part of the Ninth Circuit Court and has a long-standing and close relationship with Hawaii. I am pleased that Hawaii will have local representation on the court of appeals.

Before we hear from the distinguished Senators here that are taking part in this hearing to introduce the nominees, I would like to ask Senator Specter for any of his comments.

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

Senator SPECTER. Well, thank you, Madam Chairwoman. I am delighted to see these distinguished judicial nominees, even more delighted to see three from the Commonwealth of Pennsylvania. Let the proceedings begin.

Senator CANTWELL. We really do want these nominees.

[Laughter.]

Senator CANTWELL. Senator Akaka, would you like to start?

PRESENTATION OF RICHARD CLIFTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. DANIEL AKAKA, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator AKAKA. Thank you very much, Madam Chairwoman. I greatly appreciate this opportunity to appear before this committee this afternoon on the nomination of Richard Clifton to the United States Court of Appeals for the Ninth Circuit. I would like to welcome with much aloha Mr. Clifton and his wife, Teresa, and his family.

Aloha, and welcome.

Madam Chairman, I want to commend this committee and the Senate for the progress made on judicial nominations during the 107th Congress. I applaud the committee and its members and the committee staff for holding 16 hearings involving 55 judicial nominations during the past 10 months, leading to the confirmation of at least 52 judicial nominees in the 107th Congress. I am glad that today we confirm four of them.

As you know, Hawaii has waited a number of years for Senate confirmation of a Hawaii resident for a position on the U.S. Court of Appeals for the Ninth Circuit. In 1995, I introduced legislation to require representation on the court from each State within the

jurisdiction of the court. We have waited many years for this opportunity. I am pleased that Hawaii will finally have a judge on the Ninth Circuit.

I first had the pleasure of meeting Mr. Clifton last year, after I learned that the White House was considering him for this judicial position. Mr. Clifton has had a distinguished legal career. The Hawaii State Bar Association found him to be highly qualified for this position.

A graduate of Princeton University, he received his juris doctorate from the Yale Law School in 1975. Mr. Clifton has practiced in Hawaii since 1975 and has been a partner with the law firm of Cades, Schutte, Fleming and Wright in Honolulu, Hawaii, since 1982.

Mr. Clifton is licensed to practice before Hawaii's State and Federal courts, Illinois State courts, the United States Courts of Appeals for the Second and Ninth Circuits, and the U.S. Supreme Court. Mr. Clifton has written articles published in the Yale Review of Law and Social Action and the Hawaii Bar News. He has extensive legal experience in civil litigation, primarily business and commercial litigation. I believe he will be an asset to the Court of Appeals for the Ninth Circuit, and I offer my full support of his nomination.

Thank you very much for this chance to speak up on him. Thank you very much.

Senator CANTWELL. Thank you, Senator Akaka. As I said in my statement, we do appreciate you being here and the comments that you have made about the nominee.

Senator AKAKA. I would like to be excused for a markup.

Senator CANTWELL. Thank you.

Senator Specter, would you like to introduce the nominees from Pennsylvania?

PRESENTATION OF CHRISTOPHER C. CONNER, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, JOY FLOWERS CONTI, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA, AND JOHN E. JONES, III, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA BY HON. ARLEN SPECTER, A UNITED STATES SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Yes, thank you very much.

The nominees are, ladies first, Joy Flowers Conti, who brings an outstanding academic and professional resume and public service, a graduate of Duquesne University in 1970 and the law school in 1973, summa cum laude. The first woman hired as an associate by Kirkpatrick and Lockhart, a very prestigious Pittsburgh law firm, she was later professor at the Duquesne University School of Law. She is co-chair of the Pennsylvania Bar Association's Task Force on Legal Services for the Poor. So Ms. Conti has quite a record of academic achievement and work as a professor and also in the community sector.

Christopher C. Conner is a graduate of Cornell University, with a bachelor's degree in 1979, and Dickinson Law School in 1972, a shareholder—that is the current word for partner, with the cor-

porate structure taking over the law firms—in the distinguished law firm of Mette, Evans and Woodside, and vice president of the Pennsylvania Bar Association. He received two special achievement awards from the Pennsylvania Bar for leadership in the campaign for reform of judicial discipline and co-chairing the statewide high school mock trial competition.

John Jones has had a distinguished career, a bachelor's degree from Dickinson College in 1977 and Dickinson School of Law in 1980. He has served as chairman of the Commonwealth of Pennsylvania Liquor Control Board from 1995 to the present time, and that is a very complicated, very high-pressure job.

He has had a distinguished record in the practice of law, having a one-man office, a great item, from 1986 to the present time, almost an extinct species. He had been an associate and partner in Dolbin, Cori and Jones, a very prestigious law firm in Pottsville, Pennsylvania.

I could say a great deal more about these three outstanding nominees, but I am going to defer at this time, if I may, to my distinguished colleague, Senator Santorum.

PRESENTATION OF CHRISTOPHER C. CONNER, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, JOY FLOWERS CONTI, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA, AND JOHN E. JONES, III, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Senator. I appreciate the opportunity to be here, and I want to thank the committee for holding hearings on these three district court nominees from Pennsylvania. We have had 11 vacancies in Pennsylvania. Three have been confirmed to date, and this will double that number and we are very happy to see that progress here today.

I too will take them in order, as Senator Specter did. Let me first comment on Joy Conti. Joy, as you mentioned, was one of the first hired at Kirkpatrick and Lockhart. And you are right; it is a very distinguished firm. I used to work at it. She was a partner when I was a lowly associate at that law firm and she had an incredible reputation for integrity, for hard work, and being just incredibly fair in dealing obviously with her clients, but also with those of us who were underlings at the firm.

She had just a sparkling reputation, and I am very, very excited. She no longer works at that firm. She works at Buchanan and Ingersoll, but she had an incredible reputation at the firm and has distinguished herself in the Pittsburgh legal community over quite a period of years and we are very, very fortunate that she has agreed to take on this task of serving in the Federal judiciary. So I want to thank her for that, and thank her husband and three children for being here today.

Kit Conner, or Christopher Charles Conner, is looking for a position here in the Middle District of Pennsylvania. He is someone who is an outstanding litigator. He comes with the highest of recommendations. He went to a great law school. It happens to be the

law school I graduated from, Dickinson School of Law, and he has made a tremendous contribution to that school and to jurisprudence in the Middle District. He is going to be an outstanding member of the court.

John Jones is another outstanding lawyer and has served not just as an outstanding lawyer, but served the community beyond the practice of law. As Senator Specter mentioned, he was the head of the Liquor Control Board in Pennsylvania which, as Senator Specter noted, is a very difficult position. It is a position that is constantly under scrutiny of attempts to privatize, to modernize, and he has shepherded it through some very difficult waters and dramatically improved efficiency there and has just done an outstanding job for Governor Ridge, and now Governor Schweiker, in an appointed position in that regard. It shows his commitment to public service, but he has also been, as Senator Specter noted, an outstanding litigator, an outstanding attorney in Schuylkill County.

So I am very, very excited about all three of these nominees. I think the committee, under review, will find them to be incredible nominees for these positions, and I certainly recommend that the committee move them to the floor and get them voted on and seated quickly.

Senator CANTWELL. So, Senator Santorum, you have not worked with Mr. Jones before?

Senator SANTORUM. No, but I did mention he also went to the same law school I went to. So he also has an outstanding legal education.

Senator CANTWELL. I thought perhaps you were on the Liquor Control Board and we hadn't known about it.

[Laughter.]

Senator SANTORUM. No. I have tried. Well, that is another story. Let's not go there.

Senator CANTWELL. We are honored to have three of our colleagues from the House here to also give comments on the nominees. I am glad to see Representatives Cox and Holden, whom I have served with in the House. It is good to have you here, as well, Congresswoman Hart.

Representative Cox?

PRESENTATION OF RICHARD CLIFTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. CHRISTOPHER COX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Reprensentative COX. Thank you, Madam Chairman. I am happy to be here with Senators Inouye and Akaka in support of President Bush's nomination of Richard Clifton to the Ninth Circuit Court of Appeals. Like you, I am a resident of the Ninth Circuit and I am very, very pleased that Mr. Clifton, whom I have known for a quarter century, is going to become a judge of that court, if, as and when the Senate votes to confirm him.

I have known Rick for 25 years. I have known his, wife, Terrie, for 14 years, and most importantly I have known David Clifton and Katherine Clifton for their entire lives. I think it is a very nice thing that they all here from Honolulu with us today.

As you have heard from Senator Akaka, Rick Clifton is an outstanding lawyer, a legal scholar, a civic leader, and he is very involved in his community and widely admired by his peers in the profession. But it must be said at the outset that more than all of that, and more even than his lifelong support of the Chicago Cubs, Rick Clifton is a dedicated husband and father. It is a special honor, as I said, for that reason, to have his entire family here with us today.

When I first met Rick Clifton in 1977, I served as law clerk to U.S. Court of Appeals Judge Herbert Choy, the first Asian American Federal appellate judge in America. Rick had preceded me as Judge Choy's law clerk in 1975, after graduating with honors from Princeton University and Yale Law School.

By 1977, when I met him, he was a lawyer in private practice with Cades, Schutte, Fleming and Wright, one of the most prestigious law firms in Hawaii. He became a partner with Cades Schutte in 1982. In the last two decades, his practice has focused on commercial litigation, with an emphasis on complex litigation and appellate practice. Today, Richard Clifton is recognized as one of Hawaii's premier trial and appellate lawyers.

Beyond the courtroom, he has been active in the bar. He has served on the board of directors of the Hawaii Women's Legal Foundation, and remains a member of that organization. He served the State bar as chairman of its Special Committee on Quality of Life for 3 years. He is a leader of the Hawaii Chapter of the American Judicature Society and serves as a director of the Ninth Circuit Historical Society. He is a delegate to the Judicial Conference of the U.S. District Court for the District of Hawaii. Previously, he has served as a delegate to the Hawaii State Judicial Conference.

He has also been a teacher of law. For many years, he was an adjunct professor of law at the University of Hawaii William S. Richardson School of Law, where he taught appellate advocacy.

But neither teaching law nor practicing law, nor even serving the bar, was enough to consume Rick Clifton's energies for public service. He served not just on the board of directors, but as chairman of Hawaii Public Radio for 5 years, from 1995 to 2000. He remains both a director and a member of the executive committee of the board of Hawaii Public Radio.

Even more taxing perhaps was his service as a Cub Scout den leader and a youth soccer coach and referee. I am certain that refereeing youth soccer games provided exceptionally valuable experience for his commercial litigation practice, and should serve him especially well as well on the Federal bench.

From the time I met Richard Clifton a quarter century ago, I have been impressed with his quickness of mind, his ready grasp of even the most difficult legal concepts, his always calm and reasoned approach to issues, and his honesty and fairness. In these exceptional personal qualities, he is much like Judge Herbert Choy, whom we both deeply admire and from whose powerful example of integrity we both learned at a formative point in our careers.

When confirmed by the Senate, Rick Clifton will become only the second Hawaiian ever to serve on the Ninth Circuit. I cannot imagine a more qualified person.

Madam Chairman, Senator Specter, it is both a privilege and honor this afternoon to join with Senators Inouye and Akaka in introducing Rick Clifton to this committee. He will be an outstanding Federal judge because he is an outstanding individual.

I thank you.

Senator CANTWELL. Thank you, Congressman Cox, for your comments.

Congressman Holden?

PRESENTATION OF JOHN E. JONES, III, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE OF PENNSYLVANIA BY HON. TIM HOLDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. HOLDEN. Madam Chairwoman, nice to see you again.

Senator CANTWELL. Nice to see you.

Mr. HOLDEN. Madam Chairman, it is an honor and a privilege for me to be here to support my constituent and my friend, John Jones, and I say that with all sincerity. As the Pennsylvanians who are here today know, John and I were political opponents in 1992, but I stand here today in strong support of John Jones' nomination to be a district judge in the Middle District of Pennsylvania.

I have known John Jones for well over 20 years. I have known him in a professional manner. Before coming to Congress, I served as the sheriff of Schuylkill County, and during that time period John was a practicing attorney in Schuylkill County, as well as a public defender. I can tell you that all the court-related staff who worked with John during those years have the highest respect for the dedication, for the sincerity, and for the real drive that he performed his duties with representing his clients.

I also just want to comment briefly on what Senator Specter and Senator Santorum have said about John's duty as chairman of the Pennsylvania Liquor Control Board. As they have said, that is not an easy position, but he has done an outstanding job and he has made all Pennsylvanians, and particularly all Schuylkill Countians proud of the job that he has done.

I am not an attorney, so I don't feel all that qualified to comment on John's ability in the courtroom. But I come here today with the strongest possible support and recommendations from three members of the bench in Schuylkill County.

Judge JOSEPH F. McCluskey, who is now in senior status on the Commonwealth Court and a former president judge of Schuylkill County, Judge William Baldwin, who is now the president judge in Schuylkill County, and Judge D. Michael Stein, who is a sitting judge in the Court of Common Pleas in Schuylkill County, have all spoken to me in the last 24 hours and asked me to relay to you and to the committee their strongest support of the qualifications of John and how they believe he would really be an asset to the Middle District Court.

Finally, Madam Chairwoman, I also would like to bring the recommendation of a former prosecutor in Schuylkill County, Cal Shields, who was the district attorney for 16 years and fought neck-and-neck, head-to-head with John in many, many cases. They also go back to their days as undergraduates at Dickinson College,

and he also sends his highest possible recommendations, and believes truly that John would be a tremendous asset to the court.

Madam Chairwoman, I want to note that all four of those individuals are Democrats, so I want you know that this is a bipartisan effort. People in Schuylkill County are proud to have John Jones sit on the Federal court, and again I ask the committee to move the nomination and take it to the Senate floor.

I thank you for the opportunity today.

Senator CANTWELL. Thank you, Congressman Holden.

Congresswoman Hart?

PRESENTATION OF JOY FLOWERS CONTI, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. MELISSA HART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Representative HART. Thank you, Madam Chairwoman. Fellow members and Senators Specter and Santorum, I am honored to be here as well to reintroduce, as she has already been introduced to you, Joy Flowers Conti, who is the nominee for the U.S. District Court in western Pennsylvania.

I first met Joy Conti as a young attorney in Pittsburgh just beginning my practice. She at that time already had a stellar professional and personal reputation within our community, and in the years since she has certainly built on that reputation. She embodies all that is unique and great about Pennsylvania. She has a strong and proud work ethic, coupled with an important commitment to helping her community, as her resume clearly indicates.

She was mentioned by the Senators as being a pioneer for women in the law, being the first at her firm. But she has also worked to improve the profession for women as a beginning member of our women's bar association, and also contributing a significant amount to the education of young women as a professor at the Duquesne University School of Law, but also furthering our legal knowledge as attorneys by giving a significant amount of her time in continuing education as a seminar speaker.

Her character and her dedication have well served the clients of her law practice. She also has served the individuals aided by the groups on which she voluntarily serves as a board member throughout the community, whether it is Catholic Charities or serving on one of her child's sport team's mother's groups; I believe football mothers, in fact, at this time.

She has always been respected by the legal community in Allegheny County, where I have practiced law, and is just an outstanding woman. Her talents and her dedication will serve us all with honor on the U.S. district court and I recommend her highly.

Thank you for allowing me to be here.

Senator CANTWELL. Thank you, Congresswoman Hart, and again thank you for taking time out of your schedules. We hope you will look favorably on those Senate bills that we are passing over to the House and we are glad that you made time today to talk about these important nominees.

Thank you.

I would like to call up Richard Clifton.

If, Richard, you could just stand to be sworn in, do you swear that the testimony you are about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. CLIFTON. I do.

Senator CANTWELL. Welcome, Mr. Clifton, to the committee. We obviously like nominees to take the opportunity to introduce their families and friends who have traveled with them. I can't think of too many people that could have traveled farther than you and your family, so if you would please take that opportunity.

STATEMENT OF RICHARD CLIFTON, OF HAWAII, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. CLIFTON. Thank you, Senator. I would like to start with my family, seated directly behind me: my wife, Terrie; our children, David and Katherine. Tied with us for the record of longest distance, I am happy to recognize U.S. District Judge Helen Gillmor, of the District of Hawaii, who I confess was in Washington for other business but took advantage of the opportunity to be here today—other business, had to leave.

And then there are several people from my past who have promised to be discreet about my past, dating back to friends in high school. Roger Wilson from Chicago and Jim Lutton from Syracuse and Jim's son, Michael Lutton, are all here; my college roommate, David Whitman, from Baltimore.

And then as you heard, I am a member of what we call the Federal family of Judge Choy, the only Hawaii resident to sit on the Ninth Circuit to date. Representative Cox is one of my colleagues there, and two other of my colleagues from that family are here, Anna Durand Kraus and Doug Jordan, both of whom are lawyers here in Washington.

I don't know if somebody else has slipped in while I was in the front, but I think that is it.

Senator CANTWELL. Thank you, and welcome to all of you. We appreciate you being here.

Obviously, Mr. Clifton, as a nominee to the circuit court of appeals, you have not previously served as a judge so you don't have a record of decisions that the committee can evaluate regarding your commitment to precedent. With that in mind, could you just comment, in your opinion, on how strongly should judges follow precedent set in previous cases, and does the commitment to following precedent change with the type of court, whether it is the district court level or the court of appeals? If you could comment on that?

Mr. CLIFTON. I would be happy to, Senator. A court of appeals such as the one to which I have been nominated is absolutely obligated to follow precedent set down by the U.S. Supreme Court. It is also obligated, at least in the case of the Ninth Circuit, to follow established Nine Circuit precedent. So if there is a previous Ninth Circuit decision, an individual judge or an individual panel of three judges is not at liberty to alter or overturn that decision.

The court's procedures require than an en banc court be called if there is to be a reversal or overturning of prior Ninth Circuit precedent. So if I am given the opportunity to serve, I would be

bound by and would be committed to comply with all precedent from the Supreme Court and all prior Ninth Circuit Court decisions.

I apologize for my voice. I picked up a cold on the flight here, I am afraid.

Senator CANTWELL. You are likely aware of a trend of decisions by the Supreme Court that have basically questioned Congress' constitutional authority to pass Federal regulations.

In your opinion, are there any Federal statutes that go beyond Congress' enumerated powers under the Constitution?

Mr. CLIFTON. I am not sure that I have a good answer to that question, Senator. I haven't considered it. I am aware of the recent decisions of the U.S. Supreme Court which have called into question Congress' exercise of the commerce power, for example, as to whether a particular statute properly falls within the ambit of the power to regulate interstate commerce, and suggestions that perhaps stronger connections have to be made or more explicit findings might be useful. I am not aware and have not identified any statutes that would run afoul of a similar decision, so I am afraid I cannot identify any others to you.

Senator CANTWELL. Thank you. One issue that we have obviously had a lot of dealings with on this committee so far is the issue with regard to personal privacy, everything from the appropriate level of government intervention into personal decisions as it relates to the PATRIOT Act that we passed, to other concerns about how businesses handle personal information.

Do you believe there is a constitutional right to privacy and can you just describe, if you do believe there is a constitutional right, where that exists?

Mr. CLIFTON. Well, it is my understanding from Supreme Court decisions which I would be obligated to follow that there is, in fact, a constitutional right of privacy that I think comes primarily from the 14th Amendment and the due process rights of all citizens.

I should say that my own State of Hawaii has a separate constitutional right of privacy. And there is no such separate articulated right within the U.S. Constitution, but the Supreme Court has found it within the document and I join that opinion.

Senator CANTWELL. Thank you.

Senator Specter, do you have questions for Mr. Clifton?

Senator SPECTER. Yes, thank you very much.

The Supreme Court of the United States has stricken considerable legislation on the grounds that Congress hasn't "thought it through," challenging what I consider to be fairly extensive records having been made in the legislative process.

Have you followed those decisions?

Mr. CLIFTON. I have read a good number, I believe, of the opinions that you are referring to.

Senator SPECTER. What are your views as to the scope of a congressional record which is necessary in order to avoid having them stricken on those constitutional grounds?

Mr. CLIFTON. Well, Senator, I believe the starting point ought to be the assumption, indeed the legal presumption, that an enactment of Congress is presumed to be constitutional, and I don't be-

lieve any judge should lightly entertain the notion that an act exceeds the power of Congress.

There certainly are constitutional limitations on the power of Congress, as with each of the branches of Government. But the starting point, I think, would be an assumption that Congress had reason to do what it did, because it is Congress that is supposed to make the laws, and exercised power that was properly granted to it under the Constitution.

Senator SPECTER. What standing do you believe the Supreme Court has to conclude that Congress hasn't thought some matter through? Is the thought process of the Court superior to the thought process of the Congress?

Mr. CLIFTON. Well, as a court of appeals judge, I would be legally bound to follow Supreme Court precedent, so I don't want to call that into question. I don't believe a constitutional standard exists as to whether or not Congress has sufficiently thought things through. I don't know that that—in fact, indeed I don't believe that is a proper basis for striking down any statute enacted by Congress as being an excess of congressional power.

Senator SPECTER. There has been considerable disclosure of people who have had their innocence established through DNA, and there are many who are on death row who have been exonerated by DNA evidence. Many of the States have been very slow to give DNA tests to inmates who are serving for very long periods of time.

One Federal judge made a finding that it was a constitutional right to have DNA evidence, part of due process, and a number of bills have been introduced on the subject, some trying to encourage the States to give DNA tests. I have introduced legislation to establish access to DNA testing as a constitutional right pursuant to section 5 of the 14th Amendment, which gives Congress the authority to legislate in furtherance of due process.

You might want to submit a written response to this question, or perhaps you would care to answer it now. Do you think that the one district court which found a constitutional right to have DNA testing is accurate?

Mr. CLIFTON. Senator, let me start by observing that Hawaii does not have the death penalty, and I became aware when I was asked about and considered accepting the nomination to the Federal bench that there is a Federal death penalty, and further that the Federal courts review State convictions. Other States within the Ninth Circuit do have the death penalty and it becomes an increasing part of any judge's responsibility to deal with those issues.

Representative Cox revealed that I am a lifetime fan of the Chicago Cubs, and because of that I daily check the Chicago Tribune, which had a series a couple of years ago on what is the case in Illinois and reached the conclusion that there were as many innocent people on death row in Illinois as there had been people put to death, a series which ultimately led Governor Ryan to impose a moratorium on death penalties in Illinois.

There must be enormous concern. The Supreme Court has stated clearly that the death penalty is constitutional, and it would be my obligation as a court of appeals judge to adhere to that case law. Yet, any judge has to take seriously the responsibility that he or she has when considering a matter of literally life and death.

I don't know that I can comment to the precise question you pose because it could come to me as a court of appeals judge; that is, whether there is a constitutional right to DNA testing. But I will observe that at least from my reading, I am not aware of a challenge to Federal convictions of the same kind there has been a challenge to State convictions.

I think such things as the Federal Public Defender Service and the resources given to defense lawyers within the Federal system makes an enormous difference in at least reducing the possibility that an innocent man is convicted and sentenced to death, and I think any judge considering cases brought before the court needs to be mindful of that.

Senator SPECTER. Well, I think your observation about the difference in procedures in the Federal court is accurate. But as a court of appeals judge, you would have habeas corpus cases which come up through the State.

I believe that the death penalty is a deterrent, and I believe that having been district attorney of Philadelphia for some 8 years. I am not going to take the time now to give my reasons, but I think that the death penalty will be lost if it is not administered properly and if there are not tests given for DNA and adequate counsel provided, which I have taken up as a legislative matter.

Beyond protecting the death penalty for society's interest, it is a matter of fundamental fairness for the defendant not to be in jail if there is the potential for exonerating evidence to come up through DNA testing which wasn't available at the time of his conviction and original sentencing.

Well, on to more serious matters, how did you become a Cub fan?

[Laughter.]

Mr. CLIFTON. Exposure through my father, and proximity.

Chairman LEAHY. Your answer may determine whether you get through or not.

[Laughter.]

Mr. CLIFTON. My father was a Cub fan and he inflicted it on me, as I am slowing inflicting it upon my own son.

Senator CANTWELL. But coming to the Ninth Circuit, don't you think you will pick a Ninth Circuit West Coast team?

Chairman LEAHY. Trust me, you don't want to answer that question.

[Laughter.]

Mr. CLIFTON. They have had a good team in Seattle lately, so maybe I will find another team.

Senator CANTWELL. Thank you.

Senator SPECTER. What was Stan Hack's lifetime batting average?

Mr. CLIFTON. My father's generation, but I can probably give you Billy Williams. I am afraid I can't give you Stan Hack.

Senator SPECTER. Are you a native Chicagoan?

Mr. CLIFTON. No. My family moved there when I was 10, and so I lived there until I went to college. Those were probably the critical years of cementing the Cub fandom.

Senator SPECTER. Why did you pick the Yale Law School?

Mr. CLIFTON. Because at the time I believed that it was the best law school in the country and——

Senator SPECTER. Now, you are in trouble with everybody but me.

[Laughter.]

Mr. CLIFTON. I did say "at the time." I was a foolish 21-year-old at that time.

[Laughter.]

Senator SPECTER. Thank you very much, Mr. Clifton.

Mr. CLIFTON. Thank you, Senator.

Senator CANTWELL. Thank you.

Senator Leahy has joined us. Senator Leahy, do you have comments or questions?

Chairman LEAHY. Both, Madam Chair. I obviously welcome everybody here. I will put my whole statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. I do have a couple of questions of Mr. Clifton, but I was also glad to see Ms. Conti's nomination.

I commend you for taking the time to do this. Earlier in the week, we were told that my friends on the other side of the aisle would object, as they have the right to under the Senate rules, to us holding hearings today. I am glad they did not because I know a lot of you came from long distances to be here.

I am glad Ms. Conti is here. It is the first hearing on a nominee to the Western District of Pennsylvania since 1994. I mention that because during the past 6 years under other control of the Senate, no nominee from the Western District received a hearing. In fact, one of the nominees to the Western District, Lynette Norton, waited for almost 1,000 days. She did not get a hearing or a vote, and she died, never knowing how we might have voted. So I was glad that we could move far faster on Ms. Conti.

I remember when Judge Legrome Davis was nominated by President Clinton, the committee did not give him a hearing for 868 days, notwithstanding the very strong support he had from the senior Senator from Pennsylvania, who had worked very hard to get him a hearing. In fact, I give Senator Specter credit for getting the President to renominate Judge Davis earlier this year. Unfortunately, during the other time he couldn't get a hearing or a vote.

In fact, the junior Senator from Pennsylvania testified that Judge Davis did not get a hearing because local Democrats objected. I was the ranking Democrat at that time and I never heard that before. But I am glad he got through and I am glad that we were able to get Ms. Conti through faster.

Let me ask you this, Mr. Clifton, on the question of DNA. Obviously, that is not going to be dispositive in a lot of cases. I think you would agree with me that there will be an awful lot of cases, murder cases and others, in which there will be no DNA. I mean, I wouldn't want us to fall in this trap of thinking that we can determine guilt or innocence in a case because of DNA, because in a lot of cases there just will be no DNA evidence available.

Would you agree with that?

Mr. CLIFTON. I agree, Senator.

Chairman LEAHY. Just as a lot of times in a trial people say, well, let's wait for the fingerprint evidence, when in a criminal

case, a large majority of them, there is no fingerprint evidence either. Would you agree with that?

Mr. CLIFTON. Yes, sir.

Chairman LEAHY. Would you also agree, though, that what can be the most important thing is to have competent counsel if somebody is charged with a capital crime? Would you agree with that? I am talking about competent counsel on both sides.

Mr. CLIFTON. I would certainly agree, and indeed from the defendant's perspective one of the problems that has been identified in many cases over the past few years where apparently innocent persons have been convicted is the lack of competent counsel at the time of trial and the lack of resources the defendant needs to defend himself effectively.

Chairman LEAHY. Wouldn't it be far more likely if you have competent counsel, if there is DNA evidence or fingerprint evidence or something like that, the counsel would have made sure that was presented?

Mr. CLIFTON. DNA may be unique because it is becoming known to us in a way that was not known before, and so——

Chairman LEAHY. I am thinking of prospectively.

Mr. CLIFTON. Correct. Certainly, now that we know DNA we evidence exists, competent counsel would be expected to pursue that avenue if it had any applicability in the given case, if they had evidence they could work with that would speak to guilt or innocence.

Chairman LEAHY. I mention the need for competent counsel. There was a murder case in Texas where, in effect, the person who was convicted appealed, supplying irrefutable evidence that his attorney slept through most of the trial. The Texas Supreme Court said the Constitution requires him to have counsel; it does not require the counsel to be awake.

You are not going to be ruling on the Texas Supreme Court case, but as a practicing lawyer, would you feel that counsel, to be competent, should, at a minimum, stay awake during the trial?

Mr. CLIFTON. You would hope so. I will confess having sat in proceedings where sometimes I wondered if I wanted to stay awake. But you think a criminal trial—you would hope that counsel would be paying enough attention to follow what was happening.

Chairman LEAHY. You realize this desire to doze off during a hearing never occurs in the U.S. Senate.

[Laughter.]

Mr. CLIFTON. Not when I am sitting here.

Chairman LEAHY. We are usually dealing with billions of dollars and things like that, but not with somebody's life.

Madam Chair, I just wanted to compliment you for holding this hearing. I know you had a dozen other places you were supposed to be and I do appreciate you doing it. I appreciate the fact that the Senator from Pennsylvania has——

Senator CANTWELL. Three nominees.

Chairman LEAHY[continuing]. Three nominees here, and that we are able to start moving finally on nominees for Pennsylvania, a wonderful State.

Senator CANTWELL. Thank you, Senator Leahy.

Thank you, Mr. Clifton, for your answers to the questions, and you are excused.

Mr. CLIFTON. Thank you, Madam Chair.

[The biographical information of Mr. Clifton follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Richard Randall Clifton

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

Residence: Honolulu, Hawaii

Office: Cades Schutte Fleming & Wright
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

3. Date and place of birth.

Framingham, Massachusetts, November 13, 1950

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

Married, to Teresa Morano Clifton (maiden name: Teresa Lynn Morano)

Wife's Occupation: Dietitian

Wife's Employer: She is a self-employed consultant, working from our home. Her primary client is Salvation Army Family Treatment Services, located at 845 22nd Street, Honolulu, Hawaii 96816.

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

Princeton University; September 1968-June 1972; A.B., June 1972
Yale Law School; September 1972-May 1975; J.D., June 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.

June-August 1972: American Bar Foundation, Chicago (research assistant)

June-August 1973: Sidley & Austin, Chicago (summer associate)

May-July 1974: Cravath Swaine & Moore, New York City (summer associate)

July-September 1974: Morrison & Foerster, San Francisco (summer associate)

September-December 1974: Yale Univ., New Haven, CT (teaching assistant)

June-September 1975: Sidley & Austin, Chicago (summer associate)

October 1975-September 1976: U.S. Court of Appeals for the 9th Circuit (law clerk to Judge Herbert Y.C. Choy, based in Honolulu)

February 1977-present: Cades Schutte Fleming & Wright, Honolulu (associate until I became a partner of the firm effective October 1, 1982)

September 1978-May 1980 & September 1983-May 1989 (one term each academic year): University of Hawaii William S. Richardson School of Law (adjunct professor)

1988-present: Hawaii Women's Legal Foundation, Director

1991-present: Hawaii Public Radio, Director; also Secretary (1992-95) & Chairman of the Board (1995-2000)

1991-1992: Hawaii State Reapportionment Commission, Member

1996-present: Ninth Judicial Circuit Historical Society, Director

1998-present: American Judicature Society, Hawaii Chapter, Director

2001-present: Hawaii State Reapportionment Commission, 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 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.

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.

Hawaii State Bar Association: member (1977-present)
Chair, Special Committee on Quality of Life (1990-92)

American Bar Association: member (1977-present)
Sections of Litigation and of Antitrust Law

Hawaii State Judicial Conference: delegate (1987-1989)

U.S. District Court (Hawaii) Judicial Conference: delegate (2001-2003)

Hawaii Women's Legal Foundation: Director (1988-present)
Grant Distribution Committee member (1988-present) & Chair (1990-94)

Hawaii Women Lawyers: member (1999-present)

Ninth Judicial Circuit Historical Society: Director (1996-present)

American Judicature Society: member (approx. 1990-present)
A.J.S. Hawaii Chapter: Director (1998-present)

Federal Bar Association, including its Hawaii Chapter: member (2000-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 am not aware of any other organizations to which I belong which are active in lobbying before public bodies, aside from seeking public contracts or appropriations for themselves. If any of the organizations are active in lobbying, I am not aware of that activity.

The following organizations are ones in which I have been personally active:

Central Union Church (United Church of Christ)
Cub Scouts (Boy Scouts of America) (adult leader)
Hawaii Public Radio
Hawaii Republican Party
Supreme Court Historical Society

There are also organizations to which I might be said to "belong," or which use the term "member," but in which my actual involvement is minimal. In most cases, I am subscribing to a publication (e.g., National Geographic Society) or making a contribution (e.g., Hawaii Public Television). Those organizations include the following:

Amnesty International USA
Bishop Museum Association
The Churchill Center
Colonial Williamsburg Foundation
Consumers Union
The Contemporary Museum (Honolulu)
Die-Hard Cub Fan Club
Friends of the East-West Center
Friends of the Judicial History Center (Honolulu)
Friends of the Waikiki Aquarium
Hawaii Justice Foundation
Hawaii Public Television
Hawaiian Humane Society
Historic Hawaii Foundation
Honolulu Academy of Arts
Honolulu Symphony Society
Honolulu Zoological Society
Mothers Against Drunk Driving
National Geographic Society
National Wildlife Federation
Nature Conservancy of Hawaii
Polynesian Voyaging Society
Princeton Alumni Association of Hawaii
Punahou School Parent-Faculty Association
Society for American Baseball Research
World Wildlife Fund
Yale Club of Hawaii

[This does not include all recipients of contributions, but only those which use the term "member."]

In addition, I belong to two social clubs in Honolulu, the Plaza Club (essentially a downtown lunch club) and the Honolulu Club (athletic facilities). Both are "clubs" in name only, as they are privately owned and are operated as for-profit businesses. Both are non-discriminatory and were founded within the past 25 years.

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.

Hawaii state courts (1976-present)

Illinois state courts (1975-present; on nonresident/inactive status since approx. 1978)

U.S. District Court for the District of Hawaii (1976-present)

U.S. Court of Appeals for the Ninth Circuit (1976-present)

U.S. Court of Appeals for the Second Circuit (1979-present)

U.S. Supreme Court (1982-present)

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

Author, "The Shreveport Plan for Providing Legal Services," 3 Yale Review of Law and Social Action 280 (1973).

Co-author, The Shreveport Plan: An Experiment in the Delivery of Legal Services (American Bar Foundation, 1974).

Author, "Torn Between Work and Family: How Happy Are We?," Hawaii Bar News, August 1991, pages 24-27.

Co-author, "Court must abide by the law," Honolulu Advertiser, July 5, 2000.
(This was actually written by another Honolulu attorney, Paul Alston. He asked me and several other Honolulu lawyers to sign a letter to the editor responding to published letters criticizing a local federal judge for decisions in a particular case. The newspaper printed the letter as an op-ed column.)

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

I believe I am in very good health. My last physical exam was in May 2001.

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

None

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

Not applicable

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

Member, Hawaii State Reapportionment Commission, 1991 & 2001, appointed.

I have never run for elective public office.

7. 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;

Law clerk to Judge Herbert Y.C. Choy, U.S. Court of Appeals for the 9th Circuit, October 1975-September 1976

February 1977-present: Cades Schutte Fleming & Wright, Honolulu, employee (associate) until October 1, 1982, thereafter a partner in the firm

I have never practiced alone or with any other firm. I worked during the summer after law school graduation (June-September 1975) for Sidley & Austin in Chicago, at which time I also studied for and took the Illinois bar exam, but I did not "practice law" with that firm. By the time the bar exam results were posted and I was admitted to the Illinois bar, I had moved to Honolulu for my judicial clerkship. After the clerkship was over, I stayed in Hawaii.

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 practice has concentrated in civil litigation, primarily business and commercial litigation and cases that would be described as complex (by Hawaii

standards). There has also been some emphasis on appellate practice and on antitrust counseling.

Typical clients:

Alexander & Baldwin, Inc. (and subsidiaries)
Aloha Petroleum, Ltd.
American Classic Voyages, Inc./American Hawaii Cruise Lines
Consolidated Amusement Company, Limited
Deloitte & Touche
First Hawaiian Bank (BancWest Corp.)
Honolulu Federal Savings & Loan Assn. (later acquired by Bank of America)
Industrial Bank of Japan, Limited
Morgan Stanley Dean Witter
Outrigger Hotels Hawaii
PaineWebber
USX Corporation (U.S. Steel)

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," in the context of a business litigation practice with concentration on complex matters. During and leading up to a trial, there will be court appearances every day or nearly every day. Trials are relatively infrequent in my practice, but when they occur, they generally last for several weeks. At other times, there may be as few as one or two or as many as eight or ten court appearances in a month, usually for motion hearings.

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

I estimate that approximately 40 percent of my appearances have been in federal courts and 60 percent in state courts of record. Appearances in other courts are extremely rare.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

All (100 percent) of my practice has been civil.

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

I have tried 12 cases to verdict or judgment after a trial, in which I was the sole counsel in 6, the chief counsel in 5, and an active associate counsel in 1. (I have excluded cases in which my role was to observe or to assist in a purely subordinate capacity.) Most of the sole counsel cases were of relatively small size, in my early years of practice.

I understand this question to exclude arbitrations, judgments based on motions without a trial (e.g., for summary judgment), and judgments on appeal in cases handled only on appeal. I have handled many cases in each of those categories, as well, in addition to cases that were resolved by settlement.

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

Of the 12 trials identified above 42% (5 of 12) were jury trials, and 58% were non-jury.

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

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

1. USA v. 729.773 Acres of Land

U.S. District Court (Hawaii), Civil No. 80-0504

Trial: November 1982

Reported decision (prior to my involvement): 531 F. Supp. 967 (D. Haw. 1982)

Judge: Samuel P. King (now on senior status, but still active)

My client: Oahu Sugar Co.

Opposing counsel, representing the Navy: Tom Carolan, then with the Department of Justice, Washington, D.C., current whereabouts unknown

Co-lead counsel with me: Philip J. Leas, then and now a partner in my law firm, Cades Schutte Fleming & Wright, 1000 Bishop Street, Suite 1200, Honolulu, Hawaii 96813, 808-521-9328

This was a condemnation action tried to a jury. I entered the case after it started, principally for discovery and trial, including certain motions immediately prior to trial. Other motions (including the motion that led to the reported decision) were filed and argued before I became involved. Responsibility for the trial was divided between Mr. Leas and myself. He presented the opening statement and examined our experts, I gave the closing argument and cross-examined the government's experts, and other witnesses were divided up in a similar fashion..

The Navy condemned certain land adjacent to Pearl Harbor. Our client, Oahu Sugar, leased the property from the landowner (The Estate of James Campbell) for growing sugar cane. At the date of condemnation, a crop was growing on the property. The condemnation action concerned the valuation of that crop. A separate trial was held to value the Campbell Estate's real estate interest.

That factual question was complicated by the fact that sugar prices were volatile at the time. I do not recall the exact numbers, but the government argued for a total value of approximately $1 million. We argued for a value of approximately $3.5 million. I think the value reached by the jury was $2.7 million.

There was no appeal.

2. Aloha Airlines v. Director of Taxation of Hawaii

U.S. Supreme Court, 464 U.S. 7, 78 L.Ed.2d 10, 104 S.Ct. 291 (1983).

My client: Aloha Airlines

Opposing counsel, representing the State of Hawaii:

William Dexter (from the Mainland, current whereabouts unknown to me)

Kevin Wakayama, still with the Department of the Attorney General, 425 Queen Street, Honolulu, HI 96813, 808-586-1128

Lead counsel for our client: Richard L. Griffith, then a senior tax partner with our law firm. He subsequently left to become an executive with a client company. He retired within the past year, but he was most recently president of Queen's Health System, 1099 Alakea Street, Suite 1100, Honolulu, HI 96813, 808-532-6101.

Counsel for co-party, Hawaiian Airlines: H. Mitchell D'Olier, now president of Victoria Ward, Ltd., 1210 Auahi Street, Suite 115, Honolulu, HI 96814, 808-591-8411.

This was a tax case on appeal from the Hawaii Supreme Court. The issue was whether the Hawaii Public Service Company Tax, as applied to airlines, was preempted by a federal statute. In 1982 the Hawaii court upheld the tax against the taxpayers' challenge.

I became involved after that decision. Mr. Griffith was a tax lawyer with limited experience in litigation. At that time I specialized in appellate litigation. I was the main author of the Jurisdictional Statement filed by Aloha Airlines. I also served as our liaison with the Office of the Solicitor General. (Our contact there was, by coincidence, a lawyer I knew from law school, Samuel A. Alito, currently a judge on the U.S. Court of Appeals for the 3rd Circuit in Newark, N.J.) That office was involved because the U.S. Department of Transportation was persuaded to file an amicus brief supporting our Jurisdictional Statement. After the Supreme Court noted probable jurisdiction, I was the main author of the briefs filed for our client and helped to prepare for oral argument, which was presented by Mr. Griffith, on behalf of both airlines.

The U.S. Supreme Court ruled in our favor, reversing the decision of the Hawaii Supreme Court and holding the Hawaii tax to be preempted.

3. Bulgo v. Munoz, et al.

U.S. District Court (Hawaii), Civil No. 85-1206
Judge Harold M. Fong (now deceased)
Trial: February 1987 (approx. 3 weeks)

U.S. Court of Appeals for the 9th Circuit, 853 F.2d 710 (1988)

My clients: Paine Webber, Inc. and Alex Lau (an account executive with Paine Webber)

Plaintiff's counsel: James Dombroski, no longer in Hawaii, reported to be at
P.O. Box 751027, Petaluma, CA 94975, 707-762-7807

Counsel for the other defendants (and cross-claimants against my clients): Paul A. Lynch,
1132 Bishop Street, Suite 1405, Honolulu, HI 96813, 808-528-0100

Other attorney with our firm: Barry Tagawa, then an associate of our firm, now at 57 Post
Street, Suite 900, San Francisco, California 94104, 415-951-8600

This was a three-party action involving a securities transaction. Plaintiff Joseph Bulgo sued two sets of two defendants each: (a) Frank Munoz and Land and Construction Co., and (b) Paine Webber and Lau. The Munoz set of parties also filed a claim against the Paine Webber set of defendants, in the form of a cross-claim. Many legal theories were offered to support the various claims, including claims under federal and state securities laws, a Hawaii statute regarding unfair or deceptive acts or practices in trade or business, and misrepresentation. In short, Bulgo placed an order for a stock purchase, in a Paine Webber account held in the name of a company owned by Munoz. The value of the shares dropped by nearly 50 percent within days of the order. Bulgo contended that he was the victim of a scheme and refused to take the loss. Munoz claimed that the use of his account was unauthorized and that he should not be forced to bear the loss.

I was the lead counsel for Paine Webber throughout the proceedings, working with one associate from my firm.

The district judge dismissed or granted judgment on several counts prior to sending the case to the jury. (Those were the main focus of the appeal.) The jury ruled in favor of all defendants regarding the claims asserted by Plaintiff Bulgo, and in favor of my clients on the claims asserted against them by Munoz.

Plaintiff appealed. The 9th Circuit affirmed.

4. In the Matter of the Tax Appeal of Aloha Motors, Inc.; and Aloha Motors v. General Motors

Hawaii Tax Appeal Court, Judge Robert G. Klein (now in private practice in Honolulu)

Hawaii Supreme Court, 69 Haw. 515, 750 P.2d 81 (1988)

Hawaii First Circuit Court, Judge Robert G. Klein (as civil motions judge)

My client: Aloha Motors

Opposing counsel, representing the State: Kevin Wakayama, Department of the Attorney General, 425 Queen Street, Honolulu, HI 96813, 808-586-1128 (same as case no. 2, above)

Opposing counsel, representing General Motors: Lisa Woods Munger, Goodsill Anderson Quinn & Stifel, 1099 Alakea Street, Suite 1800, Honolulu, HI 96813, 808-547-5600

These were actually two separate cases involving the same subject matter and treated together for discovery purposes. Our client, Aloha Motors, operated a GM dealership in Honolulu from 1966 to 1982. When the franchise started, Aloha Motors was obligated under Hawaii law to pay a ½% wholesale use tax on all GM products imported for sale in Hawaii. Sometime thereafter, in 1969, GM changed its internal organization. A GM subsidiary became responsible for paying the ½% tax and did so. At that point, the local GM dealers were no longer obligated to pay that tax. But neither the state tax department nor GM advised Aloha Motors about the change. Thus, Aloha Motors continued to pay that tax until sometime in 1981, when the mistake was discovered by Aloha.

Aloha Motors applied for a refund from the state for the mistaken payments. The state tax department allowed a refund for the 1978-81 period, but denied the earlier claim as being barred by Hawaii law. Aloha Motors sought judicial review, in the Tax Appeal Court of Hawaii (to which one judge of the First Circuit Court is assigned).

Aloha Motors also filed a lawsuit in First Circuit Court against the pertinent GM subsidiary, for its failure to notify Aloha Motors that it no longer had to pay the Hawaii tax in question. Discovery in the two cases was conducted together, but rulings were sought on the tax claim first.

I was the lead counsel for Aloha Motors throughout both cases, with assistance from our firm's tax department.

After discovery, the state and Aloha Motors stipulated the facts for the Tax Appeal Court case. That court granted the state's motion to dismiss on two separate grounds. It held

that it lacked jurisdiction because Aloha Motors had not followed the procedures required for judicial review of a tax claim, and further that the claim was barred as untimely under the Hawaii non-claim statute.

That decision was appealed to the Hawaii Supreme Court. It reversed the Tax Appeal on the issue of jurisdiction, holding that the Tax Appeal Court had jurisdiction. It affirmed its decision as to the untimeliness of the claim, however, meaning that our client was denied recovery from the state tax department.

After that decision, activity resumed in the case against GM. Before it progressed to trial, however, that claim was mooted by outside events. The Hawaii Legislature passed legislation that permitted Aloha Motors to recover the duplicative payments which it had made to the state, after all. The case against GM was dismissed.

5. Leibert v. Finance Factors

Hawaii Supreme Court, 71 Haw. 664, 833 P.2d 899 (1990)

My client: Finance Factors

Opposing counsel: Charles H. Witherwax, currently listed as Counsel at D'Amato & Lynch, 70 Pine Street, New York, New York 10270, 212-269-0927

Other attorney with our firm: Ann Misura, then an associate with our firm, now at 59-559 Ke Iki Rd., Haleiwa, Hawaii 96712, 808-638-8593

This was an appeal from an adverse judgment entered by the First Circuit Court against our client in a class action suit for damages. Finance Factors (a state-licensed institution similar to a thrift bank) offered a "prepaid education program" to parents of private school students, through which it provided financing for tuition payments. Parents signed "retail installment contracts" with the schools, requiring the parents to make monthly payments. Finance Factors paid the tuition to the schools and collected the monthly payments from the parents. The interest rate disclosed for the program was calculated based upon the full loan amount at the beginning of the school year. Finance Factors had a side arrangement with the schools that were part of the program, however, under which Finance Factors was permitted to pay the schools in two installments. After a bench trial, the trial court held that the program and the stated interest rate violated Hawaii's unfair and deceptive business acts statute.

John Rolls, then with the Honolulu law firm of Ashford & Wriston, represented Finance Factors at trial. (Mr. Rolls subsequently left that firm to practice in Honolulu on his own. His current whereabouts are unknown to me. He is not listed as either an active or inactive member of the Hawaii State Bar Association.) Our firm was retained after the trial court reached the adverse verdict.

I was the lead counsel for Finance Factors on appeal. I drafted the briefs, with the assistance of an associate, and presented the oral argument.

The Hawaii Supreme Court affirmed in part and reversed in part. By a 3-2 decision, the court affirmed the judgment as to liability, that the program violated the unfair business act statute. The court reversed other elements of the judgment, however, notably the calculation of damages, cutting the ultimate amount due nearly in half.

6. Pure, Ltd. v. National Beverage Corporation and Shasta Beverages, Inc.

U.S. District Court (Hawaii), Civil No. 88-00101

Judge Alan C. Kay (now on senior status, but still active)

Magistrate Judge Francis I. Yamashita (recently left the federal bench here)

Trial: April-May 1991 (approximately 5 weeks)

U.S. Court of Appeals for the 9th Circuit, No. 92-15144

Unpublished memorandum, September 13, 1993, 1993 U.S. App. LEXIS 23519

Table of dispositions, 5 F.3d 539 (1993)

My client: Pure, Ltd.

Opposing counsel, representing Shasta: Robert J. Jossen, Swidler Berlin Shereff Friedman, 405 Lexington Avenue, New York, NY 10174, 212-973-0111

Opposing counsel, representing National Beverage: William C. McCorriston, McCorriston Miller Mukai MacKinnon, P.O. Box 2800, Honolulu, HI 96803, 808-529-7300

Other attorneys with our firm: William Swope (then a partner, now retired and "of counsel"), David Schulmeister (then and now a partner), Carole Petersen (then an associate, now teaching at the University of Hong Kong, Department of Law), Elizabeth Schaller (then an associate, now with the Department of the Attorney General, 465 S. King Street, Room 200, Honolulu, HI 96813, 808-587-3050)

This was primarily a breach of contract action. Our client, Pure, Ltd., entered into a contract with Shasta to introduce and distribute across the U.S. a product which our client produced and had distributed in Hawaii, a bottled water called Pure Hawaiian Sparkling Water. Pure alleged that Shasta breached the contract, and that National Beverage was liable for Shasta's breach under the alter ego doctrine.

I was not involved in the case at the outset. After the filing of the complaint, some motion practice, and some discovery, I entered the case, at the request of our clients, and become the lead counsel. Through trial, I was assisted by two partners and one associate from our firm. On appeal, I drafted the briefs, with the assistance of a different associate, and presented the oral argument. After remand, I continued to be responsible for the case.

The case was tried to a jury, which returned a verdict in favor of our clients on the breach of contract claim for $1.4 million. Judge Kay subsequently set aside that verdict and entered judgment for defendants, ruling that there was insufficient evidence as a matter of law to support the verdict, because the agreement between the parties was not sufficiently definite as to essential terms to constitute a binding contract. We appealed, and the 9th Circuit reversed. It concluded that there was sufficient evidence to support the jury's conclusion that there was a binding contract. The case was remanded for further proceedings, which mostly involved our clients' claim for costs and attorneys' fees. (Hawaii has a statute, HRS § 607-14, providing for an award of attorneys' fees to the prevailing party in actions in the nature of assumpsit, which this was.) Those proceedings were handled almost entirely by Magistrate Judge Yamashita. Defendants ultimately satisfied the judgment, including the amount awarded for fees and costs, in 1996.

7. State of Hawaii v. Erkel Greenfield and Associates, et al.

Hawaii First Circuit Court, Civil No. 71916

Filed June 1982; Trial: June – October 1993 (approximately 12 weeks of trial)

Trial Judge: Wendell K. Huddy (recently retired from the court)

Special masters prior to 1993 trial: Peter Adler and Keith Hunter

Judge after remand: Gail C. Nakatani

Hawaii Supreme Court, State by Bronster v. United States Steel Corporation, 82 Haw. 32, 919 P.2d 294 (1996)

My client: U.S. Steel Corporation, which came to be known as USX Corporation

Co-counsel for our client:

Tony Berman, Berman Paley Goldstein & Kannry, 500 Fifth Avenue New York, NY, 212-354-9600

John M. Rochefort, Weston, Benshoof, Rochefort, Rubalcava MacCuish, 444 South Flower Street, 43rd floor, Los Angeles, CA 90071, 213-623-2322

Other attorneys from our firm: in the first year, William Swope (then a partner, now retired and "of counsel"); later and through trial and appeal, Milton Yasunaga (originally an associate, later and now a partner); other primary associates included Barry Tagawa (now at 57 Post Street, Suite 900 San Francisco, CA 94104, 415-951-8600), Patricia Wong (now at Hawaiian Electric Co., P.O. Box 2750, Honolulu, HI 16840, 808-543-4880), Rhonda Griswold (now a partner), and Allen Wolff (now at Carlsmith Ball, P.O. Box 656, Honolulu, HI 96809, 808-523-2500)

Counsel for Plaintiff State of Hawaii:

Nelson S.W. Chang, now at 47-577 Halemanu Street, Kaneohe, HI 96744, 808-239-7447 (lead counsel at filing and for most of the duration of the case, but replaced as lead counsel prior to trial)

David J. Dezzani, Goodsill Anderson Quinn & Stifel, 1099 Alakea Street, Suite 1800, Honolulu, HI 96813, 808-547-5600 (lead counsel at trial)

Girard D. Lau, Department of the Attorney General, 425 Queen Street, Honolulu, HI 96813, 808-586-1360 (lead counsel on appeal)

Counsel for generally allied co-defendants (other steel manufacturing companies):

Harvey E. Henderson, Jr., now with Henderson Gallagher & Kane 220 South King St., Suite 2100, Honolulu, HI 96813, 808-531-2023 (counsel for Bethlehem Steel)

Bruce M. Ito, 735 Bishop Street, Suite 200, Honolulu, HI, 808-537-9122 (counsel for Kaiser Steel)

Craig Jorgensen, Los Angeles (now deceased) (counsel for Nippon Steel)

Counsel for sometimes adversarial co-defendants:

Willson C. Moore, now retired from Rush Moore Craven Sutton Morry & Beh, 745 Fort Street, Suite 2000, Honolulu, HI, 808-521-0400 (counsel for the architects for the project, Charles Luckman & Associates, et al.)

Wesley H.H. Ching, now with Fukunaga Matayoshi Hershey & Ching, 841 Bishop Street, Suite 1200, Honolulu, HI 96813, 808-533-4300 (counsel for one of the structuring engineering firms, Erkel Greenfield and Associates)

Brian K. Yomono, now with the Law Office of Richard Lee, 1750 Kalakaua Ave. Suite 2904, Honolulu, HI 96826, 808-957-0000 (counsel for another structural engineering firm, Severud)

Burnham H. Greeley, Greeley & Futa, 1001 Bishop Street, Suite 1300, Honolulu, HI 96813, 808-526-2211 (counsel for general contractor, Dillingham Corporation, dba Hawaiian Dredging and Construction Co.)

William A. Bordner, Burke, Sakai, McPheeters, Bordner, Iwanaga & Estes, 3100 Mauka Tower, 737 Bishop Street, Honolulu, HI 96813, 808-523-9833 (counsel for steel subcontractor/supplier Inryco)

John M. Cregor, P.O. Box 492, Honolulu, HI 96809, 808-533-8845 (counsel for structural steel erection subcontractor Hawaii Welding)

(There were other counsel, representing less significant parties or parties that got out of the case earlier than those identified above.)

As the above description suggests, this was an extraordinarily complicated and long-lived case. By a wide margin, this case has occupied more of my time than any other matter during my legal practice.

I was involved representing U.S. Steel ("USS") in this case for over 15 years, from beginning to end. For the first year, I worked under another partner in my law firm. Starting sometime in 1983, I became the main attorney for USS. That continued through substantial discovery, many motions, and an extensive alternative dispute resolution effort which included a four-day "mini-trial" in the late 1980's. In about 1990, after it became plain that the state was targeting USS as the primary defendant in the case and had dramatically increased its claim for damages, USS added two other firms to its defense team, which was led by Mr. Berman (listed above). Responsibility for pretrial motions, remaining discovery, and trial was divided between Mr. Berman, Mr. Rochefort (also listed above), me, and another partner from my law firm. The many expected witnesses were, for example, divided into categories, with different attorneys taking the lead on different categories. At trial, the state presented a drastically altered case from that which had been previously outlined. It omitted many, perhaps most, of the witnesses it had previously listed, including most of those on which the lead had been taken by Mr. Rochefort and by me. At trial (which I attended for all but a few hours, when I had an argument before the Hawaii Supreme Court in another case) I thus spent most of my time identifying and organizing lines of cross-examination for other witnesses and argument. For the appeal that followed, I was one of three primary authors of the briefs submitted by USS. Different attorneys concentrated on different sections, and we each commented on the others' sections. There was no oral argument on appeal. (For a long time, the Hawaii Supreme Court dispensed with all oral arguments, to catch up on a backlog of cases.)

The case concerned the allegedly excessive corrosion of a product known as "weathering steel" used in Aloha Stadium, the primary sports stadium in Honolulu. It is a 50,000-seat stadium best known as the home since the early 1980's of the NFL Pro Bowl. The state contended that weathering steel in the stadium corroded excessively. The state broadly alleged that weathering steel was not appropriate for use in the stadium, at a location on an island surrounded by sea water, and sought to hold the steel companies accountable for encouraging the architect to use the material. Defendants disagreed concerning the extent of corrosion, contending that it was limited to certain areas. The steel company defendants minimized their involvement in the architect's decision and pointed out that the limited places where corrosion was a problem connected directly with poor design features and with poor maintenance of the structure by the state.

When the state filed suit in June 1982, the claim for damages was identified as $3.3 million. The state's claim expanded enormously, and many additional parties and claims were added. By the time of trial in 1993, the state had decided that none of the weathering steel was appropriate for use at the site of the stadium and had painted or

replaced all of it, at a cost of approximately $80 million, plus future maintenance costs. The claim for actual damages was approximately $97 million. The state also claimed that those damages should be trebled, to $291 million, under a Hawaii statute against unfair or deceptive trade practices, and also sought punitive damages, fees, and costs.

Most of the other defendants settled with the state prior to trial. USS was identified by the state as its "deep pocket" primary target. When jury selection started, the case was down to four defendants (or set of defendants): USS, the architects, and the two different structural engineering firms. After jury selection and before opening statements, the state settled with the other three defendants. Trial proceeded thereafter with USS as the only defendant.

The state presented three claims against USS at trial: fraudulent misrepresentation, unfair or deceptive acts in trade or business in violation of HRS §480-2, and breach of warranty. Prior to closing argument, the state dropped the claim for breach of warranty, so only the first two claims went to the jury. The jury ruled in favor of USS on both claims.

The state appealed. The Hawaii Supreme Court affirmed in part and reversed and remanded in part. It held that the state should have been allowed to present a claim for negligent misrepresentation, which had been dismissed prior to trial, and that there were an error in the jury instructions on the claim for unfair or deceptive acts. It thus remanded for a new trial on those two claims.

Thereafter the case returned to First Circuit Court. The previous trial judge had in the meantime shifted to the criminal calendar, so a different judge was assigned to the case. In the course of several settlement conferences, a confidential settlement was reached, and the case was finally dismissed in April 1998.

8. The Long-Term Credit Bank of Japan, Ltd. v. Kaloko Land Corporation

U.S. District Court (Hawaii), Civil No. 94-00953

Judge Harold M. Fong (now deceased)

Key hearing, on Plaintiff's motion for preliminary injunction: February 14, 1995

My client: Kaloko Land Corporation

Opposing counsel:

> John E. Porter, Paul Hastings Janofsky & Walker, 555 South Flower Street, Los Angeles, CA 90071, 213-683-6000, and
>
> William H. Dodd, Chun Kerr Dodd Beaman & Wong, 745 Fort Street, Suite 900, Honolulu, HI 96813, 808-528-8200

Other attorneys from our firm: Dennis Gaughan (then and now a partner) and Mitchell Sockett (then an associate, now in New York)

Co-counsel for our client:

> Bennett L. Silverman, Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071, 213-229-7000

In this action, plaintiff Long-Term Credit Bank of Japan ("LTCB") sought an injunction to prevent our client, Kaloko, from drawing on a letter of credit issued by LTCB, confirmed by Security Pacific Bank, in the amount of approximately $27 million. The focus of the court action was on LTCB's motion for preliminary injunction.

I was the lead counsel for Kaloko, assisted by one other partner and one associate from my law firm and also by attorneys from Gibson Dunn & Crutcher in Los Angeles.

Kaloko was the owner of a large parcel of land on the Big Island of Hawaii. It sold that property to a substantial customer of LTCB, operating through a newly formed subsidiary, Hue Hue Corp. The funds for the transaction were provided by a loan from LTCB, secured by a mortgage on the property. Part of the total payment to Kaloko for the property was deferred. A complicated structure was put together, under which title to the property was held by Huehue Ranch Associates, a limited partnership. Hue Hue Corp. was its only general partner and Kaloko was its only limited partner. The agreement granted Kaloko the right to withdraw from the partnership, at which time it had the right to receive its capital account (i.e., the deferred payment for the property) plus unpaid portions of a preferred return. To protect Kaloko against the risk of

non-payment, Kaloko was named as the beneficiary of an irrevocable letter of credit, issued by LTCB, and confirmed by a U.S. bank.

The proposed resort development failed, and property values in the area declined substantially. Huehue defaulted on the debt owed to LTCB, and LTCB filed an action to foreclose on the property. The debt at that point greatly exceeded the value of the property. Kaloko exercised its right to withdraw. The day before Kaloko was entitled to draw on the letter of credit, LTCB filed the lawsuit, seeking to enjoin Kaloko from drawing on the letter of credit. The parties agreed not to draw on the letter of credit or otherwise change their positions pending resolution of a motion for preliminary injunction (thus avoiding the need to deal with a motion for temporary restraining order).

After expedited discovery, the matter came before the court in an extended hearing on LTCB's motion for preliminary injunction. LTCB argued that permitting the draw would violate various provisions of Hawaii law. We opposed those arguments and further argued that California law, which governed the letter of credit, did not permit the issuance of such an injunction.

The court ruled in our favor on essentially all points. LTCB's motion was denied in a written decision filed on March 28, 1995.

That decision was essentially the end of the lawsuit. Kaloko drew on the letter of credit and obtained the money. Within a month of issuing this order, Judge Fong passed away unexpectedly, of a heart attack. LTCB threatened to seek recovery of the money, perhaps in hopes that a different judge would see the case differently. In the end, however, LTCB dismissed the action.

9. Tokyo Green Co. and Tokyo Green Hawaii, Inc. v. The Industrial Bank of Japan and TSA International, Limited

Hawaii First Circuit Court, Civil No. 97-0829-03

Filed March 1997; Trial started July 2000, scheduled for 11 weeks, but settled in July

Several judges were involved, but two played the most important roles:

> Judge Kevin S.C. Chang (now a magistrate judge with the U.S. District Court in Honolulu) – ruled on several motions and served as the primary settlement judge
>
> Judge Gary W.B. Chang – assigned as trial judge, ruled on several substantive motions and motions in limine, and assisted settlement discussions

My client: The Industrial Bank of Japan ("IBJ")

Opposing counsel, representing plaintiffs:

> James T. Paul, Paul Johnson Park & Niles, 1300 Pacific Tower, 1001 Bishop Street, Honolulu, HI 96813, 808-524-1212 (primary counsel from outset through trial)
>
> Edward A. Jaffe, Torkildson Katz Fonseca Jaffe Moore & Hetherington, 700 Bishop Street, 15th Floor, Honolulu, HI 96813, 808-523-6000 (entered the case as co-counsel to Mr. Paul's firm during the last three months, apparently with the purpose of facilitating a settlement)

Counsel representing co-defendant TSA International ("TSA)

> James Kawashima, Watanabe Ing & Kawashima, 999 Bishop Street, 23rd floor, Honolulu, Hawaii 96813, 808-544-8300 (lead counsel throughout, but heavily involved personally mostly in the last few months leading up to trial)
>
> Michael A. Lorusso, Watanabe Ing & Kawashima, 999 Bishop Street, 23rd floor, Honolulu, Hawaii 96813, 808-544-8300 (primary counsel until the last stages, and equally as active as Mr. Kawashima then)

Other attorneys from our firm: Richard Hicks (now deceased), Dennis Gaughan (then and now a partner), Colin Miwa (then and now a partner), Alex Woody (then an associate, now with White & Case in Tokyo), Steven Thaler (then and now an associate)

I was the lead counsel for IBJ throughout. I was assisted by three partners and two associates from my firm, and by Japanese lawyers with a Tokyo law firm.

This was a lender liability lawsuit which took perhaps half or more of my professional time for nearly 3½ years. Plaintiff was a successful golf course developer in Japan, which wanted to pursue projects in the United States. It borrowed $50 million from IBJ and used that money to purchase a one-half interest in property on the Big Island of Hawaii in 1990 from TSA, which retained ownership of the other half interest. Plaintiffs and TSA planned to enter into a partnership to develop the property. At about that time, however, the Japanese "bubble" economy burst. Plaintiff's Japanese business and the value of this Hawaii parcel both declined considerably. Plaintiff sought to withdraw from the partnership with TSA, as it was entitled to do under its agreement, but TSA did not refund the money. In 1993, the parties entered into a new set of agreements, restructuring the arrangement. Plaintiff borrowed approximately $62 million from IBJ, the proceeds of which were used to pay off the previous loan, to acquire the balance of the Hawaii property from TSA, and to provide funds to carry the Hawaii property for three more years, during which time it was hoped that property values would improve sufficiently for Plaintiff to find another solution. Instead, the value declined even further. In 1996, IBJ declined to provide additional financing on the property.

Plaintiffs filed suit soon thereafter, asserting a variety of theories, including breach of contract, fraud, and negligent misrepresentation. Plaintiff sought cancellation of the debt owed, consequential damages (identified by the time of trial as approximately $25 million), punitive damages, interest, fees, and costs. Extensive discovery and motion practice followed, leading up to a July 2000 trial date. The trial started, but a settlement was reached (on terms which are confidential) after selection of the jury.

10. PKF International Association, et al. v. PKF Consulting, Inc., et al.

U.S. District Court, Civil No. 97-01077

Judge Helen Gillmor

Plaintiffs' motions for summary judgment granted in orders entered March 4, 1999 and July 21, 1999

U.S. Court of Appeals for the 9th Circuit, Nos. 99-15526 & 99-16751

Unpublished memorandum decision, filed February 2, 2001.

My client: Pannell Kerr Forster International Association

Counsel for co-plaintiff, The CPA Consulting Group, Inc. dba PFK Hawaii: Craig K. Shikuma, Kobayashi Sugita & Goda, 999 Bishop Street, Suite 2600, Honolulu, HI 96813, 808-539-8700

Counsel for opposing parties, defendants: John P. Manaut, Carlsmith Ball, 2100 Pacific Tower, 1001 Bishop Street, Honolulu, HI 96813, 808-523-2548

Other attorneys from our firm: Susan Oki Mollway (then a partner, now a U.S. District Judge, 300 Ala Moana Blvd., Room C-409, Honolulu, HI 96808, 808-541-1720), Colin Miwa (then and now a partner), Theodore Young (then an associate, now a partner)

This action involves the use of trade names and trade marks "Pannell Kerr Forster" and "PKF." The names and marks are owned by my client, known as PKF International. It is an international organization made up of many separate firms which practice accounting and provide consulting services in their home territories, using the "PKF" names and marks under licensing agreements issued by PKF International.

There is a dispute over the entitlement to use the names and marks in Hawaii. Defendant PKF Consulting has a license to use the names and marks for consulting services in the 48 contiguous states plus Alaska. Co-plaintiff PKF Hawaii has a license to use them in Hawaii. PKF Consulting contends that it is also entitled to use them in Hawaii, pursuant to a "side letter" agreement. Our client disagrees. We obtained a preliminary injunction against defendants, prohibiting them from using the names and marks in Hawaii. Later, we brought a motion for summary judgment, which the court granted in an order dated March 4, 1999. That order granted, among other things, our request for a permanent injunction. Defendants appealed. Because of uncertainty whether the March order provided a proper basis for appeal, the district court was asked to grant a subsequent

motion, which it did in an order dated July 21, 1999. Defendants appealed that order, as well. The two appeals were consolidated.

The 9th Circuit reversed the district court and remanded the case for further proceedings, in an unpublished memorandum decision issued earlier this year. It concluded that summary judgment should not have been granted, because the agreements were ambiguous, and because under English law (which governs the license agreements) the district court should have considered evidence outside the four corners of the contract. On remand, the case has been assigned a trial date in May 2002.

I have officially been the lead counsel for our client from the outset. In practice, however, much of the responsibility for the case was assumed by my then-partner, Susan Oki Mollway. We both participated in discovery and depositions, but she carried the larger role. She took the lead in preparing the motion for summary judgment, with my comments, and argued it successfully. After that, she became a U.S. District Judge, so the case returned to me. I was thus primarily responsible for the briefs on appeal and appeared at the oral argument held in November 2000. Although it has not yet concluded, I identify this case for this questionnaire since it is the most recent case I have handled before the 9th Circuit.

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 cases identified in response to Question 18 above were deliberately selected with the intent of illustrating my litigation experience, which has constituted the overwhelming majority of my legal practice.

The biggest omission is probably litigation conducted in the form of arbitration. It would not be appropriate to discuss particular arbitrations in detail here, however, since in most cases they are subject to confidentiality agreements. Indeed, the ability to provide for confidentiality is one of the major motivations behind agreements to arbitrate. I have represented clients in many arbitrations over the years, involving claims up to millions of dollars. I have also served as an arbitrator a number of times, through the American Arbitration Association or the National Association of Securities Dealers.

In addition to my litigation practice, I have also had some degree of experience with antitrust counseling. My practice in that field is not nearly as extensive as some attorneys who truly specialize in the field. It has probably made up no more than 5 to 10 percent of my practice. Most of the antitrust counseling has taken place in a confidential context and cannot be discussed here. There is one notable exception, however.

I have for many years represented Consolidated Amusement Company, Limited, which operates Hawaii's largest circuit of movie theatres. At one time, Consolidated controlled a majority of the screens in Hawaii. Consolidated was the subject of separate investigations by the Hawaii Attorney General in the late 1980's and by the U.S. Department of Justice Antitrust Division (San Francisco office) in the early 1990's. I participated in responding to requests for factual information and in discussing the matters with the government lawyers in both instances. In both, I worked together, on behalf of the same client, with John Edd Stepp, Jr., currently Of Counsel with Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071, 213-229-7000. In each case, the investigation was concluded with a determination that no prosecution or other action was warranted against my client. (The fact of and the results of these investigations became public knowledge, so this disclosure does not violate any confidentiality.)

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 currently a partner in the law firm of Cades Schutte Fleming & Wright. Under the firm's partnership agreement, after leaving the firm I would be entitled to receive two types of payments. The first is my share of profits earned but not yet distributed while I was a partner. Those payments are due within six months of departure. The second is a "retirement" amount, paid on a certain schedule. I estimate that I would be entitled to receive a total of about $250,000, spread out over calendar years 2003, 2004, and 2005.

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

The first step would be to identify possible conflicts. The names of interested parties and counsel in a given case before the court can be identified through the case file and the Corporate Disclosure Statement required under Rule 26.1 of the Federal Rules of Appellate Procedure. I would expect to compare that with a list of my family's own financial interests, a list of clients and cases I have worked on during my career, and a list of attorneys with whom I have personal ties, including my current law firm, so that the staff could identify potential conflicts at the earliest stage. There are other conflicts which might not be recognized by someone else, but which I would pick up from personal knowledge. I would expect, for example, to have relatively few cases involving Hawaii attorneys or parties, because those cases make up only a tiny percentage of the 9th Circuit's caseload, but when such a case is assigned to me I would look specifically for any disqualifying relationships.

Once the fact of a relationship has been established, the standard to be applied for recusal and disqualification can itself become a legal issue. As a general proposition, I can say that I would expect to withdraw from any case where I have (or another member

of my family has) a financial interest or a personal relationship such that my judgment could be influenced or there would be a reasonable appearance of impropriety or basis for concern. In all events, I would follow the Code of Judicial Conduct.

I would not expect there to be many such conflicts.

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 have no such plans, commitments or agreements.

I might consider the possibility of teaching again someday, on a part-time basis. I taught Appellate Advocacy for many years as an adjunct professor at the University of Hawaii School of Law. From time to time I have been asked if I would be willing to teach again, either that course or another course. I have not discussed that subject recently. I am aware of other judges who teach on a part-time basis, so I might consider it at some point in the future.

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 schedules.

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

I have been the attorney for the Hawaii Republican Party for many years. In that capacity, I have answered questions and given guidance to many candidates. I have specifically served as an attorney for the last two Republican candidates for governor of Hawaii, Patricia Saiki (1994) and Linda Lingle (1998). In each campaign I dealt with legal matters and was sometimes called upon to comment or advise on more general matters. Occasionally I was asked to comment publicly on some topic on behalf of the campaign, such as matters pending before the Hawaii State Campaign Spending Commission.

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		63	425	Notes payable to banks-secured		232	862
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	1	693	713	Notes payable to relatives			
Unlisted securities--add schedule		177	625	Notes payable to others			
Accounts and notes receivable:		25	000	Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule	1	083	900	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		12	000				
Cash value-life insurance		70	272				
Other assets itemize:							
				Total liabilities		232	862
				Net Worth	2	893	073
Total Assets	3	125	935	Total liabilities and net worth	3	125	935

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				

FINANCIAL STATEMENT SUPPORTING DETAILS SCHEDULE
(values as of last statements received)

Cash on hand and in banks

Richard R. Clifton

First Hawaiian Bank CD	29,828
First Hawaiian Bank checking	17,058
American Savings Bank	7,402
Territorial Savings	3,640

Teresa M. Clifton

University of Hawaii FCU	2,664

Richard R. & Teresa M. Clifton

Hawaii Central Credit Union	2,833

Listed Securities
(* = held in a retirement account)

Richard R. Clifton

Echostar Communications	61,180
Goodyear	56
Hawaiian Electric Industries	21,879

IBM	44,720
Metromedia Fiber Networks	4,020
Real Networks	4,404
CDC Nvest Cash Management Trust	18,766
Fidelity Growth & Income	30,466*
Fidelity Magellan Fund	24,972*
Oppenheimer Growth Fund A	57,208*
HR-10 account (Diversified Investment Advisors)	637,419*
401k account (Diversified Investment Advisors)	300,288*

Teresa M. Clifton

Amgen	6,638
Applied Materials	39,944
Ballard Power Systems	16,230
Ciena	43,320
Compaq	6,396
Intel	37,862
Nokia Corp. ADR	14,620
Schwab Money Market fund	16,418
Intel	39,564*
Merck	30,388*
Microsoft	6,097*
Motorola	4,750*
Hawaii State bonds	37,104*
Jundt Growth Fund Class 1	11,428*
Templeton Growth Fund Class A	61,875*
Schwab Money Market fund	2,974*
CREF retirement funds	55,522*
TIAA retirement fund	1,939*
Interest in Kala Hui investment club account (4.48% interest)	5,792

Son's custodian account

Boeing	6,289
Compaq	3,198
Schwab Money Market fund	639
BankOne Group Equity Index Fund A	17,261

Daughter's custodian account

Motorola	4,490
Schwab Money Market fund	336
BankOne Group Equity Index Fund A	17,261

Unlisted Securities

Richard R. Clifton

Partnership interest in law firm, Cades Schutte Fleming & Wright (value unknown)

Richard R. & Teresa M. Clifton

Agence 21, Inc.	262,500 shares	
(no reasonable basis to value)		
MAAS Intek, Inc.	doubtful value	
RepNet, Inc.	doubtful value	
Original investment amounts		177,625
Loan to Agence 21, Inc.		25,000

Real Estate Owned

Richard R. & Teresa M. Clifton

Residence (assessed value)	1,083,900

Autos and other personal property

1995 Mercury Villager	12,000
Miscellaneous personal property	(value unknown)

Cash value – life insurance

Northwestern Mutual Life	65,607
Clarica Life Insurance	4,665

Notes payable to banks -- secured

Mortgage on residence	232,862
(Due to First Hawaiian Bank, Honolulu, HI)	

O-10 (w)
ev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

. Person Reporting (Last name, first, middle initial) :lifton, Richard R.	2. Court or Organization 9th Circuit	3. Date of Report 06/28/2001
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Circuit Judge	5. Report Type (check type) X Nomination, Date 06/22/1901 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2000 to 06/28/2001
7. Chambers or Office Address 1000 Bishop Street, Suite 1200 Honolulu, Hawaii 96813	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.)

__ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Partner	Cades Schutte Fleming & Wright
2	Director & Former Chairman (until 7/15/00)	Hawaii Public Radio
3	Director	Hawaii Women's Legal Foundation

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

__ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
	01/95	Cades Schutte Fleming & Wright Partnership Resolutions (including retirement terms, no control)
2		
3		

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

__ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	1999	Cades Schutte Fleming & Wright	319,686
2	2000	Cades Schutte Fleming & Wright	257,791
3	2001	Cades Schutte Fleming & Wright	115,842
4	2001	State of Hawaii - Reapportionment Commission	50

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Clifton, Richard R.	06/28/2001

V. REIMBURSEMENTS – ~~transportation, lodging, food, entertainment.~~

Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS

Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1		EXEMPT	
2			
3			

VI. LIABILITIES

[illegible] of spouse and dependent children. See pp 33-35 of Instructions.)

☒ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
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
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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting: Clifton, Richard R.

Date of Report: 06/28/2001

II. 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 First Hawaiian Bank CD	B	Interest	K	T	exempt				
2 First Hawaiian Bank checking	A	Interest	J	T					
3 American Savings Bank	A	Interest	J	T					
4 Territorial Savings & Loan	A	Interest	J	T					
Hawaii Central Credit Union	A	Interest	J	T					
6 Univ of Hawaii FCU	A	Interest	J	T					
7 Goodyear common	A	Dividend	J	T					
8 Hawaiian Electric Industries common	B	Dividend	K	T					
9 Brokerage acct #1									
10 Echostar Communications common		None	L	T					
IBM common	A	Dividend	K	T					
12 Metromedia Fiber Networks common		None	J	T					
13 Real Networks common		None	J	T					
14 CDC Nvest Cash Mgtmt Trust	B	Dividend	K	T					
15 Fidelity Growth & Income (IRA)	A	Dividend	K	T					
16 Fidelity Magellan Fund (IRA)	A	Dividend	K	T					
17 Oppenheimer Growth Fund A (IRA)	A	Dividend	K	T					

1 Inc/Gain Codes: (Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; 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: (Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Clifton, Richard R.	06/28/2001

II. 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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Brokerage acct #2									
19 Amgen common		None	J	T	exempt				
20 Applied Materials common		None	K	T					
21 Ballard Power Systems common		None	K	T					
22 Ciena common		None	K	T					
23 Compaq common	A	Dividend	J	T					
24 Intel common	A	Dividend	K	T					
25 Nokia Corp Spon ADR		None	J	T					
26 Charles Schwab Money Market Fund	A	Dividend	K	T					
27 Hawaii state bonds		None	K	T					
28 IRA acct #3									
29 Intel common	A	Dividend	K	T					
Merck common	A	Dividend	K	T					
31 Microsoft common	A	Dividend	J	T					
32 Motorola common	A	Dividend	J	T					
33 Jundt Growth Fund Class I	A	Dividend	J	T					
34 Templeton Growth Fund class A	A	Dividend	L	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 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 Clifton, Richard R.	Date of Report 06/28/2001

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income,assets, or transactions.)									
35 CREF Stock Fund		None	K	T	exempt				
36 CREF Global Equities		None	K	T					
37 TIAA Traditional	A	Dividend	J	T					
38 Brokerage acct #4									
39 Boeing common	A	Dividend	J	T					
40 Compaq Common	A	Dividend	J	T					
41 Schwab Money Market Fund	A	Dividend	J	T					
42 Banc One Group Equity Index Fund A	A	Dividend	K	T					
43 Brokerage acct #5									
44 Motorola Common	A	Dividend	J	T					
45 Charles Schwab Money Market Fund	A	Dividend	J	T					
46 Bank One Group Equity Index Fund A	A	Dividend	K	T					
47 Agence 21, Inc. common		None	M	W					
48 MAAS Intek, Inc. common		None	J	W					
49 RepNet, Inc.		None	J	W					
50 HR-10 account									
51 Diversified Investment Adv.Core Bond Fund (HR-10)	D	Dividend	M	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 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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting: Clifton, Richard R.

Date of Report: 06/28/2001

II. Page 4 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				
ce "(X)" after each asset exempt from prior disclosure.	(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 Diversified Investment Adv. Value & Income (HR-10)	D	Dividend	N	T	exempt				
53 Diversified Investment Adv. Equity Growth (HR-10)	A	Dividend	M	T					
54 Diversified Investment Adv. Special Equity (HR-10)	A	Dividend	M	T					
55 401K account									
56 Diversified Investment Adv. Growth & Income (401k)	A	Dividend	N	T					
57 Trust #1 First Hawaiian Bank checking		None	J	T					
Kala Hui Investment Club	A	Dividend	J	T					
59 Agilent Technologies common									
60 Amgen common									
61 Avaya common									
62 Cisco common									
63 EMC Corp common									
64 Enron Corp. common									
65 Freddie Mac common									
66 Intel Corp. common									
67 Interpublic Common									
68 J.P. Morgan Chase common									

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	Date of Report
Clifton, Richard R.	06/28/2001

VII. Page 5 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
69 Mcdata Corp. common					exempt				
70 Merck common									
71 Nabors Industries common									
72 Newell Rubbermaid common									
Newport common									
74 Oracle common									
75 Pepsi common									
76 Proctor & Gamble common									
77 Sun Microsystems common									
78 Sysco common									
Walgreen common									
80 Agence 21, Inc. note		None	K	U					
81									
82									
83									
84									
85									

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

NANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Clifton, Richard R.	06/28/2001

III. ADDITIONAL INFORMATION OR EXPLANATIONS.
dicate part of report.)

RT 3: Date re: 2, cntd ...001

INANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Clifton, Richard R.	06/28/2001

ECTION HEADING. (Indicate part of report.)
ıformation continued from Parts I through VI, inclusive.

PART 1. POSITIONS (cont'd.)

.ne	Position	Name of Organization/Entity
4	Director	Ninth Judicial Circuit Historical Society
5	Director	American Judicature Society, Hawaii Chapter
6	Trustee	Kent M Keith Insurance Trust (Trust #1)

PART 3. NON-INVESTMENT INCOME (cont'd.)

ine	Date	Source and Type	Gross Income
5	1999	Self-employed, dietitian consultant	
6	2000	Self-employed, dietitian consultant	
7	2001	Self-employed, dietitian consultant	

iANCIAL DISCLOSURE REPORT	Name of Person Reporting Clifton, Richard R.	Date of Report 06/28/2001

CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or ependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any nformation 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 ave been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 nd Judicial Conference regulations.

Signature Richard R. Clifton Date 7/3/01

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 provided pro bono services, both to the disadvantaged and to civic and community organizations, throughout my years in practice. I understand this inquiry to concern service to the disadvantaged in particular, so that is what I will discuss here.

In the past year, for example, I represented a woman who needed assistance in getting out from under mortgage debt that exceeded the current market value of her leasehold condominium. She had purchased the condo some years ago, with the mortgage loan in question. She went through personal bankruptcy four or five years ago, but she wanted to hold on to her home, so at that time she reaffirmed the mortgage debt. Since then, however, the value of leasehold property (that is, property which is not owned in fee simple, but only for a fixed period of time under a ground lease with a master lessor) declined substantially in Hawaii. Now she was at an age when she wanted to retire, on Social Security and limited retirement savings, but the mortgage debt prevented her from doing so. She could not afford to make the mortgage payments on her expected retirement income. She tried to sell the condo, but its market value was several thousand dollars less than the remaining balance due on the mortgage loan, and she could not afford to pay the balance in order to get the mortgage lien released, without wiping out much of her retirement savings. She did not want simply to walk away and permit foreclosure, because that seemed dishonorable and would have led to a deficiency judgment. I negotiated on her behalf with the mortgage company and helped her carry out the actions required by the mortgage company, including arranging for a valuation of the property and another listing to sell it, at a lower price. Ultimately, the mortgage company agreed to permit her to sell the unit for less than the amount of the debt, and to accept the net proceeds from that sale in full satisfaction of the debt. That way she was able to leave the property free and clear, and retire, which she has done. This effort took about six months, and I devoted about 30 hours to it.

Within the past year I also represented a person in connection with a confidential matter, involving a petition for a restraining order. I spent approximately 25 hours on that matter.

Over the first part of my career, these kinds of cases were most often referred to me by a local organization then known as Hawaii Lawyers Care. More recently, most have come from direct referral from other individuals.

In addition, for a number of years I participated in a Hawaii State Bar Association program, usually held during or near "Law Week" in May, through which attorneys would meet with individual citizens on a particular day at public locations, to discuss problems. Although there was no expectation that the attorney would provide representation to the citizen after that day, let alone on a pro bono basis, sometimes it happened.

Almost all of my pro bono activity on behalf of disadvantaged people has taken the form of assistance to individuals. I recall only one exception. In 1984, at the request of an attorney on the mainland (who contacted me through a mutual friend), I served as local counsel in a class action case filed in U.S. District Court in Hawaii, Civil No. 84-0425, People of Bikini v. United States. Plaintiffs sought to require the federal government to clean up radioactive waste left from the testing of atomic weapons at Bikini Atoll. As I recall, the case did not ultimately amount to much, but I do not remember exactly how it ended or what I was called upon to do. I do recall spending a substantial number of hours discussing local procedure and reviewing drafts, but at this date I could not state a number of hours.

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

I do not belong to any such organization, and to my knowledge never have.

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 such commission in Hawaii, to my knowledge. I recall reading about such a commission more than 20 years ago, during the Carter Administration, but I understand that it became inactive a few years later, during the Reagan Administration.

In December and January, I told certain people affiliated with the Bush-Cheney campaign and/or the Hawaii Republican Party of my interest in a judicial nomination. They included current and past elected officials and party officers, all of whom I had known personally for years. I understand that some of them may have formally interviewed other persons interested in obtaining recommendations for federal appointments. I was not interviewed in that fashion, but I talked with many of them for other purposes, and they may have asked me similar questions in the course of those discussions. In any event, I understand that I was recommended for appointment by many of those people. I was also recommended to the White House by the 9th Circuit judge for whom I had clerked, Judge Herbert Y.C. Choy.

I submitted an expression of interest and a copy of my resume to the Bush-Cheney Administration, via its transition website. In March I was invited to meet with Judge Alberto Gonzales, the White House counsel, and one of his deputies. A few weeks after that meeting, I was told that a tentative decision had been made to nominate me, subject to a background check and a review of more detailed information.

Thereafter I filled out various questionnaires, including a version of this one and the questionnaire for national security positions. An FBI background investigation was conducted in April and May, during which I was interviewed in person by two agents in Honolulu. I subsequently responded to several follow-up telephone inquiries from them.

I met with Sen. Daniel K. Akaka at his office in Honolulu on May 30, 2001 and again at his office in Washington on June 13, 2001. I met with Sen. Daniel K. Inouye at his office in Washington on June 13, 2001.

On June 21, 2001, I received a telephone call from the President, advising me of his intent to nominate me. My nomination was made on the following day, June 22, 2001.

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 American system of government is made up of three independent branches and a structure providing for "checks and balances." The judiciary is one of those independent branches of the federal government, and it is often called upon to act as a "check and balance" on the other branches. In addition, the U.S. Constitution, primarily through the Bill of Rights and the Fourteenth Amendment, protects certain rights of its

citizens against actions by the federal government and by state and local governments. The exercise of those rights, such as freedom of speech, is to be protected, even when the speech in question may be highly unpopular. It is the courts to which the citizens most often turn to defend those rights, especially when the cause in question is unpopular.

A court's proper role is inherently limited. Judges are not entitled to rule as they might wish the law to be. Nor should they render opinions on issues not before them. They are to apply the law as it written, and as it has been interpreted in prior cases, to the situations presented in the cases before them. It is the role of the legislative and executive branches to debate and determine the law of the land through the democratic process, by enacting laws and adopting regulations. The proper role of the judiciary is impartially to interpret and apply those laws and regulations, as well as the Constitution, to the facts of each case, and to do so with a high degree of predictability. Doctrines such as stare decisis and the requirement for a case or controversy represent important and basic limitations on the authority of judges. When judges fail to adhere to those limitations, they exceed their authority and disserve the Constitution they are sworn to support.

Senator CANTWELL. I would like to call up now the three district court nominees—Joy Conti, Christopher Conner, and John Jones—and if you would please stand so we can swear you in?

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

Mr. CONNER. I do.

Ms. CONTI. I do.

Mr. JONES. I do.

Senator CANTWELL. Thank you.

As with Mr. Clifton, we appreciate that family and friends have joined you on this journey to Washington for this hearing and if you would like to each take the opportunity to introduce your family and friends, we will give you that opportunity.

Mr. Conner?

STATEMENT OF CHRISTOPHER C. CONNER, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Mr. CONNER. Thank you, Madam Chair. I am here with my wife and four children—my wife, Kathy, and my four children, Greg, Lauren, Ben, and Casey. My parents are here from Harrisburg, Pennsylvania, Marcia and Ben Conner, as is my sister, Mona Conner, who is an artist in Brooklyn, New York. I also have my sister-in-law's husband, Eric Levine, here from Frederick, Maryland.

I have been blessed with some long-time friendships from Cornell University and three of my friends from Cornell are here—Shaun Eisenhauer, Gregory Strub, and Samuel Fisher. I also have some law school classmates and long-term friendships that have developed over time, and one of the sitting Common Pleas judges in Pennsylvania, Judge Tom Kistler, is here with his wife, Mary Jane. And my friend, Randall Bachman, with his wife, Lenore, and his daughter, Lauren, are here.

Thank you, Madam Chair.

Chairman LEAHY. No wonder there is such a crowd here today.

Senator CANTWELL. Thank you, Mr. Conner.

Ms. Conti?

STATEMENT OF JOY FLOWERS CONTI, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Ms. CONTI. Thank you. It is an honor to be here, and a privilege. I appreciate the opportunity to introduce my family and colleagues and friends.

First of all, I would like to introduce my husband, Anthony Thomas Conti; as we call him, Tony. He is my husband for 31 years and a big supporter of mine. I have my three sons with me as well. My oldest son, Andrew, Drew, is 26; my second son, Michael, who is 23; and my youngest son, Gregory, who is 16. He is the football player presently. All my other boys have also been football players in high school.

I am also fortunate to have with me my mother, Elizabeth Rodgers. She is living in Richmond, Virginia, and in Pittsburgh, Penn-

sylvania. I am happy that she is able to join us today. My mother-in-law, Ann Conti, is also here and she has been a big help to us throughout the years.

I am fortunate to have my brother here, Lieutenant General Robert Flowers, who has the command of the Corps of Engineers and is presently a resident in the District of Columbia. His wife, Lynda, is here as well, and my nephew, Matt Flowers, who is my brother's youngest son, is here.

I have my two sisters. My sister, Kathy Mayo, is here with her husband, Bill Mayo, and their son, Bill Mayo. They are from Richmond, Virginia. My youngest sister, Elizabeth, Betsy, Horvat is here with her husband, Ken Horvat, and they have traveled from Pittsburgh, Pennsylvania, to be with me today.

I also have my husband's brother, Mark Conti, and his wife, Diane Conti. They have come down from Beaver Falls, Pennsylvania, and with them are their two children, Kevin Conti—and his wife, Jackie Conti. My niece, April Conti, and her fiance, Jeremy Dean, are also here today.

I am fortunate to have a long-time friend of mine from Pittsburgh who was a predecessor of mine as the President of the Allegheny County Bar Association, and we have been friends for many years, J. Frank McKenna. He is with the law firm of Reed Smith. I am fortunate that he is here today, as well.

My fellow shareholder at Buchanan Ingersoll, Sister Melanie DiPietro, is here with me. I am happy that she could join us. And last but not least is my colleague at Buchanan, a personal friend, my project assistant, Sarah Pankey. I am also pleased to have my step-niece, Angela Pegram, who is going to be—who just took her last exam at Catholic University Law School and will be joining Jones Day in their D.C. office after she passes the bar.

Have I forgotten anyone?

[Laughter.]

Senator CANTWELL. Thank you, Ms. Conti.

Chairman LEAHY. If I might, I apologize for the mispronunciation of your name.

Ms. CONTI. That is fine. We go variously, Conti or Conti, so we answer to both.

Chairman LEAHY. I grew up in an Italian American family and many friends of mine in Vermont pronounce it Conti, and I apologize.

Ms. CONTI. Well, I pronounce it that way, too, but they go—in Elwood City, where my husband is from, it is Conti. In Pittsburgh, it is pronounced Conti, so do we answer to both.

Chairman LEAHY. I don't feel so badly.

[Laughter.]

Senator CANTWELL. Well, thank you, Ms. Conti.

Mr. Jones, if there is anybody left in the room——

[Laughter.]

Senator CANTWELL. Thank you for being here and we would love to hear introductions of your friends and family.

STATEMENT OF JOHN E. JONES, III, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Mr. JONES. I don't have as many, Madam Chairwoman. It is an honor to be before this committee, and my name is a little easier for everybody, but I have a number of folks here who have honored me by their presence.

First and foremost, my family: my wife, Beth, and my daughter, Meghan, and my son, John. John has the space shuttle tie on right behind me. My parents are deceased, unfortunately, but I am very honored to have my father-in-law here, Emil Feryo. He is seated behind my wife and children; my nephew and his grandson, Emil Feryo. And my sister-in-law, Amie Feryo, is here as well.

I have a group of friends from the Pennsylvania Liquor Control Board—my assistant, Emma Pettis; Patty Lookinbaugh; Steve Schmidt; Darryl Stackhouse, our Director of Administration from the Pennsylvania Liquor Control Board. Patty Lookingbaugh's daughter, I think, is here also.

I also have a dear friend of mine from home, Frank Schoeneman, from Schuylkill County. And Representative Bob Allen from Schuylkill County, a member of the Pennsylvania State House of Representatives, is here with me today.

Have I forgotten anybody? I hope that I have not. I apologize if I have, but thank you, Madam Chairwoman.

Senator CANTWELL. Well, thank you, and welcome to all of you. We appreciate you attending this important hearing.

I will start, I think, with Ms. Conti and Mr. Conner.

Ms. Conti, your professional experience as a lawyer has focused on general corporate matters, with a concentration in bankruptcy. Mr. Conner, your experience has mostly been in general civil litigation, I believe. Thus, you both have limited criminal experience. As you know, a significant portion of the Federal judicial docket deals with criminal matters.

Could you tell us how you plan to prepare to handle complex criminal cases and what steps you will take to prepare for the challenge of handling the criminal matters that will be before you?

Ms. CONTI. Madam Chair, that is a matter that I have given some very serious consideration to. I have spoken with members of the Federal bench in Western Pennsylvania and I have talked with them about what I would need to do personally to prepare for that. They have assured me that I would have their full assistance.

I know that the Federal Judicial Center, as well as the Administrative Office, has very fine educational programs which I would be fully committed to participating in. I am a quick study. I have entered various areas of the law and am able to understand the read very diligently, and I would work very hard to become competent in the areas of criminal law and procedure as soon as possible.

Mr. CONNER. Madam Chair, I would make the same commitment that Ms. Conti has described, and make the same commitment toward hard work and getting up to snuff in all of the areas of criminal law that I am not currently exposed to, and relying also on the resources of the Federal Judicial Center.

I have also spoken with the members of the court of the Middle District and they have encouraged me to seek their counsel if I am fortunate enough to be confirmed and I certainly would do that.

Senator CANTWELL. Thank you.

I see that we have been joined by Senator Inouye, from Hawaii.

Senator if you would join these three distinguished nominees at the table and give your comments on Richard Clifton, whom we just heard from, we would be honored to hear those comments.

Senator SPECTER. He has done very well so far, Senator Inouye.

PRESENTATION OF RICHARD CLIFTON, OF HAWAII, NOMINEE TO BE CIRCUIT JUDGE FO THE NINTH CIRCUIT BY HON. DANIEL K. INOUYE, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator INOUYE. Madam Chairman and members of the committee, I am pleased to present to you Richard R. Clifton, Esquire, a very distinguished member of the State of Hawaii who has been nominated by the President to serve on the Ninth Circuit Court of Appeals.

He is here this afternoon with his wife, Teresa, whom you have just seen, and two children, Katherine and David.

Mr. Clifton was born in Framingham, Massachusetts. He received his bachelor of arts degree from Princeton and his juris doctor from Yale Law School. He is currently a distinguished member of the Hawaii State Bar Association and a partner in the firm of Cades, Schutte, Fleming and Wright, and until recently was legal counsel for the Hawaii Republican Party.

I have met with Mr. Clifton, I have met with his family, and I am certain he will serve this court with much distinction and integrity. So I recommend his confirmation by this committee and by the U.S. Senate.

Thank you very much.

Senator CANTWELL. Senator Inouye, thank you for being here. Mr. Clifton introduced his family and answered questions from the committee, all of which I think were very well received by the committee, including his comments on major league baseball teams in America, and we look forward to proceeding.

Senator INOUYE. Madam Chair, when do I vote for him?

[Laughter.]

Senator CANTWELL. Well, I am sure there will be a Judiciary Committee meeting shortly after today's hearing on these nominees that we heard testimony and comments from today. So thank you very much for being here.

Senator INOUYE. Thank you, ma'am. May I be excused?

Senator CANTWELL. Yes.

I thank the panel for their indulgence in allowing our colleague to give his comments on Mr. Clifton's nomination.

Mr. Jones, you have served as the Chairman of the Pennsylvania Liquor Control Board since 1995, I believe it is.

Mr. JONES. That is correct.

Senator CANTWELL. In that capacity, you have had, I am sure, to develop strategies on how to reduce the risks of under-age drinking of young people. Could you tell us about that, some of your

strategies and what has worked in order to prevent high-risk drinking?

Mr. JONES. We have had an emphasis, Senator, on under-age drinking and binge drinking for the last 7 years of my tenure and I have been very proud of our efforts. I don't want to go on excessively long about them, but in a nutshell, Senator, what we have done is created, among other things, over 70 campus-community coalitions across Pennsylvania where we have put together college administrators, law enforcement officials, students, liquor licensees, and others to come up with strategies.

We believe that you need to have enforcement, but that you can't arrest your way out of the problem of under-age drinking, so we are getting to the culture, we think, on these college campuses. I believe that under-age drinking and binge drinking by our youth is one of the largest health risks that we face in the United States today.

Among other things that we have done have been to train licensees in good practices. We have created a statewide coalition that will survive me, if I am fortunate enough to be confirmed, Pennsylvanians Against Under-Age Drinking, which is a broad coalition of groups all across the Commonwealth of Pennsylvania.

Fundamentally, I think what we have done is we have taken a problem that, although it had some attention 7 years ago, I think we have put it on the radar screen for all of the United States. And I am very happy to say that a lot of what have done in Pennsylvania on the Liquor Control Board has been picked up nationally by other States and duplicated, and that is the highest form of flattery, I think, that we have been copied and emulated in other States.

Senator CANTWELL. Thank you.

Senator Specter, do you have questions for the nominees?

Senator SPECTER. Yes, thank you very much.

Ms. Conti, when were you hired by Kirkpatrick and Lockhart, thus becoming the first woman to be employed by them?

Ms. CONTI. I was the first woman summer associate in the summer of 1972, and after I returned from clerking for a justice on the Pennsylvania Supreme Court, I was the first woman lawyer hired in 1974.

Senator SPECTER. Well, there has been quite a dramatic change on the hiring of women from law schools and generally, and quite a dramatic change in the number of women who go to law school. I know in my class there were 4 women out of 125, and today I understand the statistics are about 50–50.

How many were in your class at Yale?

Mr. CLIFTON. About 25 percent.

Senator SPECTER. So that shows some improvement, but it is surprising that it would take until 1974 for a major firm—how many lawyers did the firm have when you were hired?

Ms. CONTI. At that time, they were considered to be quite a large firm and we had 35 lawyers. The largest firm in Pittsburgh at that time was Reed Smith and they had 50, and that was in the summer. When I came back in 1974, Kirkpatrick and Lockhart had approximately 50 lawyers. Today, they have over 450, perhaps over 600.

Senator SPECTER. When I joined Barnes, Decker, Price, Meyers and Rhodes in 1956, that was the same year that the first woman was hired there, although come to think of it, there was a woman partner before. When I was elected D.A. in 1965, I made it a top priority to hire a woman, and then women, but in the first group a woman.

I was surprised to hear recently that Justice Ruth Bader Ginsburg, when she graduated from law school, got a job in a law firm as a secretary, couldn't get a job as a practicing lawyer. So it is nice to see times changing.

Ms. CONTI. Yes, it is, and we need to have more women staying in the practice of law, practicing and achieving levels of leadership.

Senator SPECTER. Mr. Conner, you have extensive litigation experience which should stand you in good stead. Any ideas about how to speed up the civil docket?

Mr. CONNER. Things are working reasonably well in the Middle District. In terms of speeding up the civil docket there, I think if I were to follow the orders, scheduling orders that are currently in place among the members of the bench, I would be well served.

In terms of overall prompt disposition of cases, I concur in the statement that justice delayed is justice denied, and I would try to move those matters before me as quickly as I could, giving deference to the parties and their rights to litigate their case.

Senator SPECTER. Any thoughts on the limitation of discovery, such as excessive interrogatories?

Mr. CONNER. There are some limitations by local rule in the Middle District and I would follow those limitations. I think that the Federal judiciary has gotten some excellent—has undergone some excellent changes in connection with Rule 26 and the mandatory disclosures under Rule 26, and I think maybe to the extent that could be expanded that would be terrific.

Senator SPECTER. Mr. Jones, how long did you practice as a sole practitioner?

Mr. JONES. I practiced as a solo practitioner, Senator, from 1986 to just 2 years ago, when I took on an associate.

Senator SPECTER. How did you handle all of the complexities of the modern law?

Mr. JONES. You commented in your introduction that I am a somewhat—I am not sure that you used this word, but I am an anachronism as a solo practitioner and in a small firm. But it is difficult and you have to know your limitations and you have to be dedicated, and it entails that you go into your office at very early hours and you stay late hours and you work Saturdays. But it has been a very rewarding life for me.

I have been a—I describe myself frequently as a country lawyer and I mean that in the best possible sense, but it has given me broad experience in so many different areas.

Senator SPECTER. To what extent do you think your experience as Chairman of the Pennsylvania Liquor Control Board will assist you in judicial functions?

Mr. JONES. Well, it is a quasi-judicial function in the sense that I have dealt with complex cases and numerous cases. As I have frequently said to people, I came from being the aforesaid country lawyer to Harrisburg 7 years ago and was given the reins to a

4,000-person, billion-dollar State agency. And there was no manual left on my desk from my predecessor on how to run that and I hope that I have distinguished myself in that job.

I think that more than anything else, it gives you the opportunity to have a structure and an order, and to set a style that I would to as a trial judge, and bring the skills that hopefully are portable in organizing things to bear on the Federal court.

Senator SPECTER. Mr. Jones, I know the people in the Williamsport area will be glad to know that you will be sitting in Williamsport. I believe that the different locations for the Federal court is a very, very important item.

During my tenure in the Senate, I took the lead in establishing new stations in Lancaster, and also in Johnstown. We have stations in Allentown and Easton as well, and, of course, courthouses, in addition to Pittsburgh and Philadelphia, in Erie, Harrisburg, Scranton, and Wilkes-Barre.

The station in Williamsport has been in existence for a long time, and Judge Muir is 86 years old, as I understand it. I know that you and Judge Vanaskie, the Chief Judge of the Middle District, have worked out an arrangement where your chambers will be in Williamsport and you will be committed to sitting in Williamsport.

Mr. JONES. That is correct, Senator, and if I am fortunate enough to be confirmed, I will be able to call on the wisdom of Senior Judge Muir and Senior Judge McClure, whom I will be replacing, although, of course, as a senior judge he is going to continue to work. So I am glad to help and I feel so fortunate to be nominated for this position and, if confirmed, I will happily take my place in upstate Pennsylvania.

Senator SPECTER. Well, Judge McClure was recommended, I think, by Senator Heinz and myself some time ago because we wanted to be sure Williamsport—Judge McClure, I think, comes from Union County?

Mr. JONES. He does. That is exactly correct.

Senator SPECTER. So the people will know, you come from Schuylkill County, from Pottsville, the home of John O'Hara, a very famous Pennsylvania town. Senator Santorum and I have been very careful to disperse the judicial selections as much as we can. There is, candidly, a little over-balance in the big cities, but we are trying to disperse as much as possible.

In the competition, there were some very able people from Williamsport who aspired to be Federal judges and who may yet be. But Pottsville is not too far from Williamsport and in making the recommendation to the President which Senator Santorum and I did on you, after your approval by the bipartisan nominating commission, it was with the expectation that you would sit in Williamsport. I am glad to hear that Judge Vanaskie and you have worked that out and that you are committed to doing that.

Mr. JONES. Yes, sir, we are, Senator. I have had great help from Judge Vanaskie, Chief Judge Vanaskie, I might say. And as I said, if I am fortunate enough to be confirmed, it appears to me to be a great court and one which I would be proud to serve on in Williamsport.

Senator SPECTER. Thank you very much. I look forward to all of you serving. I think you will be very fine judges.

Madam Chairwoman, I have decided not to read Senator Hatch's lengthy statement, but just would like unanimous consent that it be inserted into the record.

Senator CANTWELL. Without objection.

I have one last question for actually all of you, a panel question. Some of our most beloved judges in history have been judges who made decisions that were against popular sentiment, or stood up to protect the rights of minorities or people's whose views made them outcasts.

Can you tell me of an instance in your career where you have stood up, took an unpopular stand, or fought for something, maybe a client, and how you stood up to those pressures?

Mr. CONNER. Madam Chair, the first thing that comes to my mind is a case that I am currently involved in in Lancaster County. I represent a group of hoteliers who are challenging a hotel tax that has been imposed by Lancaster County, in part to support a convention center that is proposed in Lancaster County.

One of the parties which is interested in that convention center is the Lancaster newspapers, which is a partner in the hotel that is going to be built next to the convention center. So I have been taking a stance on behalf of my clients, the hoteliers, which has been unpopular locally for those who would like to see the convention center built. That case is currently pending before the Pennsylvania Supreme Court.

Senator CANTWELL. Mr. Jones or Ms. Conti?

Mr. JONES. I served for 10 years, Madam Chairwoman, as an assistant public defender in Schuylkill County, and so very frequently I found myself enmeshed in unpopular areas representing unpopular people. In particular, in 1989, I represented an individual who was alleged to have murdered a 12-year-old boy.

It was, as you can imagine, coming from a small town, a highly charged atmosphere. We had a week-long trial. I represented him throughout in a most difficult circumstance, with the community at large very much against him. He was convicted. I was able to keep him from suffering the death penalty in that case.

But I learned perhaps more than anything else that I ever did as an attorney about the obligation that we have as attorneys to take on occasionally unpopular cases, and that at that time was the most unpopular case that I could possibly have chosen to have undertaken. And so that stands out amongst all the cases that I ever handled, or matters that I have handled as the most unpopular, but I was very proud to do that as an assistant public defender consistent with my obligations as an attorney.

Senator CANTWELL. Ms. Conti?

Ms. CONTI. I have had a career-long commitment to equal justice that includes justice for the poor, and throughout my career, in addition to doing pro bono work, I was active in the bar association with respect to protecting the rights of the poor in terms of access to justice.

I can recall earlier in my career debating and bringing forth before the House of Delegates of the Pennsylvania Bar Association resolutions to enhance statutory protections for indigents in connection with landlord-tenant disputes. And I think the quality of the debate on the floor of the House of Delegates—the fact that we

did move those proceedings forward in terms of providing in Pennsylvania additional protections for indigents in those circumstances is something that comes to my mind as a contribution to equal justice.

Senator CANTWELL. Thank you.

Senator Specter, any more questions from you?

Senator SPECTER. No. Thank you very much.

Senator CANTWELL. We will keep the record open for a week for any of our colleagues who want to submit questions and have you answer them. We appreciate your time this afternoon and your answers to our questions, and appreciate again the large crowd that is here to accompany all of you today.

With that, the Senate Judiciary Committee is adjourned.

[The biographical information of Mr. Conner, Ms. Conti, and Mr. Jones follow:]

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

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

   Christopher Charles Conner, a/k/a Kit Conner

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

   U.S. District Judge, Middle District of Pennsylvania

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

   Mette, Evans and Woodside
   3401 North Front Street
   P.O. Box 5950
   Harrisburg, PA 17110-0950
   (717) 232-5000

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

   10/25/57. Harrisburg, Pennsylvania, USA.

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

   Katherene Holtzinger Conner, Esquire
   Chair, Pennsylvania State Civil Service Commission
   Commonwealth of Pennsylvania
   Bowman-Worth Building - 4th Floor
   Harrisburg, PA 17108-0569

   We have four dependent children.

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

Dickinson School of Law
Carlisle, Pennsylvania
August 1979 - June 1982
Degree: Juris Doctor, June 1982

Cornell University
Ithaca, New York
September 1975 - May 1979
Degree: Bachelor of Arts, May 1979

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

Compensated Employment Positions:

1980 - Present
Mette, Evans and Woodside
(formerly known as Shearer Mette & Woodside)
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950
(717) 232-5000

Law Clerk:	October 1980 - September 1982
Associate:	September 1982 - December 31, 1988
Shareholder:	January 1, 1989 - Present

Spring Semester 2000:
Adjunct Professor
Widener University School of Law
Harrisburg, PA
Course: Pre-Trial Methods

Other Director Positions (non-profit):

The Wildcat Foundation of the Mechanicsburg Area School District -
Board of Directors.
Pennsylvania Bar Institute -
Board of Directors.

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

I did not serve in the military.

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

1993 -	PBA Special Achievement Award Campaign for Judicial Discipline Reform
1990 -	American Bar Association Award of Achievement (First Place - Service to Bar) Judicial Reform Day
1990 -	American Bar Association Award of Achievement (Second Place - Service to Public) High School Mock Trial Competition
1986-87	PBA Special Achievement Award Statewide High School Mock Trial Competition

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

Pennsylvania Bar Association (1982 - Present)
Vice-President (2001)
PBA Board of Governors (1988 - 1991; 1997 - 2000)
Chair, Judicial Selection and Reform Committee (1991 - 1995)
Chair, Campaign for Judicial Discipline Reform (1993)
Representative, House of Delegates (1988 - 1994, 1996 - Present)
Council on Judicial Independence (1999 - Present)
Task Force on Quality of Life and Balance (2000 - Present)
Task Force on Legal Services to the Needy (1991)
Chair, Young Lawyers Division (1989)
Chair, Task Force on Legal Services to the PBA (1992)

Chair, Mid-Year Meeting Committee (1993)
PBA Practicum for Law Students (Passim)
PBA Media Response Team (1999 - Present)
Co-Founder - High School Mock Trial Competition (1986)

Dauphin County Bar Association (1982 - Present)
Board of Directors (1991 - 1996)
Chair, Membership Committee (1993 - Present)
Founder - People's Law School (1989)
Federal Bar Association (2000 - Present)
American Bar Association (off and on between 1982 - 2000)
Association of Trial Lawyers of America (1990 - 1999)
Pennsylvania Defense Institute (1987 - 2000)
Pennsylvania Bar Foundation (Life Fellow - 1989)
Pennsylvania Bar Institute, Director (2001)
Civil Litigation Advisory Committee (1999 - Present)

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

Supreme Court of Pennsylvania - October 18, 1982.
United States District Court for the Middle District of Pennsylvania - October 19, 1982.
United States Court of Appeals for the Third Circuit - November 13, 1985.
Supreme Court of the United States - March 19, 1990.
U. S. District Court for the District of New Jersey (special admission - April 24, 1995).

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

The Wildcat Foundation of the Mechanicsburg Area School District, President (1999 - January 2002), Director (February 2002 - Present)
Mechanicsburg School District - PTO (1993 - Present)

Mechanicsburg Presbyterian Church, Elder (1970 - Present)
Synod of the Trinity (Evaluation and Planning Committee - approximately 1988)
Cornell Alumni Ambassador Network (1986 - Present)
Cornell Club of Greater Harrisburg (Secretary/Treasurer - 1990 - Present)
Upper Allen Baseball Association/Mechanicsburg Area Youth Sports (Past-President - 1997 - 1998)
National Rifle Association (Approximately 1991 - 1992)
Dickinson School of Law Alumni Association (1982 - Present)
Carlisle Country Club (1984 - Present)
Harrisburg Claims Association (Approximately 1987 - 1990)
Pennsylvania Claims Association (Approximately 1987 - 1990)
Multiple Sclerosis Society (1997)

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

(a) *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*
Dickinson Law Review, Volume 98, p. 1

(b) *Closing Arguments in A Commercial Trial*
Pennsylvania Law Weekly (22 PLW 1035 and 1079)
(August 30, 1999 and September 6, 1999 Editions)

(c) *Minimize Workplace Sexual Harassment Liability*
Central Penn Business Journal

(d) *Workforce 2000: Is Your Company Ready for Diversity?*
Pennsylvania County News (May/June 2000 Edition)

(e) Pretrial Civil Practice: *Preparation of Pleadings*
(Pennsylvania Bar Institute - 1992-2001 editions)

(f) Trial Evidence in Civil Cases: *Discovery of Experts*
(Pennsylvania Bar Institute - 1996 ed.)

(g) *Personnel Decision-Making: The Minefield of Human Resources Management*
Central Penn Business Journal (May 30, 1994 edition)

(h) PBA Senior Citizens Handbook - (1991 ed.)

(i) PBA Young Lawyer's Handbook - Co-Editor (1988 ed.)
(I made inquiries with a representative of the PBA and this publication was discontinued several years ago. Hence, I am unable to produce a copy of this publication.)

(j) The Keystone (Trade Magazine)
How to Collect From Reluctant or Defaulting Purchasers - Sellers Remedies Upon Default Under the UCC (1985 ed.)

(k) The Keystone (Trade Magazine)
State and Federal Disclosure Requirements for Credit Transactions (1985 ed.)
(I have attempted unsuccessfully to locate a copy of this publication.)

I have given numerous continuing legal education seminars on topics such as evidence, preparation of pleadings, litigation ethics, staff relations, discovery techniques, motions practice, closing arguments and settlement strategies. My oral presentations were derived from seminar materials and I have not retained copies of my notes of these presentations. In addition, in my capacity as Chair of the PBA Judicial Selection and Reform Committee, I made several presentations on merit selection of Pennsylvania appellate judges and judicial discipline reform. These presentations were in the context of bar association functions and I am unable to identify precise dates; in addition, I have not retained copies of these speeches and I am unable to produce the same. I have spoken with representatives of the Pennsylvania Bar Association and the PBA typically does not maintain recordings of oral presentations; hence, they were unable to locate copies of my presentations.

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

I have not testified before a committee or subcommittee of the Congress.

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

Excellent. The date of my last physical was December 19, 2001.

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

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

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

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

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

I have not previously served as a judge.

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

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

I have not held any public office. I have not been an unsuccessful candidate for an elective office and I have never been nominated for an appointed office for which I was not confirmed.

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

Yes. I assisted a colleague, Michael L. Bangs, Esquire, in a local judicial race (Court of Common Pleas of Cumberland County, Pennsylvania) in 1997. I had no official title on this campaign and was simply supporting a law school classmate and friend. Other than this minor role, I have not played an active role in any other political campaigns.

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

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

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

I have not served as a clerk to a judge.

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

I have never practiced alone.

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

1980 - Present Mette, Evans & Woodside
(originally known as Shearer, Mette & Woodside)
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950

1980 - 10/1982	Law Clerk
10/1982 - 12/31/88	Associate
1/1/89 - Present	Shareholder

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

All 19 years of my practice have been focused on general civil litigation, concentrating in the areas of business litigation, employment law and, in the last 8 years, mediation and federal civil rights litigation.

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

My typical clients are medium-size businesses, as well as several insurance risk pools. I represent these clients in contract disputes, employment discrimination claims, commercial disputes such as unfair competition and Lanham Act claims, and actions seeking injunctive relief. I have also worked on civil rights litigation, sexual harassment claims and insurance coverage disputes.

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

I appear in Court on a regular basis. My practice has always been focused on general civil litigation.

(2) Indicate the percentage of these appearances in

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

(A) Federal Courts - 40%
(B) State Courts of Record - 60%
(C) Other Courts - N/A

(3) Indicate the percentage of these appearances in:

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

(A) Civil Proceedings - 95%
(B) Criminal Proceedings - 5%

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

Approximately 25. In approximately 15 of these cases I was either sole counsel or chief counsel. In approximately 10 of these cases I was associate counsel.

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

Approximately 25% of these trials were decided by a jury.

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

My only submission to the United States Supreme Court was a brief in opposition to a petition for writ of certiorari in the case of Boyd E. Graves v. Careercom Corporation, U.S. Supreme Court Docket No. 89-6447. The petition was denied. Copies of my opposition brief are attached.

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

I am a member of the Dauphin County Bar Association. For many years, Dauphin County has maintained a *pro bono* program which assigns two cases to participating members on an annual or bi-annual basis. The majority of my assignments have been *pro bono* domestic relations cases. I have handled approximately four *pro bono* divorces, as well as custody, support and equitable distribution claims. I have handled two insurance coverage disputes on a *pro bono* basis through assignments from the Dauphin County *pro bono* program.

In addition to my association with the Dauphin County *pro bono* program, I have provided *pro bono* legal services to the Pennsylvania Bar Association, The Wildcat Foundation of the Mechanicsburg Area School District, the Mechanicsburg Presbyterian Church and several, individual members of the congregation of my Church. For example, I represented my Church in a request for a zoning variance necessary for the expansion and modification of our facilities. I am unable to provide the precise amount of time devoted to each of these *pro bono* matters, but I estimate that I spend approximately 40-50 hours per year in the representation of non-profit organizations or individual *pro bono* clients.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

(1) Bold Corp., as Trustee for MASSPA Realty Trust, t/d/b/a Lancaster Host Resort and Conference Center, et al. v. Lancaster County Convention Center Authority, et al. Docket No. CI-00-02944, 77 Lanc.L.Rev. 171 (2000).

In this pending action, I represent 11 hotel owners and operators in a constitutional challenge to an amendment to the Third Class County Convention Center Authority Act ("Act") and to the enactment of certain hotel taxes which took effect January 1, 2000. The Defendants are represented by Daniel B. Huyett, Esquire, Stevens & Lee, 111 North Sixth Street, P.O. Box 679, Reading, PA 19603-0679 (610/478-2219) and Christopher A. Stump, Esquire, Stevens & Lee, One Penn Square, P.O. Box 1594, Lancaster, PA 17608-1594 (717/291-1031).

This case involves a proposed $75 million convention center and hotel project in the City of Lancaster financially supported, in part, by a 5% hotel tax. At the time the hotel taxes were enacted, the Act did not apply to counties with an existing convention center in excess of 40,000 square feet. The plaintiffs contend that Lancaster County has two existing convention centers in excess of 40,000 square feet and that the hotel taxes are unauthorized. After the hotel taxes were enacted by Lancaster County, the Act was amended to eliminate the exception applicable to Lancaster County. The hotel and bed and breakfast owners then filed suit alleging that this amendment violated the due process and equal protection clauses of the state and federal constitutions.

Trial occurred from December 4, 2000 through December 11, 2000 and closing arguments were held on January 12, 2001 before Judge Louis Farina of the Court of Common Pleas of Lancaster County. The Court issued a Decree Nisi denying plaintiffs' requested relief on February 2, 2001 and issued a Final Decree on April 24, 2001.

Plaintiffs filed an Appeal with the Commonwealth Court and this matter was argued before the Court *en banc* on November 7 2001. On January 23, 2002, in an unpublished opinion, the Commonwealth Court vacated the trial court decision and remanded the case to the trial court for supplemental proceedings. The Defendants recently filed a petition for the exercise of plenary jurisdiction and a petition for allowance of appeal in the Pennsylvania Supreme Court.

(2) Dauphin Deposit Bank and Trust Company v. Rash W. Hess, Joan B. Pattison and Jered L. Hock, individually and on behalf of all others similarly situated, Civil Action No. 907 Civil 1994, 698 A.2d 1305 (Pa. Super. Ct. 1997), appeal granted, 723 A.2d 671 (1998), affirmed, 727 A.2d 1076 (Pa. Supreme Ct. 1999).

This was class action litigation brought by the Bank against a class of approximately 4,300 of its individual retirement account customers. In its Complaint, the Bank sought the right to terminate unilaterally an IRA account guaranteed to provide a minimum interest rate of 10%. I acted as lead counsel for the class representatives, assisted by my law partner, Daniel L. Sullivan, Esquire. The Bank was represented at trial by R. Stephen Shibla, Esquire, Rhoads & Sinon, One South Market Square, 12th Floor, P.O. Box 1146, Harrisburg, PA, 17108-1146 (717/233-5731). On appeal, the Bank was represented by LeRoy S. Zimmerman, Esquire, Eckert Seamans Cherin & Mellott, One South Market Square Building, 213 Market Street, P.O. Box 1248, Harrisburg, PA 17108 (717/237-6000).

This case involved a dispute between Dauphin Deposit and a defendant class of approximately 4,300 IRA Accountholders over whether the Bank had the right to terminate an account offered between 1982 and 1984 and guaranteed to provide a premium interest rate. The total amount invested in this particular IRA account was approximately $200 Million Dollars.

A non-jury trial was conducted from April 1, 1996 through April 4, 1996 before Judge Kevin A. Hess of the Court of Common Pleas of Cumberland County, Pennsylvania. The parties agreed to a proposed class action settlement after the fourth day of trial and presented the same to Judge Hess for approval. On July 11, 1996, the Court rejected the proposed settlement. The Bank appealed this Order and the Pennsylvania Superior Court reversed. The Supreme Court affirmed the decision of the Superior Court and the class action settlement was reinstated.

This case is significant in several ways. First, the aggregate account balance of the IRA accounts at issue was substantial. Second, the case proceeded as a defendant class action; most class actions are certified with a plaintiff class. The case is also significant because of the large number of individuals involved in the defendant class (originally estimated to be 4,500, now reduced to 4,300). Finally, the case is significant because it is the Pennsylvania Supreme Court's first pronouncement of standards for the evaluation of proposed class action settlements.

(3) Andrews, et al. v. Gregory Holloway, Continental Rare Coin Funds, Inc., Continental Rare Coin Fund I, Ltd., Continental Investment Group, Scott R. Baker, Esquire, The Scott Baker Firm, P.C., Carl Sempier, Daniel Stephenson, Willard Canum, Lee Holloway, Carlayne Holloway, Palm Beach Development Group, Inc., Gary Ross, U.S. Trading Group, Inc. and Laura Andre-Rushin, Civil Action No. 95-1047 in the U.S. District Court for the District of New Jersey.

In this case, I represented Louis F. Larsen, an investor in a limited partnership in response to a 1988 prospectus issued by Defendant Gregory Holloway. Mr. Larsen was the single largest investor in this limited partnership. The remaining Plaintiffs were represented by Richard Kwasny at 3131 Princeton Pike, Lawrenceville, NJ 08648 (609/896-2414). Mr. Holloway and the corporate Continental Defendants were represented by Bradley T. Beckman at 235 South 17th Street, Philadelphia, PA 19103 (215/735-6677). Mr. Sempier was represented by Albert P. Massey at 49 E Lancaster Avenue, Frazer, PA 19355-2120 (610/647-3310), Mr. Canum was represented by Gregory W. Boyle at One Hovchild Plaza, 4000 Route 66, Tinton Falls, NJ 07753-7308 (908/922-3300). U.S. Trading Group and Laura Andre-Rushin were represented by Stephen M. Holden, 402

Park Boulevard, Cherry Hill, NJ 08002 (609/488-0282). Gary Ross and Palm Beach Development Group, Inc., were represented by Kent Huffman, 204 Phipps Plaza, Palm Beach, FL 33480 (407/833-5833). Scott R. Baker and Lee and Carlayne Holloway represented themselves.

This case was a non-jury proceeding which was tried before Judge Simandle during the weeks of April 24, 1995 and May 22, 1995. After review of proposed findings of fact and conclusions of law, the Court entered a preliminary injunction in favor of the Plaintiffs on November 9, 1995. As the result of contemptuous conduct on the part of Defendant Holloway, the Court held additional proceedings on April 8 and 9, 1996 and May 17, 1996 to address Plaintiffs' application to hold Defendant Holloway in contempt of court and to expand the scope of the preliminary injunction order.

Gregory Holloway was the sole shareholder of Defendant Continental Investment Group, Inc., which served as the investment advisor to Continental Rare Coin Fund I, Ltd. The purpose of the limited partnership was to invest in rare domestic coins through buying, holding and selling. It was capitalized with approximately $1.7 Million Dollars of cash and coins contributed by the limited partner plaintiffs. In conjunction with other investors, the limited partnership held coins in its inventory with a value exceeding $5 Million Dollars as of December 31, 1989. By 1992, the partnership had no value and had ceased operations. As a result, Plaintiffs' filed suit under the Racketeering Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962, and also proceeded on common law fraud theories.

In a 49 page Opinion issued on August 27, 1996, the Court held Defendant Holloway in contempt of court and expanded the scope of the preliminary injunction relief previously awarded to Plaintiffs. Judge Simandle determined that the Defendant's reliance on the Fifth Amendment gave rise to an adverse influence, ultimately resulting in a finding of contempt of court.

On May 9, 2001, I concluded the final phase of this litigation: a trial on causation and damages against Defendant Scott R. Baker, the attorney who represented the limited partnership during the early 1990s. A decision is expected in the very near future.

(4) Boyd E. Graves v. Careercom Corporation, U.S. District Court for the Middle District of Pennsylvania, Docket No. CV:87-0351, Third Circuit Docket Nos. 87- 5773, 88-5507, 89-8009, 89-5109, 89-5347, U.S. Supreme Court Docket No. 89-6447.

This case involved charges of race discrimination by an African American employee of Careercom Corporation. Mr. Graves proceeded pro se at trial and his last known address is 223 Greeley Lane, Youngstown, OH 44505. He was represented before the Third Circuit by William A. Dobrovir and Joseph D. Gebhardt whose address is 1748 N Street, N.W., Washington, DC 20036 (202/496-0400). I acted as lead counsel for the defense. My associate counsel was Ms. Marty Anderson, 400 South Fifth Street, Columbus, OH 43230 (614/464-1877).

This case was tried to a jury before Judge Sylvia Rambo, former Chief Judge of the U.S. District Court for the Middle District of Pennsylvania, on April 17 and 18, 1989. The trial resulted in a defense verdict.

Plaintiff secured the services of an attorney to address the applicability of Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). In Patterson, a majority of the Supreme Court held that claims actionable under Section 1981 are limited to those redressing discrimination in the making and enforcement of contracts. The case held that racial harassment claims are related to post-contract conditions of employment and, thus, are not actionable under Section 1981. Patterson was one of a series of Supreme Court decisions that led to the enactment of the Civil Rights Act of 1991. In response to briefs on the applicability of Patterson, the Third Circuit affirmed the trial verdict because the Plaintiff had not proven his *prima facie* case under Section 1981.

(5) Robert J. Murphy, Jr. v. Commonwealth of Pennsylvania, Department of Education, 74 Pa.Commw.Ct. 499, 460 A.2d 398 (1983); on remand, 94 Pa.Commw.Ct. 430, 504 A.2d 382 (1986).

This litigation involved a determination of the appropriate program of education for a brain-damaged child under the Education of the Handicapped Act, now known as the Individuals with Disabilities Education Act. I represented the child's parents who sought approval of an educational placement in an out-of-state private school. At both hearings, I acted as co-counsel with Jack M. Stover, Esquire. The school

district/intermediate unit was represented by the late Paul L. Stevens, Esquire, 116 East Court Street, P.O. Box 150, Doylestown, PA 18901, (717/348-5862) and The Department of Education was represented by Mary Beth O'Hara Osborne, 14 Floor, Strawberry Square, Harrisburg, PA 17120, (717/783-2850). Mr. Stevens, a past-President of the PBA and good friend, passed away last summer after a lengthy illness.

At the initial hearing, the hearing examiner appointed by the Secretary of Education undertook an *ex parte* communication to determine whether an in-state school could provide an appropriate educational program for the subject child. He then determined that the in-state school was adequate. On appeal, the Commonwealth Court reversed and remanded. The Court specifically determined that my clients' due process rights were violated as a result of the *ex parte* communication because we were not afforded the right of cross-examination. On remand, the Secretary of Education determined that an in-state program could provide an appropriate program of education and, accordingly, denied our request for an out-of-state placement. The Commonwealth Court affirmed this decision.

(6) Anstine, et al. v. AC&S, Inc., 106 Dauph. 146 (1985), Dauphin County Asbestos Cases - Docket No. 1 AMF.

This litigation consists of approximately 130 separate actions consolidated to a special docket number and known as the Dauphin County Asbestos Cases. The actions consist of the claims of plumbers, pipe fitters and insulators who were exposed to asbestos-containing products during the course of their respective work lives. As a result, the Complaints allege that the Plaintiffs suffer from asbestosis and other, related diseases.

In this litigation, I represented a defendant, MCI, Inc., a/k/a McCormick Asbestos Company. Plaintiffs were represented by William D. Poland of the Law Offices of Peter Angelos, 2101 North Front Street, Harrisburg, PA 17110 (717/232-1886). A consortium of asbestos manufacturers was represented by Robert B. Hoffman, 213 Market Street, Harrisburg, PA 17101 (717/257-3042). In addition, Eagle Picher Manufacturing Company was represented by G. Daniel Bruch, 1601 Market Street, 34th Floor, Philadelphia, PA 19103-2316 (215/564-5190) and Celotex Corporation was represented by Patrick A. Hewitt, 460 Cochran Road, Pittsburgh, PA 15228 (412/341-9300).

Trial commenced on September 6, 1988 and lasted approximately three weeks. The case was tried to a jury before Judge John C. Dowling of the Court of Common Pleas of Dauphin County. The cases of ten plaintiffs (five sets of spouses) were consolidated for this trial. None of the plaintiffs had a serious asbestos disorder such as mesothelioma. The trial resulted in verdicts of $10,000 in four of the five cases and in a $100,000 verdict in the fifth action. The verdicts were entered only against certain asbestos manufacturers. My client was one of two defendants that received a defense verdict.

(7) Robert J. Hessler and Roberta A. Hessler, husband and wife v. Centre Hotel Associates, Ltd., Court of Common Pleas, Centre County, Civil Action No. 93-32.

This was a slip and fall case in which I represented the Plaintiff, Robert J. Hessler, and his wife against the owner of a hotel. Mr. Hessler sustained injuries as the result of a slip and fall on February 13, 1991. The action was commenced in February 1993 in the Court of Common Pleas of Centre County. The Defendant, Centre Hill Associates, Ltd., trading and doing business as Days Inn Penn State, was represented by Roger T. Margolis, Esquire, at The Law Offices of Roger T. Margolis, 6400 Flank Drive, Suite 900, Harrisburg, PA 17112. (To my knowledge, Mr. Margolis is no longer practicing law in the Commonwealth of Pennsylvania. However, the fact of this case can be confirmed by contacting Mr. Margolis' former partner, Thomas M. Fraticelli, Esquire, 1631 North Front Street, Harrisburg, PA 17102 (717/233-3515).)

Jury selection occurred on June 6, 1994 and trial commenced on September 6, 1994. The jury returned with a verdict in favor of the Plaintiff in the amount of $165,000. The case was subsequently settled and the judgment was marked satisfied.

(8) Stacy L. Price v. Borden, Inc., U.S.D.C., Middle District, No. 4:CV-97-0304.

This was a sexual harassment claim in which I represented the Plaintiff, Stacy L. Price, now known as Stacy Linkins. The Defendant, Borden, Inc., was represented by Peter G. Loftus, Esquire, P.O. Box V, Main Street, Waverly, PA 18471 (570/347-1453).

This was a *quid pro quo* and hostile work environment sexual harassment action filed by an employee against her supervisor and the employer, Borden, Inc. The Plaintiff alleged that when she advised her employer's human resources representatives about the sexual harassment, the Human Resources Department did not take effective remedial action. Plaintiff alleged that she was forced to resign on or about October 6, 1995.

On March 7, 1999, following a three-day jury trial, the jury returned a verdict in favor of the Plaintiff and against the Defendants on her hostile work environment and constructive discharge claims. Judgment was entered for the Defendant on the *quid pro quo* claim.

The jury awarded Plaintiff $75,000 in compensatory and punitive damages and $14,292.25 in actual damages. In addition, the Court ordered Defendants to pay attorneys' fees of $92,504 and costs in the amount of $6,039.46, plus pre-judgment and post-judgment interest.

The judgment was satisfied in November 1999.

(9) Woolrich, Inc. v. Western Im-Ex Companies, Inc., Court of Common Pleas, Clinton County, Civil Action No. 885-93. (Related case Western Im-Ex Companies, Inc. v. Woolrich, Inc., U.S.D.C., Middle District, No. 4:CV-93-1373.

In this case I represented Woolrich, Inc., in a dispute over an attempted draw on a standby letter of credit. The Defendant Western Im-Ex Companies, Inc., was represented by Lee H. Roberts, Esquire, 146 East Water Street, Lock Haven, PA 17745 (570/748-4059).

In August 1993, Woolrich, Inc., filed a Complaint in Equity and an action for declaratory relief as well as a Motion for Preliminary Injunction against Western Im-Ex Companies, Inc., and Philadelphia National Bank, incorporated as Corestates Bank, N.A. (a stakeholder only - represented by Eugene E. Pepinsky, Esquire, Keefer, Wood, Allen & Rahal, LLP, 210 Walnut Street, Harrisburg, PA 17101 (717/255-8051). President Judge Saxton issued a temporary injunction as well as a permanent injunction, precluding Western Im-Ex Companies, Inc., from submitting any demands for payment under the irrevocable standby letter of credit.

In a companion action, Western Im-Ex Companies, Inc., filed suit in the U.S. District Court for the Middle District of Pennsylvania against Woolrich, Inc., seeking damages for certain program service charges provided by Western Im-Ex Companies to Woolrich. Western Im-Ex Companies provided import and export services to Woolrich from an assembling facility in San Jose, Costa Rica. This matter was tried to a jury before Judge James F. McClure and resulted in a jury verdict in favor of Western Im-Ex Companies and against Woolrich, Inc., for an amount less than $50,000. Thereafter, the case was amicably resolved and the judgment was marked satisfied.

(10) Mildred E. Crowl v. Catherine M. Myers, Court of Common Pleas of Dauphin County, Equity Docket No. 4322.
In this case, I represented the Defendant Catherine M. Myers. The Plaintiff was represented by Jordan D. Cunningham, Esquire, Cunningham & Chernicoff, 2320 North Second Street, Harrisburg, PA 17110 (717/238-6570).

This was an action for partition and sale of improved real estate by the Administratrix and second wife of a deceased against his first wife who was co-owner of the property. The case presented approximately twelve issues related to credits and deductions before the distribution of proceeds from a partition sale.

The case was tried before the late Judge Herbert Schaffner on April 4, 1994. Judge Schaffner issued a decree on October 2, 1984 directing partition of the property and allotting certain credits and deductions in accordance with the presentation of evidence. The decision is reported at 105 Dauph. 292 (1984). Subsequent to the decree, the property was sold and the case was settled.

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

None.

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

    I have been a party to one equity proceeding. On April 19, 2000, the Executive Committee of the Pennsylvania Bar Institute (PBI) filed an injunction action against the Pennsylvania Bar Foundation (PBF) and the Pennsylvania Bar Association (PBA) in the Court of Common Pleas of Philadelphia County, Orphan's Court Division, Docket No. 446 of 2000. All of the members of the PBA Board of Governors were named as defendants, including me (my term expired May 2000). Essentially, the complaint sought to enjoin the PBF and PBA from securing PBI grants to fund educational programs. The injunction was denied by order dated June 1, 2000 and the matter was dismissed.

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

    The only potential conflict of interest (that I foresee) would be with matters originating with my current law firm, Mette, Evans and Woodside. I believe that standard procedure is to refrain from any assignments involving one's former law firm for an appropriate period of time. Obviously, I would recuse myself from any cases in which I provided professional services as a private practitioner. I am not aware of any other, potential conflicts of interest; however, I would follow the guidelines for recusal if unanticipated conflicts arose during my service.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    No.

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

See Financial Disclosure Report.

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

See attached.

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

Yes.

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

Yes.

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

I submitted my responses to the Judicial Nominating Commission's Personal Data Questionnaire on May 14, 2001. I was interviewed by the Federal Judicial Nominating Commission for the Middle District of Pennsylvania on August 13 and 14, 2001. The initial interview was conducted by a three-member panel and the second interview was before the entire Judicial Nominating Commission. Thereafter, I was advised that I was a recommended candidate.

I was interviewed by representatives of the Office of White House Counsel in November 2001. I was subsequently interviewed by an agent of the FBI on December 21, 2001. Finally, I was interviewed by representatives of the Department of Justice in early January 2002.

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

No.

Case No. 89-6447

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

BOYD E. GRAVES,
Petitioner

v.

CAREERCOM CORPORATION,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For The Third Circuit

BRIEF OF RESPONDENT CAREERCOM CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Daniel L. Sullivan, Esquire
Christopher C. Conner, Esquire
METTE, EVANS & WOODSIDE
1801 North Front Street
P. O. Box 729
Harrisburg, PA 17108
(717) 232-5000

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the district court below abuse its discretion in granting respondent CareerCom Corporation's[1] motion for a new trial?

2. On retrial, did the district court properly view the evidence in the light most favorable to petitioner Boyd E. Graves and properly determine as a matter of law that the evidence was insufficient to create a material issue of fact for the jury?

3. Do any special and important reasons exist to warrant review on writ of certiorari?

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[1] Pursuant to Supreme Court Rule 28.1, CareerCom Corporation hereby states that it is a corporation without any parent companies, affiliates or subsidiaries (except wholly owned subsidiaries). Moreover, all parties in these proceedings below are set forth in the caption of the case in this Supreme Court.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS WHICH THE CASE INVOLVES

Respondent respectfully submits that the provisions of 42 U.S.C. §1981 and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(a)(1), are pertinent to the instant case. 42 U.S.C. §1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to know other.

The pertinent section of 42 U.S.C. §2000e-2 provides as follows:

> (a) It shall be an unlawful employment practice for an employer -
>
> > (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

CareerCom Corporation denies that this case involves the Seventh Amendment to the Constitution of the United States as alleged by Petitioner.

COUNTERSTATEMENT OF THE CASE

CareerCom Corporation is in the business of operating career training schools or vocational schools located in several states. The curriculum for a CareerCom school varies from secretarial training to eyeglass grinding, but the common thread of each school is to provide a short and intensive period of training for people who are having some difficulty in the job market.

CareerCom schools hire admissions representatives to recruit students and to secure enrollments for the school. Petitioner was initially hired as an in-house admissions representative for the Mansfield Business School in San Antonio, Texas in August 1985. As an admissions representative, Petitioner enrolled a fair number of students and performed admirably. In November or December of 1985, Petitioner changed positions from an in-house admissions representative to a high school workshop coordinator.

The high school workshop coordinator program was developed in 1985 as a new, company-wide recruiting method. The function of the high school coordinator was to make contact directly with the local high schools, perform workshops for students to demonstrate the benefit of a CareerCom training program and, ultimately, enroll the student. There was only one high school coordinator per school, and not every CareerCom school participated in the high school workshop program.

The majority of school directors of the CareerCom schools were unhappy with the National High School Workshop Program because the program was expensive and because school directors were having difficulty verifying the activity and success of individual high school workshop coordinators. In addition, the program created within an individual school an atmosphere of competition between the high school recruiter and the traditional in-house admissions representative. Moreover, compared to the steady flow of enrollments generated by in-house admissions representatives, the enrollments of even the best high school workshop coordinator were substandard.

Ultimately, CareerCom Corporation made a policy decision to phase out the National High School Coordinator Program. The phase out of the program began in the spring of 1986 and was completed by the end of calendar year 1986. During the phase out, the decision as to when the position would be eliminated from each school was left to the discretion of the individual school director. As part of the phase out of the high school program, a number of the high school coordinators were offered positions as in-house admissions representatives. Petitioner was offered the position of in-house admissions representative prior to his termination. Petitioner refused the position of in-house admissions representative and his position as a high school recruiter was terminated on June 4, 1986. CareerCom Corporation did not replace Petitioner nor has the high school coordinator position he occupied ever been reinstated.

Petitioner thereafter, proceeding pro se, filed a Complaint in the U.S. District Court for the Middle District of Pennsylvania against his former employer, alleging that he had been terminated because of his race in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2. The §1981 claim was tried to a jury and the Title VII claim was tried concurrently to the court on July 22 and 25, 1988. As a result of Petitioner's failure to submit any evidence on damages, only the issue of liability was submitted to the jury. The jury returned a verdict in favor of Petitioner. The district court granted CareerCom Corporation's request to file post trial motions with regard to the liability verdict prior to the trial on damages.

In an Order dated January 10, 1989, the district court denied CareerCom Corporation's motion for judgment notwithstanding the verdict, but granted CareerCom Corporation's alternative motion for a new trial. The new trial commenced before the Honorable Sylvia H. Rambo on April 17 and 18, 1989. Following the close of Petitioner's case, Judge Rambo granted CareerCom Corporation's motion for a directed verdict and issued an Order to that effect dated April 18, 1989.

Petitioner thereafter filed an appeal to the United States Court of Appeals for the Third Circuit. In a Memorandum Opinion filed October 12, 1989, the Court of Appeals for the Third Circuit affirmed the orders of the district court dated January 10, 1989 and April 18, 1989. On or about October 25, 1989, Petitioner filed a Petition for Rehearing which

Petition for Rehearing was denied by the Court of Appeals for the Third Circuit on or about November 9, 19[illegible]. Petitioner thereafter filed the instant Petition for Writ of Certiorari in the Supreme Court of the United States. Respondent CareerCom Corporation respectfully submits this Brief in opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The trial court properly exercised its discretion in granting CareerCom Corporation's motion for a new trial. Even a cursory review of the trial court's memorandum opinion reveals a careful and thorough examination of the record evidence and an appropriate exercise of its discretion to grant a new trial. In its memorandum opinion, the district court properly determined that the jury's verdict was contrary to the clear weight of the evidence and that a new trial was necessary to prevent a miscarriage of justice. There is no evidence to suggest that the trial court abused it discretion in the instant case, particularly given the deference to a trial court who is able to observe the witnesses and follow the trial in a manner that cannot be replicated by reviewing a cold record. The decisions below which make and affirm this determination are wholly consistent with existing case law and do not conflict with any decision of another federal court of appeals on the same matter or with a state court of last resort.

On retrial, the district court, and the court of appeals on review, properly examined the evidence in the light most favorable to Petitioner and properly determined as a matter of law that the evidence was insufficient to create a material issue of fact for the jury. The district court correctly held that the record of the second trial was critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief with respect to Petitioner's claim of disparate treatment. Following the close

of Petitioner's case-in-chief, the district court appropriately concluded that rather than proving he was treated less favorably than others not in his protected class, the evidence showed that Petitioner was given an opportunity to be treated more favorably in the long run, but turned down that opportunity. The decisions of the district court and the court below, in toto, are correct and consistent with existing law.

At every stage in these proceedings, Petitioner has been afforded great latitude and flexibility due to his pro se status. Petitioner's attempt to paint a picture of prejudice and unfair dealings in the U.S. District Court for the Middle District of Pennsylvania and in the U.S. Court of Appeals for the Third Circuit are utterly devoid of merit. No special reasons exist to justify review on writ of certiorari.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING CAREERCOM CORPORATION'S MOTION FOR A NEW TRIAL.

Appellate review of orders granting motions for a new trial is limited to a determination of whether or not the trial court abused its discretion. Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988). A district court may grant a new trial "to prevent injustice or to correct a verdict that was against the weight of the evidence." American Bearing Company, Inc. v. Litton Industries, Inc., 729 F.2d 943, 948 (3rd Cir. 1984), cert. denied 105 S.Ct. 178 (1984). Accord Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980), cert. denied 469 U.S. 854 (1984).

In a case alleging violations of Title VII, 42 U.S.C. §2000e-2 and 42 U.S.C. §1981, the plaintiff can establish a prima facie case by showing:

(i) he or she belongs to a racial minority;

(ii) he or she was discharged from a position for he or she was qualified;

(iii) his or her co-workers or other persons in a comparable position were treated more favorably.

Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (3rd Cir. 1985). The plaintiff bears the burden of establishing all the elements of his or her prima facie case by a preponderance

of the evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In the district court's new trial order, the court noted only two references in Petitioner's case-in-chief to other workshop coordinators who might have been treated more favorably than Petitioner. First, Petitioner testified that "[t]here were other workshop coordinators, all of whom were Caucasian, none of whom were laid off on June 4 . . . ." Second, Petitioner testified that he was "the only workshop coordinator terminated; whereas others all of whom had less productivity than I were not terminated." See Memorandum Opinion of Judge Rambo dated January 10, 1989, p. 5, attached to Petitioner's Petition for Writ of Certiorari. As the district court stated in its opinion, "[s]uch testimony hardly is enough to establish other non-black workshop coordinators were retained in their positions after plaintiff was terminated and, therefore, received more favorable treatment than plaintiff." Id. The trial court's memorandum opinion of January 10, 1989 specifically states that Petitioner did not establish a prima facie case at the first trial: "[t]his court believes a new trial is warranted to prevent the injustice of [Petitioner] attaining a jury verdict in his favor while having failed to establish his prima facie case during his own case-in-chief." Id.

The trial court carefully reviewed all of the evidence of record and determined that the only high school coordinator who might have been retained in that position after Petitioner was terminated was Ms. Sally Vickery. The court observed that

Respondent's witness, Mrs. Bonnie McMillan, properly explained Ms. Vickery's employment status following Petitioner's termination and concluded that there was "scant" evidence that Ms. Vickery was treated more favorably than Petitioner.

The district court concluded as follows:

> [Respondent's] motion for a new trial necessitated this court's thorough review of all significant evidence presented at trial. Having viewed that evidence under the appropriate standard, this court finds the jury's verdict is contrary to the clear weight of the evidence with regard not only to a critical element of [Petitioner's] prima facie case but also as to [Petitioner's] ultimate burden of persuasion. A new trial is necessary to prevent a miscarriage of justice in this case. Accordingly, [Respondent's] motion for a new trial will be granted.[2]

Id. at p. 15.

Clearly, there is no evidence to suggest that the trial court abused its discretion in the instant case, particularly given the deference to a district court who is able to observe the witnesses and follow the trial in a manner that cannot be replicated by reviewing a cold record. See Semper v. Santos, 845 F.2d 1233, 1237 (3rd Cir. 1988). Respondent respectfully submits that the decision of the

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[2] At the first trial, the district court was unable to conclude that the record was devoid of evidence of disparate treatment and, hence, denied Respondent's motion for judgment notwithstanding the verdict. The Third Circuit has held on numerous occassions that a new trial may be granted even when a judgment n.o.v. is inappropriate. American Bearing Co., supra. at 948, n.11.

district court to grant a new trial, as affirmed by the Third Circuit, was not an abuse of its discretion.

ON RETRIAL, THE DISTRICT COURT PROPERLY VIEWED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONER AND PROPERLY DETERMINED AS A MATTER OF LAW THAT THE EVIDENCE WAS INSUFFICIENT TO CREATE A MATERIAL ISSUE OF FACT FOR THE JURY.

It is axiomatic that following the grant of a motion for a new trial, the second trial of an action is de novo. See generally 66 C.J.S., New Trial §226 (1974). Thus, during Petitioner's case-in-chief, Petitioner was required to adduce sufficient evidence to prove his prima facie case by a preponderance of the evidence. Reichman v. Bureau of Affirmative Action, 536 F.Supp. 1149 (M.D. Pa. 1982). Following the close of Petitioner's case-in-chief, the district court properly determined that, rather than proving he was treated less favorably than others not in his protected class, the evidence showed that Petitioner was given an opportunity to be treated more favorably in the long run but turned down that opportunity.

The testimony produced at retrial by the Petitioner consisted of two witnesses: first, Frank Jennings, formerly school director of the Mansfield School where Petitioner was employed and, second, Mrs. Bonnie McMillan, former National Director of the High School Workshop Coordinator Program. It was Mr. Jennings' uncontradicted testimony that he offered Petitioner the position of in-house admissions representative prior to the termination of the high school coordinator position at the Mansfield School. Mr. Jennings also testified

that there was the possibility of future promotional opportunities for petitioner if he chose to continue his employment with Respondent within the admissions department. Nevertheless, Petitioner did not choose to accept the offer of employment as an admissions representative after the demise of the high school coordinator program.[3] Mr. Jennings testified that it was simply more cost-effective for the Mansfield School to have an in-house admissions representative who was generating a steady flow of enrollments than a high school coordinator who was not generating a steady flow of enrollments:

> Q: Mr. Jennings, in June of 1986, could you have afforded a high school coordinator?
>
> A: Yes, I could.
>
> Q: Can you explain to me why then the position was eliminated?
>
> A: Once again, it was the - it is obvious lack of results on a daily and weekly basis relative to what the in-house reps were doing.
>
> Probably the best illustration would be if someone had two savings accounts and one savings account was drawing one percent interest and one was drawing ten percent interest. You obviously wouldn't want the savings accounts to remain open with the one percent interest. The inhouse reps were enrolling anywhere every six weeks anywhere from 125 to 175 or more students.

(Supp. App. 297-298).

The record reflects that Mr. Jennings offered Petitioner the in-house admissions position during the phase

---

[3] Petitioner initially denied that he was offered the position of admissions representative (Supp. App. 266) and later admitted the offer of this position (Supp. App. 307). References contained herein are to the Supplemental Appendix filed by Respondent in the Third Circuit.

out of the National High School Program, which position would have permitted Petitioner to follow the high school leads and potential enrollees contacted during his tenure as a high school coordinator. Petitioner did not accept the position and the high school coordinator position was abolished.

Following the conclusion of Petitioner's case-in-chief, Respondent moved for a directed verdict, but the trial court, cognizant of Petitioner's pro se status, permitted Petitioner to re-open the record and attempt to introduce some evidence of disparate treatment. The trial court permitted Petitioner to re-open the case to try to establish that a high school coordinator at another school received more favorable treatment, such as the offer of a better position than that offered to Petitioner. Petitioner produced additional testimony through Mr. Jennings that Ms. Sally Vickery, formerly a high school coordinator in Fort Worth, Texas, changed positions from high school coordinator to placement director. However, Mr. Jennings testified that commissioned admissions representatives received higher pay than placement directors and, consequently, Ms. Vickery's change in position to placement director was not more favorable treatment than the admissions representative position offered to Petitioner. (Supp. App. 288-289).

Thereafter, Respondent renewed its motion for a directed verdict and, after recess, the district court granted Respondent's motion. The trial court's rationale for granting the subject directed verdict motion is cogent and unequivocal on Petitioner's failure to establish his prima facie case and

failure to prove that others not in his protected class were treated more favorably. The district court's review of the record and ultimate order directing a verdict in favor of Respondent is wholly consistent with existing case law and does not conflict with existing case law in either the federal system or any state court of last resort. The decision of the district court, as affirmed by the Third Circuit, is proper and correct in all respects and a Writ of Certiorari should not be granted.

NO SPECIAL CIRCUMSTANCES EXIST TO JUSTIFY GRANTING CERTIORARI IN THE INSTANT CASE.

The nature of the pro se Petition filed by Petitioner makes an item by item response to the matters raised therein difficult. The Petition for Writ of Certiorari contains a variety of matters complained of, some of which have nothing to do with the matter set forth in his complaint and some of which have nothing at all to do with a rational approach to evaluating and deciding this case.

Petitioner appears to assert as error the trial court's granting of Respondent's directed verdict motion on retrial in light of the trial court's denial of Respondent's motion for judgment n.o.v. after the initial trial. Although the standard of review of motions for a directed verdict and judgment n.o.v. are identical, see e.g. Fireman's Fund Insurance Co. v. Videfreeze, Corp., 540 F.2d 1171, 1177 (3rd Cir. 1976), the trial court's decisions of January 10, 1989 and April 18, 1989 are entirely reconcilable because the decisions are based upon two separate records. As previously stated, the

retrial of a case, absent any stipulations, must proceed de novo. Therefore, it is entirely possible for a trial court to deny an initial motion for judgment notwithstanding the verdict and, on retrial, direct a verdict for the party who previously moved for judgment n.o.v. E.g. Day v. Amax, Inc., 701 F.2d 1258 (8th Cir. 1983).

Petitioner also assigns as error the district court's refusal to permit Petitioner to reopen his case-in-chief to take the stand. Petitioner misstates the record and overlooks the lower court's conscientious deference to Petitioner's pro se status. The record on retrial reflects that Petitioner initially rested his case on the issue of liability without taking the stand. (Supp. App. 258). Following Respondent's motion for a directed verdict, the trial court reviewed Petitioner's request to re-open his case and take the stand. The district court specifically asked Petitioner to detail his proposed testimony. (Supp. App. 265). Petitioner replied that he intended to take the stand to introduce some discovery responses of Ms. Sally Vickery to Rule 31 deposition questions permitted by the trial court's order of February 19, 1989. After a discussion of the potential hearsay in Petitioner's proposed testimony, the trial court permitted Petitioner to re-open his case with the testimony of Mr. Jennings in order to authenticate a document reflecting Ms. Vickery's change in position from high school coordinator to placement director. (Supp. App. 274). Thereafter, Mr. Jennings testified that the treatment of Ms. Vickery, i.e. the change in position to placement director, was less favorable than the treatment of Petitioner, i.e. the offer of an admissions representative

position. The decision to re-open a case after a party has rested is within the discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-332 (1971). As an accommodation to Petitioner and with an understanding of the additional testimony and documentary evidence proposed by Petitioner, the trial court permitted the re-opening of the record on the treatment of Ms. Sally Vickery's vis-a-vis the Petitioner. (Supp. App. 274). The trial court permitted the proffered evidence through the testimony of Mr. Jennings and the Petitioner failed to request or proffer any additional testimony by himself that would warrant further re-opening of the record. Thereafter, Petitioner rested for the second time. Respondent respectfully submits that the trial court properly exercised its discretion and permitted the proffered testimony, albeit in a form slightly different than that originally proposed by the Petitioner.

Petitioner also makes reference to the decision of this Court in Patterson v. McLean Credit Union, ____ U.S. ____, 109 S. Ct. 2363 (1989). After requesting briefs on the issue, the Third Circuit appropriately noted that it was not required to determine whether Patterson could be applied to defeat a termination case brought under 42 U.S.C. §1981. The Third Circuit observed that the district court assumed that, on a sufficient factual showing, Petitioner could have recovered under his §1981 claim. Therefore, the Third Circuit held that the trial court correctly decided that Petitioner simply had not proven his prima facie case.

The Third Circuit concluded that the district court did not abuse its discretion in granting the new trial and that on retrial, the motion for a directed verdict was properly granted. The Third Circuit aptly stated:

> There is simply no question but that Graves' position was abolished for legitimate business reasons. Furthermore, there is no basis to conclude that Graves' termination was in any way related to his race.

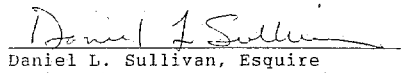
Memorandum Opinion of Judge Greenberg filed October 12, 1989, p. 3.

The decisions of both the trial court and the court of appeals are entirely consistent with existing case law and procedure. Respondent respectfully submits that the Petition for Writ of Certiorari should be denied because Petitioner simply failed to prove his case at retrial.

CONCLUSION

For the reasons and authorities set forth herein, Respondent CareerCom Corporation respectfully requests this Honorable Court to deny the Petition for Writ Certiorari filed by Petitioner.

Respectfully submitted,



Daniel L. Sullivan, Esquire
Christopher C. Conner, Esquire
METTE, EVANS & WOODSIDE

1801 North Front Street
P. O. Box 729
Harrisburg, PA 17108
(717) 232-5000

Attorneys for Respondent
CareerCom Corporation

DATED: FEBRUARY 15, 1990

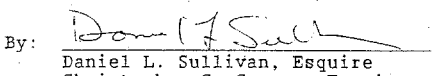
CERTIFICATE OF SERVICE

I, Daniel L. Sullivan, Esquire, attorney for Careercom Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 15, 1990, I served true and correct copies of the foregoing Brief of Respondent Careercom Corporation in Opposition to Petition for Writ of Certiorari by Mail by depositing the same in a United States mailbox, first class postage prepaid, upon the following counsel and unrepresented parties at the following addresses:

Boyd E. Graves
223 Greeley Lane
Youngstown, OH 44505-4863

Respectfully submitted,

METTE, EVANS & WOODSIDE

By: 

Daniel L. Sullivan, Esquire
Christopher C. Conner, Esquire
1801 North Front Street
P. O. Box 729
Harrisburg, PA 17108-0729
(717) 232-5000

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* Conner, Christopher C.	2. Court or Organization Middle District Pennsylvania	3. Date of Report 03/01/2002
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 02/28/2002 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2001 to 02/15/2002
7. Chambers or Office Address P.O. Box 5950 3401 North Front Street Harrisburg, PA 17110-0950	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Vice President	Pennsylvania Bar Association
2	Director	Pennsylvania Bar Institute
3	Board Member	Wildcat Foundation

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	06/01/90	Stock purchase agreement: Mette Evans & Woodside and current shareholders (list of shareholders is attached); Book value per share at December 31, 2001
2	01/01/94	Employment contract: Mette Evans & Woodside and Christopher C. Conner; Percentage of aged accounts receivable
3	01/18/01	Partnership Agreement: RiverOaks Associates and current shareholders (list of shareholders is attached); 4.35% of the net value of partnership property

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2002	Mette Evans and Woodside (Attorney)	$ 28,601
2	2002	RiverOaks Leasing Company (office equipment leasing to law firm)	$ 0
3	2002	Commonwealth of Pennsylvania	
4	2001	Mette Evans & Woodside (Attorney)	$ 216,285

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Conner, Christopher C.	03/01/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	EXEMPT		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Mette Evans & Woodside Pension Plan F/B/O Christopher C. Conner	Pension Plan loan	J
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	Date of Report
Conner, Christopher C.	03/01/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Commerce Bank/Harrisburg cash accounts	A	Interest	J	T	EXEMPT				
2 Dow Chemical Company common stock	A	Dividend	J	T	EXEMPT				
3 First Union Bank account	A	Interest	J	T	EXEMPT				
4 RiverOaks Associates - general partnership interest	B	Rent	K	W	EXEMPT				
5 Public Service Company of New Mexico	A	Dividend	J	T	EXEMPT				
6 BROKERAGE ACCOUNT #1					EXEMPT				
7 - Cash equivalent accounts	A	Dividend	J	T	EXEMPT				
8 - Templeton World Fund Class A	A	Dividend	J	T	EXEMPT				
9 BROKERAGE ACCOUNT #2					EXEMPT				
10 - Cash equivalent accounts	B	Interest	J	T	EXEMPT				
11 - Coca Cola common stock	A	Dividend	J	T	EXEMPT				
12 - Emerson Electric Co. common stock	A	Dividend	J	T	EXEMPT				
13 - Fox Entertainment Group Inc. Class A common stock	A	Dividend	J	T	EXEMPT				
14 - Alliance Premier Growth Fund Class B	A	Dividend	J	T	EXEMPT				
15 - Van Kampen Emerging Growth Fund Class B	A	Dividend	J	T	EXEMPT				
16 - NM General Motors Acceptance Corp. 5.25% due 11/15/04	A	Interest	J	T	EXEMPT				
17 - NM General Motors Acceptance Corp. 4.75% due 11/15/03	A	Interest	J	T	EXEMPT				

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	Date of Report
Conner, Christopher C.	03/01/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 - NM General Motors Acceptance Corp. 6.0% due 11/15/06	A	Interest	J	T	EXEMPT				
19 BROKERAGE ACCOUNT #3					EXEMPT				
20 - Cash equivalent accounts	B	Interest	J	T	EXEMPT				
21 - Coca Cola common stock	A	Dividend	J	T	EXEMPT				
22 - Emerson Electric Co. common stock	A	Dividend	J	T	EXEMPT				
23 - Fox Entertainment Group Inc. Class A common stock	A	Dividend	J	T	EXEMPT				
24 - Alliance Premier Growth Fund Class B	A	Dividend	J	T	EXEMPT				
25 - Van Kampen Emerging Growth Fund Class B	A	Dividend	J	T	EXEMPT				
26 - NM General Motors Acceptance Corp. 5.25% due 11/15/04	A	Interest	J	T	EXEMPT				
27 - NM General Motors Acceptance Corp. 4.75% due 11/15/03	A	Interest	J	T	EXEMPT				
28 - NM General Motors Acceptance Corp. 6.0% due 11/15/06	A	Interest	J	T	EXEMPT				
29 BROKERAGE ACCOUNT #4					EXEMPT				
30 - Cash equivalent accounts	B	Interest	J	T	EXEMPT				
31 - Coca Cola common stock	A	Dividend	J	T	EXEMPT				
32 - Emerson Electric Co. common stock	A	Dividend	J	T	EXEMPT				
33 - Fox Entertainment Group Inc. Class A common stock	A	Dividend	J	T	EXEMPT				
34 - Alliance Premier Growth Fund Class B	A	Dividend	J	T	EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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: Conner, Christopher C.

Date of Report: 03/01/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,assets, or transactions.)									
35 - Van Kampen Emerging Growth Fund Class B	A	Dividend	J	T	EXEMPT				
36 - NM General Motors Acceptance Corp. 5.25% due 11/15/04	A	Interest	J	T	EXEMPT				
37 - NM General Motors Acceptance Corp. 4.75% due 11/15/03	A	Interest	J	T	EXEMPT				
38 - NM General Motors Acceptance Corp. 6.0% due 11/15/06	A	Interest	J	T	EXEMPT				
39 BROKERAGE ACCOUNT #5					EXEMPT				
40 - Cash equivalent accounts	B	Interest	J	T	EXEMPT				
41 - Coca Cola common stock	A	Dividend	J	T	EXEMPT				
42 - Emerson Electric Co. common stock	A	Dividend	J	T	EXEMPT				
43 - Fox Entertainment Group Inc. Class A common stock	A	Dividend	J	T	EXEMPT				
44 - Alliance Premier Growth Fund Class B	A	Dividend	J	T	EXEMPT				
45 - Van Kampen Emerging Growth Fund Class B	A	Dividend	J	T	EXEMPT				
46 - NM General Motors Acceptance Corp. 5.25% due 11/15/04	A	Interest	J	T	EXEMPT				
47 - NM General Motors Acceptance Corp. 4.75% due 11/15/03	A	Interest	J	T	EXEMPT				
48 - NM General Motors Acceptance Corp. 6.0% due 11/15/06	A	Interest	J	T	EXEMPT				
49 BROKERAGE ACCOUNT #6					EXEMPT				
50 - ML Fundamental Growth A	A	Dividend	K	T	EXEMPT				
51 - Templeton World Fund Class A	A	Dividend	K	T	EXEMPT				

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	Date of Report
Conner, Christopher C.	03/01/2002

VII. Page 4 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 - ML Muni Bond Insured PT A	A	Interest	J	T	EXEMPT				
53 BROKERAGE ACCOUNT #7					EXEMPT				
54 - Cash equivalent accounts	A	Interest	J	T	EXEMPT				
55 - Disney Company common stock	A	Dividend	J	T	EXEMPT				
56 - ML Global Allocation Fund C	A	Dividend	J	T	EXEMPT				
57 BROKERAGE ACCOUNT #8					EXEMPT				
58 - Cash equivalent accounts	A	Interest	J	T	EXEMPT				
59 - Zero Coupon Treasury Receipt Bond due 11/15/05	A	Interest	J	T	EXEMPT				
60 - Disney Company common stock	A	Dividend	J	T	EXEMPT				
61 - Merc Pan Europe Growth Cl. C	A	Dividend	J	T	EXEMPT				
62 BROKERAGE ACCOUNT #9					EXEMPT				
63 - Cash equivalent accounts	A	Interest	J	T	EXEMPT				
64 - Zero Coupon Treasury Receipt Bond due 11/15/05	A	Interest	J	T	EXEMPT				
65 - Disney Company common stock	A	Dividend	J	T	EXEMPT				
66 - AIM Global Growth Fund Cl. B	A	Dividend	J	T	EXEMPT				
67 - Merc Pan Europe Growth Cl. C	A	Dividend	J	T	EXEMPT				
68 BROKERAGE ACCOUNT #10					EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 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: (Col. C1, D3)	J=$15,000 or less 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: (Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Conner, Christopher C.	03/01/2002

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

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[ ] NONE (No reportable income, assets, or transactions.)									
69 - Cash equivalent accounts	A	Interest	J	T	EXEMPT				
70 - Zero Coupon Treasury Receipt Bond due 11/15/05	A	Interest	J	T	EXEMPT				
71 - Disney Company common stock	A	Dividend	J	T	EXEMPT				
72 - AIM Global Growth Fund Cl. B	A	Dividend	J	T	EXEMPT				
73 - Merc Pan Europe Growth Cl. C	A	Dividend	J	T	EXEMPT				
74 PENSION PLAN #1 (401-K)					EXEMPT				
75 - Pps Ti Short-term Fund	A	Dividend	K	T	EXEMPT				
76 PENSION PLAN #2 (Pension)					EXEMPT				
77 - Cash equivalent accounts	A	Interest	K	T	EXEMPT				
78 - GMAC Corporate bond due 10/15/06	B	Interest	K	T	EXEMPT				
79 - AOL Time Warner common stock	A	Dividend	J	T	EXEMPT				
80 - AT&T Corp. common stock	A	Dividend	J	T	EXEMPT				
81 - AT&T Wireless common stock	A	Dividend	J	T	EXEMPT				
82 - BP PLC SPON ADR	A	Dividend	J	T	EXEMPT				
83 - ML Russell 2000 Index due 09/30/2004		None	J	T	EXEMPT				
84 - Biogen Inc. common stock		None	K	T	EXEMPT				
85 - Cisco Systems Inc. common stock		None	J	T	EXEMPT				

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	Date of Report
Conner, Christopher C.	03/31/2002

VII. Page 6 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
86 - Comcast Corp Spl Class A		None	J	T	EXEMPT				
87 - Compaq Computer Corp common stock	A	Dividend	J	T	EXEMPT				
88 - Fulton Financial Corp common stock	A	Dividend	J	T	EXEMPT				
89 - General Electric common stock	A	Dividend	K	T	EXEMPT				
90 - Global Crossing Ltd. common stock		None	J	T	EXEMPT				
91 - H.J. Heinz Co.PV $.25 Preferred	A	Dividend	J	T	EXEMPT				
92 - Hershey Foods Corp common stock	A	Dividend	J	T	EXEMPT				
93 - Intel Corp common stock	A	Dividend	J	T	EXEMPT				
94 - Kinder Morgan Inc. common stock	A	Dividend	K	T	EXEMPT				
95 - Legacy Bank of Harrisburg		None	J	T	EXEMPT				
96 - Eli Lilly & Co. common stock	A	Dividend	J	T	EXEMPT				
97 - Medtronic Inc. common stock	A	Dividend	K	T	EXEMPT				
98 - Microsoft Corp common stock		None	J	T	EXEMPT				
99 - Motorola Inc. common stock	A	Dividend	J	T	EXEMPT				
100 - NASDAQ 100 Trust		None	J	T	EXEMPT				
101 - Oracle Corp common stock		None	J	T	EXEMPT				
102 - PPG Industries Inc. common	A	Dividend	J	T	EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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
Conner, Christopher C.	03/01/2002

VII. Page 7 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
103 - Pfizer Inc. PV $.05 Pfd.	A	Dividend	J	T	EXEMPT				
104 - Sanmina-Sci Corp. common stock		None	J	T	EXEMPT				
105 - SBC Communications Inc. PV $1.00	A	Dividend	J	T	EXEMPT				
106 - Susquehanna Bancshares Inc. common stock	A	Dividend	J	T	EXEMPT				
107 - United Technologies Corp common stock	A	Dividend	J	T	EXEMPT				
108 - Verizon Communications common stock	A	Dividend	J	T	EXEMPT				
109 - Worldcom Inc.-MCI Group common stock		Dividend	J	T	EXEMPT				
110 - Worldcom Inc. - Worldcom Group common stock		None	J	T	EXEMPT				
111 - Alliance Intl. Premier Growth Fund Class B		Dividend	J	T	EXEMPT				
112 - ML Fundamental Growth Furd Class D	A	Dividend	J	T	EXEMPT				
113 - ML Fundamental Growth Fund Class B	A	Dividend	K	T	EXEMPT				
114 - ML Global Value Fund Class D		Dividend	J	T	EXEMPT				
115 - ML Global Growth Fund Class B		Dividend	J	T	EXEMPT				
116 - ML Global Allocation Fund Class B		Dividend	J	T	EXEMPT				
117 - ML S&P 500 Index Fund Class D		Dividend	J	T	EXEMPT				
118 MERRILL LYNCH IRRA	A	Dividend	J	T	EXEMPT				
119 - ML Retirement Reserves Cl. I					EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 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: (Col. C1, D3)	J=$15,000 or less 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: (Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Conner, Christopher C.	03/01/2002

VII. Page 8 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
120 - Putnam New Opportunities Fund Class A and B					EXEMPT				
121 - Putnam Fund for Growth and Income Class A and B					EXEMPT				
122 - Putnam Global Growth Fund Class A and B					EXEMPT				
123 - Putnam Voyager Fund Class A and B					EXEMPT				
124 - Putnam Diversified Income Trust Class B					EXEMPT				
125 TRUSTEE ACCOUNT #1	A	Dividend	K	T	EXEMPT				
126 - 20th Century Intl. Growth Fund					EXEMPT				
127 - 20th Century Growth Fund					EXEMPT				
128 - Blackrock Large Cap Value Equity Instl.					EXEMPT				
129 - Franklin Small Cap Growth Fund II					EXEMPT				
130 - Goldman Sachs Intl. Equity Fund Class A					EXEMPT				
131 - MFS Stategic Growth Fund Class A					EXEMPT				
132 - ML Small Cap Value Fund Class A					EXEMPT				
133 - Pioneer Fund Inc.					EXEMPT				
134 Bison Lodge, Inc. hunting camp		None	K	V	EXEMPT				
135 South Central Agency Inc.		None	J	V	EXEMPT				
136									

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 Conner, Christopher C.	Date of Report 03/01/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Part II, Line 1; List of current shareholders of Mette Evans & Woodside:

Howell C. Mette	Steven D. Snyder	Gary J. Heim
Robert Moore	Christopher C. Conner	David A. Fitzsimons
Charles B. Zwally	Jeffrey A. Ernico	Guy P. Beneventano
Peter J. Ressler	Kathryn L. Simpson	Thomas F. Smida
Lloyd R. Persun	P. Daniel Altland	John F. Yaninek
Craig A. Stone	Andrew H. Dowling	Vicky A. Trimmer
James A. Ulsh	Michael D. Reed	Timothy A. Hoy
Daniel L. Sullivan	Paula J. Leicht	

Part II, Line 3; List of current partners in RiverOaks Associates is the same as the listing for Line 1 above.

Part VII, Line 134; Value of Bison Lodge Inc. hunting camp is the value assigned to a shareholder.

Part VII, Line 135; South Central Agency Inc. is a title insurance agency which has no assets or liabilities. Any net income realized by the agency is periodically distributed to the law firm.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Conner, Christopher C.	03/01/2002

SECTION HEADING. (Indicate part of report.)
Information continued from Parts I through VI, inclusive.

PART I. POSITIONS (cont'd.)

Line	Position	Name of Organization/Entity
4	Trustee	Trustee Account #1
5	General Partner	RiverOaks Associates
6	General Partner	RiverOaks Leasing Company
7	S Corporation shareholder	South Central Agency, Inc.
8	Shareholder	Bison Lodge, Inc. (Hunting camp)
9	Custodian (UGMA)	Brokerage Accounts #2, #3, #4 and #5

PART II. AGREEMENTS (cont'd.)

Line	Date	Parties and Terms
4	01/01/97	Nominee is a participant in the Mette Evans & Woodside 401(k) Plan (successor to a defined contribution plan). Nominee intends to transfer all vested funds to an IRA upon resignation from the law firm.

PART III. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	2001	RiverOaks Leasing Company (office equipment leasing to law firm)	$ 1,500
6	2001	Commonwealth of Pennsylvania	
7	2000	Mette Evans & Woodside (Attorney)	$ 193,155
8	2000	RiverOaks Leasing Company (office equipment leasing to law firm)	$ 1,029
9	2000	Commonwealth of Pennsylvania	
10	2000	Weidner University (Part time law professor - one semester)	$ 4,500
11	2000	Weidner University (Part time law professor)	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Conner, Christopher C.	Date of Report 03/01/2002

IX. CERTIFICATION

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

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

Signature _____ Date 3-1-02

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

CHRISTOPHER C. CONNER
DECEMBER 15, 2001

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	15,561	Notes payable to banks-secured	—
U.S. Government securities-add schedule	—	Notes payable to banks-unsecured	—
Listed securities-add schedule	54,436	Notes payable to relatives	—
Unlisted securities--add schedule	101,500	Notes payable to others	8,000
Accounts and notes receivable:		Accounts and bills due	5,000
Due from relatives and friends	—	Unpaid income tax	—
Due from others	—	Other unpaid income and interest	—
Doubtful	—	Real estate mortgages payable-add schedule	189,604
Real estate owned-add schedule	335,000	Chattel mortgages and other liens payable	—
Real estate mortgages receivable	—	Other debts-itemize:	—
Autos and other personal property	80,000	Brokerage margin account	7,677
Cash value-life insurance	—		
Other assets itemize:			
401(K) Retirement Plan	34,187		
Pension Plan	336,077		
Individual Retirement Account	7,856	Total liabilities	210,281
Children's Custodial Accounts	223,153	Net Worth	977,489
Total Assets	1,187,770	Total liabilities and net worth	1,187,770
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	See attached	Are any assets pledged? (Add schedule)	See attached
On leases or contracts	No	Are you defendant in any suits or legal actions?	No
Legal Claims	No	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	No		
Other special debt	No		

Christopher C. Conner
Attachment to NET WORTH FINANCIAL STATEMENT
December 15, 2001

Listed securities:

Dow Chemical Company	$	190
Public Service Company of New Mexico		750
Templeton World Fund		4,700
ML Fundamental Growth Fund A		23,046
Templeton World Fund		24,020
ML Muni Bond Insured Pt A		1,730
Total	$	54,436

Unlisted securities:

Restricted partnership interest - RiverOaks Associates	$	40,000
Restricted partnership interest - RiverOaks Leasing Company		-
Mette Evans & Woodside restricted employment agreement		43,000
Restricted stock interest - Bison Lodge, Inc.		18,500
Restricted stock interest - South Central Agency, Inc.		-
Total	$	101,500

Real estste mortgages payable:

Fifth Third Mortgage Company (1st mortgage)	$	167,398
Pennsylvania State Employees Credit Union (2nd mortgage)		22,206
Total	$	189,604

Additional information:

As a partner of RiverOaks Associates, Mr. Conner (as well as the other partners) has guaranteed partnership mortgage indebtedness up to a maximum of $100,000.

Mr. Conner's personal residence is pledged as collateral securing the first and second mortgage loans on the property. In addition, the real estate owned in the RiverOaks Associates partnership is pledged as collateral securing the mortgage loan in that partnership, with the individual partners being contingently liable as explained above.

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

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

   Joy Flowers Conti; nee Joy Marie Flowers

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

   United States District Judge for the Western District of Pennsylvania

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

   Buchanan Ingersoll
   Professional Corporation
   One Oxford Centre, 20th Floor
   301 Grant Street
   Pittsburgh, PA 15219-1410
   Telephone: (412) 562-3989

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

   December 7, 1948
   Kane, Pennsylvania

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

   Husband: Anthony T. Conti, investment banker with a business address at Commonwealth Securities and Investments, Inc., 1317 Investment Building, Fourth Avenue, Pittsburgh, Pennsylvania 15222.

   Dependent Children: 2

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

   Law School: Duquesne University School of Law, Pittsburgh, PA
   1970 - 1973; Degree (May 1973): J.D. Summa Cum Laude
   College: Duquesne University, Pittsburgh, PA
   1966 - 1970; Degree (May 1970): B.A.

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

(a) Buchanan Ingersoll Professional Corporation
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219-1410
Position: Shareholder; March 1996 - Present

(b) Kirkpatrick & Lockhart LLP
1500 Oliver Building
Pittsburgh, PA 15222
Position: Partner, November 1983 - March, 1996
Position: Associate, July 1982 - October 1983
September 1974 - August 1976
Position: Summer Law Clerk, June 1972 - August 1972

(c) Duquesne University School of Law
600 Forbes Avenue
Pittsburgh, PA 15282
Position: Professor of Law, August 1976 - June 1982

(d) Commonwealth of Pennsylvania - Department of State, Bureau of Occupational & Professional Affairs
Position (part-time): Hearing Examiner, May 1978 - June 1982

(e) Carlow College
3333 Fifth Avenue
Pittsburgh, PA 15213-3165
Position (part-time): Adjunct Professor (1975)

(f) Justice Louis L. Manderino (deceased)
Supreme Court of Pennsylvania
Eastgate Professional Building
Monessen, PA 15062
Position: Law Clerk, September 1973 - August 1974

(g) Holiday Inn
1815 West Mercury Boulevard
Hampton, Virginia 23666
June 1970 through August 1970
Position: Waitress

(h) Allegheny County Bar Foundation (Trustee, 1995 - 2001) (Secretary, 2000 - 2001)

(i) American Red Cross; Southwestern Pennsylvania Chapter (Director, 1994 - 2000)

(j) Pennsylvania Business-Education Partnership (Director, 1996-1997)

(k) Catholic Charities of the Diocese of Pittsburgh, Inc. (Director, 1991-1997) (President, 1995) (Vice President, 1994)

(l) St. Alphonsus Christian Mothers' and Women's Guild (Treasurer, Vice President, approx. 1995-1997)

(m) Family Services of Western Pennsylvania (Director, 1990-1997)

(n) Executive Council, National Conference of Bar Presidents (Council Member, 1993-1997)

(o) The Historical Society of the United States Court of Appeals For The Third Circuit (Vice President, Executive Committee, Member, Board of Directors 1994-1997) (President, 1997)

(p) Duquesne Law Alumni Association (Member, Board of Governors, 1994-1996)

(q) Tri-State Network of the International Women's Insolvency & Restructuring Confederation (Chair, Tri-State Network, 1995 -1996)

(r) Pennsylvania Bar Institute (Director, 1991-1996)

(s) Pine-Richland Football Mothers (At-Large Officer, 2002) (Co-President, 1995)

(t) Pennsylvania Bar Association (Governor-At-Large, 1993-1995)

(u) Allegheny County Bar Association (Board of Governors, 1978, 1980-1994) (Various offices, including President, 1993)

(v) American Judicature Society (Director, 1982 - 1985)

(w) St. Thomas More Society (Board of Governors for several years beginning 1984)

(x) Committee on Justice Education in Pennsylvania (Vice President, 1984)

(y) Berkeley Hills Nursery School (Director, 1980-1981)

(z) Duquesne Law Review, Editor-in-Chief (1972-1973)

(aa) Delta Theta Phi Fraternity, Master Scholar (1973)

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

None.

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

1995-Present	Fellow of the American College of Bankruptcy
Since at least 1997-Present	Best Lawyers in America
Several years-Present	Who's Who in American Law; Who's Who in America
2000	One of Four Finalists for the 1999 "Federal Lawyer of the Year Award" presented by the Western Pennsylvania Chapter of the Federal Bar Association
1999, 1986, 1982	Pennsylvania Bar Association, Award of Achievement
1999	Neighborhood Legal Services Association, 6.1 Award
1996	City of Peace Award for distinguished legal career presented by the State of Israel Bonds
1995	Century Club of Duquesne University
1995	Vectors/Pittsburgh Award for 1995 Women of the Year in Law & Government
1995	Anne X. Alpern Award given by the Pennsylvania Bar Association to recognize an outstanding woman lawyer
1993	YWCA of Greater Pittsburgh Tribute to Women Award for Professions
1993	Allegheny County Bar Association Pro Bono Award
1993	St. Barnabas Health Systems Leadership Award

1989	Triangle Award for Outstanding Women Professional in Allegheny County
1981	One of the Ten Outstanding Young Women in America
1981	Outstanding Young Woman in Pennsylvania
Law School (1970-1973)	Academic Scholarship 1970 - 1973; J.D. Summa Cum Laude; Order of the Barrister; Highest Honor--Constitutional Law, Estates and Trusts, Corporations, Conflict of Laws, Property; Editor-in-Chief of the Law Review; Graduated first in the class
College (1966-1970)	Academic Scholarship; Dean's List; Greek Woman of the Year 1970

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

ALLEGHENY COUNTY BAR ASSOCIATION

1994	Board of Governors, Immediate Past-President
1993	President
1992	President-Elect
1991	Governor
1990	Administrative Vice President
1987 - 1989	Treasurer
1983 - 1986	Board of Governors, Administrative Vice President
1981 - 1983, 1978	Board of Governors, Governor
1980	Board of Governors, Assistant Secretary - Treasurer
1980 - Present	Corporation, Banking & Business Law Section, Chairperson (1987 - 1988)
1980 - Present	Bankruptcy and Commercial Law Section, Member
Since at least 1997 - Present	Federal Court Section, Member; Council Member (1998 - 2001)

1979	Young Lawyers Section, Chairperson
1978	Young Lawyers Section, Vice Chairperson
1976 - 1977	Young Lawyers Section, Executive Council, Member
1980 - 1994	Liaison to and member of, at various times, committees and sections, including Planning Committee, Women & the Law Committee, Public Relations, Bankruptcy and Commercial Law, Corporation, Banking and Business Law, Continuing Legal Education, Arts and the Law

PENNSYLVANIA BAR ASSOCIATION

1998 - Present	Co-Chair - Legal Services for the Poor Task Force (Part II)
1993 - 1995	Governor-at-Large
1980 - 1995 1996 - Present	House of Delegates, Member
1993 - Present	Commission on Women in the Profession, Member
1986 - 2001	Publications Committee, Member of Editorial Board
1981 - Present	Corporation, Banking & Business Law Section, Chair (1997 - 1999), Council Member (1984 - May, 1987, 1989, Treasurer, 1991 - 1993, Chair-elect, 1995-1996); Chair, Commercial Law Committee (1989 - 1993); Fraudulent Conveyance Task Force, Chair (1990 - 1993); Insolvency Law Task Force (1994 - present); Legal Opinions Drafting Committee, Chair (1991 - 1994); Member (1994 - present); Title 15 Revision Committee, Member (1981 - present)
1981 - 1995	Legal Ethics and Professional Responsibility Committee, Member
1979 - 1994	Civil Rights and Responsibilities Committee, Member; Chair (1986 - 1988)
1985 - 1988	Judicial Selection Reform Committee, Member
1986 - 1988	Constitution Bicentennial Committee, Member
1987	Task Force on Aids
1979 - 1981	Constitutional Law Committee, Member

1981 - 1983	PBA/YLS Law School Liaison Committee, Chairperson
1980 - 1981	PBA/YLS American Bar Association Liaison Committee, Chairperson
1980 - 1982	PBA/YLS Committee to Study the Proposed Model Rules of Professional Conduct, Member

PENNSYLVANIA BAR INSTITUTE

1991 - 1996	Director
1986 - 1997	Western Pennsylvania Curriculum Planning Committee, Member

AMERICAN BAR ASSOCIATION

1991 - 1998	House of Delegates, Member (Representative of Allegheny County Bar Association)
1981 - 1986	House of Delegates, Member (Representing Pennsylvania Bar Association)
1975 - Present	Business Section; Member, Pro Bono Committee (1993 - 1999), Committee on Commercial Financial Services and Subcommittee on Creditor Rights (1984 - 1990); Business Bankruptcy Committee - Member Professional Ethics Subcommittee and Rules Subcommittee (1990 - 1995); Corporate Law and Taxation Committee (1982 - 1983)
1981 - 1982	ABA/YLD, Corporation, Banking & Business Law Committee Vice Chairperson
1979 - 1982	ABA/YLD, Corporation, Banking & Business Law Committee; Bankruptcy - Consumer and Commercial Subcommittee - Chairperson
1979 - 1981	ABA/YLD, Delegate (Representing Pennsylvania)
1980	ABA National Conference on the Role of Lawyers in the 1980's, Participant
1979 - 1983	ABA/YLD Judicial Selection, Tenure and Compensation Committee, Member
1986 - Present	Fellow of the Young Lawyers Division of the American Bar Association

AMERICAN BAR FOUNDATION

1992 -1997	Chair of Pennsylvania Fellows
1986 - Present	Fellow

PENNSYLVANIA BAR FOUNDATION

2000	Fellow

ALLEGHENY COUNTY BAR FOUNDATION

1995 - 2001	Trustee; Secretary (2000 - 2001)

AMERICAN COLLEGE OF BANKRUPTCY

1995 - Present	Fellow

AMERICAN LAW INSTITUTE

1993 - Present	Member

THE HISTORICAL SOCIETY OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1997	President
1994 - 1996	Vice President, Executive Committee Member of Board of Directors

AMERICAN JUDICATURE SOCIETY

1982 - 1985	Director
1979 - Present	Member

FEDERAL BAR ASSOCIATION

1999 - Present	Member

AMERICAN BANKRUPTCY INSTITUTE

1990 - Present	Member

AMERICAN HEALTH LAWYERS ASSOCIATION

At least since 1999 - Present -	Member

COMMERCIAL LAW LEAGUE

1984 - Present Member

INTERNATIONAL WOMEN'S INSOLVENCY & RESTRUCTURING CONFEDERATION

1994 - Present Member

1995 - 1996 Chair, Tri-State Network

NATIONAL CONFERENCE OF BAR PRESIDENTS

2000 Nominating Committee

1993 - 1996 Executive Council

WOMEN'S BAR ASSOCIATION OF WESTERN PENNSYLVANIA

1993 - Present Member

PROFESSIONAL ACTIVITIES

United States Court of Appeals for the Third Circuit
1994 -1995
Activity: Chair of the Bankruptcy Judge Selection Committee for the Western District of Pennsylvania

1987
Activity: Member of the Bankruptcy Judge Selection Committee for the Western District of Pennsylvania

Supreme Court of Pennsylvania
1995
Activity: Member of Pennsylvania Futures Commission on Justice in the 21st Century

United States District Court for the Western District of Pennsylvania
1994 - 1995
Activity: Member of the United States Magistrate Judge Merit Selection Panels for the Western District of Pennsylvania

United States District Court for the Western District of Pennsylvania
1991 - 1993
Activity: Member of the District Court Advisory Committee

Corporation Bureau, Advisory Committee, Department of State,
Commonwealth of Pennsylvania
1991 - Present
Activity: Member of Advisory Committee to the Corporation Bureau

Advisory Committee, Third Circuit
March 1982 - 1983
Activity: Member of four-person committee which was responsible for making a recommendation to the Third Circuit on the number of Bankruptcy Judges needed in the Third Circuit

Court of Common Pleas of Allegheny County, Pennsylvania
1985 - 1988
Activity: Member of 1988 Bicentennial Committee serving as a member of the Historical Reference Subcommittee

The Disciplinary Board of the Supreme Court of Pennsylvania
Harrisburg, Pennsylvania
July 1982 - 1988
Activity: Member of Hearing Committee with responsibility for making recommendations in disciplinary cases brought by the Disciplinary Board against attorneys

Commonwealth of Pennsylvania, Department of State,
Harrisburg, Pennsylvania 17120
May 1978 - June 1982
Activity: Hearing Examiner with responsibility for rendering final opinions in disciplinary cases brought by the Commonwealth against physicians

Allegheny County Bar Association, City-County Building
Pittsburgh, Pennsylvania 15219
December 1978 - March 1979
Activity: Administrator for project involving the revision of local rules of criminal procedure

Advisory Committee, Office of the Attorney General, Pennsylvania
Joint State Government Commission
1978
Activity: Advised the Joint State Government Commission on legislation needed to recognize and implement the powers of the new office of an elected Attorney General

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

May 1993	Supreme Court of the United States of America
May 1976	United States Court of Appeals for the Third Circuit
October 1973	Supreme Court of Pennsylvania
October 1973	United States District Court for the Western District of Pennsylvania
October 1973	Courts of Allegheny County, Pennsylvania

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

1994 - Present	Executive Women's Council, Greater Pittsburgh, Inc. Member
1994 - Present	The Supreme Court Historical Society, Member
2000 - Present	National Association For Female Executives, Member
1994 - 2000	American Red Cross; Southwestern Pennsylvania Chapter, Member, Board of Directors
1996 - 1997	Pennsylvania Business-Education Partnership, Member, Board of Directors
1991 - 1997	Catholic Charities of the Diocese of Pittsburgh, Inc., Member, Board of Directors; President 1995, Vice President (1994)
1990 - 1997	Family Services of Western Pennsylvania, Member, Board of Directors
At least since 1999 - Present	Delta Theta Phi Law Fraternity, Member in Good Standing

At least since 1999-2001	Catholic League
At least since 1994 - Present	Duquesne Law Alumni Association, Member, Board of Governors (1994-1996)
1994 - 1995	Duquesne University, Member, Search Committee for Liberal Arts Dean
2001 - Present 1991 - 1995	Pine-Richland Football Mothers, Member; (Officer-At-Large, 2002) (Co-President 1995)
Since at least 1997 - Present	Carnegie Museums of Pittsburgh
1993 - Present	World Affairs Council of Pittsburgh, Member
1987 - 1995	LEAP Advisory Board (law related education project affiliated with Temple University School of Law), Member
Since 1988	Trotting Acres Homeowners' Association, Member
1988 - Present	St. Alphonsus Parish, Member (since 1988) and eucharistic minister (since at least 1997); St. Alphonsus Christian Mothers' and Women's Guild, Member and various officer positions (for several years around 1995)
At least since 1983 - Present	St. Thomas More Society, Member; Board of Governors (for several years beginning 1984)
1988	Leadership Pittsburgh, Participant
1986 - 1989	Assistant Cubmaster, Cub Scouts, Pack 297
1984	Committee on Justice Education in Pennsylvania, Vice President
1979 - 1981	Attorneys' Section of the United Way of Southwestern Pennsylvania; Cabinet Counsel; Chairperson (1979-1980)
1980 - 1981	Berkeley Hills Nursery School, Member, Board of Directors
Law School	Duquesne Law Review, Editor-in-Chief (1972-1973); Appellate Moot Court Board (1972); Appellate Moot Court Representative to Regional Competition (1972); Delta Theta Phi Fraternity, Master Scholar (1973)

Social: Duquesne Club (since at least 1995); Rivers Club (approximately 1984-1994); Treesdale Country Club (Anthony T. Conti has been a member since at least 1995)

I do not belong to any organization that discriminates on the basis of race, sex or religion. The Duquesne Club formerly discriminated, but had eliminated its discriminatory practices prior to my becoming a member. Please also note that to be a member of St. Alphonsus' Church and its Christian Mothers and Women's Guild, I must be a Roman Catholic.

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

Conti, "Anticipating and Avoiding Bankruptcy--Liability Exposure From Related Entities", Duquesne University -- Jubilee International and Ecumenical Canon Law Conference, co-sponsored by The Angelicum University in Rome and University of Wales, Cardiff (February, 2000)

Conti, "Liability Issues for Church Related Entities", Angelicum and Duquesne University School of Law - Colloquium (April 24, 1998 Rome, Italy)

Conti, "Automatic Stay & Section 105 Injunctions", Chapter 11 Theory and Practice: A Guide to Reorganization, Ch. 8 (LRP Publications, 1994); Supp. (May, 1998)

Conti, Kozlowski & Ferleger,

"Claims Trafficking in Chapter 11", 9 Bankr. Dev. Journal, 281 (1992)

Conti, "Statutory Close Corporations", Pa. Bus. Corp. Prac., Ch. 8 (PBI 1991)

Conti, "An Analytical Model for Substantive Consolidation of Bankruptcy Cases", 38 Business Lawyer 855 (1983)

Conti, "Disciplining Physicians in Pennsylvania - Licensing Problems Involving Medicare Fraud Convictions", 18 Duq. L. Rev. 521 (1980)

Conti, "The Role of Lawyers in the 1980's and Beyond - An Essay on the Future of Lawyers", Pittsburgh Legal J. 8 (April 1980)

Comment, "Local Regulation of Air Pollution: The Allegheny County Experience", 11 Duq. L. Rev. 612 (1973)

Conti, "Chairman's Column" published during 1997-1999 in the Pennsylvania Bar Association's Corporation, Business and Banking Law Section Newsletter

Conti, "President's Message" published monthly in the 1993 Pennsylvania Legal Journal (Allegheny County Bar Association)

Conti, "The Automatic Stay and Section 105(a) Injunctions", Law Education Institute, Inc. (November 7, 2001) (course outline for program held January 2002)

DiPietro & Conti,

"Religious Organizations and the Law", Pennsylvania Religious Corporation Issues, Lorman Education Services (May 2001) (course outline)

Conti & Wenzel,

"Protecting Directors, Officers, Members and Volunteers From Liability", Pennsylvania Tax Exempt Organizations, Lorman Education Services (November 2000) (course outline)

Conti & Walent,

"Bankruptcy For Transactional Lawyers", Sixth Annual Business Lawyers' Institute, Pennsylvania Bar Institute (November 2000) (course outline)

Conti & Smith,

"The Nonprofit Corporation in Bankruptcy", Law Education Institute, Inc. (course outline for program held February 2000)

Conti, "Recent Developments in Plan Confirmation and Other Issues", Fifth Annual Business Lawyers' Institute, Pennsylvania Bar Institute (October 1999) (course outline)

Conti & Hess,

"Confessions of Judgments in Pennsylvania: An Introduction", Confessions of Judgment & Deficiency Judgments in Pennsylvania, Pennsylvania Bar Institute (March 1999) (course outline)

Conti & Diggs,

"Confessions of Judgments in Pennsylvania: An Introduction", Confessions of Judgment & Deficiency Judgments in Pennsylvania, Pennsylvania Bar Institute (March 1996) (course outline)

Conti & Diggs,

"Fraudulent Transfers - Defenses", Fraudulent Transfers in Pennsylvania, Pennsylvania Bar Institute (March 1995) (course outline)

Conti & Schmeck,

"Representing Secured Creditors: Consequences of an Ailing Business Filing for Bankruptcy Protection", Chapter 11 Business Bankruptcy: Preserving Your Client's Interests, Pennsylvania Bar Institute (1994) (course outline)

Conti & Mason,

"Bankruptcy for Benefit Lawyers: An Introduction to Bankruptcy Proceedings", The Fourth National Institute on Employee Benefits in Bankruptcy and Lending Transactions, American Bar Association (Feb./Apr. 1991) (course outline)

Conti & Kozlowski,

"Representing Secured Creditors: Consequences of an Ailing Business Filing for Bankruptcy Protection", Saving the Ailing Business: Work-outs, Reorganizations & Bankruptcies, Pennsylvania Bar Institute (May 1991) (course outline)

Conti & O'Connell,

"Remedies and Exceptions", Legal Opinions, Pennsylvania Bar Institute (January 1991) (course outline)

Conti, "Statutory Close Corporations - A Useful Tool", Corporate Practice for the Non-Specialist, Pennsylvania Bar Institute (May 1990) (course outline)

Conti, O'Connell & Adelkoff,

"Real Estate Partnerships and Limited Partnerships in Bankruptcy", The Troubled Real Estate Project: Bankruptcy & Tax Implications, Pennsylvania Bar Institute (May 1989) (course outline)

Conti, Kozlowski & Krasik,

"Representing Secured Creditors: What Your Client Can Do and What to Expect", What Every Lawyer Must Know to Practice Bankruptcy in 1988, Pennsylvania Bar Institute (1988) (course outline)

Conti & Richardson,

"Fiduciary Obligations in Bankruptcy", Reorganization Problems in Depth, Pennsylvania Bar Institute (1987) (course outline)

Conti & Aceto,

"Representing Secured Creditors: What Your Client Can Do And What To Expect", What Every Lawyer Needs To Know About Bankruptcy, Pennsylvania Bar Institute (1986) (course outline)

Prior to 1987, I lectured and wrote course outlines on bankruptcy, general corporate law and ethical issues for various continuing legal education programs for lawyers, but I did not keep a copy or record of the program materials.

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

Not applicable.

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

Excellent. My last physical examination was on October 24, 2001.

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

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

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

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

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

Not applicable.

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

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

Not applicable.

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

I have served as a member of lawyers' committees for various persons running for election for judicial office in the Commonwealth of Pennsylvania, including:

The Honorable Mary Jane Bowes, Superior Court of Pennsylvania (March/April 2001);

The Honorable Maureen Lally-Green, Superior Court of Pennsylvania (approximately Fall of 1999);

The Honorable Eugene F. Scanlon, Court of Common Pleas, Allegheny County, Pennsylvania (approximately Fall of 1999 -- Co-Chair of Lawyer's Committee);

The Honorable Deborah Todd, Superior Court of Pennsylvania (approximately Fall of 2000);

The Honorable Joseph Del Sole, Superior Court of Pennsylvania, in his unsuccessful campaign for Supreme Court of Pennsylvania (approximately Fall of 1998).

I also served as a member of a Host Committee for Melissa Hart, member of the U.S. House of Representatives (approximately Spring of 2001).

As a member of a lawyers' or host committee, there were relatively few responsibilities other than to attend fundraising events and to encourage other lawyers to make contributions.

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

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

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

Justice Louis L. Manderino (deceased)
Supreme Court of Pennsylvania
September 1973 - August 1974

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

(a) Buchanan Ingersoll Professional Corporation
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219-1410
Position: Shareholder, March 1996 - Present
Experience: Services related to business bankruptcy, commercial finance, health care and general corporate matters

(b) Kirkpatrick & Lockhart LLP
1500 Oliver Building
Pittsburgh, PA 15222
Position: Partner, November 1983 - March, 1996
Position: Associate, July 1982 - October 1983
September 1974 - August 1976
Position: Summer Law Clerk, June 1972 - August 1972
Experience: Services related to business bankruptcy, commercial finance and general corporate matters

(c) Duquesne University School of Law
600 Forbes Avenue
Pittsburgh, PA 15282
Position: Professor of Law, August 1976 - June 1982
Experience: Responsibility for teaching courses on Civil Procedure, Corporate Finance, Corporate Readjustments and Reorganizations, Corporations, and Creditors' and Debtors' Rights

(d) Commonwealth of Pennsylvania - Department of State, Bureau of Occupational, Professional Affairs
Position (part-time): Hearing Examiner, May 1978 - June 1982
Experience: Responsibility for hearing licensure cases brought by the Commonwealth of Pennsylvania against physicians licensed to practice medicine in Pennsylvania

(e) Justice Louis L. Manderino (deceased)
Supreme Court of Pennsylvania
Eastgate Professional Building
Monessen, PA 15062
Position: Law Clerk, September 1973 - August 1974
Experience: Responsibility for research and preparation of opinion memoranda

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

From September 1974 through August 1976, I worked as an associate at then-named Kirkpatrick, Lockhart, Johnson & Hutchison. I was in the rotation system and my practice involved a variety of civil, business, corporate and litigation matters. In August 1976 I joined the faculty of Duquesne University School of Law as a full-time professor. I taught courses on Civil Procedure, Corporate Finance, Corporate Reorganizations, Corporations, and Creditors' and Debtors' Rights. I received tenure. When I returned in 1982 to Kirkpatrick & Lockhart after teaching for six years at Duquesne University School of Law, my practice involved general corporate matters with a concentration in business bankruptcy law. I practiced primarily before the United States Bankruptcy Court for the Western District of Pennsylvania and in the United States District Court for the Western District of Pennsylvania. After I left Kirkpatrick & Lockhart LLP in 1996 and joined Buchanan Ingersoll Professional Corporation, I continued my practice in general corporate law with a business bankruptcy emphasis and expanded my practice into health care and nonprofit corporation law. In my firm, I serve as the co-chair of the Carta Group, which focuses on issues affecting religious and religiously affiliated institutions. I also continue to practice primarily before bankruptcy courts and other federal courts.

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

I have represented business entities and financial institutions in bankruptcy cases and restructuring including both creditors and debtors. I have also represented non-profit entities, including religious organizations, in

connection with governance and litigation matters. I have provided pro bono services to individuals seeking relief under Chapter 7 of the Bankruptcy Code.

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

My appearances in court varied between regular and occasional appearances in bankruptcy court during the course of representation of debtors-in-possession and creditors. For example, in connection with the related bankruptcy cases of Trend-Lines, Inc. and Post Tool, Inc. in the United States Bankruptcy Court for the District of Massachusetts, Case Nos. 00-15431 and 00-15432 - CJK, which commenced in August 2000, I have appeared before the bankruptcy court approximately eight times. I had occasional appearances in federal district and circuit courts on matters arising out of the bankruptcy cases in which I appeared. I also occasionally appeared in state and district courts in connection with matters involving non-profit or religious entities.

(2) Indicate the percentage of these appearances in

(A)	federal courts;	Over 95%
(B)	state courts of record;	Under 5%
(C)	other courts.	None

(3) Indicate the percentage of these appearances in:

(A)	civil proceedings;	100%
(B)	criminal proceedings.	None

(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. Most of the cases in which I have been involved were in the bankruptcy courts. Bankruptcy practice involves primarily motions or non-jury trials. Many issues were settled or resolved on motions for summary judgment. I generally served as the chief or co-counsel. In that context, I litigated to judgment approximately ten adversary proceedings or motions.

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

0%

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

Not applicable.

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

I accept from time to time pro bono cases to represent indigent persons in seeking bankruptcy relief. I am currently representing on a pro bono basis a person seeking to obtain relief under chapter 7 of the Bankruptcy Code, on which matter I have spent six hours and anticipate that the engagement will require approximately ten hours of service. I also represented an indigent woman in a chapter 7 bankruptcy case in August 2001. I spent approximately seven hours on that case.

For the last three years I have served as a co-chair of the Pennsylvania Bar Association's Task Force For The Poor - Part II. The Task Force is charged with developing ways to improve the access to justice for the poor in Pennsylvania. The amount of time involved has been significant. I spend approximately 40 to 50 hours each year on matters relating to the Task Force. I received the Pennsylvania Bar Association Award of Achievement in 1999 for my service on the Task Force, and I also received the 6.1 Award from Neighborhood Legal Services Association for my services.

During my service as President of the Allegheny County Bar Association in 1993, I initiated programs to raise money for Project Challenge, which was the bar association program for pro bono services. I also initiated a program for disadvantaged high school youth. The program enabled high school students between their junior and senior year of high school to work in legal offices in Allegheny County. That program continues today. For those endeavors, I received the Allegheny County Bar Association Pro Bono Award in 1993. I spent approximately 200 hours on those matters in 1993.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

1. **In re Busy Beaver Building Centers, Inc.**, 19 F.3d 833 (3d Cir. 1994)

This case arose from the Chapter 11 bankruptcy case of Busy Beaver Building Centers, Inc. filed in the United States Bankruptcy Court for the Western District of Pennsylvania. The Bankruptcy Court on February 25, 1991 issued an order disallowing payment to the debtor's counsel for fees charged for certain paralegal services on the basis that the services were purely clerical. My firm at that time was Kirkpatrick & Lockhart and we represented the debtor. Kirkpatrick & Lockhart, at its own cost and expense which far exceeded the amount at issue, requested reconsideration and after an evidentiary hearing the Bankruptcy Court reaffirmed its decision. The case was appealed to the United States District Court which affirmed the Bankruptcy Court's decision. On appeal to the Third Circuit, the Third Circuit voided the District Court's opinion and remanded the case for reconsideration. This case is significant because the concern involved was the role of the paralegal. The Third Circuit applied a market test to determine whether paralegal services are compensable and recognized the positive contribution of paralegals to the legal profession.

I was the chief counsel for my firm Kirkpatrick & Lockhart which was the appellant in this case. I presented the case to the Bankruptcy Court and had the primary responsibility for arguing and briefing the case on appeal. Ultimately, Busy Beaver Building Centers, Inc. was successfully reorganized and fees were awarded consistent with the market approach articulated by the Third Circuit. The trial and the appeals occurred between 1991 and 1994. The case was submitted to the Third Circuit on May 13, 1993 and was decided without argument on March 11, 1994.

The case in the Third Circuit was before Circuit Judges Becker, Hutchison and Roth. The opinion was written by Circuit Judge Becker. The case in the District Court was before District Judge Donald E. Ziegler, C.J. In the Bankruptcy Court the case was before Bankruptcy Judge Judith K. Fitzgerald. The case before the Bankruptcy Court is reported at 133 B.R. 753 (Bankr. W.D. Pa. 1991).

The name(s), address(es) and telephone number(s) of the associate counsel from my office are:

Paula A. Schmeck, Esq. (formerly with Kirkpatrick & Lockhart LLP)
National City Bank of Pennsylvania
National City Tower
20 Stanwix Street
Pittsburgh, PA 15222
Telephone: (412) 644-8806

Scott E. Westwood, Esq. (formerly with Kirkpatrick & Lockhart LLP)
Allegheny Teledyne, Inc.
1000 Six PPG Place
Pittsburgh, PA 15222
Telephone: (412) 394-2992
(last known address)

The name, address and telephone number for counsel for National Federal of Paralegal Associations, Inc., et al. are:

Robert P. Simons, Esq. (formerly with Klett, Lieber, Rooney & Schorling, P.C.)
Reed Smith Shaw & McClay
436 Sixth Avenue
Pittsburgh, PA 15219
Telephone: (412) 288-3131

The name, address and telephone number for counsel for the United States Trustee are:
(appeared and argued at the Bankruptcy Court hearing)

Kathleen Robb-Singer, Esq.
Office of the U.S. Trustee
319 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15219
Telephone: (412) 644-4756

2. **Belcufine v. Aloe**, 112 F.3d 633 (3d Cir. 1997)

This case arose from claims of former employees of Shenango, Inc., a corporation which had successfully reorganized under Chapter 11 of the United States Bankruptcy Code. The former employees, after Shenango, Inc.'s plan of reorganization was confirmed, sued a former director of Shenango, Inc. and a current director who was also an officer of Shenango, Inc. based upon an assertion that the Pennsylvania Wage Payment and Collection law ("WPCL") made those individuals personally liable for the unpaid pre-petition benefits which had become payable after the bankruptcy filing. Those individuals in turn raised third-party indemnification claims against Shenango, Inc. The Third Circuit affirmed the decision of the District Court, which upheld a summary judgment in favor of the individual defendants and Shenango, Inc., and held that the WPCL did not apply to pre-petition claims or benefits that come due after a corporation's filing for bankruptcy protection. This case is significant because if the former employees' claims for personal liability against officers of a debtor corporation were upheld, the ability to reorganize a corporation that has Pennsylvania employees would have been seriously impacted. The WPCL makes only the officer and director who is in office at the time payment is due liable. Thus, to avoid personal liability, directors and officers would resign prior to a bankruptcy filing and it would be hard to imagine anyone agreeing to serve post-petition. Without management there would be no opportunity to reorganize. Ultimately, employees, creditors and the community would suffer greater harm.

I was the chief counsel who represented Shenango, Inc., the debtor, and argued the case on behalf of Shenango, Inc. before the Bankruptcy Court, the District Court and the Third Circuit.

This case was originally filed in the Court of Common Pleas for Allegheny County in September, 1994 and was removed to the United States District Court for the Western District of Pennsylvania and then referred to the United States Bankruptcy Court for the Western District of Pennsylvania. The decision of the Bankruptcy Court which granted summary judgment in favor of my client and others was appealed to the District Court which affirmed the grant of summary judgment and then was appealed to the Third Circuit. The case was decided by the Third Circuit on April 28, 1997 and it upheld the grant of summary judgment in favor of my client.

After the reference, Bankruptcy Judge Joseph Cosetti granted summary judgment in favor of my client and others. The case was appealed to the District Court and District Judge Donetta Ambrose affirmed the Bankruptcy Court decision. The case was then appealed to the Third Circuit and was argued before Circuit Judges Greenberg, Alito and Roth. The Third Circuit in an opinion by Circuit Judge Alito, joined by Circuit Judge Roth, affirmed the District Court's decision. Circuit Judge Greenberg concurred and dissented.

The name, address and telephone number of my co-counsel are:

Wendy E. D. Smith, Esq.
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222-2312
Telephone: (412) 355-6500

The name, address and telephone number of counsel for the other Appellees, Mark Aloe and Andrew Aloe are:

Clem C. Trischler, Esq.
Raymond G. McLaughlin, Esq.
Pietragallo, Bosick & Gordon
38th Floor
One Oxford Centre
Pittsburgh, PA 15219
Telephone: (412) 263-2000

The name, address and telephone number for counsel for Appellants are:

Lee R. Golden, Esq.
Todd T. Zwikl, Esq.
Suite 660 USX Tower
Pittsburgh, PA 15219
Telephone: (412) 227-5950

3. **Sharon Steel Corporation and Caparo Steel Company v. Hatch Associates, Ltd. and Steltech**, No. 97-3656 (3d Cir. Sept. 22, 1998)

This case arose from an adversary proceeding filed in the bankruptcy case of Sharon Steel Corporation ("Sharon") by Sharon and Caparo Steel Company ("Caparo") against Hatch Associates, Ltd. and Steltech, Ltd. (the "Defendants"). The adversary proceeding was filed for the purpose of obtaining a declaratory judgment that a license agreement (the "License") for the use of certain technology was not an executory contract and that the licensing rights under the License transferred to Caparo when Caparo purchased certain assets from Sharon. Before the completion of discovery, Defendants filed a motion for summary judgment. Caparo and Sharon responded by filing an cross motion for summary judgment. The bankruptcy court found in favor of Caparo and Sharon holding that the License was not an executory contract. Defendants appealed to the District Court, which affirmed the holding that the License was not an executory contract, and then appealed to the Third Court which also affirmed the holding. This case was significant because the technology in issue was critical to operation of Caparo's steel business and dealt with an analysis of executory contract issues, which is difficult because there is no precise definition of the term "executory contract."

I was the chief counsel who represented Caparo. I argued the case on behalf of Caparo before the Bankruptcy Court and had the primary responsibility for briefing the case on appeal. I represented Caparo in the appeals before the District Court and the Third Circuit. The grant of summary judgment by the Bankruptcy Court in favor of my client and Sharon was upheld by the District Court and the Third Circuit.

Bankruptcy Judge Warren W. Bentz granted summary judgment in favor of my client and Sharon. District Judge Robert J. Cindrich affirmed the Bankruptcy Court decision. The Third Circuit in an unpublished memorandum opinion by Judge Dolores K. Sloviter affirmed the District Court's opinion.

The name, address and telephone number of counsel for the co-plaintiff, Sharon Steel Corporation are:

Herbert P. Minkel, Jr., Esq.
131 E. 62nd Avenue
New York, NY 10022
Telephone: (212) 319-2797

The name, addresses and telephone number of counsel for the Defendants are:

Paul K. Stecker, Esq.
Jeremiah J. McCarthy, Esq.
Phillips, Lytle, Hitchcock
Blaine & Huber, LLP
Suite 3400
3400 HSBC Center
Buffalo, New York 14203-2887
Telephone: (716) 847-8400

The name, address and telephone number of the associate counsel from my office are:

Frank B. Harrington, Esq.
Buchanan Ingersoll Professional Corporation
650 College Road East, 4th Floor
Princeton, NJ 08540
(609) 987-6815

4. **In re Marcus Hook Development Park, Inc.**
Marcus Hook Development Park, Inc. v. T.A. Title Insurance Co.
143 B.R. 648 (Bankr. W.D. Pa. 1992)

This case involved issues raised on remand from the Third Circuit. A title company challenged the validity of the County of Delaware, Pennsylvania's tax lien on property. There were two conflicting orders entered by the Bankruptcy Court. One order stated that a sale of certain property was free and clear of liens; the second order confirmed a plan which left intact

the lien of the County against that property. The case is significant because it addressed the due process rights of holders of liens against property which is being administered in bankruptcy. The Bankruptcy Court held in favor of the County and found, among other things, that the County had not received adequate notice of the terms of the sale and thus the sale was not free and clear of its lien.

I was the chief counsel at Kirkpatrick & Lockhart representing the County of Delaware, the respondent in this case. On behalf of my client I handled the trial and was primarily responsible for the briefs that were filed. The court found in favor of the County. Ultimately the parties settled the matter.

The dates of this litigation occurred between December 4, 1991, the date of the title company's objections which raised the issue of divesting the County's lien, to August 14, 1992, the date of the opinion of the Bankruptcy Court.

This case was argued before Bankruptcy Judge Bernard Markovitz of the United States Bankruptcy Court for the Western District of Pennsylvania.

The name, address and telephone number for counsel for the debtor, Marcus Hook Development Park, Inc. are:

Robert G. Sable, Esq. (formerly of Sable, Makoroff & Gusky P.C.)
McGuireWoods, LLP
Dominion Tower, 23rd Floor
625 Liberty Avenue
Pittsburgh, PA 15222-3143
Telephone: (412) 667-6000

The name, address and telephone number for counsel for T.A. Title Insurance Co. are:

Eric A. Schaffer, Esq.
Reed, Smith, Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219
Telephone: (412) 288-4202

The name, address and telephone number for counsel for the Committee of Unsecured Creditors are:

Gary M. Schildhorn, Esq.
Adelman Lavin Gold and Levin
Two Penn Center Plaza, Suite 1900
Philadelphia, PA 19102-1799
Telephone: (215) 568-7515

The name, address and telephone number for counsel also representing the interests of the County of Delaware are:

James DelBello, Esq.
Last known address:
323 West State Street
Media, PA 19063
Telephone: (610) 565-3050

5. **In re Busy Beaver Building Centers, Inc.**
Maryland National Bank v. Busy Beaver Building Centers, Inc.
127 B.R. 343 (Bankr. W.D. Pa. 1991)

This case involves a Complaint for Declaratory Judgment filed in the Busy Beaver Building Centers, Inc. bankruptcy case. The secured lender in that case was concerned that a fraudulent conveyance action would be filed against it and sought a declaration that the matter would be barred by a statute of limitations. The debtor and the creditors committee objected. The court upheld the objections. This case is significant because it reaffirmed that even if a matter is ripe, when the declaration would not end the matter the court may deny the relief. Here the secured creditor was seeking relief to in effect preempt an investigation into its conduct. The court correctly held that the relief requested would be inappropriate without an opportunity for the parties to contest facts and determine appropriate legal theories.

I was the chief counsel at Kirkpatrick & Lockhart representing the debtor, Busy Beaver Building Centers, Inc., and had primary responsibility on behalf of the debtor for arguing and briefing the case before the Bankruptcy Court. The case was ultimately settled through a plan of reorganization which was confirmed. Busy Beaver Building Centers, Inc. continues to operate a chain of home improvement stores in Western Pennsylvania.

This case was briefed and argued after the bankruptcy case was filed on December 12, 1990 and was decided on May 28, 1991.

This case was decided by Bankruptcy Judge Judith K. Fitzgerald of the United States Bankruptcy Court for the Western District of Pennsylvania.

The name, address and telephone number for counsel for Maryland National Bank are:

Robert P. Simons, Esq. (formerly with Klett, Lieber, Rooney & Schorling, P.C.)
Reed Smith Shaw & McClay
436 Sixth Avenue
Pittsburgh, PA 15219
Telephone: (412) 288-3131

The name, address and telephone number for counsel for the Official Committee of Unsecured Creditors are:

David W. Lampl, Esq. (formerly with Sable, Makoroff & Gusky P.C.)
Leech, Tishman, Fuscaldo & Lampl
1800 Frick Building
Pittsburgh, PA 15219
Telephone: (412) 261-1600

6. **In re Pittsburgh Cut Flower Co., Inc.**
Mellon Bank, N.A. v. The Union National Bank of Pittsburgh
118 B.R. 31 (Bankr. W.D. Pa. 1990)

This case arose in the Chapter 11 bankruptcy case of Pittsburgh Cut Flower, Inc. Mellon Bank, N.A. filed a complaint to determine the priority of its liens and the liens of the Union National Bank of Pittsburgh against property of the debtor and to direct equal lien priority and adequate protection between the banks. The Union National Bank of Pittsburgh sought to dismiss the complaint for lack of subject matter jurisdiction arguing that it dealt only with a dispute between non-debtor parties. This case is significant because the Bankruptcy Court rejected that argument and held that the matter was a core proceeding and that also when a claim under a subordination agreement between non-debtors is raised it was inextricably intertwined with the merits of the action to determine lien priority. This case is precedent that competing lien claims may properly be resolved in the Bankruptcy Court and need not be relegated to a state court proceeding which might not be timely in relation to the bankruptcy.

I was the chief counsel for my firm, Kirkpatrick & Lockhart, representing Mellon Bank, N.A., the plaintiff, and had primary responsibility for arguing and briefing the case on behalf of my client. The case was ultimately resolved through a plan of reorganization under which the banks shared lien priority.

The dates of this action were between June 8, 1990, the date the debtor submitted its first plan of reorganization, and August 23, 1990, the date of the decision.

The case was decided by Bankruptcy Judge Bernard Markovitz of the United States Bankruptcy Court for the Western District of Pennsylvania.

The name, address and telephone number for the associate counsel from my office who assisted me in representing Mellon Bank, N.A. are:

Paula A. Schmeck, formerly with Kirkpatrick & Lockhart, now at:
National City Bank of Pennsylvania
National City Tower
20 Stanwix Street
Pittsburgh, PA 15222
Telephone: (412) 644-8806

The name, address and telephone number of counsel for the debtor are:

Stanley E. Levine, Esq.
Campbell & Levine
1700 Grant Building
330 Grant Street
Pittsburgh, PA 15219
(412) 261-0310

The name, address and telephone number of counsel for the defendant are:

Peter S. Russ, Esq.
Buchanan Ingersoll Professional Corporation
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-1416

The name, address and telephone number of counsel for the Committee of Unsecured Creditors are:

Mark L. Glosser, Esq.
Glosser & Shreve
1331 Gulf Tower
Pittsburgh, PA 15219
Telephone: (412) 281-6555
(last known address)

7. **Ben F. Blanton Construction, Inc. v. Netwest Development Corporation, et al.**; Superior Court of the State of Arizona (County of Pima); No. C2000-5428 Under Advisement Ruling on Motion to Dismiss (August 21, 2001)

This case involves a complaint asserting counts of promissory estoppel and unjust enrichment against various defendants, including Key Corporate Capital Inc., a secured lender. In this case a general contractor, which had constructed several assisted living projects, sued various parties, including the secured lender which provided financing to the owners of the projects. The owners of the projects are debtors under Chapter 11 of the United States Bankruptcy Code. My firm and I represent Key Corporate Capital Inc. in connection with various matters relating to the assisted living projects, including in the two bankruptcy cases of the owners in the United States Bankruptcy Court for the District of Arizona. The contractor asserts in the complaint that the secured lender made promises to third parties and was unjustly enriched by the services provided by the contractor. Key Corporate Capital Inc. moved to dismiss the complaint on the basis that grounds for promissory estoppel did not arise under the facts as plead and that unjust enrichment also was not proper. The court denied the motion to dismiss, except as to the promissory estoppel count regarding one of the assisted living projects. The issues raised in this case are significant for commercial purposes in that a decision adverse to

the secured lender could negatively impact the availability of construction loans in the State of Arizona and also elsewhere. Discovery is presently ongoing in the case and it is expected that Key Corporate Capital Inc. will move for summary judgment. If summary judgment is not granted, or if the case proceeds to trial and the case is decided adversely to the secured lender, it is expected that an appeal will be taken. The consequences of an adverse decision could be that a construction lender which does not fund after maturity of construction loans made to an owner of a project could be held liable to third parties. The cost and expense of construction lending could increase if liability is imposed in these circumstances.

At Buchanan Ingersoll Professional Corporation I have had the primary client responsibility for Key Corporate Capital Inc. In this case, I was admitted *pro hac vice*. I was involved in the preparation of the motion to dismiss; I attended the argument on the motion; and I was involved in the preparation of the answer and response to discovery.

The motion to dismiss was argued before the Honorable Ted B. Borek, Judge of the Arizona Superior Court, Pima County, on August 13, 2001, and the Court's decision was entered on August 21, 2001.

The name, address and telephone number for counsel for the plaintiff, Ben F. Blanton Construction, Inc. are:

G. Todd Jackson, Esq.
McNamara, Goldsmith & Jackson
33 North Stone Avenue, Suite 1410
Tucson, Arizona 85701
Telephone: (520) 624-0126

The name(s), address(es) and telephone number(s) of co-counsel for defendant Key Corporate Capital Inc. are:

Craig H. Kaufman, Esq.
Quarles, Brady & Streich, Lang, LLP
One S. Church Avenue, Suite 1700
Tucson, Arizona 85701-1621
Telephone: (520) 770-8700

The name, address and telephone number of the shareholder at my firm working on this matter with me are:

Peter S. Russ, Esq.
Buchanan Ingersoll Professional Corporation
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 562-1416

8. **State of New York v. St. Francis Hospital, et al.**
United States District Court, Southern District of New York
No. 98-Civ.-0939 (WWC); Opinion and Order dated April 10, 2000

This case was brought by the attorney general of the State of New York pursuant to state and federal antitrust laws against three health care institutions in the State of New York. One of those defendants was St. Francis Hospital, which my firm and I represented. The State alleged that two hospitals through the third healthcare institution, a joint venture, fixed rates, terms and conditions for services in violation of the federal and state antitrust laws. Injunctive relief and several penalties were sought. Cross-motions for summary judgment were filed by the plaintiff and the defendants. The primary issue in the case was whether the court would be compelled to apply the rule of reason. The defendants argued that, among other things, the rule of reason was applicable by reason of the State's involvement in the creation of the joint venture defendant. The court denied the defendants' motion for summary judgment and granted the State's motion for summary judgment concluding that the defendants' alleged activities were illegal, *per se*, and that the defendants were not entitled to state action immunity. After the filing of a Motion For Reconsideration on April 24, 2000, the case was settled and a Consent Judgment was entered into on June 30, 2000.

I was admitted *pro hac vice* to appear in this case. I had primary responsibility for the representation of St. Francis Hospital and participated in the drafting of the answer, the motion for summary judgment and supporting brief. My fellow shareholder, Wendelynne J. Newton, had chief responsibility for the antitrust issues.

This case is significant because it involved the relationships between hospitals in a difficult financial situation which had collaborated at the instigation of the State. The court was not persuaded by the arguments of the defendant and found that the defendants had violated State's antitrust laws. The decision, while not having precedential value, does demonstrate which kind of collaboration between hospitals is impermissible.

The case was decided on April 10, 2000. The case was decided by the Honorable William C. Conner, Senior United States District Judge for the United States District Court for the Southern District of New York.

The name(s), address(es) and telephone number(s) of counsel for the State of New York are:

Harry First, Esq.
Bureau Chief, Antitrust Bureau
Susan E. Raitt, Esq.
Robert L. Hubbard, Esq.
Attorneys General, Antitrust Bureau
120 Broadway
New York, NY 10271
Telephone: (212) 416-8267

The name, address and telephone number for co-counsel for defendant St. Francis Hospital are:

William F. Harrington, Esq.
Mary Ann Wirth, Esq.
Bleakley, Platt & Schmitt
One North Lexington Avenue
White Plains, NY 10601-1700
Telephone: (914) 949-2700

The name, address and telephone number for counsel for defendant Vassar Brothers Hospital are:

R. Mark McCareins, Esq.
Jeffrey A. Leon, Esq.
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601-9073
Telephone: (312) 558-5600

The name, address and telephone number for counsel for defendant Vassar Brothers and Mid-Hudson Health are:

Robert Andrew Wild, Esq.
Roy Breitenbach, Esq.
Garfunkel, Wild & Travis, P.C.
111 Great Neck Road, Suite 503
Great Neck, NY 11021
Telephone: (516) 393-2200

The name, address and telephone number for the shareholder who worked with me on this case are:

Wendelynne J. Newton, Esq.
Buchanan Ingersoll Professional Corporation
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 562-8932

9. **Greek Orthodox Archdiocese of North and South America, Inc. v. Greek Orthodox American Leaders, Inc.**
United States District Court for the Southern District of New York
No. 98-Civ.-6435; Memorandum Decision Entered on November 24, 1998

This case involved a complaint filed by the plaintiff alleging that the defendant had appropriated the plaintiff's confidential membership list. The plaintiff sought a temporary

restraining order and preliminary injunction to enjoin the defendant from using the list. The court, although it denied the motion, limited the use of the membership list. The court noted that it was not denying the motion because it believed the claim was ultimately without merit, but rather because plaintiff had failed to demonstrate irreparable harm. The court also noted that the plaintiff had a substantial basis for arguing that the defendant misappropriated confidential information. The plaintiff moved for summary judgment. Thereafter, the parties consented to a dismissal with prejudice which limited the defendant's use of the list. A judgment was entered on February 9, 1999 which set forth the limitations for use of the list and dismissed the complaint. The primary limitation placed on the defendant was that it could use the list only for a proper purpose within the meaning of the New York not-for-profit corporation law. Specifically, the defendant was not permitted to use the list for commercial purposes or to solicit funds and could not disclose the list to any third party.

This case is significant because it addressed the issue of the permissible use of membership lists under New York not-for-profit corporation law. I was admitted *pro had vice* in this matter to represent the plaintiff, Greek Orthodox Archdiocese of North and South America, Inc. I had the primary client responsibility for the case and was directly involved in the preparation of the complaint, motion for a temporary restraining order and brief in support.

The case was decided on November 24, 1998 by Denny Chin, United States District Judge for the United States District Court for the Southern District of New York.

The name, address and telephone number of counsel for the defendant, Greek Orthodox American Leaders, Inc. are:

John B. Madden, Jr., Esq.
Arent Fox Kintner Plotkin & Kahn, PLLC
1675 Broadway, 25th Floor
New York, NY 10019
Telephone: (212) 484-3900

The name, address and telephone number for the shareholder who worked on this matter with me at Buchanan Ingersoll Professional Corporation, and who argued the case, are:

Linda H. Joseph, Esq.
Buchanan Ingersoll Professional Corporation
268 Main Street, Suite 201
Buffalo, NY 14202
Telephone: (716) 853-2330

10. **In re: Allegheny International, Inc.**, 118 B.R. 282 (Bankr. W.D. Pa. 1990)

This case involved whether or not the plan of reorganization for Allegheny International, Inc. could be confirmed. Mellon Bank, N.A. was the agent bank for a group of 16 banks who were pre-petition secured lenders to the debtor. My firm, Kirkpatrick & Lockhart, and I represented Mellon Bank, N.A. The banks brought an adversary proceeding at Adversary No.

90-260 seeking equitable relief against Japonica Partners, LP a proponent of a plan of reorganization. The litigation involved issues concerning whether or not Japonica Partners, LP would be entitled to vote on claims which it had purchased. The court held that Japonica Partners, LP was not entitled to vote on the claims because it had acted in bad faith. The court also approved the settlement of litigation which had been commenced against Mellon Bank, N.A. and other members of the bank consortium. I was one of the principal counsel for Mellon Bank, N.A. and the bank group in connection with this bankruptcy case, which was commenced in 1988.

This case is significant because it established standards for determining whether or not ballots can be disqualified on the basis of bad faith by reason of strategic purchasing of claims. This case was decided on July 12, 1990, as amended July 25 and August 2, 1990 by Bankruptcy Judge Joseph L. Cosetti, Chief Judge, United States Bankruptcy Court for the Western District of Pennsylvania.

The name, address and telephone number of counsel for the U.S. Trustee are:

Steven I. Goldring, Esq.
(formerly with the U.S. Trustee's Office)
United States Bankruptcy Court for the Western District of Pennsylvania
1001 Liberty Avenue
Pittsburgh, PA 1522
Telephone: (412) 644-4756
(last known address)

The name, address and telephone number of counsel for the Official Committee of Unsecured Creditors are:

Douglas A. Campbell, Esq.
Campbell & Levine
1700 Grant Building
330 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 261-0310

The name, address and telephone number of counsel for the Official Committee of Unsecured Creditors for Allegheny International, Inc. are:

Robert G. Sable, Esq. (formerly of Sable, Makoroff & Gusky P.C.)
McGuireWoods, LLP
Dominion Tower, 23rd Floor
625 Liberty Avenue
Pittsburgh, PA 15222-3143
Telephone: (412) 667-6000

The name, address and telephone number of co-counsel for the Allegheny International, Inc. are:

M. Bruce McCullough, Esq.
(formerly of Buchanan Ingersoll Professional Corporation)
The Honorable M. Bruce McCullough
United States Bankruptcy Court for the Western District of Pennsylvania)
5436 USX Tower
600 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 644-4329

The name, address and telephone number of counsel for Japonica Partners, LP are:

Joseph A. Katarincic, Esq.
Katarincic & Salmon, P.C.
CNG Tower, Suite 2600
625 Liberty Avenue
Pittsburgh, PA 15222
Telephone: (412) 338-2900
(last known address)

James W. Giddens, Esq.
Hughes Hubbard & Reed, LLP
One Battery Park Plaza
New York, NY 10004-1482
Telephone: (908) 526-4902

Herbert P. Minkel, Jr., Esq.
131 E. 62nd Avenue
New York, NY 10022
Telephone: (212) 319-2797

The name, address and telephone number of co-counsel for Mellon Bank, N.A. are:

Richard C. Tufaro, Esq.
Milbank Tweed Hadley & McCloy
International Square Building, Suite 1100
1825 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7500

The associate at Kirkpatrick & Lockhart who assisted on this project was:

Raymond F. Kozlowski, Jr., Esq.
Senior Counsel
PNC Bank, National Bank
One PNC Plaza, 21st Floor
249 Fifth Avenue
Pittsburgh, PA 1222
Telephone: (412) 762-5917

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

None.

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

Yes.

Conti v. Board of Supervisors of the Township of Pine. et al. - Petition for Allowance of Appeal filed in the Supreme Court of Pennsylvania, on February 19, 1997, No. 104 W. D. Allocatur Docket 1997. The Petition was denied. My husband and I asserted that the courts below erred in affirming the Board of Supervisors of Pine Township's decision to grant tentative approval to a planned residential development proposed to be developed on land adjacent to our home. A court reporter, Nancy G. Grega, who transcribed some of the testimony before the Board of Supervisors of Pine Township related to my challenge to the grant of tentative approval of a planned residential development sued me in 1995 in a local District Justice Court for the cost of transcribing a portion of the record which I had not ordered. The case was settled and dismissed. Since that was a minor matter I did not keep a copy of the pleadings and thus do not have the case number.

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

I will resolve any potential conflict of interest in accordance with applicable ethical requirements. I will recuse myself from any matter in which my current law firm is counsel during the time I am receiving any severance payments and for at least one year thereafter. I will also recuse myself from any matter in which a client that I am currently representing on a regular basis is a litigant or interested party for a period of at least one year from the assumption of my judicial duties. I will also not participate in any proceeding involving any member of my family or any matter in which I have or any member of my immediate family has a financial interest. I will recuse myself as necessary and proper in any particular situation.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement.

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

Yes.

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

Yes.

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

I was interviewed and recommended for nomination by the Federal Judicial Nominating Commission of Pennsylvania in February 2001. I was also interviewed by the Office of Counsel to the President in July 2001, and the Department of Justice and the Federal Bureau of Investigation in November/December 2001.

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

No.

40-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* Conti, Joy F.	2. Court or Organization U.S. District Court Western District of PA	3. Date of Report 01/25/2002
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 01/23/2002 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2001 to 12/31/2001
7. Chambers or Office Address Buchanan Ingersoll One Oxford Ctr, 301 Grant Str. Pittsburgh, PA 15219-1410	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Shareholder	Buchanan Ingersoll Professional Corporation
2	Secretary	New Jersey Property Title Holdings I, LLC
3	Secretary and Director	Allegheny County Bar Foundation

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2002	BIPC Severance Agreement (no actual agreement yet -- the amount will be a sum certain and will not be based upon the sharing of profits earned by (cntd Part 8)
2	2002	BIPC Pension Plan and Profit Sharing Plan (no control)
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2001	Buchanan Ingersoll Professional Corporation	$243,395
2	2000	Buchanan Ingersoll Professional Corporation	$276,719
3	2001	Commonwealth Securities and Investments, Inc. (investment banker)	
4	2000	Commonwealth Securities and Investments, Inc. (investment banker)	

NANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Conti, Joy F.	01/25/2002

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

ncludes those to spouse and dependent children. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
☐ NONE (No such reportable reimbursements.)		
1 EXEMPT		
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
☐ NONE (No such reportable gifts.)			
1 EXEMPT			
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
☐ NONE (No reportable liabilities.)			
1	Bank of America	Credit Card	J
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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Conti, Joy F.	01/25/2002

II. 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Brokerage Account #1					EXEMPT				
2 Alliance Muni Trust	A	Interest	J	T	EXEMPT				
3 Allegheny County Hospital Authority Bond	B	Interest	K	T	EXEMPT				
4 Sonus Network, Inc.	A	None	J	T	EXEMPT				
5 Neoprobe Corp. stock		None	J	T	EXEMPT				
6 Superconductor Technologies stock		None	J	T	EXEMPT				
7 Brokerage Account #2					EXEMPT				
8 Cash Account	A	Interest	J	T	EXEMPT				
9 IRA Rollover #1	E	Int/Div	N	T	EXEMPT				
10 Pershing Government Money Market					EXEMPT				
11 Alliance Health Mutual Fund					EXEMPT				
12 Alliance High Yield Bond Fund					EXEMPT				
13 Ariel Appreciation Mutual Fund					EXEMPT				
14 Black Rock Small Cap Mutual Fund					EXEMPT				
15 Babson Small Cap Mutual Fund					EXEMPT				
16 Davis Financial Mutual Fund					EXEMPT				
17 Fidelity 500 Index Fund					EXEMPT				

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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Conti, Joy F.	01/25/2002

II. 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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Fidelity Aggressive Growth Fund					EXEMPT				
19 Fidelity Growth and Income Mutual Fund					EXEMPT				
20 Longleaf Partners Mutual Fund					EXEMPT				
21 TCW Galileo Agressive Growth Mutual Fund					EXEMPT				
22 Tweedy Brown Global Mutual Fund					EXEMPT				
23 Vanguard Index 500 Mutual Fund					EXEMPT				
24 CRM Small Cap Value Mutual Fund					EXEMPT				
25 AOL stock					EXEMPT				
26 Alcoa stock					EXEMPT				
27 Citigroup stock					EXEMPT				
28 Crown American Realty stock					EXEMPT				
29 EMC Corp. stock					EXEMPT				
30 GM-Rughes stock					EXEMPT				
31 Johnson & Johnson stock					EXEMPT				
32 Goldman Sachs stock					EXEMPT				
33 Health Care Properties stock					EXEMPT				
34 Home Depot, Inc. stock					EXEMPT				

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	Date of Report
Conti, Joy F.	01/25/2002

II. 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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,assets, or transactions.)									
35 McData Corp. stock					EXEMPT				
36 Nasdaq 100 stock					EXEMPT				
37 Pharm. Holder stock					EXEMPT				
38 Sycamore Network stock					EXEMPT				
39 Wal-Mart Stores stock					EXEMPT				
40 Worldcom, Inc. stock					EXEMPT				
41 Northumberland County PA notes					EXEMPT				
42 Worldcom, Inc. stock					EXEMPT				
43 Retirement Plan No. 1	D	Int/Div	M	T	EXEMPT				
44 Oak Associates Mutual Fund					EXEMPT				
45 Dollins Symons Mutual Fund					EXEMPT				
46 Armada Growth Mutual Fund					EXEMPT				
47 Armada Index Mutual Fund					EXEMPT				
48 Armada Money Market Fund					EXEMPT				
49 Fidelity High Yield Fund					EXEMPT				
50 Janus Worldwide Mutual Fund					EXEMPT				
51 IRA Rollover #2	D	Interest	L	W	EXEMPT				

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	Date of Report
Conti, Joy F.	01/25/2002

VII. Page 4 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Israel Zero Cpn Bond					EXEMPT				
53 Retirement Plan No. 2	D	Int/Div	M	T	EXEMPT				
54 Cref stock mutual fund					EXEMPT				
55 TIAA Traditional Annuities					EXEMPT				
56 IRA Rollover #3	A	Int/Div	L	T	EXEMPT				
57 Pershing Government Money Market					EXEMPT				
58 Black Rock International Small Cap Mutual Fund					EXEMPT				
59 Vanguard Index 500 Mutual Fund					EXEMPT				
60 Global Crossing, Ltd. stock					EXEMPT				
61 ABB Ltd. ADS stock					EXEMPT				
62 Intel Corp. stock					EXEMPT				
63 Jabil Circuit, Inc. stock					EXEMPT				
64 Micron Technology stock					EXEMPT				
65 NSDBancorp, Inc. stock					EXEMPT				
66 Nasdaq 100 stock					EXEMPT				
67 Neoprobe Corp. stock					EXEMPT				
68 Sonus Network, Inc. stock					EXEMPT				

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	Date of Report
Conti, Joy F.	01/25/2002

II. Page 5 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
69 Superconductor Technologies stock					EXEMPT				
70 Sycamore Networks stock					EXEMPT				
71 Texas Instruments, Inc. stock					EXEMPT				
72 IRA #4	A	Int/Div	K	T	EXEMPT				
73 Pershing Government Mutual Fund					EXEMPT				
74 Black Rock Micro Cap Mutual Fund					EXEMPT				
75 Belmont Bancorp. stock					EXEMPT				
76 Capstone Turbine stock					EXEMPT				
77 Echelon Corp. stock					EXEMPT				
78 Exodus Communications stock					EXEMPT				
79 Neoprobe Corp. stock					EXEMPT				
80 Superconductor Technologies stock					EXEMPT				
81 IRA #5 (Mellon Bank CD)	A	Interest	J	T	EXEMPT				
82 Brokerage Account #3					EXEMPT				
83 Alliance Muni Money Market Fund	A	Interest	J	T	EXEMPT				
84 Alliance Technology	A	Dividend	J	T	EXEMPT				
85 Black Rock Micro-Cap Mutual Fund	A	Dividend	J	T	EXEMPT				

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	Date of Report
Conti, Joy F.	01/25/2002

II. Page 6 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
86 Davis Financial Mutual Fund		None	J	T	EXEMPT				
87 Federated Communications Tech. Mutual Fund		None	J	T	EXEMPT				
88 Buffalo Small Cap Mutual Fund		None	J	T	EXEMPT				
89 Echelon Corp. stock		None	J	T	EXEMPT				
90 Rite-Aid Corp. stock		None	J	T	EXEMPT				
91 Superconductor Technologies stock		None	J	T	EXEMPT				
92 Brokerage Account #4					EXEMPT				
93 Bookham Technology stock		None	J	T	EXEMPT				
94 Superconductor Technologies stock		None	J	T	EXEMPT				
95 Brokerage Account #5					EXEMPT				
96 Federated Communications Mutual Fund		None	J	T	EXEMPT				
97 Sycamore Network stock		None	J	T	EXEMPT				
98 Brokerage Account #6					EXEMPT				
99 E-New Media Co. stock		None	J	T	EXEMPT				
100 Brokerage Account # 7					EXEMPT				
101 Gabelli Asset Mutual Fund	A	Dividend	K	T	EXEMPT				
102 401(k)	B	Dividend	L	T	EXEMPT				

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

NANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Conti, Joy F.	01/25/2002

II. Page 7 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
.03 Black Rock High Yield Bond Fund					EXEMPT				
104 Black Rock Mid-Cap Value Fund					EXEMPT				
105 Black Rock Index Mutual Fund					EXEMPT				
106 Black Rock Small Cap Growth Fund					EXEMPT				
107 Black Rock Large Cap Growth Fund					EXEMPT				
108 Black Rock International Equity Fund					EXEMPT				
109 Black Rock Large Cap Value Fund					EXEMPT				
110 Black Rock Small Cap Value Fund					EXEMPT				
111									
112									
113									
114									
115									
116									
117									
118									
119									

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

NANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Conti, Joy F.	01/25/2002

II. ADDITIONAL INFORMATION OR EXPLANATIONS.

licate part of report.)

RT 2: Parties and Terms re: BIPC Sever, cntd ...the Firm after my departure).

NANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Conti, Joy F.	01/25/2002

C. 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 Joy F. Conti Date January 25, 2002

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
(As Of December 31, 2001)

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	$	31	868	Notes payable to banks-secured	$	172	000
U.S. Government securities-add schedule			---	Notes payable to banks-unsecured			---
Listed securities-add schedule		100	138	Notes payable to relatives			---
Unlisted securities--add schedule (Inmedius, Inc.)		Not Valued		Notes payable to others (GMAC car loan)		2	385
Accounts and notes receivable: Cash due from Buchanan Ingersoll		40	000	Accounts and bills due (Monthly)		22	000
Due from relatives and friends			---	Unpaid income tax			---
Due from others		50	000	Other unpaid income and interest			---
Doubtful			---	Real estate mortgages payable-add schedule		620	000
Real estate owned-add schedule		800	000	Chattel mortgages and other liens payable			---
Real estate mortgages receivable			---	Other debts-itemize:			---
Autos and other personal property		100	000				
Cash value-life insurance		23	000				
Other assets itemize:							
IRA, IRA Rollovers (See Attached Schedule)	1	055	169				
				Total liabilities		816	385
				Net Worth	1	383	790
Total Assets	2	200	175	Total liabilities and net worth	2	200	175

CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			No	Are any assets pledged? (Add schedule)			No
On leases or contracts			No	Are you defendant in any suits or legal actions?			No
Legal Claims			No	Have you ever taken bankruptcy?			No
Provision for Federal Income Tax			No				
Other special debt			No				

SCHEDULE TO FINANCIAL STATEMENT
OF JOY FLOWERS CONTI
(AS OF DECEMBER 31, 2001)

Listed Securities:

A. Joint

Money Market Funds:	
Tax-Free Money Market Fund Alliance Muni TR PA	$7,490
Portfolio Holdings:	
Municipal Bonds	$26,184
(Allegheny County, PA Hosp. Dev. Auth. Rev Health Sys Ser B 9.250%)	
Stocks, Rights and Warrants:	
500 shares Neoprobe Corp.	$200
900 shares Superconductor Technologies, Inc.	$5,778
750 shares Sonus Networks, Inc.	$3,450

B. Child One

Mutual Funds:	
Federated Communications Technology Fund (Class A)	$1,680
Stocks, Rights and Warrants:	
300 shares (Sycamore Networks)	$1,608
10,000 shares (E-New Media Co. Ltd.)	$414

C. Child Two

Tax-Free Money Market (Alliance Muni TR Pa)	$6,930
Mutual Funds:	
Alliance Technology Fund	$1,994
Blackrock Micro-Cap Equity (Class A)	$1,592
Davis Financial Fund (Class A)	$5,550
Federated Communications Technology Fund (Class A)	$1,051
Buffalo Small Cap	$2,483

(Continuation of Schedule to Financial Statement of Joy Flowers Conti As of December 31, 2001) -- Page 2

Stocks, Rights and Warrants:		
125 shares (Echelon Corp. OC)		$1,770
1,000 shares (Rite-Aid Corp.)		$5,060
500 shares (Superconductor Technologies, Inc.)		$3,210
30 shares (Bookham Technology PLC Spon Adr.)		$74
300 shares (Superconductor Technologies, Inc.)		$1,950
Gabelli Funds	(est.)	$21,641

Real Estate Owned:

Residence:		$800,000

Other Assets:

TIAA	(est.)	$220,803
BIPC Retirement	(est.)	$115,264
IRA Rollover #1		$467,986
IRA Rollover #2	(est.)	$ 77,000
IRA #3	(est.)	$ 500
IRA Rollover #4		$ 94,698
IRA #5		$ 22,918
401(k)	(est.)	$ 56,000

Real Estate Mortgages (payable)

Mortgage on residence	$620,000

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

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

John Edward Jones, III.

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

Judge, United States District Court for the Middle District of Pennsylvania.

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

Office address – P.O. Box 149
Route 61 North
Pottsville, PA 17901
Telephone: 570-622-3355

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

Born June 13, 1955 in Pottsville, Schuylkill County, Pennsylvania.

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

Married to Beth Ann (Feryo) Jones on November 27, 1982. Wife is not employed outside the home. Two dependent children.

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

Dickinson School of Law
Carlisle, PA
Attended 1977-80
Received Juris Doctor Degree in June, 1980

Dickinson College
Carlisle, PA
Attended 1973-77
Received Bachelor of Arts in Political Science in June, 1977

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

   (a) **John Jones & Associates** - Route 61 North, P.O. Box 149, Pottsville, PA 17901. Sole proprietor of law firm. 1986-present. I receive payment for my services with this law firm.*

   (b) **Commonwealth of Pennsylvania, Liquor Control Board** - Northwest Office Building, Room 518, Harrisburg, PA 17124. Chairman of the Board. 1995-present. I receive a statutory salary for my services.

   (c) **Phoenix Contracting Co. & Affiliated Corporations** – 1753 Panther Valley Road, Pine Grove, PA 17963. Co-owner of corporation and affiliated close corporations comprising family business interests, which operate five public golf courses in Pennsylvania and New Jersey. I currently serve as Vice-President and Secretary, Director, and counsel to the corporations. 1980-present. I receive payment for my services.

   (d) **Quality Vending, Inc.** – 45 Spruce Street, Pine Grove, PA 17963. 50% shareholder of corporation which owns small laundromat facility in Frackville, Schuylkill County, Pennsylvania.

   (e) **Union Bank and Trust Company** – 25 South Centre Street, Pottsville, PA 17901. Director of community bank. 1993-present. I receive payment for my services as a member of the Board.

   (f) **County of Schuylkill, Pennsylvania Public Defender's Office,** 120 Claude A. Lord Boulevard, Pottsville, PA 17901. Served as a part-time Assistant Public Defender. 1984-1995. I received payment for my services in this capacity.

*Through my firm, I serve as counsel to the Reading, Pennsylvania firm of Roland & Schlegel, P.C. Any compensation for these services is received via John Jones & Associates.

(g) **Part-Time Law Clerk to the Honorable Guy A. Bowe, Deceased** – Schuylkill County Court House, Pottsville, PA 17901. Served as a part-time Law Clerk to the President Judge of the Schuylkill County Court of Common Pleas. 1980-1984. I received payment for my services as a law clerk.

(h) **Associate and partner with Dolbin & Cori, then Dolbin, Cori & Jones (dissolved in 1986)**, 501 West Market Street, Pottsville, PA 17901. Associate and then partner with three-person law firm. (Associate – 1980-1982) (Partner – 1982-1986). I received payment for my services as an associate and partner.

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

I have never served in the U.S. Military.

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

(a) Distinguished Alumnus Award, Dickinson School of Law (2000).

(b) Named Dickinson Law Fellow, Dickinson College (2000).

(c) Government Leadership Award from the National Commission Against Drunk Driving, Washington, D.C. (2000).

(d) Co-Chair of Pennsylvania Governor-elect Tom Ridge's transition team (1994).

(e) Commendation from Pennsylvania D.A.R.E. (Drug Abuse Resistance Education) Program for donating my time to incorprate and represent the program in the Commonwealth of Pennsyvlania (1991).

(f) Welsh Citizen of the Year Award, Schuylkill & Carbon County Welsh Society (1994).

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

I have been a member of the Schuylkill County and Pennsylvania Bar Associations since my admission to the Bar in December, 1980. I served as Chairman of the standing Civil Rules of Court Committee in Schuylkill County in the mid-1980's. On various dates, I have been a participant in, and on the planning committee for, the Annual Schuylkill County Bar Association Bench-Bar Conferences.

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

(a) All Pennsylvania Courts – December, 1980.

(b) United States District Court for the Eastern District of Pennsylvania (approx. 1985).

(c) United States Court of Appeals for the Third Circuit (October 19, 1994).

(d) United States District Court for the Middle District of Pennsylvania (admitted **Pro Hac Vice** – my county of residence and practice, Schuylkill County, was moved from the Eastern District of Pennsylvania to the Middle District of Pennsylvania on April 19, 1999. Therefore, the balance of my federal practice has been in the Eastern District. Formal admission is pending).

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

(a) Schuylkill Country Club, Orwigsburg, PA — 1980-present
(Golf and social club)

(b) Pottsville Club, Pottsville, PA — 1980-present
(Social dining club)

(c) St. David's Welsh Society of Schuylkill & Carbon Counties St. Clair, PA (Promotes Welsh heritage)(former President)	1980-present
(d) Schuylkill County Republican Committee, Pottsville, PA (Finance Chairman)	1980-present
(e) Pennsylvania State Republican Committee, Harrisburg, PA (Member – Finance Committee)	1999-present
(f) Boy Scouts of America – Troop 615, Pottsville, PA (Assistant Scoutmaster and Troop Committee)	1997-present
(g) Pennsylvania Trial Lawyers Association, Philadelphia, PA (Member)	1990-present

None of the aforesaid organizations, to the best of my knowledge, have discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies.

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

Titles, publishers, and dates of books, articles, reports, or other material written or edited: A complete listing of all material has been attached hereto as Exhibit "A". Four (4) complete sets of copies of the material listed in Exhibit "A", including speeches, are being delivered herewith.

Videotaped speeches: A complete listing of all videos in existence, covering speeches and announcements, is attached hereto as Exhibit "B". A single videotape which contains a compilation of the five separate video speeches is being delivered herewith.

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

I have never testified before the United States Congress.

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

My health is excellent. The date of my last physical examination was November 13, 2001.

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

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

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

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

Not applicable – I have not served as a Judge.

17. Public Office, Political Activities and Affiliations:

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

1. Appointed Chairman of the Pennsylvania Liquor Control Board and member in May of 1995 by former Pennsylvania Governor Tom Ridge. Served a four-year term until May, 1999, and then renominated for a second four-year term which is due to expire in May, 2003. Confirmed by the Pennsylvania State Senate subsequent to both nominations.

2. City Solicitor, Pottsville, Pennsylvania. 1994-1996. Appointed by City Council (this was a legal client through my law firm and is considered a public office under the Pennsylvania Ethics Act).

3. Borough Solicitor, Pine Grove, Pennsylvania. 1985-present. Appointed by Borough Council (this is a legal client through my law firm and is considered a public office under the Pennsylvania Ethics Act).

4. Unsuccessful candidate for the United States Congress for the Sixth District of Pennsylvania in 1992. Unsuccessful candidate for Sate Representative in the 125th District of Pennsylvania in 1984.

(b) Have you ever held a position or played a rule 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. I was a candidate for public office, as aforestated, on two occasions in 1984 and 1992.

2. I served as a member of the Finance Committee for former Pennsylvania Governor Tom Ridge in his campaign during 1993 and 1994.

3. I was the Schuylkill County coordinator for the Presidential campaign of former President George H.W. Bush in 1988.

4. In 1983, I served as co-chairman of a committee to elect Schuylkill County Commissioners Franklin Shollenberger and Paul Sheers, as well as Schuylkill County Common Pleas Judge Wilbur H. Rubright.

5. Since 1999, I have served on the Finance Committee of the Pennsylvania Republican State Committee.

6. Since approximately 1983, I have been involved in periodic fundraisers for candidates for local or statewide office. In this capacity, I have held fundraisers at my home for Senator Arlen Specter, Senator Rick Santorum, former Governor Tom Ridge, Pennsylvania Attorney General Mike Fisher, and for statewide judicial candidates through the auspices of the Pennsylvania Republican State Committee.

18. Legal Career: Please answer each part separately:

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

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

As noted above, I served as a part-time Law Clerk to the late Guy A. Bowe, President Judge of the Court of Common Pleas of Schuylkill County, from 1980-1984.

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

I have been the sole proprietor of my current law firm, John Jones & Associates, P.O. Box 149, Route 61 North, Pottsville, PA 17901, from 1986 to the present. This firm currently has one associate, Christopher W. Hobbs, Esquire since 2000. As noted above, I serve as counsel to the law firm of Roland & Schlegel, P.C., via my firm.

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

From 1980 to1986, I was first an associate, and then a partner with Dolbin, Cori & Jones (dissolved), formerly located at 501 West Market Street, Pottsville, PA 17901. From 1984 to 1995, I was an part-time Assistant Public Defender in the Office of Public Defender for Schuylkill County, Pennsylvania. The Public Defender's Office is now located at 120 Claude A. Lord Boulevard, Pottsville, PA 17901. The Chief Public Defender under whom I served was Harry Rubright, Esquire, (telephone – 570-385-4511).

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

My law practice has involved both state and federal practice. My federal practice has been predominantly in the Eastern District of Pennsylvania, since as noted above Schuylkill County was a part of the Eastern District of the U.S. District Court until April 19, 1999, when it was moved to the Middle District. In addition to practice before the federal trial courts, I have also had an extensive bankruptcy practice, first in the Eastern District and now in the Middle District of Pennsylvania. My practice has significant emphasis on personal injury cases (plaintiffs) as well as family law including divorce, support, and child custody. I have been engaged in real estate and title practice since the inception of my legal career. My practice has involved aspects of corporate law, estates and estate planning, as well as municipal law. I have served as the Solicitor for several Schuylkill County municipalities. I have had extensive experience with banking law, as my firm has represented the Union Bank and Trust Company generally for in excess of 10 years.

In May, 1995, former Governor Tom Ridge appointed me to the position of Chairman of the Pennsylvania Liquor Control Board (PLCB). Although I have continued in the active practice of law subsequent to assuming that office, the character of my practice changed at the time of my PLCB appointment to the extent that I then resigned my position as a Schuylkill County part-time Assistant Public Defender. Accordingly, the criminal portion of my practice has been substantially reduced since 1995, and I have only occasionally represented defendants in criminal matters since 1995.

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

My former and current clients have comprised everyone from indigent residents of my community to multi-million dollar corporations with business interests throughout the United States. If there has been "specialization" or a theme throughout my practice, it is that I am trial attorney and I have appeared frequently in various courts throughout the Commonwealth in all manner of cases and controversies.

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

I have been involved in the active practice of law since my admission to the Bar in December, 1980. My appearances have been predominantly before the

Schuylkill County Court of Common Pleas. However, I have had an extensive federal bankruptcy practice, and therefore have appeared in bankruptcy courts in the Middle and Eastern Districts of Pennsylvania. I have appeared predominantly in the Eastern District federal courts, since as noted above Schuylkill County was part of the Eastern District until April 19, 1999. I typically appear before a tribunal in some capacity at least weekly.

(2) Indicate the percentage of these appearances in:

(A) federal courts - 5%
(B) state courts – 95%
(C) other courts – negligible

(3) Indicate the percentage of these appearances in:

(A) civil proceedings – 95%
(B) criminal proceedings – 5% (Represents current total. Total was higher while serving as an Assistant Public Defender).

(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.

By my estimate, from 1984 to 1995, I tried as sole counsel approximately 50 criminal cases to verdict. I assisted as associate counsel during that interval in a number of other criminal cases. All cases were in the Court of Common Pleas of Schuylkill County, Pennsylvania, Criminal Division. From 1980 to the present, I have tried over 100 civil cases, as sole counsel, to verdict or judgment. These have been in numerous Commonwealth courts, but predominantly in the Court of Common Pleas of Schuylkill County, Pennsylvania, Civil Division. I have also appeared before the United States District Court predominantly in the Eastern District of Pennsylvania. I have appeared before the bankruptcy courts for the Eastern and Middle Districts of Pennsylvania. The civil cases I have tried to verdict or judgment included personal injury, other torts, commercial disputes, breach of contract, divorce, custody, and bankruptcies.

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

Approximately 95% of the criminal cases set forth in (4) were decided by jury. Approximately 10% of the civil cases described in (4) were decided by jury.

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

I have not practiced before the United States Supreme Court.

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

At various times since my admission to the Bar in 1980, I have provided **pro bono** legal representation to clients in Schuylkill County, Pennsylvania. I believe that this is an obligation of all practicing attorneys, and where I have identified prospective clients who are in need of such representation, I have waived charges or represented them for costs only. In addition, I have participated through the Schuylkill County Bar Association and Mid-Penn Legal Services in an organized **pro bono** program for approximately three years, which commits members of the local Bar to meet with prospective **pro bono** clients at a scheduled time at the Legal Services Office in Pottsville, Pennsylvania. Most recently, I attended a **pro bono** session scheduled by Mid-Penn Legal Services on January 29, 2002, where I undertook representation of two clients through the aforesaid program.

19. **Litigation: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated, and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:**

(a) **the citations, if the cases were reported, and the docket number and date if unreported;**

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

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

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

(a)-(d) During my legal career, the ten most significant litigated matters which I handled personally, in no particular order, are as follows:

1. Betty M. Felty, Administratrix of the Estate of Dennis Felty and Betty M. Felty, Individually v. Shung S. Choong, M.D., and Good Samaritan Hospital: Court of Common Pleas of Schuylkill County; No. S-1344-1986. This was the first major civil case which I litigated, and involved a medical malpractice claim on behalf of my client, Betty M. Felty. I handled this case as co-counsel with Attorney Ronald Pellish, 809 West Market Street, Pottsville, Pennsylvania (telephone: 570-622-2338). After extensive pre-trial proceedings, a jury was selected in a trial before the Honorable Wilbur H. Rubright (now Senior Judge) in July, 1988. The case settled with a substantial award to Mrs. Felty after the jury was empanelled. Counsel for the Good Samaritan Hospital was Edward Heitmiller, Esquire, now of 501 West Market Street, Pottsville, Pennsylvania (telephone: 570-628-4852). Counsel for Defendant Choong was Peter J. Curry, Esquire, previously with Curry & Gale, and now with the firm of Thomas, Thomas & Hafer, 305 North Front Street, P O. Box 999, Harrisburg, PA 17108 (telephone: 717-255-7637).

2. Commonwealth v. Charles Kaufman: Court of Common Pleas of Schuylkill County; Nos. 908-88 and 909-88. Charles Kaufman was my client as an Assistant Public Defender for Schuylkill County. He was charged with criminal homicide arising out of the death of a 12-year old boy in Schuylkill County, Pennsylvania. The case was tried by jury in approximately May of 1989 in a proceeding which lasted approximately seven days. The jury was selected from Cumberland County, Pennsylvania. The presiding Judge was Joseph F. McCloskey (now Senior Judge of the Commonwealth Court, telephone – 570-621-3435). Opposing counsel was former District Attorney Claude A. Lord Shields (telephone – 570-366-5175), assisted by then-Assistant District Attorney D. Michael Stine (now Judge of the Schuylkill County Court of Common Pleas, telephone – 570-628-1312). The trial resulted in a guilty verdict; however, I was successful in avoiding the death penalty for Mr. Kaufman, which penalty had been strongly asserted by the Commonwealth due to the circumstances of the crime.

3. James J. Curran, Jr. v. Carolyn T. Curran: Court of Common Pleas of Schuylkill County; No. S-462-1993. I represented Defendant Carolyn T. Curran in this divorce proceeding. The case was litigated over many years, and ended with the award of what is believed to be the highest monetary divorce settlement in favor

of a litigant (Mrs. Curran) in the history of Schuylkill County. My co-counsel were Mark Sheppard, Esquire (telephone: 215-979-1814) and Steve Janove, Esquire, (telephone: 215-979-1804), both of Duane, Morris & Heckscher, One Liberty Place, Philadelphia, PA 19103. Opposing counsel was predominantly James J. Riley, Esquire, of Riley & Fanelli, The Necho Allen, One Mahantongo Street, Pottsville, PA 17901 (telephone: 570-622-2455). The Judge involved was Senior Judge Roy Gardner (all Schuylkill County Judges had recused themselves). Judge Gardner died and was replaced by Judge William Lipsitt, Senior Judge of the Court of Common Pleas of Dauphin County. Judge Lipsitt was succeeded by Schuylkill County Court of Common Pleas Judge Jacqueline L. Russell, who after her election to the bench determined that she did not need to recuse herself.

4. Commonwealth v. Lizetta Haynes: Court of Common Pleas of Schuylkill County; No. 481-91. I represented Ms. Haynes, again as an Assistant Public Defender. She was charged with criminal homicide arising out of the murder of an elderly resident of a local hotel. Ms. Haynes had made a full confession to the police subsequent to the homicide; however, circumstances existed which made her capacity, as well as her mental state, substantial issues. The presiding Judge was Schuylkill County Judge William E. Baldwin (telephone – 570-628-1303) and opposing counsel was First Assistant District Attorney Charles Bressi, of 401 North Second Street, Pottsville, PA 17901 (telephone: 570-628-1350). This case resulted in a finding by the Court of guilty but mentally ill, which was one of the alternatives requested by the defense after protracted trial proceedings.

5. Gregory D. Sharockman v. St. Jude Polymer Corp.: Court of Common Pleas of Schuylkill County; No. S-1904-1994. I represented Plaintiff, Gregory D. Sharockman, who was injured in an industrial accident while delivering soft drinks to a plant owned by the Defendant. After extended litigation, this matter ended in a substantial settlement achieved in favor of Mr. Sharockman from the Defendant's insurance carrier. Defendant was represented by Attorney Ken Rapp of Harrisburg (Attorney Rapp subsequently left private practice and is employed as the head of the Corporation Bureau of the Pennsylvania Department of State. His telephone number is 717-772-1616).

6. Metropolitan Life Insurance Company v. Betty J. Reick, et al.. United States District Court for the Eastern District of Pennsylvania; No. 93-6211. I represented Defendant Betty J. Reick. The case involved an action by

Metropolitan Life Insurance to determine the appropriate payee of a substantial life insurance policy insuring the life of Mrs. Reick's late former husband, Claude Reick, Jr. Jurisdiction was based upon diversity and the amount in controversy. Opposing counsel was the late Thomas Aungst, Esquire, although at various times certain of the defendants were **pro se**. The matter was resolved via a bench trial before the Honorable Franklin Van Antwerpen, U.S. District Court Judge, whereby Judge Antwerpen entered an Opinion and Order awarding all of the said life insurance proceeds to my client, Betty J. Reick.

7. Donald Marks v. Erie Insurance: Contract Arbitration –Schuylkill County. Case involved my client, Donald Marks, who was injured in an automobile accident attributable to the fault of a third party in 1996. A claim was made administratively against Mr. Marks' insurance company, Erie Insurance, for payment of certain underinsured motorists benefits. Erie denied the said claim based upon certain policy waivers executed by Mr. Marks. After extensive discussion and negotiations, it was established that according to prevailing law, Erie's waivers were defective under Pennsylvania law, and hence Mr. Marks was able to avail himself of approximately $200,000.00 of coverages which were previously alleged to be non-existent by the said Erie Insurance. The result in this case, as well as others, caused Erie to make changes to all of its Pennsylvania waiver forms thereafter. Counsel for Erie Insurance was Timothy I. Mark, Esquire (telephone – 717-731- 0444).

8. Landfill Application Involving Reading Anthracite and BFI: Schuylkill County Zoning Hearing Board. In or about 1991, BFI (Browning Ferris Industries) filed an application with the Schuylkill County, Pennsylvania Zoning Hearing Board in order to situate a massive multi-purpose landfill in western Schuylkill County. I represented an adjacent property owner, Reading Anthracite Company, which objected to the placement of the said landfill. Through an administrative proceeding before the said Zoning Board which lasted for months and involved numerous lengthy hearings, I was able to achieve a refusal by the Board of the said application, which was thereafter affirmed on appeal (I was not counsel during the appeal process). Opposing counsel (attorney for BFI) was James Wallbillich, Esquire, 450 West Market Street, Pottsville, PA, 17901 (telephone: 570-622-0767). Representative of my client was President and CEO, Mr. John Rich, Jr., 200 Mahantongo Street, Pottsville, PA 17901 (telephone: 570-874-1602).

9. James E. Kehley v. Susan Kehley: Court of Common Pleas of Schuylkill County; No. S-1815-1997. I represented Susan Kehley (now Baddick by remarriage), party to a highly contested child custody claim involving her ex-husband, James Kehley, as well as her former in-laws and the paternal grandparents of her minor child, Mr. and Mrs. James J. Kehley. The case was litigated before the Honorable C. Palmer Dolbin of the Court of Common Pleas of Schuylkill County for a period of several years. The case culminated in an Order in November 2001 permitting Mrs. Baddick to move and relocate from Schuylkill County to the Lehigh Valley area of Pennsylvania pursuant to the original prayer of our custody petition. Opposing counsel were Karen E. Rismiller, Esquire, 103 Union Street Pottsville, PA 17901 (telephone: 570-628-2333) and Lori A. Schafer Guzick, Esquire, Williamson, Friedberg & Jones, Ten Westwood Road, P. O. Box 1190, Pottsville, PA 17901 (telephone: 570-622-5933).

10. Kenneth F. Schoeneman v. Dale F. Schoeneman, Franklin K. Schoeneman, Edna Schoeneman and Pennsylvania National Bank: Court of Common Pleas of Schuylkill County; No. S-465-1989. I represented the late Edna Schoeneman, divorced wife of the late Kenneth Schoeneman. In a complex, protracted action, Kenneth Schoeneman attempted to dissolve certain trust and business agreements which he had entered into with his sons. Mrs. Schoeneman would have been materially affected in the event that the trust agreements were opened, in that subsequent to their signing she had divorced Kenneth Schoeneman in reliance upon certain income streams made available to her via those trusts and agreements. After prolonged discovery and numerous hearings, the matter resolved by stipulation. My client's substantial monetary interests were protected, despite alteration of Kenneth Schoeneman's trusts and agreements. Trial Judge was the Honorable Joseph F. McCloskey (now Senior Commonwealth Court Judge, telephone – 570-621-3435). Co-counsel for Dale F. Schoeneman and Franklin K. Schoeneman was Abraham H. Frumkin, Esquire, now practicing with the firm of Duane, Morris & Heckscher, Philadelphia, PA (telephone – 215-979-1319). Opposing counsel was James J. Riley, Esquire, Riley & Fanelli, The Necho Allen, One Mahantongo Street, Pottsville, PA 17901 (telephone: 570-622-2455).

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

I have never been convicted of a crime at any time.

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

On three occasions, I have been a Defendant in my official capacity, but not in my individual capacity, as Chairman of the Pennsylvania Liquor Control Board when that agency has been named as a party to a suit. A precise listing of the said cases is attached hereto as Exhibit "C". I have been involved as a party in the following three civil cases or administrative proceedings in the past 10 years:

(a) An action was filed against me in the Court of Common Pleas of Schuylkill County in 1991 to No. S-1412-1991 by Argonaut Insurance alleging that I had failed to protect that insurance carrier's subrogation interest in connection with a personal injury suit and settlement achieved by me on behalf of a client, Russell Bubeck. Mr. Bubeck was also named as a Defendant. This suit was dismissed with prejudice after sitting dormant for an extended period of time, via a ruling on a pre-trial motion, by Order entered by Schuylkill County Common Pleas Judge D. Michael Stine on November 21, 2000.

(b) In 1993, I was a co-defendant in a suit filed by Dennis P. Dunkel. Mr. Dunkel was a former client and the suit was filed by him **pro se** in the United States District Court for the Eastern District of Pennsylvania to No. 93-5273. Co-defendants in the suit were Judge D. Michael Stine of the Court of Common Pleas of Schuylkill County and the late William R. Mosolino, Esquire, and Attorney Mosolino's wife, Barbara Mosolino. The suit, in essence, arose out of an eviction action filed by Attorney Mosolino against Mr. Dunkel, and was a baseless attempt at retribution by Mr. Dunkel. It was not a legal malpractice action. It was dismissed with prejudice against all defendants by the District Court Judge, the late Honorable Daniel Huyett, on May 26, 1994, pursuant to Federal Rule of Civil Procedure 12(b)(6).

(c) Federal Election Commission v. John Jones for Congress. In approximately January, 1993, following my unsuccessful candidacy for the United States Congress, I was advised that the Federal Election Commission (FEC) was intending to file a complaint against my congressional campaign committee, John Jones for Congress, for violation of a rule requiring that candidates provide interim notification to the FEC when certain contributions were received within a defined period. The issue arose due to a contribution received prior to the primary election in or about May, 1992. After a period of discussion and conciliation with the FEC, the matter was resolved via an admonition from the FEC and payment of a civil assessment in the amount of $3,000.00.

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

All conflicts of interest will be resolved consistent with prevailing U.S. and Pennsylvania laws and appropriate, applicable judicial ethics. Every effort will be made to avoid even the appearance of a conflict. With the exception of my ownership of family business interests, I will divest any and all other business interests that I have, and resign from all boards and commissions, in preparation for my service as a trial judge. I do not believe that there are any categories of litigation which will present potential conflicts of interest.

23. Outside Commitments During Court Service: **Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

Other than retaining my ownership of the family business interests, I will divest any other business relationships and employment, including but not limited to resigning my position as Chairman of the Pennsylvania Liquor Control Board, terminating my practice of law, resigning from the Board of Directors of the Union Bank and Trust Company, and relinquishing any other non-family related employment, ownership, or affiliations that I currently have.

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

See filed Ethics in Government Act of 1978 Financial Disclosure Report (attached hereto as Exhibit "D").

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

See attached Exhibit "E".

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

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

The Federal Judicial Nominating Commission for the Middle District of Pennsylvania recommended my nomination to Senators Arlen Specter and Rick Santorum subsequent to an interview process which took place in August, 2001.

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

On November 16, 2001, I was interviewed at the White House by the Counsel to the President of the United States. Subsequently, on December 14, 2001, I was initially interviewed by the Federal Bureau of Investigation pursuant to my subsequent background check by that agency. On January 3, 2002, I was interviewed by the Department of Justice staff. At various times, I have been in contact with the staff of the Department of Justice with respect to completion of my nomination submissions, both pre- and post-nomination, including forms related to my FBI check, this questionnaire, and my Ethics in Government Act Financial Disclosure Report.

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

No one involved in this process has discussed with me any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking a commitment as to how I would rule in that matter.

John E. Jones, III

1) PA Senate Appropriations Committee, Harrisburg, PA; Feb 28, 2002
2) PA League of Cities and Municipalities, PLCB awards mini-grants to prevent underage drinking, Carlisle, PA; Feb 12, 2002
3) PLCB/Penn State Leadership Conference; Jones addresses campus and coalition leaders statewide; State College, PA; Sept 24, 2001
4) TEAM DUI News Conference; PLCB, Millie Webb (MADD), Harrisburg, PA; August 31, 2001
5) U.S Dept. of Educ., PLCB and PA Assn of Colleges and Universities (PACU) statewide conference, State College, PA; April 26, 2000
6) RALLY Coalition Conference, KidCO/TadCO youth organizations hold anti-underage drinking rally, Erie, PA; March 3, 2000
7) PACU Annual Meeting, PLCB joins to fight binge drinking, Hershey, PA; Oct 4, 1999
8) Second annual PLCB/Penn State Partnership For Prevention Conference, State College, PA; Sept 27, 1999
9) Campus/Community Coalition Workshop at Alvernia College, Reading, PA; April 16, 1999
10) Alcohol 101 News Conference with Gov. Ridge, The Century Council, State College, PA; Aug 19, 1998
11) Responsible Hospitality Coalition, Harrisburg, PA; April 30, 1996
12) StateWays Magazine, Sept/Oct 2001
13) StateWays Magazine, Sept/Oct 1999
14) StateWays Magazine, Mar/Apr 1996
15) Wine & Spirits Quarterly, Winter 1999
16) Wine & Spirits Quarterly, Winter 1998
17) Wine & Spirits Quarterly, Winter 1997
18) Wine & Spirits Quarterly, Spring 1997
19) Wine & Spirits Quarterly, Fall 1996
20) Wine & Spirits Quarterly, Spring 1996
21) Wine & Spirits Quarterly, Winter 1995
22) Wine & Spirits Quarterly, Fall 1995
23) The Observer, October 1999
24) Speech: PA Senate Appropriations Committee, Harrisburg, PA; March 1, 2001
25) Speech: Korbel Reception, Philadelphia, PA; Sept. 14, 1999
26) Speech: PA House Liquor Control Committee, Doylestown, PA; March 2, 1999
27) Speech: PA House Appropriations Committee, Harrisburg, PA; Feb. 25, 1999
28) Speech: PA Assn. of Colleges and Universities, Hershey, PA; Oct. 4, 1999
29) Speech: PA Against Underage Drinking Conference, Harrisburg, PA; Oct. 22, 1998
30) Speech: PA House Liquor Control Committee, S. Strabane Twp., PA; July 29, 1998
31) Speech: PA Senate Appropriations Committee, Harrisburg, PA; March 5, 1997
32) Speech: MADD Red Ribbon Campaign, Harrisburg, PA; Dec. 10, 1996
33) Speech: PA DUI Association, State College, PA; Oct. 22, 1996
34) Speech: Senate Appropriations Committee, Harrisburg, PA; March 7, 1996
35) Speech: House Liquor Control Committee, Philadelphia, PA; Oct. 12, 1995

EXHIBIT "A"

Video Speeches: John E. Jones, III, Chairman PA Liquor Control Board

1.) Jones swearing-in as chairman of the PLCB; Harrisburg, PA; *June 15, 1995*

2.) PLCB/Penn State Partnership for Prevention Conference; State College, PA; *May 10, 1998*

3.) College coalitions grant announcement with Gov. Ridge (choppy); State College, PA; *Aug. 19, 1998*

4.) Pennsylvania Wine Promotion program; Harrisburg, PA; *September 6, 2000*

5.) NABCA Alcohol Education Conference w/Michele Ridge, Washington, D.C.; *March 24, 2000*

EXHIBIT "B"

III. CASES WHEREIN JOHN E. JONES III IS NAMED AS DEFENDANT - ALL

Chairman Jones has been named as a Defendant in three cases during his tenure. All of the cases involving Chairman Jones were defended by the Office of Attorney General

A. Timothy J. Savage, Patrick J. Mellody, George E. James and James Kirchner v. Governor Thomas J. Ridge, Pennsylvania Liquor Control Board, John E. Jones, III, in both his official and individual capacities, and Robert Fohl, in both his official and individual capacities (No. 71 Middle District Appeal Docket 1997)

In 1990, the Liquor Code was amended to provide that five (5) hearing examiners would be selected from a then-existing complement of thirteen (13) examiners to hear licensing cases. In 1996, the Office of Administration conducted a study to determine whether there was still a need for five hearing examiners. Its conclusion that it was not fiscally prudent for the Board to employ more than one full-time hearing examiner led to a request by former Governor Ridge to Chairman Jones that the current four (4) examiners'[2] employment be terminated as of January 31, 1997. Chairman Jones wrote to each hearing examiner, terminating his employment, but permitting each to apply for the one remaining hearing examiner position.

On January 30, 1997, the four remaining hearing examiners filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief and

[2] One examiner had passed away.

an Application for Special Summary Relief in the Nature of a Preliminary and Permanent Injunction against Governor Ridge, the Board, Chairman Jones and Board Member Fohl ("Defendants"). Chairman Jones and Board Member Fohl were sued both in their official and individual capacities. The hearing examiners sought to enjoin the Defendants from eliminating their positions and unilaterally changing the terms and conditions of their employment.

On January 31, 1997, the Commonwealth Court issued a Preliminary Injunction, and set a hearing date on the permanent injunction request. On February 28, 1997, the Commonwealth Court granted the hearing examiners' request for a permanent injunction, concluding that Chairman Jones' termination letters, issued under the color of the Governor's authority, violated the doctrine of separation of powers.

The Defendants filed an Application for Reconsideration and Reargument, which was denied by the Commonwealth Court on May 16, 1997. Defendants subsequently appealed to the Supreme Court of Pennsylvania, which affirmed the Commonwealth Court's determination by Order dated June 25, 1998. The hearing examiners' renewed application for attorney's fees and costs resulted in a decision favorable to them by the Commonwealth Court on March 8, 1999.

B. Beer & Pop Warehouse, Inc., Case Beer & Soda Outlet, Inc., Jet Distributors, Inc., and Q.F.A., Inc., all t/d/b/a "Beer World", Plaintiffs vs.

John E. Jones, III, Chairman of the Pennsylvania Liquor Control Board, in his official capacity; Robert Fohl, Member of the Pennsylvania Liquor Control Board, in his official capacity; Robert P. Kaskiel, Director of the Pennsylvania Liquor Control Board Investigative Unit, in his official capacity; and Paul J. Evanko, Commissioner of the Pennsylvania State Police, in his official capacity, Defendants

In this matter the plaintiffs named John E. Jones, III, as a defendant in his official capacity as Chairman of the Pennsylvania Liquor Control Board. Also named in their official capacity were Robert Fohl, as member of the Pennsylvania Liquor Control Board, Robert Kaskiel, Director of the Pennsylvania Liquor Control Board Investigative Unit, and Paul J. Evanko, the Commissioner of the Pennsylvania State Police.

The plaintiffs in this matter filed a suit seeking injunctive relief against recent Pennsylvania legislation regulating the wholesale price of malt and brewed beverages. The plaintiffs asserted that 47 P.S. §4-447 (a)(2), (a)(3), (b) and (c) were in violation of the Sherman Act, 15 U.S.C.S. §1, and thereby filed this suit seeking injunction against enforcement of these provisions. The plaintiffs and defendants filed cross motions for summary judgment. The court denied defendants' motion and granted plaintiffs' motion, finding that all the challenged provisions violated section 1 of the Sherman Act, specifically 47 P.S. §4-447(c), effectively fixed prices and stifled competition; 47 P.S. §4-447(a)(3) was found to impede plaintiffs' ability to use short-term price promotions, thereby reducing

competition and restrained trade; 47 P.S. §4-447(a)(2) was found to have prevented plaintiffs from seeking a competitive price because all prices were the same.

C. The Pitt News, Appellant v. D. Michael Fisher, in his capacity as Attorney General of the Commonwealth of Pennsylvania; Major Francis Koscelnak, in his capacity as Director, Bureau of Liquor Control Enforcement, Pennsylvania State Police; John E. Jones, III; in his capacity as Chairman, Pennsylvania Liquor Control Board

In the above-captioned matter, John E. Jones, III, was named as an Appellee in his official capacity as Chairman of the Pennsylvania Liquor Control Board, as were Michael Fisher, and Major Francis Koscelnak in their capacities as Attorney General and Director, Bureau of Liquor Control Enforcement, respectively.

This appeal was brought by The Pitt News, a student run newspaper, which was supported by advertising revenue. Several alcoholic beverage industry members withdrew advertising contracts from the newspaper, based on another such advertiser's prosecution under section 498 of the Liquor Code which provides for criminal sanctions against businesses that advertise alcoholic beverages in newspapers published on behalf of educational institutions. [47 P.S. §4-498(e)(5)]. The newspaper sought a preliminary injunction enjoining enforcement of a 1996 amendment to the Liquor Code, codified at 47 P.S. §4-498(e)(5), alleging that such violated its rights and the rights of its advertisers under the First Amendment to the United States Constitution.

The District Court ruled Appellant lacked standing because it felt only indirect economic effects from the regulation. On appeal, the Third Circuit Court of Appeals found standing on Appellant's own behalf, but found Appellant lacked standing to challenge the act for third parties. However, the court affirmed denial of the injunction, finding Appellant failed to show a likelihood of succeeding on the merits that enforcement of the 1996 amendment to the Liquor Code violated its right to free speech. The Appellant asked the Supreme Court to accept Certiorari. On January 16, 2001, the Supreme Court refused to accept Certiorari.

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) JONES III, JOHN E.	2. Court or Organization US COURT-MIDDLE DISTRICT OF PA	3. Date of Report 02/28/2002
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) US DISTRICT JUDGE NOMINEE	5. Report Type (check type) X Nomination, Date 02/28/2002 Initial Annual Final	6. Reporting Period 01/01/2001 to 02/28/2002
7. Chambers or Office Address ROUTE 61 NORTH PO BOX 149 POTTSVILLE, PA 17901	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.)*

NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	DIRECTOR	* UNION BANK & TRUST CO.
2	DIRECTOR & OFFICER	FAMILY BUSINESS AND 8 AFFILIATED CORPORATIONS
3	CHAIRMAN	* PENNSYLVANIA LIQUOR CONTROL BOARD

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

NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		JOHN JONES & ASSOCIATES (LAW PRACTICE) - PRACTICE WILL BE SOLD TO CURRENT ASSOCIATE UPON CONFIRMATION.
2		SEP/IRA - WILL BE CONVERTED TO TRADITIONAL IRA UPON CONFIRMATION.
3		

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

NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	LAW PRACTICE GROSS RECEIPTS	358,915.00
2	2001	LAW PRACTICE GROSS RECEIPTS	633,382.00
3	2002	LAW PRACTICE GROSS RECEIPTS	75,522.00
4	2000	DIRECTORS FEES - UNION BANK & TRUST CO.	3,146.00

EXHIBIT "D"

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JONES III, JOHN E.	02/28/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
[ ] NONE (No such reportable reimbursements.)		
1 EXEMPT		
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
[ ] NONE (No such reportable gifts.)			
1 EXEMPT			
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
[X] NONE (No reportable liabilities.)			
1			
2			
3			
4			
5			
6			

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JONES III, JOHN E.

Date of Report: 02/28/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 BUNKER HILL GOLF COURSE INC.-FAMILY BUSINESS	A	Distribution	N	W	EXEMPT				
2 WILLOW HOLLOW GOLF COURSE INC.-FAMILY BUSINESS	A	Distribution	M	W	EXEMPT				
3 WEDGEWOOD GOLF COURSE INC.-FAMILY BUSINESS	B	Distribution	O	W	EXEMPT				
4 HIDDEN VALLEY GOLF COURSE INC.-FAMILY BUSINESS	B	Distribution	M	W	EXEMPT				
5 FAIRVIEW GOLF COURSE INC.-FAMILY BUSINESS	B	Distribution	M	W	EXEMPT				
6 AUBURN GOLF CAR CO. INC.-FAMILY BUSINESS	A	Distribution	K	W	EXEMPT				
7 PARKWAY ANTHRACITE INC.-FAMILY BUSINESS	A	Distribution	J	W	EXEMPT				
8 PAT MAR CO. INC.-FAMILY BUSINESS	A	Distribution	M	W	EXEMPT				
9 1ST NATIONAL BANK OF CHEROKEE-CD IRA	A	Interest	J	T	EXEMPT				
10 PROVIDIAN NATIONAL BANK-CD IRA	B	Interest	K	T	EXEMPT				
11 UNION BANK M/M FD IRA	A	Dividend	K	T	EXEMPT				
12 GERMANY FUND-MUTUAL FUND IRA	A	Dividend	J	T	EXEMPT				
13 GERMANY FUND (NEW)-MUTUAL FUND IRA	A	Dividend	J	T	EXEMPT				
14 CATS SERIES P IRA	A	Interest	J	T	EXEMPT				
15 GAM-COMMON STOCK IRA	A	Dividend	J	T	EXEMPT				
16 MTB-COMMON STOCK IRA	A	Dividend	J	T	EXEMPT				
17 STRD-COMMON STOCK IRA	A	Dividend	J	T	EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; 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: (Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

3 Val Mth Codes: (Col. C2) 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: JONES III, JOHN E. | Date of Report: 02/28/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 UNION BANK M/M FD IRA	A	Dividend	J	T	EXEMPT				
19 NATIONWIDE-ANNUITY	A	Interest	J	T	EXEMPT				
20 FIRST UNION BANK-CHECKING	A	None	J	T	EXEMPT				
21 UNION BANK & TRUST CO.-CHECKING	A	Interest	M	T	EXEMPT				
22 QUALITY VENDING INC.-50% INTEREST	C	Distribution	L	W	EXEMPT				
23 LOAN RECEIVABLE-PHOENIX CONTRACTING	A	Interest	M	T	EXEMPT				
24 UBPTE-COMMON STOCK	A	Dividend	J	T	EXEMPT				
25 UBPTE-COMMON STOCK	A	Dividend	J	T	EXEMPT				
26 UBPTE-COMMON STOCK	A	Dividend	J	T	EXEMPT				
27 NATIONWIDE M/M FD.	A	Dividend	J	T	EXEMPT				
28 DREYFUS PREMIER BALANCED FD.	A	Dividend	J	T	EXEMPT				
29 OPPENHEIMER CAPITAL APPRE. FD.	A	Dividend	J	T	EXEMPT				
30 OPPENHEIMER GLOBAL FUND	A	Dividend	J	T	EXEMPT				
31 GE COMMON STOCK	A	Dividend	J	T	EXEMPT				
32 NASDAQ 100 SHARES-COMMON STOCK	A	Dividend	J	T	EXEMPT				
33 SOVEREIGN BANCORP-COMMON STOCK	A	Dividend	J	T	EXEMPT				
34 TARGET CORP.-COMMON STOCK	A	Dividend	J	T	EXEMPT				

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: JONES III, JOHN E.

Date of Report: 02/28/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure: (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions.)									
35 TYCO INTERNATIONAL LTD-COMMON STOCK	A	Dividend	J	T	EXEMPT				
36 LEGG MASON M/M FD.	A	Dividend	J	T	EXEMPT				
37 AT&T-COMMON STOCK	A	Dividend	J	T	EXEMPT				
38 AT&T WIRELESS-COMMON STOCK	A	Dividend	J	T	EXEMPT				
39 ASTRAZENECA PLC-COMMON STOCK	A	Dividend	J	T	EXEMPT				
40 CISCO SYSTEMS INC-COMMON STOCK	A	Dividend	J	T	EXEMPT				
41 COACH INC.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
42 FULTON FINANCIAL CORP.	A	Dividend	J	T	EXEMPT				
43 UIT FIRST TRUST COMM. SVCES.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
44 LEGG MASON VALUE TRUST-COMMON STOCK	A	Dividend	J	T	EXEMPT				
45 ABITI CONSOLIDATED-COMMON STOCK	A	Dividend	J	T	EXEMPT				
46 CROWN CORK & SEAL CO.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
47 CARPENTER TECHNOLOGY-COMMON STOCK	A	Dividend	J	T	EXEMPT				
48 HUBBELL INC. CLB-COMMON STOCK	A	Dividend	J	T	EXEMPT				
49 IMC GLOBAL CORP.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
50 NATIONAL SVC. IND. INC.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
51 PHELPS DODGE CORP.-COMMON STOCK	A	Dividend	J	T	EXEMPT				

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
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FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JONES III, JOHN E.

Date of Report: 02/28/2002

VII. Page 4 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 PETROLEUM GEO SVCS.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
53 USG CORP.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
54 BROOKSTREET SECURITIES CORP.-M/M FD.	B	Dividend	K	T	EXEMPT				
55 FIRST UNION SECURITIES-M/M FD.	A	Dividend	J	T	EXEMPT				
56 STRATEGIC DISTRIBUTION-COMMON STOCK	A	Dividend	J	T	EXEMPT				
57 BARRISTER GLOBAL SVCS.NETWORK-COMMON STOCK	A	Dividend	J	T	EXEMPT				
58 FIRST CHESAPEAKE FINANCIAL CORP.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
59 STRATEGIC DISTRIBUTION INC.-COMMON STOCK	A	Dividend	J	T	EXEMPT				
60 FIDELITY AGGRESSIVE GROWTH FUND	A	Dividend	J	T	EXEMPT				
61 FIDELITY BLUE CHIP GROWTH FUND	A	Dividend	J	T	EXEMPT				
62 JANUS TWENTY FUND	A	Dividend	J	T	EXEMPT				
63 U.S. TREASURY NOTE-IRA	A	Interest	K	T	EXEMPT				
64 CATS SERIES P ZERO COUPON BOND-IRA	A	Interest	J	T	EXEMPT				
65 ABM COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
66 AHP COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
67 AV COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
68 BK COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				

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: JONES III, JOHN E.

Date of Report: 02/28/2002

VII. Page 5 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
69 BMY COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
70 CRS COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
71 CVX COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
72 CPQ COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
73 CAG COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
74 CCK COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
75 DD COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
76 EAS COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
77 XOM COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
78 FCFK COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
79 FULT COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
80 GAM COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
81 GE COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
82 HON COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
83 HUM COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
84 K COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
85 KEY COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				

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: JONES III, JOHN E.

Date of Report: 02/28/2002

VII. Page 6 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
86 KMB COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
87 LG COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
88 LV COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
89 MTB COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
90 MBNK COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
91 MRK COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
92 MMM COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
93 NXL COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
94 BOH COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
95 PTV COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
96 JCP COMMON STOCK-IRA	A	Dividend	K	T	EXEMPT				
97 PEP COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
98 PFE COMMON STOCK-IRA	A	None	K	T	EXEMPT				
99 SFE COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
100 SPI COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
101 STRD COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
102 TE COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				

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: JONES III, JOHN E.

Date of Report: 02/28/2002

VII. Page 7 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
103 TYC COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
104 UL COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
105 VZ COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
106 WFSL COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
107 WMI COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
108 2MH COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
109 UBPTE COMMON STOCK-IRA	A	Dividend	J	T	EXEMPT				
110 DISCOVER BANK OF DE-CD-IRA	B	Interest	J	T	EXEMPT				
111									
112									
113									
114									
115									
116									
117									
118									
119									

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	Date of Report
	JONES III, JOHN E.	02/28/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

PART I

* I WILL TERMINATE THIS RELATIONSHIP UPON CONFIRMATION AS JUDGE.

PART VII

THE STOCK IN QUALITY VENDING INC. IS IN THE PROCESS OF BEING SOLD TO THE OTHER STOCKHOLDER OR A THIRD PARTY.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JONES III, JOHN E.	02/28/2002

SECTION HEADING. (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

PART 1. POSITIONS (cont'd.)

Line	Position	Name of Organization/Entity
4	PRESIDENT ELECT	* NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION
5	OWNER	* PROPRIETORSHIP LAW PRACTICE

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	2001	DIRECTORS FEES - UNION BANK & TRUST CO.	3,895.00
6	2002	DIRECTORS FEES - UNION BANK & TRUST CO.	0.00
7	2000	FEES - NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION	1,253.00
8	2001	FEES - NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION	0.00
9	2002	FEES-NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION	0.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JONES III, JOHN E.	02/28/2002

IX. CERTIFICATION

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

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

Signature _____ Date 2-28-02

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	243003	Notes payable to banks-secured - Vehicle	19000
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule	156688	Notes payable to relatives	
Unlisted securities--add schedule	2 154570	Notes payable to others	
Accounts and notes receivable:		Accounts and bills due - Credit Cards	6500
Due from relatives and friends		Unpaid income tax	
Due from others - Phoenix Contracting - Clients	141466 83000	Other unpaid income and interest	
Doubtful - Clients	(41500)	Residence - Union Bank Real estate mortgages payable-add schedule	180000
Real estate owned-add schedule - Residence	310000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	135000	Margin A/C - Fidelity Invest.	3046
Cash value-life insurance			
Other assets itemize:			
Vested Pension PSERS Annuity - Nationwide - Joint	17822 2890		
IRA - Union Bank	14762		
SEPIRA - Union Bank	545698	Total liabilities	208546
Equipment - Law Practice	5000	Net Worth	3 559053
Total Assets	3 767599	Total liabilities and net worth	3 767599
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		

EXHIBIT "E"

Unlisted Securities		
Bunker Hill Golf Course - S Corporation		
9.28% of Total Value	$5,188,249	$ 481,631
Willow Hollow Golf Course Inc - S Corporation		
12.50% of Total Value	$1,854,751	231,844
Wedgewood Golf Course Inc - S Corporation		
9.32% of Total Value	$8,924,072	831,459
Hidden Valley Golf Course Inc - S Corporation		
9.30% of Total Value	$1,951,152	181,457
Fairview Golf Course Inc - S Corporation		
9.28% of Total Value	$2,451,031	227,489
Auburn Golf Car - S Corporation		
12.50% of Total Value	$313,078	39,136
Parkway Anthracite - S Corporation		
7.22% of Total Value	$2,000	144
Pat Mar Co Inc - S Corporation		
12.50% of Total Value	$851,284	106,410
Quality Vending, Inc		
50.00% of Total Value	$110,000	55,000
		$ 2,154,570

Listed Securities

140 Shs	Union Bancorp Inc - Pottsville	Child 1	$ 2,310
110 Shs	Union Bancorp Inc - Pottsville	Child 2	1,815
275 Shs	Union Bancorp Inc - Pottsville	Joint	4,538
	Nationwide Money Market	Child 1	1,529
71 Shs	Dreyfus Premier Balanced Fund	Child 1	867
22 Shs	Oppenheimer Capital Apprec Fund	Child 1	790
84 Shs	Dreyfus Premier Balanced Fund	Child 2	1,023
20 Shs	Oppenheimer Global Fund	Child 2	817
22 Shs	Oppenheimer Capital Apprec Fund	Child 2	793
100 Shs	General Electric Co	Wife	3,641
40 Shs	NASDAQ 100 Shares - Ser I	Wife	1,356
100 Shs	Sovereign Bancorp	Wife	990
100 Shs	Target Corp	Wife	3,115
100 Shs	Tyco International Ltd	Wife	4,914
	Legg Mason Money Market Funds	Wife	9,021
120 Shs	AT&T	Wife	1,830
38 Shs	AT&T Wireless Services	Wife	549
100 Shs	Astrazeneca PLC	Wife	4,511
100 Shs	Cisco Systems Inc	Wife	1,692
100 Shs	Coach Inc	Wife	2,790
105 Shs	Fulton Financial Corp	Wife	2,302
212 Shs	UIT First Trust Comm Svcs	Wife	1,240
69 Shs	Legg Mason Value Trust	Wife	3,145
500 Shs	Abitibi Consolidated	Joint	3,190
400 Shs	Crown Cork & Seal Co	Joint	916
150 Shs	Carpenter Technology Corp	Joint	3,338
200 Shs	Hubbell Inc CLB	Joint	5,832
300 Shs	IMC Global Corp	Joint	2,700
200 Shs	National Svc Ind Inc	Joint	4,130
100 Shs	Phelps Dodge Corp	Joint	2,750
500 Shs	Petroleum Geo Svcs	Joint	3,150
200 Shs	USG Corp	Joint	746
	Brookstreet Securities Corp - Money Market Fund	Joint	34,412
	First Union Securities - Money Market Fund	Joint	2,266
500 Shs	Strategic Distribution	Joint	4,500
1500 Shs	Barrister Global Svcs Network	Joint	615
9500 Shs	First Chesapeake Financial Corp	Joint	1,975
3255 Shs	Strategic Distribution, Inc	Joint	26,854
53 Shs	Fidelity Aggressive Growth	Joint	773
45 Shs	Fidelity Blue Chip Growth	Joint	1,694
36 Shs	Janus Twenty	Joint	1,269
			$ 156,688

Cash on Hand and in Banks	
First Union Bank - Checking	$ 9,268
Union Bank & Trust Co - Checking	10,767
Union Bank & Trust Co - Business Checking	222,968
	$ 243,003

Autos and Other Personal Property	
2001 Toyota	$ 35,000
Household Belongings	100,000
	$ 135,000

[Whereupon, at 3:15 p.m., the committee was adjourned.]
A submission for the record follows.]

SUBMISSION FOR THE RECORD

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Opening Statement of Chairman Patrick Leahy
on the Nominations of
Richard R. Clifton to the U.S. Court of Appeals for the Ninth Circuit,
Christopher C. Conner to the U.S. District Court for the Middle District of Pennsylvania
Joy Flowers Conti to the U.S. District Court for the Western District of Pennsylvania
John E. Jones, III, to the U.S. District Court for the Middle District of Pennsylvania
May 9, 2002

I would like to welcome the nominees to today's hearing. The nominees before us come from Hawaii and Pennsylvania. I am glad that Republicans have decided to reverse themselves and not object to this hearing, as they had threatened earlier in the week, so that we may proceed. Many of the nominees' family members have made this journey with them, and I extend the welcome of this Committee to the friends and families in attendance.

I am especially grateful to Senator Cantwell for volunteering to chair this important hearing on behalf of the Committee. As a Senator from a State within the Ninth Circuit, she has a real interest in the nominee to that Court.

With today's hearing, in little less than 10 months, the Senate Judiciary Committee will have held 18 hearings involving a total 65 judicial nominations. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In fact, it is more hearings than they held in 1996 and 1997 combined. Indeed, one-sixth of President Clinton's judicial nominees – more than 50 – never got a Committee hearing and Committee vote from the Republican majority, which perpetuated longstanding vacancies into this year. That includes, in particular, the vacancy for the Hawaii seat on the

Ninth Circuit on the agenda today.

Richard Clifton is the first Court of Appeals nominee for whom we have held a hearing this year that comes from a State without a Republican Senator. The other six on whom hearings have been held earlier this year were all scheduled at the request of a Republican Senators.

I thank Senators Inouye and Akaka for their statesmanship in connection with this hearing. I remember very well their important efforts to establish the Hawaii seat on the Ninth Circuit and to try to fill it with a qualified nominee.

I voted with them and supported their effort to ensure that every State, even States as small as Hawaii and Vermont, are represented on our Courts of Appeals.

I recall the saga of the nomination of James Duffy to fill the Hawaii seat on the Ninth Circuit, how hard they worked to find a consensus nominee and how that nomination was they stalled for years. Despite the "Well Qualified" rating he received from the ABA and the strong support of both his home-state Senators, Mr. Duffy never received a hearing or a vote.

He was nominated at the beginning of 1999 and remained pending for over two full years until it was withdrawn by President Bush in March 2001 without any Senate action of any kind.
Despite that recent history, the Hawaii Senators are here today in support of Mr. Clifton for that same vacancy. In contrast to the treatment that Mr. Duffy received, Mr. Clifton's nomination is being scheduled for a hearing less than 60 days after his file and paperwork were completed. Mr. Duffy waited 791 days and never got a hearing.

By including Mr. Clifton on this hearing, we hope to provide some relief to the Ninth Circuit, which has four vacancies that have been classified as "judicial emergency" vacancies by the U.S. Courts. Two of those vacancies are more than five years old. They date back to 1996 and 1997, and two outstanding nominees to those seats. I have mentioned the nomination of James Duffy. The other nominee was Barry Goode of California, whose nomination also languished for years without ever getting a hearing or a vote.

When Barry Goode was first nominated to a Ninth Circuit vacancy in 1998 it was already a judicial emergency. Both of his home-state Senators supported the nomination but the Republican leadership refused to act. Mr. Goode was nominated not once, not twice, but three times to the Ninth Circuit and he never was given the courtesy of a hearing or a vote during almost 1,000 days (998 days).

The Ninth Circuit vacancies are a prime and unfortunate legacy of the partisan obstructionist practices during the Republican control of the Senate. Some are now complaining that nominees are waiting a year for hearing. The anniversary of the reorganized Judiciary Committee with a Democratic majority is not until July 10, of course. We have not been in charge for 10 months yet and we have held hearings on 13 Court of Appeals nominees and 65 judicial nominees.

Mr. Goode waited almost three years, 1,000 days, for nothing. He was renominated in January 2001, and the Republican controlled Senate did nothing. In March of 2001, President Bush withdrew Mr. Goode's nomination, but he has not nominated anyone to this judicial emergency vacancy. It remains one of a number of judicial emergency vacancies for which there is no nominee and one of the 40 judicial vacancies for which there is no nominee.

Today the Judiciary Committee is also holding a hearing on three nominees to the District Courts in Pennsylvania. Two of them, Mr. Conner and Mr. Jones, are nominated to relatively recent vacancies in the Middle District of Pennsylvania. They were first nominated two months ago and are today receiving hearings on their nominations, just as soon as their paperwork was completed. The third nominee, Ms. Conti, was first nominated in January, and she receiving a hearing on her nomination to the Western District of Pennsylvania within weeks of her paperwork being complete.

I know that Senator Specter strongly supports Ms. Conti's nomination and specifically requested that she be accorded a hearing as soon as possible. With today's hearing on three Pennsylvania nominees, the Judiciary Committee will have held hearings for a total of six nominees from that State, including Judge Davis, Judge Baylson and Judge, who were confirmed last month. Those confirmations and today's hearing illustrates the progress being made under Democratic leadership and the fair and expeditious way this President's nominees are being treated.

In contrast, Judge Legrome Davis was first nominated to the position of U.S. District Court Judge for the Eastern District of Pennsylvania by President Clinton on July 30, 1998. The Republican-controlled Senate took no action on his nomination and it was returned to the President at the end of 1998. On January 26, 1999, President Clinton renominated Judge Davis for the same vacancy. The Senate again failed to hold a hearing for Judge Davis and his nomination was returned after two more years.

Under Republican leadership, Judge Davis' nomination languished before the Committee for 868 days without a hearing. Unfortunately, Judge Davis was subjected to the kind of inappropriate partisan rancor that befell so many other nominees to the district courts in Pennsylvania and to the Third Circuit during the Republican control the Senate. I want to note emphatically, however, that I know personally that the

senior Senator from Pennsylvania, supported Judge Davis's nomination and worked hard to get him a hearing and a vote.

The lack of Senate action on Judge Davis's initial nominations are in no way attributable to a lack of support from the senior Senator from Pennsylvania. Far from it. In fact, I give Senator Specter credit for getting President Bush to renominate Judge Davis earlier this year and commended him publicly for all he has done to support this nomination from the outset.

This year we moved expeditiously to consider Judge Davis, and he was confirmed within a few months of his renomination by President Bush.

The saga of Judge Davis recalls for us so many nominees from the period of January 1995 through July 10, 2001, who never received a hearing or a vote and who were the subject of secret anonymous holds by Republicans for reasons that were never explained. At Judge Davis' recent confirmation hearing Senator Santorum testified that Judge Davis did not get a hearing because local Democrats objected. I was the ranking Democrat on the Judiciary Committee during those years and never heard that before.

My understanding at the time, from July 1998 until the end of 2000, was that Judge Legrome Davis would have had the support of Senator Specter as well as every Democrat on the Judiciary Committee and in the Senate. Despite that bipartisan support, he was not included by the then-Chairman of the Committee in the May 2000 hearing for a few other Pennsylvania nominees.

In contrast, today's hearing for Ms. Conti marks the first hearing on a nominee to the Western District of

Pennsylvania since 1994, despite qualified nominees of President Clinton. No nominee to the Western District of Pennsylvania received a hearing during the entire period that Republicans controlled the Senate in the Clinton Administration. One of the nominees to the Western District, Lynette Norton, waited for almost 1,000 days, like Mr. Goode, and she was never given the courtesy of a hearing or a vote.

Unfortunately, Ms. Norton died earlier this year, having never fulfilled her dream of serving on the federal bench. Despite the poor treatment of other nominees, we are moving fairly and expeditiously.

Large numbers of vacancies continue to exist, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than 50 of President Clinton's judicial nominees, many of whom waited for years.

In fact, 56 percent of President Clinton's Courts of Appeals nominees in 1999 and 2000 never got a hearing or a vote and the Republican majority was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. Many other nominees waited for years to be confirmed, but they were the lucky ones.

From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling.

Democrats have broken with that recent history of inaction. Nine nominees have been confirmed to the Courts of Appeals in fewer than 10 months. Mr. Clifton is the 13th nominee to a Circuit Court to receive a hearing in fewer than 10 months. I welcome Mr. Clifton to this hearing–the first hearing on a Hawaii Circuit Court nominee in more than a decade.

I also welcome the district court nominees: Ms. Conti, Mr. Conner, and Mr. Jones. In less than nine months, the Committee has confirmed 45 District Court nominees.

That is more district court nominees confirmed than were confirmed in seven of the eight years of the Reagan Administration and three of four years of the first Bush Administration.

I congratulate you all on your hearing today.

NOMINATION OF LAVENSKI R. SMITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT; HENRY E. AUTREY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI; RICHARD E. DORR, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI; HENRY E. HUDSON, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA; AMY J. ST. EVE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS; AND TIMOTHY J SAVAGE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THURSDAY, MAY 23, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 2:08 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Specter, and Sessions.

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

Chairman LEAHY. I want to welcome everybody here. The nominees before us come from Arkansas, Missouri, Virginia, Pennsylvania, Illinois, and I know a number of the nominees' families have made the journey with them, and I extend the welcome to them.

With today's hearing, in just about 10 months, the Senate Judiciary Committee will have held 19 hearings involving a total of 71 judicial nominations—in fact, the only judicial hearings held by this Congress. Control, of course, was in the other party the first 6 months. That is more hearings, actually, on judges than my friends on the other side held in any year of their control of the Senate. In fact, it is more hearings than they held in 1996 and 1997 combined and includes more judicial nominees than were accorded hearings in 1999 and 2000. I just thought I would point that

out because of some of the misinformation that has been floating around, certainly not by any of those who are going to testify today, but it has happened.

Indeed, actually, one-sixth of President Clinton's judicial nominees—more than 50—never got a committee hearing and committee vote when the committee was under other control.

One of these vacancies was on the Eighth Circuit, a vacancy recently filled by Michael Melloy of Iowa. That was the seat to which President Clinton nominated Bonnie Campbell, a talented, well-qualified candidate who did get a hearing but was never allowed to come up for a vote, and it was finally returned.

Now, since the change in control of the Judiciary Committee, even though, as I said, while there were some nominees the first 6 months of last year, no hearings were held, but we started ours—noticed the first one of our hearings 10 minutes after I became chairman. We moved quickly to fill vacancies on the Eighth Circuit. We have already confirmed two judges to this circuit: William Riley from Nebraska and Judge Melloy from Iowa. I was determined not to do to President Bush what the other party had done to President Clinton.

The nominations to the district courts today deserve mention. I am pleased to be able to move so many of these in a hurry. In fact, as soon as the senior Senator from Virginia, a well-respected man, a close personal friend, came to me to ask me to schedule Judge Hudson for a hearing—I actually have to admit I didn't realize his name was here, but as soon as Senator Warner mentioned him, I was happy to accommodate him. In fact, the ink on the paperwork on the other trial court nominees before us this afternoon is practically still wet. Mr. Savage's file was completed about 9 days ago; Mr. Dorr's, 6 days ago; Ms. St. Eve's, 3 days ago; Judge Autrey's, 2 days ago.

I almost shouldn't mention that, 5, 3, 6 days, because somebody is going to say, well, why didn't we do them on that day?

While some of the vacancies to which these nominees have been named arose relatively recently, the vacant seat in the Eastern District of Pennsylvania to which Mr. Savage has been nominated has been empty since the beginning of 1999. Now, President Clinton did nominate somebody for that, who waited there for a couple years, did not come before this committee in 9 days the way Mr. Savage has. But he had to wait quite a bit, never got a hearing, which turned into a benefit for Mr. Savage.

As of today's hearing, this Judiciary Committee will have held hearings for seven nominees to judgeships in Pennsylvania, including Judge Legrome Davis, Judge Michael Baylson, and Judge Cynthia Rufe, who were all confirmed last month, and we are already through another one, on a split vote but a comfortable margin, from Pennsylvania this morning——

Senator SPECTER. Are you referring to Judge Smith?

Chairman LEAHY. Yes. I just mention this because we did have—I do recall when at least one person from Pennsylvania apparently wanted to hold up Judge Legrome Davis and did for years. We are moving through a lot quicker.

The vacancy to which Judge Autrey has been nominated has been vacant even longer, since December 1996, when the late

Judge Gunn took senior status. President Clinton nominated Missouri Supreme Court Judge Ronnie White to this vacancy in June 1997. He had to wait nearly a year for a hearing. We then voted to send his nomination to the Senate floor, but then his nomination waited for a full Senate vote, never got one, was sent back to the President. He renominated him. Again he waited patiently a long time for a vote, and he was given a floor vote, and even though a number of Republican colleagues had voted for him in committee, by an unprecedented—and it was unprecedented—party line vote on the floor, it was voted down.

I just mention that to show that we are trying to move these a lot quicker. So I would like to especially commend Senator Carnahan for being here today to recommend the Missouri nominees to the committee. That just underscores for us what we all know about her, that she is a person of character and grace, willing to work on a bipartisan basis in the best interests of the State of Missouri, and is here to support President Bush's nominee.

So I am glad we are able to hold today's hearing. I wish we could have held hearings on the 50 of President Clinton's that they refused to hold hearings on. In fact, 56 percent of President Clinton's courts of appeals nominees in 1999 and 2000 never got a hearing or a vote. In 1996, as I recall, there wasn't a single court of appeals judge that was allowed to have a vote.

From the time my friends on the other side took over majority control of the Senate in 1995 until we reorganized last July, circuit vacancies increased from 16 to 33, more than doubling.

We have broken that. Nine nominees have been confirmed in fewer than 10 months. Mr. Smith is the 14th nominee to a circuit court to receive a hearing in just 10 months. In that case, I want to commend Senator Lincoln for her efforts. I appreciate your interest in ensuring that Mr. Smith be accorded a hearing. I had reached the point where I was afraid to walk on the Senate floor within Senator Lincoln grabbing me and asking when we were going to have this hearing. And so that is why we have moved forward in the same way, of course, that I wanted to accommodate Senator Warner on his, as I have with Senator Allen on other matters. But Judge Smith should thank you for being here.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. What we will do, following the normal procedure, we will hear from the two Senators who have a court of appeals judge, and then we will hear from other Senators according to seniority.

Senator SESSIONS. Mr. Chairman, I just——

Chairman LEAHY. After your opening statement. I am sorry.

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

Senator SESSIONS. Thank you very much. We are glad to have this hearing today, a hearing with a number of judges on it, and I think that that is a good pattern for us to follow. Sometimes it is not just the number of hearings but the number of judges that sit on that panel. And it is good that we have had 57 nominees con-

firmed, but I have got to just respond to a couple of things that you said, Mr. Chairman.

When President Clinton left office, there were only 41 nominees pending that he had nominated that had not been confirmed. So I am not sure how this number saying only 56 percent or something got confirmed. And they were——

Chairman LEAHY. Well, 56 percent did not get confirmed.

Senator SESSIONS. Well, we only voted down one nominee in the entire time President Clinton was in office. We confirmed 377. There were 41 left pending that he had nominated in the last year that didn't get confirmed. There were only 67—there were 67 vacancies. That is when the Republicans controlled this committee and when a Democrat was in the White House.

Now, when Senator Hatch chaired the committee and President Clinton was in the White House—well, when former President Bush left office, there were not 41 nominees but 54 nominees pending and unconfirmed, and there were 70 vacancies—70 vacancies when Senator Hatch took over, and when he finished his term and President Clinton finished his term in office, there were only 67 vacancies. He had reduced the number of vacancies. We are now at about 90. We know that we have a real slow time with our courts of appeal judges particularly. The President has only gotten three of those confirmed, 27 percent——

Chairman LEAHY. What number was Judge Smith this morning, courts of appeals?

Senator SESSIONS. He hasn't been confirmed yet. And we had a lot of these nominees that are yet to even have a hearing who have been pending over a year. In fact, 8 of the first 11, I believe, have not had a hearing.

So we are pleased to move forward today. I won't belabor the point, but I would just make the point that we think this is an alteration of the historic ground rules of moving judges, and it is slower than we have a right to expect, and certainly slower than was done under President Clinton.

Chairman LEAHY. You know, I would totally agree with you if I were working on those numbers. You said three courts of appeals judges have been confirmed by us. Actually, we have confirmed nine on the floor and 14 out of here. But as I said, normally we would go to the——

Senator SESSIONS. You are right, Mr. Chairman. I read this note over here wrong. Of the first 11 nominees——

Chairman LEAHY. OK, don't feel badly——

Senator SESSIONS [continuing]. Only three were confirmed.

Chairman LEAHY. Don't feel badly.

Senator SESSIONS. Of the first 11 nominees that have been pending over a year, 3 only have been confirmed.

Senator WARNER. Mr. Chairman, could I seek recognition for 10 seconds?

Chairman LEAHY. Of course.

PRESENTATION OF HENRY E. HUDSON, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. I am one of the Senators who invited the FBI Director to appear before the Senate, and I now must attend that briefing. Could I just submit my statement, and that would enable the panel to go forward more speedily.

Chairman LEAHY. You know, there is a reason why I have such enormous respect for you and think of you as one of the real giants of the Senate, Senator Warner.

Senator WARNER. Thank you. We have served here a quarter of a century together, and there is no Senator—I will say this publicly—that is more conscientious about personal relationships than you, and I thank you.

Chairman LEAHY. I thank you.

Senator WARNER. And I so submit my statement because I have 100 percent confidence in this candidate, and if you lack a little confidence in my statement, we have here a handwritten letter by Congressman Moran and from Richard Saslaw, the Senate Democratic Minority leader in Virginia. I also submit a letter from the Virginia Bar Association on Mr. Hudson's behalf.

Chairman LEAHY. Thank you.

Senator WARNER. I rest my case, Mr. Chairman.

[Laughter.]

Chairman LEAHY. You are doing pretty good.

[The prepared statement of Senator Warner appears as a submission for the record.]

Chairman LEAHY. I was going to say that our normal procedure is to go to the courts of appeals, except for the one—and I should tell Mr. Hudson that he says those nice things about you when you are not around, too. The one exception to that is if there are members of the committee, which would be Senator Specter and Senator Durbin.

PRESENTATION OF TIMOTHY J. SAVAGE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you very much, Mr. Chairman. I shall be brief.

As Senator Warner noted, the FBI Director is going to be in S–407 in 9 minutes, and that is a very heavy Judiciary Committee oversight issue, and I am going to excuse myself early to go.

Chairman LEAHY. And I would note that the senior Senator from Pennsylvania has been one of the strongest of either party is making sure that FBI oversight is held. I mean that seriously.

Senator SPECTER. I want to make just a few comments about a very distinguished Pennsylvanian who is up for confirmation today, Timothy Savage. He has his bachelor's degree from Assumption College in 1968 cum laude; Temple University Law School, 1971. He has some 30 years' experience as a hearing examiner for the Pennsylvania Liquor Control Board, which is a judicial position. He is permitted to practice privately, which he has, and has very ex-

tensive experience on both the civil and criminal docket, having tried more than 100 criminal cases to verdict. More recently, most of his practice has been in the civil field.

He has extensive community activities, as counsel, Board of Directors for the Metropolitan (Northeast) Philadelphia Boys & Girls Clubs, and in an unusual qualification—and I think it is a qualification—is a Democratic Philadelphia County Executive Committee and an elected Democratic leader of the Philadelphia 23rd Ward. And that provides a lot of very grass-roots experience.

Mr. Savage is a product of an arrangement which Senator Santorum and I have worked out so that the President's party has three nominees for every one nominee of the party which is out. This is a practice which we started some time ago and I think is very, very important, and one time in a 24-year period, 20 years were controlled by one party and many lawyers of the other side did not have an opportunity. And I think this gives us some balance. And to President Bush's credit, he has honored that commitment carte blanche even though Mr. Savage has been an active worker in the field and was against the President. So it is a tribute to the President and it is also a tribute to Mr. Savage.

I would stay and await his questioning, but he is not going to have any problem with his experience at the trial bar.

Thank you very much, Mr. Chairman.

Chairman LEAHY. I would much prefer that you ask the questions at the meeting you are going to, because I suspect they are some of the same ones that you and I have shared before.

Senator SPECTER. I will oblige you, Mr. Chairman.

Chairman LEAHY. And I would like to talk to you when you get back. Thank you.

Senator Durbin?

PRESENTATION OF AMY ST. EVE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS BY HON. RICHARD DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Mr. Chairman, I am pleased to be here today to support the nomination of Amy St. Eve to the U.S. District Court of the Northern District of Illinois. I have a lengthy statement here, which I would like to be put in the record.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Senator DURBIN. I don't know if it is appropriate, Mr. Chairman, but I would yield my time at this point to Senator Fitzgerald who actually—oh, is he still here? He left? OK. Then I will make a statement, and I will make it very briefly.

I would like to—he has just returned. Is it appropriate for me to yield to Senator Fitzgerald, who actually nominated Ms. St. Eve?

Chairman LEAHY. Of course. These younger Senators can move so fast.

[Laughter.]

Chairman LEAHY. I was 34 when I arrived here. I remember those days. Go ahead.

PRESENTATION OF AMY ST. EVE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS BY HON. PETER FITZGERALD, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator FITZGERALD. Well, Mr. Chairman, thank you very much, and, Senator Durbin, my colleague from Illinois, I appreciate you yielding your time to me to introduce a nominee to the United States District Court for the Northern District of Illinois. I am very pleased to present to the Senate Judiciary Committee Ms. Amy St. Eve. Ms. St. Eve is very young herself. She is 36. But I think when you hear of her achievements and accomplishments thus far, you will agree with Senator Durbin and me that she makes an outstanding candidate for the Federal district court.

Ms. ST. Eve is from Belleville, Illinois. She graduated as valedictorian in her class at Belleville High School. She went to Cornell undergraduate and law school at Cornell Law School. She was Order of Coif, an articles editor on the Cornell Law Review. She received the Boardman Third Year Law Prize. She was No. 1 in her class rank after her second year in law school. And she received numerous other awards while she was at Cornell Law.

She began her career at Davis, Polk & Wardwell in New York where she practiced corporate law in civil and criminal matters. From 1994 to 1996, Ms. St. Eve was an associate independent counsel for the Whitewater Independent Council in Little Rock, Arkansas. She did secure, along with another lawyer, the one successful prosecution in that Whitewater investigation, and that was a prosecution of Governor Jim Guy Tucker, Jim McDougal, and Susan McDougal for fraud.

From 1996 through 2001, Ms. St. Eve was an Assistant United States Attorney in the Northern District of Illinois. She handled bank fraud, health care fraud, narcotics trafficking, public corruption, and gang violence cases.

From May 2001 through the present, Ms. St. Eve has served as a senior counsel in litigation at Abbott Laboratories, which is in the Chicago area. She has also taught trial advocacy at Northwestern University School of Law. And it is with great pleasure that I present to the committee Amy St. Eve and her husband, Howard Chrisman, who is a physician at Northwestern Memorial Hospital, and, Amy and Howard, if you would want to stand? And they have with them their young son, Brett, who is 1 month old. He is their third child. They have Lauren, Emily, and now Brett. Congratulations to all of you. Thank you.

[Applause.]

Chairman LEAHY. The family archives will show the 1-month-old was here, just in case he doesn't remember.

Senator FITZGERALD. And just in concluding, during the process in which I was searching for a candidate and we were reviewing Ms. St. Eve's references, I believe my office talked to one judge who was very impressed that she had tried a case while she was maybe in her eighth month of pregnancy. So she has a lot of stamina and has done a wonderful job balancing family and career, and I am very pleased to present Amy St. Eve to the committee, and I appreciate the chairman and the committee members' time.

Thank you very much, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Durbin, did you want to add anything?

Senator DURBIN. No, that is all right.

Chairman LEAHY. OK. Then we will go to—again, going back to the court of appeals, I appreciate the courtesy of both Senator Hutchinson, who is a strong supporter of this nominee, and Senator Lincoln.

Senator Hutchinson, go ahead, sir.

PRESENTATION OF LAVENSKI R. SMITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT BY HON. TIM HUTCHINSON, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator HUTCHINSON. Thank you, Mr. Chairman. I am delighted to be here. Thank you for calling the hearing and thank you for the opportunity to introduce Lavenski Smith, the nominee for the Eighth Circuit Court of Appeals. I would also like to introduce his family. His wife, Trendle, is here, and his children, Stacia and Gabriel. They are right back here on this front row.

Chairman LEAHY. Thank you. And, of course, each nominee will get a chance to put that in further in the record. But I do have to think that nominees someday somebody goes into the old family archives, and it is kind of neat to find who was there.

Senator HUTCHINSON. Absolutely.

Chairman LEAHY. Go ahead.

Senator HUTCHINSON. Mr. Chairman, Arkansas does not get the chance to fill a court of appeals seat very often. In fact, the last time an Arkansan was placed on this bench was 10 years ago, in 1992. That is one of the many reasons that this particular nomination is so important.

As someone from Arkansas, I want you to know that those of us who know Lavenski Smith best feel that President Bush made an excellent choice.

As I briefly outline Justice Smith's background and qualifications for the bench, I hope the members of the committee will note the recurring theme of service. Be it public service as a government official, service to his community through aid and religious organizations, or service to the bar as a public interest lawyer, Lavenski Smith has made service the guiding light in his life. Justice Smith earned both his bachelor's degree and his law degree from the University of Arkansas in Fayetteville. In fact, Mr. Chairman, he put himself through law school by working as a janitor.

Following law school and 3 years clerking in private practice, Judge Smith served the poorest citizens of Arkansas as the staff attorney for the Ozark Legal Services representing abused and neglected children. After working with the Ozark Legal Services, Judge Smith opened the first minority-owned firm in Springdale, Arkansas, handling primarily civil cases. He then taught business law at John Brown University and took several positions in public service, including regulatory liaison for the Governor's office. Currently, Judge Smith is serving as the commissioner of the Arkansas Public Service Commission.

In 1999, he was appointed to the Arkansas Supreme Court for 2 years. As a Supreme Court Justice, he presided over hundreds of cases and authored several dozen majority opinions.

Throughout his work as an attorney and a judge, Lavenski Smith has earned the respect and admiration of his colleagues. Among those who have publicly expressed their support, the Chief Justice of the Arkansas Supreme Court, W. H. "Dub" Arnold, who said of his former colleague, "He'll make a great Federal judge. I think President Bush made the best possible nomination he could have made." And his colleague at the Ozark Legal Services, Mona Teague, states, "We hated to see him go."

Another strong supporter is Mr. Dale Charles, the president of the Arkansas NAACP, who has spoken out publicly supporting this nomination and written to you, Mr. Chairman, to express his support.

In June of 2001, the American Bar Association reviewed Justice Smith's qualifications and made a unanimous qualified determination. Justice Smith has received broad support from colleagues on the bench, colleagues from his days of practicing law, the American Bar Association, and the Arkansas editorial writers.

Finally, I want to point out that Justice Smith will bring more than just his obvious legal qualifications to the Eighth Circuit Court of Appeals. He will bring a long history of community service to the bench. He has served on the board of Northwest Arkansas Christian Justice center, a nonprofit organization dedicated to providing mediation and conciliation services. He worked with Partners for Family Training, a group that recruits and trains foster parents. And Justice Smith has raised funds for the School of Hope, a school for handicapped children in his hometown of Hope, Arkansas.

Mr. Chairman, this outstanding record of service is the most outwardly visible sign of something people in Arkansas know well. Lavenski Smith is a good and honorable man who will serve his country well, and he is someone I am proud to call my friend.

I appreciate very much Senator Lincoln's strong support for this nomination. I think the President has nominated the right person for this job, and as you hear his testimony here today, I am confident the committee will agree.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, you have been, again, very strong in your private comments as well as your public comments, and I appreciate that.

Senator Lincoln, we have the nominee here, so go ahead.

PRESENTATION OF LAVENSKI R. SMITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT BY HON. BLANCHE LINCOLN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator LINCOLN. Thank you, Mr. Chairman. I am telling you, that good old female patience and perseverance pays off. I am wondering if my colleagues are going to put up with me much longer, however.

I do appreciate you and the members of the Judiciary Committee providing us the opportunity to appear before you today to introduce Judge Lavenski Smith, who has been nominated to fill a va-

cancy on the Eighth Circuit Court of Appeals. He is joined, obviously, as Senator Hutchinson mentioned, by his wife, Trendle, and their son and daughter, and as always, we are so pleased that the entire family could be here.

I want to begin my remarks today by offering a very special word of thanks to you, Chairman Leahy, for convening this hearing today. I have been somewhat of a pest, and I appreciate very much your paying attention. I want to acknowledge the chairman's diligent efforts over the past 10 months to reduce the number of judicial vacancies that were largely created before the Senate reorganized in June of last year.

Even though there has been a good deal of heated debate surrounding the pace of judicial confirmations in recent months, I can say from personal experience that the chairman has been highly responsive to my inquiries in this matter.

In short, I am grateful to him for granting my request that Judge Smith receive a hearing so that he can present his qualifications to this committee for consideration.

To the committee and the chairman, Lavenski Smith is a lifelong resident of Arkansas. After graduating from high school, Judge Smith moved north to Fayetteville where he received both his B.A. and J.D. from the University of Arkansas, as Senator Hutchinson has mentioned. And I will try hard not to be duplicative of what my senior colleague from Arkansas has mentioned, but it is also important.

Since that time, Judge Smith has enjoyed a very impressive career as a practicing attorney, as a State Supreme Court Judge, as a professor, and most recently, as a member of the Arkansas Public Service Commission.

This would be an impressive list of accomplishments for anyone, but at age 43, Judge Smith's record is a good indication that he has many years of very productive service in his future. Since President Bush announced the appointment of Judge Smith last year, I have heard from dozens of Arkansans from across the political spectrum who support his nomination.

Since, Mr. Chairman, I am not a lawyer and I do tend to turn to the legal community for their recommendations, my support for Judge Smith's nomination is based in large part on the enthusiastic endorsement he has received from those who know him best, his colleagues and friends who have firsthand knowledge of his professional and personal attributes.

Those who have indicated strong support for Judge Smith in Arkansas, as Senator Hutchinson mentioned, include Governor Mike Huckabee, the Arkansas Supreme Court Chief Justice "Dub" Arnold, and the Arkansas NAACP President Dale Charles, all of which I have heard from on more than one occasion.

In addition, I believe it is important to note that Judge Smith received a unanimous qualification rating for his position by the ABA Standing Committee on the Federal Judiciary.

Even though Judge Smith and I may not agree on every issue, that is not the test that I apply to determine an individual's fitness for the Federal judiciary. I evaluate judicial nominees based on their skills, experience, and ability to understand and apply estab-

lished precedent, not on any particular point of view a nominee may hold.

Fundamentally, I am interested in knowing that a nominee can fulfill his responsibility under the Constitution in a court of law and implement the rule of law of this great Nation. I am satisfied that Judge Smith has really met that standard.

In closing, Mr. Chairman, I highly value the role the Judiciary Committee plays in evaluating and screening lifetime judicial candidates. Like you, I do not believe the Senate's constitutional role of providing advice and consent on judicial nominations should ever be interpreted to mean advice and rubber stamp. If so, the exercise that we are engaging in today is meaningless.

In accordance with those principles, I ask my colleagues on the Judiciary Committee to give Judge Smith your full attention and your careful consideration in the following hearing.

I thank you, especially, Mr. Chairman, for all your accommodations and certainly the wonderful working relationship we share in the Senate.

Chairman LEAHY. Thank you very much, and I know both you, Senator Hutchinson, and you, Senator Lincoln, are supposed to be in about three different committee meetings right now. So please feel free to leave, and I do appreciate your coming. I do appreciate your time, and I do appreciate your consistent support for this nominee.

Senator LINCOLN. Thank you, Mr. Chairman.

Senator HUTCHINSON. Thank you, Mr. Chairman.

Chairman LEAHY. Again, now going back on the seniority rule, we will go to Senator Bond and Senator Santorum, then Senator Allen, Senator Carnahan, and Congressman Clay. So, Senator Bond, you are no stranger to this committee. You have been here a number of times before. Please go ahead, sir.

PRESENTATION OF HENRY E. AUTREY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI, AND RICHARD E. DORR, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI BY HON. KIT BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman, and thank you for calling the hearing, and we do appreciate the fact that there is the confidential briefing and many other things going on. But we are most grateful that you are taking the time today to hear two exceptional candidates for the Federal district court is Missouri: the Honorable Henry Autrey for the Eastern District of Missouri and Richard E. Dorr for the Western District.

I believe the committee will find that each of these two gentlemen are extremely well qualified for the position, possess the experience, the intellect, and the personal qualities necessary to preside over trials and rule in an informed and impartial manner. The administration of justice in Missouri will be enhanced by the presence of both of these men on the Federal bench.

Judge Autrey will bring to the bench an outstanding reputation and extensive experience as both a judge and a prosecutor. Upon graduation from law school at the St. Louis University School of Law, Judge Autrey took a job as a prosecutor in the city of St.

Louis, a profession I know the chairman holds in very high regard. Judge Autrey served as a prosecutor for 9 years. In addition to running the office for a time as its first assistant, he established the office's Child Abuse Unit and prosecuted abuse and neglect cases. As a prosecutor, Judge Autrey tried over 60 felony cases, including homicides, and won a number of high-profile convictions.

After serving as a prosecutor for 9 years, Judge Autrey was appointed associate circuit judge by then-Governor Ashcroft, presiding over civil and criminal cases. Judge Autrey was later promoted to circuit judge of the city of St. Louis by then-Governor Mel Carnahan. Over his career on the bench, Henry Autrey has earned a reputation as fair, approachable, thoughtful, and a hard-working judge.

While conducting extensive due diligence in finding a candidate to recommend to President Bush, I spoke with a number of attorneys in the St. Louis legal community who know or have appeared before Judge Autrey. Their praise was as effusive as it was abundant. He is regarded as a very impartial judge who has the temperament and the work ethic for this important post. In fact, I encountered no one who had anything but positive things to say about Judge Autrey.

As evidence, in his last retention vote, over 90 percent of the attorneys in his jurisdiction voted to keep him on the bench under our Missouri non-partisan court plan.

In addition to his work on the bench, he has been active around the St. Louis area. His activities range from teaching numerous courses at St. Louis University School of Law to serving on the board of the St. Louis Food Bank, becoming active in city revitalization, to frustrating a purse snatcher. He is also married, has two fine children, lives in the city of St. Louis.

Dick Dorr also brings to this position an outstanding reputation as a trial attorney from his legal practice in Springfield, Missouri. Dick is a highly respected lawyer in Springfield and currently a partner with the law firm of Blackwell, Sanders, Peper & Martin. He has extensive experience as a trial attorney. While he currently concentrates in the area of commercial litigation, he has represented clients in both civil and criminal matters. He has appeared in the State, Federal, and appellate court and has done so throughout his career of more than 30 years.

Attorneys in Springfield who know and have practiced with Dick share my belief that he has the experience to preside over fair and efficient trials, and his presence on the bench will be a tremendous benefit to the bench and improve the administration of justice in the Western District of Missouri.

Dick has spent most of his adult life in Springfield, Missouri, but he was born and raised in Jefferson City. He attended and played football on scholarship at the University of Illinois. My guess is that he is probably the only person appearing before the committee today who played in the Rose Bowl. Following college, he came back to Missouri to attend the University of Missouri School of Law. He has practiced law in both private practice and in the United States Air Force as judge advocate.

Over the years, Dick has remained active in the Springfield community. His work was cited to me frequently, and he has earned

the regard of many of Springfield's citizens for his involvement. He has worked as an instructor at Southwest Missouri State University in Springfield, served on the board of a number of organizations, and given countless hours of volunteer work. He has worked for Missouri Bar's Volunteer Lawyer Program. He was instrumental in starting the Legal Aid Society of Southwest Missouri and served on its board. He has received the Equal Access to Justice Award from the Springfield Bar for his work and was recognized for outstanding service to the community by the Greene County Community Justice Association.

As a judge advocate, he received two awards for meritorious service. Dick has been a reservist in the United States Air Force. He is married to Barbara, and they have one son.

I thank the committee and urge with my highest recommendation their favorable consideration.

Chairman LEAHY. Well, thank you very much, and I also know—I have seen your schedule for the afternoon. I know you are probably going to have to leave. I appreciate your being here.

Senator Santorum is no stranger to this committee, because I think this is either the sixth or seventh Pennsylvania judge we have had before this committee—seventh, I believe it is, since I became chairman. And so I am delighted to have you here. Please go ahead.

PRESENTATION OF TIMONTHY J. SAVAGE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman. Mr. Chairman, I also want to thank you for the executive meeting this morning on Judge Smith, and I want to thank the committee for its favorable recommendation. In particular, I want to thank Senators Biden, Edwards, and Kohl for their support of Judge Smith and his nomination.

The nomination that we have here today is of Timothy Savage, and as Senator Specter commented to the committee, Senator Specter and I have worked out an arrangement under the prior administration and have kept it under this administration, even though there are two Republican Senators and a Republican President, that we would keep a ratio of three of the President's party and one of the opposing party of the President in our judicial selections.

We have had 11 nominations that have been sent to this committee for the district court, and of those 11, 3 of the 11—actually, a little better than 3 to 1 have been Democrats: Judge Davis, who has been moved out of this committee today; Tim Savage; and yet to be considered by the committee, Judge Dave Circone from the Pittsburgh area, who is also a Democrat elected official.

We believe very strongly in a bipartisan approach to this, and Senator Specter laid out how we did that. I also would suggest that one of the things that I feel very strongly about is that when there is a Democrat to be nominated from the Commonwealth of Pennsylvania, the Democratic political leaders in our Commonwealth should have the say as to who those nominees are. And I have worked very closely with Congressman Brady—I was going to say

nice things in your absence, and I will say them in your presence. I have worked very closely with Congressman Brady, who is obviously a Congressman from the 1st District in Pennsylvania, but also is the chairman for the city of Philadelphia, the Democratic chairman. And this is a nominee that I know Congressman Brady as well as Congressman Fattah very, very strongly support and highly recommended him to us.

And so as is our practice, we have deferred to Democrats within the State to select the nominees both under the Clinton administration as well as under this administration, and we will continue that practice as we try to work together in concert as a delegation.

I am very pleased that they did nominate Tim Savage, who has an excellent reputation, has experience, as Senator Specter suggested, judicial experience, trial attorney experience, private practice experience, and—not a negative in my mind—political experience, someone who has a very balanced career, someone who will bring, I believe, great integrity to the bench as well as a tremendous amount of skill. I won't go through his resume because Senator Specter did so adequately. I would just like to say that I strongly support his nomination, and I want to welcome him to this committee and introduce him to the committee, as well as his wife, Linda, for being here today, and I look forward to the committee acting favorably on his nomination and hopefully moving it quickly to the floor of the Senate.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Santorum.

We will go next, before we go to Congressman Brady and Congressman Clay, to the Commonwealth of Virginia with Senator Allen. Senator Allen has been very, very helpful to this committee because he also has the perspective that some of our Senate colleagues have of having been a former Governor, a well-respected Governor, and as a result has had to think about judicial appointments well before coming here. And I have listened to him and relied on his advice since he came here, and I appreciate the time that you have taken, Senator Allen, to be here. Please go ahead, sir.

PRESENTATION OF HENRY E. HUDSON, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, Senator Sessions. Thank you all for having this hearing. And I appreciate your kind words and your help on other judgeships and other matters that are important for people's liberty, including one who was incarcerated last year at this time in China. There are a lot of things this committee——

Chairman LEAHY. Incidentally, I admire your efforts on that because your voice was one of conscience and your voice was a steadfast and clear voice, and I appreciate that.

Senator ALLEN. Well, it helped a great deal to have your leadership to assist us in that cause.

My colleague, the senior Senator from Virginia, whom I learn from every day, I noticed how he came in, interrupted your rep-

artee here between the Senators and got to the briefing with the FBI Director. Senator Warner and I, when we are considering judges for the Eastern District of Virginia, which is a very important district—it has many significant cases. It has a rocket docket. They have the Moussaoui trial before it right now. The John Walker Lindh trial is in the Eastern District of Virginia in the Alexandria Division.

We interviewed many, many quality candidates and recognized how important it was to find the very best individual to promote to the President and present to the President for nomination. And I am very pleased that you are having this hearing. And, of course, I offer my support for the nomination of Henry Hudson to the United States District Court for the Eastern District of Virginia.

I have personally known Henry Hudson for several decades now. He has a long and distinguished career. I think it is great to see all the public service roles that he has played. He is here with his wife, Tara, and son, Kevin, and Kevin doesn't know this, but—well, I guess he does. Before Kevin was around, Henry started as a fire fighter, then was a deputy sheriff, and he has had a very long, distinguished career. In fact, he was elected in 1979 as Commonwealth's attorney for Arlington County, which, for a Republican, is no easy task, and, in fact, did such an outstanding job of good quality, he was re-elected by a large margin 4 years later.

In 1986, President Reagan selected him to serve as U.S. Attorney for the Eastern District of Virginia. He is credited with elevating the stature and visibility of that office with such prosecutions as Operation Illwind, which restored integrity to the field of defense procurement.

In 1992, Judge Hudson was appointed by President Bush to serve as Director of the United States Marshals Service, and he received outstanding awards and commendations there.

While I served as Governor, Mr. Chairman, as Governor you make appointments, not just judges but to commissions on matters that are important to the people of our Commonwealth and States. I asked, and Henry fortunately agreed to serve as chairman of the Criminal Justice Services Board while I served as Governor. He also was a key member of my Governor's Commission to Abolish Parole and Reform Sentencing. Later, I selected him to be a key member of the Virginia Criminal Sentencing Commission, and I can personally attest, due to his performance in those tasks, that his dedication, his work ethic, and integrity are just superb and his leadership is one that is very much needed in those areas as well as then showing what kind of a judge he would be, because since 1998 he has been a circuit court judge in Fairfax County, Virginia. He has that proven experience. Those who present themselves before the bar have been able to judge the judge, and there is bipartisan support. Democrats and Republicans, the evidence that Senator Warner mentioned earlier, all think he is a very firm but fair judge. That is what you would want.

And so you will find, Mr. Chairman, Senator Sessions, and other members of the committee, as you do your examination, you will find Judge Hudson to be calm, you will find him to be steady, you will find as you inquire, as I always do, what is your philosophy as a judge, that he has the proper understanding of what is the

right philosophy and what is the proper role of a judge: to administer the law, interpret the law fairly based on the facts of the case, not to create laws. That is the role of the legislative in partnership with the executive branch. He is a gentleman that you will find with proven integrity, proven scholarship, proven judicial experience and philosophy.

I again thank you for having this hearing and would hope that you would move as quick as possible to fill this vacancy with a gentleman that we all would be proud to call judge for the Eastern District of Virginia.

Chairman LEAHY. Well, thank you, Senator Allen. Of course, what is not stated but is obvious, his two biggest attributes are the strong support of you and Senator Warner. You are both highly respected on both sides of the aisle, and if he did not have your support, this committee would not be moving that expeditiously. We are moving expeditiously, so I thank you. Thank you for being.

Senator ALLEN. Mr. Chairman, if I may be excused, and I will present the evidence of Senator Warner as well.

Chairman LEAHY. Be on your way.

Senator ALLEN. Thank you.

Chairman LEAHY. Senator Carnahan has worked—I believe I can honestly say this—from the day she came here to lower the level of partisanship and to try to make things work the way they should, in the way that is best, not only for Missouri but for the whole United States. And she has certainly done that in the area of judgeships and appointments from the great State of Missouri, and I am so glad that you are here, and I would like to hear from you and then from Congressman Clay. And I apologize. These openings are taking a little bit longer than expected, but I do want to hear from both of you.

Please, Senator Carnahan?

PRESENTATION OF HENRY E. AUTREY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI, AND RICHARD E. DORR, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI BY HON. JEAN CARNAHAN, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator CARNAHAN. Thank you, Mr. Chairman. I appreciate this committee's steadfast effort to fill the existing vacancies in the Federal judiciary. The committee has moved expeditiously in scheduling today's hearing. I thank you for that.

I am especially pleased to introduce to you two Missourians that President Bush has nominated for positions on the United States Federal District Court. Dick Dorr is a partner at the Blackwell, Sanders law firm in Springfield, Missouri. Earlier in his legal career, he served in the United States Air Force. He has also demonstrated a strong commitment to the Springfield Bar Association as well as the Legal Aid Society of Southwest Missouri, and has been active in his church and community. Mr. Dorr has been nominated to serve on the United States District Court for the Western District of Missouri.

Judge Henry Autrey, who has been nominated for Missouri's Eastern District, was appointed by my late husband, Governor Carnahan, to serve as a Circuit Court Judge for the city of St.

Louis. This appointment followed many years of service as a local prosecutor and a legal aid attorney. Judge Autrey has also been active in the Missouri Bar and the Mound City Bar Association in St. Louis.

Both nominees may take great pride in the President's nomination and the committee's proceeding today. But I do not want to let this occasion pass without acknowledging another Missouri nominee who sought to serve on the Federal bench. Ronnie White will remain a symbol of partisan mistreatment. What happened to him still leaves many Missourians bitter about this process. And while I believe the mistreatment of Ronnie White deprived our Nation of a skilled jurist, we cannot let our lingering feelings interfere with the fair treatment of future nominees. The scheduling of this hearing today, Mr. Chairman, demonstrates your commitment to the fair treatment of these and all other judicial nominees that come before us.

Thank you very much.

Chairman LEAHY. Thank you. Thank you very much, Senator Carnahan, and thank you for the help you have given this committee in moving forward on judges.

Chairman LEAHY. Congressman Clay, we are always delighted to have you come over on this side of the Hill, and please go ahead, sir.

PRESENTATION OF HENRY E. AUTREY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI BY HON. WILLIAM LACY CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Representative CLAY. Mr. Chairman, Senator Sessions, thank you for allowing me this opportunity to come before you today to offer my unequivocal support for the nomination of Judge Henry E. Autrey to the U.S. District Court for the Eastern District of Missouri.

Judge Autrey is an excellent choice for the U.S. district court as he brings many significant personal and professional attributes to the Federal bench.

For the last 16 years, Judge Autrey has served with distinction on the bench of the 22nd Judicial Circuit in the city of St. Louis. In this capacity, he has presided over all civil and criminal matters within the jurisdiction of the circuit court, including trial and disposition of civil litigation and supervision of probation matters relating to criminal trial assignments.

Prior to his work on the bench, Judge Autrey served 10 years in the Office of the Circuit Attorney of St. Louis where he established and headed the Child Abuse Unit.

On the personal side, I have known Judge Autrey and his family for nearly 20 years, and I can attest that he is a man of unwavering integrity and one who possesses a deep sense of community and civic involvement.

He is a former member of the board of directors of the St. Louis Area Food Bank and a former board member of Aid to Victims of Crime. Judge Autrey currently serves on the St. Margaret of Scotland School Board. Judge Autrey's outstanding character, judicial expertise, and fair-minded approach are all qualities that will en-

able him to serve with distinction from the Federal bench. I believe this is a well-deserved appointment for both Judge Autrey and the citizens of St. Louis, and I look forward to his confirmation.

Thank you.

Chairman LEAHY. Thank you very much, Congressman Clay. And, again, thank you for being so patient, and I know you and Congressman Brady have a lot of other things going on as we are pushing toward this coming recess. But thank you very, very much for being here.

Chairman LEAHY. Congressman Brady, I am delighted to have you here. You honor us by coming over, and I thank you for that.

PRESENTATION OF TIMOTHY J. SAVAGE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA BY HON. ROBERT BRADY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Representative BRADY. Thank you, Senator. I thank you for allowing me to have a real brief presentation in front of you and Senator Sessions.

Chairman LEAHY. Take as long as you want.

Representative BRADY. I would also like to thank Senator Santorum and Senator Specter. I saw him on the way over. He told me that he had presented Timmy Savage to you, and he couldn't do it in a better way. He went through his credentials, so I won't bore you with that.

I would also like to tell you that it is fulfills me, makes me feel good that in the city of Philadelphia we make arrangements—some people make deals, but we make arrangements, and it was good to know that the arrangement was held when we changed Presidents, and I would like to thank the President for nominating Timmy Savage.

I have known Timmy Savage for 25 years. I have known him and his lovely wife, Linda, and his family for that long also. He is a sole practitioner, and that brings a unique experience to the Federal bench. He has tried a lot of cases on every single level. He had to do it himself. He is not part of a major law firm, and he has been extremely successful.

He has counseled me at all times. Sometimes I have taken that counsel and I have done well. The times I haven't taken it, I have gotten in a little trouble and had to go back to him and receive some more. But I am proud of him, as you all should be proud of him, someone who will aspire to the Federal bench. He was found well qualified by extensive investigation, and again, I thank the President and I thank you, Senator, for your consideration, and I thank all of you and hopefully you will have confirmation to my friend and someone who will do us proud to be on the Federal bench in Timmy Savage.

Thank you.

Chairman LEAHY. Thank you very much, Congressman Brady. And I am pleased to see the procedure they have in the Commonwealth of Pennsylvania. There have been others like that of long standing in a number of other States that have existed when there have been both Republican or Democratic Presidents. Unfortunately, the administration—I assume there is somebody here from

the administration; they do come by. Unfortunately, they have decided not to go and use them, and it has created a problem. I can think of several States where that has happened with commissions actually set up by Republicans, and now all of a sudden they don't want to use them. And I think it is unfortunate.

We do use similar ones in Vermont, begun by a predecessor senior Senator, Senator Stafford, who was a Republican. I was there as a Democrat, and we set it up so that there would be representation from both parties, plus representation from the bar association, and we had no idea what their party affiliations were. And it has worked out very well. We don't have that many judges in Vermont, but we have some darn good ones. And I appreciate what you have done. Thank you.

Representative BRADY. Thank you, Senator.

Chairman LEAHY. At this time we will enter into the record the statements of Senators Hatch and Thurmond.

We are going to take a 3-minute break so that we can re-set up the table, and then we will start with Mr. Smith.

[Recess 3:01 p.m. to 3:12 p.m.]

Chairman LEAHY. Mr. Smith, do you swear the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SMITH. I do.

Chairman LEAHY. Please be seated. And, Mr. Smith, you have members of your family here. Again, I know they have already been introduced once, but please introduce them again because I have a feeling that someday, somewhere in the family archives they will want to look back and see who was here.

STATEMENT OF LAVENSKI R. SMITH, OF ARKANSAS, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Judge SMITH. Thank you, Mr. Chairman. I have with me my wife, Trendle Smith; my daughter, Stacia Smith; and my son, Gabriel Smith. With me in spirit, of course, is my father, who is deceased, and my mother, who is 76 and unable to physically travel and be here. And I certainly know that they are with me.

Chairman LEAHY. I am sure somewhere your father is looking down with pride.

Judge SMITH. I firmly believe that.

Chairman LEAHY. I have the same feeling about my parents every day. Miss them every day, but have the same feeling.

Mr. Smith, did you have an opening statement you wish to make?

Judge SMITH. Nothing other than simply to express my gratitude for the privilege of being before the committee today.

Chairman LEAHY. Thank you very much. And could you pull the microphone just a little bit closer? Thank you.

For about a quarter of a century, of the different nominees I almost always ask questions about stare decisis and how strongly judges think they should bind themselves to that doctrine, and even whether the commitment to stare decisis may vary from court to court.

It is always easy to give the quick answer that it is the bedrock principle of our legal system that lower courts have to follow the

rules of superior courts. But I have read a Law Review article recently where the author, who is a respected law professor, asserts his belief that a lower court, when faced with case law it thinks a higher court would overturn if the higher court considered the case, should take the responsibility upon itself and go ahead and reverse on its own.

As I read it, the idea is the Supreme Court, for instance, has rules it follows about when to overturn precedent, and lower courts should be no less bound to follow those rules than they are to follow any other rule of a superior court.

Do you subscribe to this theory in which lower courts would have to somehow decide whether a higher court is going to overturn precedent? Or do you think they have the right to overturn the precedents of higher courts?

Judge SMITH. Mr. Chairman, I agree with, I guess, the general sense of things regarding the importance of stare decisis, that confidence in our judicial system is one of the most important things that binds our democracy. And I would not be of the view that one should as a lower appellate judge take lightly the responsibility to follow previously decided cases to maintain consistency within our law.

Chairman LEAHY. Well, you say you generally follow the principle, but so does this law professor generally follow the principle of stare decisis, but raises the theory that if a lower court somehow intuits the idea that the circuit, for example, is going to go a certain way, then they have got a case before them that they should go that way really on their own rather than make the case go all the way up, get reversed, and go back.

Do you subscribe to that more flexible thought of stare decisis?

Judge SMITH. As I sit here before you this afternoon, I can't consider or think of a specific case where I would vary from the responsibility to follow established precedent as an appellate judge.

Chairman LEAHY. Now, in your case, that would be, of course, your own court of appeals, but the court of appeals itself under certain circumstances can and has the ability to overturn its own precedents. Is that not correct?

Judge SMITH. Yes.

Chairman LEAHY. But would you hold that they, however, even in that regard, would be bound by the precedent of the only court above them, the Supreme Court?

Judge SMITH. Absolutely.

Chairman LEAHY. And without judges following—and I don't mean to put words in your mouth, so please feel free to correct me if you disagree. But would it be safe to say that without courts following stare decisis, you feel that there would not be the kind of continuity and consistency in the law that our courts should have?

Judge SMITH. Yes. My sense would be that overturning established precedent should be something that should occur very rarely.

Chairman LEAHY. Now, you know yourself that sometimes you look at an opinion of an appellate court, and you could find a kind of fractured opinion. It is sometimes hard to discern precisely on what a majority of the court has really agreed. It may agree on the final ruling, but you may have several different decisions there,

and it is pretty hard to tell what is the rule of law. The Sixth Circuit recently had a long discussion about a case like that.

What does the lower court do if they have a fractured opinion?

Judge SMITH. Well, that sometimes happens, of course. Our Supreme Court produces plurality opinions and opinions which reflect not a clear majority opinion. In those cases, it would have to be a very clear and very thorough analysis of the specifics of the case before the lower court determining just how close and just how—close in fact and law that case actually is to the established precedent. And certainly if it is, as the law professors would say, on all fours, then certainly that weighs heavily in favor of maintaining established rules.

Chairman LEAHY. Would it be your philosophy that judges should interpret the law, not make the law?

Judge SMITH. Yes.

Chairman LEAHY. Legislative bodies make the law.

Judge SMITH. Yes.

Chairman LEAHY. I ask that because in the past few years the Supreme Court struck down a number of Federal statutes, most notably several designed to protect the civil rights and prerogatives of our most vulnerable citizens. They have said this goes beyond Congress' power under Section 5 of the Fourteenth Amendment. The Supreme Court has also struck down a statute as being outside the authority granted to Congress by the Commerce Clause. And these cases have generally been described as creating some kind of new power for State governments, Federal authority being diminished because the Supreme Court has basically rewritten the laws of the Congress or set them aside and creating new powers for the State.

At the same time, the Court has issued several decisions most notably in the environmental area where they grant States significant new authority over the use of land and water, notwithstanding longstanding Federal regulatory protection of the environment.

So taken individually, the cases have raised concerns about the limitations imposed on congressional authority. Taken collectively, they appear to reflect a new federalism crafted by the Supreme Court where it would alter fundamentally the structure of our Government.

Do you have a view on these developments?

Judge SMITH. Not in the particular developments that you describe in terms of the individual laws and issues that may be at issue in the question you raise. What I would respond to is, as part of our judicial system, the principle of judicial review of the acts of a legislative body certainly has a long and storied history in our legal system. The right or the power of an appellate court to declare unconstitutional an act of Congress or a State legislative body is something that should not be taken lightly, shouldn't be done on any basis that is not clearly an indication—where there is clear indication that the legislative body has acted outside the bounds of its authority under the Constitution.

Chairman LEAHY. Well, the Supreme Court, for example, has basically done away with a great deal of our copyright and patent laws, and while it is in the Constitution as it deals with states, and

now we have a real problem. They basically said the states can steal somebody's copyrighted material and use it for themselves and benefit by it and nothing can be done. We have a pretty activist Supreme Court.

Judge SMITH. My approach would be to recognize that Acts of Congress are presumed constitutional and accord them the proper regard and deference that is required in a system of government of three branches such as we have, and would not in any measure view the role of the Court that I would serve on, if I am confirmed by this body, I would not view that as a super legislature to easily and lightly overturn or discard the acts of this body.

Chairman LEAHY. So you would look at least, ab initio, you would look at a congressional statute as being appropriately enacted?

Judge SMITH. Yes.

Chairman LEAHY. Realizing of course the courts can still overturn. I mean if the Congress acts outside the Constitution or the Congress exceeds its authority, they could do that, but it is your view that the law as passed, at least it starts off with a presumption that it was passed validly.

Judge SMITH. Yes.

Chairman LEAHY. And certainly I understand that if the U.S. Supreme Court had set aside a congressional statute, neither one of us questions the fact that then you are bound by that; is that correct? Are you bound by the—if you have again a case on all fours from the Supreme Court, you are bound by that?

Judge SMITH. Yes.

Chairman LEAHY. Thank you. Now you practiced law for 7 years. I was looking back through the back ground material you gave us, the types of clients you had, the kind of cases you handled, did not give the opportunity to spend a great deal of time in Federal Court. In fact during the 7 years you practiced law, the matters you did have in Federal Court were for the Resolution Trust Company; am I correct in that?

Judge SMITH. Yes, Resolution Trust Corporation.

Chairman LEAHY. Corporation, I am sorry. Have you had experience in the Federal Appellate Courts including the Eighth Circuit?

Judge SMITH. Yes.

Chairman LEAHY. You have?

Judge SMITH. I have attended hearings at the Eighth Circuit in conjunction with those cases for Resolution Trust Corporation.

Chairman LEAHY. Have you argued cases in the Federal Appellate Courts?

Judge SMITH. No, I have not.

Chairman LEAHY. So the reason I ask this I think one of the great strengths of our Federal Bench is that people come from a whole lot of different categories. Quite often somebody going on the Court of Appeals, going on there from having served a number of years as a Federal District Judge or as an Appellate Judge of a State Court or one who spends a lot of time before it, you have been nominated for the seat of one of the most respected jurists in this country, Judge Richard Arnold, and one with decades of experience and all. You are going from 7 years of practicing law, and

never having argued a case before a Federal Court of Appeals, and with limited courtroom experience.

Now, there are those who would say that that is making a large jump to the Court of Appeals as compared to another step initially. How would you respond to that because obviously you have heard those statements. I want you to have a chance. You do not often get a chance to answer critics, so here is your chance. Here is your microphone.

Judge SMITH. Thank you, Senator. I would respond this way. The experience that I have had I do believe qualifies me to serve not only the trial experience that I had, not only the attending experience that I had before the Eighth Circuit, and participating in the preparation of those appeals, but also my experience in other areas of Federal law, not specifically related to the actual practice of law. I served 2 years as Chairman of my State's Public Service Commission, regulating our State's electric, natural gas and telephone companies. I am now currently back in that capacity, and that position has required me to gain substantial familiarity with a number of Federal laws including the Federal Power Act, the Public Utilities Holding Company Act, the Telecommunications Act of 1996 as well as numerous dockets which are currently pending before the Federal Energy Regulatory Commission. And in fact, I would submit that many of the issues that currently are in the Federal Courts relating to energy and telecommunications are as federally significant at present as patent law or any number of other Federal areas that an attorney may have obtained legal practice and qualification in in years past. So while my resume may not indicate that I tried a lot of cases in Federal Court, I certainly do have familiarity with Federal procedure and I do have familiarity with a number of substantive areas of Federal Law.

Chairman LEAHY. Well, let me ask you this. You were appointed for a short time to the Arkansas Supreme Court; is that right?

Judge SMITH. Yes.

Chairman LEAHY. And then you left that to run for a position on another court; these are elected positions in Arkansas, am I correct?

Judge SMITH. That is correct.

Chairman LEAHY. During that time there was a case, *State* v. *Robbins*, where the Arkansas Supreme Court presided over a death penalty case in which the defendant waived the right to appeal. The majority in that case noted that nearly every other state that has the death penalty requires an automatic review of the death sentence, whether or not a defendant waives the right to appeal. You dissented. Why?

Judge SMITH. It had to do with the specifics of the *Robbins* case. The facts of the *Robbins* case involved a young man who admitted I very graphic and clear terms in an unquestioned manner that he had committed a very brutal homicide upon a young woman. All the facts indicated there was not one ounce of question of doubt as to the culpability of the defendant for the crime. Under the circumstances of that case and compliance with the precedents under the—the then existing precedents under previously decided cases of the Arkansas Supreme Court. It was not my view that any additional appellate review would have provided any additional process

for the defendant that would provide any reasonable alternative to the outcome.

Subsequent to that, that case was reviewed. It did come back to our State Supreme Court. I joined unanimously with the remainder of the Court in that holding on review as that case came back to us on subsequent.

Chairman LEAHY. But originally you dissented from the majority opinion which was to allow the appeal; is that correct?

Judge SMITH. That is correct.

Chairman LEAHY. It is interesting because in the past few years 100 people on death row have been released within days from being executed where they found they had the wrong person. I can think of a couple where the people on death row had confessed in great detail to having committed the crime, and it was subsequently found they were not anywhere near the crime. They were of limited intellectual ability. Suggestion was made, like Senator Sessions, I am a former prosecutor. I remember that we had one person especially that every time any major crime was in the paper, he was immediately in the police station as soon as the paper came out, "I did it." I mean we would tell him, "Well, that happened 6 hours ago in California or Hawaii or something and we are in Vermont." He said, "Well, I did it." And there are people like that, that at least where DNA is shown, it was not them. Even though you know and I know that a lot of cases will have no DNA. But how do you feel considering the number of mistakes that have been made on death penalty cases, do you think that there should be an automatic review of death sentences by appellate courts?

Judge SMITH. Yes, I do.

Chairman LEAHY. Thank you. I will have further questions, but I want Senator Sessions to have a chance.

Senator Sessions?

Senator SESSIONS. Judge Smith, we are glad you are here. There can certainly be no question that you are qualified for the Eighth Circuit. You began your legal career as a staff attorney for the Ozark Legal Services, where you provided legal representation to the poor in Northwest Arkansas. After 4 years doing that, you opened your own law firm and handle all sorts of cases, including business law, real estate, domestic relations, workers compensation, public benefits and estates, just to name a few. You earned a reputation as a lawyer such that in January 1999, Governor Huckabee appointed you to the Arkansas Supreme Court.

Currently you serve on the Arkansas Public Service Commission, which is responsible for regulating the State's electric, gas and telecommunications industries. Complex legal issues come up there, do they not?

Judge SMITH. Very complex.

Senator SESSIONS. They certainly do. Your nomination is widely and bipartisanly supported in your home state. I think the Arkansas Democrat Gazette puts it best. It said, Judge Smith possesses, quote, "integrity, intelligence and compassion," and I agree. And I will support you, Judge Smith, and we will work with our colleagues, and we are glad that we have had this hearing, and we hope to be able to move you timely to the floor for a vote. I know

you have been waiting for a year now, and you will be glad to move forward.

I also was pleased to note that you had been unanimously rated qualified by the American Bar Association. You know, Senator Leahy asked you about the standards for review on appeal, and I think you answered precisely correct, in accord with a great legal tradition of the United States to follow established precedent as you are able to do, and leaving it to the Supreme Court to change precedents. There will be occasions when a case will come before you and there is no appellate law there, and so you will have to make the first decision in the matter, but normally and frequently our appellate courts are required on a daily basis to follow the opinions of the Supreme Court and I am glad you are committed to that.

Mr. Chairman, I do not think you would suggest, and I certainly do not, that merely because a Court strikes down a Federal statute that means that you are an activist Court, that sometimes statutes even we in this Congress pass are not constitutional. If they are not constitutional, then the Court has a duty but to strike them down. And our constitutional framework does call, for example, for an interstate commerce nexus before certain Federal actions can be taken and I believe that those words have meaning, that the Federal Government is a government is a government of limited powers and so on occasion when we exceed those powers, we expect the Court to strike them down.

What would be improper, I think, Judge Smith, is if you had a belief in an outcome in a case and you really thought that the legislature should have done thus and so or a jury should have done thus and so or a lower court should have done something different from what they did, are you able, and will you commit to following the law even if the outcome of the case might be different then you personally would favor?

Judge SMITH. I certainly do.

Senator SESSIONS. I think that is the key to any judge showing restraint and respect for law. If we do not respect the law, if we do not respect it as it is, if we think any judge can alter it for their highest ideals they may have, it means the next judge can do it too, and the next judge and the next judge, and pretty soon the legal system gets undermined, and it gets to be a dangerous matter, particularly when, as I think we all understand with Federal Judges, the appointment is for life, and you are not any more answerable to the public as you are as most state judges are.

Mr. Smith, you have had quite a bit of litigation and experience in court, and you have tried cases, have you not?

Judge SMITH. Yes.

Senator SESSIONS. You have had some interesting positions, but you have dealt with individual human beings who have problems with the legal system, but you also have been to court and handled cases in the courtroom.

Judge SMITH. Yes, sir.

Senator SESSIONS. Many cases.

Judge SMITH. Yes, sir.

Senator SESSIONS. Well, I think that is important. We have had nominees here that have never been to court, and I think when

that occurs, we need to look for some countervailing strengths to overcome that weakness, and I believe you have broad-based support from your community. Both your Senators strongly support. Obviously the Governor of Arkansas is a believer in you. Your newspaper supports you.

Mr. Chairman, I think we have a good nominee. I appreciate you moving it, and I appreciate your good questions.

Chairman LEAHY. Good to see Senator Sessions, following his withering cross-examination, has maintained an open mind.

Senator Durbin.

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

And, Judge Smith, thank you for joining us today and thank you for your family joining us as well.

The office which you are seeking is a very important one. It is the second highest Federal Court in the land. It is a lifetime appointment, and if some of the questions which you are facing today seem probative, it is because for some of us, it is the first time we have had a chance to meet with you and to really kind of explore what you are about, what your values are, and that is of course very important to us as we get into this discussion.

Let me ask you, many years ago when you went into sole practice you said to the Arkansas Gazette, if you are properly quoted here, that you had a sincere desire to have an influence on law and the way things were being decided, and to approach it from a Christian perspective.

Can you explain to me what you meant by that statement?

Judge SMITH. By that statement I mean simply this. The approach that I take to life is an approach that first gives due regard to everyone, recognizing that everyone deserves respect and courtesy. And in my practice of law I attempted to accord the courts before whom I practiced due regard and respect, the people for whom I served as counsel, to give them due regard and respect, to take seriously the legal concerns that they brought to me and entrusted into my care, and that I would take as a solemn obligation to perform my service for them to the very best of my ability.

Senator DURBIN. And of course as we look at your legal career, there are many times in legal services and in the law practice when you did represent—I remember from my own practice, you were representing some clients that were not the high rollers.

Judge SMITH. Definitely not.

Senator DURBIN. And they were people who were coming in with basic problems with automobiles and homes and things, and you were their attorney, and that speaks very well of you and your values.

I guess the point I am trying to get to is this. On the Circuit Court you are of course going to be facing cases that involve many different American citizens with different values and different backgrounds. And some of them will not be Christians, they will be of other religious persuasions. I do not want to put words in your mouth, but do you feel that there is something different about your view of law, based on your religious belief, than the view of law that other Americans might have?

Judge SMITH. No. No, I do not think that there would be anything superior or substantially different about my approach to that

of someone of a different faith or someone of no faith at all, but who approached the law with a sense of due regard for the unique privilege that it accords one to be a servant to others and to be entrusted with responsibilities in advocating and defending the rights of others.

Senator DURBIN. I think that is exactly the right answer. I hope others do too.

Let me ask you about the Rutherford Institute. You were characterized as the Volunteer Executive Director of the Rutherford Institute in Arkansas for a period of time, and I think it was also a period of time when you had your own private practice.

Judge SMITH. Yes, that is correct.

Senator DURBIN. And as a volunteer, you clearly were not making a living as the Volunteer Executive Director. What is the Rutherford Institute?

Judge SMITH. The Rutherford Institute, at least during the time that I had any affiliation with it, was a nonprofit civil liberties organization that primarily focused on First Amendment family issues as well as some value of life issues.

Senator DURBIN. Can you give me example of the types of legal issues that you dealt with with the Rutherford Institute?

Judge SMITH. Some issues may have pertained to freedom of assembly, freedom of religion. I dealt in a number of advisory roles to churches and avoiding entanglements with the law, supervision of day cares, et cetera, to make sure that they were properly carrying out their responsibilities. The one case that I was a named counsel on for the Rutherford Institute was a case filed in Little Rock, I believe it was *Unborn Child Amendment Committee* v. *Ward* was the citation of the case, name of the case.

Senator DURBIN. Before we get to that case, what can you tell me about the Rutherford Institute? How are they financed?

Judge SMITH. To my knowledge, and at least during the time that I had any affiliation with Rutherford, which is now close to 10 years past, it was entirely donation.

Senator DURBIN. Were there any major sponsors, individual, corporate and otherwise?

Judge SMITH. I really do not know. I do not—there were none that I was aware of at the time that I had any affiliation with Rutherford.

Senator DURBIN. How did you become affiliated with them?

Judge SMITH. Through contact with the founder of the Rutherford Institute, Attorney John Whitehead.

Senator DURBIN. And he contacted you personally?

Judge SMITH. Yes.

Senator DURBIN. Is he from Arkansas?

Judge SMITH. He attended law school in Arkansas.

Senator DURBIN. But he lives in another state now?

Judge SMITH. Yes, I believe he lives in Virginia.

Senator DURBIN. Let me ask you about that case. And I guess the one thing that the staff found interesting is when we asked you to identify the 10 most significant cases that you had been involved in, you did not mention that case, and this was a case before the Arkansas Supreme Court on a very important issue involving a

woman's right to choose or the issue of abortion. Is there a reason why you did not list that case?

Judge SMITH. Yes. I chose to list the cases that I had some significant legal involvement with other than I was named as counsel in that case, but I did very little of the actual litigation. And so the cases that I listed were cases that I handled principally or was significantly involved in a substantial way in the actual legal work.

Senator DURBIN. In the report of the case before the Supreme Court of Arkansas, you were listed as the lead attorney.

Judge SMITH. That would have been, David Nixon would have been the lead attorney in——

Senator DURBIN. He is listed as the next name. Lavenski R. Smith and David G. Nixon, Springdale, for appellants.

Judge SMITH. He actually argued the case. I did not argue the case before the Supreme Court.

Senator DURBIN. I would like to, if I have the time, spend a minute on this case, because it is an interesting issue that you may face as a Circuit Court Judge. First let me ask you this. As Senator Sessions has said, you are going to be asked to uphold some laws that you may disagree with. Now, the Circuit Courts of our country consider 50,000 cases a year, and many times their decisions lead to changes in the Court opinion of law. Can you tell us your view now of *Roe* v. *Wade*, the Supreme Court decision involving a woman's right to choose, and how you would enforce that decision?

Judge SMITH. Well, as I understand the current precedence of U.S. Supreme Court Roe and those cases decided subsequent to it are the law of the land, and it would be my obligation, and I would assume that obligation fully, to apply that law and enforce it. It would be my obligation to follow the precedence of the U.S. Supreme Court.

Senator DURBIN. Did you feel the position you took in this Ward case was consistent with *Roe* v. *Wade*?

Judge SMITH. At the time, yes. The case was not a case that I viewed in any way as an attempt to somehow not follow the U.S. Supreme Court. It was a case based on the Constitution of the State of Arkansas.

Senator DURBIN. And of course the Supreme Court of Arkansas ruled against you in that case and said that your legal argument did in fact violate the Arkansas, I guess, Amendment to the Constitution involving the funding of abortion; is that correct?

Judge SMITH. Well, the—as I recall, the holding of the State Supreme Court was that there was not—it was not demonstrated that the actions of the hospital in question were in contravention of the Unborn Child Amendment.

Senator DURBIN. That is right. And I think they said specifically that the Arkansas Constitution, the Amendment that was agreed to by the people of Arkansas, said no public funds were used to pay for an abortion. You argued to the Court, I believe, that the University of Arkansas Medical Sciences Facility, because it was sustained by public funds, was at least indirectly in violation of that constitutional provision. Was that the basis of your argument?

Judge SMITH. That was essentially the argument.

Senator DURBIN. And the Supreme Court ruled otherwise.

Judge SMITH. Yes.

Senator DURBIN. What I am trying to get to is this: I can understand as a former attorney and trial court lawyer and such, you seek an advocacy position for your client or you are not doing the job for them. Now, I am trying to put you in this new role as a Circuit Court Judge and ask you, as you step back from the fact pattern in this case, do you have any problems with their conclusion that *Roe* v. *Wade* and the Arkansas Constitution, consistent in terms of guaranteeing a woman's right to choose?

Judge SMITH. Senator, if I am fortunate enough to be confirmed by this body, I will enforce the precedence of the U.S. Supreme Court and would view that as my solemn obligation.

Senator DURBIN. [Presiding] OK, thank you. Thank you very much.

I do not have any further questions. I do not know if Senator Sessions does, or if Senator Leahy when he returns.

Senator SESSIONS. Yes, briefly on the subject, because these are issues that people care about, but really I think most of the time we are just talking about simple legal issues that people disagree on. Your concern was that there was a Arkansas Supreme Court provision adopted by a vote of the people of Arkansas, that would prohibit public funds for the purposes of performing abortions except when the life of the mother is at stake. Is that basically correct?

Judge SMITH. Yes. It was an Amendment to the Arkansas Constitution.

Senator SESSIONS. And so the question was whether or not in utilizing public hospitals that are funded by the State, that that was in violation of that Constitutional Amendment, and the Arkansas Supreme Court held that contrary to your argument or the argument of attorneys on your side, that funds did not prohibit the use of facilities, but did agree with you that to the extent, and I am quoting now, quote: "To the extent a State hospital incurs actual cost in performing and abortion and these costs go uncharged and unpaid by the parties, public funds are being used to pay for abortions," close quote, in violation of it.

So anyway it is a complex issue, and I do not think your position was out of leftfield, that you are a lawyer representing a action and taking it to Court, and you got your day in Court, and the Court agreed with you on some and did not agree with you on others.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

And Senator Durbin may have asked this, but am I correct that you are not currently affiliated with the Rutherford Institute in any way?

Judge SMITH. That is correct.

Chairman LEAHY. Were you affiliated with them in any way at all except from 1991 to 1993?

Judge SMITH. No. Those dates I think are accurate, but the only affiliation I had was temporarily as a State Executive Director, and Rutherford abandoned its state chapter organization many years ago.

Chairman LEAHY. Any further questions?

Senator SESSIONS. Can I followup on one point?

Chairman LEAHY. You can take all the time you want; you are good enough to stay here for this hearing.

Senator SESSIONS. I believe you were asked about when you began your legal services career. You said you like to bring a Christian perspective to your practice. Was it legal services career or——

Judge SMITH. No, that was—I had begun my private practice.

Senator SESSIONS. Your private practice. Did that mean that you would not seek to advocate the best legal issues and positions possible for your client, so in any way that you would fail to follow the law as written?

Judge SMITH. No, it did not mean that at all.

Senator SESSIONS. I presume it had more to how you intended to relate to your clients?

Judge SMITH. Precisely.

Senator SESSIONS. And your personal caring for them.

Judge SMITH. Senator, if I can give you an example, I had a gentleman come to me for a divorce. His wife had filed a divorce complaint against him. We began the process of attempting to work out an amicable dissolution of that marriage. He came back to me another day completely livid with how things were progressing, and stood in front of my desk and asked me could I get mean, meaning, I suppose, that he would like for me to take a very aggressive stance in the contest of his divorce proceeding. My approach, and I explained it to him this way, "Yes, I can get mean if that is"—and I told him what that would mean in terms of how it might be commonly understood by those in the practice of the law. But I told him that I would not, and that that was not what was in the best interest of his children, and of the dissolution of his marriage. And we discussed it, discussed the pros and cons to how—the alternatives to approach his case. And after he calmed down I think he saw that the appropriate way to continue the case was not to acerbate the emotions of the parties.

Senator SESSIONS. I think I hear more judges and older lawyers tell me that there is too little of that in the practice today, too little civility, too little concern, and too much concern for winning. I think you have got the kind of values that would be helpful to our judicial system. Thank you very much.

Chairman LEAHY. Mr. Smith, when I look at a judicial nomination, I look at a number of things, and I voted on—of those that have come before us, I voted for probably 99 percent of President Ford's, President Carter's, President Reagan's, former President Bush, President Clinton's, and now all but a couple of the ones that have come here so far from the current President Bush. But the issue I look at and what determines my vote is obviously the questions of qualification, how much experience has a person had, how prepared are they to walk out of this room today and into that courtroom tomorrow, but how they treat people who come before them. I do not particularly care whether a person is a Republican or a Democrat when they are coming to go on the bench. What I want to know is if I come into that courtroom as a litigant, or my neighbor who has different political affiliations than I do comes in that courtroom as litigant, or whether it is a rich person or a poor person, plaintiff or defendant, popular cause or unpopular cause, are they going to be treated the same? Are they going to look at

their judge and say, "I know I will have a fair hearing. The Judge and I may come from different backgrounds. The Judge and I may have different past political affiliations, whatever it might be. But I know I am going to get treated fairly. I am going to win or lose based on what my case is," which is of course what the courts are supposed to be. They are not supposed to be somebody shifted ideologically to the far right or ideologically to the far left. They are supposed to be there so everyone, so any person in this room or any person walking down the street out front could look at whatever court that was and say, "I am going to be treated fairly." And when I voted no on a judge, basically it wa because I felt they could not do that.

I mean a judge, a Federal Judge has a very powerful position, and everybody is always going to say the right things when they come here. And once they are confirmed, they are there for life. We have had some nominees come here and told us one thing and once they got confirmed, they had done something else. There is not much we can do about it. But if you are confirmed, I would hope you would think there is more than just the legal issues, it is a question of forcing yourself to be absolutely fair. What if somebody comes in with a position you may feel is an unpopular one, or a popular one, either way, you have got to be even-handed. In other words, you do not hold the unpopular position against somebody any more than you would hold the popular one for them. You would have to look at it really straight down the middle. Otherwise our Federal Court systems fall apart. We have a Federal Court system that is respected when it is seen as impartial and independent. The public loses that respect when it is seen otherwise.

Judge SMITH. I agree entirely.

Chairman LEAHY. Thank you. Mr. Smith, I would like to have you and your family here—are there further questions? The record of course will stay open for Senators on either side, Senator Hatch or anybody else to submit questions if they want, and I thank you for being here. I certainly do not feel that you have to stay longer. By this time probably everybody with you and your family probably stayed long enough, and we will recess for 3 minutes while we set up the table for the panel of the District Judge nominees. Thank you, sir.

Judge SMITH. Thank you very much for your consideration.

[The biographical information of Judge Smith follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Lavenski Roy Smith

2. Address: List current place of residence and office address(es).
Residence: **Little Rock, Arkansas**
Office: **1000 Center Street, P.O. Box 400, Little Rock, AR 72203-0400**

3. Date and place of birth.
October 31, 1958 in Hope, Arkansas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married. Spouse: Trendle Joyce Smith; Her maiden name was Scott. She is a social worker by education and is employed part-time as Activities Director for Parris Towers, a senior citizen public housing facility. She works for an organization known as "SCAT" which stands for Senior Citizens Activities Today. The address is 1800 Broadway, Little Rock, AR 72206.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
College: University of Arkansas, Fayetteville, Fall 1977-Spring 1981
Degree: Bachelor of Arts, Psychology with honors, May 1981
Law School: University of Arkansas, Fayetteville, Fall 1984-Spring 1987
Degree: Juris Doctor, May 1987

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.
1981-1984 Harmony Building Maintenance, employee
1985-1987 Hall, Wright and Morris Law Firm, law clerk
1987-1991 Ozark Legal Services, staff attorney
1991-1993 Rutherford Institute of Ark., volunteer-officer
1991-1994 Smith Law Office, proprietor
1994-1996 John Brown University, Assistant Professor

1994-1997 Partners for Family Training, partner and trainer
1996-1997 Governor's Office, Regulatory Liaison
1997-1999 Arkansas Public Service Commission, Chairman
1999-2000 Arkansas Supreme Court, Associate Justice
2001-now Arkansas Public Service Commission, Commissioner

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.
Arkansas Bar Foundation Scholarship, 1985-87

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.
Arkansas Bar Association
American Bar Association, former
American Inns of Court, W.B. Putman Chapter, former
W. Harold Flowers Law Society
Arkansas Supreme Court, Technology Committee, former
Arkansas Supreme Court, Client Security Fund Committee
Amendment 80 Implementation Committee, Arkansas Bar Assoc.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
Lobby: National Association of Regulatory Utility Commissioners
Other: Mission Blvd Baptist Church, Fayetteville, Arkansas
Volunteer Organization for Central Arkansas Legal Services
Arkansas Alumni 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.
Arkansas Supreme Court, 1987-present
U.S. District Court, Eastern & Western District Courts of Arkansas, 1987-1997

United States Courts of Appeal, Eighth Circuit, I have been inactive in federal court since 1998 due to full-time state employment as a utility commissioner and as a state court judge.

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 have I edited any. Speech-Hempstead County Law Day-May 2000; Speech on Legal Ethics to the Arkansas Workers' Compensation Commission Annual Meeting.

13. Health: What is the present state of your health? List the date of your last physical examination.
I am in good physical condition. My last complete physical exam was in August 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.
Associate Justice, Arkansas Supreme Court. I was appointed by the Governor to complete the term of retiring Justice David Newbern. The Supreme Court is the highest court of record in the State of Arkansas. It is the final state legal authority on matters of the Arkansas Constitution and state 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). **a) *Arkansas Department of Human Services v. Ferrel*, 336 Ark. 297, 984 S.W.2d 807 (1999).**

b) *In the Matter of $3,166,199. Arkansas Highway Police v. Crittenden County*,337 Ark. 74, 987 S.W.2d 663 (1999)
c) *Buchte v. State of Arkansas*, 337 Ark. 591, 990 S.W.2d 539 337 Ark. (1999).
d) *Grine v. Board of Trustees*, 338 Ark. 791, 2 S.W.3d 54 (1999).
e) *Rushing v. State of Arkansas*, 340 Ark. 84, 8 S.W.3d 489 (1999).
f) *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W. 3d 531 (2000).
g) *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000)
h) *Showmethemoney Check Cashiers Inc.*, 342 Ark. 112, 27 S.W.3d 361 (2000).
i) *State of Arkansas v. Robert Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000).
j) *Cambiano v. Neal*, 343 Ark. 691, 35 S.W.3d 792 (2000).

(2) **None of these opinions have been reversed by the U.S. Supreme Court. b) and g) were appealed but cert denied.**

(3) **See, *Buchte*, supra, and *Cambiano*, supra. See also, *Mclennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999) and *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000).**

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
Chairman, Arkansas Public Service Commission Jan,1997-Dec,2000. Appointed
Commissioner, Arkansas Public Service Commission Jan,2001-present. Appointed

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the

court, and the dates of the period you were a clerk;
I have not served as a judicial clerk.

2. whether you practiced alone, and if so, the addresses and dates;
Yes, I had a solo-practice. I founded and did business as Smith Law Office from July 1991 until August 1994.My address was United Federal Bank, Suite 250, 2600 S. Thompson, Springdale, Arkansas 72756.

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) Hall, Wright and Morris*, 30 N. College Ave., Fayetteville, Arkansas 72701 from Spring, 1985 until Summer 1987. I served as a law clerk.**

***b)Ozark Legal Services*, 4083 N. Shiloh Dr., Fayetteville, Arkansas 72703 from September 1987 until July 1991. I was employed as a staff attorney providing legal representation to the poor.**

***c)Governor's Office*. State Capitol, Little Rock, Arkansas. I served as the Regulatory Liaison for the governor from July 1996 until January 1997. I interfaced on behalf of the Governor's office with several regulatory state agencies including the Public Service Commission, the Securities Commission, the Labor Commission, the Insurance Commission and the Labor Department**

***d)Arkansas Public Service Commission*, 1000 Center St., Little Rock, Arkansas 72203. From January 1997 until January 199 I served as Chairman of the commission. There, I with my two fellow**

commissioners, regulated the State's electric, gas and telecommunications industries.

e) *Arkansas Supreme Court,* 625 Marshall, Little Rock, Arkansas 72201. From January 1999 until January 2001, I served as an Associate Justice completing the term of a retiring justice. I authored several dozen majority opinions and participated in the decision-making process for hundreds of others. I also served as the Court's liaison to its technology committee and its client security fund committee.

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?

1987-1991 Ozark Legal Services, I did poverty law representing poor citizens of Northwest Arkansas. My areas of emphasis were juvenile law and consumer issues.
1991-1994 Private law practice, As a solo-practitioner, I maintained a general civil practice in a variety of subject matters including business law, real estate, domestic relations, worker's compensation, public benefits and decedent's estates.
1994-1996 John Brown University, as an Assistant Professor, I taught business law and business ethics and a pre-law course.
1996-present Government service(see above)

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

My typical clients were low to middle income individuals and families but I represented clients across the socio-economic spectrum. I had some commercial clients as well. I also served as outside counsel for the Resolution Trust Corporation.

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 occasionally. When at Ozark Legal Services, I appeared in court frequently. In private practice, I appeared in court less occasionally, as I did transactional work as well as litigation. When I began to teach, I appeared in court infrequently. After beginning to work for the State of Arkansas, I ceased appearing in court for clients.

2. What percentage of these appearances was in:
(a) federal courts;
5%
(b) state courts of record;
85%
(c) other courts.
10% administrative agencies

3. What percentage of your litigation was:
(a) civil;
98%
(b) criminal.
2%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
I settled the vast majority of my litigated cases. I do not know the precise number of cases tried to verdict but estimate that the number would be no more than a dozen.

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.

1. *Resolution Trust Corporation v. Eason*, Federal lawsuit against former directors and officers of a defunct savings and loan institution seeking recoupment of multi-million dollar losses caused by alleged negligent lending practices. I served as outside counsel local counsel for the RTC. I worked hand in hand with the lead counsel firm, Boesche, McDermott & Eskridge and the RTC house counsel. During the trial phase I served as second chair trial counsel and examined the RTC's expert witness on lending practices.

a) 1992-1993
b) U.S. District Court W.D. Fayetteville, Judge H. Franklin Waters
c) Boesche, McDermott & Eskridge- Brad Beasley, Lance Stockwell, Co-counsel
Suite 800 Oneok Plaza
100 West Fifth St.
Tulsa, Oklahoma 74103; Phone-918-583-1777
Davis, Cox & Wright,19 E. Mountain, Fayetteville, Arkansas- Jack Butt-opposing counsel 501-521-7600
Also, Matthew Horan of Smith, Maurras, Cohen & Redd 510 N. Greenwood Fort Smith, AR 72901. Phone: 501-782-1001

RTC, 7400 W. 110th, Suite 400
Overland Park, KS 66210-2346
Neysa Day-RTC counsel 913-344-8136

2. *Resolution Trust Corporation v. Armbruster*
Similar litigation to that described above but revolving around the dissolution of First American Savings & Loan in Ft. Smith. I served in the same capacity as in the previous case. However, the case was resolved without trial.
a) 1992-1994
b) U.S. District Court W.D., Fort Smith

c) Lance Stockwell, Brad Beasley, Neysa Day co-counsel Opposing Counsel-Williams & Anderson, 111 Center, Little Rock, AR 72201, 501-372-0800;Phil Anderson and Leon Holmes.

3. *Resolution Trust Corporation v. Benafield,*
Similar litigation to Eason & Armbruster but revolving around the dissolution of Savers Savings and Loan in Little Rock, Arkansas.
a) 1992-1994
b) U.S. District Court E.D., Little Rock, Judge Stephen Reasoner
c) Boesche, McDermott & Eskridge-Lance Stockwell and Brad Beasley co-counsel. Opposing counsel consisted of Phil Anderson, and Leon Holmes mentioned above and also included Phil Kaplan, 415 Main Place, Little Rock, AR 72201; 501-372-0400 and Clayton Blackstock, 1010 W. 3rd Street, Little Rock, AR 72201; 501-378-7870

4. *Thurston v. Horton*, Civ 93-452-2
Lawsuit by home owner against seller for misrepresentation. I represented the plaintiff who sought approximately $70,000 in damages. The case ultimately settled with the plaintiff receiving full compensation for her losses.
a) 1993-1995
b) Benton County Circuit Court, Judge David Clinger
c) Opposing Counsel-Paul Davidson, Davidson Law Firm, 215 E. 2nd Street, Bentonville, AR 72712 501-273-3764 Barbra Lingle, Lingle & Corley P.O. Box 652, Rogers, AR 501-636-7899; Howard Slinkard, Slinkard Law Firm, 410 N. 8th Street, Rogers, AR 72756, 501-636-9169

5. *Honeycutt v. Marlow*, Civ 92-193
Tort suit against former tenants for intentional damages caused to owner's premises. The suit sought and obtained actual as well as punitive damages in excess of $90,000. The suit had been originally filed by another attorney. I was hired later by the owner to complete the litigation.
a) 1993-1995
b) Washington County Circuit Court, Judge Kim Smith

c) Opposing counsel Charles Darwin Davidson, Davidson Law Firm, 724 Garland Street, Little Rock, AR 72203, 501-374-9977.

6. *Luxury Cars, Inc. v. Shawn McKay,*
I represented the defendant against the plaintiff who sought substantial damages on an alleged fraudulent commercial paper instrument for purchase of an automobile. The defendant lived in another state. I defended on the basis of lack of personal jurisdiction and obtained dismissal of the suit for lack of sufficient contacts with Arkansas following briefing and argument.
a) 1996
b) Benton County Circuit Court, Judge Tom Keith
c) Opposing counsel- Ed McClure, Matthews, Campbell, Rhoads, McClure & Thompson, P.A. 119 South Second Street, Rogers, Arkansas 72756, 501-636-0875.

7. *Gussie Malone Trust v. Arthur Green, et.al.*E-93-1948
The case involved foreclosure and related issues. I represented the interest of the RTC as receiver for a failed S&L. I obtained my client's dismissal from the action.
a) 1994
b) Washington County Circuit Court, Judge John Lineberger
c) Opposing Counsel-Jim E. Crouch, Cypert, Crouch, Clark and Harwell, 111 Holcomb Street, Springdale, AR 72765; 501-751-5222; Larry D. Douglas, 101 E. Emma Ave., Springdale, AR 72765 501-751-8804

8. *United States of America, and Ron W. Strother, Trustee v. Janice N. Yount,* Civil 92-5068
I represented the defendant in a foreclosure action filed by U.S. government to collect on a defaulted mortgage assigned to it. I negctiated a settlement avoiding personal liability to my client.
a) 1992-93
b) U.S. District Court, W.D. Ark.; Judge Franklin Waters
c) Opposing Counsel-Matthew W. Fleming; Asst. U.S. Attorney, P.O. Box 1524, Fort Smith, AR 72902

501-783-5125

9. *Grayson v. Hellstern*, et. al. Civ 95-388-2
I represented parents sued after their child, to whom they entrusted motor scooter, allowed another child to operate same and cause an accident involving serious physical injury. The case was voluntarily dismissed after months of litigation.
a) 1995-96
b) Benton County Circuit Court, Judge David Clinger
c) Opposing Counsel- J. Timothy Smith of Odom, Elliot, Winburn, Watson, Smith & Odom; 1 East Mountain, Fayetteville, Arkansas 72702; 501-442-7575

10. *State of Arkansas v. Sequoyah L. West*, J91-164
I represented juvenile charged in delinquency action. I negotiated nolle pros and diversion enabling juvenile to receive needed treatment and avoidance of a criminal record.
a) 1991
b) Benton County Juvenile Court, Judge Terry Crabtree
c) Marilyn Washburn, Deputy Prosecuting Attorney, Benton County; 201 NE 2nd Street; Bentonville, AR 72712

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.)

During my years in solo private practice I represented numerous individual litigants in domestic relations, public benefits cases, and in transactional matters such as contracts and wills. I routinely handled legal matters from the interview stage through final resolution. These matters often involved either no litigation or were resolved by settlement. One matter I provided significant legal work on related to certain financial instruments of Madison Guaranty Savings and Loan. Pursuant to contract with RTC I conducted legal analysis on the documents to determine their

compliance with Arkansas's usury law. I determined that they did not violate the law and no litigation ensued.

Also, as a legal services attorney, I represented dozens of abused and neglected juveniles as guardian at litem. These cases often required significant court advocacy and thorough out of court investigation and preparation. Quite often, a substantial amount of juvenile representation involved participating in case plan development and monitoring thus facilitating the safe return of juveniles to their parent's custody, if appropriate.

I also found teaching the law to be extraordinarily rewarding professionally. For five years I taught business law as an Adjunct Professor at John Brown University. In 1994, I became a full-time assistant professor. I taught classes in Business law and Business ethics to many undergraduate students who had no prior exposure to the legal system.

I also had the opportunity to provide alternative dispute resolution services through an organization known as the Northwest Arkansas Christian Justice Center. As a board member, I helped initiate the centers Conciliation service. In at least one matter handled by the Center, I helped the parties resolve their conflict without the need of formal litigation.

Further, my experience in state government as a utility commissioner enabled me to participate in major changes in State law concerning regulation of the telecommunications and electricity industries. I presided as hearing officer over a number of cases impacting state utilities including rate cases and industry restructuring proceedings.

Finally, my service on the Arkansas Supreme Court enabled me to work on two of the court's committees in addition to the case work. I worked with the court's technology committee to explore methods of modernizing our state's court system with computers and document imaging. I also served as the court's liaison to its client security fund committee. This committee reviewed requests for compensation from clients who were financially harmed by unethical conduct of their attorneys. Following review the committee could award some relief depending upon the availability of funds.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

   I do not anticipate receiving any deferred income payments other than retirement benefits with TIAA-CREF associated with my teaching employment.

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

   I intend to follow the guidelines of the Model Rules of Professional Conduct for attorneys and the Canons of Judicial Ethics for judges to identify and resolve any potential conflicts of interest. As a judge, I scrupulously examined all cases coming before the court for potential conflict and would promptly recuse from any case where a conflict could have been perceived as existing. I reviewed the parties, law firms and subject matter to see whether any of them raised issues that would raise a concern as to my impartiality or pose a conflict due to prior representation.

   I have been employed by the State of Arkansas for the past four and a half years and do not anticipate any litigation or financial arrangement creating conflicts of interest.

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

   No, I have no plans, commitments or agreements to pursue outside employment during my service on 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 AO-10 Financial Disclosure Report

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

See attached.

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

The only campaign in which I have actively participated was my own. I was a candidate for the Arkansas Court of Appeals in November 2000.

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Smith, Lavenski R.	Court of Appeals, 8th Circuit	05/24/2001
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
U.S. Circuit Judge	X Nomination, Date 05/22/2001 __ Initial __ Annual __ Final	01/01/2000 to 04/30/2001
7. Chambers or Office Address	**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.**	
1000 Center Street P.O. Box 400 Little Rock, AR 72203-0400	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.)

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Church Elder	Mission Blvd. Baptist Church
2		
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1995	TIAA-CREF, John Brown University. Retirement plan, some control
2	2000	State of Arkanas pension, not vested
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	State of Arkansas, salary	106,232.00
2	1999	State of Arkansas, Judicial salary	109,642.00
3	2001	State of Arkansas, salary	25,422.00
4			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Smith, Lavenski R.	05/24/2001

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Superior Federal Bank	A	Interest			Exempt				
2 Regions Bank IRA	A	Interest							
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less P=$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: (Col. C1, D3)	J=$15,000 or less 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: (Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Smith, Lavenski R.	Date of Report 05/24/2001

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Exempt		
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 Smith, Lavenski R.	Date of Report 05/24/2001

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Smith, Lavenski R.	05/24/2001

IX. CERTIFICATION

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

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

Signature _____ Date 5/24/01

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 $9,000				Notes payable to banks-secured $8,000			
U.S. Government securities-add schedule			0	Notes payable to banks-unsecured $18,000			
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 income and interest			0
Doubtful			0	Real estate mortgages payable-add schedule $121,000			
Real estate owned-add schedule $150,000				Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts-itemize:			
Autos and other personal property $45,000			0	medical debt $3,775			
Cash value-life insurance							
Other assets itemize:							
Judicial pension fund $13,635							
TIAA-Cref Teaching pension $7,100							
				Total liabilities $150,775			
				Net Worth $73,960			
Total Assets $224,735				Total liabilities and net worth $224,735			
CONTINGENT LIABILITIES			0	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				

III. GENERAL (PUBLIC)

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

   The first three and half years of my legal career were devoted to serving the poor and disadvantaged as a staff attorney for Ozark Legal Services. When in private practice, I handled a number of pro bono matters for individuals and also nonprofit organizations serving the disadvantaged and troubled youth. Specifically, I provided pro bono legal advice and general business advice to Good News Place a home for troubled teens on an on-going basis for several years in the early 1990's. I also became a member of Ozark Legal Services' referral panel for pro bono assignments. From 1994 to 1997, I put my experience in the juvenile system and concern for abused children to work in an enterprise that recruited and trained foster parents for a four county area of northwest Arkansas. For the past two years I have been a contributing member of "VOCALS", the Volunteer organization for Central Arkansas Legal Services. This organization helps fund legal representation of indigent citizens in Central Arkansas.

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 not a member of 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).

No, Arkansas does not have a selection commission for judicial candidates.

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 integrity of the judicial system is undermined when judges make decisions based on political or personal

interests rather than the law and the official record of the case before the court. Courts exercise enormous powers affecting the rights of citizens and should do so respecting the proper bounds of judicial power within our constitutional system. There are matters of public policy best left to the legislative and executive branches of government rather than the adversarial forum of the court system. I wholeheartedly agree with and endorse Canons One and Three of the Arkansas Code of Judicial Conduct which state, "A judge shall uphold the integrity and independence of the Judiciary" and "a judge shall perform the duties of judicial office impartially and diligently." As an appellate judge I assiduously avoided making decisions based upon any personal or political agenda but exclusively based upon the applicable law and the facts of the individual cases. I believe the role of a judge is to serve as a fair and impartial decision maker and not to serve as an advocate for any particular interest group or issues.

Hempstead Co. Law Day Outline

I. Acknowledgments

A. Local Bar officials
B. Senator David Pryor
C. Guests

II. Home

Because of the relationship between law and liberty, I would be pleased to participate in a Law Day celebration anywhere in the country. But, I am especially pleased to be here. My home town. The place of my birth. The place of my rearing. Hope will always hold special memories.

III. Respectable laws/ Law respecting People

Law truly is the foundation of freedom. It is a bit paradoxical but the strictures of wise law help keep us free from the shackles of tyrants. A stable, desirable society requires both laws that respect people and people who respect laws. Laws that ignore or deny the worth and dignity of humanity establish regimes that may espouse lofty ideals of general prosperity but usually result in the exaltation of some privileged few. Communism didn't lack laws. It lacked laws that recognized the divine origin and value of individual liberty. Liberty to choose one's economic, social and spiritual goals. The founders of this great nation recognized the value of that liberty and were willing to give their lives, their fortunes and their sacred honor to secure them for their posterity. Sadly, they did not initially accord these cherished freedoms to all on this country's soil. But, they set in place the ideals and put in motion the constitutional mechanisms that would later ensure freedom for all Americans regardless of skin color or national origin. Who would dispute the immortal truth found in our declaration of independence "that we hold these truths to be self-evident, that all men are created equal and endowed by their creator with certain unalienable rights. Among which are life, liberty and the pursuit of happiness." I sit here now as a living testament to the triumph of those ideals.

When my grandfather, Virgil Smith, was born near Strong, Arkansas in the late1870's this state's laws discriminated invidiously against him limiting severely his economic and social options. At one time, Arkansas law made it illegal to even teach negroes to read. Before his death at age 98, he marveled at the technological advances that had occurred in his lifetime but he was more proud of his son's

achievement in going to college. When my father graduated from Arkansas AM&N in the late 1940's one of his classmates became the first black to enroll at the University of Arkansas's law school. Silas Hunt died there of tuberculosis before completing his degree. Yet, a half century later, Virgil Smith's grandson sits as a jurist on this State's highest court. Progress has been made.

As I said, not only must we have laws that respect people but we must have people who respect those laws. One of the greatest perils facing our nation is the potential that in the face of increasing legislation the people themselves will grow ever more lawless. Not just violent crimes that wreak mayhem and produce fear but also crimes of graft and deception that tear at the very fiber of democratic government, which is trust.

Edmund Burke stated, "Men are qualified for civil liberties in exact proportion to their disposition to put moral chains upon their own appetites,-in proportion as their love to justice is above their rapacity,-in proportion as their soundness and sobriety of understanding is above their vanity and presumption,-in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within them, the more there must be without. It is ordained in the eternal Constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters. "

The point is further emphasized by the words of Horace Mann who stated,

> Let but the public mind once become thoroughly corrupt, and all attempts to secure property, liberty or life by mere force of laws written on parchment, will be as vain as to put up printed notices in an orchard to keep out canker-worms.

Laws are wholly inadequate for governing people who have no respect for them.

IV. Conclusion

In closing, I would just like to say that thank you for the opportunity to be present and I exhort everyone hear to take very seriously their role in the maintenance of our system of government. As lawyers and judges, it begins with us. It will take cooperation and concerted effort by people of common mind to maintain a free country. The American experience of liberty is like a cool oasis in the desert of history–an aberration. Tyranny is much more prevalent historically. America will go the way of all other great civilizations if teamwork principles are not applied by its people. Teamwork demands that we acknowledge and activate all our differing

abilities and attributes. As a bobcat playing games in Hammonds stadium we would have never won a game with eleven quarterbacks. Every player brought something unique to the team and the team could only prosper when every player was given the opportunity to do what he did best. Our nation is not much different.

I. Acknowledgment

Thanks to chairman of Coffman
Workers compensation commission
Attendees

I appreciate the opportunity to speak regarding ethics. Sound ethics under gird the American justice system. Whether attorney or judicial officer, we must conduct our professional affairs with the utmost regard for those affected by our actions. We are professionals. Our profession accords us the privilege to pursue it with a great deal of liberty. That liberty, must not be abused. Liberties abused maybe deemed abandoned and forfeited, ultimately to uncomfortable strictures.

> Edmund Burke stated, "Men are qualified for civil liberties in exact proportion to their disposition to put moral chains upon their own appetites,-in proportion as their love to justice is above their rapacity,-in proportion as their soundness and sobriety of understanding is above their vanity and presumption,-in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within them, the more there must be without. It is ordained in the eternal Constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters. "

These words were true of our national civil liberties but they're also true of our professional privileges. We are governed by external rules and by internal reason. When reason fails, rules rise to fill the void. The external ethical standards that govern lawyers and judges are set forth in the model rules of professional conduct and the judicial canons of ethics respectfully. No doubt, you have read them. They set forth broad

guidelines for proper and improper conduct. They are accompanied by extensive commentary designed to flesh out the parameters the of rules. One common type of ethics presentation would be an examination of one or several particular rules and recent cases or comments touching them. For instance, the recent A. B.A. comment on the reasonable expectation of privacy in electronic mail. Another, is the discussion of a series of hypotheticals.

However, I don't intend to do that type of presentation. Those presentations are very useful and necessary but they put me in mind of the soldier walking through a mine field who learns where not to go by the location of the broken bodies of his comrades. Today, I would rather talk about the internal standards--the rules set not by the court but by the conscience. I truly believe that a strong sense of internal rules coupled with a thorough knowledge of the external rules place us safely away from the boundaries of unethical conduct. Everyone of us has words or actions in our professional life we wish we could subject to an "Instant replay" and upon further review, undue. Life, unlike sport, rarely affords us that opportunity, but, we can consciously choose to be better prepared for the next similar event.

High internal standards do not replace external rules. We need guidance on the specific actual and hypothetical circumstances that may arise in the course of our professional service. However, the presence of external rules in the absence of some internal standards produce numerous technical violations of rules in a conscious or unconscious effort to avoid their constraint. Good internal rules informed by a some acceptable moral compass tends to ease us away from questionable conduct. The purpose of my talk is simply to encourage you and me to take time to examine ourselves for the basis of our ethical standards. Are they just imposed on us or have we instilled certain standards within?

Unfortunately, public opinion of the legal profession and justice system in general is skewed by those who conduct themselves unethically.

I note three main sources for Unethical conduct.

CARELESSNESS

---Simply being asleep at the wheel, not paying attention to dates and deadlines
---Unable or unwilling to prioritize
---Over scheduled
---Losing receipts
---Preoccupied with financial, health or family concerns
Usually this causes minor infractions but sometimes they can have serious consequences, not just to ourselves but to clients and the public.

Example: Colorado attorney who did not read the prosecutor's file. When reading cases involving the future well-being of others we cannot countenance carelessness in ourselves. To deal with problems of carelessness we must first know ourselves. We must first be honest with ourselves and recognize where we have problems. Sometimes we're too close to ourselves to see and need the assistance of a good friend. But however we come to be aware of the problem once aware, we must resolve to overcome bad habits of carelessness and create new habits of diligence just as we would do to overcome any other weakness. The written ethical standards can only identify the good and punish the bad. They simply don't address the cause of either. We must do that for ourselves.

The second major source of unethical conduct is COMPROMISE.

When I was a kid growing up in Hope, Arkansas, marbles was a major sport in my neighborhood. We played "Funzies" where everyone got there marbles back after the game and sometimes we played for "Keeps". When you play keeps, whatever you win, you keep. In either game, when a player eased his shooter off the line we called it fudging and protested vehemently. Fudging was done to get a competitive

advantage. Court and administrative proceedings are for keeps. We're Professional now and are not playing marbles anymore, but fudging is still a great temptation. Fudging never gives good ethics the benefit of the doubt. Instead, doubt is resolved in favor of questionable activities. For instance, mingling client funds. We fall victim to the "Just a little" thinking.

> Stephanie Genlis, the 18th century French writer said, "The man whose probity consists in merely obeying the laws, cannot be truly virtuous; for he will find many opportunities of doing contemptible and even dishonest acts, which the laws cannot punish. "

the third source of unethical conduct is CORRUPTION

Certainly, it is these overt acts of dishonesty that most besmirch the legal profession. Our society has some significant percentage of people prone to perniciousness. Some of them are lawyers. Some of them are judges. Few, though, probably became lawyers or judges in order to plunder the innocent. More likely, they lacked internal standards that would have sounded alarms of conscience when confronted with the choice to do wrong. We speak often of people having made a mistake. We should distinguish though, some mistakes from others. Understandably, when traveling down interstate 630 to come here and one intends to take the Broadway exit but inadvertently takes Center street exit instead, we made a mistake. It is a substantially different kind of mistake to take the Main street exit to get donuts at community bakery. Taking the wrong exit intentionally and knowing it takes you to an entirely different destination is affirmative act of indifference to proper conduct.

double billing
lying to clients and tribunals
scamming insurance companies

these aren't mere logical mistakes they're moral mistakes. Mistakes not

not in perception but in moral judgment. Everyone is capable of them but no one has to make them.

To get at the root of all these we must willing to look deeply into the mirror and scrutinize our motives.

In the time remaining I would like to briefly address three suggested internal standards that have found helpful.

Uncommon Courtesy

Society becoming much less courteous. Problems in collegiality.

--respect for clients, courts and cases

They are all worthy of due regard. Requires humility.

Uncommon Competence

Don't be satisfied with good enough. Know the facts, the law, the process, and the people. Internalize the rules— rather than "a lawyer" or "a judge" make it "I" and "me".

Uncommon Character

If lying has become fashionable, I hope to remain hopelessly out of style. Know your motives at all times. Don't be swayed by greed, envy, or pride. Promise only what you can do then do all that you promise. Let error be brought to your attention by your conscience before it is brought by a client or committee.

In conclusion, John Marshall, an early chief justice of the U.S. Supreme Court stated during the Virginia constitutional convention, "I have always thought, from my earliest youth until now, that the greatest scourge an angry heaven ever inflicted upon and ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary. " Our judges come from our lawyers and we can expect no better judges than we have attorneys.

This has been an atypical ethics presentation. It has not been filled with hypotheticals and case studies. Instead it is simple reminder that often good ethics aren't a matter of just knowing the rules but a matter of choosing to rule the impulses within us.

Thank you.

[Recess from 3:58 p.m. to 4:01 p.m.]

Chairman LEAHY. Is everybody here? If you all raise your right hand.

Do you swear the testimony you are about to give before this committee should be the truth, the whole truth and nothing but the truth, so help you God?

Judge AUTREY. I do.

Mr. DORR. I do.

Judge HUDSON. I do.

Ms. ST. Eve. I do?

Mr. SAVAGE. I do.

Chairman LEAHY. The record can show that all answered in the affirmative. Please sit down.

So we can have this for the record, we can start. Judge Autrey, would you please introduce whoever is here with you? Some day you are going to look back on this and be glad you got it on the record.

STATEMENT OF HENRY E. AUTREY, OF MISSOURI, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI

Judge AUTREY. Mr. Chairman, I would like to introduce my lovely wife, Mary, who is here I think, unless she stepped out too. She did step out. But she is here.

Chairman LEAHY. We are going to show her as being here. And who else?

Judge AUTREY. Just my wife and I. The kids are Emily and Fritz, are at home and school. And my mother and father are both deceased, although I know they are here in spirit, because it is because of them that I am here today.

Chairman LEAHY. Thank you. I am sure it would be a proud day for them. As I said earlier, we have to assume they know.

Judge AUTREY. Indeed.

Chairman LEAHY. Mr. Dorr.

STATEMENT OF RICHARD E. DORR, OF MISSOURI, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI

Mr. DORR. Mr. Chairman, I would like to introduce my wife, Barbie and my son, Scott.

Chairman LEAHY. It is good to have you both here.

Mr. HUDSON. You had along drive to get here.

STATEMENT OF HENRY E. HUDSON, OF VIRGINIA, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Judge HUDSON. In the traffic in Northern Virginia, yes, sir.

Chairman LEAHY. I know, I know that traffic.

Judge HUDSON. I would like to introduce, Mr. Chairman, my wife Tara, my son Kevin, my brother and sister-in-law Lance and Jessica Lydon, and my law clerk Julie Gossman, who is here today to give me some support.

Chairman LEAHY. Well, you are no stranger to this room, having been here a number of times before in various capacities.

Ms. ST. EVE.

STATEMENT OF AMY J. ST. EVE, OF ILLINOIS, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Ms. ST. EVE. Thank you, Mr. Chairman. I would like to introduce my husband Howard, my oldest daughter Lauren who is 4–1/2. Our 20-month old Emily we left at home, otherwise you would hear her. And Brett, our 6-week-old son who you have already heard from. Also my sister-in-law Amy Cima, and my niece Alessia Cima. Thank you.

Chairman LEAHY. Thank you very much.

Mr. SAVAGE.

STATEMENT OF TIMOTHY J. SAVAGE, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mr. SAVAGE. Thank you, Mr. Chairman. I would like to introduce my wife and best friend, Linda. My eldest son Tim is not here, but my grandson, his son Patrick is here. My middle son Daniel, and his son, our grandson, Daniel, Jr., and our youngest son Christian, and my brother-in-law Paul Brisgone.

Chairman LEAHY. Good to have you all here. And if I might begin, Judge Autrey, you worked on a number of bar association committees that work and improve the judicial system I think since the year 2000, and correct me if I am wrong on this, you have served on the Missouri Bar Agenda Bias Committee and the Missouri Legal Services Oversight Committee. These are basically pro bono things, are they not?

Judge AUTREY. That is correct, Mr. Chairman.

Chairman LEAHY. I am a strong advocate of people doing pro bono work. Those that come before us for confirmation simply, because it gives them a different experience than just the normal facts of law. How do you feel this has helped you? I mean you have worked a number of different areas. How does the experience of these pro bono operations help you in what you feel a Federal District Judge should be?

Judge AUTREY. I appreciate the opportunity to answer that question, Mr. Chairman, because it is my life and career as a lawyer and as a member of the Court has been dedicated to serving people within the community, regardless of who they may be from where they may be whether they are rich or poor, regardless of their religion or race. And the pro bono experience that I have had specifically outside of any committee work that I have been involved in as a member of the bench or as a lawyer has mostly been, almost entirely been related to helping persons who have been victimized in one way or another, beginning with my career as an intern for Legal Services for Eastern Missouri while a law student my third year, and then moving on during my tenure as a prosecutor in the city of St. Louis in the Office of the Circuit Attorney.

You know, with respect to the Prosecutor's office, the fiction was, and I think still is, that we represent an entity, the State. In my view as a prosecutor and the view of many other prosecutors that I worked with in that office was that our true client was the indi-

vidual victim who had been victimized either by robbery or burglarized or sexually assaulted. The pay that we received as public servants was far greater than any pay that any of my colleagues received who went on to the prior practice of law. Many of them joke that in essence we were doing pro bono work because of our salary in relation to the salaries that many of them receive.

So the wealth of my experience has been in essence dealing with pro bono circumstances. I think that has served me well, and will serve me well should I be fortunate and privileged enough to be confirmed by this committee, to deal with and resolve issues that appear before me from members of the community at large, members at the society at large, members of this Nation, regardless of their position, status, race or background. I think that is what the job is all about as a Judge.

Chairman LEAHY. Do you feel that pro bono work is important for somebody who may be considered for the bar?

Judge AUTREY. I think pro bono work——

Chairman LEAHY. Or maybe I should ask you this. Not necessarily for the bench, but how about this. Do you feel it is important for lawyers, who after all do have a privileged part in society in most cases, to do pro bono work?

Judge AUTREY. I would agree with you, Mr. Chairman, that being a lawyer in America is a privilege, and as it is a privilege, it has a heightened duty of service for those who are granted the privilege to occupy themselves as practitioners of the law. I think that pro bono work is the heart and soul of the practice of law because the practice of law is fundamentally about providing services, and it is fundamentally about providing services for those persons that have legal issues and legal problems and they don't have the skills and the ability to address those particular issues themselves. They're not trained in the practice or in the art of the law as we are as attorneys, and to pay back, if you will, for the privilege of serving, I think that all lawyers should provide pro bono services for those individuals that need it, who otherwise may not be able to redress issues that are personal to them in a court of law.

Chairman LEAHY. And Judge Autrey, would it be safe to say that you have no problems with the well-established tradition of stare decisis?

Judge AUTREY. Stare decisis and the duty to follow precedent is the fulcrum of our legal system. It is that aspect which provides continuity, provides consistency, and it provides the public a degree of predictability as to what the outcome of their case may be. I think without it we would be in serious disarray.

Chairman LEAHY. You may have heard the discussion I had earlier about trying to guess the direction of a court may be going—would you agree with me that that might be a little bit dangerous to take that kind of leap of faith, that you know which way the appellate court is going, or more specifically, would it be a kind of dangerous leap of faith to assume the appellate court is going to overturn precedent?

Judge AUTREY. Well, Mr. Chairman, I have been a trial judge at the State level in the city of St. Louis in Missouri since 1986, and it was my view before I came onto the bench as a trial judge, and it would be my view as a trial judge at the Federal District level

for the Eastern District of Missouri if I am privileged enough to get the confirmation vote, that it would be my duty to follow the law, particularly as a trial judge. You're not in a position to make law, if you will, and I don't mean that from a legislative standpoint, but I mean it from a creative legal analysis standpoint. It is the primary duty of a trial judge to follow existing precedent, and to apply it effectively to the facts and circumstances that are before him or her at the time.

Chairman LEAHY. A trial judge does not get an awful lot of legal room, a lot of wiggle room.

Judge AUTREY. Very little, and sometimes I find, Mr. Chairman, if you start wiggling, you have some big problems.

Chairman LEAHY. I understand. I have been in those courts. I know.

Mr. Dorr, your professional experience as a lawyer is focused generally on civil practice.

Senator SESSIONS. Mr. Chairman, could I interrupt you 1 second?

Chairman LEAHY. Of course you can. You have been good enough to stay here all day. You can do whatever you want.

Senator SESSIONS. It is always wonderful, and this is an important time for these excellent nominees and their families, and I thank you for the courtesy you have shown to them, and the respect you have shown to them.

I want to introduce in the record some general remarks about all the nominees, but I did want to say how much, how pleased I was to see Henry Hudson. Judge Hudson, it is good to see you. We served as United States Attorneys together, and during that time on the U.S. Attorneys Advisory Committee, I got to know Henry well. He led the Operation Ill Wind investigation, which I think would probably represent the most significant Federal prosecution of defense fraud activities ever prosecuted in this country's history. 54 people were convicted by his office. A lot of people wanted to tell him how to do it. He did it like he wanted to, according to justice and what he believed was right. He was aggressive, and there was a lot of howling and gnashing of teeth, but you did justice, Henry, and I think the entire defense industry is a lot better today than it was.

Judge HUDSON. Thank you for your kind words, Senator.

Chairman LEAHY. Judge Hudson, we are moving Senator Sessions slightly out of the undecided column on your nomination. And I am taking, that is on a leap of faith right there.

Senator SESSIONS. And Senator Thurmond also wanted to have his statement put in the record, and I know he also has known Mr. Hudson, and particularly commented on his personal knowledge of his abilities.

Chairman LEAHY. We will put all statements in the record of course. The record will stay open for questions that other Senators may have.

Mr. Dorr, as I was saying before, you have been generally civil practice, commercial litigation, real estate issues, employment law and so on. I take that from your questionnaire. You said about 2 percent has focused on criminal matters. Unfortunately or fortunately, as Judge Hudson and I and Senator Sessions were all former prosecutors, and we know that in the courts it is getting

more and more criminal cases. Whether they like it or not, even to the extent of squeezing a lot of important civil cases.

How do you get up to speed to handle criminal matters which are in many areas a lot different than the civil matters you have handled?

Mr. DORR. I understand that question, and I have had some experience. It's been a few years ago, but in the military I did prosecute and defend. In those days we switched back and forth on the workload there, so for 5 years I had that, and I haven't forgotten those experiences.

I will, in terms of what I will do, I, if I'm fortunate enough to go forward, I will do what it takes to get up to speed. I've talked to the judges, some of the judges in the Western District, who likewise did not come from a criminal law background. They've indicated they didn't have a problem and didn't think it would be a problem. I feel like I can likewise be a good listener, do what I need to do to put the time in to read and understand it, but I really have not felt that it would be that much of a challenge for me.

Chairman LEAHY. The military, that was with the Air Force; is that correct?

Mr. DORR. Yes, it was.

Chairman LEAHY. Going through the background, you have taken a number of pro bono cases from Legal Aid. You should be very proud of having received the Equal Access to Justice Award from the Springfield Metropolitan Bar. You are an original Incorporator of the Partners with Youth Foundation, raising funds to provide assistance to low-income students to help them, to spend in school activities. I mentioned also, following up with what I said with Judge Autrey before, I think lawyers have responsibility to do that kind of thing. I commend you for it.

Mr. DORR. Thank you.

Chairman LEAHY. Not to embarrass you here, but you are not about to come up with that, so I will do it for you. The law firm I was in when I first started practicing law in Vermont, we were told by the senior partner, a very conservative, cantankerous pillar of the Republican Party, but actually that time, that is the only party that was, that we are going to do pro bono work, all of us, and we did, which included, as he would remind us at Christmas time, he would ring the bell on our main shopping street for several hours each day around Christmas time for the Salvation Army. And you have to understand this is outdoors in Vermont in December. And he was sure the young lawyers would volunteer an equal time. You had better believe that we volunteered, at least an hour or more.

Mr. Hudson, you have been serving as a Judge in the Fairfax County Circuit Court since 1998?

Judge HUDSON. Since 1998, yes, sir.

Chairman LEAHY. That is what I thought. You were a prosecutor for over 20 years, and a very active prosecutor. I am a part-time resident of the Commonwealth of Virginia. I know what you mean about traffic, which has gotten considerably worse in 25 years here, at least in Northern Virginia.

Anybody who has been here during that time has seen your name over and over again in the press, and your work as a prosecutor, cracking down on burglars, drugs, sexual assault and so on.

Now, some defense lawyers—and you have heard this before—raise concerns about your ability to be fair to all parties. They said you are unyielding, rigid, not interested in even-handed justice. In March 1999 the Washington Post said as a Judge you raised an objection on behalf of the prosecution and sustained it, even though the prosecutor had not moved, although you said that you were going to take an effort not to do that in the future.

I am asking these questions not to embarrass you, but to give you a chance to speak to them. I was a prosecutor. I was picked as—back when they used to do that—the National DA's picked me as one of the three outstanding prosecutors in the country. I considered myself a tough prosecutor but I considered myself a fair one. I also felt that a prosecutor had to be pretty—while we wanted to win, also had to win fairly, just to set the standards for everybody from the police all the way up, and also to maintain the credibility of the office so that courts would know they are being fair. Courts of course have even a greater thing. In a Federal Court you cannot have somebody come in and say, "I am the defendant. I am automatically dead if I come in that court." Or if I'm the plaintiff, "I'm automatically dead if I come in that court."

How do you assure us you would be even-handed in a court where even-handedness has to be the standard, there can be no other standard?

Judge HUDSON. Mr. Chairman, it's been about 10 years since I was a prosecutor, maybe more than that. I actually did some defense work for quite a while and handled a number of criminal defense cases.

When I became a Circuit Court Judge in Fairfax County, you are absolutely right, that was a consideration a lot of people had. However, I think my track record as a Circuit Court Judge in the last 3–1/2 years has demonstrated that I can be even, that I can see both sides of the issue and I can be fair and compassionate.

Some of the comments that have come out from the criminal defense bar after my nomination to this position have been just the opposite. The head of the Criminal Defense Lawyers in Virginia indicated that he was surprised at how fair I had been and what a balanced job I had done as a Circuit Court Judge.

From the number of letters you may have received, Mr. Chairman, from members of the bar in Fairfax County, who indicate that I have striven to be balanced, to be fair, to consider all sides of the issue. Sometimes I find people guilty, sometimes I find them not guilty. I don't owe any allegiance to either side. I call them as I see them.

Additionally, when the American Bar Association did my investigation, that was one of the things the investigators said "We're going to focus on." And he was surprised at how balanced my record is and how high marks I get from lawyers who practice in my court, because they gave me, as you know, the majority rating of well qualified.

So I think any notion that I can't be fair has been far overcome by what I have done in the 3–1/2 years as a Circuit Court Judge.

Chairman LEAHY. Thank you. There will be some followup questions. Also Senator Warner and Senator Allen have other letters on your behalf, which all of these will be part of the record. And if I look like I am rushing it is partly because this vote has begun, and if I do not complete this panel before I have to go to vote, you are all going to get stuck here till about 7 tonight, and you do not want that.

Judge HUDSON. So I can enlarge on my answer with just one more thing, sir?

Chairman LEAHY. Of course.

Judge HUDSON. Senator, you mentioned a comment that I made to my good friend, the reporter from the Washington Post that did that article about me, and it is something I did the first week or two on the bench. I did sustain my own objection, which is a frequent practice in Virginia I might add, that every judge I have ever clerked for has done that. I don't do that any more. I recognize that's inappropriate, and I learn by my mistakes.

Chairman LEAHY. I kind of wondered on that one, because I remember when I was prosecuting cases I had a number of times when I know I could object, but I did not, because one I did not want to have the jury see me object too much, but I also knew that they were about to get into an area that if I did not object, I had a lot of room on redirect that I would not have had otherwise, and so I was delighted to let them go down the primrose path.

Judge HUDSON. The only reason I would ever do that, Mr. Chairman, would be to prevent a mistrial.

Chairman LEAHY. Yes, of course. And there a judge, I think we both agree, a judge should do everything possible to avoid having to have a mistrial, and one can argue that that is in the better interest of justice itself.

Ms. ST. Eve, talking about trying a case close to the time you were going to deliver. We have one of the attorneys here who is a former prosecutor on my staff who had a major organized crime case in New York, finished her summation to the jury, while the jury was out deliberating, went and had her baby. She won the case incidentally.

Ms. ST. Eve. I wasn't quite that close.

Chairman LEAHY. You have been practicing law for a relatively short time. I can assume your answer to this, other questions. Do you feel ready to step into what are enormous responsibilities, and with some people literally are going to be life and death responsibilities as a Federal Judge?

Ms. ST. Eve. Yes, Mr. Chairman, I do. And I certainly realize the big shoes that I'll be stepping into. During the 12 years I have been practicing law I've been fortunate enough to see all sides. I've been a criminal prosecutor. I've been a defense lawyer. I'm in house now. I've practice criminal law. I practiced civil law. And I feel that that wide variety of experience has prepared me for this position.

Chairman LEAHY. In case anybody sitting here thinks that you are getting off very easy, there are going to be a couple of followup questions, but I did want to get to Mr. Savage.

You're a sole practitioner, am I correct, Mr. Savage?

Mr. SAVAGE. That is correct, Senator.

Chairman LEAHY. And that's criminal, commercial, personal injury litigation, that type of thing?

Mr. SAVAGE. That's correct.

Chairman LEAHY. But did you not serve as a Judge Pro Tem in the Court of Common Please?

Mr. SAVAGE. In Philadelphia, the Court of Common Pleas, I did. I still do.

Chairman LEAHY. Thank you. You have also been a mediator and hearing examiner. Tell me about that. Does that—do you feel the experience you have had as that will serve you well or be irrelevant as a Federal Judge? How is that for a nice softball? If you cannot hit that one of the park, you do not deserve to be on the bench.

Mr. SAVAGE. The answer is yes, Senator. I'm not going to disagree.

Chairman LEAHY. But as a mediator, is it fair to say you have got to really pay attention to both sides when you come in there?

Mr. SAVAGE. I believe you do, and that mediation service was with the Eastern District of Pennsylvania Federal Court.

Chairman LEAHY. I also notice your pro bono activities.

I will recess at this point. We will keep the record open for other Senators' statements, Senator Hatch and others, and for followup questions. I would urge and tell staff to notify your Senators. I would like, if there are followup questions, in very quickly out of courtesy to the nominees so that they will not have this matter hanging.

And I thank all of you for the courtesy and the time that you took. And we did not give all of you a chance to mention your family here. Mr. Savage, you did not?

Mr. SAVAGE. Yes, I did.

Chairman LEAHY. I want to make sure. With the interruptions I have been getting back here, I wanted to make sure I got all of you. Fine. Thank you.

[The biographical information of Judge Autrey, Mr. Dorr, Judge Hudson, Ms. St. Eve, and Mr. Savage follow.]

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

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

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

   Federal District Court Judge, United States District Court, Eastern District of Missouri

3. **Address**: List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.
   (Office)#10 North Tucker Blvd., St. Louis, Missouri 63101 (Phone: 314.622.4646)

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

   March 18, 1952 in Mobile, Alabama

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

   Married to Virginia Mary Perkinson. My wife is a homemaker and mother. She also maintains a Subchapter S corporation known as Heal-Thy Life, Inc., which is located in St. Louis, Missouri 63110. We have 2 dependent children.

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

   St. Louis University School of Law from 1974 to 1977 with a Juris Doctorate (May 1977).

   St. Louis University from 1971 to 1974 with a Bachelor of Science degree in Political Science (magna cum laude, May 1974).

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

1986(February) through Present-- Circuit Court of the City of St Louis, Twenty-Second Judicial Circuit, State of Missouri;

1977(August) through 1986(February) Office of Circuit Attorney for the City of St. Louis, 1320 Market, St. Louis, Missouri;

1976(September) through 1977(April) Legal Aid Society of St. Louis, 5874 Delmar Blvd, St. Louis, Missouri;

1975(June to July) St. Louis University School of Law, 3700 Lindell Blvd., St. Louis, Missouri 63108;

1974(June to August) G. W. Warnecke Corporation, 3733 Lindell Blvd., St. Louis, Missouri 63108;

1982 through 1986 Senior Home Security, Forest Park Blvd., St. Louis, Missouri 63108 (Not for Profit Board of Directors)

1985 through 1986 Aid to Victims of Crime, West Pine Blvd., St. Louis, Missouri 63108(Not for Profit Board of Directors);

1998 Aid to Victims of Crime, West Pine Blvd., St. Louis, Missouri 63108(Not for Profit Board of Directors);

1996 through 1999 St. Louis Area Foodbank, 5959 St. Louis, Missouri 63120(Not for Profit Board of Directors).

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

No military service.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society

memberships, military awards, and any other special recognition for outstanding service or achievement.

I received an academic and partial need scholarship relative my undergraduate study at St. Louis University. Upon graduating from St. Louis University, I received an academic and partial need scholarship from St. University School of Law. In 1986 I received the Award of Recognition from the Black Law Student Association of Washington University School of Law. In 1990 I received the Good Citizenship Award from the Grand Jury Association of the City of St. Louis. In 1996 I received an Honorary Degree from Sanford Brown Business College. In 1998 I was inducted into the De Smet Jesuit High School Hall Of Fame.

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

Member Missouri Bar since 1978;
Member Metropolitan St. Louis Bar Association since 1987;
Member Lawyers Association since 1987;
Member Mound City Bar(although I don't pay dues) since 1986;
Member---Missouri Supreme Court Time Standards Monitoring Committee;
Member---Missouri Trial Judge Education Committee--2000-present;
Member---Missouri State Court Budget Committee-1999 to present;
Member---Missouri Bar Gender Bias Committee-2000 to present;
Member---Missouri Legal Services Oversight Committee-2000 to present;
Member---Missouri Supreme Court Regional Justice Center Committee-1999-present;
Member---Missouri 22nd Circuit Court Operational Support Committee;
Member---Missouri 22nd Circuit Court Jury Supervision Committee;
Member---Missouri 22nd Circuit Court Rules Committee;
Appointed as Special Judge Missouri Supreme Court---February 2001;
Member---Missouri 22nd Circuit Court Budget Committee 1994 to 1998
Member---Missouri Supreme Court Security Committee 1994 to 1995

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

Supreme Court of Missouri (1978);
Circuit Court of the City of St. Louis(1978);
United States District Court for the Eastern District of Missouri(1978)—This admission has long since expired as I was a State prosecutor upon admission and was subsequently administered the oath of office as a Judge for the State of Missouri.

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

Member, School Board, St. Margaret of Scotland School, Castleman Ave., St. Louis, Missouri 63110(June 2001 to present);
The Media Club, Laclede Gas Building, St. Louis, Missouri 63101(1997 to present).

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

Professionalism: Accommodating the Disabled in Court Settings, Missouri Judicial College, 1994;
Chapter 517 and Landlord/Tenant Law---What's Hot and What's Not, Judicial Orientation, 1997;
Summary Judgments, Missouri Judicial College, 1998;
Demonstrative Aids in Closing Argument, Missouri Judicial College, 1999;

Common Objections During Closing Arguments, Missouri Judicial College, 1999;
Closing Argument 101: Protecting Your Own Record, Missouri Judicial College, 2001.

I have no copies of any speeches other than presentations related to the referenced matters above.

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

I have never testified before Congress at any time.

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

My health is excellent. About a year ago, however, I did have a minor hypertension issue which has been resolved by meditation, minimal medication and some additional aerobic activity. The date of my last physical examination was around December of 2001.

16. **Citations:** If you are or have been a judge, provide:
(a) citations for the ten most significant opinions you have written;

1. STATE OF MISSOURI vs. ROBERT TAYLOR
998 S. W. 2d 817(Mo. App. E. D. 1999)

The defendant was charged with committing three counts of robbery in the first degree and one count of robbery in the second degree. The defendant was also charged as a persistent offender in that he had two or more previous felony convictions, or pleas of guilty under the laws of the State of Missouri. The jury convicted the defendant of all counts and I sentenced him as a persistent offender. The Missouri Court of Appeals affirmed the conviction.

2. STATE OF MISSOURI vs. KEITH L. ALLEN
905 S. W. 2d 874(S. Ct. 1995)

The defendant, a member of a college fraternity, was prosecuted for violating the Missouri anti-hazing statute, after his actions resulted in the death of a

fraternity pledge. During trial, the defendant asserted that the statute was vague and overbroad in contravention of the Fifth Amendment. He asserted the statute did not clearly define what conduct was prohibited and that it interfered with his right of association. The defendant also asserted that the statute violated the Equal Protection Clause of the United States constitution. I denied his claims and the defendant was convicted. On appeal, the Missouri Supreme Court affirmed the conviction.

3. **CITY OF BRIDGETON vs. CITY OF ST. LOUIS, 18 S. W. 2d 107(Mo. App. E. D. 2000)**

The Plaintiff filed an action seeking Declaratory Judgment from the plan of the City of St. Louis to expand a Lambert Field, a significant regional airport. Plaintiff asserted that the taking by the City of St. Louis violated Bridgeton's ordinances and was not justified by necessity. The City of Bridgeton asserted the City of St. Louis was required to apply for planning and building permit approval before the plan could proceed. Plaintiff further asserted this was necessary also as required under State Law as it was a new airport. I denied the relief sought by Plaintiff and ruled in favor of defendant, City of St. Louis. My opinion was affirmed by the Missouri Court of Appeals for the Eastern District of Missouri.

4. **STATE OF MISSOURI vs. FRANCIS GARDNER, 841 S. W. 2d 702(Mo. App. E. D. 1990)**

The defendant was charged with three counts of sexual abuse in the first degree involving a minor child. I tried the matter on special assignment by our then presiding judge. Due to the ages of the victims there were issues related to whether they could testify and what testimony they could provide pursuant to our statutes relating to the competency of child witnesses. There were some confrontation issues also. The defendant was convicted and the conviction was affirmed by the Missouri court of Appeals.

5. **STATE ex rel. TYRONE BURRELL-el vs. HON. HENRY AUTREY 752 S. W. 2d 895 (Mo. App. E. D. 1988)**

The relator, Burrell-el, appeared as a defendant for preliminary hearing on a weapons charge. While in court he was wearing a fez(a type of hat or head covering worn by members of the Moorish Science Temple, whose local members were prosecuted for

violations of various Federal criminal laws). When I requested he remove his hat he refused and stated he could not remove it due to religious considerations. He did not state what the religious basis was and upon further attempts to have him remove the hat I held him in contempt of court. The court of appeals reversed the contempt citation noting that I did not provide al the requisite orders relative the contempt citation.

6. **RICHARD DIFFLEY, KEVIN BECKERLE vs. ROYAL PAPERS INC.**
948 S. W. 2d 244(Mo. App. E. D. 1997)

This matter came before me on Motion for Summary Judgment. Appellants were pension plan trustees who filed an action to collect money which represented 10% of the total contributions by the employer. They asserted that the employers had made late contributions. The issue presented were whether State law or Federal law applied. The other issue was whether the 10% late fee was an enforceable penalty. I concluded that Federal Law applied and the late fee was unenforceable. The Missouri Court of appeals affirmed the grant of the summary judgment in favor of the employer, Royal Papers, Inc.

7. **THE ROUSE COMPANY OF MISSOURI vs. JUSTIN'S, INC., et al.**
883 S. W. 2d 525 (Mo. App. E. D. 1994)

The plaintiffs filed suit against defendants for delinquent rents based upon contract. I had entered judgments but upon application I amended my original judgment and entered a new judgment. The new judgment included an individual defendant not part of the original judgment and during the course of the trial I admitted a lease between the parties as a business record. The Missouri Court of appeals affirmed in part and reversed in part. The Court affirmed my original judgment but reversed the newly entered judgments.

8. **STATE OF MISSOURI vs. MARTIEZ DAVIS**
980 S. W. 2d 92(Mo. App. E. D. 1998

The defendant was tried for the murder of a teenage girl. He slit her throat with a kitchen fork. The State sought the death penalty. The jury convicted the defendant of first degree murder and in the penalty phase of the trial assessed punishment at life without probation or parole. At trial the defense sought to

introduce expert testimony regarding interrogation techniques in order to diminish the credibility of police testimony regarding admissions by the defendant. I disallowed the use of the "expert". The Missouri Court of Appeals affirmed the conviction.

9. KEVIN J. RUZICKA vs. HART PRINTING COMPANY, et al. 21 S. W. 3d 67(Mo. App. E.D 1998)

Plaintiff sued his employer for breach of contract relating to an Employment Agreement, breach of fiduciary duty and for dissolution of the corporation, specific performance of the Employment Agreement. The defendant was an employee and a minority shareholder in the corporation. I entered judgment in favor of the employer on the breach of contract claim, the breach of fiduciary duty claim, the corporate dissolution claim, the claim for specific performance and judgments for the employer on its three counterclaims. I also awarded plaintiff only half of his requested attorney fees. The Missouri Court of Appeals sustained my judgment in part and reversed in part, remanding the matter for reconsideration and recalculation of attorney fees.

10. JASON D. JAMES vs. UNION ELECTRIC COMPANY 978 S. W. 2d 372(Mo. App. E. D. 1998)

Plaintiff filed suit against Union Electric Company after their father was electrocuted while attempting to repair a telephone line. Defendant filed a motion to dismiss for lack of subject matter jurisdiction or in the alternative a motion for summary judgment. I granted the motion to dismiss in favor of Southwestern Bell Telephone Company and dismissed the case with prejudice as to the Company. The deceased was an independent contractor and the Missouri Court of Appeals therefore reversed my ruling noting that summary judgment should be entered in favor of Southwestern Bell Telephone Company. The deceased was not under their control and the Company did not control the manner of his work.
(Note: these are citations for the appellate opinion ruling upon my ruling/opinion as a trial judge);

(b) a short summary of and citations for all appellate opinions where your decisions were reversed or was significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court;

I do not believe I have ever been criticized by the appellate court in any manner related to my application of substantive or procedural law. The following is a list of cases, together with a

short summary, wherein I was reversed:

1. **CITY OF ST. LOUIS vs. ROE AND AUTO CLEANING PROFESSIONALS, INC., 823 S.W.2d 29 (Mo. App.E.D. 1991)**

   This case was a Trial de Novo matter from our Municipal Division. Respondent was charged with violation of a St. Louis City Health Ordinance by allowing waste water or refuse to be discharged into the street or alley. I found the respondent guilty of the ordinance violation in that the water from his car wash service was in a corrupt condition ("filthy or offensive") and therefore in violation of the ordinance. The Appellate Court reversed holding that the limited record did not support my conclusion that the water was "filthy or offensive".(See copy of attached Order and Judgment)

2. **GILMORE vs. BI-STATE DEVELOPMENT AGENCY, 936 S.W.2d 193 (Mo.App.E.D.1996)**

   This was a subrogation action with a counterclaim against the Respondent arising from an automobile collision between a vehicle and a bus owned by respondent. A directed verdict was entered in favor of Bi-State Development Agency on the theory that plaintiff failed to prove the corporate status of Bi-State. The Appellate Court reversed noting that Bi-State had not specifically denied its corporate existence and therefore it had admitted the existence.

3. **WELCH vs. AUTOMOBILE CLUB INTERINSURANCE EXCHANGE, 948 S.W.2d 718(Mo. App.E.D.1997)**

   Welch had filed a claim under the uninsured motorist provision of her automobile policy for damages sustained in a collision with a postal delivery truck. Defendant filed a motion for summary judgment. I sustained the motion and entered judgment for the defendant as a matter of law. The appellate court disagreed and suggested, de novo, that the statute of limitations in the instant case was 10 years and there were material facts in dispute relative to coverage.

4. **JAMES vs. UNION ELECTRIC COMPANY, et al, 978 S.W.2d 372(Mo.App.E.D.372)**

   Plaintiffs filed suit after their father was electrocuted while repairing a telephone line. Southwestern Bell Telephone Company filed motion to dismiss for lack of subject matter jurisdiction or motion for summary judgment. I granted the motion and judgment was entered for Southwestern Bell Telephone. There were issues related to the Workers Compensation Act which guided the procedural aspects of the case. On appeal the case was remanded

with directions to enter judgment for SWBT on the motion for summary judgment rather than the motion to dismiss. We reached the same result but through different vehicles.

5. RUZICKA vs. HART PRINTING COMPANY, et al., 21S.W.3d 67(Mo.App.E.D.2000)

Ruzicka filed claims against the defendant corporation for breach of contract, breach of fiduciary duty and dissolution of the corporation, and for a service letter claim relating to his termination from employment. The Appellate Court agreed with my rulings related to the substantive issues. It disagreed with my rulings related to the entry of attorney fees and reversed for that reason and on the calculation of damages. The case was remanded to revisit these issues and resolve them.

6. STATE OF MISSOURI vs. LARSHUN WILKINS, No. ED77711(Mo.App.2001)

The defendant was charged, tried, and convicted of robbery in the first degree. At trial the prosecutor called the co-defendant to testify against the defendant. The co-defendant refused to testify or otherwise admit that he even pleaded guilty. The prosecutor was allowed to ask questions which implicated the defendant on trial. The defense objected to these questions. The Appellate Court reversed on the theory that the impeachment process of the co-defendant was really an attempt substantively to prove the guilt of defendant on.

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

1. STATE OF MISSOURI vs. KEITH L. ALLEN 905 S. W. 2d 874(S. Ct. 1995)

The defendant, a member of a college fraternity, was prosecuted for violating the Misscuri anti-hazing statute after his actions resulted in the death of a fraternity pledge. During trial, the defendant asserted that the statute was vague and overbroad in contravention of the Fifth Amendment. He alleged the statute did not clearly define what conduct was prohibited and that it interfered with his right of association. The defendant also asserted that the statute violated the Equal Protection Clause of the United States Constitution. I denied these claims and proceeded to trial. The Supreme of Missouri affirmed the

conviction and denied Allen's Constitutional claims.

If any of the opinions listed were not officially reported, please provide copies of the opinions.

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

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

I have held no public office other than as a member of the Judiciary. I have not run for any elective public office. I have never been appointed and not confirmed for any office.

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

I have never held a position or played a role in a political campaign.

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

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

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

I did not serve as a clerk to a judge since graduation from law school.

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

I did not engage in the solo practice of law since graduation from law school.

(3) the dates, names and addresses of law firms or offices, companies, or governmental

agencies with which you have been affiliated, and the nature of your affiliation with each.

1986(February) through Present—Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, #10 North Tucker Blvd., St. Louis, Missouri 63101

Associate Circuit Judge(1986-1997)—charged with the duty of the trial or other disposition of civil matters with an amount in controversy under $15,000.00 or $25,000.00. My duties also included presiding over preliminary hearings, misdemeanor matters, spouse abuse matters, and uncontested dissolutions.

Circuit Judge(1997-Present)—charged with general jurisdiction over all civil and criminal matters.

1977(August) through 1986(February)—Office of Circuit Attorney for the City of St. Louis, 1320 Market St., St. Louis, Missouri 63103

Assistant Circuit Attorney-charged with the duty of prosecuting criminal law violators. This included prosecution of homicides, property offenses, violent street crime, child sexual abusers, physical abuse of children, rapists, and serial rapists. I also served on the Rape Trial Task Force and established the first Child abuse Unit in the Office of the Circuit Attorney.

First Assistant Circuit Attorney(1984-1986)—charged with the responsibility for the general operation of the prosecutor's office, in addition to maintaining a reduced caseload. The position was administrative and included public relations, police liaison, investigation and prosecution of errant police officers and general supervision of the office staff.

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

As a prosecutor, from 1977 through 1986, the majority of my legal practice was in the area of the criminal law. As a prosecutor in the Office

of Circuit Attorney, I prosecuted felony law violators. My work included the prosecution of homicides, property offenses, violent street crime, child sexual abusers, physical child abusers, rapists, and serial rapists. As First Assistant Circuit Attorney, I was involved in the daily operation of the Office. My duties also included investigation of police misconduct, managing a reduced personal caseload, managing public relations, general supervision of trial staff and support personnel. There were very limited civil aspects in these position.

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

My clients were always the citizenry of the City of St. Louis.

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

I appeared in court on a frequent and sometimes daily basis. When I was conducting preliminary hearings, I was in the court at least three times per week. Upon my progression to the Grand Jury section, I presented all Grand Jury matters to the Grand Jury for its consideration. I appeared in court at least twice per week to present the indictments to the court. As a member of the felony trial staff, I appeared in court weekly, for disposition of felony matters by way of plea or by trial. During my tenure as a trial attorney I tried (we describe trial in St. Louis as selecting a jury, presenting evidence and securing a verdict) over 60 felony matters. As an administrator, I frequently appeared in court to manage my own limited docket or to assist one of my attorneys with the argument of a legal matter or the disposition of a matter.

(2) Indicate the percentage of these appearances in:
(A) federal courts; one percent, at best
(B) state courts of record; ninety-nine per cent
(C) other courts; N/A.

(3) Indicate the percentage of these appearances in:
(A) civil; one percent, at best

(B) criminal; ninety-nine percent.

(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 prosecutor I tried over 60 felony matters, to verdict, as sole counsel.

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

Every trial(100%) was a jury trial. Our office did not count jury waive matters in our overall statistical data.

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

I have never appeared before the United States Supreme Court for the purpose of presenting or arguing a matter before it.

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

I have been a member of the Judiciary for approximately 15 years and have, therefore, not been in a position to provide legal services to any member of the community. Prior to becoming a judge, I was a prosecutor and was specifically prohibited from engaging in the practice of law outside my duties as a prosecutor.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

In all instances I represented the people of the State of Missouri.
All cases were tried in the Circuit Court of the City of St. Louis before various judges then presiding.

1. STATE OF MISSOURI vs. DAVID STIDUM, 684 S. W. 2d 448(Mo. App. E. D. 1985)

This matter was tried before the Honorable Brendan Ryan. The defendant was represented by Mr. John Putzel, 935 Oak Knoll Dr., St. Louis, MO 63119(314-918-9367), a former Assistant Public Defender. This was a homicide, charged as Murder in the Second Degree, where the only evidence establishing the identity of the assailant was an excited utterance/res gestae statement of the victim. The conviction was affirmed on appeal.

2. STATE OF MISSOURI vs. CRAIG ARNOLD 674 S.W.2d 141(Mo. App. E. D. 1984)

This case was tried before the Honorable Richard Brown. It was a kidnapping, rape, and sodomy of a 14 year old girl. It was a difficult case as there was serological evidence that did not match the defendant. The Court of appeals affirmed the conviction. The case was tried by Doris Gregory Black(current address is unknown) for the defendant. The issue was identification and admissibility of inconsistent serological evidence.

3. STATE OF MISSOURI vs. JAMES NOEL 693 S. W. 2d 317(Mo. App. E. D. 1985)

This case was tried before the Honorable William Geary. It was Capital Murder trial. During closing argument I argued, in rebuttal, the statistical fact that the majority of crimes are committed by Blacks against Blacks. The jury was predominantly Black. The court of Appeals affirmed the conviction. Mr. Charles McMullen(current location unknown) represented the

defendant.

4. STATE OF MISSOURI vs. SHERRIAD WHITE
689 S. W. 2d 699(Mo. App. E. D. 1985)

This case was tried before the Honorable Thomas McGuire. It was a homicide prosecution of a father for beating his seven year old son to death with a belt. Photos depicting the injuries of the victim were enlarged for presentation to the jury. The defendant was convicted and the Court of Appeals affirmed the use of the enlarged photos. The defendant was represented by MacArthur Moten, 1015 Locust, Ste. 520, St. Louis, Mo. 63101(314-231-3922).

5. STATE OF MISSOURI vs. JEFFREY POLLARD
719 S. W. 2d 38(Mo. App. E. D. 1986)

This case was tried before the Honorable Floyd McBride. It was a sodomy prosecution wherein the defendant anally sodomized a six year old boy. The victim would not initially identify the defendant in court. I had him identify the defendant by having him exclude all others in the courtroom from being possible perpetrators. The Court of Appeals affirmed the in-court identification through process of elimination. Kevin Curran, 111 South 10th Street,St. Louis, Missouri 63101(314-241-1255),now a Federal Public Defender, represented the defendant.

6. STATE vs. ERNIE GILLESPIE
Cause number 811-02562(1982)

This case was tried before the Honorable Richard Mehan. The trial was that of a serial child rapist. The defendant was charged with 26 counts of rape, sodomy, and kidnapping of 14 and 15 year old girls. Although this was the weakest of several cases, it was tried first in order to secure a psychological advantage on the part of the state in the hope of securing pleas on all remaining cases and thereby obviate additional trauma to the victims. The defendant was convicted and it was successful in securing pleas to consecutive terms of years of imprisonment plus several life sentences. Defense counsel was Chris Adelamn-Adler, One Shaw Place, St. Louis, Missouri 63110(314-772-1588).

7. **STATE vs. ETHEL PEARL FIELDS**
636 S. W. 2d 76(Mo. App. E. D. 1982)

This case was tried before the Honorable Clyde S. Cahill, Jr. The defendant was charged with burglary in the second degree and stealing. Defendant sought to suppress certain evidence, as the result of an illegal arrest, which linked him to the commission of the crimes. He also sought to discharge his attorney on the grounds of certain conflicts and ineffectiveness. The motions were denied and the defendant was convicted of both offenses. He was sentenced to six years for burglary and two years for stealing to run concurrently. These were his fourteenth and fifteenth convictions, respectively. The Missouri Court of Appeals affirmed the convictions. Defense counsel was Andrew S. Meyer, 326 Calvert, St. Louis, Missouri 63119(314-961-3694)

8. **STATE vs. CHARLES STARR**
689 S. W. 2d 704(Mo. App. E. D. 1985)

This case was tried before the Honorable Thomas McGuire. The defendant was charged with two counts of robbery in the first degree and one count of armed criminal action. At trial the defense was insufficient identification of the defendant. The defendant was convicted of all counts and sentenced to a total term of imprisonment of 55 years. On appeal the defendant argued that a mistrial should have been granted because of the assertion that one of the jurors was sleeping during the trial. The Missouri Court of Appeals rejected the argument and affirmed the convictions. Defense counsel is unknown due to the age of the file.

9. **STATE vs. ANTHONY DUNLAP**
706 S. W. 2d 272(Mo. App. E. D. 1986)

This case was tried before the Honorable Edward Peek. The defendant was charged with two counts of assault in the first degree involving shooting his wife and stabbing his 3 year old son. The defendant asserted mental disease or defect as a defense which was induced by his long term consumption of phencyclidine (PCP) and the use of PCP the evening of the assaults. The defendant was convicted of both assault counts and sentenced to two 25 year concurrent terms of imprisonment. On appeal to the Missouri Court of Appeals the defendant asserted that rebuttal evidence regarding his prior arrests should not have been admitted, parts of my closing argument comparing him to notorious criminals was improper, and

the form of the verdict directing instructions was improper. The Missouri Court of Appeals affirmed the convictions. Defense counsel was Clyde Cahill, Jr. I have no information regarding his whereabouts.

10. STATE vs. ROBERT CHILDS
652 S. W. 2d 161(Mo. App. E. D. 1983)

This case was tried before the Honorable Richard Mehan. The defendant was charged with one count of robbery in the first degree. The defendant was convicted and sentenced to 10 years imprisonment. During trial a police officer testified, unresponsively, that the defendant knew him. On appeal the defendant asserted that this injected the issue of his prior arrest record. The Missouri Court of Appeals rejected the argument and affirmed the conviction. Defense counsel was Mr. Kevin Curran, now a Federal Public Defender. He is located at 111 South 10th Street, St. Louis, Missouri, 63102(314-241-1255).

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

I have not been convicted of a crime of any sort within ten years of my nomination.

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

I have not been a party to a civil or administrative proceeding within the last ten years. I have not been involved as a party in any civil or administrative proceeding within the last ten years. There have been no proceedings within the last ten years where I have been a party in interest.

22. **Potential Conflict of Interest**: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these

areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

There are no areas which present any potential conflicts of interest difficulties. I will, however, follow all guidelines of the Code of Judicial Conduct in the resolution of conflicts.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

The only outside commitments I would intend to continue are those Bar Association activities and memberships in which I am currently committed.

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

See attached Financial Report.

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

See attached Net Worth Statement.

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

There is no selection committee.

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

A selection commission was not utilized in my selection.

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

Senator Bond personally interviewed me and made the selection based upon the interview and other information available to him. I was also interviewed by the White House, completed the appropriate FBI investigative documents, investigated by the FBI, and nominated by the President on March 21, 2002.

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

No one has made any such inquiry. All inquiry has been related to my general qualifications and my reputation as a trial judge. No one has ever attempted to inquire into any political or social philosophy or to secure any commitment on any legal issues.

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	$12,145			Notes payable to banks-secured	N/A		
U.S. Government securities-add schedule				Notes payable to banks-unsecured	$18,000		
Listed securities-add schedule	$7290.65	A		Notes payable to relatives	N/A		
Unlisted securities--add schedule	N/A			Notes payable to others	N/A		
Accounts and notes receivable:	N/A			Accounts and bills due	N/A		
Due from relatives and friends	N/A			Unpaid income tax	N/A		
Due from others	N/A			Other unpaid income and interest	N/A		
Doubtful	N/A			Real estate mortgages payable-add schedule	$16,800	B	
Real estate owned-add schedule	$175,000	B		Chattel mortgages and other liens payable	$5,966		
Real estate mortgages receivable	N/A			Other debts-itemize:	N/A		
Autos and other personal property	$63,700						
Cash value-life insurance	$150,000						
Other assets itemize:							
100% of stock in Dulcinea, Inc.	$65,000						
Which owns property valued at							
$60,000.00				Total liabilities	$40,766		
				Net Worth	$412,381.25		
Total Assets	$463,129.65			Total liabilities and net worth	$463,129.65		
CONTINGENT LIABILITIES	N/A			GENERAL INFORMATION			
As endorser, comaker or guarantor	N/A			Are any assets pledged? (Add schedule)	No		
On leases or contracts	N/A			Are you defendant in any	No		

				suits or legal actions?			
Legal Claims	N/A			Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	N/A						
Other special debt	N/A						

QUESTIONNARE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
AFFIDAVIT

I, Henry Edward Autrey, being duly sworn, hereby state that I have read and signed the foregoing Questionnaire of Nominees Before the Committee on the Judiciary and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Henry Edward Autrey

SUBSCRIBED AND SWORN TO before me this 28th day of March, 2002

NOTARY PUBLIC

"NOTARY SEAL"
Sherry A. Marshall, Notary Public
St. Louis City, State of Missouri
My Commission Expires 9/16/2003

O-10 (v)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

. Person Reporting (Last name, first, middle initial) Autrey, Henry E.	2. Court or Organization Eastern District of Missouri	3. Date of Report 03/21/1902
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 03/21/2002 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2001 to 03/21/2002
7. Chambers or Office Address 810 North St. Louis, Missouri 63101	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.)*

☒ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1		
2		
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		There may be vested retirement benefits which I may receive at some point in time in the future.
2		
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	State of Missouri	$106,810.00
2	2001	State of Missouri	$104,812.00
3	2002	State of Missouri	$22,500.00
4			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Autrey, Henry E.

Date of Report: 03/21/1902

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-33 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1			
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	HENA	CREDIT CARD	J
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: Aubrey, Henry E.

Date of Report: 03/21/1902

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 35-54 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Information Highway.Com, Common Stock		None	J	T	Exempt				
2 Egames, Inc., Common Stock		None	J	T	Exempt				
3 BCE, inc., Common Stock		None	J	T	Exempt				
4 Pacific Webworks, Inc., Common Stock		None	J	T	Exempt				
5 Logitech International SA, Common Stock		None	J	T	Exempt				
6 Money Market Account	A	Dividend	J	T	Exempt				
7 Getty Petroleum Marketing, Common Stock		None	J	T	Exempt				
8 Money Market Account	A	Interest	J	T	Exempt				
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Inc/Gain Codes: (Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; 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: (Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

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

	Name of Person Reporting	Date of Report
NANCIAL DISCLOSURE REPORT	Autrey, Henry E.	03/21/1902

III. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Autrey, Henry E.	03/21/1902

IX. CERTIFICATION

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

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

Signature [signature] Date 03.22.02

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

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

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

   Richard Everett Dorr (Dick Dorr)

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

   United States District Court Judge, Western District of Missouri

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

   Blackwell Sanders Peper Martin, LLP
   901 St. Louis Street, Suite 1900
   Springfield, MO 65806

   Phone: (417) 268-4050

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

   DOB: August 26, 1943
   Place: Jefferson City, MO

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

Wife:	Barbara W. Dorr Maiden name - Barbara Wilson
Occupation:	Homemaker
Dependent children:	None

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

   A. University of Missouri at Columbia, Missouri
      Attended from September 1965 to January 1968
      Juris Doctor, January 29, 1968

B. University of Illinois at Champaign, Illinois
Attended from September 1961 to June 1965
B.S. Marketing, June 19, 1965

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

Employment

A. Present to 11/96
Blackwell Sanders Peper Martin, LLP
901 St. Louis Street, Suite 1900
Springfield, MO 65806
Partner/Attorney

B. 10/96 to 3/83
Dorr, Baird and Lightner, P.C.
Two Corporate Centre, Suite 2-102
Springfield, MO 65804
Partner/Attorney

C. 2/83 to 9/78
Harrison Tucker and Dorr
1121 South Glenstone
Springfield, MO 65804
Partner/Attorney

D. 5/79 to 9/78
Southwest Missouri State University
901 South National Avenue
Springfield, MO 65804
Part-time Agriculture Law Instructor

E. 8/78 to 8/73
Mann, Walter, Burkart, Weathers and Walter
(Firm is no longer in existence)
810 Landers Building
149 Park Central
Springfield, MO 65806
and

2nd Floor Woodruff Building
316 Park Central
Springfield, MO 65806
Attorney

F. 6/73 to 8/68
U.S. Air Force, Active Duty
6/73 to 7/70
36th Cmbt. Spt. Gp.
Bitburg AB, Germany
Assistant Staff Judge Advocate
6/70 to 8/68
3510th Fly. Tng. Wg
Randolph AFB, Texas
Assistant Staff Judge Advocate

G. 5/72 to 9/71
University of Maryland, European Division
Bitburg Air Base, Germany
Part-time Business Law Instructor

H. 8/68 to 2/68
Missouri Attorney General
Supreme Court Building
Jefferson City, MO
Assistant Attorney General

I. 2/68 to 6/66
Missouri Supreme Court
Supreme Court Building
Jefferson City, MO
Assistant Librarian

J. 8/65 to 6/65
Missouri Pacific Railroad
Jefferson City, MO
Brakeman

Volunteer Activities

A. Present to 1973
Springfield Metropolitan Bar Association
Director (1976-1978) Officer (1983)

B. Present to 1991
Partners with Youth Foundation
Director and Officer

C. Present to 1974
Christ Episcopal Church
Vestry (1977-1981 and 1990-1994)
Jr. Warden (1979-1981 and 1990-1992)

D. Present to 1990 (approx.)
Missouri Organization of Defense Lawyers
Director (1995-1999)

E. Present to 1984
Southwest Missouri State University Basketball Booster Club
Director (1987-1992) Officer (1989-1992)

F. Present to 1984
Southwest Missouri State University Football Booster Club
Director (1988-1992) Officer (1989-1992)

G. Present to 1975
Air Force Association, Ozark Chapter
Officer (1975-1982)

H. 1992 to 1986
Springfield Area Sports Hall of Fame
Director

I. 1990 to 1989
Glendale High School Band Booster Club
Officer

J. 1988 to 1986
Springfield Chamber of Commerce
Director (1986-1988) Officer (1987-1988)

K. 1986 to 1983
Springfield Little Theatre
Director

L. 1984 to 1983
Ozarks Council Boy Scouts of America
Director

M. 1982 to 1976
Legal Aid of Southwest Missouri
Director (1976-1982) Officer (1976-1982)

N. 1973-1968
Officers Open Mess
Bitburg AB, Germany, Director (1971-1973)
Randolph AFB, Texas, Director (1969-1970)

O. 1973-1971
Rod and Gun Club
Bitburg AB, Germany
Director

P. 1973-1971
Audio/Photo Club
Bitburg AB, Germany
Director

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

A. Present to 9/90
U.S. Air Force
Lieutenant Colonel
Service No. FV3172114
SSN: 491-46-0282
Retired

B. 9/90 to 1974
U.S. Air Force Reserve/Judge Advocate
Active Reserve
1990-1978 HQ AFCC/JA, Scott AFB, IL
1978-1974 HQ AFCC/JA, Richards-Gebaur AFB, MO

C. 7/73 to 8/68
U.S. Air Force/Judge Advocate
Active Duty
1973-1970 36th Cmbt. Spt. Gp./JA, Bitburg AB, Germany
1970-1968 3510th Fly. Tng. Wg./JA, Randolph AFB, TX

D. 8/68 to 6/65
U.S. Air Force
Inactive Reserve (law school)

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

A. In 1995, I received the Equal Access to Justice award from the Springfield Metropolitan Bar Association for outstanding service to the clients of Legal Aid of Southwest Missouri.

B. In 1979, I was recognized for outstanding service to the community by the Greene County Community Justice Association.

C. I received two meritorious service medals while in the Air Force.

D. I attended the University of Illinois on a football scholarship.

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

A. American Bar Association
B. Missouri Bar Association
C. Springfield Metropolitan Bar Association
(f/k/a Greene County Bar Association)
Board of Directors 1976-1978
Secretary 1983
D. Legal Aid of Southwest Missouri
Board of Directors 1976-1982
Secretary 1976-1978
President 1978-1982
E. Defense Research Institute
F. Missouri Organization of Defense Lawyers
Board of Directors 1995 - 1999

G. Advisory Group Civil Justice Reform Act of 1990, Western District of Missouri
H. Missouri Supreme Court Committee on Alternative Dispute Resolution

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

A. Missouri - All state and municipal courts and administrative bodies
April 17, 1968 to present

B. Federal - United States Supreme Court
October 6, 1980 to present
United States Court of Appeals-8th Circuit
November 14, 1990 to present
United States District Court-WD Missouri
November 5, 1974 to present

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

A. Partners With Youth Foundation, 1991 – Present, Director and Officer

B. Christ Episcopal Church, 1974 – Present, Vestry and Junior Warden

C. Southwest Missouri State University Basketball Booster Club, 1984 – Present, Director and Officer

D. Southwest Missouri State University Football Booster Club, 1984 – Present, Director and Officer

E. Air Force Association, 1975 – Present, Officer in Ozark Chapter (1975-1982)

F. The Reserve Officers Association, Approximately 1990 - Present

G. The Retired Officers Association, Approximately 1990 - Present

H. Association of the U.S. Army, Approximately 1994 - Present

I. Phi Delta Theta Social Fraternity, 1962 – Present

J. Illinois Letterman's Association, 1965 - Present

K. Highland Springs Country Club, 1998 – Present

L. Hickory Hills Country Club, 1988-1998

M. Springfield Area Sports Hall of Fame, 1986 – 1992, Director

N. Springfield Little Theatre, 1983-1986, Director

O. Springfield Chamber of Commerce, Director (1986-1988), Officer (1987-1988

P. Glendale High School Band Booster Club, 1989-1990, Officer

Q. Ozarks Council Boy Scouts of America, 1983-1984, Director

R. Rod and Gun Club, Bitburg AB, Germany, 1972-1973, Director

S. Audio/Photo Club, Bitburg AB, Germany, 1972-1973, Director

T. Officers Open Mess, 1968-1973
Bitburg AB, Germany, 1971-1973, Director
Randolph AFB, Texas, 1969-1970, Director

I am not aware of any discriminatory practices ever having been carried on by any of these organizations.

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

I have made presentations at continuing legal education programs. The subject matter for each was related to litigation practice tips. On one occasion my material was published in a seminar handbook. I have attached four copies of the chapter I prepared for this handbook.

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

I have never testified before a committee or subcommittee of Congress.

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

Excellent. My last physical examination was on November 1, 2001.

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

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

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

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

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

Not applicable.

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

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

I have never held a public office nor have I run for elective office. In 1992, I was recommended by Senator John Danforth and nominated by President George H.W. Bush for the position of Federal District Court Judge, Western District of Missouri, but the nomination was not confirmed before President Bush's term expired.

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

I have never held a position nor played a role in any political campaign other than making financial contributions to certain candidates for federal, state and local offices. There have been occasions when the names of my wife and I have been listed with others as hosts or sponsors of a fund raising event. Our actual involvement in these events has been limited to a financial contribution and occasional ticket sales.

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

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

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

Not applicable.

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

Not applicable.

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

Employer/Position	Employment Address	Dates
Missouri Attorney General Asst. Attorney General	Supreme Court Bldg. Jefferson City, MO	Feb. to Aug. 1968
U.S, Air Force Judge Advocate	3510 Fly. Tng. Wg. Randolph AFB Texas	Aug. 1968- June 1970
U.S. Air Force Judge Advocate	36th Cmbt. Spt. Gp Bitburg Air Base Germany	July 1970- June 1973

University of Maryland European Branch Business Law Instructor	Bitburg Air Base Germany	Sept. 1971- May 1972
Mann, Walter, Burkart, Weathers & Walter Partner (1978) Associate (1973-77)	Firm no longer in existence. 810 Landers Building 149 Park Central Springfield, MO 65806 and 2nd Floor Woodruff Building 316 Park Central Springfield, MO 65806	Aug. 1973 to Aug.1978
Southwest Missouri State University Agriculture Law Instructor	901 S. National Springfield, MO 65804	Sept. 1978- May 1979
Harrison, Tucker and Dorr Partner	1121 S. Glenstone Springfield, MO 65804	Sept. 1978 to Feb.1983
Dorr, Baird and Lightner Partner	1949 E. Sunshine Suite 2-102 Springfield, MO 65804	March 1983- Oct. 1996
Blackwell Sanders Peper Martin, LLP Managing Partner (Springfield office)	901 St. Louis Street Suite 1900 Springfield, MO 65806	Nov. 1996 to Present

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

My first seven months of practice (Feb.-Aug., 1968) were in the Missouri Attorney General's Office on an interim basis while I first waited for the results of the bar exam and then waited for orders to active Air Force duty. I provided legal advice to several state agencies and prepared briefs for criminal appeals. During the next five years (1968-1973), I was an active duty Air Force Judge Advocate. I regularly appeared as either prosecution or defense counsel in criminal cases before Courts Martial and Administrative Boards. I also served as a legal advisor to Administrative Boards and as a Military Judge. In addition, I provided staff advice to the commanders and legal assistance to base personnel.

I entered private practice in 1973 and for the next five years (1973-1978) I was an associate in a firm with experienced lawyers (Mann, Walter, Burkart, Weathers & Walter). I routinely made court appearances on motions, objections, etc., and participated in the trial of several civil cases, first as associate counsel and later as the chief counsel. Most of this was insurance defense work. I also began to develop a general civil practice of my own.

In 1978, I formed a partnership with two other attorneys (Harrison, Tucker and Dorr) and began a general civil practice for which I had primary responsibility. Thereafter, I was regularly involved in litigation and, except for occasional schedule conflicts, I handled my own court appearances and was lead counsel at trial. This was a very general civil practice that included real estate, business, domestic relations and litigation of all kinds. In 1993, I moved to a new partnership (Dorr, Baird and Lightner) and continued with my general civil practice.

In 1996, I joined the partnership of my present firm, a large law firm based in Kansas City, Missouri and became the managing partner for a new branch office that was opened in Springfield, Missouri. I have ceased doing domestic relations cases and now concentrate my practice more on business related issues and commercial litigation. I have also had increased administrative responsibilities as part of my current position.

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

I have had a general civil practice that has included pro bono work. Typical clients for the domestic relations and personal injury litigation part of my practice have included about equal numbers of men and women and involved the full spectrum of ethnic backgrounds, economic means, and education levels. The medical malpractice defense part of my practice necessarily was limited to health care professionals. The commercial litigation, real estate and employment law part of my practice typically involved business managers and professionals. My present practice is still a general civil practice, but the bulk of my direct legal work involves personal injury litigation, commercial litigation, real estate and employment matters.

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

I have appeared in court frequently throughout my law career from 1968 to the present.

(2) Indicate the percentage of these appearances in

(A) federal courts;
(B) state courts of record;

(C) other courts.

Federal courts: 25% (100% during active military duty)
State courts of record: 70%
Other courts: 5%

(3) Indicate the percentage of these appearances in:

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

Civil: 98%
Criminal: 2% (minor municipal court matters) (It was 100% during active military duty.)

(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 no longer have records from which I can determine the exact number of cases I have tried to conclusion since I began practicing law in 1968. During the time I was on active military duty (1968-1973), I was involved as either trial or defense counsel in at least six (6) trials per year. During my first five (5) years of private practice, I was an associate in a firm with older lawyers and I participated as associate counsel in 3-4 trials per year and as primary counsel in 1-2 trials per year. Since 1978, I have been chief counsel in most of my trials and sole counsel in at least one-half of my trials. My best judgment as to the number of cases I have taken through trial since 1968 is that it is at least 150.

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

My best judgment is that at least 33% of these trials were decided by a jury.

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

I was admitted to practice before the United States Supreme Court on October 6, 1980, but I have not had any occasion to practice before the court since that time. During the time I worked for the Missouri Attorney General (1968) I did some research and assisted on a brief to be filed with the Supreme Court on behalf of Respondent State of Missouri in response to a Petition for Writ of Certiorari. The case was *Smith v. Missouri*. The Supreme Court denied the Petition at 393 US 895, 21 LEd2d 176, 89 SCt 150. I have attached four copies of this brief as requested.

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

While I served in the military at Bitburg Air Base Germany, I was appointed to the Human Relations Council and served as an active member until my return to the United States. The Human Relations Councils were part of an Air Force-wide program to educate all personnel about appropriate behavior in dealing with the racial diversity which exists on large US military installations. We also were intended to be an outreach for the commanders to identify problems related to potential discrimination at the earliest opportunity. We all wore special name tags to identify us as council members so base personnel would know they could have confidential communications with us.

I was actively involved in establishing the Southwest Missouri Legal Aid Corporation, served on its first board of directors (1976-1982) and was Secretary (1976-1978) and President (1978-1982). We were involved in public hearings and frequent meetings at the beginning. Our first board met every Thursday at 7:00 a.m. for over a year. We had a very small staff for several years and while I was president, I spoke or met daily with the director to discuss the operation of the program.

I have served on the Board of Directors of two civic organizations which have as their purpose the provision of assistance to disadvantaged young people. One organization is the Springfield Area Sports Hall of Fame which uses its recognition banquet as the vehicle to raise money to purchase sports equipment for needy youth organizations. The second organization is the Partners With Youth Foundation for which I was one of the original incorporators. The purpose of this organization is to raise funds to provide assistance to students who have financial needs related to their ability to participate in school activities.

I have participated in other activities which included disadvantaged young people among the participants. This includes being a YMCA soccer coach for several years (Spring and Fall), Boy Scouts (Council Director and assistant troop leader) and president of a high school band booster club. In each of these activities we worked to ensure that all of the participants were treated equally including arrangements to meet financial needs in a respectful manner.

I have done volunteer legal work throughout my career. This has included work in the Missouri Bar Association's Volunteer Lawyer Program and taking pro bono cases from Legal Aid. These have usually been pro bono divorce cases, child custody issues or juvenile matters. In 1995, I received the Equal Access to Justice Award from the Springfield Metropolitan Bar Association for outstanding service to the clients of Legal Aid of Southwest Missouri.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

(1) (a) **Southwestern Bell Tel. Co., et al. v. Wickliffe**, 629 S.W.2d 618 (Mo.App. 1982)

(b) This case involved a tax protest in which Appellants, Southwestern Bell Telephone Company and St. Louis-San Francisco Railway Co. contended that an additional school tax levy had expired and should no longer be collected. The language on the ballot that had been presented to the voters provided in part that the school district "be authorized to levy, for a period of two years" a particular tax. Intervenor School District wanted to continue the tax after the expiration of two years based on its contention that the Missouri Constitution allowed the school board to continue the "last" tax rate approved regardless of whether it had a time limitation.

(c) I represented the Plaintiffs/Appellants Southwestern Bell Telephone Company and St. Louis-San Francisco Railway Co.

(d) I handled the case from the filing of the petition, through the trial in Circuit Court and the preparation of briefs and oral argument in the Court of Appeals. Each client had staff attorneys that consulted with me, but they did not actively participate in the case. The trial court found in favor of the school district, but the Missouri Court of Appeals reversed the decision of the trial court and directed that judgment be entered in favor of Appellants.

(e) The trial of this case was in November 1980. Oral arguments for the appeal were on September 17, 1981.

(f) Trial: Circuit Court of Greene County, Missouri.
Robert H. Russell, Special Judge

Appeal: Missouri Court of Appeals,
Southern District

Appellate Judges: James Prewitt, Robert Hogan and William Billings.

(g) Co-Counsel:
Southwestern Bell Telephone Company
James E. Taylor
112 S. Main
Windsor, MO 65360
(660) 647-3111
John W. Kelly, Jr.
6500 West Loop South, Zone 5.1
Bellaire, TX 74401
(713) 630-1055

St. Louis-San Francisco Railway Co.
Donald Ransom
(current address unknown)

Opposing Counsel:
R. Max Humphreys
Carson & Coil, P.C.
211 East Capitol Avenue
Jefferson City, MO 65102
(314) 636-2177

(2) (a) **Matter of Williams**, 711 S.W.2d 518 (Mo. banc 1986)

(b) This was a disciplinary proceeding against the Respondent attorney for professional misconduct. He was accused of misappropriating client's funds from his trust account. Respondent attorney claimed inadvertent error and sought to place blame on his wife (office manager) for not informing him of problems with the trust account.

(c) I prosecuted the case for the Bar Committee that initiated the action. The committee requested that I take this matter on behalf of the Greene County Bar Association and I provided my services without charge.

(d) This procedure involved an evidentiary hearing before a Master followed by briefing and oral argument in the Missouri Supreme Court. The master recommended disbarment and the Supreme Court concurred.

(e) The hearing before the Master was on October 21, 1985. The oral argument before the Missouri Supreme Court was May 13, 1986.

(f) Special Master: L. Thomas Elliston, Presiding Judge, Twenty-Ninth Judicial Circuit.

Appeal: Missouri Supreme Court En Banc

Appellate Judges: William H. Billings, Charles B. Blackmar, Robert T. Donnelly, Albert L. Rendlen, Edward D. Robertson, Jr., Warren D. Welliver, and Andrew J. Higgins

(g) Opposing Counsel:
Mark E. Fitzsimmons
Greene County Associate Circuit Judge
1010 Boonville
Springfield, MO 65802
(417) 868-4095

(3) (a) **Sunshine Realty Corp. v. Killian**, 702 S.W.2d 95 (Mo. App.1985)

(b) This case involved three consolidated claims arising out of a propane gas explosion in a car wash. Two claims were for property damage and the third was for wrongful death. The issue at trial was the negligence of the Union Gas employee who had converted the pickup truck involved in the explosion to operate on propane gas. Judgments were entered for plaintiffs in the trial court and one of the property damage claims included punitive damages. Union Gas paid the judgment that had been for property damages only. We then settled the second property damage claim that included punitive damages which avoided judgment being entered for punitive damages. Union Gas appealed the judgment on the wrongful death claim and some collateral issues related to contribution among other defendants. The issues on appeal related to collateral estoppel and instructional error concerning punitive damages included in the wrongful death claim.

(c) I represented Union L.P. Gas Systems, Inc.

(d) I did not participate in the trial of these claims, but was retained by Union Gas to handle the appeal and the pending trials of several related cases that arose out of the same incident. I prepared the appellate brief and argued the case before the Court of Appeals. The appellate court reversed the wrongful death judgment but upheld the application of collateral estoppel to the negligence issues.

(e) This representation occurred during 1983-1985.

(f) Missouri Court of Appeals, Southern District.

Appellate Judges: Rex Titus, Doug Greene and George Flanigan

(g) Opposing Counsel:

Warren S. Stafford
3315 E. Ridgeview St.
Suite 1000
Springfield, MO 65804
(417) 887-2020

Glenn A. Burkart
242 S. National
Springfield, MO 65802
(417) 864-4906

Charles C. Shafer, Jr., Deceased
Kansas City, MO

(4) (a) **Bitner v. McGonigle**, Circuit Court of Jasper County, Missouri, Case No. CV195-288CC

(b) This case involved the jury trial of a wrongful death action brought by the parents of a six year old boy who had died suddenly and unexpectedly, twenty-two hours after a tonsillectomy. The trial centered on the very complicated issue as to the cause of death. Plaintiffs claimed the doctor should have requested a pre-operative blood study which would have revealed the possibility of infection which later caused the death. Defendant claimed the death was more likely a sudden unexpected death from epilepsy.

(c) I represented the defendant Dr. Michael McGonigle.

(d) The jury returned a verdict for the defendant doctor. There was no appeal.

(e) The representation occurred during 1995-1998 with the trial occurring in February 1998.

(f) Trial: Circuit Court of Jasper County, Missouri

Judge: Jon Dermott, Circuit Judge

Appeal: None

(g) Opposing Counsel:
Edward J. Herschewe
431 Virginia Avenue
Joplin, MO 64801-2399
(417) 782-3790

Fred Spigarelli
100 S. Broadway, Suite 200
Pittsburg, Kansas 66762
(620) 231-1290

(5) (a) **Pemberton v. Chicago and Northwestern Transportation Co.**, Missouri Court of Appeals, Western District, Appeal No. WD 37,845

(b) This case was a personal injury action brought under the Federal Employers Liability Act. Appellant Railroad had originally joined two other defendants in a third party action, claiming their negligence caused plaintiff's injury, but this claim was severed before trial. Plaintiff obtained a $1.45 million judgment against Appellant Railroad. On appeal, Appellant contended it was error for the trial court to sever the claims against the third party defendants since it deprived the Appellant of a fair adjudication of its right to contribution.

(c) I was not involved in the trial or preparation of the appellate brief. I was requested by a highly respected Chicago appellate attorney (Hugh Griffin) to handle the oral argument for appellant on appeal. The oral argument went very well. Within a few days, thereafter, plaintiffs initiated settlement discussions (which had been refused before) and the case was immediately settled. An appellate decision was, therefore, never issued.

(e) This representation occurred in 1986 with the oral argument in the Court of Appeals on December 11, 1986.

(f) Missouri Court of Appeals, Western District

Appellate Judges: Charles Shangler, Donald L. Manford and Robert W. Berrey, III

(g) Co-Counsel:

Hugh Griffin
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, IL 60603
(312) 523-2408

Guy A. Magruder, Jr.
11612 Pennsylvania Avenue
Kansas City, MO 64114

David M. Harding
2268 St. Andrews Ct.
High Ridge, MO 63049
(636) 677-0768

Opposing counsel:

G. Michael O'Neal
Hubbell, Sawyer, Peak & O'Neal
106 West 14th Street
Kansas City, MO 64105
Phone (816) 221-5666

(6) (a) **Four-S Corporation v. Valmac Industries, Inc., et al.**
United States District Court for WD of Mo. Case No. 843212-CV-S-4
(Summary Judgment entered-case not reported.)

(b) This was a Sherman Act antitrust case in which plaintiff claimed the defendants were fixing the prices charged to plaintiff for chicken parts. Plaintiff claimed the price fixing caused its chicken processing business to fail and go into bankruptcy.

(c) I represented defendant, Pacific Agri-Products and personally handled all aspects of the case through judgment.

(d) Detailed discovery, including many depositions, was completed and the defendants then filed a motion for summary judgment which was granted by the court. There was no appeal from this judgment.

(e) This representation occurred in 1985-1986 with the summary judgment being granted on April 18, 1986.

(f) United States District Court for the Western District of Missouri, Southern Division

Judge: Russell G. Clark

(g) Counsel for other defendants:

Jeffrey King
Bickel & Brewer
Suite 1010
1301 K. Street
N.W. Washington, D.C. 20005
(202) 898-0900
Attorney for Marshall Durbin Poultry Co.

Mark Haseltine
405 Woodruff Building
Springfield, MO 65806
(417) 862-0792
Attorney for Valmac Industries, Inc.

Lincoln J. Knauer
750 N. Jefferson
Springfield, MO 65802
(417) 862-6726
Attorneys for Springdale Farms, Inc.

Mark E. Fitzsimmons
Greene County Associate Circuit Judge
1010 Boonville
Springfield, MO 65802
(417) 868-4095

Jerome T. Wolf
Sonnenschein, Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400

John M. May
343 E. Bodley Avenue
St. Louis, MO 63122
(314) 984-8124
Attorneys for Gold Kist, Inc.

Craig Oliver
Bruer, Wooddell, Oliver & Bates
1360 East Bradford Parkway
Springfield, MO 65804
(417) 887-2740
Attorneys for Conagra, Inc.

Opposing Counsel:
Robert Hyder
800 Peachtree Drive
Jefferson City, MO 65101
(573) 636-9501

(7) (a) **May v. AOG Holding Corp.**, 810 S.W.2d 655 (Mo. App. 1991)

(b) This case involved the trial and appeal of a personal injury action arising out of a propane explosion in a car wash. Defendant-Appellant AOG Holding Corp formerly known as Union Gas was bound by collateral estoppel for liability for actual damages based on a prior decision of the appellate court. This trial concerned the determination of the amount of plaintiffs damages including the issue of punitive damages.

(c) I represented Defendant/Appellant AOG Holding Corp.

(d) I was the principal counsel at trial and through the appeal for Defendant-Appellant. The jury awarded plaintiffs both actual and punitive damages. The primary issue on appeal was whether or not the evidence supported a finding of punitive damages. The Court of Appeals found it was error to submit the issue of punitive damages to the jury and reversed the award of punitive damages.

(e) This representation occurred during 1983 to 1991 with the trial occurring on July 17-24, 1989. The appellate decision was entered on May 15, 1991.

(f) Trial: Circuit Court of Greene County, Missouri
Judge: David Anderson

Appeal: Missouri Court of Appeals, Southern District

Appellate Judges: George Flanigan, Robert Hogan and John Parrish

(g) Co-Counsel:
R. Lynn Myers
1909 E. Bennett
Springfield, MO 65804
(417) 887-7408

Opposing Counsel:
David W. Hall, Jr.
1949 E. Sunshine
Springfield, MO 65806
(417) 882-9090

Craig R. Oliver
Bruer, Wooddell, Oliver & Bates
1360 East Bradford Parkway
Springfield, MO 65804
(417) 887-2740
Attorneys for Plaintiff

(8) (a) **V. Hanner & Associates, P.C. v. Investment Properties. Inc.**
United States Court of Appeals for the Eighth Circuit
Case No. 88-2485-WM. (unpublished opinion entered on April 10, 1989)

(b) This case involved the trial and appeal of an action on a contract brought by an architect against the developer. The defense claimed that the architect had not prepared the plans in a timely manner which resulted in the developer losing its financing for the project. The architect claimed that the developer had decided to not go through with the project and was trying to avoid paying for the work done by architect.

(c) I represented the plaintiff architect.

(d) I handled this case from the beginning through trial and preparation of the appellate brief. The trial judge directed a verdict for plaintiff on the issue of liability. The jury awarded the architect the full contract amount (approx. $125,000). This judgment was sustained on appeal.

(e) This representation occurred during 1987-1989 with the trial occurring on July 6-8, 1988.

(f) Trial: United States District Court for the Western District of Missouri, Southern Division

Judge: Russell G. Clark

Appeal: United States Court of Appeals for the Eighth Circuit

Appellate Judges: John R. Gibson, Gerald W. Heaney and Pasco M. Bowman

(g) Opposing Counsel:
Joseph Bohrer
3300 East Battlefield Road, Suite 1000
Springfield, MO 65808
(417) 883-7411

(9) (a) **Schupbach v. Schupbach,** 760 S.W.2d 918 (Mo. App.1988)

(b) This case was a declaratory judgment action brought by the personal representative of an estate to determine the amount of funding for the family trust portion of a trust agreement. There was a latent ambiguity between the language in the will and the trust agreement. The ramifications were significant in that any amount funded for the family trust in excess of $325,000 would be subject to tax as well as being distributed to the children rather than the widow.

(c) I represented the widow, Marjorie Schupbach.

(d) I handled the case from the filing of the petition, through trial and the appeal. The trial court declared the funding of the family trust was limited to $325,000 and the Court of Appeals affirmed

(e) This representation occurred during 1987-1988. The appellate decision was dated November 28, 1988.

(f) Trial: The Circuit Court of Christian County, Missouri.

Judge: James Clifford Crouch

Appeal: Missouri Court of Appeals, Southern District

Appellate Judges: Almon Maus, Douglas Greene, John Crow

(g) Opposing Counsel:
Michael Patton
1355 Bradford Parkway
Springfield, MO 65804
(417) 883-2102

(10) (a) **McKellips v. Holmes Trucking**, Circuit Court of Greene County, Missouri, Case No. 193CC2339

(b) This case involved a plaintiff truck driver who was severely injured (quadriplegic) when a load of windows fell over on him while his trailer was being unloaded at defendant's terminal. Plaintiff claimed the defendant's employee negligently drove a forklift into the trailer causing the windows to fall. Defendant's employee testified that plaintiff was not paying attention to the stack of windows and was joking around rather than holding the windows in place.

(c) I represented the defendant trucking company.

(d) I handled the case from beginning to end with assistance from an associate attorney in our office. After a lengthy trial the jury returned a verdict for the defendant trucking company. There was no appeal.

(e) This representation occurred in 1993-1994 with the trial in March 1994.

(f) Trial: Greene County Circuit Court

Judge: Donald Bonnaker, Circuit Judge

Appeal: None

(g) Co-Counsel:
Mark Milsap
1949 E. Sunshine, Suite 2-102
Springfield, MO 65804
(417) 887-0133

Opposing Counsel:
F. William Joyner
901 St. Louis, 20th Floor
Springfield, MO 65806
(417) 866-7777

Michael K. Cully
901 St. Louis, 20th Floor
Springfield, MO 65806
(417) 866-7777

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

No.

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

No.

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

In all cases I will follow the Code of Judicial Conduct as it relates to conflicts of interest and the procedures that are established for the Western District of Missouri.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

I have attached a copy of my form A0-10 Financial Disclosure Report .

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

See attached financial statement.

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

No.

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

Not applicable.

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

I expressed an interest in the position to Senator Bond in January 2001. On August 2, 2001, I had an interview with White House Counsel Judge Alberto Gonzales, which lasted approximately forty minutes. On October 15, 2001 I received forms from the Justice Department which I completed and returned on November 1, 2001. On November 20, 2001, I was interviewed by the FBI. I was nominated by President Bush for this position on March 21, 2002.

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

No.

Richard E. Dorr
FINANCIAL STATEMENT

NET WORTH
March 22, 2002

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	180000	Notes payable to banks-secured	0
U.S. Government securities-add schedule	0	Notes payable to banks-unsecured	0
Listed securities-add schedule	229221	Notes payable to relatives	0
Unlisted securities--add schedule	0	Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid income and interest	0
Doubtful	0	Real estate mortgages payable-add schedule	257273
Real estate owned-add schedule	1310000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts-itemize:	0
Autos and other personal property	150000		
Cash value-life insurance	0		
Other assets itemize:			
Springfield Trust Co. Conduit IRA	605677		
Blackwell Sanders 401K, SEP, ERC	99859		
Blackwell Sanders Capital Account	60000	Total liabilities	257273
		Net Worth	2377484
Total Assets	2634757	Total liabilities and net worth	2634757
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule) No	0
On leases or contracts	0	Are you defendant in any suits or legal actions? No	0
Legal Claims	0	Have you ever taken bankruptcy? No	0
Provision for Federal Income Tax Est. Tax	85000		
Other special debt	0		

SF-69609-3

FINANCIAL STATEMENT
RICHARD E. DORR
March 22, 2002

SCHEDULES

Listed Securities Schedule

Edward D. Jones Brokerage Account

Description	Current Value (22 Mar 02)
Money Market	$ 16,659.00
Common Stocks:	
O'Reilly Automotive Inc.	$ 114,084.00
SBC Communications Inc.	7,726.00
Mutual Funds:	
Hartford Cap Appreciation CL A	$ 3,890.00
Growth Fund of America Inc. A	6,954.00
Putnam New Opportunities FD B	12,506.00
Putnam New Opportunities FD B	4,663.00
Annuities	
Sunamerica Life Insurance Polaris Variable Annuity	$ 23,957.00
Hartford Life Director V Variable Annuity	22,758.00
IRAs	
Federated American Leaders	$ 8,012.00
Federated American Leaders	8,012.00
Total Listed Securities	**$ 229,221.00**

FINANCIAL STATEMENT
RICHARD E. DORR
March 22, 2002

SCHEDULES

Real Estate Schedule

1.	Residence	$1,200,000.00
2.	Second Home – Lake Cabin	110,000.00
Total Real Estate		**$1,310,000.00**

FINANCIAL STATEMENT
RICHARD E. DORR
March 22, 2002

SCHEDULES

Real Estate Mortgage Payable Schedule

Loan on Residence	$ 257,273.00

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Dorr, Richard E.	2. Court or Organization U.S. Dist. Ct. W.D. MO	3. Date of Report 03/22/2002
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 03/21/2002 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2000 to 03/22/2002
7. Chambers or Office Address Blackwell Sanders Peper Martin 901 St. Louis St., Suite 1900 Springfield, MO 65806	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Partner/Attorney	Blackwell Sanders Peper Martin, LLP
2		
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	12/31/01	My law firm will pay my share of profits and refund my capital contribution within 12 months of my withdrawal from the partnership.
2		
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	12/31/00	Blackwell Sanders Peper Martin, LLP	$278,480
2	12/31/01	Blackwell Sanders Peper Martin, LLP	$323,694
3	03/22/02	Blackwell Sanders Peper Martin, LLP (Jan-Feb 2002)	$ 26,250
4			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dorr, Richard E.	03/22/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

[ ] NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

[ ] NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

[X] 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	Date of Report
Dorr, Richard E.	03/22/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Commerce Bank	A	Interest	L	T	Exempt				
2 Blackwell Sanders Peper Martin Member Account	A	Interest	M	T	Exempt				
3 EDWARD D. JONES BROKERAGE ACCOUNT:									
4 - Money Market	A	Interest	K	T	Exempt				
5 - O'Reilly Automotive (ORLY) Common Stock	A	Dividend	M	T	Exempt				
6 - SBC Communications (SBC) Common Stock	A	Dividend	J	T	Exempt				
7 - Hartford Cap Apprec (ITHAX) Mutual Fund	A	Dividend	J	T	Exempt				
8 - Growth Fund of America Mutual Fund (AGTHX)	A	Dividend	J	T	Exempt				
9 - Putnam New Opportunities Mutual Fund (PNOBX)	A	Dividend	J	T	Exempt				
10 - SunAmerica Life Ins. Polaris Variable Annuity	A	None	K	T	Exempt				
11 - Hartford Life Director Variable Annuity	A	None	K	T	Exempt				
12 - Putnam New Opportunities Mutual Fund (PNOBX)	A	Dividend	J	T	Exempt				
13 - IRA NO. 1									
14 -- Federated American Leaders Mutual Fund (FAIDX)	A	Dividend	J	T	Exempt				
15 - IRA NO. 2									
16 -- Federated American Leaders Mutual Fund (FAIDX)	A	Dividend	J	T	Exempt				
17 - ASSETS SOLD DURING REPORTING PERIOD:									

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	Date of Report
	Dorr, Richard E.	03/22/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 -- Washington Mutual Mutual Fund	A	Dividend	J	T	Exempt				
19 -- Goldman Sachs Cap Growth Mutual Fund	A	Dividend	J	T	Exempt				
20 -- Great Southern Bancorp Common Stock	B	Dividend	M	T	Exempt				
21 BLACKWELL SANDERS RETIREMENT FUNDS:									
22 - 401(K)									
23 -- Growth Fund of America Mutal Fund	A	Dividend	J	T	Exempt				
24 -- Invesco Dynamics Inv Mutual Fund	A	Dividend	J	T	Exempt				
25 -- Janus Advisor Growth & Inc Mutual Fund	A	Dividend	J	T	Exempt				
26 - ERC									
27 -- Growth Fund of America Mutual Fund	A	Dividend	J	T	Exempt				
28 -- Invesco Dynamics Inv. Mutual Fund	A	Dividend	J	T	Exempt				
29 -- Janus Advisor Growth & Inc.	A	Dividend	J	T	Exempt				
30 - SEP									
31 -- Europacific Growth Fund Mutual Fund	A	Dividend	J	T	Exempt				
32 -- Growth Fund of America Mutual Fund	A	Dividend	K	T	Exempt				
33 -- Small Cap World Fund Mutual Fund	A	Dividend	J	T	Exempt				
34 SPRINGFIELD TROST COMPANY CONDUIT IRA:	D	Dividend	O	T	Exempt				

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	Date of Report
Dorr, Richard E.	03/22/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
35 - CASH EQUIVALENTS:									
36 -- Goldman Sachs F/S Federal Money Market Fund									
37 - FIXED INCOME SECURITIES:									
38 -- Federal Home Ln Bks Deb 6.000% 3/10/04									
39 - CORPORATE BDS & NTS:									
40 -- AT&T Corp Note 6.500% 9/15/02									
41 -- Citicorp Note 6.375% 1/15/06									
42 -- General Mtrs Accep Corp Note 6.125% 1/22/08									
43 -- Sprint Cap Corp Note 5.700% 11/15/03									
44 - FIXED INCOME FUNDS:									
45 -- Federated High Yield Trust									
46 -- Federated Mortgage Fund #835									
47 - COMMON STOCK:									
48 -- American Express Co Com									
49 -- Amgen Inc. Com									
50 -- Anheuser Busch Cos Inc. Com									
51 -- Bristol Myers Squibb Co Com									

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: Dorr, Richard E.

Date of Report: 03/22/2002

VII. Page 4 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 -- Chevrontexaco Corp Com									
53 -- Cisco Sys Inc. Com									
54 -- Citigroup Inc. Com									
55 -- Clorox Co Del Com									
56 -- Dell Computer Corp Com									
57 -- Exxon Mobil Corp									
58 -- Fannie Mae Common Stock									
59 -- Fleet Boston Corp Com									
60 -- General Elec Co Com									
61 -- Home Depot Inc. Com									
62 -- Intel Corp Com									
63 -- International Business Machs Com									
64 -- Johnson & Johnson Com									
65 -- Kroger Co Com									
66 -- MBNA Corp Com									
67 -- McDonalds Corp Com									
68 -- Merck & Co Inc. Com									

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	Date of Report
Dorr, Richard E.	03/22/2002

VII. Page 5 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
69 -- Microsoft Corp									
70 -- Northern Tr Corp Com									
71 -- O'Reilly Automotive Inc. Com									
72 -- Pepsico Inc.									
73 -- Pfizer Inc. Com									
74 -- Proctor & Gamble Co Com									
75 -- Schering Plough Corp Com									
76 -- Sprint Corp									
77 -- Sprint Corp PCS Com Ser 1									
78 -- Tyco Intl Ltd New Com									
79 -- Verizon Communications Com									
80 -- Worldcom Inc. Worldcom Group									
81 - EQUITY MUTUAL FUNDS:									
82 -- VGD Star FD Dev Mkt Stk Index									
83 -- VGD Index TR Mid Cap Stk Inv									
84 - ASSETS SOLD DURING REPORTING PERIOD:									
85 -- AT&T Corp Common Stock									

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: Dorr, Richard E.

Date of Report: 03/22/2002

VII. Page 6 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
86 -- Nike, Inc. Class B Stock									
87 -- Citrix Sys Inc. Common Stock									
88 -- Citigroup Inc. Common Stock									
89 -- Chase Manhattan Corp New Common Stock									
90 -- Avaya Inc. Common Stock									
91 -- Federated Income Secs TR Shrt Intr									
92 -- Federal Natl Mtg Assn Mtn Mtnf 6.070% 9/02/03									
93 -- Microsoft Corp Common Stock									
94 -- Lucent Technologies Inc. Common Stock									
95 -- Federal Home Ln Mtg Corp Deb 6.000% 3/03/05									
96 -- Worldcom Inc. GA New MCI Group Com Common Stock									
97 -- Zimmer Hldgs Inc. Common Stock									
98 -- Federal Natl Mtg Assn Mediumntnf 6.125%									
99 -- Amgen Inc. Common Stock									
100 -- Janus Invt FD Worldwide FD									
101 -- Fed Ultra-Sht Bd 108									
102 -- Echostar Communications New CL A Common Stock									

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 Dorr, Richard E.	Date of Report 03/22/2002

VII. Page 7 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				
Place "(X)" after each asset exempt from prior disclosure.	(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.)									
103 -- Goldman Sachs International Equity FD									
104 -- Vanguard International Growth Fund									
105 -- Robertson Stephens Invt TR Emerging GRW									
106 -- Agere Sys Inc. CL A									
107 -- Gillette Co Common Stock									
108									
109									
110									
111									
112									
113									
114									
115									
116									
117									
118									
119									

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	Date of Report
	Dorr, Richard E.	03/22/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dorr, Richard E.	03/22/2002

IX. CERTIFICATION

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

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

Signature Richard E. Dorr Date March 22, 2002

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

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

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

   Henry Edward Hudson

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

   United States District Court Judge, Eastern District of Virginia

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

   Residence: 8201 Collingwood Court, Alexandria, Virginia 22308 (703) 768-9014
   Office: Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia 22030 (703) 246-2221

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

   July 24, 1947; Washington, DC

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

   Wife's Name: Tara Kathleen Lydon Hudson
   Wife's Occupation: Occupational Field Manager, United States Marine Corps Headquarters Marine Corps, Arlington, Virginia 20380-1775.
   Dependent Children: One son, Kevin Patrick Hudson

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

   1970-1974 American University, Washington, D.C.
   J.D. awarded May, 1974
   1966-1969 American University, Washington, D.C.
   B.A. awarded May, 1969
   1965-1966 University of Richmond; Richmond, Virginia
   (no degree)

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships,

institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

1998-present	Judge, Fairfax County Circuit Court 4110 Chain Bridge Road, Fairfax, Virginia 22030
1996-1998	Counsel, Reed Smith Shaw & McClay, LLP 8251 Greensboro Drive, McLean, Virginia 22102
1997-1998	Director, The Heritage Bank 1313 Dolly Madison Drive, McLean, Virginia 22102
1995-1997	Broadcaster, WWRC AM-980 8750 Brookeville Road, Silver Spring, Maryland 20910
1994-1996	Counsel, Mays & Valentine, LLP 1660 International Drive, McLean, Virginia 22102
1992-1993	Director, United States Marshal Service United States Department of Justice 600 Army Navy Drive, Arlington, Virginia 22202
1991-1992	Counsel, Reed Smith Shaw & McClay, LLP 8251 Greensboro Drive, McLean, Virginia 22102
1986-1991	United States Attorney, Eastern District of Virginia 2100 Jamieson Avenue, Alexandria, Virginia 22314
1980-1986	Commonwealth's Attorney, Arlington County, Virginia 1425 North Courthouse Road, Arlington, Virginia 22201
1979	Solo practice of law and candidate for public office
1978-1979	Assistant United States Attorney, Eastern District of Virginia 2100 Jamieson Avenue, Alexandria, Virginia 22314
1974-1979	Assistant Commonwealth's Attorney, Arlington County, Virginia 1425 North Courthouse Road, Arlington, Virginia 22201
1970-1974	Deputy Clerk, Arlington County Circuit Court 1425 North Courthouse Road, Arlington, Virginia 22201

1969-1970 Deputy Sheriff, Arlington County, Virginia
1425 North Courthouse Road, Arlington, Virginia 22201

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

United States Marine Corps, 1970, officer candidate (E-1)
serial number 260-18-10, Honorable Discharge.

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

John Marshall Award for Outstanding Legal Achievement, presented by Attorney General William P. Barr, January, 1993;
The National Sheriff's Association President's Award, 1993;
Maryland Governor's Award for Outstanding Crime Prevention Program, 1997

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

Virginia State Bar (Member, Committee on Advertising and Solicitation, 1987; Member, Criminal Law Section)

Alexandria Bar Association (Member, Board of Directors, Foundation of the Alexandria Bar Association 1988-1995)

Arlington County Bar Association (Chairman, Courts Committee, 1982; Member, Valor Awards Committee, 1985-1991)

Fairfax County Bar Association (Member, Board of Directors, Fairfax Bar Foundation, 1995-1999)

Virginia Criminal Sentencing Commission (Appointed by Governor of Virginia, 1997 to present)

Virginia Criminal Justice Services Board (Chairman, 1994-1999, Appointed by Governor of Virginia)

Virginia Juvenile Justice And Delinquency Prevention Advisory Committee. (Appointed by Governor of Virginia, 1994-1998)

Governor's Commission to Abolish Parole and Reform Sentencing (Appointed by Governor of Virginia, 1994-1995)

United States Attorney General's Advisory Committee of United States Attorneys (1987-1990)

Virginia Commonwealth's Attorney's Association (Member, Board Of Directors, 1985)

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

Supreme Court of Virginia, 1974

United States District Court, Eastern District of Virginia, 1978

United States Court of Appeals for the Fourth Circuit, 1978

Supreme Court of the United States, 1979

United States Court of Claims, 1989

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

Aside from the Virginia Bar Association, I am not a member of any organization that lobbies before public bodies.

Other Organizations:

Aldersgate United Methodist Church, Member
Arlington County Volunteer Fire Department, Engine Co. 1, active firefighter, paramedic, 1966-1980; Life Member
Arlington County Sheriff's Office, Special Deputy Sheriff, 1978-1979; 1992-1998
Arlington County Parade Committee, Member, 1980-1985
Arlington Host Lions Club, 1979-1999, First Vice President, 1984-1985
Ashlawn Civic Association, member 1978-1987, President 1984-1985
Stratford Harbor Property Owner's Association, Westmoreland County, Virginia, Member, Board of Directors, 1988-1991; First Vice President, 1993-2001
Westmoreland County Sheriff's Office. Special Deputy Sheriff, 1992-1998

None of the above organizations engage in discriminatory practices.

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

During my service as United States Attorney, I authored three articles for the Virginia State Trooper Magazine.(Published by the Virginia Department of State Police.) Copies of all three articles are attached.

a. "A Balanced Drug Enforcement Strategy" (1988)
b. "Sharing in Federally Forfeited Property" (1987)
c. "Opening of Closed Containers Found During Inventory Searches" (1990)

Speeches delivered in written form:

During my years of public service, I have given thousands of speeches. Typically such presentations related to public safety issues, or projects or investigations being conducted by my office. While holding public office, I frequently addressed citizen groups on issues of local concern. I occasionally spoke at local law schools on trial advocacy, evidence and forensic science. I rarely delivered speeches in written form. I preferred to speak extemporaneously with the aid of key word notes. I have attached copies of those speeches in my possession, which were delivered using a written text.

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

Since leaving federal government service, I have testified three times before the Senate Committee on the Judiciary. Two of those occasions related to my prior government service. At the request of Senator Hatch, I testified in favor of de-politicizing the appointment of United States Marshals. I also testified on another occasion concerning the Marshal Service's involvement in the arrest of Randy Weaver at Ruby Ridge, Idaho. My third appearance was at the request of Senator Thompson. In the latter instance, I testified against the federalization of the criminal offense of possession of a firearm on school grounds. In my view, it was a crime best left to state and local law enforcement.

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

I am in excellent health. I received my last physical on November 27, 2001.

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

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

1. *Commonwealth of Virginia vs. Kenneth Bryant* - Defendant serving life sentence moved trial Court to set aside conviction for failure to notify his parents of jurisdictional transfer hearing in Juvenile Court. Court held that Commonwealth complied with parental notification statute.

2. *Keyvan Rafei & Associates vs. West* - Defendant challenged arbitrator's computation of damages under statute permitting trial court to correct " evident miscalculations". Court held that defendant in effect disputed the merits of the arbitrator's award rather than its arithmetic accuracy. Arbitrator's award affirmed, judgment entered.

3. *The Hertz Corporation vs. United Services Automobile Association* - Insurance coverage dispute between car rental agency and renter's insurance carrier. Under Virginia law, the rental company assumes primary property damage liability; the insurance carrier's coverage is secondary.

4. *Fowler vs. Fairfax County Police Officers Retirement System* - Court declined to overturn the election of a member of the Board of Trustees of the Fairfax County Police Officers Retirement System. Portions of the Fairfax County Code governing the election of Board members held to be at variance with enabling statute and consequently invalid.

5. *Salah vs. Serag*- Court found a marriage contract entered into, as part of an Islamic religious tradition, was an enforceable prenuptial agreement.

6. *Westerra Reston , LLC vs. Walker*- In a matter of apparent first impression, the Court fashioned a method for computing compensatory damages for deprivation of an easement preventing development of commercial property.

7. *Look vs. TRW, Inc., et. al.*- Court held that in order to survive demurrer, claim for intentional infliction of emotional distress must allege specific facts supporting foreseeability of severe emotional distress.

8. *Gittins vs. Board of Zoning Appeals of Fairfax County, Virginia*- Complainant was denied a special use permit for a nonconforming structure by the Board of Zoning Appeals. Court affirmed Board's decision and order the removal of the structure.

9. *Duncan vs. Duncan*- Husband and wife jointly represented by same attorney in investigation of death of child. Later, husband sues former wife for wrongful death. Court held that wife's communications to original attorney under facts of this case were not privileged.

10. *National Title Insurance Corporation Agency vs. First Union Bank*- This case involved a claim for charge-back to plaintiff's account for negligent payment of unauthorized checks. Court held that the notice provision of Uniform Commercial Code did not preclude bank and corporate customer from contractually modifying the time for reporting unauthorized payments.

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

In three years as a Circuit Court Judge, 29 of my decisions have been appealed. Fifteen cases have been appealed to the Virginia Court of Appeals, two were reversed and the others affirmed. Fourteen cases were reviewed by the Virginia Supreme Court, two were reversed for decisions made by me. Two additional cases, *Tonti v. Akbari*, 262 Va. 681 (November 2,2001) and *O'Connell v. Bean*, (January 11, 2001) were reversed by the Virginia Supreme Court for a pretrial decision by another judge. However, because I ultimately tried the cases, without error, the decisions bear my name. Copies of all opinions are attached. Footnote one of the *Tonti* decision clarifies my role in that case. A copy of the *O'Connell* decision is also attached, although the opinion is not in final form.

1. *Ohio Casualty Insurance Co. v. State Farm Fire and Casualty Co.*, 261 Va. 238 (2001). This was a dispute between two insurance carriers arising from fire damage to two adjacent homes under construction by the same builder. The higher court held that the trial court misconstrued the scope of coverage in holding that "both carriers share a concurrent insurance obligation for the damage occasioned by the fire."

2. *Walsh v. Bennett*, 260 Va. 171 (2000). Virginia Supreme Court held that trial court abused discretion when court struck plaintiff's designation of expert witnesses for failure to comply with order compelling discovery. Counsel for plaintiff had advised trial court that he could not comply with discovery order and invited court to dismiss case. Supreme Court, with two justices dissenting, reversed, holding that court should not have dismissed case until after discovery deadline.

3. *Tonti v. Akbari*, 262 Va. 681 (2001). This was a personal injury action arising out of an automobile accident. Prior to trial, Defendant filed motions to quash subpoenas duces tecum issued to non-parties to the case. Judge Kathleen H. MacKay presided over those pre-trial motions and ultimately denied them. In addition, Judge MacKay ordered Defendant to pay attorney's fees to Plaintiff's counsel. The case was then assigned to me for trial on the merits. The Virginia Supreme Court held that the trial court (Judge MacKay) erred in awarding attorney's fees against Defendant after denying Defendant's motions to quash subpoenas duces tecum issued to non-parties. The Court reversed and remanded the case for entry of an order directing return of the attorney's fees. Although Judge MacKay decided the main issue in controversy, the opinion was issued in my name because I presided over the jury trial and entered the final judgment order.

4. *O'Connell v. Bean*, (January 11, 2002). Plaintiff obtained service in this legal malpractice action through the Secretary of the Commonwealth. Defendant failed to file a timely answer and was found to be in default. Case was tried before a jury that awarded substantial compensatory and

punitive damages. Defendant subsequently appeared and moved to set aside default judgment, which had been awarded by Chief Judge F. Bruce Bach. Judge Bach denied Defendant's motion to set aside default judgment. Case was then reassigned to me for additional post-trial motions. I granted Defendant's motion for a new trial on damages and subsequently conducted a second trial on damages. Supreme Court found the affidavit supporting substituted service to be defective and held that the trial court (Judge Bach) erred in refusing to set aside default judgment. The Court also held that Plaintiff was not entitled to punitive damages on remand because there was no factual basis for any tort claims independent of the breach of contract for legal services. The finding of default judgment under Virginia law limited Defendant's ability to challenge the sufficiency of the claims against her. Although Chief Judge Bach decided the main issues in controversy, the opinion was issued in my name because I presided over the trial and signed the final judgment order.

5. *McLaughlin v. McLaughlin*, (unpublished opinion, February 8, 2000). Virginia Court of Appeals reversed trial court for failure to state on the record its rational for changing the date of valuation of marital property in an equitable distribution proceeding.

6. *Murray v. Commonwealth*, (unpublished opinion, April 10,2001). Virginia Court of Appeals held that trial court erred in failing to dismiss a juror for cause. Higher court found that juror's responses to voir dire questions were ambiguous and equivocal and that court should not have attempted to rehabilitate the juror by asking follow-up questions.

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

None.

17. Public Office, Political Activities and Affiliations:

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

1. Director, United States Marshal Service; Presidential Appointment with Senate Confirmation, 1992

2. United States Attorney, Eastern District of Virginia; Presidential Appointment with Senate Confirmation, 1986

3. Chairman, Attorney General's Advisory Committee on Pornography; Appointed by Attorney General William French Smith, 1985

4. Commonwealth's Attorney, Arlington County, Virginia.; elected 1979; reelected 1983

5. Member, National Highway Traffic Safety Committee; Presidential Appointment, 1981

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

1. Dole for President-1995, Northern Virginia Coordinator, advised candidate on criminal justice issues, assisted with debate preparation.

2. Warner for Senate- 1983, Arlington Coordinator, 1995, advised candidate on criminal justice issues.

3. Davis for Congress-1995-1998, Finance Committee

4. Wolf for Congress- 1981, 1983, 1985, Arlington Coordinator

5. Trible for Senate- 1981, Arlington Coordinator

6. Durrette for Governor-1984, Arlington coordinator; advised candidate on criminal justice issues.

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

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

(1) whether you served as clerk to a judge, and if so, the name for the judge,

the court and dates of the period you were a clerk;

I have never served as a judicial law clerk.

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

I was engaged in the solo practice of law from June, 1979 to December, 1979 at 2330 Wilson Blvd., Arlington, Virginia. During that time I drafted wills and contracts and handled a variety of civil matters. While in private practice, I also served as a Special Assistant United States Attorney, where I completed a political corruption investigation.

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

January 1996-December 1998. Counsel, Reed Smith Shaw & McClay, 8251 Greensboro Drive, McLean, Virginia, 22102. General litigation in the areas of civil rights, tort, contract, labor law and government contracts. I also provided advice and counsel in criminal cases.

December 1993-December 1995. Counsel, Mays & Valentine, 110 South Union Street, Alexandria, Virginia, 22314. General litigation practice with particular emphasis on commercial matters and representation of public officials.

June 1991-February 1992. Counsel, Reed Smith Shaw & McClay, 8251 Greensboro Drive, McLean, Virginia, 22102. Civil litigation in the areas of labor and employment law and government contracts.

June 1986-June 1991. United States Attorney for the Eastern District of Virginia. Supervised an office of 70 Assistant United States Attorneys and 25 Special Assistants. Personally tried, or was in direct supervision, of a variety of complex civil and criminal cases.

January 1980-June 1986. Commonwealth's Attorney of Arlington County, Virginia. Responsible for the prosecution of all crimes occurring in that jurisdiction. Personally prosecuted most homicides, violent sexual assaults, drug conspiracies and vehicular manslaughter cases; managed a staff of ten attorneys.

January 1978-May 1979. Assistant United States Attorney, Eastern District of Virginia, Alexandria Division. Prosecuted federal criminal cases, including drug conspiracies, racketeering, firearms, bank robbery, and political corruption.

May 1974-December 1977. Assistant Commonwealth's Attorney, Arlington, Virginia. Responsible for prosecution of all types of felony and misdemeanor cases.

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

1993-1998- Mainly civil practice, representing both individual and business interests. My principal areas of concentration were contract disputes, personal injury, slander and defamation, malicious prosecution and false arrest, labor and employment, False Claims Act, and Civil Rights Act. I represented both plaintiffs and defendants.

1991-1992- Advice on criminal matters, government contracts, employment, tort and contract litigation.

Prior to leaving government service in 1991, my practice had been devoted almost exclusively to criminal prosecution and the defense of government interests in civil matters.

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

Former Clients: The profile of my client base ranged from chief executive officers of Fortune 500 companies to injured indigents. I devoted approximately 75% of my practice to the representation of individuals, including wrongfully terminated educators, public officials and corporate officers; corporate officials accused of fraudulent conduct; government employees accused of mishandling classified materials; judges, law enforcement officials constitutional officers and store employees sued for civil rights violations, defamation, malicious prosecution, etc.; persons injured in automobile accidents; families of persons killed in automobile accidents; disgruntled purchasers of substandard homes; professionals sued for malpractice or breach of contract; realtors and mortgage lenders charged with illegal financial transactions; and real estate developers sued for breaches of contract.

I also represented corporations, including Federal Express, Atlantic Research, Southland Corporation, Phillip Morris, Motel 6, Household Finance, Alexandria Hospital, Diamond Healthcare, LifeLine Ambulance Service, Cogentrix, The Woodrow Wilson Institute; and the Cable Television Association.

Areas of Specialization: Criminal law, labor and employment, civil rights and commercial litigation.

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

1993-1998- Every other month

1991-1992- Quarterly

1986-1991- Monthly

1980-1986- Daily

1978-1979- Weekly

1974-1977-Daily

(2) Indicate the percentage of these appearances in

(A) federal courts: 40 percent
(B) state courts of record: 50 percent
(C) other courts: 10 percent

(3) Indicate the percentage of these appearances in:

(A) civil proceedings: 30 percent
(B) criminal proceedings: 70 percent

(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.

(a) Sole Counsel: 122 cases

(b) Chief Counsel: 11 cases

(c) Associate Counsel: 2 cases

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

(a) Jury: 90 percent

(b) non-jury: 10 percent

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

None.

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

In the private sector, I devoted approximately 15 hours a year to providing *pro bono* services. Such services included counseling on employment issues, criminal matters, medical malpractice, and personal injury claims. In addition, I served on the Board of Directors of the Alexandria and Fairfax County Bar Foundations. Part of the mission of the Bar Foundations was to raise money for *pro bono* bar projects. I devoted approximately two hours per month to my duties as a Foundation Board Member.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;

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

(3) the party or parties whom you represented; and

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

1. *United States of America v. Anthony McCray*, (United States District

Court, Eastern District of Virginia, Criminal No. 90-00051-A, Judge James C. Cacheris, 1990). In December 1989, Melissa Brannon, a child of six years, was kidnapped during a neighborhood Christmas party. The body of Melissa Brannon has never been recovered. Several months after the abduction, the Defendant and another individual contacted the victim's mother and demanded ransom for her daughter's return. After a very emotionally charged and aggressively defended case, Mr. McCray was convicted of extortion and a variety of other federal offenses. I represented the United States. The Defendant was represented by Mr. Ferris Bond, 601 Pennsylvania Avenue, NW, Washington, D.C. 20004, (202) 638-4100.

2. *Michelle Sumner v. United States*, (United States District Court, Eastern District of Virginia, Civil Action No. 89-0640-A, Judge T.S. Ellis, III, 1989). This was an action brought under the Federal Torts Claims Act by the passenger on a motorcycle that collided with a Special Agent of the Federal Bureau of Investigation. The operator of the motorcycle died in the accident, and the passenger Plaintiff suffered severe injuries. The case involved a host of negligence issues and extensive expert testimony. The Court ultimately ruled in the Plaintiff's favor and awarded her $250,000.00 in damages. I represented the United States. Counsel for the Plaintiff was Mr. Thomas C. Palmer, Jr., 8575-D Sudley Road, Manassas, Virginia 22110, (703) 369-7500.

3. *United States of America v. Craig Dee Kunkle*, (United States District Court, Eastern District of Virginia, Norfolk Division, Criminal No. 89-5-N, Judge Robert Doumar, 1989). I handled this matter for the United States with Assistant United States Attorney Robert J. Seidel, Jr. This case involved a retired Navy Acoustics Instrument Operator who was attempting to convey to Soviet Intelligence Agents classified information concerning the United States Navy's anti-submarine warfare program. I personally briefed and argued all the pre-trial motions, including all issues raised under the Classified Information Procedures Act. I also prepared most technical experts for trial. Just prior to trial, Mr. Kunkle entered a plea of guilty and was ultimately sentenced to confinement in a federal penitentiary. I represented the United States. The Defendant was represented by Gregory Stillman, 500 East Main Street, Suite 1000, Norfolk, Virginia, 23510, (804) 625-5501 and Larry Shelton, 5900 E. Virginia Beach Boulevard, Norfolk, Virginia 23510, (804) 627-6225.

4. *United States of America v. Giuseppe Cottone, et al.*, (United States District Court, Eastern District of Virginia, Criminal No. 87-0008-A, Judge Claude M. Hilton, 1987). This case involved a number of individuals engaged in the sale of multiple kilograms of pure heroin from pizza parlors in the Washington Metropolitan Area. The case involved a long-term undercover operation and extensive use of electronic surveillance. Eight

individuals were indicted for conspiracy to distribute heroin. Several were also indicted for engaging in continuing criminal enterprise. I represented the United States with Justin W. Williams, Assistant United States Attorney. Defendant Giuseppe Cotton was represented by Stephen R. Pickard, 115 Oronoco Street, Alexandria, Virginia 22313, (703) 836-3505. Defendant Beniamino Centurino was represented by Christian C. Westerman, 128 North Pitt Street, Alexandria, Virginia 22320, (703) 836-0553. Defendant Diego Hoyos was represented by Thomas J. Foltz, 1708 Commonwealth Avenue, Alexandria, Virginia 22314, (703) 836-5506. Defendant Elieser Hoyos was represented by Barry Stiller (deceased); Defendant Patricia Leon Gomez was represented by Brian W. Shaughnessey, 1155 15th Street, NW, Suite 502, Washington, DC 20005, (202) 371-2285. Defendant Ramiro Medina was represented by Barry R. Diamond, 1922 Marthas Road, Alexandria, Virginia 22314, (703) 549-8010. Defendant Giovanni Gorgone was represented by Charles Kramer, 526 King Street, Suite 213, Alexandria Virginia 22314, (703) 836-7222. Defendant Correalzaro Cardona was represented by Lloyd F. Sammons, P.O. Box 249, Manassas, Virginia 20108, (703) 362-8793.

5. *United States of America v. Adrien M. James*, 834 F.2d 92 (4th Cir. 1987), Judges Sprouse, Chapman, and Butzner. This case presented the United States Court of Appeals with the first opportunity to decide whether possession of a controlled substance with the intent to distribute falls within the language "crime of drug trafficking" as used in Title 18 U.S.C. § 924(c), which mandates a five-year sentence for carrying a firearm during a crime of drug trafficking. The Court of Appeals reversed the District Court and held that the statute applied to the crime of possession of a controlled substance with the intent to distribute. This case has now gained national application. I represented the United States. The Defendant was represented by Christopher Schewe, 120 North Alfred Street, Alexandria, Virginia 22314 (703) 684-8200.

6. *In Re Grand Jury Proceedings, Grand Jury No. 87-4, Impaneled September 9, 1987 (Two Cases), United States of America v. (Under Seal)*, 856 F.2d 685 (4th Cir. 1988), Judges Russell, Widener, and Ervin. Several witnesses were subpoenaed to testify before a Federal Grand Jury in Alexandria, Virginia. Upon the witnesses' refusal to testify, the United States submitted appropriate letters and requested the entry of a Compulsion Order by the United States District Court Judge. The Defendants objected to the entry of the Order on the ground that they had been the subject of an illegal electronic surveillance under the Foreign Intelligence Surveillance Act. In a case of first impression, the United States Court of Appeals for the Fourth Circuit held that in-camera review of documentation submitted under the Foreign Intelligence Surveillance Act was sufficient to protect the procedural rights of the witnesses, and

furthermore, that the District Court Judge is not required to undertake a review of minimization procedures before witnesses could be questioned by the Grand Jury. The Court also held that non-targeted grand jury witnesses were not entitled to notice that they have been overheard on electronic surveillance under the Foreign Intelligence Surveillance Act. I represented the United States. The Plaintiff Appellees were represented by John K. Zwerling, 108 North Alfred Street, Alexandria, Virginia 22314,(703) 684-8000.

7. *Commonwealth of Virginia v. Daniel Kfoury*, (Arlington County Circuit Court, Criminal No. 24,300, Judge Paul F. Sheridan, 1986). The Defendant in this case was charged with first degree murder occurring during the court of administering an exorcism. The case involved extensive psychiatric analysis of the Defendant as well as expert testimony on the performance of exorcisms. This was the first case in Virginia in which the defense attempted to exclude a confession on the grounds that a Defendant was mentally incapable of voluntarily providing information, despite a total absence of any governmental coercion. I represented the Commonwealth of Virginia. The Defendant was represented by Frank Ceresi, 916 DeWolf Dr. Alexandria, Virginia 22308.

8. *Commonwealth of Virginia v. Joseph Francis O-Brian*, (Arlington County Circuit Court, Criminal No. 22-0617-22-0619, Judge William L. Winston, 1985). The Defendant in this case was charged with capital murder occurring during the course of an armed robbery and burglary of the victim's residence. There was no direct evidence of the Defendant's involvement in this homicide. The prosecution's case was built on extensive forensic and circumstantial evidence. He was ultimately convicted of capital murder and sentenced to 50 years confinement in a Virginia penitentiary. I represented the Commonwealth of Virginia. The Defendant was represented by John C. Youngs, 2009 North 14th Street, Suite 610, Arlington, Virginia 22201,(703) 645-8600.

9. *Commonwealth of Virginia v. Gregory Church*, (Arlington County Circuit Court, Criminal No. 20,579-20,582, Judge Charles H. Duff, 1983). The Defendant and others kidnapped a nurse in Arlington, Virginia and transported her to a basement in a remote area of Washington, DC. Six men defiled the victim in front of 30 individuals. This was one of the most vicious rapes perpetrated on a citizen of Arlington County during my tenure as Commonwealth's Attorney. The Commonwealth's case was based entirely on circumstantial evidence. The Defendant was convicted of all counts and sentenced to a lengthy term of imprisonment. I represented the Commonwealth of Virginia. The Defendant was represented by Conrad Gaarder, 2009 North 14th Street, Arlington, Virginia, 22201, (703) 522-4122.

10. *Commonwealth of Virginia v. John A. Peters,* (Arlington County Circuit Court, Criminal No. 11, 899-900, Judge William L. Winston, 1977). This case involved the seizure of a substantial quantity of marijuana in a residence of Arlington County. It was the first major challenge to the legality of the classification of marijuana as a controlled substance in the Commonwealth of Virginia. The Defendant was convicted and sentenced to a term of confinement in a Virginia penitentiary. I represented the Commonwealth. The Defendant was represented by John K. Zwerling, 108 North Alfred Street, Alexandria, Virginia 22314, (703) 684-8000.

11. *Commonwealth of Virginia v. Beth Axelrod, et al.*, (Arlington County Circuit Court, Criminal Nos. 10737, 10740, 10739, 10779, 10785, 10788, 10789, Judge Charles S. Russell, February, 1976). This case involved a locally-based heroin distribution syndicate. It was the first major narcotics conspiracy case brought in the Commonwealth of Virginia relying upon electronic surveillance evidence. This was also the first major challenge to the legality of the Virginia Wiretap Statute. All of the Defendants in this case were either found guilty or pleaded guilty prior to trial. I represented the Commonwealth of Virginia. Defendant Beth Axelrod was represented by William B. O'Connell, 4113 Lee Highway, Arlington, Virginia 22207, (703) 528-2904. Defendant Barry D. Brady was represented by Jonathan C. Kinney, 2000 North 14th Street, Arlington, Virginia 22201, (703) 525-4000. Defendant Sherry Bacon was represented by Lorelie Haig, 5622 Columbia Pike, Suite 101, Arlington, Virginia 22216, (703) 243-3300. Defendant Robert H. Liebing was represented by Louis Koutoulakos, 2009 North 14th Street, Suite 708, Arlington, Virginia 22201, (703) 527-0124. Defendant David A. Radoulovitch was represented by John F. Mark (deceased). Defendant Steven T. Skalabrin was represented by John K. Lally, 7224 Beverly Park Drive, Springfield, Virginia 22150, (703) 455-3544. Defendants Sandra and Peter Tallamantes were represented by Denman A. Rucker, 2009 North 14th Street, Arlington, Virginia 22201, (703) 525-4900.

12. *Darrell Wayne Coppage v. Jatinder P.S. Mann, M.D.*, 906 F.Supp. 1025 (E.D. Va. 1995), Judge T.S. Ellis, III. During the plaintiff's incarceration in a regional detention facility, he suffered from an undiagnosed cancerous tumor at the base of his spine. The condition eventually resulted in partial paralysis and incontinence. Plaintiff sued the facility superintendent, medical director and the head nurse under the Civil Rights Act. Plaintiff alleged that the defendants violated his Eighth Amendment rights by failing to diagnose and treat his cancer and subjecting him to inhumane living conditions. Plaintiff also joined a consulting physician as a defendant, alleging professional negligence. After lengthy oral argument and multiple briefings, the Court granted summary judgment as to all defendants except

the physicians. I represented the superintendent of the detention facility and the head nurse. I personally drafted most of the briefs and conducted the oral argument. The plaintiff was represented by Victor M. Glasberg, 121 S. Columbus St., Alexandria, Virginia, 22314, (703) 684-1100. Dr. Mann, the medical director, was represented by John J. Brandt, 6565 Arlington Blvd. Suite 200, Falls Church, Virginia. 22042, (703) 536-2500. Dr. Ranel was represented by Brewster Rawls, 830 East Main St. Suite 1800, Richmond, Virginia, 23219, (804) 344-0038.

13. *United States v. Rodney Jenkins, et. al.*, (United States District Court, Eastern District of Virginia, Docket No., Judge Albert V. Bryan, Jr., July 15, 1987). Six inmates at the Lorton Correctional Facility were indicted for arson, inciting a riot, damaging buildings, witness tampering and obstruction of justice. The riot involved several hundred inmates and resulted in over three and one-half million dollars in damage to the facility. The United States Attorney's Office and the FBI received minimal cooperation from the correctional staff and the inmate population. The government case was developed on circumstantial evidence and hostile witnesses. After a three-day trial, a jury convicted three of the defendants of the central charges in the indictment. Three other defendants plead guilty prior to trial. I was co-counsel for the United States, along with Karen Tandy (currently Associate Deputy Attorney General). Donn Edward Garvey, Jr., 8120 Richmond Highway, Alexandria, Virginia 22309 (703) 780-7202, represented defendant Rodney Jenkins; Warren G. Stambaugh (deceased) represented defendant Frederick Edwards and David Rosenblum, 228 South Washington St. Alexandria, Virginia, (703) 548-9002, represented defendant Carl Henderson.

14. *United States v. Louis M. Parrish, et. al.*, (United States District Court, Eastern District of Virginia, Docket No., Judge Oren R. Lewis, March 22, 1979). Defendants were indicted for conspiracy to violate the Mann Act, interstate travel in aid of racketeering and numerous substantive violations of the Mann Act. This high publicity case involved a sophisticated prostitution syndicate operating throughout the Washington metropolitan area. The operation employed over 100 people based in Virginia, Maryland and the District of Columbia. The business netted in excess of two million dollar a year in profits. The government's case involved extensive asset tracing and analysis of documentary evidence. After almost a full week of deliberations, the jury convicted all defendants. Approximately twelve other defendants pleaded guilty prior to indictment. As co-counsel with then United States Attorney Justin W. Williams, I presented approximately one-half of the evidence. Defendant Parrish was represented by Jake Stein, 1100 Connecticut Avenue, NW, Suite 1100, Washington, DC 20036 and Defendant Wadino was represented by Plato Cacheris, 1100 Connecticut Avenue, NW, Suite 730, Washington, DC 20036, (202) 775-8700.

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

I have never been arrested.

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

Yes, see attached Litigation Addendum.

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

After three years as a state court judge, I have few remaining areas of potential conflict. In my current position, I have filed a list with the Clerks Office of all corporations in which I own stock or formerly represented in private practice, and all members of the bar with whom I have a close association. Cases involving people or entities on that list are not assigned to me. To further insure that I do not have a conflict with any party in interest, I personally review each case assigned to me. When conflicts emerge, I recuse myself and have the matter assigned to another judge. I would employ the same approach as a United States District Judge.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I do not have any current plans to pursue outside employment during my service with the court.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents,

royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached Financial Disclosure Statement.

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

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

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

The Virginia Bar Association reviewed the credentials of candidates submitted by Senators Allen and Warner. I was rated "highly recommended" by the Virginia Bar Association.

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

Upon learning of a vacancy on the United States District Court, I sent letters to Senators Warner and Allen expressing my interest. Several months later, I was interviewed by both Senators and their chiefs of staff. Subsequently, I was advised that my name had been advanced by both Senators to the White House. In time, I was interviewed by the Deputy White House Counsel, his assistant and a representative of the Department of Justice. I returned several weeks later and was interviewed by the White House Counsel. The White House Counsel's Office notified me that I had been selected, subject to a satisfactory FBI background investigation and Senate confirmation.

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

No such question has been asked.

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		80	000	Notes payable to banks-secured		9	000
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		433	000	Notes payable to relatives			
Unlisted securities–add schedule		22	000	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		11	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		336	000
Real estate owned-add schedule		710	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		52	000				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities		356	000
				Net Worth		941	000
Total Assets	1	297	000	Total liabilities and net worth	1	297	000
CONTINGENT LIABILITIES			0	GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

Real Estate Schedule

Real Estate Owned:

Residence (Alexandria, Va.)	$ 490,000
Recreational Home (Montross, Va.)	$ 220,000

Mortgages:

Columbia National Mortgage Co.	$ 250,000
Bank of America (Montross Home)	$ 36,000
Bank of America (Home Equity Loan)	$ 50,000

Securities Schedule

Listed Securities:

Dominion Resources	$72,100
Wal-Mart Stores, Inc.	$11,100
Gateway, Inc.	$ 900

	$84,100

Mutual Funds:

Amcap Fund	$ 18,000
American Legacy II	$102,500
Capital World Growth & Income Fd.	$ 31,500
Dreyfus Lifetime Fd.	$ 37,200
Franklin High Yield Fund	$105,400
Income Fund of America	$ 13,700
Smallcap World Fund	$ 27,500
Washington Mutual Invest. Fd.	$ 13,400

Unlisted Securities:

Cardinal Bank	$ 18,000
Campaign Solutions	$ 4,000

SF278 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Initial Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Hudson, Henry E.	U.S.District Court-Eastern,VA.	01/23/2002
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)** ___ Nomination, Date 01/23/2002 X Initial ___ Annual ___ Final	**6. Reporting Period** 01/01/2001 to 12/31/2001
7. Chambers or Office Address Fairfax County Circuit Court 4110 Chain Bridge Road Fairfax, Virginia, 22030	**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.)*

[X] **NONE** (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1		
2		
3		

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

[ ] **NONE** (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1996	Reed Smith Shaw & McClay, retirement plan with former law firm, no control
2	1998	Virginia Retirement System, Judicial pension upon retirement age 65.
3		

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

[ ] **NONE** (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	Fairfax County Circuit Court	120,000
2	2001	Fairfax County Circuit Court	124,000
3	2000	Paramount Pictures, Inc.	1,000
4	2000	U.S. Department of Defense	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Hudson, Henry E.	01/23/2002

IV. REIMBURSEMENTS — ~~transportation, lodging, food, entertainment.~~

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Navy Federal Credit Union	VISA, Credit Card	J
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 Hudson, Henry E. 01/23/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Bank of America	A	Interest	J	T	exempt				
2 Cardinal Bank	C	Interest	K	T	exempt				
3 Cardinal Bank (stock)	B	Dividend	K	T	exempt				
4 Navy Federal Credit Union	B	Interest	K	T	Exempt				
5 Campaign Solutions, Inc.	B	Dividend	J	W	exempt				
6 Franklin High-Yield Fund	D	Interest	M	T	exempt				
7 Dominion Resources, Inc.	D	Dividend	L	T	exempt				
8 America's Utility Fund	A	Dividend	K	T	exempt				
9 Capital World Growth and Income Fund	A	Interest	K	T	exempt				
10 AMCAP Fund Inc.	A	Dividend	K	T	exempt				
11 Income Fund of America	B	Dividend	J	T	exempt				
12 Smallcap World Fund, Inc	A	None	K	T	exempt				
13 Gateway, Inc.	A	None	J	T	exempt				
14 Wal-Mart Stores, Inc.	A	Dividend	J	T	exempt				
15 American Legacy II	B	Dividend	M	T	exempt				
16 Dreyfus LifeTime Portfolios, Inc. Growth and Income Fund	A	None	K	T	exempt				
17 Burke & Herbert Bank	A	Interest	J	T	exempt				

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: Hudson, Henry E.

Date of Report: 01/23/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 New Economy Fund	A	None	J	T	exempt				
19 Wash. Mutual Invs. Fd.	A		J	T	exempt				
20 Growth Fund Amer Inc.	A	Dividend	J	T	exempt				
21 Virginia Retirement System		None	K	T	exempt				
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									

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	Date of Report
	Hudson, Henry E.	01/23/2002

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

ICIAL DISCLOSURE REPORT	Name of Person Reporting Hudson, Henry E.	Date of Report 01/23/2002

. 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 Jan. 23, 2002

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

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

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

My full name is Amy Joan St. Eve. Some people (my daughter's friends and some of my husband's friends) refer to me as Amy Chrisman because my husband's last name is Chrisman. I have always used Amy St. Eve professionally.

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

United States District Court Judge in the Northern District of Illinois.

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

Abbott Laboratories
100 Abbott Park Road
Dept. 0324, Bldg. AP6D
Abbott Park, Illinois 60064-6034
847-937-5204

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

11-20-65 in Belleville, Illinois.

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

I am married to Howard Brett Chrisman. We have been married since June 5, 1993. Howard is a physician at Evanston Northwestern Hospital, 2650 Ridge Avenue, Evanston, Illinois 60201. We have two children.

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

Cornell Law School – I attended Cornell Law School from August 1987 through May 1990, and received my J.D. from Cornell Law School in May 1990.

Cornell University – I attended Cornell University from August 1983 through May 1987, and received my B.A. in history from Cornell University, College of Arts and Sciences in May 1987.

Oxford University – I attended Oriel College at Oxford University during the summer of 1985.

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

Abbott Laboratories: From May 2001 through the present, I have been employed at Abbott Laboratories as a Senior Counsel in their litigation department. Abbott's address is:

Abbott Laboratories
Dept. 0324, Building AP6D
100 Abbott Park Road
Abbott Park, Illinois 60064-6034

United States Attorney's Office: From August 1996 through May 2001, I was an Assistant United States Attorney in the Northern District of Illinois. The address is:

United States Attorney's Office
219 South Dearborn Street
5th Floor
Chicago, Illinois 60604

Independent Counsel's Office: From October 1994 through July 1996, I was an Associate Independent Counsel for the Whitewater Independent Counsel in Little Rock, Arkansas. This office no longer exists.

Davis Polk & Wardwell: From October 1990 through September 1994, I was a litigation associate at Davis Polk & Wardwell. The firm is located at:

Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 14850

Cornell Law School: I was a tutor at Cornell Law School from February 1990 through May 1990. The address is:

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14850

Kirkland & Ellis: From June 1989 through August 1989, I was a summer associate at Kirkland & Ellis in Washington, DC. Kirkland & Ellis' address is:

Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 20005

Armstrong, Teasdale, Schlafly, David & Dicus: From June 1988 through August 1988, I was a summer associate at Armstrong, Teasdale, Schlafly, David & Dicus. The firm's address is:

Armstrong, Teasdale, Schlafly, David & Dicus
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102

Matt R. St. Eve: During the summer of 1987, I worked at my brother's dental office in Belleville, Illinois. His address is:

5700 West Main Street
Belleville, Illinois 62223

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

I have never served in the military.

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

While at the United States Attorney's Office, I received the following awards: Cook County Crime Prevention Excellence in Law Enforcement Award, the Health and Human Services Office of Inspector General Award for Integrity (2000) and the Health and Human Services Office of Inspector General Award for Integrity (2001).

At Cornell Law School, I received the following awards: Order of the Coif; Cornell Law Review (Articles Editor); Boardman Third Year Law Prize – Number One in Class Rank After Second Year of Law School; West Publishing Company's Hornbook Award for Outstanding Scholastic Achievement, 1987-88 – Number One in Class Rank After First Year of Law School; and the American Jurisprudence Award for Civil Procedure.

At Cornell University, I graduated with Honors in History and Academic Distinction in All Subjects. I was on the Dean's List at Cornell and received the Moises Coit Tyler Award in American History.

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

I belong to the following bar associations: American Bar Association, Chicago Bar Association, the Women's Bar Association of Chicago and the D.C. Bar Association. I am still a member of these associations. I have not held any offices in these associations.

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

I was admitted to practice law in the State of New York on March 4, 1991, in Washington, D.C. on January 8, 1993 and in the State of Illinois on October 9, 2001.

I was admitted to practice in the following courts:

a. United States District Court for the Southern District of New York – April 24, 1991;

b. United States District Court for the Eastern District of New York – April 24, 1991;

c. United States District Court for the District of Columbia – February 7, 1994; and

d. United States District Court for the Eastern District of Arkansas – November 22, 1994.

I do not practice in these courts at this time.

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

I belong to the Women's Club of Evanston, an organization that donates time and money to charitable activities. I am also active in my church and I volunteer regularly at my daughter's school.

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or

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

I have not written or edited any books, articles or reports. I have not delivered any speeches in written or videotaped form over the past ten years. I gave several presentations while at the United States Attorney's Office regarding health care fraud, but none of these were in written or videotaped form. In addition, I appeared as a guest speaker at two courses in 2000. First, I spoke at a Northwestern University political science course on public corruption. Second, I spoke at a Kent Law School white collar crime class regarding health care fraud.

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

None.

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

I am in excellent health. My last physical examination was on March 21, 2002.

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

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

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

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

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

I have never been a judge.

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

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

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

I have not held any political offices and I have never held a position or played a role in a political campaign.

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

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

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

I never clerked for a judge.

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

I have never practiced alone.

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

Abbott Laboratories: From May 2001 through the present, I have been employed at Abbott Laboratories as a Senior Counsel in their litigation department. Abbott's address is:

Abbott Laboratories
Dept. 0324, Building AP6D
100 Abbott Park Road
Abbott Park, Illinois 60064-6034

United States Attorney's Office: From August 1996 through May 2001, I was an Assistant United States Attorney in the criminal division in the Northern District of Illinois. The address is:

United States Attorney's Office
219 South Dearborn Street
5th Floor
Chicago, Illinois 60604

Independent Counsel's Office: From October 1994 through July 1996, I was an Associate Independent Counsel for the Whitewater Independent Counsel in Little Rock, Arkansas. This office no longer exists.

Davis Polk & Wardwell: From October 1990 through September 1994, I was a litigation associate at Davis Polk & Wardwell. The firm is located at:

Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 14850

Kirkland & Ellis: From June 1989 through August 1989, I was a summer associate at Kirkland & Ellis in Washington, DC. Kirkland & Ellis' address is:

Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 20005

Armstrong, Teasdale, Schlafly, David & Dicus: From June 1988 through August 1988, I was a summer associate at Armstrong, Teasdale, Schlafly, David & Dicus. The firm's address is:

Armstrong, Teasdale, Schlafly, David & Dicus
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102

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

Throughout my career as an attorney, I have been a litigator. The character of my law practice has changed over the past years. From October 1990 through September 1994 when I was employed at Davis Polk & Wardwell, I was a defense attorney. I primarily represented large corporations and their officers and directors. My practice included complex civil cases and white

collar criminal defense. My practice was primarily in federal court. From October 1994 through May 2001, I was a federal prosecutor representing the United States. Throughout this time period, I practiced federal criminal law. From May 2001 through the present, I have served as in-house counsel at Abbott Laboratories. During this time period, I have been involved in a variety of litigation matters, including class action disputes, derivative actions, federal RICO cases, patent cases, product liability cases, environmental cases and government investigations.

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

For most of my career, I have worked for the United States. Since May 21, 2001, I have represented Abbott Laboratories as an in-house counsel in litigation. From October 1994 through May 2001, I represented the United States and specialized in criminal law, particularly white collar criminal law. While at Davis Polk, I represented large corporations and investment banks in complex litigation matters.

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

I have appeared in federal court frequently. From October 1994 through April 2001, I appeared in federal court more frequently than during the other times of my career. From August 1996 through April 2001, I appeared in court on a weekly basis, and frequently appeared in federal court daily.

(2) Indicate the percentage of these appearances in

(A) federal courts;

100% of my court appearances have been in federal court.

(B) state courts of record;

I have never appeared in state court.

(C) other courts.

I have never appeared in other courts.

(1) Indicate the percentage of these appearances in:

(A) civil proceedings;

Less than 5 %.

(B) criminal proceedings.

Greater than 95%.

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

I have tried twelve cases to verdict in federal court. All of these cases were criminal trials that I tried with at least one trial partner. I was lead counsel on at least half of these cases.

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

Approximately 75% of these cases were tried before, and decided by, a jury.

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

I have never practiced before the United States Supreme Court.

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

While at Davis Polk & Wardwell, I participated in numerous pro bono cases. One such case was a civil action in which Allison Harrison, the woman I represented, sued the transit authority for sexual discrimination. Harrison eventually won the case after I had left Davis Polk.

In addition, I taught trial advocacy at Northwestern Law School during the Fall of 2001 on a volunteer basis.

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

other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;

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

(3) the party or parties whom you represented; and

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

a. In re: Lupron Marketing and Sales Practices Litigation (MDL No. 1430, CA No. 01-CV-10891). This is a multi-district litigation ("MDL") matter in the District of Massachusetts (Judge Richard Stearns) involving a purported class action of individuals and entities who are seeking hundreds of millions of dollars in damages allegedly resulting from TAP and Abbott's Lupron marketing activities. I represent Abbott Laboratories in connection with these cases. I work with Josh Buchman (312-984-7600) at McDermott, Will and Emory, 227 West Monroe Street, Chicago, Illinois 60606 and Dan Reidy (312-269-4140) at Jones Day Reavis and Pogue, 77 West Wacker Drive, Chicago, Illinois 60601. The plaintiffs are represented by Thomas Sobol of Lieff, Cabraser, Heimann & Bernstein, 175 Federal Street, 7th Floor, Boston, Massachusetts 02110 (617-720-5000) and Jeff Kodroff of Spector, Roseman & Kodroff, 1818 Market Street, Suite 2500, Philadelphia, Pennsylvania 19103 (215-496-0300). As part of this case, we are seeking to have eleven pending federal cases consolidated before the Court for pre-trial purposes.

The case involves allegations of violations of the federal RICO laws and Medicare fraud by TAP Pharmaceuticals, Abbott Laboratories and Takeda in connection with the marketing of Lupron, a drug used to treat prostate cancer. Lupron is reimbursed through Medicare Part B. Medicare pays 80% of an allowed amount, and the Medicare beneficiary is responsible for the remaining 20%. The complaint is filed on behalf of a purported class of consumers who used Lupron and third party payors who paid the 20% Medicare co-payment for Lupron. There are numerous legal issues involving class action certification, confidentiality issues, federal RICO, Medicare laws, ERISA laws and corporate responsibility. I have participated in depositions, deposition preparation, discovery issues, stay motions, protective orders, transfer motions, MDL motions and other pre-trial motions.

b. United States v. Mary Ann Mastrodomenico, et al. (98 CR 623). This case was one of the Operation Safe Road cases that I co-prosecuted as an Assistant United States Attorney with Assistant United States Attorney Patrick Collins (312-886-7625) in 1998 and 1999. Judge Suzanne Conlon, United States District Court Judge for the

Northern District of Illinois, was the presiding judge. The following defendants were indicted: Mary Ann Mastrodomenico (represented by Jeffrey Steinback, 2737 Shannon Road, Northbrook, Illinois, 312-986-1200), Carmen Fajdich (represented by Richard Jalovec, 1021 West Adams Street, Suite 102, Chicago, Illinois 60607, 312-829-2300), Phyllis Volpe (represented by Patrick Tuite, Arnstein & Lehr, 120 South Riverside Plaza, Suite 1200, Chicago, Illinois 60606, 312-876-7100), Miodrag Dobrosavljevich (represented by Stephen Connolly, 119 Springlake Avenue, Hinsdale, Illinois, 630-654-0045), and Janusz Kruzyzak, (represented by Marco Raimondi, 221 North LaSalle Street, Chicago, Illinois, 312-663-3739). We charged these defendants with the federal RICO statute, as well as Hobbs Act violations, for their role in accepting cash bribe payments in exchange for passing unqualified commercial drivers' license applicants on their written driving exams at the Melrose Park Illinois Secretary of State facility. All of the defendants pled guilty.

I conducted extensive grand jury work, interviewed numerous witnesses, drafted search warrants and arrest warrants and submitted wire tap reports to the Chief Judge. I also assisted in drafting the indictment. Additionally, I drafted and negotiated plea agreements with the defendants' attorneys, and conducted extensive debriefings of the cooperating defendants. I represented the United States in Court when the defendants pled guilty and when Judge Conlon sentenced the defendants.

c. United States v. Ken Golumb, et al. (99 CR 871). The Honorable James B. Zagel of the Northern District of Illinois presided over this Operation Safe Road case in 2000. This case involved seven employees who worked at the Chicago West Secretary of State facility who fraudulently passed applicants on the road portion of their Illinois drivers' tests. The applicants paid them cash bribes to ensure their passage. I drafted the indictment charging these defendants with extortion. In addition, I drafted search warrants, reviewed extensive documents subpoenaed on behalf of the grand jury and drafted arrest warrants for the defendants. I also interviewed witnesses and conducted grand jury work. After we charged the defendants, I extensively interviewed those who cooperated with the government. I handled the court appearances involving the seven defendants. Furthermore, I drafted plea agreements for each of the defendants, negotiated the pleas with the defense attorneys and conducted an extensive sentencing hearing regarding Kenneth Golumb. Assistant United States Attorney Zachary Fardon (312-886-7629) assisted me on this case.

The seven defendants whom I prosecuted were: Kenneth Golumb (represented by William Huyck, 122 South Michigan Avenue, Suite 1850, Chicago, Illinois 60608, 312-427-7500), John Conti (represented by by Joseph Michael Urgo, 6914 West North Avenue, Suite 2000, Chicago, Illinois 60707, 773-622-4800), Dina Bartucci-Miller (represented by Robert Callahan, 53 West Jackson Street, Chicago, Illinois 60604, 312-322-9000), Veronica Martinez (represented by Kevin Bolger, 150 North Wacker Drive, Chicago, Illinois 60606, 312-899-8100), Evelyn Huszar (represented

by Elliot Samuels, 181 West Madison, Chicago, Illinois 60602, 312-357-0597), Ernestine Jordan (represented by George B. Collins, Collins & Bargione, One North LaSalle Street, Suite 2235, Chicago, Illinois 60602, 312-372-7813), Daniela Goris (represented by Marc Martin, 53 West Jackson Blvd., Chicago, Illinois 60604, 312-726-9015) and Peco Sherovski (represented by Michael Ettinger, 10059 South Roberts Road, Suite 1A, Palos Hills, Illinois 60465, 708-598-1111).

The Seventh Circuit dismissed the defendant's appeal at United States v. Kenneth Wisch, 2001 US App. LEXIS 3592 (March 5, 2001).

d. United States v. Hagop Demirjian, et al. (97 CR 789). This was a narcotics case involving a Colombian drug organization that transported millions of dollars worth of cocaine into the Chicago area. Hugo Catano, who currently is a fugitive, was the leader of the ring. As part of the case, the Drug Enforcement Agency and the Federal Bureau of Investigation seized over one hundred kilograms of cocaine in the Northern District of Illinois. Mr. Demirjian worked with the Colombians in distributing the cocaine in the Chicago area. Michael Krejci (115 West 55th Street, Suite 400, Clarendon Hills, Illinois 630-323-2366) and John Beal (53 West Jackson, Suite 108, Chicago, Illinois 60604, 312-408-2766) represented Demirjian. The Honorable James B. Zagel presided over the case.

My role in this case consisted of conducting the grand jury investigation, drafting search warrants, interviewing cooperating witnesses and drafting the indictment. In addition, I prepared for trial (including drafting the pre-trial motions and jury instructions, and preparing the fact and expert witnesses) and tried the case. I also cross examined Mr. Demirjian during trial. The jury found Mr. Demirjian guilty on all counts. I also conducted the post trial hearing and sentencing hearing. Judge Zagel sentenced Mr. Demirjian to life in prison in February 2001.

e. United States v. Santa Chiappetta (99 CR 847). I was the lead trial attorney on this approximate two week case against Ms. Chiappetta. Assistant United States Attorney Jacquelin Stern (312-353-5300) tried the case with me in May 2000. United States District Court Judge William Hart presided over the case. Ms. Chiappetta was represented by Robert Bailey (53 West Jackson Boulevard, Suite 918, Chicago, Illinois 60604, 312-427-6050).

The evidence presented at trial demonstrated that Ms. Chiappetta engaged in a scheme to defraud numerous investors out of over $1.5 million. Ms. Chiappetta represented to these investors that she was a successful businesswoman looking for investors in her ventures. Once they "invested" their money with her, Ms. Chiappetta spent it on personal items such as luxury vehicles and summer vacations. I prosecuted Ms. Chiappetta for mail fraud and wire fraud. My role in the case included assisting in the investigation with the Federal Bureau of Investigation, drafting the indictment, drafting and responding to pre-trial and post-trial motions, drafting jury instructions,

interviewing and preparing witnesses to testify at trial and trying the case. As part of this case, I traced the money Ms. Chiappetta received from her victims to her personal expenditures and presented an accountant at trial to testify regarding the expenditures. The jury convicted Ms. Chiappetta on all counts. Judge Hart's opinion denying defendant's motion for judgment of acquittal notwithstanding the verdict of the jury is reported at 2000 U.S. Dist. LEXIS 12436 (Aug. 23, 2000).

f. United States v. Ronald James Blum, et al. (97 CR 120). This case was part of a telemarketing fraud initiative that I worked on at the United States Attorney's office. I prosecuted Ronald James Blum for preying on senior citizens in the Northern District of Illinois and elsewhere and committing telemarketing fraud. Mr. Blum participated in a scheme to defraud these senior citizens by telling them that they had won large cash prizes, but that they had to send a certain amount of money to Canada to cover the taxes on their winnings. Many victims sent significant amounts of money to Mr. Blum. Of course, the senior citizens never received any prizes.

I coordinated the investigation with the Royal Canadian Mounted Police in Canada. I conducted an extensive grand jury investigation, and reviewed numerous documents. After drafting the indictment, I drafted and filed extradition papers with Canada supporting the extradition of Mr. Blum. Canada subsequently extradited him to Chicago, and he pled guilty to telemarketing fraud. I negotiated the plea agreement with Mr. Blum's attorney, and appeared in court on behalf of the United States at the plea hearing and the sentencing hearing. The Honorable William Hart presided over the case. Mr. Blum is still in jail. Andrea Gambino represented Mr. Blum. Ms. Gambino was at the Federal Defender Program, but has since taken a leave of absence.

g. United States v. Richard Pergler (98 CR 469). I tried this jury trial with Assistant United States Attorney Mark Filip (312-407-0597) before the Honorable Harry Leinenweber in March 1999. Herve Gouirage (Arent Fox Kintner Plot Kin & Kahn, 1675 Broadway, 25th Floor, New York, New York 10019, 212-484-3900) represented Richard Pergler.

This was a health care fraud case. The evidence presented at trial proved that Mr. Pergler and others defrauded Medicare by billing for a product that they never provided to the Medicare beneficiaries. Mr. Pergler and his co-schemers defrauded Medicare out of over seven million dollars in less than two years. I investigated the case, reviewed thousands of documents, drafted the indictment, responded to motions, argued motions, filed motions and tried the case before a jury. I also drafted seizure warrants so the government could seize some of Mr. Pergler's assets in anticipation of forfeiture. In addition, I negotiated plea agreements with two of Mr. Pergler's co-schemers – John Zarate (represented by Jim Graham (53 West Jackson Blvd., Suite 1150, Chicago, Illinois 60604, 312-922-3777) and William Weiss (represented by Jim Ferguson, Sonnenschein, Nath & Rosenthal, Sears Tower, 233 S.

Wacker Driver, Suite 8000, Chicago, Illinois 60606, 312-876-3188). The jury found Mr. Pergler guilty on all counts.

Judge Leinenweber's opinion on defendant's motion to dismiss the indictment is reported at 1998 U.S. Dist. LEXIS 19626 (Dec. 1, 1998). The Seventh Circuit affirmed the district court at United States v. Richard Pergler, 233 F.3d 1005 (7th Cir. 2000), and denied Pergler's request for a rehearing at 2001 US App. LEXIS 153 (7th Cir. Jan. 4, 2001).

h. United States v. James McDougal, et al. (95 CR 175). This case was one of the Whitewater criminal trials tried before a jury in the United States District Court for the Eastern District of Arkansas. The Honorable George B. Howard presided over the case. I represented the United States, along with Ray Jahn, who was the lead trial lawyer. Mr. Jahn is an Assistant United States Attorney in San Antonio, Texas. (United States Attorney's Office, Western District of Texas, 601 N.W. Loop 410, San Antonio, Texas 915-534-6884). The case involved bank fraud and government fraud charges against Jim McDougal, Susan McDougal and then Governor Jim Guy Tucker. Mr. Tucker's primary defense attorney was George Collins (Collins & Bargione, One North LaSalle Street, Suite 2235, Chicago, Illinois 60602, 312-372-7813); Mr. McDougal's counsel was Sam Heuer (124 West Capitol Street, Suite 1650, Little Rock, Arkansas 72201, 501-372-0566); and Ms. McDougal's principal attorney was Bobby McDaniel (McDaniel & Wells, 400 South Main Street, Jonesboro, Arkansas 72401, 870-932-5950). We tried the case from March through May, 1996.

I participated in this case from the investigation through the appeal. I interviewed witnesses, drafted the indictment and presented the evidence to the grand jury. I also drafted, responded to and argued pre-trial motions. Furthermore, I second chaired the trial against these defendants, and put over half of the witnesses on the stand during the trial. After the jury found all of the defendants guilty, I assisted in the preparation of the post trial motion responses and the appeal.

The following opinions were published in this case: United States v. McDougal, et al., 906 F. Supp. 494 (E.D.AR 1995) (denying motion to dismiss); United States v. McDougal, et al., 934 F. Supp. 296 (E.D.AR 1995) (denying defendant James McDougal's motion to compel personal appearance of President William Jefferson Clinton at trial); United States v. McDougal, et al., 940 F. Supp. 224 (E.D.AR 1996) (granting, in part, President Clinton's motion for a protective order).

i. United States v. Kenneth Wisch (99 CR 608). I prosecuted Mr. Wisch (a licensed firearms dealer) for illegally selling firearms. Wisch sold the firearms to individuals, but reflected in his records that he was selling them to other individuals, including a dead person. The Honorable Harry Leinenweber in the Northern District of Illinois presided over the case. Mr. Wisch pled guilty to a twenty-two count indictment. Judge Leinenweber sentenced Mr. Wisch on February 16, 2001 following a contested

sentencing hearing. James Reilly (847-228-9870), 2015 South Arlington Heights Road, Suite 119, Arlington Heights, Illinois 60005, was Mr. Wisch's attorney.

I investigated the case, drafted the search warrants, interviewed the witnesses, questioned witnesses before the grand jury, presented the indictment to the grand jury, negotiated the plea agreement and handled the plea hearing.

j. Steinfink, et al. v. Pitney Bowes, Inc., et al. (B90-349). While at Davis Polk & Wardwell, I represented Pitney Bowes in this class action law suit from 1990 through 1993 pending in the United States District Court for the District of Connecticut. Gary Lynch (formerly with Davis Polk & Wardwell), (212-325-2000), Global General Counsel, Credit Suisse First Boston Corporation, One Madison Avenue, 9th Floor, New York, New York 10010-3629, also represented Pitney Bowes. Roger Kirby (formerly with Kaufman Malchman Kaufmann & Kirby) (212-371-6600), Kirby McInerney & Squires, 830 Third Avenue, New York, New York 10022, represented the plaintiffs. The lawsuit alleged that Pitney Bowes had violated Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and Rule 10b-5. Specifically, the lawsuit alleged that Pitney Bowes and its chairman fraudulently projected certain growth earnings for the second quarter of 1990, thereby committing a fraud on the market. The legal issues involved interpretations of the securities fraud laws and corporate officer responsibility.

In connection with this class action, I reviewed and produced documents, interviewed witnesses, prepared witnesses for depositions, defended depositions, drafted various pre-trial motions, prepared expert witnesses, drafted discovery requests, prepared trial exhibits, drafted protective orders and participated in negotiating a settlement. The case settled out of court.

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

I have never been convicted of a crime.

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

Neither I nor any business of which I was an officer has ever been a party or otherwise

involved as a party in an civil or administrative proceeding.

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

I will examine each matter on a case by case basis to determine if I have a conflict of interest in the case. I will follow the Code of Conduct for United States Judges and 28 U.S.C. Section 455. I will determine on a case by case basis if I have a particular relationship to the litigants, the counsel or the cause that would make it inappropriate for me to handle the case. Even in cases where disqualification is not required by law or the Code of Conduct for United States Judges, I will disclose to the litigants any potential conflict and fairly consider the parties' positions on my handling the case.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I may continue teaching a trial advocacy course at Northwestern Law School in the fall, but I have no commitment or arrangement to do so. If I decide to continue with teaching, I will first request permission from the Chief Judge in the Northern District of Illinois.

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

Please see attached financial disclosure statement.

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

See attached financial net worth statement and schedules.

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

No.

(1) If so, did it recommend your nomination?

(2) Describe your experience in the judicial selection process, including the

circumstances leading to your nomination and the interviews in which you participated.

Senator Fitzgerald announced that he was accepting applications to fill Judge Lindberg's judgeship when Judge Lindberg became a senior judge. In May 2001, I applied for this position. In August 2001, I interviewed with two senior members of Senator Fitzgerald's staff. In November 2001, I interviewed with Senator Fitzgerald for the position. Senator Fitzgerald contacted me in January 2002 to inform me that he was recommending me to President Bush for nomination.

I subsequently met with the White House counsel's office and the Federal Bureau of Investigation. I also met with two of Senator Richard J. Durbin's staff members who handle judicial nominations. After these interviews and the completion of my background check, the White House informed me that they intended to nominate me. I was nominated on March 21, 2002.

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

No.

FINANCIAL STATEMENT

NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	$208,091	Notes payable to banks-secured Honda Finance:	$281/month
U.S. Government securities-add schedule	None.	Notes payable to banks-unsecured	None.
Listed securities-add schedule	$147,638	Notes payable to relatives	None.
Unlisted securities--add schedule	None.	Notes payable to others	None.
Accounts and notes receivable:	None.	Accounts and bills due	approx. $4,000
Due from relatives and friends	None.	Unpaid income tax	None.
Due from others	None.	Other unpaid income and interest	None.
Doubtful	None.	Real estate mortgages payable-add schedule	$646,181
Real estate owned-add schedule	$1,065,000	Chattel mortgages and other liens payable	None.
Real estate mortgages receivable	None.	Other debts-itemize:	
Autos and other personal property	$90,000	Annual Real Estate Taxes:	$20,000 (~10,000 remaining)
Cash value-life insurance	$850,000		
Other assets itemize:			
Retirement Accounts	$231,103		
		Total liabilities	666,925
		Net Worth	1,924,907
Total Assets	$2,591,832	Total liabilities and net worth	2,591,832
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	No.	Are any assets pledged? (Add schedule)	No.

On leases or contracts	No.				Are you defendant in any suits or legal actions? No.			
Legal Claims	No.				Have you ever taken bankruptcy? No.			
Provision for Federal Income Tax	No.							
Other special debt	No.							

FINANCIAL STATEMENT SCHEDULES – Amy St. Eve

Cash on Hand and in Banks:

Checking Account:	$ 7,738
Savings Accounts:	$ 16,108
Certificate of Deposit:	$ 7,540
Money Market	$ 8,239
Money Market	$120,228
Total:	$ 159,853

Children's Accounts:

Savings:	$ 18,176.00
Savings:	$ 17,521.00
Certificate of Deposit:	$ 8,000.00
Certificate of Deposit:	$ 4,044.00
Cash Fund :	$ 497.00
Total:	$48,238

TOTAL: 208,091

Retirement Accounts:

Paine Webber IRA:	$ 11,900
Fidelity:	$116,400
U.S. Government Thrift Savings Plan:	$ 95,000
Abbott:	$ 7,803
TOTAL:	231,103

Listed Securities:

Anheuser Busch:	$10,170
AT&T Wireless:	$ 8,226
Citigroup:	$10,096
Covad Communications:	$ 4,430
General Electric:	$11,550
Gillette Company:	$ 6,680
Home Depot:	$10,202
Medimmune:	$10,307
Microsoft:	$13,126
Pfizer:	$11,264
Tyco Internationl:	$11,780
Delaware Select Growth Fund:	$ 2,294
Oppenheimer Global Growth & Income:	$ 3,170
Pilgrim Large Capital Growth Fund:	$ 1,985
Fidelity Magellan Mutual Fund:	$21,160
Fidelity Ginnie Mae Bond Fund:	$ 3,959
Fidelity Low Price Stock Fund:	$ 2,439
Van Kampen Equity Trust Small Cap Growth Mutual Fund (Amy):	$1,600
Van Kampen Americna Cap. Emerging Growth Mutual Fund (Emily):	$3,200
TOTAL:	$147,638

REAL ESTATE AND MORTGAGE SCHEDULE

Real Estate Mortgages Payable – Washington Mutual holds the mortgage.

Principal on Mortgage for Residence: $646,181

Monthly Payments: $4,270.04

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Government Act of 1978, as amended
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
St. Eve, Amy J.	Northern District of IL	03/21/2002
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 03/21/2002 __ Initial __ Annual __ Final	6. Reporting Period 1/01/2001 to 3/01/2002
7. Chambers or Office Address Abbott Laboratories, 100 Abbot Park Road, Bldg. AP6D, Dep.324 Abbott Park, IL 60064	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Senior Counsel, Litigation	Abbott Laboratories
2	Adjunct Professor	Northwestern Law School
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		None.
2		
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2002	Northwestern Memorial Faculty Foundation	
2	2001	Northwestern Memorial Faculty Foundation	
3	2001	Abbott Laboratories (salary)	101,546
4	2001	U.S. Department of Justice	

FINANCIAL DISCLOSURE REPORT | St. Eve, Amy J. | 03/21/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt.	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Marshall Fields	Credit Card (Furniture -- paid off in full)	J
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 | St. Eve, Amy J. | 03/21/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Bank One (Accounts)	A	Interest	L	T	EXEMPT				
2 Anheuser Busch Common Stock	A	Dividend	J	T					
3 AT&T Wireless Services Common Stock		None							
4 Charter Communications Common Stock		Dividend							
5 Citigroup Inc. Common Stock	A	Dividend	J	T					
6 Covad Communications Group Common Stock		None	J	T					
7 GE Common Stock	A	Dividend	J	T					
8 Gillette Company Common Stock		None	J	T					
9 Home Depot Inc. Common Stock	A	Dividend	J	T					
10 Medimmune Inc.		None	J	T					
11 Microsoft Corp. Common Stock	A	Dividend	K	T					
12 Pfizer Inc. Common Stock	A	Dividend	J	T					
13 Tyco Common Stock	A	Dividend							
14 RMA Money Market	A	Interest	M	T					
15 Delaware Select Growth Fund		None	J	T					
16 Oppenheimer Global Growth & Income	A	Dividend	J	T					
17 Pilgrim Large Cap Growth Fund Class A	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 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: St. Eve, Amy J. | Date of Report: 03/21/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 US Paine Webber CD	A	Interest	J	T	EXEMPT				
19 EMC Corp. Mass Common Stock		None	J	T					
20 Sun Microsystems Inc. Common Stock		None	J	T					
21 Agere Systems Inc. Common Stock		None							
22 Echelon Corp. Common Stock		None							
23 Foundry Networks Common Stock		None							
24 Lucent Technologies Common Stock	A	Dividend							
25 Focal Comm. Corp. Common Stock		None							
26 Medtronic Common Stock	A	Dividend							
27 Fidelity Magellan Mutual Fund	A	Dividend	K	T					
28 Fidelity Municipal Money Market Account	A	Interest	J	T					
29 Abbott Laboratoires Common Stock	A	Dividend	J	T					
30 Putnam Growth and Income Fund		None	J	T					
31 George Putnam Fund of Boston		None	J	T					
32 SRP Stable Value Fund		None	J	T					
33 Smith Barney Money Funds	A	Interest							
34 Cisco Systmes Inc. Common Stock		None							

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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: St. Eve, Amy J. | Date of Report: 03/21/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure: (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions.)									
35 Smith Barney TRAK Fund	A	Dividend			EXEMPT				
36 Van Kampen Equity Trut Small Cap Growth Fund Class A		None	J	T					
37 Van Kampen Amern Cap Emerging Growth Fund Class A		None	J	T					
38 Fidelity Independence Fund	A	Dividend	J	T					
39 Fidelity Blue Chip Fund	A	Dividend	K	T					
40 Fidelity Growth & Income Fund	A	Dividend	K	T					
41 Fidelity OTC Port Fund		None	J	T					
42 Spartan US Equity Fund	A	Dividend	K	T					
43									
44									
45									
46									
47									
48									
49									
50									
51									

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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
	St. Eve, Amy J.	03/21/2002

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	St. Eve, Amy J.	03/21/2002

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	2000	U.S. Department of Justice	
6	2002	Evanston Northwestern Hospital	
7	2002	Abbott Laboratories (salary)	$54,313.54

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	St. Eve, Amy J.	03/21/2002

IX. CERTIFICATION

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

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

Signature Amy J St. E Date 3-21-02

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

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

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

Timothy J. Savage

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

United States District Judge for the Eastern District of Pennsylvania

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

5030 Oxford Avenue
Philadelphia, PA 19124
(215) 537-4800

4. Birthplace: State date and place of birth.

March 24, 1946
Philadelphia, Pennsylvania

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

Married
Linda S. (Siegle) Savage
Consultant
Timothy J. Savage, P.C.
5030 Oxford Avenue
Philadelphia, PA 19124

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

Temple University School of Law, 1968-1971, J.D., granted May 19, 1971

Assumption College, 1964-1968, B.A. *cum laude,* granted June 8, 1968

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

Employment

1976-present	**Timothy J. Savage, P.C. 5030 Oxford Avenue Philadelphia, PA 19124**
1977-present	**Pennsylvania Liquor Control Board Northwest Office Building Harrisburg, PA 17124 Hearing Examiner**
1974-1976	**Savage and Ciccone 1716 Two Girard Plaza Philadelphia, PA 19102 Partner**
1971-1974	**MacCoy, Evans & Lewis Two Penn Center Philadelphia, PA 19107 Associate attorney**
1970-71	**Goodis, Greenfield, Narin & Mann 1315 Walnut Street, Philadelphia, PA 19107 Summer associate and librarian**
1968-69	**ShopRite Red Lion Road & Bustleton Avenue Philadelphia, PA 19115 Clerk**

Nonprofit Organizations

Metropolitan (Northeast) Boys & Girls Clubs
Kinsey and Hedge Streets
Philadelphia, PA 19124
Counsel and member of board of directors

Northeast Community Center for Mental Health & Mental Retardation
Friends Hospital
Philadelphia, PA 19124
Former member and secretary of board of directors (1974 -1981)

Frankford Special Services District
4714 Oxford Avenue
Philadelphia, PA 19124
Former president and founding member of board of directors (1995 -1999)

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

I have not had any military service.

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

Graduated college *cum laude*

Editor, *Temple Law Quarterly*

Received distinction in labor law in law school

Received scholarships while attending both college and law school

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

American Bar Association (Section of Litigation)
Philadelphia Bar Association (Fee Disputes Committee)
New Jersey Bar Association
American Trial Lawyers Association
Pennsylvania Trial Lawyers Association
Philadelphia Trial Lawyers Association

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

Supreme Court of the United States, 1982
United States Court of Appeals for the Second Circuit, 1981

United States Court of Appeals for the Third Circuit, 1981
United States Tax Court, 1985
United States District Court for the Eastern District of Pennsylvania, 1971
United States District Court for the District of New Jersey, 1985
Supreme Court of Pennsylvania, 1971
Supreme Court of New Jersey, 1985

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

Metropolitan (Northeast) Boys & Girls Clubs, 1980-present, counsel and member of board of directors
Frankford Special Services District, 1995-1999, former president and founding member of board of directors
Philadelphia County Democratic Executive Committee, 1976-present, county committeeman
Twenty-third Ward Democratic Executive Committee, 1971-1995, committeeperson; 1976-present, leader
Knights of Columbus, McHugh Council, 1975-present
Union League of Philadelphia, 1986-1999
Wildwood Golf & Country Club, 2000-present
Northwood Civic Association, 1972-present
Frankford Economic Revitalization Committee, mid-1970s, vice chairman
St. Joachim R.C. Church, former president of parish council and former chairman of finance committee

None of these organizations have discriminated or currently discriminate on the basis of race, sex or religion.

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

Note, *Union Authorization Cards Held Reliable in Place of Prejudicial Elections if Obtained Without Misrepresentation or Coercion*, 43 Temple Law Quarterly 104 (1969)

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

I have not appeared before any Congressional committee or subcommittee.

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

Excellent

October 22, 2001

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

Not applicable.

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

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

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

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

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

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions

were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

County Committeeman (elected), Philadelphia County Democratic Executive Committee, 1976-present

Leader (elected), Twenty-third Ward Democratic Executive Committee, 1976-present

Unsuccessful candidate for nomination in the Democratic primaries in Philadelphia for member of City Council at large in 1979 and for district in 1983.

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

As a member of the Philadelphia County Democratic Executive Committee and leader of the Twenty-third Ward Democratic Executive Committee since 1976, I have supported candidates for various federal, state and city offices in primary and general elections. However, I have not held any position in a campaign.

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

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

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

No.

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

Yes.

1716 Two Girard Plaza, Philadelphia, PA - 1976 -1981
4714 Oxford Avenue, Philadelphia, PA - 1981 - 1991
5030 Oxford Avenue, Philadelphia, PA - 1991 - present

(3) the dates, names and addresses of law firms or offices, companies or

governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1971-1974: **MacCoy, Evans & Lewis**
Two Penn Center
Philadelphia, PA 19102
Associate

1974-1976: **Savage and Ciccone**
1716 Two Girard Plaza
Philadelphia, PA 19107
Partner

1976-present: **Timothy J. Savage, P. C.**
5030 Oxford Avenue
Philadelphia, PA 19124
Sole principal

1977-present: **Pennsylvania Liquor Control Board**
Northwest Office Building
Harrisburg, PA 17124
Hearing Examiner

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

Litigation, civil and criminal, state and federal courts.

At MacCoy, Evans & Lewis, I was an associate in the litigation department handling only civil matters. After leaving the firm for more trial work, I concentrated on representing criminal defendants in cases ranging from misdemeanors to homicide. During the last two decades, my practice has evolved to an emphasis on civil litigation and white collar crime.

I currently serve as a mediator in the United States District Court for the Eastern District of Pennsylvania and as a judge *pro tem* in the Court of Common Pleas, First Judicial District of Pennsylvania (Philadelphia County).

I was on the Criminal Justice Act Panel of the United States District Court for the Eastern District of Pennsylvania from 1982 through 1991.

I have served in an adjudicative capacity with the Pennsylvania Liquor Control Board since April 18, 1977, when I was appointed by Governor Milton J. Shapp. In that quasi-judicial role, I make

evidentiary rulings, control the mode and interrogation of the witnesses, author findings of fact and recommend Board decisions.

As a hearing examiner, I have presided over adversarial hearings on Liquor Code violations, license transfers, applications for new licenses and non-renewals of licenses. After 1987, hearings on citations for violations were assumed by the Office of Administrative Law Judge which was created by the Legislature to separate the prosecutorial and adjudication functions. Since then I have continued to conduct hearings in licensing cases.

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

Business entities and individuals of all types, including professionals, businesspersons, public officials, judges and injured persons. Many of my clients are referred by other attorneys, some of whom have been my adversaries.

Criminal, commercial and personal injury litigation.

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

Frequently.

During the first three years of my professional career, I made very few court appearances. In the late seventies and eighties, I was trying more criminal cases in both state and federal courts, and my criminal trial practice constituted about 60-75% of my time. During that period, I had several jury trials and many bench trials a year. As I began handling more civil and less criminal matters, I tried fewer cases to verdict because the civil cases were more likely to settle. Thus, the breakdown between civil and criminal trials, and between jury and non-jury trials was substantially different during the last ten years than in the earlier years.

(2) Indicate the percentage of these appearances in

(A) federal courts;

10%

(B) state courts of record;

90%

(C) other courts.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

75%

(B) criminal proceedings.

25%

These percentages are for the last five years. As stated above, the breakdown between civil and criminal cases was reversed in earlier years.

(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.

Sixteen, during the last five years. In the previous 25 years, I tried in excess of 100 jury trials and many more non jury and arbitration cases to verdict.

I was sole counsel for the party or parties I represented in all cases, except in one where I was assisted by referral counsel.

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

55%

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

I represented two petitioners on *petitions for certiorari.* See attached copies of the petitions.

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

During the past 35 years, I have continuously and regularly served in many roles in providing social and legal services to my economically and ethnically diverse community. I had been the attorney for the civic association for several years and have been counsel to the Metropolitan Boys & Girls Club (Northeast) for the past 20 years. In addition, I have held leadership positions in community organizations and my church. In these various capacities, I have represented, without financial compensation, the organizations and have offered formal and informal advice to its members. I have also performed free legal services for churches and senior citizens in the community.

I served on the Philadelphia Bar Association's Volunteers for Indigent Persons panel of attorneys providing free legal services to needy persons. I have also been a member of the bar association's fee disputes committee.

I have regularly provided services free or for a minimal or token fee. However, I cannot state the amount of time spent on each *pro bono* service provided.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

The following cases are illustrative of my experience in representing different types of clients in varied forums and fields of law:

***JIRB v. McCabe* - 1987**

One of 15 Common Pleas judges accused of accepting bribes from the Roofers Union, Judge Joseph Patrick McCabe, Jr. was the subject of a federal grand jury investigation and was charged with misconduct by the Pennsylvania Judicial Inquiry and Review Board which sought his removal from the bench.

McCabe was acquitted and reassigned to the bench after a trial before the JIRB at which I represented him. He was never indicted by the federal government after the investigation during which I represented him.

Court: Judicial Inquiry and Review Board No. 86-A-105, Board Hearing Docket No. 121

JIRB Panel Members: Hon. James E. Rowley (former Pennsylvania Superior Court judge); Bruce Kauffman, Esquire (presently a federal district judge); and, James H. Higgins

JIRB trial counsel: Robert L. Keuch, Esquire
and William T. Arbuckle, III, Esquire
1315 South Allen Street
State College, PA 16801
(814) 237-6255

The significant part of the defense case was the exculpatory evidence contained in FBI taped conversations which we presented to the JIRB. McCabe was the only judge to present such evidence which was accessed after I had litigated a motion in the federal district court for an order permitting us to review and copy the secretly recorded conversations.

Court: United States District Court for the Eastern District of Pennsylvania
Judge: Hon. Raymond J. Broderick

Government's Counsel: Richard L. Scheff, Esquire
(former AUSA)
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-7502

Elstone v. Waste Management - 1996

I represented the plaintiff, a building contractor, who was seriously injured when a truss roof he and his employees were erecting collapsed. The plaintiff had contributed to the cause of the accident. The central issue was whether the defendant, the owner of the property who designed the project, was also responsible under OSHA as the "prime contractor" pursuant to Title 29 C.F.R. §1926.16.

The jury returned a verdict finding the plaintiff and the defendant liable 49% and 51%, respectively. The damages award was settled during the pendency of post trial motions.

Court: Philadelphia County Court of Common Pleas, No. 9011-05176

Judge: Hon. Paul Ribner

Defense counsel: Michael J. Plevyak, Esquire
White & Williams LLP
1500 Lancaster Avenue
Paoli, PA 19301
(610) 240-4707

Co-plaintiffs' counsel: Lawrence J. Roberts, Esquire
8380 Old York Road, Suite 120
Elkins Park, PA 19027
(215) 886-5600

Robert Aaron Greenberg, Esquire
Harris and Greenberg
34 Tanner Street
Haddonfield, NJ 08033
(856) 795-1912

Commonwealth v. Beck - 1976-1983 (2 cases)

I represented the defendant who was charged with murder and claimed self defense. After two jury trials and two appeals to the Pennsylvania Supreme Court, he was discharged.

At the first trial, he was found guilty of third degree murder and sentenced to 7-20 years imprisonment. On appeal, the Pennsylvania Supreme Court reversed the conviction and clarified an evidentiary rule applicable to self defense. *Comm. v. Beck,* 402 A.2d 1371 (Pa. 1979).

On retrial, the jury returned a verdict of not guilty of third degree murder and guilty of voluntary manslaughter. Dwayne Beck was sentenced to 1-1/2 years to 3 years, 5 months. The Pennsylvania Supreme Court, in *Comm. v. Beck*, 464 A.2d 316 (Pa. 1983), reversed the second conviction and discharged the defendant.

In the first case, the ground work was laid in the trial record for the appellate court to set out a clear rule regarding the admissibility of certain evidence relevant to a defendant's state of mind when he claims self defense. Specifically, the Pennsylvania Supreme Court held that evidence of the victim's prior conviction for assault on a policeman and of his violent confrontation with a woman earlier the same day was relevant to the defendant's belief that he was in danger of serious harm or death.

The second appeal rested upon an esoteric rule of law, *autrefois acquit*, which arose out of the unique circumstances established at the end of the first trial and then during the jury charging conference. At the first trial, the defendant had been found not guilty of voluntary manslaughter. On retrial for third degree murder, the defendant was found not guilty of third degree murder and guilty of manslaughter. Because he had been found not guilty of the latter charge in the first trial, the defendant was discharged.

Court: Philadelphia County Court of Common Pleas,
April Term, 1976, No. 350

Judge: Hon. Albert F. Sabo (first trial) and
Hon. Joseph T. Murphy (second trial)

Prosecutors: Barbara Christie, Esquire (first trial)
Chief Counsel, State Police
State Police Headquarters
1800 Elmerton Avenue
Harrisburg, PA 17110
(717) 783-5568

Pierre B. Pie, II, Esquire (second trial)
1845 Walnut Street, Suite 600
Philadelphia, PA 19103
(215) 568-8282

Robert B. Lawler, Esquire (both appeals)
1818 Market Street
Suite 3100
Philadelphia, PA 19103
(215) 564-4141

Shields v. Friedland - 1996

Joseph Shields suffered a closed head injury in a motor vehicle collision. Despite his apparently healthy appearance, we were able to demonstrate to the jury that he had suffered a serious injury. The jury awarded Shields a substantial amount.

Court: Philadelphia County Court of Common Pleas, No. 9606-01724

Judge: Hon. Arnold L. New

Defense counsel: Elizabeth F. Walker, Esquire
1818 Market Street, Suite 2510
Philadelphia, PA 19102
(215) 568-4120

United States v. Lederer - 1982-83

I represented former Congressman Raymond Lederer in an appeal to the United States Court of Appeals for the Second Circuit from his federal conviction in the Abscam investigation for Hobbs Act violations and on a petition for certiorari in the United States Supreme Court. The appeal and the petition were denied. I

later successfully litigated a motion to reduce the sentence which resulted in a substantial reduction.

Courts: United States Court of Appeals for the Second Circuit and United States District Court for the Eastern District of New York

United States v. Lederer, 692 F.2d 823 (1982), *cert denied*, 103 S. Ct. 2437 (1983)

Judge: Hon. George C. Pratt in the district court

Government counsel: Lawrence H. Sharf, Esquire
United States Attorney's Office
Eastern District of New York

United States v. Katz – 1984-1986

Along with several other high ranking Philadelphia police officials, George Katz was charged with RICO and Hobbs Act violations in connection with the extortion and bribery of vice figures. After a lengthy trial at which I represented him, Katz was convicted.

I represented Katz on appeal to the Third Circuit Court of Appeals and later filed a petition for writ of certiorari with the Supreme Court. The petition was denied.

Court: United States District Court for the Eastern District of Pennsylvania, C.R. No. 84-106

Judge: Hon. Daniel H. Huyett, III

Government Counsel: Howard B. Klein, Esquire
Assistant United States Attorney (former)
1700 Market Street, Suite 2632
Philadelphia, PA 19103
(215) 972-1411

Court: United States Court of Appeals for the Third Circuit, *United States v. Martin,* 778 F.2d 963 (3d Cir. 1985)

Court: United States Supreme Court, No. 85-1538

United States v. DiGiovannantonio - 1993

I represented the defendant, a former Conrail employee, who was charged with various crimes arising from an alleged scheme to defraud his employer. After a trial at which several alleged co-conspirators testified against him, James DiGiovannantonio was acquitted by a jury.

Court: United States District Court for the Eastern District of Pennsylvania, No. 93CR26330-04

Judge: Hon. Lowell A. Reed, Jr.
Government Counsel: J. Alvin Stout, III
Assistant United States Attorney
615 Chestnut Street
Philadelphia, PA 19106
(215) 451-5461
(215) 861-8461

Co-defendant's Counsel: John J. McCreesh, III, Esquire
7053 Terminal Square
Upper Darby, PA 19082
(610) 734-2160

Ford v. Allstate - 2000

I was trial counsel in a bad faith action against the plaintiff's automobile insurer which had denied her claim. The defendant contended the plaintiff had lied about how the accident had occurred. After several days of trial, Allstate settled the case before it was submitted to the jury for an amount which was more than twelve times the amount of the original claim.

Court: Philadelphia County Court of Common Pleas, No. 9902-03078

Judge: Hon. Francis P. Cosgrove

Defense Counsel: Kevin R. McNulty, Esquire
225 S. 15th Street, Suite 1600
Philadelphia, PA 19102
(215) 790-8400

Co-Counsel: **Bart Benoff, Esquire**
9245 Roosevelt Boulevard
Rear Plaza
Philadelphia, PA 19114-2205
(215) 677-7777

***Van Conversions, Inc. v. Freedom Industries, Inc, et al* - 1992**

I represented the defendant corporation and its shareholders in an action brought against them and their certified public accountant alleging fraud and misrepresentation in the sale of the corporation's assets. The plaintiff sought rescission and damages in excess of $1,000,000. The jury returned a verdict of $100,000.00 in favor of the plaintiff and found the accountant jointly liable.

Court: **Montgomery County Court of Common Pleas, No. 85-00347**

Judge: **Hon. Richard S. Lowe**

Plaintiff's Counsel: **Stephen G. Yusem, Esquire**
40 E. Airy Street
Norristown, PA 19404
(610) 275-0700

Additional Defendant's Counsel: **Walter R. Milbourne, Esquire**
1500 Market Street
Philadelphia, PA 19102
(215) 972-1975

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

No.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of

your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

Yes.

The following cases are recorded in the Court of Common Pleas for the First Judicial District (Philadelphia County), Commonwealth of Pennsylvania:

1. **Timothy J. Savage** — **Case No. 940700133**
   and
   Linda S. Savage — **Filed 7/18/94**
   v.
   PennDOT
   Appeal from Department of Transportation suspension of vehicle registrations for alleged failure to maintain insurance coverage. The Court reinstated the registrations.

2. **Travelers Insurance Company** — **Case No. 950103870**
   v.
   Steven H. Fonnemann — **Filed 2/2/95**
   and
   Timothy J. Savage

   Subrogation action by insurer against attorney and his client. Complaint against attorney (Savage) dismissed with prejudice.

3. **Timothy J. Savage** — **Case No. 970902726**
   and
   Linda S. Savage
   v.
   Timothy J. Savage, Jr. — **Filed 9/22/97**
   and
   Susan B. Savage

   Confession of judgment on a promissory note.

4. **Linda S. Savage** — **Case No. 98088588**
   v.
   Timothy J. Savage — **Filed 8/24/98**

   Divorce action. Inactive since initial filing. Parties have reconciled.

5. Northwood Civic Association, *et al* v. CO-MHAR, Inc., *et al* — Case No. 90603112, Filed 6/25/98

Action against defendants for violations of the zoning and land use laws and to enforce restriction against non-residential uses. I was a nominal plaintiff as a member of the civic association. Matter was settled by stipulation approved by the Court.

The following case is recorded in the Commonwealth Court of Pennsylvania:

6. Timothy J. Savage, *et al* v. Governor Thomas J. Ridge, *et al* — Case No. 94 M.D. 1997, Filed 1/3/97

Plaintiffs challenged the authority of the Executive to abolish Liquor Control Board hearing examiner positions created by the Legislature. They successfully argued that the attempt violated the separation of powers doctrine. The Pennsylvania Supreme Court, No. 71 M.D. 1997, affirmed.

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

I am aware that a judge should avoid even the appearance of impropriety. Should a conflict of interest arise, I shall follow the Code of Conduct for United States Judges.

There are no areas of law or financial arrangements which are likely to present a conflict of interest.

23. Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

See attached Financial Disclosure Report.

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

See attached financial net worth statement and schedules.

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

Yes.

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

Yes.

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

The Federal Judicial Nominating Commission of Pennsylvania established by Senators Specter and Santorum has recommended my nomination. I submitted a personal data questionnaire to the Commission. On March 14, 2001, I was interviewed by a screening panel of three members of the Commission which recommended that the entire membership of the Commission consider my qualifications. After appearing before the Commission, I was recommended to Senators Specter and Santorum.

On June 19, 2001, I was interviewed by Judge Alberto Gonzalez, Counsel to the President. Senator Specter interviewed me on August 1, 2001.

The Federal Bureau of Investigation conducted a background investigation. On March 21, 2002, I was nominated by President Bush.

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

No.

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Savage, Timothy J.	Eastern Dist. of Pennsylvania	03/25/2002
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
U. S. District Judge Nominee	X Nomination, Date 03/21/2002 ___ Initial ___ Annual ___ Final	01/01/2001 to 03/20/2002
7. Chambers or Office Address	**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.**	
5030 Oxford Avenue Philadelphia, PA 19124	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Sole Officer, Director, Shareholder	Timothy J. Savage, P.C.,
2	Partner	Savage & Savage (Real Estate Investment)
3	Director, Counsel	Metropolitan (Northeast) Boys & Girls Club

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1977	State Employees' Retirement System, Pension upon retirement
2		If confirmed, I shall make arrangements to transfer pending litigation files to another firm. I contemplate receiving immediate reimbursement of (cntd Part 8)
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	Commonwealth of Pennsylvania	56,240
2	2001	Commonwealth of Pennsylvania	59,446
3	2002	Commonwealth of Pennsylvania	15,805
4	2000	Timothy J. Savage, P.C.	183,367

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Savage, Timothy J.	03/25/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		Exempt
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1		Exempt	
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Washington Mutual	Mortgage on Rental Property (Pt. VII, line 1)	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 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
Savage, Timothy J.	03/25/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Rental Property, Philadelphia, PA (1990 $155,000)	G	Rent	M	R	Exempt				
2 Mortgage Edward & Deborah Bednarz	A	Interest	J	U	"				
3 OBJX - Common Stock		None	J	T	"				
4 NGWY - Common Stock		None			"				
5 AXA - Common Stock	A	Dividend	J	T	"				
6 Summit Bancorp - Common Stock	A	Dividend	J	T	"				
7 Joseph Manley - Commodity Investment Pool	B	Dividend	K	T	"				
8 Bridesburg FCU	A	Interest	J	T	"				
9 Alger Mutual Fund		None	J	T	"				
10 AIM - Weingarten - Mutual Fund	A	Dividend	J	T	"				
11 Righttime - Blue Chip - Mutual Fund (Federated Capital)	A	Dividend	K	T	"				
12 Nationwide - Best of America - Annuities (2)		None	L	T	"				
13 BLLS - Common Stock		None	K	T	"				
14 NOW - Common Stock		None	J	T	"				
15 MEDC - Common Stock		None	K	T	"				
16 ACRXX - Money Market	A	Dividend	L	T	"				
17 VGR - Common Stock	D	Dividend	M	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 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
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Savage, Timothy J.	03/25/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 LTS - Common Stock		None	J	T	Exempt				
19 FPLY - Common Stock		None	J	T	"				
20 Billserv, Inc. - restricted stock		None	K	T	"				
21 Tobacco Settlement Auth Iowa - Bond		None	L	T	"				
22 Knights of Columbus FCU	A	Interest	J	T	"				
23 Ocean City Home Bank - Accounts	A	Interest	J	T	"				
24 Mellon Bank - Accounts	A	Interest	J	T	"				
25 Trust #1	A	Dividend	J	T	"				
26 -BGL									
27 -VGR									
28 -ACR									
29 Trust #2	A	Dividend	J	T	"				
30 -BGL									
31 -VGR									
32 -ACR									
33									
34									

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
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Savage, Timothy J.	03/25/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Part I. Positions (Continuation)

	Position	Name of Organization/Entity
4	Custodian	Trust #1
5	Custodian	Trust #2

Part II. Agreements Re: If confir, contd ...costs expended and future payment of fees upon resolution of each matter for services previously rendered.

Part III. Non-Investment Income (Continuation)

	DATE	SOURCE AND TYPE	GROSS INCOME
5	2001	Timothy J. Savage, P.C. and self	124,209
6	2002	Timothy J. Savage, P.C.	Undetermined
7	2001	Timothy J. Savage, P.C.	---
8	2002	Timothy J. Savage, P.C.	---

Gross income figures on lines 4 through 6 were generated from legal fees paid to a professional corporation solely owned by the nominee. The corporation pays rent to a partnership consisting of the nominee and his spouse. The rental payments are reported in Part VII, Investments and Trusts, line 1. A portion of the income on lines 4 through 6 of this part is passed through to the rental property in Part VII.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Savage, Timothy J.	03/25/2002

IX. CERTIFICATION

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

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

Signature Timothy Savage Date 3/25/02

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		20	000	Notes payable to banks-secured			0
U.S. Government securities-add schedule				Notes payable to banks-unsecured			0
Listed securities-add schedule		409	767	Notes payable to relatives			0
Unlisted securities--add schedule		68	783	Notes payable to others			0
Accounts and notes receivable:				Accounts and bills due		1	800
Due from relatives and friends		17	158	Unpaid income tax			0
Due from others			0	Other unpaid income and interest			0
Doubtful				Real estate mortgages payable-add schedule		400	223
Real estate owned-add schedule	1	125	000	Chattel mortgages and other liens payable			0
Real estate mortgages receivable		9	500	Other debts-itemize:			
Autos and other personal property		55	000	Auto Loans (2)		47	600
Cash value-life insurance		38	489				
Other assets itemize:							
Boat		10	000				
				Total liabilities		449	623
				Net Worth	1	304	074
Total Assets	1	753	697	Total liabilities and net worth	1	753	697
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		15	000	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				

As of December 11, 2001

REAL ESTATE

Primary residence Philadelphia, PA 19124	$175,000.00
Secondary residence Ocean City, NJ 08226	950,000.00

REAL ESTATE MORTGAGES PAYABLE

Washington Mutual	$ 50,273.00
Mellon Private Mortgage	349,950.00

LISTED SECURITIES*

Stock

Billserv, Inc.	$2,100
RSTK Billserv.Com	21,000
Interactive Objects	13,800
MAI Sys Corp Com	590
Med-Design Corp.	24,585
Vector Group Ltd.	201,600

Mutual Funds

Alger	$ 7,161
Aim-Weingarten	8,601
Righttime-Blue Chip	15,718
Nationwide - Best of America	114,612

*As of December 11, 2001

UNLISTED SECURITIES*

Municipal Bonds

Iowa TOB	$ 68,783

*As of December 11, 2001

[Whereupon, at 4:26 p.m., the committee was adjourned.]
[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

RESPONSES OF HENRY E. HUDSON TO FOLLOW-UP QUESTIONS OF SENATOR PATRICK J. LEAHY

1. For years I have been questioning nominees on the subject of *stare decisis*, asking them how strongly they think judges should bind themselves to the doctrine, whether the commitment to *stare decisis* varies depending on the court, and whether they would follow the doctrine if confirmed. It would appear that the answer to these questions is easy, and fairly straightforward – it is a bedrock principle of our legal system that a lower court must follow the rulings of higher courts.

But I recently read a law review article where the author, a respected law professor, asserts his belief that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As I read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should be no less bound to follow those rules than they are to follow any other rule of a higher court.

Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

Answer:

The doctrine of stare decisis is the hallmark of judicial integrity and a critical element of American Jurisprudence. A United States District Judge is duty bound to follow the precedent of the respective Circuit Court of Appeals and the United States Supreme Court. I do not believe that a District Court Judge has the power or should engage in speculative or predictive decision making based on what a judge believes a higher court may do, and I would not do so.

2. As a U.S. Attorney, you became well-known for, among other things, taking on low-level drug crimes that were normally handled in state court. During your tenure, you adopted local drug cases for federal prosecution, saying localities requested your help, and you used the clout of federal grand juries to win heavy sentences against drug defendants who previously would have been prosecuted by the state. A few years later, in 1995, you testified before the Judiciary Committee Subcommittee on Youth Violence against the federalization of the criminal offense of possession of a firearm on school grounds. You argued that certain types of criminal activity, such as possessing firearms near schools, are best left to state control and warned that federalizing such offenses would discourage local law enforcement from vigorously prosecuting such crimes.

A. Please tell the Committee how you reconcile these diverging views regarding the federalization of criminal activity. Do you still believe that certain types of criminal activity are best left to state control and, if so, what types of activity would that be, under what circumstances and why? Please describe your view of when federal and state governments properly have exclusive versus concurrent jurisdiction over criminal misconduct.

Answer:

As United States Attorney for the Eastern District of Virginia, I established guidelines for adopting cases initiated by state and local authorities, which included state and local law enforcement officials requesting federal assistance and that the case have dimensions beyond the capability of state and local prosecutors.

Under the law of Virginia in existence at that time, there was no statutory provision for a grand jury with true investigative powers. Consequently, state prosecutors were unable to develop cases against regional suppliers and national networks without federal assistance. In each drug case that was investigated and prosecuted by my office, I was convinced that the persons involved had significant ties to regional drug distribution syndicates.

In view of the current strain on federal resources to combat terrorism, the legislative and executive branches of our government will have to assess where our limited resources are best allocated. Congress considers these issues when it enacts various types of legislation. If confirmed as a United States District Judge, I would apply all duly enacted federal laws.

3. You have been appointed to serve on various commissions working on criminal justice issues. Since 1997, you have served on the Virginia Criminal Sentencing Commission. You have also served on the Governor's Commission to Abolish Parole and Reform Sentencing, which led an overhaul of the state's criminal justice system, including the abolition of parole, increased prison time for violent and repeat criminals, and reform of the juvenile justice system.

A. Please describe for the Committee your work on the Governor's Commission to Abolish Parole and Reform Sentencing and how your experience on the Commission will inform your new position as a federal district court judge, if confirmed.

Answer:

The Governor's Commission to Abolish Parole and Reform Sentencing was a bipartisan task force established to address uniformly recognized deficiencies in Virginia's system of parole and sentencing. It was composed of members of the Virginia General Assembly, judges, justices of the Supreme Court of Virginia, prosecutors, defense attorneys, and other civic leaders. The Commission was divided into a number of committees. Along with other members, I was assigned to the committee tasked with designing a proposed plan for the development of prison industries. The plan included economic, correctional, and legal components. The proposed facilities would offer treatment as well as educational and employment opportunities for appropriate inmates. The plan also enabled selected inmates to perform community-based work on publicly-owned property. I also participated in all public hearings conducted by the Commission.

Most recommendations of the Commission were adopted by the Virginia General Assembly with broad-based support from both political parties. The resulting system of parole and sentencing in Virginia is similar to the federal system, except that the Virginia Sentencing Guidelines are discretionary, rather than mandatory. If confirmed as United States District Judge, my experience with the Commission would reinforce my appreciation for consistency in sentencing.

B. There has been a long-standing debate in our criminal justice system about whether the purpose of the system is the retribution or the rehabilitation of those who are convicted. As a former prosecutor and current trial court judge, how do you view the purpose of our criminal justice system?

Answer:

The American criminal justice system represents a delicate balance of the protection of individual rights and public safety. Toward that end, a sentencing judge must fashion a sentence that encompasses an appropriate element of punishment, commensurate with the nature of the offense, the defendant's prior criminal activity, and his demonstrated motivation to change his behavior. The system must balance the interests of the victim and the protection of the public against the defendant's need for rehabilitation. In order for a defendant to successfully reintegrate into society, he or she must have access to post-release services. If confirmed as United States District Judge, I would attempt to achieve this balance in accordance with the Federal Sentencing Guidelines and applicable law when sentencing defendants in cases before me.

4. In the past few years, the Supreme Court has struck down a number of federal statutes, most notably several designed to protect the civil rights and prerogatives of our more vulnerable citizens, as beyond Congress's power under Section 5 of the Fourteenth Amendment. The Supreme Court has also struck down statutes as being outside the authority granted to Congress by the Commerce Clause. These cases have been described as creating new power for state governments, as federal authority is being diminished. At the same time, the Court has issued several decisions, most notably in the environmental arena, granting states' significant new authority over the use of land and water, despite long-standing federal regulatory protection of the environment. Taken individually, these cases have raised concerns about the limitations imposed on Congressional authority; taken collectively, they appear to reflect a "new federalism" crafted by the Supreme Court that threatens to alter fundamentally the structure of our government. What is your view of these developments?

Answer:

Congressional statutes are entitled to the utmost deference and are presumed constitutional. Recent Supreme Court decisions regarding congressional authority under the Commerce Clause reveal that this is an interesting and dynamic area of the law. Nonetheless, it is the duty of the trial court to adhere to the time-honored presumption that all legislation is valid and constitutionally sound. If confirmed as a United States District Judge, I would be obliged to follow the precedent established by the appellate courts.

5. Please explain your understanding of the proper role of the federal judiciary in protecting individual rights guaranteed by the Constitution or federal statutes.

Answer:

The safeguarding of the constitutional rights of individuals is a core function of the federal judiciary. In the process of upholding the rule of law, a federal judge must ensure that he or she presides over a case objectively and fairly, without sympathy, bias, or prejudice. To that end, a judge must be willing to follow that law as it applies to the

facts of the case, regardless of public opinion or political consequence. If confirmed as a United States District Judge, I would decide cases fairly and impartially.

Responses of Amy J. St. Eve to Written Questions
Submitted by Chairman Patrick Leahy

1. For years I have been questioning nominees on the subject of *stare decisis*, asking them how strongly they think judges should bind themselves to the doctrine, whether the commitment to *stare decisis* varies depending on the court, and whether they would follow the doctrine if confirmed. It would appear that the answer to these questions is easy, and fairly straightforward – it is a bedrock principle of our legal system that a lower court must follow the rulings of higher courts.

   But I recently read a law review article whether the author, a respected law professor, asserts his belief that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As I read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should be no less bound to follow those rules than they are to follow any other rule of a higher court.

   Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

   Answer:

   Stare decisis is an important principle in our legal system. This principle is essential to an independent and impartial judiciary. Further, the faithful application of precedent creates certainty among litigants. If I am fortunate enough to be confirmed by the Senate as a District Court Judge, I would strictly adhere to Supreme Court and Seventh Circuit precedent. I would not subscribe to the theory that the District Court has the authority or should attempt to overturn higher court precedents where it is anticipated that the higher court would overturn its own precedent. It is the District Court's duty to apply the law as it exists.

2. Over the past decade you have had an interesting and varied legal career, in private practice, as an Assistant United States Attorney and as an in-house counsel, but you are 36 years old and you have been practicing law for a comparatively short time.

   A. Could you describe for the Committee how your experience has prepared you to assume the tremendous responsibilities of a lifetime appointment to the federal court?

B. What do you think will be the most challenging aspect of making the transition from being an in-house counsel to being a district court judge?

Answer:

Although I have been practicing law for a shorter period of time than other nominees, I have been privileged during my career to have a breadth of legal experience. I have extensive experience in civil litigation, both at the beginning of my legal career and in my current position. I have practiced law at every stage of litigation from the pleading stage through the appellate level. I have written and argued appeals in the Seventh Circuit. In addition, I have actively participated in every stage of the criminal process, including investigating and prosecuting approximately one hundred federal criminal cases. These varied experiences have prepared me for the tremendous responsibilities of a District Court Judge.

In addition, as a former prosecutor, I have appeared before most of the judges in the Northern District of Illinois and have had the opportunity to observe their courtroom demeanor. This experience has exposed me to qualities that I value and would hold dear on the bench. For example, I have observed an extraordinary work ethic that results in thoughtful, well-prepared judges. I have seen judges exhibit decisiveness after listening to the arguments and thoughtfully considering the issues. I have observed judges demand effective, efficient and ethical advocacy, which, in turn, has raised the standard of participation for all advocates in the particular courtroom. Additionally, I respect the even-tempered judge who dispenses justice without personalizing the issues.

I recognize and appreciate that a District Court Judge faces tremendous responsibilities and challenges. I am honored and humbled to have been nominated and considered for such a position. In my current position as in-house counsel for Abbott Laboratories, I advocate on behalf of, and provide advice to, one client on a variety of legal matters. It will be a challenge to switch to addressing issues and applying the law to the facts for many parties on numerous issues. I am ready to face these responsibilities and challenges.

3. Your most recent responsibilities have been to provide counsel to a major corporation. In that capacity, you have defended the corporation in a number of cases involving federal product liability law, Medicare law and procedural issues. What assurances can you give the Committee that, as a judge, you will be fair procedurally and substantively to plaintiffs who bring claims against corporate interests?

Answer:

I can assure the Committee that I will be extremely fair both procedurally and substantively to plaintiffs who bring claims against corporate entities, as well as to all parties who would appear before me. It is essential that a judge fairly dispense justice in order to maintain the integrity of our judicial system. The judge must treat all individuals who come before the bench appropriately and fairly; the judge must be guided by a principle of justice, irrespective of the individual party or courier of the just argument. Prior to becoming an in-house counsel where I represent a corporation, I was a federal prosecutor for approximately seven years where I investigated and prosecuted corporations or individuals who controlled corporations, especially in health care fraud cases. Having both represented and prosecuted corporations has provided me with a broad view of corporate activities. Furthermore, throughout my legal career, I have treated opposing counsel and parties fairly, and would continue to do so if confirmed as a District Court Judge.

4. As corporate counsel, have you handled any multi-state class actions filed in state or federal court? How can that process be reformed or improved? Given your experience advising and defending a corporation facing class action challenges, what are your views on efforts to reform the class action process, for example, to remove multi-state class actions from state courts to federal courts or to change the current requirement of complete diversity of citizenship in mass tort cases.

Answer:

As counsel for Abbott Laboratories and as an attorney at Davis Polk & Wardwell, I have handled multi-state class actions filed in both state and federal court. I am aware that there are efforts to pass legislation to reform the process governing class action litigation, but I am not familiar with the details of such proposals. I would embrace rules that allow for the efficient operation of the litigation process, including class action litigation. I believe this litigation reform is an area within the purview of Congress, and I would defer to the legislative branch to make appropriate policy decisions. As a District Court Judge, if confirmed, I would apply the class action law as defined by the Supreme Court and the Seventh Circuit and as required by the Federal Rules of Civil Procedure.

Responses of Timothy J. Savage to Questions from Chairman Patrick Leahy

1. For years I have been questioning nominees on the subject of *stare decisis*, asking them how strongly they think judges should bind themselves to the doctrine, whether the commitment to *stare decisis* varies depending on the court, and whether they would follow the doctrine if confirmed. It would appear that the answer to these questions is easy, and fairly straightforward - it is a bedrock principle of our legal system that a lower court must follow the rulings of higher courts.

But I recently read a law review article where the author, a respected law professor, asserts his belief that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As I read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should be no less bound to follow those rules than they are to follow any other rule of a higher court.

Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

The principle of stare decisis is fundamental to our legal system, providing stability and certainty. Courts are duty bound to follow precedent. Consequently, I do not believe that a district court judge can or should attempt to overturn precedent of higher courts.

2. Mr. Savage, you have served as solo practitioner, primarily involved in criminal, commercial and personal injury litigation, for over 25 years. You have also served as a hearing examiner for the Pennsylvania Liquor Control Board since 1977 and are currently a mediator in the U. S. District Court for the Eastern District of Pennsylvania and a judge *pro tem* in the Court of Common Pleas for the First Judicial District. I am sure your litigation and adjudicative experience will serve you well as a district court judge.

A. What is the single most important lesson you will take from your experience as a mediator and a hearing examiner to your new position as a district court judge?

To be fair and courteous, and to listen to all sides so that all participants can walk away knowing that they had their day in court.

B. What do you think will be the most challenging aspect of making the transition from being a solo practitioner to being a district court judge?

As a hearing examiner for almost 25 years, I also have presided over adversarial hearings where I make evidentiary rulings, control the mode and interrogation of witnesses, author findings of fact and recommend decisions. Accordingly, if I am fortunate to be confirmed, I shall bring with me my experience as a hearing examiner as well as a trial attorney.

Despite this experience, one challenge of transiting from solo practitioner to district court judge will be that I no longer will have the luxury of picking and choosing my cases. It is a challenge I welcome and can meet.

3. In your more than 25 years of legal practice, you have not published any writings. As you are aware, federal judges have the important responsibility of writing and publishing opinions. Opinions issued by federal judges provide not only direction to the parties before you, but in some instances also leave a lasting imprint on future jurisprudence.

To the extent that writing judicial opinions differs from the process of writing briefs on behalf of a client, how will you prepare yourself to take on this new responsibility?

Having written numerous briefs in criminal and civil cases in state and federal courts throughout my legal career, I have had the opportunity to study and analyze many judicial opinions. In the process of drafting briefs, I have applied legal analysis and writing principles in a manner similar to authoring judicial opinions. However, in writing opinions, I must keep in mind that I am not an advocate. Instead, my job will be to apply the law to the facts and to issue clear and concise rulings in a fair manner.

If necessary to improve, I shall study the opinions of judges whom I respect. I shall also confer with experienced district court judges.

4. Please explain your understanding of the proper role of the federal judiciary in protecting individual rights guaranteed by the Constitution or federal statutes.

The federal judiciary must be the defender of the individual rights guaranteed by the Constitution and federal statutes without reservation. The role of the district court is to apply existing law, including the rights guaranteed by the Constitution and federal statutes, to the specific facts of each case with fidelity to precedent as established by the Supreme Court and the circuit courts.

Responses of Lavenski Smith,
Nominee to the U.S. Court of Appeals for the Eighth Circuit
Questions Posed by Senator Cantwell

1. Personal privacy is one of the top issues of concern for most Americans. They are concerned about government intrusion into personal decisions. They are concerned about how businesses handle customer information. They are concerned about how the government obtains and handles personal information. Do you believe there is a constitutional right to privacy, and if so describe what you believe to be the key elements of that right?

The U.S. Supreme Court, in a line of cases beginning with *Griswold v. Connecticut*, recognized a constitutional right of privacy. The Court has repeatedly reaffirmed that in succeeding cases. The precise contours of this right are still being addressed by the Court. *Griswold* and its progeny, along with the Fourth Amendment's proscription against unreasonable searches and seizures, demonstrate that citizens are to be free from unjustified governmental intrusion into their personal autonomy and information. If confirmed, I will follow these and any other applicable precedents according to the established principles of stare decisis.

2. Given that you have only seven years of experience in the active practice of law, one year of judicial experience, and virtually no appellate experience, what steps do you intend to take to prepare yourself to handle the complex interpretation of the law which is necessary as a U.S. Court of Appeals judge?

Throughout my career I have made diligent effort to grow in the knowledge, skills, experience and the character needed to excel in the legal profession. During my last two years in law school I clerked for a local law firm and became intimately familiar with the day to day operation of a law office and the legal system generally. That experience gave me my first opportunity to research, draft pleadings, and observe attorneys in court. When a memorandum I drafted became the basis for a successful brief in a Social Security disability claim appeal to a U.S. District Court, I had confidence that I could indeed make a positive contribution to society through the practice of law.

My practice experience began as a staff attorney with Ozark Legal Services. My responsibilities required me to frequently appear in court to advocate for clients. During my years as a solo-practitioner, I handled a broad range of legal matters from the initial interview to their ultimate judicial disposition. The preparation required for competent representation for even less sophisticated legal issues develops legal skills needed in more complex litigation. Those skills include factual investigation, legal research, drafting pleadings, conducting discovery, courtroom advocacy, and brief writing. During my career I have participated in virtually every aspect of the legal process as both an advocate and a decision maker.

As a utility commissioner, I have presided over complex hearings addressing very complicated regulatory matters. These include rate-making for the electricity, natural gas and telecommunications industries, all of which require not only comprehension of the technical economic, engineering and legal issues but also requires the ability to balance the diverse

concerns of industrial, commercial, environmental and consumer interests. My duties also have required me to monitor, understand and apply complex federal law such as the 1996 Telecommunications Act and the regulatory promulgations of the Federal Energy Regulatory Commission and the Federal Communications Commission. Throughout my service as a commissioner, I have dedicated myself to continually acquire the requisite knowledge to perform my duties with the utmost competence.

Additionally, I served two full years as an associate justice on the Arkansas Supreme court. The matters coming before that court, both civil and criminal, routinely required careful interpretation of law and the exposition of that analysis in written opinions. During my terms on the court, I got to work early and left late in order to fulfill the obligations I undertook when I swore to uphold the state and federal constitutions. If confirmed, I will, as I have at every point in my career, heartily endeavor through personal research, appropriate educational opportunities and ongoing experience to continually prepare myself for the challenges of appellate judging.

3. During your career have you ever handled any other cases involving the interpretation of the Arkansas or the U.S. Constitution other than the case of *Unborn Child Amendment Committee v. Dr. Harry Ward*?

Yes. Constitutional issues permeate our law. Proper preparation for even mundane cases requires evaluation of potential constitutional issues. I recall addressing due process issues on a regular basis as a legal services attorney in juvenile, public benefits and housing cases. Similarly, constitutional issues, while not the sole or even principal issue in cases I handled in private practice, nonetheless, required careful examination and study. As a state supreme court justice, I wrote majority opinions addressing a broad range of state and federal constitutional issues, including but not limited to free speech and association, search and seizure, self-incrimination, double jeopardy, the due process clause, right to counsel, the ex post facto clause, the constitutionality of the state rape shield law, state sovereign immunity, and the state constitution's usury provision. In short, I have participated – as a private lawyer, supreme court justice, and public utility commissioner – in several cases that required substantial constitutional analysis.

4. With regard to the case of *Unborn Child Amendment Committee v. Dr. Harry Ward*, litigation in the case covered approximately a six-year period. During that time please state the amount of time that you devoted to this matter and detail your precise involvement in the preparation of written materials in the case, including briefs filed with your name before the Arkansas Supreme Court.

My involvement in the referenced case consisted principally of strategy consultation with client and counsel and attendance at the summary judgment hearing before the trial court. With respect to the preparation of the written materials, I reviewed pleadings and briefs and assisted with logistical support in filing and service to opposing counsel. I was not the principal author nor did I make substantial changes to any of the written materials.

5. You testified at your hearing that because another individual performed the majority of the work on the case of Unborn Child Amendment Committee v. Dr. Harry Ward, you did not include it in your response to question 18 of the Judiciary Committee's questionnaire, which requests information on the "ten most significant litigated matters" that you handled. However, you also omitted the case from your response to question 19, which requests information about your other legal activities. Given that this is the only appellate case you appear to have had direct involvement in during your career, can you provide a more detailed explanation as to why you did not include it in your responses to the Committee?

Question 18 specifically requested cases that I "personally handled". While I was one of those listed as counsel of record, the substantive work product of that litigation was handled by the lead counsel. My response to Question 19 did not list the *Ward* case because I understood the question to focus on "litigation which did not proceed to trial or legal activities that did not involve litigation." The *Ward* case fit neither of those categories. My response concentrated on non-litigation legal activities such as my teaching experience.

The *Ward* case was not my only appellate practice experience prior to my service on the Arkansas Supreme Court. For example, I was also involved in the federal appeals of the Resolution Trust Corporation cases in which I participated. I served as part of the team that prepared for oral arguments before the Eighth Circuit in St. Louis and Minneapolis.

6. The briefs submitted to the Arkansas Supreme Court in the case of Unborn Child Amendment Committee v. Dr. Harry Ward fail to cite the Supreme Court decision in Webster v. Reproductive Health Services, which recognizes the difference between using public funds and using public facilities and employees to perform abortions. Please comment on the failure to cite this case given the ethical guideline as stated in Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct that requires attorneys to cite all relevant legal authority in the controlling jurisdiction and explain why no effort was made to distinguish this controlling precedent.

Rule 3.3 of the ABA Model Rules requires disclosure of "legal authority in the controlling jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel." I was not the principal author of the briefs or pleadings in *Ward*. However, I would note that the appellant's reply brief cited *Webster* as supportive of the appellant's argument that the state could decline to permit the use of state funds, employees or facilities in the provision of non-therapeutic abortions. The opposing counsel also cited *Webster*.

7. From 1991 to 1993 you served as the volunteer Executive Director of the Rutherford Institute of Arkansas. In 1985 the Rutherford Institute issued a publication called, Arresting Abortion, which states that "the abortion holocaust is, without a doubt, the most crucial issue of our day." Do you agree with this statement?

In 1985, I had no affiliation with the Rutherford Institute. I am unfamiliar with the publication you cite, and have not read it. I presume it was published by the national organization and not the state organization, which I would join several years later. My involvement as a volunteer officer of the organization's state chapter several years later consisted primarily of administrative services.

8. From 1991 to 1993 you served as the volunteer Executive Director of the Rutherford Institute of Arkansas. In 1989, that organization signed an amicus brief to the Supreme Court in the case of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), arguing that the Supreme Court should reverse *Roe v. Wade* because it was "error to classify a woman's decision to terminate her pregnancy as a fundamental right protected by the Fourteenth Amendment's concept of personal liberty." Do you believe that *Roe v. Wade* improperly interprets Fourteenth Amendment of the U.S. Constitution?

I was not affiliated with the Rutherford Institute in 1989, and therefore had no role in drafting the brief you mention. My later administrative work with the state organization as a part-time volunteer officer did not include participation in drafting national organization amicus curiae briefs. *Roe v. Wade* is controlling precedent in the courts of the United States. My solemn and sworn responsibility as a circuit judge, if confirmed, will be to uphold and apply it and all other precedents of the Supreme Court.

9. During your tenure as Executive Director of the Rutherford Institute, the organization also signed an amicus brief to the Supreme Court in the case of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In that brief the Institute took the position that a law requiring a married woman to notify her spouse prior to having an abortion is constitutional. Please state whether you believe that spousal notification should be required.

With respect, I was never the Executive Director of the Rutherford Institute. Instead, I served for a time as a volunteer officer of the organization's Arkansas chapter. As such, I was not involved in preparing the brief you mention. The majority opinion in *Casey* reaffirmed the essential holding of *Roe v. Wade* and set forth that states may not enact laws that impose a substantial obstacle to a woman's choice to terminate a pregnancy. The Court held that laws requiring spousal notification constituted such a substantial obstacle. If confirmed, I would faithfully follow the precedent established in *Casey*, just as I would follow the binding precedent of all other Supreme Court cases.

Follow-Up Questions for Lavenski Smith, Nominee to the U.S. Court of Appeals for the Eighth Circuit

Thank you for your reply. Given that answers were not provided to several of the questions posed, please find those questions below.

1. Do you agree with the statement that: "the abortion holocaust is, without a doubt, the most crucial issue of our day"?

   Abortion is indeed an important social issue in America. As with many important social issues, American citizens hold a wide spectrum of views on this question. However, regardless of any individual's personal view, the law, as set forth by the Supreme Court in *Roe v. Wade* and its progeny, establishes that a woman has a constitutional right to decide whether to terminate a pregnancy, and that the government may not impose an undue burden on that decision. If I am fortunate enough to be confirmed, I will be duty bound to follow the Supreme Court's governing precedents in all cases.

2. Do you believe that *Roe v. Wade* improperly interprets Fourteenth Amendment of the U.S. Constitution?

   As the Supreme Court repeatedly has emphasized, *Roe's* interpretation of the Fourteenth Amendment is the law of the land. If confirmed as a federal judge I will follow it as precedent as I will follow all of the Supreme Court's governing precedents.

3. Do you believe that spousal notification should be required prior to a married woman being able to receive an abortion?

   The Supreme Court in *Casey* invalidated a state statute requiring prior notification to a spouse. The Court's precedent binds all inferior courts, and, if confirmed to a position on the Court of Appeals, I will enforce its holding consistent with the principles of *stare decisis*.

Senator Edward M. Kennedy's Questions for Lavenski Smith, Nominee to the U.S. Court of Appeals for the Eighth Circuit

Question #1

You did not list *Unborn Child Amendment Committee v. Dr. Harry Ward* in your questionnaire as one of the "ten most significant litigated matters" that you handled. Have you been involved in other cases, besides *Unborn Child*, raising issues of reproductive choice or the constitutional right to privacy? If so, please provide a description of these matters and details of your involvement.

Question 18 of the questionnaire, which I believe you are referring to, specifically requested cases that I "personally handled." I did not list the *Ward* case among my most significant litigated matters because the substantive work product in that case was handled by other counsel. My involvement consisted principally of strategy consultation with client and counsel, as well as attending the summary judgment hearing. With respect to the preparation of the written materials, I reviewed pleadings and briefs and assisted with logistical support in filing and service to opposing counsel. I was not the principal author nor did I make substantial changes to any of the written materials.

I have not been involved as a private lawyer in any other cases raising issues of reproductive choice or the constitutional right to privacy, though as a state supreme court justice I participated in cases involving, for example, search and seizure issues.

Question #2

You served as the volunteer Executive Director of the Rutherford Institute from 1991 to 1993. During that time, the Rutherford Institute submitted an *amicus* brief to the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in which the Institute argued that a spousal notification provision was constitutional. As you know, the Supreme Court ultimately found the spousal notification provision unconstitutional.

A. **Please describe your involvement in this *amicus* brief. At the time of this brief, was it your belief that a spousal notification provision was constitutional under *Roe v. Wade*? Please explain.**

With respect, I was never the Executive Director of the Rutherford Institute. Instead, I served for a time as a volunteer officer of the organization's Arkansas chapter. As Executive Director for the state affiliate, my duties concerned only the State of Arkansas, and I had no involvement in preparing the *amicus* brief filed by the national Rutherford Institute in *Casey*. If confirmed, I would faithfully follow the precedent established in *Casey*, just as I would follow the binding precedent of all other Supreme Court cases.

B. What is your understanding of the "undue burden" standard and the extent to which a State may place limitations on abortion without running afoul of this standard?

The majority opinion in *Casey* reaffirmed the essential holding of *Roe v. Wade* relating to viability, but it replaced *Roe*'s "trimester" formula with the "undue burden" standard. Under this standard, a state regulation constitutes an "undue burden" and is constitutionally invalid if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Under *Casey*, if an abortion restriction imposes an "undue burden" on a woman's ability to obtain an abortion, then the statute is invalid and will be struck down.

C. What role do you see for the federal courts as the guardians of reproductive rights?

Federal courts play a crucial role in the enforcement of all constitutional rights, including reproductive rights. In constitutional matters, federal courts function to identify the legitimate bounds of the government's authority and to keep the government's action within that sphere. If I am confirmed, I will scrupulously adhere to all binding Supreme Court cases on reproductive and other constitutional rights.

Question #3

In Golden v. State (2000), you dissented from the majority's holding that juveniles had a due process right to have their competency determined prior to adjudication. You stated that allowing a juvenile a competency hearing, while appearing equitable, might contribute to the "erosion of all distinction between juvenile court and adult criminal court."

A. Please explain your view of why, given the Supreme Court's recognition that the Due Process Clause is applicable in juvenile proceedings, due process did not entitle juveniles to a competency hearing?

Arkansas's juvenile code recognized the important developmental distinction between adults and children. It established that children whose actions would have constituted crimes punishable by imprisonment if committed by adults needed an alternative adjudicative process because of their immaturity. This process would, in essence, presume the child's incapacity to commit the crime and instead focus on an appropriate rehabilitative program rather than punishment. My concern was that as juveniles are treated more and more like adults they may lose the valuable legal protection of a system whose original purpose was to treat and protect them. If confirmed as a federal circuit court judge, I will adhere faithfully to all U.S. Supreme Court decisions, including those concerning the constitutional due process rights of children.

B. You stated in Golden that the denial of a competency hearing in juvenile court served a "legitimate State objective" and applied a "rational basis test" to conclude that denial of a competency hearing was constitutional. What is the legitimate State objective that you believe is served? Did the application of a rational basis test to a fundamental constitutional right end your inquiry or did your analysis also address whether the denial of a competency hearing was consistent with "fundamental fairness"?

The legitimate state objective was the appropriate treatment of a troubled juvenile charged with a serious criminal act and in need of rehabilitative services. My statements reflected a concern that juveniles maintain the special protections provided by a traditional juvenile code. My analysis did not proceed to an evaluation of fundamental fairness. The state legislature prudently added specific provisions to the State's juvenile code addressing competency following Golden's original proceedings. Again, if I am fortunate enough to be confirmed, I would assiduously apply all U.S. Supreme Court decisions, including those concerning the constitutional due process rights of children.

Senator Edward M. Kennedy's Follow-up Questions to Lavenski Smith, Nominee to the U.S. Court of Appeals for the Eighth Circuit

In written questions, I asked about your involvement in the *Planned Parenthood of Southeastern Pennsylvania v. Casey* brief that the Rutherford Institute submitted to the Supreme Court while you were a volunteer officer of its Arkansas Chapter. You have indicated to me that your duties only "concerned the State of Arkansas" and that you had no involvement in "preparing" the *amicus* brief filed by the national Rutherford Institute. However, the Arkansas chapter of the Rutherford Institute of Arkansas signed on to the *amicus* brief in *Casey*, which argued that a spousal notification provision was constitutional.

Question #1

My original question concerned the extent of your involvement in this brief. Specifically did you review the brief before it was submitted or before the Arkansas chapter made a decision to sign on? Are you listed as counsel on the brief? Is your name listed on the brief? What was your involvement in the decision of the Rutherford Institute of Arkansas to sign on to the *amicus* brief? What was your involvement in developing the positions that the Rutherford Institute, and the state chapters, ultimately took in the brief?

I did not review the brief before it was submitted, I am not listed as counsel on the brief, nor does my name appear on the brief. I do not recall having any involvement in the Arkansas chapter's decision to sign on to the *amicus* brief. I had no involvement in developing the positions that the national Rutherford Institute and the state chapters ultimately took in the brief.

Question #2

At the time of this brief, you were a volunteer officer of the Arkansas Chapter of the Rutherford Institute. My question concerned the extent to which the views you expressed in the *Casey* brief were commensurate with your views at that time. Was it your view that the spousal notification provision at issue was constitutional? What was the basis for your belief? Is it your view that *Casey* changed the understanding of the constitutionality of spousal notification provisions? If so, why?

I expressed no views in the *Casey* case. The *amicus* brief filed by the Rutherford Institute stated the views of the Rutherford Institute and not my own. The *Casey* decision plainly holds that spousal notification provisions constitute an undue burden on a woman's right to terminate a pregnancy and therefore are unconstitutional. If I am fortunate enough to be confirmed, I will be duty-bound to follow the precedent established by *Casey*, and will do so without reservation.

SUBMISSIONS FOR THE RECORD

Nominations Hearing
Senate Judiciary Committee
Introductory Remarks for Amy St. Eve
Senator Richard J. Durbin
May 23, 2002

Thank you, Mr. Chairman. I am pleased to be here today to introduce Amy St. Eve, a nominee for the U.S. District Court in the Northern District of Illinois. She is joined by her husband and two of her three children. I will leave to her the privilege of introducing them to the Committee. Welcome to all of you.

I will be brief, because Ms. St. Eve's impressive record speaks for itself. She received her undergraduate and law degrees from Cornell University, graduating with honors on both occasions. She spent the first four years of her legal career as a litigation associate at the prestigious New York law firm of Davis, Polk & Wardwell, where she worked under former United States Attorney Robert Fiske. From 1994 to 1996, Ms. St. Eve worked for the Office of the Independent Counsel in Little Rock, Arkansas. During her tenure there, she gained extensive trial experience.

In 1996, Ms. St. Eve returned to her home state of Illinois to work as an Assistant United States Attorney in Chicago. Over the next five years, she prosecuted narcotics and white collar fraud cases, including instances of health care fraud. She secured several convictions through Operation Safe Roads, the federal investigation of corruption in the Illinois Secretary of State's Office. Since last May, Ms. St. Eve has worked as a senior litigation counsel at Abbott Laboratories.

By all accounts, Ms. St. Eve has the expertise, the discipline, and the temperament to make an excellent District Court judge. Let me single out just two of the people who spoke out on her behalf. Judge Ann Williams, who was appointed to the Seventh Circuit Court of Appeals by President Clinton, informed me that Ms. St. Eve enjoys a wonderful reputation among federal judges in Illinois. I also heard from former Senator Alan Dixon, a Democrat, who has known Ms. St. Eve since her childhood and told me she is an "exceptional" candidate for the bench.

Mr. Chairman, I want to thank you for moving Ms. St. Eve and so many other nominees so swiftly through this Committee. She was nominated on March 22 of this year, a mere two months ago. Last Friday, the Committee received notice that a substantial majority of the American Bar Association's judicial screening committee rated her "well-qualified." The Chairman immediately added her to the agenda for today's hearing. If the last ten months are any guide, she is likely to receive a quick vote in Committee and a prompt confirmation vote on the Senate floor.

This nomination underscores that we can fill judicial vacancies quickly if both the White House and the Senate are committed to bipartisan cooperation. Since 1999, my colleague Senator Fitzgerald and I have worked together across the aisle to recommend judicial candidates who represent the best values of the American mainstream. If Ms. St. Eve is confirmed, we will once again have no vacancies on the federal bench in Illinois and within the entire Seventh Circuit.

Frankly, this country needs more nominees like Amy St. Eve, especially for the federal Courts of Appeals. Our experience in Illinois should serve as a reminder to the White House that the surest way to fill judicial vacancies is to consult with home state Senators and select moderate nominees with bipartisan support and strong legal credentials.

Orrin Hatch

Statement of Senator ~~Jeff Sessions~~
Before the United States Senate Committee on the Judiciary

on the Nominations of

Lavenski R. Smith to be U.S. Court of Appeals for the Eighth Circuit
Henry E. Autrey to be U.S. District Court Judge for the Eastern District of Missouri
Richard E. Dorr to be U.S. District Court Judge for the Western District of Missouri
Amy J. St. Eve to be U.S. District Court Judge for the Northern District of Illinois
Henry E. Hudson to be U.S. District Court Judge for the Eastern District of Virginia
Timothy J. Savage to be U.S. District Court Judge for the Eastern District of Pennsylvania

May 22, 2002

Thank you, Chairman Leahy.

I am pleased that the Judiciary Committee is considering six of President Bush's excellent nominations for the federal bench, and I would like to welcome all of you to the Committee. I also welcome our panel of distinguished witnesses. Our nominees here today are to be commended for their credentials, their character, and their commitment to the rule of law. I urge my colleagues to join me in supporting these fine individuals.

I would like to say just a word about each of the nominees, and I'll begin with the only Circuit Court nominee on the agenda today, Judge Smith.

There can be no question that Judge Smith is highly qualified to serve on the Eighth Circuit. He began his legal

career as a staff attorney for Ozark Legal Services, where he provided legal representation to the poor in northwest Arkansas. After four years there, he opened his own law firm, where he handled all sorts of cases including business law, real estate, domestic relations, worker's compensation, public benefits, and estates, to name a few. He earned such a reputation as a lawyer that, in January 1999, Governor Huckabee appointed Judge Smith to the Arkansas Supreme Court. Currently, Judge Smith serves on the Arkansas Public Service Commission, which is responsible for regulating the state's electric, gas, and telecommunications industries. His nomination is widely and bipartisanly supported in his home state, but I think the *Arkansas Democrat-Gazette* put it best: It said Judge Smith possesses "integrity, intelligence, and compassion." I agree. I support you, Judge Smith, and I'm going to work with my colleagues to arrange timely Committee and floor votes on your nomination. I know that you have been waiting patiently for a whole year, as of yesterday. I hope you won't have to wait much longer.

Now let me turn to our District Court nominees, who are no less suited for the bench.

Henry E. Autrey, our nominee to the U.S. District Court in the Eastern District of Missouri, has strong roots in the city of St. Louis, having served in the city's Office of the Circuit Attorney, where he prosecuted a variety of criminal cases and later acted as the First Assistant Circuit Attorney. Judge Autrey's prosecutorial excellence attracted the attention of both Republican Governor John Ashcroft, who appointed him as an Associate Circuit Judge on the Circuit Court of the City of St. Louis, and Democratic Governor Mel Carnahan, who elevated him to Circuit Court Judge in 1997. Judge Autrey is described by associates as a judge who "work[s] very hard to ensure that justice is provided to all" and as a "smart and hard-working jurist."

Richard E. Dorr, who has been nominated to the U.S. District Court in the Western District of Missouri, brings a unique resume to the federal bench, with experience as Judge Advocate for the Air Force and terrific private practice experience–nearly 30 years' worth–in general civil law matters. This is Mr. Dorr's second nomination to the federal bench. He was nominated by the first President Bush in 1992 but he did not receive a hearing at that time.

Our nominee to the U.S. District Court for the Eastern District of Virginia, Judge Henry E. Hudson, is among the most experienced and accomplished attorneys to come before the Committee, with 17 years as a state and federal attorney, including distinguished service as the U.S. Attorney for the Eastern District of Virginia. In addition to two years as head of the U.S. Marshals Service, he served as a private practice litigator during most of the 1990s. Since 1998, Judge Hudson has served as Circuit Court Judge for the Fairfax County Circuit Court.

Timothy J. Savage, our nominee to the U.S. District Court for the Eastern District of Pennsylvania, is another highly qualified litigator, who has tried to jury more than 100 cases during his career, both civil and criminal. For the last 25 years Mr. Savage has worked as a sole practitioner in Philadelphia, specializing in civil litigation and white collar crime cases. Mr. Savage knows his way around the Eastern District, serving as a mediator in the Eastern District of Pennsylvania and as judge *pro tem* in the Court of Commons Pleas in Philadelphia County.

Last, but certainly not least, is Amy J. St. Eve, our nominee to the U.S. District Court for the Northern District

of Illinois, who has already accrued a record of solid public service and private litigation experience. In addition to serving in the Office of the Independent Counsel, charged with investigating the events surrounding the Whitewater case, she worked in the United States Attorney's Office of the Northern District of Illinois for five years. Currently, Ms. St. Eve is a Senior Counsel in the Litigation Department of Abbott Laboratories.

This is obviously an incredibly talented group of nominees here today. I have every confidence that each of them will serve with distinction. I commend President Bush for selecting such fine people for the bench, and I support them all.

Thank you, Mr. Chairman.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Opening Statement of Chairman Patrick Leahy
on the Nominations of
Lavenski Smith to the U.S. Court of Appeals for the Eighth Circuit,
Henry E. Autrey to the U.S. District Court for the Eastern District of Missouri,
Richard E. Dorr to the U.S. District Court for the Western District of Missouri,
Henry Hudson to the U.S. District Court for the Eastern District of Virginia,
Timothy Savage to the U.S. District Court for the Eastern District of Pennsylvania,
and Amy J. St. Eve to the U.S. District Court for the Northern District of Illinois
May 23, 2002

I would like to welcome the nominees to today's hearing. The nominees before us come from Arkansas, Missouri, Virginia, Pennsylvania, and Illinois. Many of the nominees' family members have made this journey with them, and I extend the welcome of this Committee to the friends and families in attendance.

With today's hearing, in just about 10 months, the Senate Judiciary Committee will have held 19 hearings involving a total of 71 judicial nominations. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In fact, it is more hearings than they held in 1996 and 1997 combined and includes more judicial nominees than were accorded hearings in 1999 and 2000 combined. Indeed, one-sixth of President Clinton's judicial nominees – more than 50 – never got a Committee hearing and Committee vote from the Republican majority, which perpetuated longstanding vacancies into this year.

One of those vacancies was on the Eighth Circuit, a vacancy recently filled by Michael Melloy of Iowa. This was the seat to which President Clinton nominated Bonnie Campbell, a

talented, well-qualified candidate who was given a hearing by the Committee, but was never afforded a Committee vote. Her nomination languished and was returned to President Clinton because of this Committee inaction during the last seven months of the 106th Congress.

Since the change in control of the Judiciary Committee, we have moved quickly to fill vacancies on the Eighth Circuit, and have already confirmed two judges to this circuit, William Riley from Nebraska and Judge Melloy from Iowa.

The nominations to the District Courts today also deserve mention. I am pleased to be able to move these District Court nominations so quickly. As soon as Senator Warner came to me to ask me to schedule Judge Hudson for a hearing, I was happy to accommodate him. And the ink on the paperwork on the other trial court nominees before us this afternoon is practically still wet – Mr. Savage's file was not complete until nine days ago, Mr. Dorr's was not complete until six days ago, Ms. St. Eve's until three days ago, and Judge Autrey's until two days ago.

While some of the vacancies to which these nominees have been named arose relatively recently, the vacant seat in the Eastern District of Pennsylvania to which Mr. Savage has been nominated has been empty since the beginning of 1999. President Clinton had nominated Stephen Lieberman to that seat, but he along with a large number of the nominees to fill vacancies in Pennsylvania during the years in which the Republican majority controlled the pace of nominations. In contrast, as of today's hearing, this Judiciary Committee will have held hearings for seven nominees to judgeships in Pennsylvania, including Judge Legrome Davis, Judge Michael Baylson and Judge Cynthia Rufe, who were all confirmed last month. Those confirmations and today's hearing illustrates the progress being made under Democratic leadership and the fair and expeditious way this President's nominees are being treated.

The vacancy to which Judge Autrey has been nominated has been vacant even longer – since December 1996, when the late Judge Gunn took senior status. President Clinton nominated Missouri Supreme Court Judge Ronnie White to this vacancy in June of 1997. He had to wait nearly a year for a hearing, until May of 1998. The Committee voted to send his nomination to the Senate floor soon thereafter but his nomination sat waiting for a full Senate vote, and, having never received one, was sent back to President Clinton at the end of the 105th Congress. The President renominated Judge White in January of 1999, and again he waited patiently until July of that year to be voted out of Committee a second time to the Senate floor. On October 5, 1999, the Republican-controlled Senate finally gave Ronnie White a floor vote, but it was not the due process he deserved.

As is by now a well- known story, Ronnie White was the victim of a sneak attack on that day. He was defeated on an unprecedented party-line Senate vote and was branded "pro-criminal". These issues were aired during the confirmation hearing of John Ashcroft last year and, to his credit, Senator Specter offered an apology to Judge White for the way he was treated. I have no wish to revisit Ronnie White's terrible experience here, and what happened to him is certainly not the fault of today's nominees. But I do think it is important to remember, when there is so much unfair criticism of the way this Committee has been handling nominations since the change in Senate control last July, that, in fact, we are treating nominees more fairly and moving them more quickly than has ever been done before.

Given the controversy in Missouri and around the country about Judge Ronnie White's treatment, I would like especially to commend Senator Carnahan for being here today to recommend the Missouri nominees to the Committee. It just underscores for us what we all

know about her – that she is a person of character and grace, willing to work on a bipartisan basis in the best interests of the State of Missouri.

While I am glad we are able to hold today's hearing and move toward filling more vacancies on the federal bench, large numbers of vacancies continue to exist, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than 50 of President Clinton's judicial nominees, many of whom waited for years. In fact, 56 percent of President Clinton's Courts of Appeals nominees in 1999 and 2000 never got a hearing or a vote and the Republican majority was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. Many other nominees waited for years, the lucky ones eventually were confirmed, the unlucky ones waited in vain for a hearing and Committee vote.

From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling.

Democrats have broken with that recent history of inaction. Nine nominees have been confirmed to the Courts of Appeals in fewer than 10 months. Mr. Smith is the 14th nominee to a Circuit Court to receive a hearing in just 10 months. I want to commend Senator Lincoln for her efforts and appreciate your interest in ensuring that Mr. Smith be accorded a hearing. Due to her efforts, he is being included in this hearing today. Just as I have worked to accommodate a number of Republican Senators who asked that their States' nominees' hearings be expedited, I accord Senator Lincoln that courtesy.

MEMBER OF CONGRESS

JAMES P. MORAN
8TH DISTRICT OF VIRGINIA

Feb. 3, '02

Hon. Patrick Leahy
433 Russell S.O.B.

Dear Pat,

Henry Hudson has been nominated for the U.S. District Court. He's currently a Fairfax, Va. Circuit Court Judge.

I hope you'll confirm him. I've known him for over twenty years. He was U.S. Attorney then head of the U.S. Marshall's Service.

He has the respect of Republicans & Democrats alike. He does have the reputation of being a law-and-order Republican, but also of being a decent and fair man. He's intelligent and very conscientious and I know he'd make a good judge. He deserves your approval. Thanks for your leadership, Chairman.

Jim

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COMMONWEALTH OF VIRGINIA

RICHARD L. SASLAW
SENATE MINORITY LEADER
35TH SENATORIAL DISTRICT
PART OF FAIRFAX COUNTY
POST OFFICE BOX 1856
SPRINGFIELD, VIRGINIA 22151

SENATE

COMMITTEE ASSIGNMENTS:
COMMERCE AND LABOR
COURTS OF JUSTICE
EDUCATION AND HEALTH
FINANCE
RULES

March 7, 2002

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

President Bush has nominated Henry Hudson, an outstanding individual, to the federal bench in Virginia. I have known Henry for a good many years. He has a very impressive résumé and is currently serving with distinction as a circuit court judge in Fairfax County, Virginia.

When Judge Hudson was under consideration by the Fairfax legislative delegation, he received overwhelming support from the democrats in our delegation. In fact, we were his biggest supporters.

I have called attorneys who have practiced before him, as well as the democratic commonwealth attorney, and the praise for him has been unanimous. I don't know of another person that the president could have nominated with stronger credentials and as much bipartisan support as Judge Hudson.

Given the caseload of the Eastern District in Virginia, I would hope that you could expedite the appointment process for Judge Hudson. Thank you for your consideration.

Very truly yours,

/s/

Richard L. Saslaw

mh
Enclosure

bc: The Honorable Henry E. Hudson
Scott McGeary

REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE REGARDING JUDICIAL NOMINATIONS, THURSDAY, MAY 23, 2002, SD-226, 2:00 PM.

Mr. Chairman:

Thank you for holding this important hearing on judicial nominations. I am pleased that we are considering these highly qualified nominees today, including Judge Henry Hudson, whom President Bush has nominated to the United States District Court for the Eastern District of Virginia.

I would like to say a few words on behalf of Judge Hudson. He is very deserving of this high honor, and I commend President Bush for nominating such a well qualified candidate to the Federal bench. Throughout Judge Hudson's distinguished career, he has held several positions of public trust, and he has always performed his duties with the utmost integrity. Judge Hudson has also demonstrated a profound respect for the rule of law, and I feel confident that he will be an asset to the Eastern District of Virginia.

Judge Hudson has an illustrious legal background. Upon graduation from the American University School of Law, he worked as an Assistant Commonwealth Attorney in Arlington County, Virginia. There, he learned the basics of trial

work, and after five years, he became an Assistant U.S. Attorney for the Eastern District of Virginia. As a Federal prosecutor, Judge Hudson handled many important and oftentimes complex criminal cases, including drug conspiracies, racketeering, and political corruption cases. After his service as an Assistant U.S. Attorney, Judge Hudson served as the Commonwealth Attorney in Arlington County, Virginia. As Commonwealth Attorney, he was responsible for prosecuting crimes such as homicides and violent sexual assaults.

Judge Hudson's vast knowledge of the law and his skills as a trial attorney did not go unnoticed. In 1986, he was nominated and confirmed as the U.S. Attorney for the Eastern District of Virginia. As the U.S. Attorney, Judge Hudson not only gained additional experience as a Federal prosecutor, but also demonstrated an ability to supervise others. He was responsible for an office staffed by 70 Assistant U.S. Attorneys and 25 Special Assistant U.S. Attorneys. During his tenure, he supervised "Operation Ill Wind," a Federal investigation of unlawful defense contract bidding that resulted in the conviction of 54 people.

Judge Hudson was again honored in 1992 when he was

selected as Director of the U.S. Marshals Service, our Nation's oldest law enforcement organization. This appointment was a significant honor and serves as a testament to the widespread admiration and respect enjoyed by Judge Hudson.

I think that it is important to note that in addition to his track record as a dedicated prosecutor, Judge Hudson also has extensive trial experience in civil cases. In fact, 30% of his litigation experience has been in civil cases. As a private practictioner, Judge Hudson handled a wide range of cases in the areas of civil rights, torts, labor law, and government contracts.

In 1998, Henry Hudson became Circuit Court Judge for the Fairfax County Circuit Court in the Commonwealth of Virginia. In this role, he has performed admirably, demonstrating an outstanding legal mind and a good judicial temperament. He has served the people of Fairfax County well and will no doubt serve the Eastern District of Virginia with equal competence and integrity.

I believe that Judge Hudson is highly qualified to serve as a Federal District Court Judge. He has ample experience in both civil and criminal law, and he is

familiar with practice before Federal courts. Judge Hudson also has important experience as a state court judge, and has shown himself to be comfortable in a trial setting. Additionally, a substantial majority of the American Bar Association Standing Committee on the Federal Judiciary rated Judge Hudson as Well Qualified. I am pleased that such a fine man is receiving a hearing, and I welcome him here today. I look forward to seeing him confirmed. Thank you, Mr. Chairman.

- END -

V·B·A

The Virginia Bar Association

Organized 1888
Chartered 1890

President
Jeanne F. Franklin
604 Cameron Street
Alexandria, Virginia 22314
(703) 684-3550

President-Elect
J. Edward Betts
909 East Main Street, #1200
Richmond, Virginia 23219-3095
(804) 697-4155

Immediate Past President
Anita O. Poston
Norfolk

Secretary/Treasurer
Wm. E. Rachels, Jr.
Norfolk

Chair
Young Lawyers Division
David N. Anthony
P.O. Box 3037
Norfolk, Virginia 23514
(757) 624-3004

Chair-Elect
Young Lawyers Division
C. Vaughan Gibson
Richmond

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Executive Vice President
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Administrative Director
Sandra P. Thompson

July 18, 2001

The Honorable John W. Warner
The United States Senate
225 Russell Senate Office Building
Washington, DC 20510

The Honorable George Allen
The United States Senate
204 Russell Senate Office Building
Washington, DC 20510

RE: Pending vacancy, U.S. District Court (Eastern District of Virginia)

Dear Senators Warner and Allen:

This is to report to you in response to your letter of July 7, 2001, providing opportunity for the Association to forward comments with respect to the pending vacancy in the Federal District Court for the Eastern District of Virginia.

Our Committee on Federal Judgeships for the Eastern District, composed of a diverse group of leading practitioners from throughout eastern Virginia, has carefully reviewed and considered the individuals whose names you have provided us. Based on its review, I can now report to you that The Virginia Bar Association highly recommends as qualified for this vacancy, alphabetically:

Judge Henry E. Hudson of Fairfax, and

Virginia W. Powell of Richmond;

and, further, that we recommend to you as qualified for this vacancy:

William H. Hurd of Richmond.

Thank you for affording this Association the opportunity to offer our views on this matter. We would be pleased to be of any further assistance you or your staffs might find helpful.

Respectfully,

Jeanne F. Franklin

Jeanne F. Franklin

cc: John M. Ryan, Esq.
C.B. Arrington, Jr., Esq.

STATEMENT TO THE JUDICIARY COMMITTEE ON THE NOMINATION OF HENRY HUDSON TO SERVE AS A JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
MAY 23, 2002

Chairman Leahy, Senator Hatch, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing today. Today, I am pleased to introduce Judge Henry Hudson, who has been nominated to serve as a judge on the United States District Court for the Eastern District of Virginia. Henry is joined today by his wife Tara and his son Kevin.

Judge Hudson's background makes him highly qualified for this position, and I strongly support his nomination. And, it is important to note that the Virginia Bar Association also "highly recommends" Judge Hudson for this federal judgeship.

Judge Hudson's experience with the law is extensive, beginning with his service as a Deputy Sheriff in Arlington County, Virginia, in 1969 and 1970. He then went to law school, graduating from American University in 1974.

Subsequent to his graduation from law school, Mr. Hudson entered legal practice as a prosecutor. First, he served as an Assistant Commonwealth's attorney for five years and then as an Assistant U.S. Attorney in the Eastern District of Virginia.

In 1986, Mr. Hudson was confirmed by the Senate and began his service as the United States Attorney for the Eastern District of Virginia, a role in which he served in until 1991.

After leaving the U.S. Attorney's office, Judge Hudson once again received Senate confirmation and served as the Director of the United States Marshal Service from 1992 to 1993.

After completing his work at the Marshals Service, Mr. Hudson entered private practice until he was sworn in as a Judge on the Fairfax County, Virginia, Circuit Court. Judge Hudson has served as a Judge on this important court since 1998.

During his time on the Fairfax County Circuit Court bench, Judge Hudson has been known as a fair, objective judge who conducts proceedings with dignity and with the appropriate judicial temperament. I am confident that he will continue his service on the Eastern District of Virginia bench consistent with this reputation.

I look forward to this Committee reporting his nomination favorably and look forward to Senate confirmation.

In addition, I would like to insert into the Record a copy of a letter of support from Judge Hudson's Congressman, my Democratic colleague, Jim Moran. I would also like to insert into the Record a copy of a letter of support for Judge Hudson from the Senate Minority Leader in Virginia, Democratic State Senator Richard Saslaw. Judge Hudson enjoys strong bipartisan support throughout the Commonwealth of Virginia.

Finally, I note once again that the Virginia Bar Association "highly recommends" Judge Hudson for this federal judgeship. I join the Virginia Bar in that opinion.

NOMINATION OF JOHN M. ROGERS, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; DAVID S. CERCONE, NOMINEE TO BE DISTRICT JUDGE OF THE WESTERN DISTRICT OF PENNSYLVANIA; KENNETH A. MARRA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; MORRISON COHEN ENGLAND, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA; AND LAWRENCE GREENFELD, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE

THURSDAY, JUNE 13, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:05 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Dianne Feinstein presiding.

Present: Senators Feinstein, Feingold, Specter, and McConnell.

PRESENTATION OF MORRISON COHEN ENGLAND, JR., NOMINEE TO BE DISTRICT JUDGE FOR TH EASTERN DISTRICT OF CALIFORNIA BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. I am going to open the hearing. I am substituting for Senator Feingold, who asked that I do this, and I will turn over the gavel to Senator McConnell as soon as he comes. But in the interest of time, I thought it would be a good idea to begin.

This hearing will cover four of President Bush's judicial nominees, along with the nominee to head the Department of Justice's Bureau of Justice Statistics. And before we begin the hearing from the nominees, we will first hear from members of this committee, as well as other Senators and Members of Congress on panel one who wish to speak. And I see Senator Bunning already present.

I would like to enter into the record the statement by the chairman of the committee, Patrick Leahy, without objection.

Senator FEINSTEIN. I would indicate that the record will remain open to the close of day for any statements to be placed therein. And I would like to begin by delivering a statement on Morrison England, who is a nominee from California. And, Judge England, would you stand so that everybody might see you and welcome you. We are delighted that you are here with us today.

Judge England is—you may sit down. Thank you.

Judge England is the third candidate to come out of California's Judicial Advisory Committee, and I think it is a testament to his ability that the committee forwarded his name to President Bush with a unanimous 6–0 vote. That means that three Republicans and three Democrats all voted for him.

President Bush nominated Judge England to the district court on March 21st, and I want to thank Senator Leahy for scheduling this hearing so expeditiously.

Judge England is joined by his wife, Nancy. Would you please stand for a moment? Thank you very much. And she is a pharmacist with the Pharmaceutical Care Network.

I also know that he is joined in spirit by his son, John, and his step-children, Natalie and Clayton, whose school obligations prevented them from making the trip.

Judge England has firm roots in the Sacramento community, having spent his last 30 years in the Sacramento area. He obtained his undergraduate and law degrees from the University of the Pacific. A star football player in college, he briefly interrupted his studies in 1976 to play football for the New York Jets.

After law school, he spent over 10 years in private practice, rising to the position of main partner in the firm of Quattrin, Johnson Campora & England. His practice focused on business and real estate transactions.

In 1996, Judge England was appointed to the Sacramento County Superior Court. During his tenure on the court, he has taken on some of the toughest assignments. Among other things, he oversees cases on the court's accelerated civil trial program, and he handles the more complex civil and criminal trials.

The legal community in the Sacramento area has given him glowing marks. Sacramento Superior Court Judge David DeAlba observes that Judge England has an outstanding reputation as a jurist who is firm, fair, understanding, and compassionate.

District Court Judge Martin Jenkins writes that Judge England is an exceptional judge and praises him for his superb legal mind, his courtroom demeanor, and his commitment to the rule of law.

California State Appellate Judge Connie Callahan wrote that Judge England has widespread support in the Eastern District, including, but not limited to, the legal community, the judiciary, law enforcement, business, and charitable organizations.

And Donald Steed, president of the Sacramento County District Attorneys Association, said England would be a great addition to the Federal bench and praised him for his fairness, compassion, strength of character, and judicial knowledge.

So given such high praise, it is not surprising that a substantial majority of the American Bar Association's Standing Committee on the Federal Judiciary found Judge England to be well qualified.

I would just like to also note that he has been a member of the Judge Advocate General's Corps for the United States Army Reserve since 1988. He currently holds the rank of Major and is a senior defense counsel for the 22nd Legal Support Organization.

Because the screening panel that Senator Boxer and I negotiated with Mr. Parsky on behalf of the White House has had some complaining in the press, I want to say that these committees in each of the districts are comprised of three Republicans and three Democrats. And the fact of the matter is that it has taken partisanship away from the judging, which I think is just terrific.

Judge England comes out of that process with a 6–0 vote, and I am also proud to say that as of today all of the nominations have come out—eight people nominated to the President for two additional spots in California. And I just want to say I am very proud of the functioning of our screening panel, and I am very thankful to Mr. Jerry Parsky for suggesting it, putting it together, monitoring it, and overseeing it in the State of California. It is alive, it is well, and it is working, I think, in a fine way.

That completes my remarks, and I would now like to turn the gavel over to Senator McConnell, if I might, and ask that he conduct this hearing.

Senator MCCONNELL. [Presiding.] Thank you very much, Senator Feinstein. I am trying to get myself oriented here. Where are we?

Senator FEINSTEIN. Right now we are on members' remarks, if you have remarks to make, and then Senator Bunning was here first, so he would probably be the first one, and then Senator Santorum, to make comments about their nominees.

Senator MCCONNELL. Okay. Thank you very much.

Senator FEINSTEIN. Right.

PRESENTATION OF JOHN M. ROGERS, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT BY HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Well, Senator Bunning and I are here to introduce a nominee from our State to the Sixth Circuit Court of Appeals. I am happy to comment today on Professor John Rogers from the Commonwealth of Kentucky. President Bush has nominated Professor Rogers to the Sixth Circuit Court of Appeals.

As many people are now aware, the Sixth Circuit is in dire straits, with 50 percent of its 16 seats vacant. So I appreciate Chairman Leahy holding this hearing for Professor Rogers to try to provide some relief to our circuit.

John Rogers' career is marked by excellence and achievement. He was elected to Phi Beta Kappa during his junior year at Stanford. At the University of Michigan Law School, he was a member of the Order of the Coif. As a student, Professor Rogers chose to serve our country in the United States Army ROTC, going on to active duty in the field artillery. He excelled there, too, graduating first in his class of 120 in his field artillery studies.

Professor Rogers has continued to serve his country in the United States Army Reserve, including serving as a consulting faculty member at the Command and General Staff College in Fort

Leavenworth, Kansas. He is presently a Lieutenant Colonel (Retired) in the Army Reserves.

With respect to his legal experience, John Rogers joined the Appellate Section of the Civil Division of the U.S. Department of Justice upon graduating from law school. He accepted a position on the faculty at the University of Kentucky College of Law in 1978, where he is the Thomas P. Lewis Professor of Law.

In 1983, he returned to the Justice Department as a visiting professor. There, Professor Rogers was recognized for his outstanding work, earning a special commendation for outstanding service in the Civil Division in 1985.

In 1987, Professor Rogers accepted a position as a Fulbright professor at the Foreign Affairs College in Beijing, the first of two Fulbright professorships in China. In China, Professor Rogers met his future wife, Ying Juan, who, unfortunately, could not be here today. As a spouse myself of a Chinese immigrant, I appreciate the challenges Ying Juan has experienced as an immigrant, and I am happy she was able to become a member of our naturalized citizen community.

John Rogers' expertise is in international law, administrative law, and constitutional law. He has published 20 Law Review articles and is currently working on his second book.

He also testified before this committee in 2000 on the ability of former American World War II POWs to obtain compensation from foreign companies.

In conclusion, Professor Rogers and his wife have two children, and I must confess I am a bit relieved to learn that the only club to which he belongs is the Henry Clay Stamp Club in Lexington.

I welcome Professor Rogers to the committee and hope he can be expeditiously confirmed so that our circuit, the Sixth Circuit, can get some of the relief that it badly needs.

Now I would like to turn it over to my colleague, Senator Bunning, for his observations about our nominee.

PRESENTATION OF JOHN M. ROGERS, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT BY HON. JIM BUNNING, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator BUNNING. Thank you, Senator McConnell.

Mr. Chairman, today I have the honor of helping to introduce Professor John Rogers to the committee. By sending his nomination to the Senate, the President has nominated a first-class candidate to fill one of the vacancies on our Sixth Circuit. I hope the Senate is able to confirm him quickly.

A quick look at his resume shows his strong qualifications: Phi Beta Kappa graduate from Stanford and Michigan Law School, member of the Michigan Law Review, and distinguished professor at the University of Kentucky Law School for almost a quarter of a century.

He has worked two stints in the Civil Division at the Justice Department, working on appellate issues and drafting government briefs for the Supreme Court. Twice he has taught abroad, as you said, in China, as a Fulbright lecturer. And for 28 years, Professor Rogers served his country in the U.S. Army Reserves and the Kentucky Army National Guard.

Although he is not from Kentucky originally, early in his life Professor Rogers also made a smart decision by moving from New York to the Commonwealth. Clearly, he possesses the wisdom to sit on the Federal bench. His intellectual capabilities and curiosity will serve him well as an appellate judge.

Professor Rogers has published, taught, and practiced on a broad range of legal topics: international law, immigration law, administrative law, constitutional law, and theories of jurisprudence, just to name some of his interests. He is a top-flight scholar who can definitely handle the academic rigors of the appellate court.

As the committee knows, we are facing a judicial crisis in the Sixth Circuit. Half the bench is empty. We desperately need to fill those slots.

I appreciate the chairman—and I mean all the chairmen who sit here, including our real chairman. I appreciate the chairman scheduling this hearing, and I hope we can continue to make swift progress towards confirmation.

I would also like to thank our chairman for helping us to confirm nominees to fill the three openings at the district level in Kentucky. It is already making a very big difference for us back home.

Mr. Chairman, I will close by admitting up front that Professor Rogers was one of several candidates that Senator McConnell and I suggested to the President for the Sixth Circuit. When we were looking for candidates, we wanted to find the smartest legal eagles in Kentucky. I think you will soon discover that Professor John Rogers definitely fills that bill. He is a first-rate scholar who will make an excellent Federal appellate judge.

Thank you, Mr. Chairman, and thanks to the committee.

Senator MCCONNELL. Thank you, Senator Bunning.

Senator Santorum? Well, Senator Specter, and then Senator Santorum, I guess.

Senator SPECTER. Go ahead, Rick.

PRESENTATION OF DAVID S. CERCONE, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Okay. I always defer to my senior colleague, but I want to thank Senator Specter for deferring to me.

It is a real honor for me to have the opportunity to present to the committee Judge Dave Cercone. Judge Cercone is a common pleas court judge in my home county of Allegheny County, where Pittsburgh is. He has been a judge there since 1986, has served with great distinction on that court. He is a graduate of Westminster College in western Pennsylvania, in the little town of New Wilmington, and he is also a graduate of Duquesne University.

He is a part-time faculty member at Robert Morris College and also at the University of Pittsburgh Graduate School of Public International Affairs. He served, prior to that and his appointment to the court, as assistant district attorney in Allegheny County, and as a sole practitioner prior to that.

Judge Cercone is someone who I have known for a long, long time. I knew him when I was practicing law back in Pittsburgh. He is a man of tremendous respect in the community, as well as

his wife, who is an active member of the legal community in western Pennsylvania. He is incredibly well respected on both sides of the aisle as someone who is a great humanitarian, very active in a lot of community organizations, including, in particular, the Boys and Girls Club of Western Pennsylvania. He is someone who—the only fault that I have been able to find in Judge Cercone over the many years I have known him is his close relationship with John Kasich, who he grew up with in McKees Rocks, Pennsylvania, former Congressman Kasich from Ohio. But beyond that small blemish in his record, he really is an outstanding man in the community. He has been an outstanding judge in Allegheny County, and I have no doubt that he will be an outstanding judge in the court of the Western District of Pennsylvania.

I will add that he is a Democrat, and he is someone who was part of the arrangement that Senator Specter and I have worked in Pennsylvania to make sure that we have no long strings of just one party getting judges appointed to positions in Pennsylvania. We take groups of four judges, and we have three Republicans and one Democrat. We have four judges that have been nominated from the Western District, and Judge Cercone is the second nominee of that package to come forward. The first was Joy Conti, a Republican. There are still two awaiting, Art Schwab and Terry McVerry, which we hope the committee will act on promptly. But I am very, very excited to be here today to nominate someone who will prove to be, I think, one of our finest—Judge Cercone.

Thank you, Mr. Chairman.

PRESENTATION OF DAVID S. CERCONE, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. With Senator Santorum's introduction, there is nothing left for me to day, but that won't stop me from speaking at length, nonetheless.

[Laughter.]

Senator SPECTER. Judge Cercone brings really a unique record to this important position. Magna cum laude is a testimonial to his academic ability. He served as a magistrate court judge before coming to the Court of Common Pleas, which is the court of record in Pennsylvania. And when he served as district justice magistrate, he was appointed by the Supreme Court to serve as administrative judge for the Criminal Division, supervising 14 judges and over 200 court employees.

Senator Santorum has accurately stated what we have accomplished in Pennsylvania, and I think it is very important to have some balance on nominees. I think about the time from President Nixon's administration through President George Bush the Elder, and in the 24-year period, there was only 4 years when President Carter had the opportunity to nominate able young lawyers—or able lawyers, most of them young, who were Democrats. And that kind of balance is important, and we have worked out an arrangement which has been modeled after what Senator Javits and Senator Moynihan had done in the 1970s, and I think it is exactly the way things ought to be.

I must tell you it requires a lot of explanation, Judge Cercone, when Republicans want to know why a Democrat is appointed to the Federal bench. And Rick and I give them the long explanations, and nobody is satisfied except the Democrats who were appointed. But it works reciprocally, and that is the way it should be.

Just one note on the personal side. Judge Cercone's uncle was the president judge of the Pennsylvania Superior Court. Judge Cercone was an assistant D.A. And I was the D.A. once, but the best job I have had in public life was assistant D.A. And arguing before the Pennsylvania Superior Court was really an experience. As chief of the Appeals Division, we had about 90 cases before the superior court, and all we could do was change the cover on the brief. They were all habeas corpus cases. But I don't think any of the judges noticed that.

But Judge Cercone comes from a distinguished jurist family, and I know he will do an outstanding job.

I am going to have to excuse myself, as I think the others members will. We have Governor Ridge coming in to talk about homeland security.

Thank you very much, Mr. Chairman de facto.

Senator MCCONNELL. Thank you, Senator Specter.

Under the arrangement that we worked out with the majority, we are going to have a brief—what I hope will be a brief recess here before taking the second panel, which will be Professor John Rogers.

[Recess 2:25 p.m. to 2:30 p.m.]

Senator MCCONNELL. We are going to reconvene the session here. Congressman Bartlett has arrived and would like to make some observations about one of the judges.

Congressman feel free to have a seat and tell us about your nominee.

PRESENTATION OF LAWRENCE GREENFELD, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, BY HON. ROSCOE BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. BARTLETT. Thank you very much. I just returned from our last vote of the day.

It is a pleasure for me to come over to the other body to introduce and commend to you my constituent, Larry Greenfeld, as the Director of the Bureau of Justice Statistics for the United States Department of Justice. Larry and his wife, Barbara, have been my constituents as residents of Howard County in Maryland since 1990, where they have both been active and respected members of the community. Barbara has been an educator and administrator at Howard Community College for the past 20 years and previously taught for the Howard County Public School System. Their son, David, graduated from Atholton High School in Howard County, received his B.A. from the University of Maryland–College Park.

Mr. Greenfeld has compiled an exemplary and distinguished record for more than 20 years at the Bureau of Justice Statistics, including two periods of service as Acting Director and Principal Deputy Director, Senior Executive Service, during a 26-year career at the Department of Justice. His contributions and expertise in

the field of justice statistics have been established through hundreds of publications and presentations and have been widely recognized and honored by his peers.

In January 1993, he was the recipient of the Peter P. Lejins Award for Research from the American Correctional Association, the highest award given for research in the field of corrections, and was selected as the "Best of the Best" in the field of corrections by Corrections Today Magazine. He has served on numerous national panels and commissions, including providing assistance to the Surgeon General's National Advisory Commission on Drunk Driving. In 1996, he received the Alumnus of the Year Award from the Department of Criminology and Criminal Justice at the University of Maryland.

Once again, I am pleased and honored to introduce Larry Greenfeld. Thank you very much.

Senator MCCONNELL. Thank you very much, Congressman. We appreciate your coming by, and we are hope—I am hoping to be graced with the presence of Senator Feingold here at some point, so we will have what I hope will be another brief recess.

[Recess 2:32 p.m. to 2:44 p.m.]

Senator FEINGOLD. [Presiding.] I will call the committee out of recess and back into order. Let me thank Senator McConnell for chairing the hearing and moving things along in my absence. I also want to thank Senator Feinstein for helping. I was at an executive session of the Foreign Relations Committee that just concluded.

As I understand it, we have completed the first panel. The Members of Congress have had an opportunity to testify on behalf of the different nominees, so now we will move on to panel two.

Senator FEINGOLD. I would now ask Professor Rogers, the witness for the second panel, to come forward.

Professor Rogers is President Bush's nominee to the United States Court of Appeals for the Sixth Circuit. Professor Rogers graduated from the University of Michigan Law School. After graduation, he spent 4 years working in the Appellate Section of the Civil Division of the Justice Department, a section to which he later returned in 1983 for 2 more years.

He has been a law professor at the University of Kentucky College of Law since 1978. He also has had an extensive military career, first in the U.S. Army and later in the Army Reserve and Kentucky Army National Guard.

We welcome you, Professor, and congratulations on your nomination. Will you please stand and raise your right hand to be sworn? Do you swear or affirm that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth?

Mr. ROGERS. I do.

Senator FEINGOLD. Thank you, Professor Rogers. If you would like to make your opening statement and introduce anybody that you would like, you may do so now.

STATEMENT OF JOHN M. ROGERS, OF KENTUCKY, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Mr. ROGERS. Thank you very much, Mr. Chairman. It's a great honor to be here, and I am very excited. I regret that my wife and children are not here. They would have loved to have been here.

I want to thank you and Senator Leahy for scheduling this hearing and thank you for chairing it, and I am eager to take your questions.

Senator FEINGOLD. Very good. We will proceed with 7-minute rounds of questions. Let me begin.

As you know, many individuals nominated to the Federal bench over the years have faced questions about their views on certain controversial topics, particularly if they have written or spoken about these topics. Almost invariably, in an effort to allay concerns that Senators might have about their views, part of their answer is to say that they will respect the rulings of the Supreme Court and apply them as a matter of stare decisis, even if they don't agree with them. We have an unusual situation here, because you wrote a very interesting article in 1995 that I would like to ask you a little bit about. The article is not really about a substantive area of law; it is, rather, about the principle of stare decisis.

In your article entitled "Lower Court Application of the 'Overruling Law' of Higher Courts," you assert that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should then take responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As we read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, what you call "overruling law." Your article suggests that lower courts should follow this body of law in the same way they follow other laws of the higher court and, therefore, lower court judges should reverse higher court precedent on their own whenever they think that the higher court would do so.

Professor Rogers, have I at least reasonably correctly described your views in this article? Do you still subscribe to them?

Mr. ROGERS. I understand how that article might be interpreted that way. That article, I would stress, was in the Legal Theory journal. It was very abstract, and I used some language that I think could be misconstrued.

I want to assure you and all the members of this committee that I strongly believe that it is the duty, actually the legal duty of a court of appeals judge to follow the holdings and decisions of the Supreme Court of the United States.

Senator FEINGOLD. Let me just pursue it a little bit, then.

Mr. ROGERS. Certainly.

Senator FEINGOLD. I appreciate that answer. What factors would you use, if confirmed to the Sixth Circuit, to determine whether the Supreme Court will overturn precedent in a particular case? And what——

Mr. ROGERS. I think——

Senator FEINGOLD. Let me just finish.

Mr. ROGERS. I'm sorry.

Senator FEINGOLD. What weight, for example, will you give to the political views of individual Justices as compared to the views of Justices who made the decision that would otherwise bind you?

Mr. ROGERS. That's an eminently fair question, Mr. Chairman, and I appreciate having the chance to respond to it. I think—that was a theoretical article dealing with something that would only happen very rarely.

I would like if I could give a kind of concrete example. It is a very abstract article. A concrete example would be *Brown* v. *Board of Education*, which rejected the separate but equal doctrine in the area of public education. A year later, there was a case that involved separate but equal in the area of public transportation.

The Court of Appeals for the Fourth Circuit in that case I guess conceivably could have said, well, all they have is a holding with respect to education and they don't have a holding with respect to public transportation; and there is an old *Plessy* v. *Ferguson* separate but equal decision with respect to public transportation, so, therefore, we are just going to say that there is separate but equal in that area. I think that would be wrong. That is not what the Court of Appeals for the Fourth Circuit did in that case because it was clear, very clear, that separate but equal was rejected across the board in theory, and no one could—it fatally undermined, if you will, *Plessy* v. *Ferguson*, although it was arguably distinguishable from *Plessy* v. *Ferguson*.

In that type of situation, where it is clear that the Supreme Court would not adhere to an old precedent that it—not the lower court, but that it—has undermined or departed from, then in that case it makes sense for the lower court to follow what it perceives the Supreme Court to have done.

I think it would be a very unusual type of situation, and, again, I would reassert—and it is also present in that article, actually—that there is a strong legal obligation—and that was the purport of some of my arguments in that article—there is a strong legal obligation on the part of lower courts to follow the most applicable precedents of the Supreme Court of the United States.

Senator FEINGOLD. I appreciate that answer. You certainly seem to suggest a narrower basis for rejecting precedent than your article suggests.

Mr. ROGERS. That is absolutely fair enough, sir.

Senator FEINGOLD. It is somewhat reassuring that you use that example, and I think you have attempted to assure the committee that you would follow the precedents and uphold the Constitution.

Let me ask you about another aspect of that article. You assert the following in the article: Despite what they may say, appellate and Supreme Court judges are at least to some extent, and perhaps entirely, voting policy preferences in a way that is wholly unpredictable unless the policy views of individual judges are taken into account.

You go on to say: Perhaps, don't be shocked, judges vote on First Amendment issues, federalism issues, or search and seizure issues at least in part according to their political preferences. In fairness, I studied the writings of others in college that suggested very much the same with regard to judges. So, it is not something I have never heard before.

But, I think you would agree that one of the most fundamental underpinnings of our democracy and one of the many institutions that proves the genius of our Founders is our independent judiciary. The system of lifetime appointments allows judges to be free to base their decisions on nothing but the law and their own judgment, free of the influence that political interference can bring. I note that you have been a member of the Republican National Committee since 1970.

Given your academic writings, what assurances can you give the committee that you will fairly apply the law based on the merits of a particular case, regardless of your policy preferences and political views?

Mr. ROGERS. Absolutely. I flatly support the idea that judges should decide based on the law and not on the basis of their political views. And I think in context, that little quote from my article is, at least intended to be, a characterization of an argument that I don't think is appropriate. Maybe it happens. Maybe as a political science matter it happens sometimes. And that's what I was trying to respond to people who I thought might disagree with the esoteric arguments that I was making in that theoretical article.

But I strongly support and have always strongly supported the idea that the very idea of what a judge is doing, an Article III judge, or really any judge is doing, is deciding what the legislature and the Framers have decided and applying that, rather than using their own policy preferences. I think that's what judicial discipline is all about, is not trying to come to a result that the judge thinks is the better result, but trying to come to the result that the legislature or the Framers thinks is the proper result.

Senator FEINGOLD. Thank you, Professor. That completes my first round.

Senator McConnell?

Senator MCCONNELL. Thank you, Mr. Chairman.

Just following up on that, your article, ''Lower Court Application of the 'Overruling Law' of Higher Courts,'' obviously could be misinterpreted by some people. Some would believe it stands for the proposition that if a lower court is faced with case law, it thinks a higher court would overturn, then the lower court should take the responsibility upon itself and go ahead and reverse the precedent of the higher court on its own.

But we all know a lower court can't, of course, reverse the precedent of a higher court. Furthermore, we respect to the fidelity to precedent that a lower court must exhibit, I take your article to have the exact opposite point, that is, lower court adherence to binding precedent is so critically important to our judicial system that lower courts have a duty to strive to make sure that they correctly determine and follow governing precedent.

That very strong obligation is not always easy to discharge when it appears that a higher court has changed its precedent, whether, for example, through multiple decisions that seem to render a longstanding interpretation a nullity—you cite an example of that—or through decisions that seem to show that a prior precedent has been sub silentio overruled.

So I would like to clear up some of the confusion. Is it your position that judges must always follow binding precedent?

Mr. ROGERS. Yes, absolutely.

Senator MCCONNELL. A lower court can't, of course, reverse the precedent of a higher court, can it?

Mr. ROGERS. No, it cannot.

Senator MCCONNELL. Is it your position that judges should follow precedent even when the precedent seems to the judge to be unwise or at odds with his personal beliefs or political philosophy?

Mr. ROGERS. Emphatically, yes.

Senator MCCONNELL. In fact, did you not write in that same article that our legal system "would not work well if lower courts persisted in their own sincere legal analysis, regardless of the decisions of higher courts"?

Mr. ROGERS. Yes, Senator, I believe that's in there.

Senator MCCONNELL. And, in fact, did you not also write in that article that, "It follows judges may, indeed should follow the law as appellate courts determine it in order to apply, per their oaths, the law of the system that set up their courts"?

Mr. ROGERS. Exactly.

Senator MCCONNELL. Was one of the points in your article that higher courts sometimes change precedents without always expressly saying so?

Mr. ROGERS. Yes, sir.

Senator MCCONNELL. And that it is the job of the lower court to try to determine if there has been a change in precedent in order for the court to be faithful to that new precedent?

Mr. ROGERS. That's the idea, yes, sir.

Senator MCCONNELL. And if there has been a change in precedent, then courts should try to determine the scope of that change?

Mr. ROGERS. Yes, exactly. Thank you.

Senator MCCONNELL. Thank you, Professor Rogers.

Thank you, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator McConnell.

Professor, one of the traits I am looking for in judges is open-mindedness and fair-mindedness I like judges to be willing to listen to arguments and, where appropriate, change their minds about an issue if the law and the facts warrant it.

Can you give me an example from your legal career where you have changed or reversed a position based on the arguments that you have heard in court or the information that a client or another lawyer has presented to you?

Mr. ROGERS. Mr. Chairman, I'm primarily a law professor, and I think maybe the best example of my open-mindedness is how I try to conduct my classes. I have students who sometimes will take me on, and those tend to be the best classes that I teach. And I can think of examples where I asserted something, a reading of a particular case, and a student questioned it, and we went back and forth for several times until finally I had to agree that what the student said was the best possible—was the better reading of the case. I can think of several examples where that has happened.

So, yes—would you like specifics of—I mean, I can think of a case where I read, for instance, the holding of the *Garcia* case, *Garcia* v. *SAMTA*, as never allowing a court to say that the Federal Government could not regulate the States, that the courts were completely out of it, that it was purely a political check. And I had

a student—I remember her name is Mary Ann Both. She's a lawyer now, a public interest lawyer in Massachusetts, and she said, no, there's room in that—she wasn't advocating for it, but she said there's room in the language of that decision to—at a certain point for the Supreme Court to come back. And I said, well, you know, I just don't read it that way. And then we went back and forth, and in a logical, careful way, she demonstrated to me that, yes, there was room in the opinion for the Supreme Court to come back, and, indeed subsequently, as you know, the Supreme Court has—perhaps not in the way she anticipated, but has put some limits on it.

Now, I want to say I remember that clearly because that was one of the best classes I've taught.

Senator FEINGOLD. Well, I am pleased to hear that example, because all we can do here is examine people on their record. It is great to be able to get a little sense of how people think, because you are going to be making such important decisions for us.

Some of the most beloved judges in our history are judges who have stood up to popular sentiment to protect the rights of minorities or people whose views make them outcasts or even sometimes pariahs.

Can you give me an instance in your professional career where you took an unpopular stand or represented an unpopular client and stood by it under pressure?

Mr. ROGERS. I'm thinking, Mr. Chairman. Most of my clients were Government agencies. But——

Senator FEINGOLD. Certainly the unpopular——

Mr. ROGERS. I was going to say, I've had some pretty unpopular clients. I had one case where—it was a Federal Tort Claims Act case that involved the CIA's opening of the mail in New York, which was pretty unpopular and illegal. But they did it, and they only opened the mail that came through at night. They didn't open the mail that came through during the day. But there was a suit against the United States for $1,000 per letter, and the Justice Department had to defend that suit and try to keep the treasury from being depleted by—you know, there were millions of these letters, so it was an important financial case, and I had to litigate that in the Second Circuit. And it was subjected to criticism in the newspapers. I was kind of chewed out on the way out of the courthouse by opposing counsel for even representing the United States in that case. So I suppose that's an example of what you're talking about.

Senator FEINGOLD. Fair enough. During your second stint at the Department of Justice from 1983 to 1985, you represented different Federal agencies in a number of cases involving foreign affairs and international law.

Mr. ROGERS. Yes, sir.

Senator FEINGOLD. In particular, you seem to have specialized in handling the Government's defense of appeals in cases involving the propriety of U.S. actions in Latin American countries, including Nigeria, Honduras, and Grenada.

For example, you defended U.S. Government officials and others in a case brought by plaintiffs challenging the covert support of rebel activity in Nicaragua.

What are your views regarding the appropriate separation of powers between the courts, the executive branch, and the legislative branch with respect to such foreign policy matters and international law?

Mr. ROGERS. Well, Mr. Chairman, I wrote a book on that, and I'm not sure how to encapsulate that whole book. I guess, generally speaking, international law is a very important part of foreign policy. But international law is something that, in the final analysis, has to be determined by the political branches and not by the courts. And I think that's a general thread that underlay some of the more technical doctrines that we used when we litigated those cases.

Senator FEINGOLD. Well, if courts should not resolve disputes between the political branches under the political question doctrine, how can disputes such as the Reagan administration's support of the contras against the will of Congress or President Bush's withdrawal from the ABM Treaty without congressional approval be resolved?

Mr. ROGERS. Well, under the political question doctrine, by definition, they have to be resolved through the political process. That's the idea.

Senator FEINGOLD. In writings, you've made the case that the United States courts—and I think you just referred to this—should interpret statutes in a way that is consistent with public international law. I assume you would claim that this approach must apply as well to international human rights obligations, including customary human rights norms?

Mr. ROGERS. "Must be" may be a little bit too strong. The Supreme Court has said that statutes of the United States should be interpreted in accordance with our international obligations, if possible; not that that's a requirement, but that that's a canon of construction.

If a court could ascertain that there was an international obligation with respect to a particular human rights issue, then that might inform the interpretation of a statute. But it's up to Congress to pass the statute, and if it doesn't want that, it has to be clear. This is what the Supreme Court says courts should do. In accordance with my answers to your previous question, that's what's appropriate.

Senator FEINGOLD. Let me ask you another, more specific, question in that area, consider the complicated case in which the United States has taken a non-self-executing reservation to a human rights treaty, as we have done with most of the core human rights treaties that we have ratified. Do you agree that such a human rights treaty, while not providing a direct cause of action in a Federal court, should nonetheless guide the interpretation of U.S. law or policy?

Mr. ROGERS. When you say "guide," I'd have to say—I'm reflecting on the writings in my book. They might affect the interpretation of a statute that's otherwise ambiguous, yes. That would include that.

Senator FEINGOLD. All right. Senator McConnell?

Senator MCCONNELL. I think I will pass on this round, Mr. Chairman.

Senator FEINGOLD. I am completed with my questions. As I understand it, we are about to have a vote. So let me thank you very much, Professor Rogers.

Mr. ROGERS. Thank you very much.

Senator FEINGOLD. I think—are we pretty certain the vote is going to start?

Well, I think we will move on to the next panel. Thank you very much, Professor.

Senator MCCONNELL. Thank you.

[The biographical information of Mr. Rogers follows.]

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

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

   John Marshall Rogers

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

   Judge, U.S. Court of Appeals for the Sixth Circuit

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

   University of Kentucky College of Law
   Limestone Street
   Lexington KY 40506-0048

   859-257-3370

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

   June 26, 1948, Rochester, New York

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

   Married to XIONG Ying Juan (known at her workplace as Ying Juan Rogers), Trade Specialist, Kentucky World Trade Center, Suite 1600, 333 W. Vine Street, Lexington KY 40507. We have two dependent children.

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

   University of Michigan Law School, 1971-74, J.D., 1974

   Stanford University, 1966-70, B.A. History, 1970

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

1978-pres Law Professor, University of Kentucky College of Law, Lexington KY 40506-0048, with leaves for the following periods:

- 1998-99 Visiting Professor, University of San Diego Law School, 5998 Alcala Park, San Diego, California 92110
- 1994-95 Fulbright Professor, Law Department, Zhongshan University, Guangzhou, PRC, sabbatical leave from U. Ky.
- 1987-88 Fulbright Professor, Foreign Affairs College, 24 Zhan Lan Lu, Beijing, PRC, sabbatical leave from U. Ky.
- 1983-85 Visiting Professor, Appellate Staff, Civil Division, U.S. Department of Justice, 10th & Constitution, Washington DC 20530

1974-78 Attorney, Appellate Section, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

1971-74 Kitchen helper, University of Michigan Law School Food Service (during school year), 551 S. State Street, Ann Arbor MI 48104

1973 Summer legal intern, Legal Adviser's Office, U.S. Department of State, Washington D.C. (Jun-Aug)

1971-72 Second Lieutenant, Field Artillery, U.S. Army, student, Field Artillery Officer Basic Course, Ft. Sill OK (Jul-Oct) (see also answer to next question).

1970-72 Spotwelder, Chrysler Corp. Outer Drive Stamping Plant, Outer Drive, Detroit, Michigan (Nov-Dec 70; Apr-Aug 71; May-Aug 72)

1971 Copy person, Editorial room, Detroit News (Jan-Apr), Detroit, Michigan.

1980-92 Board member, Shadeland Terrace Condominium Association, Turkey Foot Court, Lexington KY 40502.

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

I received a U.S. Army ROTC commission in the Field Artillery in 1970. In 1970 I went on active duty to attend the Field Artillery Basic Course, where I graduated first in a class of 120. During law school I was the executive officer in an Army Reserve artillery battery. When I started teaching, I joined the Kentucky Army National Guard, in which I served five years, three as a battery commander in Bardstown, KY. I returned to the

Army Reserve in 1983. In 1989 I was accepted into the Army Reserve Foreign Area Officer program, with a specialty in China. During 1990-98 I served several short periods of active duty as a China specialist on the Department of the Army Staff at the Pentagon. For two years I served concurrently as a consulting faculty member at the Command and General Staff College in Ft. Leavenworth, Kansas. In 1998 I joined the Retired Reserve as a Lieutenant Colonel. A more detailed military resume may be found at http://www.uky.edu/~jrogers/milres.htm

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

Phi Beta Kappa (in Junior Year)
Order of the Coif
Kentucky Merit Ribbon
Special Commendation for Outstanding Service in the Civil Division of the Department of Justice, 1985
Member, American Law Institute
Member, Council on Foreign Relations

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

D.C. Bar Association
Kentucky Bar Association
American Bar Association (Co-chair, Committee on International Legal Education, Section on International Law and Policy, 2001-2002)
American Law Institute
Association of American Law Schools Section on International Law (Executive Committee member 1998-99, Chair 2000)
International Law Association
American Society of International Law
Federalist Society

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

District of Columbia Court of Appeals, 1975
Kentucky Supreme Court, 1980

United States Supreme Court, February 21, 1978

U.S. Court of Appeals for the First Circuit, September 14, 1977
U.S. Court of Appeals for the Second Circuit, May 3, 1978
U.S. Court of Appeals for the Third Circuit, April 11, 1985
U.S. Court of Appeals for the Fourth Circuit, March 3, 1975
U.S. Court of Appeals for the Sixth Circuit, June 10, 1975
U.S. Court of Appeals for the Seventh Circuit, February 24, 1975
U.S. Court of Appeals for the Ninth Circuit, May 7, 1975
U.S. Court of Appeals for the District of Columbia Circuit, November 27, 1975

I was also admitted to practice before the Courts of Appeals for the Fifth and Eleventh Circuits, in 1978 and 1983, respectively. Those circuits, unlike the others listed above, have periodically required bar members to take affirmative steps to renew membership. I have not taken these steps because I have not practiced before those courts since 1985. I am accordingly no longer a member of the bars of the Courts of Appeals for the Fifth and Eleventh Circuits.

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

Council on Foreign Relations
United Nations Association of the Bluegrass
American Automobile Association
Spindletop Hall (University of Kentucky Faculty-Alumni Club)
University of Kentucky Faculty Club
U.S. Association for Constitutional Law
Association of the United States Army
U.S. Army Field Artillery Association
Stanford Alumni Association
University of Michigan Alumni Association

Fort Knox High School Alumni Association
U.S. Army Foreign Area Officers Association
Lexington Chamber Music Society
Fulbright Alumni Association
Germania Club of Cincinnati
Henry Clay Stamp Club, Lexington
International Wizard of Oz Club
Crane House (Asia Institute), Louisville
Shadeland Terrace Condominium Association (Board member, 1980-92)

To my knowledge, none of these organizations ever has discriminated on the basis of race, sex, or religion.

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

Books

ADMINISTRATIVE LAW CASES (with Michael P. Healy and Ronald J. Krotoszynski, Jr.), to be published by Aspen Law & Business (in progress).

INTERNATIONAL LAW AND UNITED STATES LAW, Ashgate Press, August, 1999.

Articles

"Intensional Contexts" and the Rule that Statutes should be Interpreted as Consistent with International Law, 73 Notre Dame Law Review 637-66 (1998).

Anticipating Hong Kong's Constitution from a U.S. Legal Perspective, 30 Vanderbilt Journal of Transnational Law 449-93 (1997).

Class Participation: Random Calling and Anonymous Grading, 47 Journal of Legal Education 73-82 (1997).

"Issue-Voting" by Multi-member Appellate Courts—A Response to Some Radical Proposals, 49 Vanderbilt Law Review 997-1044 (1996).

Lower Court Application of the "Overruling Law" of Higher Courts, 1 Legal Theory 179-204 (1995).

A Way of Thinking About International Law, Chapter 41 of ESSAYS IN HONOUR OF WANG TIEYA, London: Martinus Nijhoff, 1994.

Some Lessons About the Law from Self-Referential Problems in Mathematics (with Robert E. Molzon), 90 Michigan Law Review 992-1022 (1992).

International Human Rights Law and U.S. Law, in Gibney, ed., WORLD JUSTICE? 107-21 (1991).

"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides, 79 Kentucky Law Journal 439-75 (1990-91).

The Alien Tort Statute and How Individuals "Violate" International Law, 21 Vanderbilt Journal of Transnational Law 47-62 (1988).

Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?, 42 University of Miami Law Review 447-65 (1987).

On the Exclusivity of the Hague Evidence Convention, 21 Texas International Law Journal 441-70 (1986).

Apportionment in Kentucky after Comparative Negligence, 75 Kentucky Law Journal 103-28 (1986-87).

A Comparative Negligence Checklist to Avoid Future Unnecessary Litigation (with Randy D. Shaw), 72 Kentucky Law Journal 25-88 (1984).

A Fresh Look at Agency Discretion, 57 Tulane Law Review 776-835 (1983).

Applying the International Law of Sovereign Immunity to the States of the Union, 1981 Duke Law Journal 449-76.

Kentucky Law Survey: Administrative Law (with Michael H. Sims), 69 Kentucky Law Journal 489-516 (1981).

A Way Out of the Social Security Jurisdiction Tangle, 21 Arizona Law Review 689-726 (1980).

Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction, 72 Michigan Law Review 1087-1113 (1974).

Short pieces

Prepared Statement, *Former U.S. World War II POW's: A Struggle for Justice, Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 67-72 (2000).

Foreword: The Internet and Public International Law, 88 Kentucky Law Journal 803-808 (1999-2000)

A Response to Professor Tushnet, 7 St. John's Journal of Legal Commentary 257-61 (1991).

Domestic Legal Challenges to U.S. Policy in Nicaragua, 6 St. Louis University Public Law Review 77-84 (1987).

Reviews of the following books:

- Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 27 Hong Kong Law Journal 288-96 (1997).
- Gordon, *Foreign State Immunity in Commercial Transactions*, 87 American Journal of International Law 365 (1993).
- Dellapenna, *Suing Foreign Governments and Their Corporations*, 86 American Journal of International Law 224 (1992).
- Wolfson, *Corporate First Amendment Rights and the SEC*, and Packer, Freedom of Expression in the American Military, 8 Constitutional Commentary 551 (1991).
- Holm, *Women in the Military*, Elshtain, *Women and War*, Mitchell, *Weak Link*, and Stiehm, *Arms and the Enlisted Woman*, 7 Constitutional Commentary 447 (1990).
- Zoller, *Enforcing International Law through U.S. Legislation*, 9 Human Rights Quarterly 436 (1987).
- Smith, *The American Road to Nuremberg*, 77 American Journal of International Law 385 (1983).

Miscellaneous publications

Legality of the NATO Action, http://jurist.law.pitt.edu/acad-com.htm#Rogers (internet commentary).

U.S. diplomacy and Chinese 'feelings,' THE WASHINGTON TIMES, May 19, 1999 (op ed).

Roundtable Discussion, Symposium on Hong Kong's Reintegration into the People's Republic of China, 30 Vanderbilt Journal of Transnational Law 747, 752-55, 766-67, 771, 776, 782-87 (1997) (roundtable contributions).

A Letter from Canton, Kentucky Lawyer 20-21 (1995) (alumni magazine feature).

From Kentucky to China, and Back, The Review (spring 1989) (alumni magazine feature).

Lectures, Talks and Panel Presentations
(Those transcribed or published are marked with an asterisk.)

Talk, "International Law and United States Sovereignty," University of Kentucky Federalist Society, March 28, 2001.

Panelist, "China and the 2000 Election," University of Kentucky Patterson School of Diplomacy Board of Advisors Meeting, Frankfort, KY, October 28, 2000.

Discussion leader, "Grotius and Montesquieu," University of Kentucky Graduate School course on Great Books of World Politics, September 28, 2000.

Commenter, Conference of the American Section of International Association for Philosophy and Social Philosophy (AMINTAPHIL), San Diego, March 10, 2000.

Panel moderator and organizer, "The Internet and International Law," Section on International Law of the American Association of Law Schools, Washington, D.C., January 8, 2000.

Panel Talk, "The Nondelegation Doctrine and the *American Trucking* case," Faculty Conference of the Federalist Society, Washington, D.C., Jan. 6, 2000.

Luncheon talk, "The Administrative Law Course as Career Preparation," Kentucky Association of Administrative Adjudicators, Frankfort, November 19, 1999.

Debate participant, "Law and Morality," sponsored by the Federalist Society and the Women's Law Caucus of the University of Kentucky College of Law, November 17, 1999.

Panelist, "The Role of the UN in the 21st Century: The Judicial Role," sponsored by Jewell Hall International Living and Learning Center (UK), the Bluegrass Chapter of the UN Association, and the UK Office of International Affairs, October 26, 1999.

Lecture, "The Commerce Clause in U.S. Constitutional Law," Department of Law, Zhongshan University, Guangzhou, China, June, 1999.

Faculty Colloquium presentation, "The Place of International Law within United States Law, University of San Diego School of Law, March, 1999.

Panel talk, "International Law and U.S. Law," Faculty Conference of the Federalist Society, New Orleans, January 6, 1999.

Lecture, "Ratification of the Kyoto Protocol to the Framework Convention on Climate Change," University of Kentucky graduate course in Environmental Systems, March 3, 1998.

Presentation, "Democracy in China and Hong Kong," University of Kentucky Donovan Scholars monthly meeting, January 15, 1998.

Luncheon talk, Hong Kong: Gateway to China, sponsored by J.C. Bradford & Co., Lexington

Panelist, "Law and Foreign Relations," 1997 Bluegrass Symposium, sponsored by the University of Kentucky History Department, Lexington, March 1, 1997.

Presentation, "International Law and Hong Kong's Return to China," First Christian Church of Georgetown, KY, February 16, 1997.

Presentation, "Constitutional Developments in Hong Kong," Central Christian Church discussion circle, Lexington, February 6, 1997.

Presentation, "Oral Advocacy," CLE Program on Advanced Legal Writing and Oral Advocacy, Office of the Attorney General, Frankfort, Kentucky, December 5, 1996.

Presentation, Fulbright Scholar Experience, Office of International Affairs, University of Kentucky, October 23, 1996.

Faculty colloquium, "U.S. Supreme Court Decisions Against the Backdrop of Binding Customary International Law," University of Kentucky College of Law, January 18, 1996.

Lecture, "Introduction to the U.S. Constitution," given to a high-level delegation of Kazakhstan Government leaders, Lexington, October 11, 1995.

Primary organizer and moderator, International Conference on International Law, Zhongshan University, Guangzhou, China, June 15-16, 1995. Obtained Ford Foundation Grant. Presented two papers: "Rescinding Security Council Resolutions" and "Problems of Plagiarism."

Presentation, "Impressions from a Return to China," University of Kentucky Donovan Scholars monthly meeting, February 16, 1993.

Lecture, "International Law and U.S. Law," Department of Law, Wuhan University, Wuhan, China, June, 1992.

Lectures, "The U.S. Electoral System" and "The U.S. Court System," Department of Law, Beijing College of Business, Beijing, June, 1992.

*Continuing Legal Education presentation, "The Demise of Joint Liability: R.I.P.?," Kentucky Bar Association Annual Meeting, June 14, 1990.

*Presentation, "Judicial Review from Federal Agency Decisions," UK CLE Seminar on Selected Problems in Administrative Law and Practice, March 28, 1980, Bowling Green, and April 11, 1980, Lexington.

*Presentation, "Some Jurisdictional Problems in the Federal Courts of Appeals," UK CLE Seminar on Appellate Practice and Procedure, Lexington, KY, November 2, 1979.

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

In 2000 I was engaged as an expert by attorneys for former U.S. POW's who brought suit in U.S. courts against Japanese private entities for whom the POW's had been forced to work without compensation during the war. Among other things, I prepared a statement for the Senate Judiciary Committee. I explained that, whatever other legal hurdles faced the plaintiffs, their domestic law claims were not precluded by Article 14 of the 1951 Treaty of Peace with Japan. *Former U.S. World War II POW's: A Struggle for Justice, Hearing Before the Senate Comm. on the Judiciary,* 106th Cong. 67-72 (2000) (prepared statement of John M. Rogers).

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

I am in excellent health. My last physical examination was on June 13, 2001.

16. **Citations**: If you are or have been a judge, provide:
    (a) a short summary and citations for the ten (10) most significant opinions you have written;
    (b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and
    (c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

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

I have never been a judge.

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

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

Apart from my service as a military officer and as a government lawyer or legal intern, I have never held public office.

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

I have never held a position in a political campaign, other than serving as chair of the Stanford Nixon Committee, a student organization, in early 1968.

I participated at a low level in the following campaigns:

1966 California GOP ticket (leafleting and get-out-the-vote)
1969 Dixon Arnett for California Assembly (handing out flyers)
1980 Larry Hopkins for Congress (6th Dist. Ky.) (yard sign volunteer)
2000 Bush-Cheney (yard sign volunteer)

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:
(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
(2) whether you practiced alone, and if so, the addresses and dates;
(3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

My active practice consisted of six years as a Justice Department litigator in the federal courts of appeals. Upon graduation from law school at the University of Michigan, I accepted a position in the Appellate Staff of the Civil Division of the U.S. Justice Department, Washington, D.C. 20530. I worked there for four years (1974-78), then accepted an offer to teach at the University of Kentucky College of law. In 1983-85, I returned to the Civil Division's Appellate Staff (as it was then renamed) as a Visiting

Professor. I was never a judge's clerk, and I have not I practiced alone or in a private law firm. I have been a professor at the University of Kentucky College of Law since 1978.

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

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

My practice during both stints at the Civil Division consisted of representing many different federal agencies at the federal court of appeals level. In almost all cases assigned to me, I had primary responsibility for writing the brief and presenting oral argument, and for writing stay papers where needed. I also wrote memoranda to the Solicitor General on whether to appeal cases that had been lost by federal agencies in the district courts. In addition, I prepared draft Supreme Court petitions, oppositions to certiorari, and briefs for use by the Solicitor General's office.

Most of my appellate cases involved court challenges to agency statutes, regulations, adjudications, and other actions. I represented the Comptroller of the Currency, the Social Security Administration, the Interior and Agriculture Departments, the Postal Service, the FAA, the military departments, and various other agencies. I also represented the United States in suits brought under the Federal Tort Claims Act.

During my second stint at Justice, as a visiting professor, I represented the Departments of State, Defense, Treasury, and the INS in a number of appellate cases involving foreign affairs and international law. I received the Special Commendation for Outstanding Service to the Civil Division in 1985.

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

While at the Department of Justice, I appeared in the courts of appeals frequently. The following oral arguments resulted in reported opinions:

Whiteside v. Secretary of Health & Human Services, 834 F.2d 1289 (6th Cir. 1987), argued May 22, 1987, before Judges Kennedy, Jones, and Ryan.

Page v. Schweiker, 786 F.2d 150 (3d Cir. 1986), argued September 10, 1985, before Judges Hunter, Garth, and Higginbotham.

Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987), argued May 17, 1985, before Judges Tang, Fletcher, and Hill.

Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985), argued May 8, 1985, before Judges Edwards, Starr, and Gesell.

Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985), argued March 15, 1985, before Judges Kaufman and Cardamone.

Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985), argued January 18, 1985, before Judges Wald and Bork.

Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985), argued October 17, 1984, before Judges Meskill, Pierce, and Metzner.

Navas v. Vales, 752 F.2d 765 (1st Cir. 1985), argued October 4, 1984, before Judges Campbell, Aldrich, and Timbers.

Donovan v. West Coast Detective Agency, 748 F.2d 1341 (9th Cir. 1984), argued September 7, 1984, before Judges Chambers, Hug, and East.

National Center for Immigrants Rights v. INS, 743 F.2d 1365 (9th Cir. 1984), argued June 8, 1984, before Judges Wright, Ferguson, and Reinhardt.

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), argued May 24, 1984, before Judges Tamm, Ginsburg, and Scalia.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), en banc, argued April 25, 1984, before Judges Robinson, Wright, Tamm, Wilkey, Mikva, Edwards, Ginsburg, Bork, Scalia. and Starr.

Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), argued October 26, 1983, before Judges Henderson, Hatchett, and Jones.

Ramirez de Arellano v. Weinberger, 724 F.2d 143 (1983), argued October 13, 1983, before Judges Wilkey, Scalia, and Lumbard.

Devine v. Pastore, 732 F.2d 213 (D.C. Cir. 1984), argued September 29, 1983, before Judges Bork, Scalia, and Williams.

Alabama Hospital Assn. v. Califano, 587 F.2d 762 (5th Cir. 1979), argued October 11, 1978, before Judges Wisdom, Godbold, and Tjoflat.

Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), argued May 3, 1978, before Judges Moore, Oakes, and Gurfein.

Matos v. Secretary of HEW, 581 F.2d 282 (1st Cir. 1978), argued February 8, 1978, before Judges Coffin, Bownes, and Moore.

Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978), argued September 14, 1977, before Judges Coffin, Campbell, and Wollenberg.

N.A.G.E. v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978), argued April 22, 1977, before Judges Robinson, MacKinnon, and Robb.

Johnson v. United States, 554 F.2d 632 (4th Cir. 1977), argued April 6, 1977, before Judges Winter, Butzner, and Hall.

Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), argued December 6, 1976, before Judges Bazelon, Leventhal, and MacKinnon.

Republic Steel Corp. v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (D.C. Cir. 1978), argued December 6, 1976, before Judges Bazelon, Leventhal, and MacKinnon.

Association of American Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977), argued September 16, 1976, before Judges Bazelon, Wright, and Robinson.

Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), argued August 24, 1976, before Judges Craven, Butzner, and Field.

Mossbauer v. United States, 541 F.2d 823 (9th Cir. 1976), argued June 7, 1976, before Judges Trask, Goodwin, and Kennedy.

Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), argued March 29, 1976, before Judges Edwards, Peck, and Miller.

Central Bank v. Smith, 532 F.2d 37 (7th Cir. 1976), argued February 18, 1976, before Judges Swygert, Tone, and Bauer.

Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976), argued January 26, 1976, before Judges Wright, Robb, and Broderick.

Tanner v. Weinberger, 525 F.2d 51 (6th Cir. 1975), argued June 10, 1975, before Judges Phillips, Peck, and Engel.

Hamilton v. Butz, 520 F.2d 709 (9th Cir. 1975), argued May 7, 1975, before Judges Ely, Hufstedler, and Taylor.

Wyatt v. Weinberger, 519 F.2d 1285 (4th Cir. 1975), argued March 4, 1975, before Judges Winter, Craven and Russell.

Oriente Commercial, Inc. v. M/V Floridian, 529 F.2d 221 (4th Cir. 1975), argued March 3, 1975, before Judges Haynsworth, Butzner, and Hall.

Harris v. Weinberger, 519 F.2d 1399 (4th Cir. 1975), argued January 10, 1975, before Judges Bryan, Winter, and Craven.

(2) Indicate the percentage of these appearances in
   (A) federal courts;
   (B) state courts of record;
   (C) other courts.

All my court appearances were before federal appellate court panels.

(3) Indicate the percentage of these appearances in:
   (A) civil proceedings;
   (B) criminal proceedings.

As a Civil Division lawyer I was never assigned a criminal case. I did however handle cases that either required a knowledge of criminal law or required coordination with the Criminal Division. For instance, I was involved in defending litigation to force the Food and Drug Administration to stop a pending criminal execution by lethal injection. In *O'Bryan v. Heckler*, D.C. Cir. No. 84-996, the district court had ordered this intervention within 24 hours of an execution. I wrote stay papers that were immediately successfully in the D.C. Circuit and that were relied upon later the same day by the Solicitor General's office in defending the court of appeals stay in the Supreme Court. Also, my preparation of successful stay papers in the 11th Circuit in *Fernandez-Roque v. Smith* (11th Cir. 1984), stopping the wholesale release of dangerous Mariel Cuban detainees, required extensive coordination with the Department's Criminal Division.

(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.

All of my cases were at the appellate level, that is, post-judgment. Only on rare occasions was I involved with settlement negotiations at the appellate level.

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

None.

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

While an attorney in the Civil Division of the U.S. Department of Justice, I prepared drafts of Supreme Court petitions, oppositions to certiorari, and briefs for use by the Solicitor General's Office. The extent to which these drafts were incorporated into final submission by the Office of the Solicitor General varied substantially. The Office of the Solicitor General places the Civil Division attorney's name on petitions and briefs, irrespective of the extent to which the Civil Division draft is relied upon to prepare the finally submitted petition or brief. My name is on the following petitions and briefs, copies of which are supplied:

- DiGiorgio v. United States, No. 74-720, Brief for the United States in Opposition to Certiorari
- Chandler v. Roudebush, No. 74-1599, Brief for the Respondents
- Hampton v. Myers, No. 75-1488, Jurisdictional Statement
- Mathews v. Sanders [decided *sub nom.* Califano v. Sanders], No. 75-1443, Brief for the Petitioner
- Califano v. White, No. 77-866, Petition for a Writ of Certiorari
- Volkswagenwerk AG v. Falzon, No. 82-1888, Brief for the United States as Amicus Curiae
- Gish v. United States, No. 77-1191, Brief for the United States in Opposition to Certiorari
- Club Mediterranee v. Dorin, No. 83-461, Brief for the United States as Amicus Curiae
- Heckler v. Chaney, No. 83-1878, Petition for a Writ of Certiorari
- Heckler v. Chaney, No. 83-1878, Brief for the Petitioner
- Thornburgh v. American College of Obstetricians and Gynecologists, No. 84-495, & Diamond v. Charles, No. 84-1379, Brief for the United States as Amicus Curiae
- Weinberger v. Ramirez de Arellano, No. 84-1398, Petition for a Writ of Certiorari

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

As a law professor I have generally not undertaken to practice law on the side, either for fees or pro bono. I support the idea of pro bono work and I have made regular voluntary contributions to the D.C. pro bono program. I provided free representation of a university colleague in a Social Security appeal to the Sixth Circuit in 1987. I also served without compensation as special counsel to the Impeachment Committee of the Kentucky House of Representatives in 1991. I have on several occasions given free legal assistance to members of the Chinese community in Lexington, for instance in an asylum application, in a traffic court case, and in incorporating the Lexington Chinese School. During the 1980's I participated as a Big Brother in the Big Brothers/Big Sisters program in Lexington. I have twice served as the law school representative for the United Way of the Bluegrass annual campaign.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;
(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
(c) the party or parties whom you represented; and
(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985), argued on October 17, 1984, before Judges Meskill, Pierce, and Metzner.

In a suit for repayment of loans to the Costa Rican government, a Second Circuit panel initially ruled for defendants (Costa Rican government banks), based on Costa Rican government actions rescheduling the debt. The panel ruled that such actions would be recognized in the United States as long as they were 'consistent with the law and policy of the United States.' On behalf of the State Department, the Treasury Department, and the Federal Reserve Board, the Justice Department appeared as amicus curiae in support of rehearing. I coordinated the drafting of a joint amicus brief that reflected and reconciled the different and strongly-felt interests of these three agencies. The brief took the position that Costa Rica's attempted unilateral restructuring of private obligations was inconsistent with the principles underlying the cooperative adjustment of international debt problems, and thus inconsistent with United States policy. The panel granted rehearing and I

presented oral argument as amicus on behalf of all three agencies. The panel reversed itself and accepted the government's arguments. The *Allied Bank* amicus brief has remained influential, and was repeatedly cited over a decade later in *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997). (Justice Department reviewer: Robert E. Kopp, 601 D St NW, Washington DC 20530, 202-514-3310. Of counsel: Harold G. Maier, Counselor on International Law at the State Dept., Vanderbilt University Law School, 131 21st Ave S., Nashville TN 37203, 615-322-2587, Ricki Tigert Helfer of the Treasury Dept., now at 173 S. Parkview Avenue, Columbus, OH 43209, 614-372-0200, and Nancy P. Jacklin of the Federal Reserve Board, now partner, Clifford Chance, New York, 212-878-8244; opposing counsel: Jeffrey Barist, Milbank, Tweed, Hadley & McCloy, 1 Chase Manhattan Plaza, New York, N.Y. 10005, 212-530-5115, and Robert B. McKay)

Association of Bituminous Contractors (ABC) v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), argued December 6, 1976, before Judges Bazelon, Leventhal, and MacKinnon.

Bituminous Coal Operators' Assn. (BCOA) v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), argued on August 24, 1976, before Judges Craven, Butzner, and Field.

These two cases involved whether coal mine construction contractors could be cited for mine safety and health violations at mine construction sites. An association of such contractors (ABC) obtained from the federal district court in D.C. a declaration that such contractors were not 'operators' under the Federal Coal Mine Health and Safety Act. Pursuant to that judgment, the agency ordered that mine owners instead be cited for violations committed by contractors. An association of mine owners (BCOA) then sued unsuccessfully in federal district court in Virginia to challenge that agency order. The government appealed the *ABC* case to the D.C. Circuit and the owners association appealed their case to the Fourth Circuit. Late in the briefing period of the *ABC* case, I was assigned to handle both appeals, which I briefed and argued. Although the government's position in the two cases appeared superficially inconsistent, the government was successful in both appeals, on the theory that the statute permitted the agency to determine whether to cite owners or contractors. (Justice Department reviewer: Leonard Schaitman, 601 D St. NW, Washington, D.C. 20530. Opposing counsel in *ABC*: Francis T. Coleman, now at Williams, Mullen, Clark & Dobbins, 1666 K Street N.W., Suite 1200, Washington, D.C. 20006, 202-833-9200. Opposing counsel in *BCOA*: Guy Farmer, now at Foley & Lardner, 200 Laura Street, Jacksonville, FL 32202-3510, 904-359-8765.)

Chandler v. Roudebush, 425 U.S. 840 (1976).

In this case the Supreme Court rejected the government's position that federal employees who have been accorded an administrative hearing on employment discrimination claims do not have a statutory right to a trial de novo in district court. The government's position was that judicial review on the agency record generally met the

statutory requirements. Over fifty reported lower court opinions had resolved the issue in widely divergent ways. I had primary responsibility for preparing the Civil Division draft of the government's Supreme Court brief, much of which was incorporated into the Solicitor General's 75-page brief. According to an informal source (*The Brethren*), the government's position at one point had the votes of five Supreme Court justices. (Argument presented by Assistant Attorney General Rex E. Lee, since deceased. Office of the Solicitor General attorney: Kenneth Geller, now at Mayer, Brown & Platt, Washington, D.C., 202-263-3225. Opposing counsel: Joel L. Selig, now Professor, University of Wyoming College of Law, P.O. Box 3035, Laramie, Wyoming 82071, 307-766-5120.)

Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), argued before Judges Henderson, Hatchett, and Jones.

Following the arrival of over 100,000 Mariel Cubans, the federal government continued to detain approximately 1000 who were deemed to be violent or dangerous. A federal district court in Georgia ordered the release of these detainees unless the government provided the equivalent of a full criminal trial. As appellate counsel for the U.S. Attorney General, I prepared an extensive set of stay papers that demonstrated, among other things, the danger involved in releasing the detainees. The 11th Circuit stayed the release order pending appeal. I briefed and argued the government's appeal, demonstrating that the Attorney General has the constitutional and statutory power to detain excludable aliens when the country of their nationality refuses to take them back. The 11th Circuit accepted our arguments and reversed the district court. (Justice Department reviewers: Robert E. Kopp, 202-514-3310, and Barbara L. Herwig, 202-514-5425, 601 D St. NW, Washington DC 20530. Opposing counsel: Deborah S. Ebel, now at Long, Aldridge & Norman LLP, One Peachtree Center, Suite 5300, 303 Peachtree St, Atlanta, GA 30308, 404-527-8530.)

Heckler v. Chaney, 470 U.S. 82 (1985).

A panel of the D.C. Circuit had held that death row inmates in Texas and Oklahoma could get judicial review of the Food and Drug Administration's determination not to regulate state criminal executions by lethal injection of drugs. I was then assigned the case. I prepared and filed a petition for rehearing en banc, which was denied. The Supreme Court granted certiorari, and I prepared the Civil Division drafts for the Supreme Court briefs submitted by the Solicitor General. The Supreme Court reversed in an important decision that established the presumption that an agency refusal to bring an enforcement action is not judicially reviewable. (Argument presented by Deputy Solicitor General Kenneth Geller, now at Mayer, Brown & Platt, Washington, D.C., 202-263-3225 Office of the Solicitor General attorney: Samuel A. Alito, Jr., now Judge, U.S. Court of Appeals for the Third Circuit. FDA attorney: Michael P. Peskoe, now at Law Department, American Home Products, 5 Giralda Farms, Madison NJ 07940. Opposing counsel: Steven M. Kristovich, now at Munger, Tolles & Olson, 355 S. Grand Avenue, 35th Floor, Los Angeles, 213-683-9100.)

Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987), argued May 17, 1985, before Judges Tang, Fletcher, and Hill.

This case involved an INS refusal to defer the deportation of an alien who was deportable because he had been convicted of dealing in heroin, but who claimed that he would be in danger at the hands of drug criminals if he were returned to Mexico. The district court had ordered the INS to defer deportation on the theory that the agency had not complied with a superseded internal INS operating instruction. I was assigned the case after the Solicitor General decided to appeal. My brief showed that the INS was not bound to comply with an internal agency procedure, and that in any event the operating instruction, as a 'general statement of policy,' had been validly changed without notice-and-comment procedures. The legal argument portion of my brief was adopted wholesale by the government attorney representing the INS on appeal in *Romeiro de Silva v. Smith*, 773 F.2d 1021 (9th Cir. 1985), a similar case which, because of a scheduling quirk, was argued and decided before I argued *Mada-Luna*. In both cases, the Ninth Circuit accepted our arguments and refused to allow judicial review of INS decisions to deny 'deferred action' status. (Justice Department reviewer: Barbara L. Herwig, 601 D St. NW, 202-514-5425, Washington, D.C. 20530. Opposing counsel: Antonio D. Bustamante, Ste. 660, 1001 N. Central, Phoenix AZ 85004, 602-495-1414.)

Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983), argued October 13, 1983, before Judges Wilkey, Scalia, and Lumbard, and 745 F.2d 1500 (D.C. Cir. 1984) (en banc), argued before Judges Robinson, Wright, Tamm, Wilkey, Mikva, Edwards, Ginsburg, Bork, Scalia, and Starr, *vacated and remanded*, 471 U.S. 1113 (1985).

In coordination with the Honduran government, the U.S. Department of Defense set up a training center for Salvadoran soldiers in Honduras. A U.S. citizen who owned the land on which the training was conducted sued without success in the federal district court in D.C. to stop U.S. support for the center. I was assigned to defend the plaintiff's appeal. I argued before the panel, which ruled 2-1 for the government, and before the en banc D.C. Circuit, which ruled 6-4 against the government. I argued that the political question doctrine, principles of equitable restraint, the Act of State doctrine, and other legal principles each independently precluded relief in this suit. The government sought certiorari, and I prepared the Civil Division drafts of the certiorari petition and other Supreme Court papers. The Supreme Court granted certiorari, but remanded the case for consideration of intervening developments. In view of the fact that the training center had in the meantime been shut down, the D.C. Circuit ordered the case dismissed (788 F.2d 762 (D.C. Cir. 1986)). (Justice Department reviewer: William Kanter.601 D St. NW, Washington, D.C. 20530. Of counsel: Steven Asher, U.S. Department of State. Opposing counsel: Mark R. Joelson, 1776 K Street, Suite 300, Washington, D.C. 20006, 202-785-4155.)

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), argued May 24, 1984, before Judges Tamm, Ginsburg, and Scalia.

This was a suit for damages and injunctive relief against United States support of the Nicaraguan Contras. The district court dismissed the case on political question grounds, and I was assigned to brief and argue the defense of the appeal. I argued for affirmance not only on political question grounds, but also on the basis of several independent arguments. The D.C. Circuit unanimously affirmed. The court held that the Alien Tort Statute could not be applied to U.S. government defendants, that equitable discretion precluded injunctive relief, that 'special factors' counseled against inferring a *Bivens*-like remedy, and that the subset of claims brought by certain Members of Congress presented a political question. (Justice Department reviewer: Michael F. Hertz. Opposing counsel: Peter Weiss and Michael D. Ratner, 666 Broadway, 7th Floor, New York, New York 10012, 212-614-6464.)

In re Impeachment of Commissioner Ward 'Butch' Burnette (1991).

The commissioner of agriculture of Kentucky, a constitutional officer, was convicted of a felony (theft by deception) while in office. Although the conviction was upheld by the Kentucky Supreme Court, the commissioner did not resign. The Kentucky House of Representatives issued an article of impeachment against the commissioner and appointed a committee to prosecute the case in the Senate. I served as Special Counsel to the House Impeachment Committee. The commissioner essentially sought a full retrial of his felony conviction before the Senate. I prepared a 22-page memorandum in support of the House Committee's motion to accept as established the facts found by the criminal court. On February 6, 1991, I was prepared to argue the motion orally before the Senate, but the commissioner resigned the night before, and the proceedings were terminated. (Opposing counsel: Gail Robinson, McNally & Robinson, now at Department of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort KY 40601, 502-564-8006.)

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

No.

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

On January 25, 1990, I filed a Petition for Alien Fiancé(e) with the Immigration and Naturalization Service. The petition was approved on February 12, 1990.

I have been an unnamed member of plaintiff classes in class actions involving National City Mortgage Co. (Keck v. National City Mortgage Co., N.D. Ill. No. 96 C 543), Toshiba notebook computers (Shaw v. Toshiba et al., E.D. Texas No. 1:99CV0120), and Pace Membership Warehouse stock shares. In the *Keck* case I filed an "Objection to Proposed Settlement,"on October 27, 1997, on the ground that the proposed settlement would provide no significant benefit to class members. In the Toshiba and Pace matters, I accepted my portion of class settlements. In all other respects in these cases, I was a passive, unnamed class member.

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

During initial service, I can foresee potential conflicts-of-interest only with cases involving the University of Kentucky, my longtime employer, or the Kentucky World Trade Center, my wife's employer. In any event, I would follow the Canons of Judicial Conduct as it relates to conflicts of interest.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments, or agreements. In the course of time, after obtaining proper approval and within appropriate limits, I may consider teaching an occasional law school class.

Two co-authors and I are under contract to prepare an Administrative Law casebook for Aspen Publishing Company by July, 2002. My contribution to the project is over 90% complete. I anticipate some continuing editorial work on this project and perhaps on subsequent editions.

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

    See attached Financial Disclosure Report.

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

    See attached net worth statement.

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	$ 35,000	Notes payable to banks-secured	
U.S. Government securities-add schedule (US Savings Bonds ser. EE)	108,958	Notes payable to banks-unsecured	
Listed securities-add schedule 100 sh Oracle (ORCL) $1591 100 sh Verticalnet (VERT) $155 170 sh LexMark (LXK) $9132 82 sh Wal-Mart (WMT) $4538	15,416	Notes payable to relatives	
Unlisted securities--add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule (residence, National City Bank)	$ 97,240
Real estate owned-add schedule (residence, Lexington KY)	250,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	40,000		
Cash value-life insurance	12,341		
Other assets itemize:			
USAA Aggressive Growth Fund (IRA)	44,907		
TIAA-CREF (retirement account)	743,551		
USAA Subscriber Savings Account	1,504	Total liabilities	97,240
		Net Worth	1,154,437
Total Assets	1,251,677	Total liabilities and net worth	1,251,677
CONTINGENT LIABILITIES	None	GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

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

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

There is presently no selection commission in Kentucky to recommend candidates for nomination to the federal courts.

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

In November, 2000, I wrote to Senator McConnell expressing interest in either a position in the Department of State, the Department of Justice, or the federal judiciary. In February, 2001, I met informally with a member of Senator McConnell's office, and later that month directly with Senator McConnell, and in both instances expressed a strong interest in the Sixth Circuit. In May I was interviewed by the Office of the White House Counsel in Washington. I was subsequently informed by that office that my name would be sent to the Justice Department so that the FBI could perform a background investigation. That investigation was undertaken in the autumn of 2001. I was nominated by the President on December 19, 2001.

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

No.

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Rogers, John M.	U.S. Court of Appeals 6th Cir	12/28/2001
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
Judge (nominee)	X Nomination, Date 12/19/2001 __ Initial __ Annual __ Final	01/01/2000 to 11/30/2001
7. Chambers or Office Address	**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.**	
University of Kentucky College of Law Lexington KY 40506-0048	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Professor	University of Kentucky College of Law, Lexington KY 40506-0048
2	Consultant	Herman, Mathis, Casey & Kitchens
3	Consultant	Greenberg, Traurig

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	04/17/97	Contract with Ashgate Publishing Co. Ltd., Aldershot, England, for 10% royalty on my book, International Law and United States Law.
2	07/31/01	Publishing agreement with Aspen Publishers and co-authors M. Healy and R. Krotoszynski for an administrative law casebook with 15% royalty for the authors.
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	University of Kentucky College of Law	115,300
2	2000	Royalty from Ashgate Publishing.	1,394
3	2000	Consulting fees from Herman Mathis & Greenberg Traurig	3,983
4	2001	University of Kentucky College of Law	109,839

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Rogers, John H.	12/28/2001

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		Exempt
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1		Exempt	
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☒ 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	Date of Report
Rogers, John M.	12/28/2001

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Oracle Common Stock			J	T	Exempt				
2 LexMark common stock	A	Dividend	J	T	Exempt				
3 Wal-Mart common stock	A	Dividend	J	T	Exempt				
4 USAA Aggressive Growth Fund (IRA)			L	T	Exempt				
5 TIAA retirement account	E	Interest	N	T	Exempt				
6 CREF Retirement Accounts			O	T	Exempt				
7 U.S. Savings Bonds Series EE	D	Interest	M	T	Exempt				
8 First Federal Savings Bank savings account	A	Interest	J	T	Exempt				
9 Salomon Smith Barney money market account	A	Dividend	J	T	Exempt				
10 Inventory of imported needle-point items (orig. cost basis)			J	V	Exempt				
11 First Federal Savings Bank CD	B	Interest	J	T	Exempt				
12 Life ins. policy Phoenix Life Ins. Co.			J	T	Exempt				
13 1/3 of life ins. policy Uniformes Svs. Benefit Assn.	A	Distribution	J	T	Exempt				
14 USAA Subscriber's Savings Account	A	Distribution	J	T					
15 Central Bank Checking Account	A	Interest	J	T					
16									
17									

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rogers, John M.	12/28/2001

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rogers, John M.	12/28/2001

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	Chair	Association of American Law Schools Section on International Law
5	Steering Committee member	Central Kentucky Lawyers Chapter, Federalist Society for Law & Public Policy Studies
6	Co-Chair	Committee on International Legal Education, ABA Section on International Law and Practice

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	2001	Internet sale of imported needlepoint	2,888 (gross)
6	2000	Kentucky World Trade Center	
7	2000	Lexington Chinese School	
8	2001	Kentucky World Trade Center	
9	2001	Lexington Chinese School	
10	2000	Internet sale of imported needlepoint	1,192 (net)
11	2001	Royalty from Ashgate Publishing	288
12	2001	Consulting fee from Herman Mathis	227
13	2001	Language Unlimited, Inc.	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rogers, John M.	12/28/2001

IX. CERTIFICATION

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

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

Signature John M Rogers Date 27 Dec 01

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).

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Senator FEINGOLD. I would now like to invite our third panel to come forward, and I apologize in advance that we may have to recess briefly during a vote.

The panel that is coming forward: Judge David Stewart Cercone, Judge Kenneth Anthony Marra, Judge Morrison Cohen England, Jr., and Lawrence Greenfeld.

Welcome, and congratulations to each of you on your nomination. Will you please stand and raise your right hands to be sworn? Do you swear or affirm that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth?

Judge CERCONE. I do.

Judge ENGLAND. I do.

Judge MARRA. I do.

Mr. GREENFELD. I do.

Senator FEINGOLD. I thank all of you. We will start with Judge Cercone. Judge David Stewart Cercone, who has been nominated to the U.S. District Court for the Western District of Pennsylvania, is a graduate of Westminster College and Duquesne University School of Law. After law school, he served as Allegheny County assistant district attorney and then as a State magistrate judge. He was first elected to be a judge in the Allegheny County Court of Common Pleas, the State trial court bench, in 1986 and has served on that court ever since. He is a native of Pittsburgh, Pennsylvania.

We welcome you, Judge, and you may proceed with your opening remarks and any introductions you would like to make.

STATEMENT OF DAVID S. CERCONE, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Judge CERCONE. Thank you. Thank you, Mr. Chairman, and I do appreciate this opportunity to appear before the Judiciary Committee. Senator McConnell, thank you very much, and my thanks to Senator Leahy for scheduling this committee meeting.

With me this afternoon is my wife, Mary Ann Cercone; my son, Spencer; my son, Stephen. My youngest son, Christopher, was here. He's 5 years old and at the risk of being the first 5-year-old ever held in contempt of Congress, I decided to have him go down to the coffee shop.

Senator FEINGOLD. I hope he is having a good time.

[Laughter.]

Senator FEINGOLD. Anything else?

Judge CERCONE. That's all. Thank you.

Senator FEINGOLD. Thank you very much, sir.

Judge Kenneth Anthony Marra, who has been nominated to serve on the U.S. District Court for the Southern District of Florida, graduated from Stetson University College of Law. Upon graduating from law school, he became a trial attorney with the Justice Department. After leaving the Department of Justice, Judge Marra practiced law in Washington, D.C., and West Palm Beach, Florida. In 1996, Judge Marra was appointed to Florida's Fifteenth Circuit Court bench by the late Florida Governor Lawton Chiles.

We welcome you, Judge, and you may proceed with any introductions or any opening statement you would like to make.

STATEMENT OF KENNETH A. MARRA, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Judge MARRA. Thank you, Mr. Chairman. Also, I would like to thank you, Senator Leahy, and Senator McConnell for having this hearing and scheduling me before you. It's a pleasure for me to be here.

I would like to introduce the members of my family. I have with me my wife, Louise; my children Andrew, Joanna, Peter, Stephen, David, Mark, John Michael, and Annalise. My mother, Phyllis Marra, is here; my sister, Barbara Matarese; my brother, Alexander Marra; my niece, Julie Matarese; and my daughter's fiance, Christopher Iaciofoli.

Thank you. I have no opening remarks, and I'm prepared to answer any questions from the Chair and the members of the committee.

Senator FEINGOLD. I thank you very much, Judge, and I would at this point ask unanimous consent that statements in support of Judge Marra from Senator Bob Graham and Senator Bill Nelson be placed in the record, without objection.

Our next nominee is Judge Morrison Cohen England, Jr., who has been nominated to serve as U.S. District Judge for the Eastern District of California. He is a graduate of the University of the Pacific's McGeorge School of Law. After graduating from law school, he practiced law in Sacramento, California. In 1996, Judge England was appointed by Governor Pete Wilson to be a Sacramento Municipal Court Judge and then elevated to Superior Court a year later. In addition to holding down these demanding day jobs since 1988, Judge England has been a member of the United States Army Reserve, serving in the Judge Advocate General Corps.

Judge England, welcome. You may make any opening statement or introduce anyone.

STATEMENT OF MORRISON COHEN ENGLAND, JR., OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA

Judge ENGLAND. Thank you, Senator Feingold. I want to first of all thank Senator Leahy for scheduling this hearing and also thank you and Senator McConnell for being present at this hearing.

I would also like to thank Senator Feinstein for her introduction today and also for the kind words I have received moments ago from Senator Boxer.

I would like to introduce my wife, Nancy England, who has also joined me here today, and I'd also like to introduce a friend, Judge Eric Taylor, from the Los Angeles County Superior Court, who was also able to attend today at the last minute.

I would like to thank you once again for the opportunity to be here, and I do look forward to answering any and all questions that the committee may present to me today.

Thank you very much.

Senator FEINGOLD. Thank you very much, and welcome, of course, to all the guests that are with the nominees today.

Next we will turn to Mr. Lawrence Greenfeld. Mr. Greenfeld has been nominated to serve in the Department of Justice as the Director of the Bureau of Justice Statistics, the Nation's primary source for criminal justice statistics.

Mr. Greenfeld is a native Washingtonian who has had a long career at the Department of Justice beginning in 1976, when he worked as a social scientist with the National Institute of Justice. He worked for a decade as the chief of the Corrections Statistics Program and over time has risen to hold various deputy director positions within the Bureau of Justice Statistics. He has twice been Acting Director of the Bureau of Justice Statistics, once during the first 21 months of the Clinton administration and again during the previous 17 months of the current Bush administration.

We welcome you, Mr. Greenfeld. Congratulations on your long career of public service and on your nomination. You may make a statement or introduce whomever you wish.

STATEMENT OF LAWRENCE GREENFELD, OF MARYLAND, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE

Mr. GREENFELD. Thank you, Mr. Chairman. It is a pleasure and an honor to be here today and to have been nominated by the President to be Director of the Bureau of Justice Statistics and have the confidence of the Attorney General and the Assistant Attorney General in charge of the Office of Justice Programs.

I also want to thank Congressman Bartlett who offered some very kind words about me a few minutes ago.

I do want to introduce my wife, Barbara, who is here, and my wife's aunt, Sara Rothman, who is here. And I'm delighted, again, to have this opportunity. BJS is a superb agency with wonderful people that we're blessed with the best statisticians, I think, in public service. And I'm ready, willing, and able to answer all of your questions.

Senator FEINGOLD. Very good. I thank you. Since the vote hasn't started, we will just keep going forward. We will start with 7-minute rounds of questions. I will start with Judge Cercone.

I noticed Judge, that you imposed the death penalty in criminal cases four times in published cases. Two of those death sentences were reversed on appeal. As you know, Governor Ryan in Illinois has instituted a moratorium on executions as a result of certain inadequacies in the State's death penalty system as shown by the fact that 13 individuals sentenced to death in that State were exonerated.

There have been four exonerations in Pennsylvania, including a recent exoneration which actually was the 101st exoneration in the country since 1977.

First, I would like to ask you: Do you know exactly how many times you have imposed the death penalty?

Judge CERCONE. Senator, when you ask that question, I'm assuming that you mean in light of a jury's determination that the death penalty should be imposed and I as a judge formally impose the death penalty as required by law in light of a jury's finding?

Senator FEINGOLD. That would be a fair interpretation.

Judge CERCONE. In total, I believe that I imposed the death penalty four times.

Senator FEINGOLD. Okay. Do you have any concerns regarding the administration of the death penalty in Pennsylvania? For example, do you believe that any of the recent recommendations made in Illinois to make the sentencing of an innocent person to death less likely are applicable either to Pennsylvania's system or to the Federal system?

Judge CERCONE. Of course, I have concerns about it. I participated in the Pennsylvania Economy League's study of the Allegheny County Public Defender's Office, and one of the inadequacies that I observed and that I passed along to this independent organization studying the county's public defender office is that lawyers were overworked when it came to serious cases like the death penalty case; there were insufficient funds for such things as expert witnesses or investigation. And I passed that along to the independent organization that was reviewing this.

Senator FEINGOLD. Thank you.

Let me turn to Judge Marra. Over the last 25 years—oh, there is the vote. If there is no objection, I think I will simply recess at this point and return right away to continue the——

Senator MCCONNELL. May I suggest that you leave first, I ask some questions? Would that—it might save some——

Senator FEINGOLD. I am concerned about that because I may, Senator McConnell——

Senator MCCONNELL. Why don't we go vote?

Senator FEINGOLD. You are a very smart Senator, and I want to make sure——

Senator MCCONNELL. Why don't we just go vote?

Senator FEINGOLD. Yes, I appreciate your willingness to help, but I think we are just going to recess.

[Recess 3:13 p.m. to 3:34 p.m.]

Senator FEINGOLD. I will call the committee back to order, and I will resume my question period, first round.

Judge Marra, over the last 25 years, you have served—you have had a interesting and varied legal career as a trial attorney with the Department of Justice and in private practice and as a judge in the Palm Beach County Circuit Court. The vast majority of your experience, however, has been in the area of civil litigation. As a judge, you have only handled criminal matters for approximately the last 2 years.

As you know, of course, a significant portion of the Federal judicial docket in South Florida deals with complex criminal and immigration matters. Please tell the committee how your legal experience has prepared you to adjudicate complex criminal cases in Federal court and, if you are confirmed, how you will work to get up to speed on Federal criminal procedure and substantive law for the criminal matters that will be before you.

Judge MARRA. Yes, Mr. Chairman. As you just mentioned, I have been exclusively dealing with criminal cases for the last 2 and a half years, and I think that experience has prepared me well for handling whatever matters come before me on the Federal district court.

I deal with constitutional issues on a regular basis, search and seizure areas, right to counsel areas, Fifth Amendment matters, and I believe that experience has prepared me well to undertake the responsibilities in the Federal district court.

Senator FEINGOLD. Thank you.

In *McCaw Cellular* v. *Kwiatek*, the jury found the defendant corporation liable for disability discrimination based on the plaintiff's HIV-positive status and awarded him $1 million in punitive damages, but you reduced the punitive damage award by 90 percent to $100,000. I have a couple of questions in that connection.

What was the basis for this reduction? Do you believe it is proper for a judge to intervene in such cases and disturb jury verdicts? Do you believe that jury-awarded damages should always be subject to immediate judicial review and can you give me a sense of the factors that a district judge should use in making these kinds of determinations?

Judge MARRA. Well, in that particular case, Mr. Chairman, there was a statutory cap on punitive damage awards under the Florida Civil Rights Act at $100,000, so the basis for my reduction in that case was the statutory cap. But obviously all jury determinations on damages are subject to review on post-trial motions, and I would obviously consider all of the relevant factors and applicable law in making those determinations.

Senator FEINGOLD. Okay. Do you believe there is a constitutional right to privacy? If so, please describe what you believe to be the key elements of that right, and if not, please explain that.

Judge MARRA. Well, Mr. Chairman, the United States Supreme Court has articulated on numerous occasions that there is a right to privacy which is protected from infringement by both the State and the Federal Governments. And I certainly as a sitting judge now in the State courts and as a United States district court judge would uphold those precedents and apply them appropriately and accurately.

Senator FEINGOLD. What do you believe to be the key elements of that right?

Judge MARRA. The courts have recognized certain decisions which they believe are so personal and private and are related to aspect of liberty that the Government should not be allowed to infringe except in very limited circumstances.

Senator FEINGOLD. Thank you, Judge.

Now I will go to Judge England. Judge England, one case you cited as among your most significant cases involved a First Amendment suit by several members of the California Bar Association who claimed that some of their mandatory dues were being misused to fund political activities. In your decision in this case you relied on what some would see as a more stringent standard than that set forth by the Supreme Court in *Keller* v. *California State Bar*. You found that several bar association activities such as programs intended to increase minority membership, the Conference of Delegates, a mentor program, pairing attorneys with parolees, and most lobbying on State issues were not related to the core purposes of the organization and, therefore, that members' First Amendment rights were violated by using mandatory dues to fund such programs.

Please tell the committee why you employed a stricter standard in this case than that set forth by the Supreme Court, and please explain your understanding of the proper role of the Federal judiciary in protecting individual rights guaranteed by the Constitution or Federal statutes.

Judge ENGLAND. Thank you, Mr. Chairman.

Mr. Chairman, with respect to that particular case, it was my interpretation of *Keller* v. *State Bar of California*, the United States Supreme Court case, that I utilized in making that determination. In that case, we were looking at a situation where the members of the California State Bar were required by law to be a member of the organization in order to practice law. As such, it was a mandatory organization.

The United States Supreme Court in a number of cases, (not only the *Keller* case but also in labor relations cases) had indicated that when an individual is required as a matter of law to be part of an organization, the dues that are paid for that organization should be related to the operation of the organization.

Now, I would state and I did state in the opinion that various activities that the California State Bar was engaged in were, in fact, very laudable activities. However, the fact that they were laudable activities and were for good purposes did not necessarily mean that everyone who was a member of that organization should be required to fund those activities. That was an issue involving the First Amendment right of free speech.

I simply went through each of the activities that were listed and that were challenged by the plaintiffs in the case and applied what I felt was the Federal standard under the First Amendment and the *Keller* case. I then made my decisions as to each of the particular programs. Some I found did not qualify and, therefore, should not be chargeable, but there were a number of others which I did, in fact, find were chargeable.

Senator FEINGOLD. Could you say a bit about your understanding of the proper role of the Federal judiciary in protecting individual rights guaranteed by the Constitution and Federal statutes?

Judge ENGLAND. I think that it is clearly incumbent upon any Federal judge, at whatever level, to be very mindful of the United States Constitution, and in the case of a district court judge, to be very mindful and cognizant of the appropriate superior courts or appellate courts and their decisions.

It is important that the district court judge understand those precedents and follow those precedents and the law as it is written and as it has been determined over the past and make those the appropriate standards for making the decisions.

Senator FEINGOLD. I will start another round. I don't see Senator McConnell.

Again, to Judge England, do you believe there is a constitutional right to privacy?

Judge ENGLAND. The United States Supreme Court has made it clear in numerous opinions, Mr. Chairman, that the right of privacy is a fundamental right, and I do, in fact, believe that I will follow the Supreme Court's determination and decision making in that process.

Senator FEINGOLD. Okay. Thank you very much.

Let me ask each of the district court nominees the two questions that I asked Professor Rogers. First, as I said before, one of the traits that I am looking for in judges, that we all look for, is open-mindedness and fair-mindedness. I would like the judges to be willing to listen to arguments and change their minds about an issue if the law and the facts warrant it. I will start with Judge Cercone. Judge Cercone, could you give me an example from your legal career where you have changed or reversed a position based on the arguments that you heard in court or the information that a client or another lawyer has presented to you?

Judge CERCONE. If I could say generally, first, I think the record of trials in my courtroom will show that I oftentimes—sometimes even on my own motion—will reverse my own decisions. I once asked a question of a witness to which a lawyer objected, and I sustained the objection to my own question.

[Laughter.]

Judge CERCONE. So, Senator, I understand that open-mindedness is very important, and that is a trait that I hope I have a reputation for having.

An example would be sometimes when I handle criminal cases in sentencing, when I hear the facts of the case and read the pre-sentence reports, sometimes I form a general view as to what an appropriate sentence should be. But after I conduct a sentencing hearing, I hear from witnesses, including defense witnesses and the defendant. And if I'm convinced that such factors such as true remorse and other indications of rehabilitation are present, I will change my mind as to what my initial thoughts were as being one example.

Senator FEINGOLD. Thank you.

Judge Marra?

Judge MARRA. Thank you, Mr. Chairman. Just recently, a case I dealt with dealing with search and seizure issues, where I made an initial ruling and then upon further argument reversed the ruling. So I believe—and I can give you the specifics if you'd like, but I believe that I am very open-minded and I have a reputation of being open-minded and fair and would not take offense to motions for rehearing or reconsideration after I made a ruling, as I did in that particular case.

Senator FEINGOLD. Thank you, Judge.

Judge England?

Judge ENGLAND. Yes, Mr. Chairman. I think it is very important as a general rule that a judge not be so welded to a particular position or theory that he or she will not be able to listen to other ideas as well. I'm not able to come up with any specific times that I have changed my mind as to a particular issue, but I can in general terms tell you that I know that there has been at least one time in a sentencing issue, that after going through the initial pre-trial review of the case, hearing the actual trial as it went on in my courtroom, and as Judge Cercone indicated, listening thereafter to the other issues that came in with the family of victims and other things, where my decision changed as to how I was going to render a sentence. And I did make a change at that particular time.

There are more facts that I could give, but, unfortunately, the case is still pending at the appellate level, so I would—I'm not able

to give you more details at this time. But I think that's something that we all have to be aware of and not become so rigid in our mind-set that we become, as has been noted, a potted plant sitting on the bench.

Senator FEINGOLD. I have one more question for each of the judicial nominees and then some questions for Mr. Greenfeld, but at this point, I will turn to Senator McConnell, if he would like a round of questions.

Senator MCCONNELL. Yes, Mr. Chairman. There are questions I could ask, but as a supporter of the administration, I have the general view that you guys have probably been through a lot of gauntlets to get to this point. You have first managed to get past the Justice Department. Second, you have managed to get past the ABA. Third, you have managed to get past the Judiciary Committee staff to the point where you now have a hearing.

So I am satisfied, not having heard anything to the contrary, that all of you are qualified for the positions to which you have been nominated. So let me just congratulate you and hope that you will do an outstanding job in the positions to which you have been nominated and to which I hope you will soon be confirmed.

Thank you, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator McConnell, and let me start another round and ask each of the three judicial nominees if you can tell me of an instance in your professional career where you took an unpopular stand or represented an unpopular client and stood by it under pressure. Judge Cercone?

Judge CERCONE. I can only think of one example, and I went on the bench when I was 33, so I didn't have much of a legal career. So it did occur when I was a judge. And there was an instance where there was a defendant who was charged with recklessly endangering people by virtue of his horrific driving. He had gone on to—driven the wrong way on a ramp to a major highway in Pittsburgh and had endangered the lives of a lot of people. When he was apprehended by the police, it was alleged that he was—that there was some police brutality involved.

When the case came before me, the only issue was the question regarding his driving and what an appropriate sentence should be for that. There was some sentiment in the community that because, allegedly, he had been beaten up by the police that that should come into play in my sentencing him on his driving record and the facts of that case. And, besides, he had also a terrible driving record, I think, of about 11 convictions within the past year or two.

I determined that what happened between him and the police would be dealt with on another day in another courtroom on a different action, that it really wasn't for me to decide that issue. And as I said, there were—there was at least one editorial on the point which sort of painted the defendant in a light where he should have been given consideration for that, and I deemed it irrelevant to the proceedings before me.

Senator FEINGOLD. Thank you, Judge.

Judge Marra?

Judge MARRA. Thank you, Mr. Chairman. I think the best example that I can give the committee is when I was in private practice here in Washington, D.C. Our firm represented an Indian tribe in

the State of New York by the name of Cayuga Indian Nation of New York, and we brought a lawsuit on behalf of the Cayuga Indian Nation seeking to regain 100 square miles of Central New York State from approximately 5,000 landowners. And I can tell you that that was not a very popular lawsuit to be involved with, and we brought that suit and prosecuted it vigorously on behalf of our client.

Senator FEINGOLD. I am sure you have heard a lot about those kind of cases as well. Thank you, Judge.

Judge?

Judge ENGLAND. Yes, Mr. Chairman, I think that the case I can bring up, the easiest, would be the case involving the State bar. As I'm sure that you can understand, there were a number of groups that were very adamant about whether or not the State bar should be involved in certain positions, if you will, and felt that there were some things that the State bar should not be involved in, whether it be minority issues, women's issues, parole issues and those types of things. I received quite a bit of comment, mostly written in the press, and various bar journals as to my decision making and how it may have affected the continued viability of those particular parts of the State bar. But I did still make those decisions notwithstanding the comments that were made.

Senator FEINGOLD. Thank you.

Let me turn to Mr. Greenfeld now. According to a BJS report, in the year 2000, the most recent year with complete statistics, 14 States executed 85 prisoners, and at the end of that year, there were almost 3,600 people on death row. The year before that, in 1999, more people were executed in the United States than in any year since 1951. In the past decade, between 1990 and 2000, the number of people on death row increased by over 50 percent.

Now, I mention these facts because over this same period of increased imposition of the death penalty, the accuracy of our criminal justice system has been called into question by the exoneration of over 100 individuals on death row. By exoneration, I mean that their convictions were reversed and they were acquitted after another trial or the charges were dropped because, for instance, DNA evidence supported their claim of innocence.

Just yesterday I chaired a hearing to examine the findings of the Illinois Governor's Commission on Capital Punishment. I recognize that BJS does not take any position on the constitutionality of the death penalty in the studies it conducts, but does BJS have any plans to study the phenomenon of the exoneration of innocent people wrongly condemned to death? Why or why not?

Mr. GREENFELD. Our current series on capital punishment, which really dates back to 1930, examines the populations under sentence of death from a point of being sentenced entering prison until they are either executed, released, or die there. So we do not have data that examines the front end, the decisions that may be made prior to that part of the sentence being imposed.

There are probably a number of studies which could be done, and I believe NIJ is doing a study, I think at your request specifically, to look at that issue. So I think they are—that is being done at NIJ, and BJS has no plans at the moment, though there are things

that probably could be investigated and developed into a national statistical series.

Senator FEINGOLD. I am pleased you refer to that. I think that study has to do with the issues of racial and geographic disparities. What I am getting at here is the innocence issue of 101 cases. So I hope you will consider that in your future work.

One of the criticisms made of OJP and other Federal grant agencies in recent years is that there have been very tight or even symbiotic relationships developed in some pockets of some agencies between long-time career staff and long-time institutional grantees. In light of the need for arm's-length relationships and the oversight of Federal moneys, what steps will you take or have you taken as Acting Director of BJS to address this problem or this perception?

Mr. GREENFELD. Well, the principal grant activity at BJS is the National Criminal History Records Improvement Program, which grew out of the Brady Act and the National Child Protection Act. This particular grant activity provides funds to States to build the infrastructure to support the national instant check system as well as other background check systems, and over the years BJS has folded in the development of the National Sex Offender Registry and the National Protection Order Files, other components of the records development process.

I assign our grant monitors geographically so they maintain liaison with the States, normally over a long period of time, and it is important to build the rapport between the grant managers at BJS and the States to clearly identify the problems inherent in each State worthy of funding; and, secondly, for them to participate in our data collection activities to quantify the magnitude of those problems, so that we can tell you in each State, for example, how many of the records are automated, how many of the records are sharable under the FBI's Interstate Identification Index, how many records they submit to the Sex Offender Registry. So it's important to have that close relationship between BJS and the States.

On the other hand, my job is to enforce all of the special conditions that we impose on those grantees with respect to how they spend the money, what personnel are on board, whether what they do is complementary to the national system that we are trying to build and so forth.

So through the rigorous special conditions, I can enforce things that I know through your question you sound worried about. But we can enforce those, and then through—when a State needs a change, I can issue a grant adjustment which permits that change. And it has to be signed by me. So I have ultimately the enforcement authority. When States don't expend their funds, I can tell them to spend the funds on something else.

For example, after September 11th, I immediately asked them to identify where they do not have backup repositories for the criminal history records. And I wanted them, where they did not have such backup facilities, to spend the money on that, the unexpended Federal funds. So I can redirect them fairly quickly.

Senator FEINGOLD. All right. Thank you.

Mr. Greenfeld, in 1999, you worked on a report called "Contacts Between Police and the Public," which was an annual report to Congress required by the landmark Violent Crime Control and Law

Enforcement Act of 1994. This was the largest survey ever conducted among U.S. residents about contacts between police and the public and the outcome of those contacts. According to that survey, in 1999 one in every five Americans, 20 percent of those over 16, or 43 million people, had contact with police mainly through traffic stops 51 percent of the time. According to the survey, 10 percent of white drivers were stopped and 12 percent of black drivers surveyed were stopped, but only 75 percent African-Americans indicated that there was a legitimate basis for the stop while 90 percent of the white drivers felt the police officer had a legitimate reason to pull them over. African-Americans were almost twice as likely to have their vehicles searched than whites. Also, African-Americans were twice as likely to experience police threats or use of force during the traffic stop.

However, 75 percent of all of the nearly half a million people (422,000) involved in a police force incident considered the force used by police officers to be excessive and believe that the police acted improperly.

This was an interesting study. Do you know what effect, if any, this study has had on police policy? I am sure this was a huge task. How often do you think such a survey would be undertaken? What would you do differently in any future study on this topic?

Mr. GREENFELD. We plan to replicate the study every 2 years through—we utilize the National Crime Victimization Survey as a platform because it is a nationally representative sample of the U.S. population. And we then survey appropriate groups, in this case those age 16 and older, with this supplement to that crime survey.

So our plan is to repeat that every 2 years. This has been widely shared with International Association of Chiefs of Police, National Sheriffs Association. We spent a good deal of time with the Police Corps folks to try to introduce it into the training curricula. And we believe that it's—since it was the first study of this magnitude, we believe that by repeating it over time, we'll get a better sense of whether this is the kind of experience people do have.

But, again, I think you pointed out most of the key findings from it, and this is just a very important activity to keep going.

We also plan to complement it with some administrative data on use of force in particular, and that will come in the coming years through our budget process.

Senator FEINGOLD. Thank you for that answer.

Senator McConnell, anything further?

Senator MCCONNELL. Nothing further, Mr. Chairman.

Senator FEINGOLD. Thank you for your patience and participation. I want to thank all of you for your participation and join with Senator McConnell in congratulating you. I certainly think matters will in all likelihood move forward pretty well here. So I am pleased that we have gone through this part of the process.

The record will remain open for one week to allow Senators to submit written questions. That is the conclusion of the hearing.

[The biographical information of Judge Cercone, Judge Marra, Judge England, and Mr. Greenfeld follow.]

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

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

David Stewart Cercone, David Thomas Cercone

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

Judge of the United States District Court for the
Western District of Pennsylvania

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

Room 702, City-County Building, Pittsburgh, PA 15219
(412) 350-6801

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

November 24, 1952; Pittsburgh, PA.

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

Married; Mary Ann Kraus Cercone; District Justice (Magistrate); Commonwealth of Pennsylvania; 104 Linden Street, McKees Rocks, PA 15136. My spouse and I have three dependent children.

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

Duquesne University School of Law, Pittsburgh, Pennsylvania; 1974-1977; Juris Doctor, 1977.

Westminster College, New Wilmington, Pennsylvania; 1970-1974; Bachelor of Arts (*magna cum laude*), 1974.

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

1986-present:	Commonwealth of Pennsylvania, Judge, Allegheny County Court of Common Pleas. Administrative Office of Pennsylvania Courts 1515 Market Street, Suite 1414 Philadelphia, PA 19102
1983-present:	University of Pittsburgh, Part-time Faculty Member. Fifth and Bigelow Avenues Pittsburgh, PA 15260
1993-1995:	Robert Morris College, Part-time Faculty Member in Graduate School of Business. Fifth and Sixth Avenues Pittsburgh, PA 15219
1982-1985:	Commonwealth of Pennsylvania, District Justice (Magistrate). Administrative Office of Pennsylvania Courts 1515 Market Street, Suite 1414 Philadelphia, PA 19102

1979-1981:	Allegheny County, Assistant District Attorney Allegheny County Courthouse, Room 300 Pittsburgh, PA 15219
1978:	Allegheny County, Judicial Law Clerk. Court of Common Pleas Administrative Office 330 Frick Building Pittsburgh, PA 15219
1978-1979 and 1982-1985:	Sole Legal Practitioner. 706 Broadway McKees Rocks, PA 15136
1975-1977:	Duquesne University School of Law, Law Library Aid. 600 Forbes Avenue Pittsburgh, PA 15282
1975:	Allegheny County Public Defender's Office, Student Law Clerk. County Office Building, 4th Floor 542 Forbes Avenue Pittsburgh, PA 15219
1992-present:	Boys and Girls Club of Western Pennsylvania, Board of Directors.
1999-present:	University of Pittsburgh, Graduate School of Public and International Affairs, Board of Visitors.

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

None.

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

Phi Alpha Theta, national history honorary society (1973).
Pi Sigma Pi, national scholastic honorary society (1974).
Awarded Bachelor of Arts Degree, *magna cum laude* (1974).
Westminster College Distinguished Alumni Award (1994).
Italian Heritage Society Man of the Year in Law Award (1995).
Italian-American Veterans Association Outstanding Citizen Award (1997).
Teacher of the Year Award, University of Pittsburgh, Graduate School of Public and International Affairs (2000).
Inaugural Students' Choice Award, presented by the College of General Studies Student Government, University of Pittsburgh (2001).

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

Allegheny County Bar Association
Civil Litigation Committee
Court Rules Committee
Pro Bono Committee
Opportunities For Minorities Committee
Association of Trial Lawyers in Criminal Court
Bench-Bar Committee

Pennsylvania Conference of State Trial Judges

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

Admitted to practice before the following courts:

Pennsylvania Supreme Court, Superior Court,

Commonwealth Court and Common Pleas Court, November 1977.

United States District Court for the Western District of Pennsylvania, November 1977.

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

Boys and Girls Club of Western Pennsylvania, Board of Directors, 1992-present.

University of Pittsburgh, Graduate School of Public and International Affairs, Board of Visitors, 1999-present.

Italian Sons and Daughters of America, 1984-present.

Sons of Italy, 1997-present.

None of the above organizations formerly discriminated or currently discriminates on the basis of race, sex or religion.

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

In my capacity as administrative judge, I prepared the annual reports of the Allegheny County Court of Common Pleas, Criminal Division, for 1994 through 1998. Copies of these reports are attached.

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

I have never testified before a committee or subcommittee of the Congress.

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

Excellent; November, 2001.

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

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

1. Edmonds v. Cooper, GD 89-18962

The plaintiff commenced this civil action on behalf of herself and her physically impaired minor son against the physician who treated her during her pregnancy. The plaintiff asserted that a sonogram taken during her pregnancy revealed a fetal abnormality, and that she was not informed of that condition in time to obtain an abortion. The plaintiff sought damages arising from both the pregnancy and the birth of her son.

I disposed of this case by granting the defendant's motion for judgment on the pleadings on the basis that these causes of action were barred by a Pennsylvania statute that disallows actions for wrongful birth and wrongful life. I further determined that the statute was constitutional because it was rationally designed to meet a legitimate state interest.

Trial court opinion reported at 139 P.L.J. 366 (1991). Judgment affirmed by the Pennsylvania Superior Court at 414 Pa.Super. 567, 607 A.2d 1083 (1992).

2. Kaczorowski v. Gay, GD 90-05180

The plaintiff commenced this civil action on behalf of the estate of his deceased spouse and himself. The plaintiff asserted that the defendants were guilty of negligent supervision of their eighteen year old son who after consuming alcohol allegedly caused an automobile accident that killed the plaintiff's wife.

I disposed of this case by granting the defendants' motion for summary judgment. The undisputed facts demonstrated that the defendants were not home at the time their son consumed the alcohol, and that they had taken extraordinary measures to prevent him from drinking.

Trial court opinion reported at 140 P.L.J. 415 (1992). Appeal to Superior Court at No. 364 PGH 1992 discontinued, October 30, 1992.

3. Commonwealth v. Mialki, CC8801331

The seventeen year old defendant was charged with criminal homicide in connection with the death of a ninety-one year old woman. The defendant along with two other juveniles surreptitiously entered the victim's home to obtain money and jewelry, taped her to a chair, and abandoned her. The victim was discovered four days later and subsequently died from severe dehydration.

The central issue raised in this case was whether the defendant's petition to transfer the homicide charge from Criminal Court to Juvenile Court should be granted. I denied the defendant's petition on the basis that he was not amenable to treatment as a juvenile under the totality of the circumstances presented in this case.

The defendant was convicted of the charges, and subsequently sentenced.

Affirmed by the Superior Court at No. 1587 PGH 1998. The Superior Court's decision is noted at 399 Pa.Super. 648, 573 A.2d 1159 (1990).

4. Commonwealth v. Buckner, CC9608176/CC9608180

In this high-profile case, Darlene Buckner and her son, Gregory Brown, were each charged with three counts of murder in the second degree, two counts of arson, insurance fraud, and other related crimes in connection with a fire that claimed the lives of three Pittsburgh firefighters. Defendant Buckner petitioned the trial court to have her case severed from that of her son and to be given a separate trial. This petition was presented because the prosecution intended to introduce evidence concerning a confession allegedly made by Brown to an acquaintance which inculpated Brown and "his family."

I granted Buckner's petition on two grounds. First, the evidence constituted hearsay as to her, and would deprive her of her Sixth Amendment right to confrontation. Secondly, the words "his family" lacked sufficient probative value to outweigh the prejudicial impact they would have on Buckner.

Defendant Buckner was convicted of insurance fraud and acquitted of all other crimes.

The decision was affirmed by the Pennsylvania Superior Court at No. 1621 Pittsburgh (1997).

5. Commonwealth v. Flaherty, CC8813100

In this criminal case, the defendant was charged with two counts of possession with the intent to deliver a controlled substance.

The defendant filed a motion to suppress the evidence of drugs seized from his automobile claiming that Fourth Amendment rights had been violated.

I granted the defendant's motion to suppress finding that probable cause was lacking for the issuance of a search warrant for his automobile. I also determined that Pennsylvania's limited "good faith" exception to the exclusionary rule was inapplicable to the facts of this case.

The Commonwealth appealed my order granting the defendant's motion to suppress.

Affirmed by the Superior Court at 400 Pa.Super. 397, 583 A.2d 1175 (1990).

6. Commonwealth v. Jackson, CC9609480

In this criminal case, the defendant was charged with homicide by vehicle and several other related crimes.

This case raised the following issue of first impression in Pennsylvania: whether a participant in a drag race can be held responsible for the death of an innocent bystander who was struck by another drag racer.

After examining factually similar cases from other jurisdictions, I decided that the defendant could be held responsible on an accomplice liability theory.

The defendant was convicted of the charges, and subsequently sentenced.

Affirmed by the Pennsylvania Superior Court at 744 A.2d 271 (1999).

7. Livingston v. Murray, GD 90-5996

The plaintiff, a former athletic director at Duquesne University, commenced this defamation action against Duquesne University and its president, John E. Murray, Jr. According to the plaintiff, President Murray made the following statement which was contained in an article published in the Pittsburgh Press following the university's hiring a new athletic director: "[n]ow we have an AD who has respect around the country."

I disposed of this case by granting defendants' motion for summary judgment. I analyzed the allegedly defamatory statement in accordance with existing legal authority, and I concluded that it was incapable of defamatory meaning.

Affirmed by the Superior Court at 417 Pa.Super 202, 612 A.2d 443 (1992).

8. Commonwealth v. Conard, CC9700690
Commonwealth v. Heim, CC9700691
Commonwealth v. Berkelbaugh, CC9700959

These high-profile consolidated cases stemmed from an escape of six inmates from the Western State Correctional Institute at Pittsburgh on January 8, 1997. The co-defendants were charged with escape and criminal conspiracy.

Several significant pretrial issues were raised in these cases. These issues included 1) whether intolerable prison conditions could be asserted as a defense to escape, 2) whether double jeopardy barred the prosecution of these defendants because prison administrative sanctions had been imposed on them, and 3) whether the disruptive behavior of a co-defendant before a jury entitled the other co-defendants to a separate trial.

I denied all defense pretrial motions basing my decisions on a controlling Pennsylvania statute and case law.

Each of the defendants was convicted of the charges, and subsequently sentenced.

Affirmed by the Pennsylvania Superior Court at Nos. 916 Pittsburgh 1998, 994 Pittsburgh 1998 and 1123 Pittsburgh 1998.

9. Commonwealth v. Bailey, CC9314654

The defendant was charged with first degree murder in connection with the stabbing death of his ex-girlfriend.

The following issues were raised during the trial: 1) whether a mistrial should have been declared because one of the jurors brought extraneous information into the deliberation room, 2) whether a mistrial should have been declared after a juror stated that she was being intimidated by other jurors, and 3) whether a mistrial should have been declared when the prosecutor made prejudicial remarks in her closing.

I denied all defense motions for a mistrial. I conducted an evidentiary hearing regarding the extraneous material brought into the jury deliberation room, and I found that no prejudice was suffered by the defendant. I determined that a cautionary jury instruction would cure the harm caused by the prosecutor's prejudicial remarks. I also determined that reinstructing the jury on how they were to properly arrive at a verdict would remedy the issue concerning the juror who claimed she felt intimidated.

The defendant was convicted of the charges, and subsequently sentenced.

Affirmed by the Superior Court at No. 754 PGH 1995. The Superior Court's affirmance is recorded at 679 A.2d 842 (1996).

10. Kapres v. Heller, GD 88-4889

The plaintiff brought this civil action against various defendants for negligently serving him alcohol which caused him to become intoxicated. The plaintiff asserted that his intoxicated condition was the legal cause of his being struck and injured by an automobile. All of the parties were minors for purposes of furnishing or consuming alcohol under Pennsylvania law.

The facts of this case presented an issue of first impression in Pennsylvania. The issue was whether a minor can be held liable for furnishing alcohol to another minor, who is subsequently injured as the proximate result of his intoxicated condition.

After examining the case law that addressed the concept of social host liability, I determined that one minor does not owe a duty to another minor regarding the furnishing or consumption of alcohol. Accordingly, I granted the summary judgment motions filed on behalf of the defendants.

Affirmed by the Superior Court at 417 Pa.Super. 371, 612 A.2d 987 (1992). The Pennsylvania Supreme Court later affirmed at 536 Pa. 551, 640 A.2d 888 (1994). The trial court's opinion is reported at 139 P.L.J. 137 (1991).

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

1. Commonwealth v. James Raub, CC8506092

Reversed by the Superior Court at No. 1410 Pittsburgh 1986. This was a driving under the influence case in which I excluded evidence relating to the defendant's good character for sobriety. I relied on *Commonwealth v. Zeger*, 193 Pa. Super. Ct. 498, 165 A.2d 683 (1960), which held that character evidence is relevant only when the defendant is charged with an offense involving criminal intent. The Superior Court reversed, holding that this

evidence should have been admitted to allow the defendant the opportunity to rebut the evidence of his intoxication, even in a driving under the influence case where criminal intent is no issue.

2. Commonwealth v. Bali Ali Diaab, CC8704372

In this case the defendant's convictions for assault by a prisoner, criminal attempt and criminal conspiracy were affirmed by the Superior Court, but the case was remanded for resentencing because the defendant was sentenced for both criminal attempt and criminal conspiracy, two inchoate crimes. Under a Pennsylvania statute, a defendant cannot be sentenced on two inchoate crimes. The Superior Court's order was entered at No. 998 Pittsburgh 1988.

3. Commonwealth v. Craig S. Carter, CC8908266

Reversed by the Superior Court at No. 752 Pittsburgh 1990. In this case I permitted an experienced police officer to offer expert testimony to the effect that the activity witnessed was consistent with drug dealing. The Superior Court held that this evidence was inadmissible since the jury could decide the matter based on the evidence presented without expert testimony.

4. In re: Lotto Jackpot Prize of December 3, 1982, GD90-14415

I granted a petition allowing the assignment of lottery prize winnings, relying on a section of the state lottery law authorizing such assignments pursuant to "an appropriate judicial order." The Commonwealth Court reversed at 144 Pa. Cmwlth. 658, 602 A.2d 401 (1992), holding that my court lacked subject matter jurisdiction. The state Supreme Court, at 533 Pa. 401, 625 A.2d 637 (1993), affirmed the holding of the Commonwealth Court in part. The Supreme Court held that the my court did in fact have subject matter jurisdiction, but that the language of the statute authorizing the assignment of lottery winnings pursuant to "an appropriate judicial order" did not give the my court authority to approve the assignment of a lottery prize.

5. John R. Robinson v. McGraw-Hill, GD 89-09488

Reversed by the Superior Court at No. 1702 Pittsburgh 1991. In this employment contract case, I found that the evidence established as a matter of law that the parties had entered into an employment contract for a definite term, and that the presumption of at-will employment did not apply. The Superior Court held that sufficient evidence existed to submit the issue to the jury, and accordingly the jury should have been charged on the presumption of at-will employment.

6. Moscatiello Construction Company v. City of Pittsburgh, GD90-15247

The Commonwealth Court reversed at No. 1337 C.D. 1992 based on an intervening decision of the Pennsylvania Supreme Court. The case involved a summary judgment motion filed on behalf of the City of Pittsburgh after a jury had been selected. I heard the motion over an objection from Moscatiello because it, as a party to the contract in dispute, should have known of the contractual provision raised in the summary judgment motion, and thus had an a adequate opportunity to prepare a response. The Commonwealth Court concluded that while the trial court was understandably unaware of the fact that the Supreme Court was about to change the law, Moscatiello was nevertheless denied procedural due process by being accorded less than the usual amount of time to respond, notwithstanding its familiarity with the basis of the motion.

Upon remand, the Moscatiello was given an opportunity to respond to the motion for summary judgment. The motion was again granted on the basis that the case was barred by an alternative dispute resolution clause contained in the contract. In a subsequent appeal filed at No. 2696 C.D. 1993, the Commonwealth Court, in a two-one opinion, reversed my summary judgment decision and remanded for trial on the merits, holding that the City had waived its ability to rely on the clause by not timely raising it. The dissenting opinion would have affirmed.

7. Tammy Allen v. Eugene Allen and Elizabeth Ann Allen, GD89-11380 and General Accident Insurance Company of America v. Eugene Allen, GD 90-14002

Reversed by the Superior Court at No. 1546 Pittsburgh 1993. These civil actions involved the sexual abuse of grandchildren by defendant Eugene Allen, the failure of his wife, Elizabeth Ann Allen, to take steps to protect her step-grandchildren from her husband, and the insurance company's duty to defend in this matter. We held that a spouse who knew or should have known of her husband's sexual abuse of grandchildren in the family residence owed a duty to warn and duty to protect the grandchildren. While the Superior Court upheld the judgment against the man who abused his grandchildren, the Court determined that no special relationship existed between the grandfather's wife and his grandchildren. Two judges dissented and would have affirmed, and two other judges concurred with the majority as to the duty to protect, but would have affirmed as to the duty to warn.

In the companion case involving insurance coverage, the Superior Court at No. 1538 Pittsburgh 1994, reversed my order denying the insurance company's motion for summary judgment as to a negligence claim against defendant Eugene Allen. The Court determined that the grandfather's sexual abuse involved expected or intended conduct, and as such, was not covered under the homeowners insurance policy. The Court affirmed our granting a summary judgment in favor of the grandchildren relating to the insurance company's duty to defend the grandfather's wife, as the allegations against her did not fall within the intentional injury exclusion. The Court reversed, however, my finding that the grandfather's wife's negligence constituted more than one occurrence under the policy language, but rather was continuing negligence.

8. Kroen v. Bedway Security Agency, GD89-13760

Reversed by Superior Court at No. 1621 Pittsburgh 1992. I granted a summary judgment motion in a civil case alleging wrongful discharge, on the basis that the dismissal of the plaintiff's private criminal complaint against his employer, the defendant, established collateral estoppel in the civil action. The Superior Court reversed and remanded for trial, holding that the dismissal was not a final judgment on the merits, which is required for collateral estoppel to apply.

9. Commonwealth v. Timothy Boczkowski, CC9415430

Superior Court at No. 1857 Pittsburgh 1995, affirmed in part and reversed in part. This appeal, taken by the Commonwealth, dealt with my denial of a motion in limine in which the Commonwealth attempted to introduce other crimes evidence against the defendant in a homicide case. The case involved the death of the defendant's wife in a hot tub, and the Commonwealth sought to introduce evidence that his prior wife had died under virtually the same circumstances. We held that this evidence was admissible only if the defendant opened the door to it by arguing that his wife's death was an accident. The Superior Court affirmed the holding that the evidence surrounding the death of the defendant's former wife was admissible, but reversed that portion of our order which provided that said evidence was only admissible to rebut a claim of accidental death of his current wife. A dissenting judge found that my ruling should have been affirmed in its entirety.

10. Commonwealth v. David M. Torres, CC9603250

Superior Court at No. 1330 Pittsburgh 1997 reversed my judgments granting suppression motions in two consolidated cases. I based my orders upon findings that the affidavits in support of the search warrants were insufficient to establish probable cause. The Supreme Court of Pennsylvania at 764 A.2d 532 (Pa. 2001), agreed with my analysis in one case, and reversed the judgment of the Superior Court. In the second case, the Supreme Court, while agreeing that the affidavit failed to establish probable cause, determined that the defendant lacked an expectation of privacy in the apartment searched, and affirmed the judgment of the Superior Court.

11. Commonwealth v. Rashad Clark, CC9402303/CC9401016

At trial, I permitted the prosecution to introduce evidence of the defendant's involvement in gang activity. I admitted this evidence for the limited purpose of establishing a motive for an otherwise inexplicable act of violence. Although the judgment of sentence was affirmed by the Superior Court, two

judges wrote that the evidence in question was inadmissible because the involvement in gang activity did not sufficiently relate to the defendant's reason for committing the crime charged, one judge found that it was harmless error, the other that is was not. The Superior Court's affirmance was filed at No. 2169 Pittsburgh 1994.

12. Commonwealth v. Ralph Bolden, CC9500193/CC9500097

The Supreme Court of Pennsylvania at No. 205 Capital Appeal Docket, affirmed the defendant's conviction of criminal homicide and other charges, but vacated the penalty of death imposed by a jury. The Court held that there was insufficient evidence for the trial court to instruct the jury that it could find as an aggravating circumstance that the defendant knowingly created a grave risk of death to another person in addition to the victim of the murder. One justice agreed with my decision to permit the jury to consider this aggravating circumstance.

13. Commonwealth v. John Thomas Spiewak, CC8800064

Reversed by the Pennsylvania Supreme Court at No. 26 W.D. Appeal Docket 1991. The defendant was charged with engaging in involuntary deviate sexual intercourse with his fifteen year old stepdaughter. At trial, the defendant attempted to inquire into a prior statement made by his stepdaughter that she had engaged in sexual activity with another man. The purpose of this inquiry was to attack his accuser's credibility. I disallowed this evidence on the basis that it was barred by the Rape Shield Law. The Superior Court affirmed my decision at No. 119 Pittsburgh 1989. The state Supreme Court reversed, however, holding that such evidence should be admitted when it may exculpate a defendant from the crime charged.

14. Lois Leone v. Victor J. Thomas, M.D., GD 87-11621

Reversed by the Superior Court at No. 786 Pittsburgh 1992 . In this medical malpractice case, I denied the Plaintiff's motion for a jury instruction on the doctrine of *res ipsa loquitur*. The Superior Court held that there were sufficient facts adduced at trial to warrant the instruction.

15. Commonwealth v. Frederick Mayhue, CC8701250

The defendant's conviction of first degree murder was affirmed, but his death sentence was vacated and remanded to my court for imposition of a life sentence at No. 28 Capital Appeal Docket 1993. The state Supreme Court held that the aggravating circumstance of "contract to kill" did not exist when the defendant killed his wife himself, notwithstanding the fact that he contracted with at least three other people to have her murdered. The Court noted that this was a case of first impression.

16. Commonwealth v. Edwin R. Crosby, CC8710098/8710674

The defendant was convicted on two separate counts of driving under the influence of alcohol that occurred within a week of each other, one of which involved a traffic accident. At the time of sentencing, I ordered that the truck he was driving at the time of the incidents be forfeited as "derivative contraband," and as a rehabilitative measure. The Superior Court at No. 405 Pittsburgh 1988, held that while the vehicle could not be forfeited for rehabilitative purposes, it was forfeitable as derivative contraband. The Court remanded the case for a hearing on whether any other party held an interest in the vehicle, and whether forfeiture would penalize other family members. On remand, I vacated my forfeiture order, finding that the defendant had begun alcohol treatment, and that the forfeiture would create a family hardship.

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

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

1. Commonwealth v. Lehrman, CC9606454,9607040

The defendant was charged with murder in the second degree, criminal conspiracy and abuse of a corpse.

This case presented two constitutional issues: 1) whether the defendant's Fifth Amendment privilege against self-incrimination was violated when he was not given his *Miranda* rights prior to making a statement to the police, and 2) whether his Sixth Amendment right to counsel was violated when he was not afforded counsel during the police interrogation.

I determined that neither of the defendant's constitutional rights were violated. There was no violation of the defendant's privilege against self-incrimination because he was not being interrogated at the time he made his initial statement, and he was advised of his constitutional rights by the police before the subsequent interrogation commenced. There was no violation of the defendant's Sixth Amendment right to counsel because he did not request an attorney when questioned by the police.

The defendant was convicted of the charges, and subsequently sentenced.

Affirmed by the Superior Court at No. 2423 Pittsburgh 1997 (1997).

2. Commonwealth v. Solberg, CC8800328

The defendant was charged with defiant trespass and harassment.

The following constitutional issues were raised in this case: 1) whether the trial court erred in refusing the defendant's waiver of a jury trial, and 2) whether the trial court erred in removing the defendant from the courtroom and continuing the trial in his absence.

Under Pennsylvania law a defendant's right to waive a jury trial is not absolute, but rather subject to the approval of the trial judge. Here the defendant by taunting me with derogatory and insulting remarks, and then demanding a non-jury trial, attempted to create a basis for a subsequent challenge to my impartiality in the event of a conviction. I refused to accept the defendant's waiver in order to prevent a misuse of the judicial process. The defendant was removed from the courtroom as a result of his disruptive behavior during the trial, despite numerous admonishments from me. While due process and the right to confrontation guarantee a defendant the right to be present during trial, he may waive this right by engaging in contumacious behavior. I deemed the removal of the defendant necessary to control the disruptive atmosphere created by the defendant.

The defendant was convicted of the charges, and subsequently sentenced.

Affirmed by the Superior Court at No. 1903 Pittsburgh 1988 (1988).

3. Commonwealth v. Morris, CC9511857

In this criminal case, the defendant was charged with possession of a controlled substance. He filed a motion to suppress the evidence.

The sole constitutional issue raised in this case was whether the police stop and subsequent seizure of contraband from the defendant violated his right under the United States and Pennsylvania Constitutions to be free from unreasonable searches and seizures.

I determined that under the facts presented in this case, what occurred between the police and the defendant constituted a mere encounter rather than an investigatory stop. My comprehensive opinion reviews the law that governs this issue.

The defendant was convicted of the charge and subsequently sentenced.

Affirmed by Superior Court at 1864 Pittsburgh 1996 (1996).

4. Commonwealth v. Kuzmanko, CC9605754

The defendant was charged with murder in the first degree. He filed a motion to suppress two inculpatory statements allegedly made by him:

This case presented three constitutional issues: 1) whether the defendant's first confession was involuntary due to an unreasonable delay in arraigning him, 2) whether the police violated the defendant's Fifth Amendment rights by failing to re-advise him of his *Miranda* rights upon recommencing their interrogation of him seven hours after they initially questioned him, and 3) whether the defendant's second confession was elicited in violation of his Sixth Amendment right to counsel.

Based upon the evidence presented at the suppression hearing, I found that the defendant was not under arrest

at the time he made the first inculpatory statement. Therefore, I determined that this statement was not involuntary as no duty existed to provide him with a timely preliminary arraignment. On the second constitutional issue, I found under the totality of the circumstances that the *Miranda* warnings given to the defendant several hours before his confession had not become stale. On the final issue, I concluded that the defendant effectively waived his right to counsel by failing to request counsel after being advised by the police of his constitutional rights. For the foregoing reasons, I denied the defendant's motion to suppress.

The defendant was convicted of first degree murder, and subsequently sentenced.

Affirmed by Superior Court at No. 310 Pittsburgh 1997 (1997).

5. Edmonds v. Cooper, GD 89-18962

The plaintiff commenced this civil action on behalf of herself and her physically impaired minor son against the physician who treated her during her pregnancy. The plaintiff asserted that a sonogram taken during her pregnancy revealed a fetal abnormality, and that she was not informed of that condition in time to obtain an abortion. The plaintiff sought damages arising from both the pregnancy and the birth of her son.

I disposed of this case by granting the defendant's motion for judgment on the pleadings on the basis that these causes of action were barred by a Pennsylvania statute that disallows actions for wrongful birth and wrongful life. I further determined that the statute was constitutional because it was rationally designed to meet a legitimate state interest.

Trial court opinion reported at 139 P.L.J. 366 (1991). Judgment affirmed by the Pennsylvania Superior Court at 414 Pa.Super. 567, 607 A.2d 1083 (1992).

6. Commonwealth v. Buckner, CC9608176/CC9608180

In this high-profile case, Darlene Buckner and her son, Gregory Brown, were each charged with three counts of murder in the second degree, two counts of arson, insurance fraud, and other related crimes in connection with a fire that claimed the lives of three Pittsburgh firefighters. Defendant Buckner petitioned the trial court to have her case severed from that of her son and to be given a separate trial. This petition was presented because the prosecution intended to introduce evidence concerning a confession allegedly made by Brown to an acquaintance which inculpated Brown and "his family."

I granted Buckner's petition on two grounds. First, the evidence constituted hearsay as to her, and would deprive her of her Sixth Amendment right to confrontation. Secondly, the words "his family" lacked sufficient probative value to outweigh the prejudicial impact they would have on Buckner.

Defendant Buckner was convicted of insurance fraud and acquitted of all other crimes.

The decision was affirmed by the Pennsylvania Superior Court at No. 1621 Pittsburgh (1997).

7. Commonwealth v. Flaherty, CC8813100

In this criminal case, the defendant was charged with two counts of possession with the intent to deliver a controlled substance.

The defendant filed a motion to suppress the evidence of drugs seized from his automobile claiming that Fourth Amendment rights had been violated.

I granted the defendant's motion to suppress finding that probable cause was lacking for the issuance of a search warrant for his automobile. I also determined that

Pennsylvania's limited "good faith" exception to the exclusionary rule was inapplicable to the facts of this case.

The Commonwealth appealed my order granting the defendant's motion to suppress.

Affirmed by the Superior Court at 400 Pa.Super. 397, 583 A.2d 1175 (1990).

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

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

None.

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

No.

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

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

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

I served as law clerk to the Honorable Paul R. Zavarella, Allegheny County Court of Common Pleas, from January 1978 to March 1979.

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

I was a sole practitioner from 1978 to 1979 and 1982 to 1986. My address was 706 Broadway Avenue, McKees Rocks, PA 15136.

An individual who has direct personal knowledge about my law office is Mr. Joseph Cirlilano, 78 Herbst Road, Coraopolis, PA 15108, (412) 331-0185.

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

From 1979 - 1982 I served as an Allegheny County Assistant District Attorney. My office address was Allegheny County District Attorney's Office, 303 Courthouse, Pittsburgh, PA 15219. I specialized in the prosecution of crimes against persons such as rape and other sexual offenses, kidnapping and aggravated assaults.

Individuals who have direct personal knowledge about my work in the Allegheny County District Attorney's Office are: the Honorable Robert E. Colville, 315 Courthouse, Pittsburgh, PA 15219, (412) 350-5547; Mr. Chris G. Copetas, Allegheny County District Attorney's Office, 303 Courthouse, Pittsburgh, PA 15219, (412) 350-4400; and Ms. Clair C. Capristo, Allegheny County District Attorney's Office, 303 Courthouse, Pittsburgh, PA 15219, (412) 350-4400.

From 1982 through 1985 I was a district justice (magistrate). My office address was District Court, 907 Valley Street, McKees Rocks, PA 15136. In this position I presided over preliminary hearings, summary trials, landlord-tenant hearings and small claims civil trials.

Individuals who have direct personal knowledge about my service as a district justice are: Mrs. Mary Anzelone, 105 St. Anne Drive, Glenshaw, PA 15116, (412) 486-1638; and Mrs. Joanne Fischio, 824 Ridge Avenue, McKees Rocks, PA 15136, (412) 771-7418.

I have been part-time faculty member at the University of Pittsburgh since 1983. My office address is 3G07 Posvar Hall, Pittsburgh, PA 15260. I teach two undergraduate courses: Constitutional Criminal Procedure and Introduction to Legal Studies.

Individuals who have direct personal knowledge about my service on the University of Pittsburgh faculty are: Dean Carolyn Ban, 3G07 Posvar Hall, Pittsburgh, PA 15260, (412) 648-7600; and Dr. Lee Weinberg, 3G07 Posvar Hall, Pittsburgh, PA 15206, (412) 648-2652.

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

I maintained a private law practice from 1978 to 1979 and from 1982 to 1986. Since my legal practice coincided with my service as a judicial law clerk and a district justice, it was part-time and generally limited to the areas of probate law, divorce and real estate transactions. During the periods between my private law practice, I worked as a full-time assistant district attorney, in which capacity I handled hundreds of criminal prosecutions.

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

The law offices of my part-time law practice were located in McKees Rocks, Pennsylvania, a suburb of Pittsburgh. My former clients were mostly individuals requiring legal assistance with estate planning, deed transfers, or estate

probate. I also handled numerous uncontested divorces. As an assistant district attorney, I represented the people of the Commonwealth of Pennsylvania.

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

From 1978 to 1979 and from 1982 to 1986, I appeared in court on behalf of private clients only occasionally because I was simultaneously serving as a judicial law clerk or a district justice. I appeared in court on a daily basis between 1979 and 1982 while working as an assistant district attorney.

(2) Indicate the percentage of these appearances in

(1) federal courts; 0%
(2) state courts of record; 80%
(3) other courts. 20% (minor judiciary)

(3) Indicate the percentage of these appearances in:

(1) civil proceedings; 10%
(2) criminal proceedings. 90%

(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 jury and non-jury trials continuously between 1979 and 1982 while working as an assistant district attorney. I would estimate that the number of cases that I tried to verdict exceeded two hundred. I was sole counsel representing the Commonwealth of Pennsylvania in all of these cases.

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

Approximately 30% of these trial were decided by a jury.

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

I never practiced before the United States Supreme Court.

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

As an assistant district attorney and immediately thereafter a member of the judiciary, I have had limited opportunity to engage in pro bono services. I have, however, served the disadvantaged in other ways as described below.

I serve on the Allegheny County Bar Association's Opportunities For Minorities Committee. One of the purposes of this committee is to increase the participation of minorities in the legal profession of our community. I have participated in such activities as job fairs and seminars designed to acquaint young minority lawyers to employment opportunities in the Pittsburgh area.

I have been a member of the Board of Directors of the Boys and Girls Club of Western Pennsylvania for the past six years. This organization has four separate club locations in Allegheny County. Each provides youth activities including tutoring, swimming, organized sports and summer camps. As a member of the Board of Directors I attend regularly scheduled meetings, participate in programs such as awards ceremonies and holiday parties and sit on the advisory board for one of the local club units (Sto-Ken-Rox Unit).

In 1994 in my capacity as Administrative Judge of the Criminal Division, I implemented the Pro Bono Program. This program requires all defense lawyers who receive court appointments to represent indigent defendants to provide free legal services in one out of every three appointments. In 2001, 16.6% of the court appointments were done pro bono, resulting in a savings of approximately $100,000.00 to the taxpayers of Allegheny County.

I have volunteered to supervise without compensation student interns from various local colleges.

The most significant way that I have helped the disadvantaged was by establishing the first "drug court" in western Pennsylvania. This comprehensive program espouses early identification and screening of offenders struggling with drug addiction. Essential to the program is direct and frequent contact between the offenders and the same judge, and intensive supervision by the probation department. Goals of the program are to reduce drug addiction and thereby reduce crime recidivism among drug-addicted offenders.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;

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

(3) the party or parties whom you represented; and

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

Nearly all of the litigated matters that I personally handled were criminal prosecutions that were conducted between 1979 and 1982 during my employment as an Allegheny County assistant district attorney. (I left the District Attorney's Office to become a member of the judiciary.) In my capacity as a county prosecutor, I appeared in criminal court on a daily basis. I was assigned to a specialized unit that prosecuted serious crimes against the person that included sexual offenses and aggravated assaults, and most of my significant cases were of this type. Because twenty years have passed since my last court appearance, I can only recall four cases in detail. Each case listed below was a criminal trial tried before a jury in which I served as the prosecuting attorney.

1. Commonwealth v. Edward McCants, CCNo. 7907233
   date of representation -1980
   court -Allegheny County Court of Common Pleas, Criminal Division
   judge - The Honorable Ralph J. Cappy
   defense counsel - Albert W. Schollaert
   U.S. Attorney's Office
   633 USPO & Courthouse 15219
   (412) 644-6600

   This high-profile case involved the successful prosecution of Edward McCants - nicknamed the "jailhouse rapist." The defendant compelled a fellow inmate at the Allegheny County Jail to engage in sexual intercourse by using threats and intimidation. The defendant was convicted of rape and involuntary deviate sexual intercourse. He was subsequently convicted of several other unrelated rapes that were committed while incarcerated at the county jail.

2. Commonwealth v. Robert Dourlain, CCNo. 8006949
   date of representation -1980
   court - Allegheny County Court of Common Pleas, Criminal Division
   judge - The Honorable James F. Clarke (deceased)
   defense counsel - James A. Wymard
   220 Grant Street - 3rd Floor
   Pittsburgh, PA 15219
   (412) 281-6225

The defendant was convicted by a jury of attempting to rape a young girl as she walked home from a local library. The defendant had a lengthy criminal history that included prior sexual assaults. This was a high profile case because the defendant was a prime suspect in the murder of Sharon Percy, daughter of former U.S. Senator Charles Percy.

3. Commonwealth v. Theopolis Bell, CC No. 8002902
date of representation -1981
court - Allegheny County Court of Common Pleas, Criminal Division
judge - The Honorable George Ross
defense counsel - Kenneth Bundy
Washington, D.C.
Eugene F. Scanlon, Jr.
(now the Honorable Eugene F. Scanlon, Jr.)
817 City-County Building
Pittsburgh, PA 15219
(412) 350-6052

The defendant, Theo Bell, a popular member of the Pittsburgh Steelers football team, was charged with sexually and physically assaulting a young woman in the stairwell of a suburban Pittsburgh hotel. He was convicted of the physical assault but acquitted of the sexual offenses.

4. Commonwealth v. Dwight Wright, CC No. 8101928
date of representation -1981
court - Allegheny County Court of Common Pleas, Criminal Division
judge - The Honorable Patrick R. Tamilia
defense counsel - Leo Harper
1034 Fifth Avenue
Pittsburgh, PA 15219
(412) 391-4305

On February 12, 1981, the defendant gained entrance to a residence by asking a nine year old boy who was home alone if he could use the telephone. Once inside the house, the defendant attempted to sexually assault the boy. When a babysitter arrived, the defendant stabbed her, breaking the knife in her back. A jury convicted the defendant of criminal attempt (at involuntary deviate sexual intercourse), robbery, false imprisonment, burglary, theft, reckless endangerment, corruption of minors, aggravated assault and simple assault.

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

I have never been convicted of a crime.

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

1. Cercone vs. Pitassi, AR 96-1833 (1996)

   This small claims civil action was brought against a contractor for damage sustained at my residence due to improper installation of a sewage line. The case was amicably settled for $1,800.

2. Cutler vs. Cercone, No. 133 W.D. Misc. Dkt. 1997 (1997)

   In my official capacity as the administrative judge of the criminal division, a mandamus action was filed against me by a prisoner seeking discovery and trial transcripts. The prisoner's new lawyer in fact already had possession of all materials sought, and the case was dismissed by the Pennsylvania Supreme Court.

3. Banks vs. Cercone, No. 28 W.D. Misc. Dkt. 1998 (1998)

   This case arose from a petition for emergency writ of mandamus. A prisoner sought to compel me as the administrative judge of the criminal division to

order a local district justice to grant him credit for time served. The Pennsylvania Superior Court found that there was no basis for relief and dismissed the case.

4. Jones vs. Cercone, No. 88 W.D. Misc. Dkt. 1997 (1997)

This case involved a petition for writ of mandamus by a defendant against another judge of our court. I was named a party because as administrative judge, I assigned this case to that judge. The Supreme Court of Pennsylvania denied the petition, and ordered that all judges' names be stricken from the caption.

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

I would first try to minimize the number of cases in which I would be required to disqualify myself by the appropriate management of my investments. I would divest myself of investments and other financial interests that might require frequent disqualification.

In the event that a conflict-of-interest would arise or where my impartiality might reasonably be questioned in a case pending before me, I would first notify the parties of the nature of the conflict, and then follow the rules for disqualification from the case.

At this time I cannot recognize any categories of litigation and financial arrangements that would be likely to present potential conflicts-of-interest during my initial service as a federal district court judge, but will follow the guidelines of the Code of Judicial Conduct.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I would consult with the Chief Judge about whether to teach at the University of Pittsburgh, provided that it does not conflict with my duties as a district court judge.

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

See attached copy of the financial disclosure report, required by the Ethics in Government Act of 1978.

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

See attached financial net worth statement.

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

(1) If so, did it recommend your nomination?

Yes, I was three times recommended by the Federal Judicial Nominating Commission of Pennsylvania.

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

In the course of this process, I was interviewed by members of the Federal Judicial Nominating Commission of

Pennsylvania, and individuals from the Office of Counsel to the President, Department of Justice and Federal Bureau of Investigation.

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

No.

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Cercone, David S.	U.S. District Court-Western District of Pennsylvania	3/22/2002
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
U.S. District Judge (Nominee)	x Nomination, Date 3/21/2002 __ Initial __ Annual __ Final	1/1/2001 to 3/1/2002
7. Chambers or Office Address	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.	
702 City-County Building Pittsburgh, PA 15219	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	Director	Boys and Girls Club of Western Pennsylvania
2	Visitor	Graduate School of Public and International Affairs, University of Pittsburgh
3	Custodian	Account #1 Under Pennsylvania Uniform Gift to Minors Act

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		PA State Employees' Retirement System-would be eligible to receive pension benefits including monthly payments for life and a lump sum payment.
2		Administrative Office of PA Courts-would be eligible to receive health care benefits for life.
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	Administrative Office of PA Courts-judge's salary	$ 113,789.00
2	2000	University of Pittsburgh-teaching salary	$ 12,700.00
3	2001	Administrative Office of PA Courts-judge's salary	$ 116,117.00
4	2001	University of Pittsburgh-teaching salary	$ 13,100.00
5	2001	University of Pittsburgh-royalties	$ 660.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Cercone, David S.	3/22/2002

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

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
1	☐ NONE (No such reportable reimbursements.)	
2	Exempt	
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
1	☐ NONE (No such reportable gifts.)		
2	Exempt		$
3			$
4			$
			$

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

	CREDITOR	DESCRIPTION	VALUE CODE*
1	☒ NONE (No reportable liabilities.)		
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
Cercone, David S.	3/22/2002

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (Including Trusts held for you)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
					If not exempt from disclosure				
Place "(X)" after each asset exempt from prior disclosure	(1) Amt. Code 1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, partial redemption)	(2) Date Month-Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets,									
1 AIM Constellation Mutual Fund		None	J	T					
2 Delaware Tax Free PA Mutual Fund	B	div.	K	T					
3 Davis NY Venture Mutual Fund	A	div.	K	T					
4 Delaware Growth and Income Mutual Fund	A	div.	J	T					
5 MFS Research Mutual Fund-A		None	J	T					
6 FT Target 15 Nasdaq Unit Trust		None			Exempt				
7 Laser Vision Common Stock		None	J	T					
8 Custody for dependant child Waste Mgmt Common Stock	A	div.	J	T					
9 Custody for dependant child Evergreen Money Market	A	div.	J	T					
10 Custody for dependant child Duquesne Cap Pref.Stock	B	div.	J	T					
11 Custody for dependant child Hartford CapII Pref.Stock	A	div.			Exempt				
12 Custody for dependant child Evergreen Money Market	A	div.	J	T					
13 Mellon Bank Account 1#	A	int.	L	T					
14 Mellon Bank Account 2#	A	int.	J	T					
15 Mellon Bank Account 3#	A	int.	J	T					
16 U.S. Savings Bonds		None	J	T					
17 PA State Employees Retirement Account		None	O	T					

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2 Value Codes: (See Col. C1, D5)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001-$100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,000-$250,000 P2=$5,000,001-$25,000,000	
3 Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Cercone, David S.	3/22/2002

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trusts/assets)	B. Income during reporting period (1) Amt. Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	(2) Date Month-Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Type (e.g., div., rent, or int.) exempt from prior disclosure						Trust exempt from disclosure			
☐ NONE (No reportable income, assets, or transactions)									
18 Centennial Money Market	A	div.	J	T	Exempt				
19									
20									
21									
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31									
32									
33									
34									
35									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less; F=$50,001-$100,000	B=$1,001-$2,500; G=$100,001-$1,000,000	C=$2,501-$5,000; H1=$1,000,001-$5,000,000	D=$5,001-$15,000; H2=More than $5,000,000	E=$15,001-$50,000
2 Value Codes: (See Col. C1, D3)	J=$15,000 or less; N=$250,001-$500,000; P3=$25,000,001-$50,000,000	K=$15,001-$50,000; O=$500,001-$1,000,000;	L=$50,001-$100,000; P1=$1,000,001-$5,000,000; P4=More than $50,000,000	M=$100,001-$250,000; P2=$5,000,001-$25,000,000	
3 Value Method Codes: (See Col. C2)	Q=Appraisal; U=Book Value	R=Cost (real estate only); V=Other	S=Assessment; W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Cercone, David S.	3/22/2002

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

Asset 13 (Parkvale Bank CDs) under Part VII listed on my first Financial Disclosure Report For Nomination Filing dated 8/1/2000, matured during a non-reporting period.

Asset 16 (U.S. Savings Bonds) and Asset 17 (PA State Employees' Retirement Account) under Part VII of my current report were inadvertently omitted from my first Financial Disclosure Report For Nomination Filing dated 8/1/2000.

IX. CERTIFICATION.

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

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

Signature David S Cercone Date 3/22/2002

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2301
One Columbus Circle, N.E.
Washington, D.C. 20544

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Cercone, David S.		3/22/2002
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type) ___ Nomination, Date _____ ___ Initial ___ Annual ___ Final	6. Reporting Period
7. Chambers or Office Address	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	Custodian	Account #2 Under Pennsylvania Uniform Gifts to Minors Act
2		
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		
2		
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2002	Administrative Office of PA Courts-judges salary	$ 19,886.00
2	2002	University of Pittsburgh-teaching salary	$ 2,650.00
3	2000	Administrative Office of PA Courts-magistrate's salary	$
4	2001	Administrative Office of PA Courts-magistrate's salary	$
5	2002	Administrative Office of PA Courts-magistrate's salary	$

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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	38	196	00	Notes payable to banks-secured	0		
U.S. Government securities-add schedule	5	450	00	Notes payable to banks-unsecured	0		
Listed securities-add schedule	130	535	00	Notes payable to relatives	0		
Unlisted securities-add schedule	0			Notes payable to others	0		
Accounts and notes receivable:	0			Accounts and bills due	2	900	00
Due from relatives and friends	0			Unpaid income tax	0		
Due from others	0			Other unpaid income and interest	0		
Doubtful	0			Real estate mortgages payable-add schedule	39	076	00
Real estate owned-add schedule	200	000	00	Chattel mortgages and other liens payable	0		
Real estate mortgages receivable	0			Other debts-itemize:	0		
Autos and other personal property	50	000	00				
Cash value-life insurance	0						
Other assets itemize:	0						
State Retirement Account	750	474	00				
				Total liabilities	41	976	00
				Net Worth	1,132	679	00
Total Assets	1,174	655	00	Total liabilities and net worth	1,174	655	00
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 A

Real Estate Owned and
Real Estate Mortgages Payable

Personal Residence

Date acquired:	August 22, 1984	
Cost:	$104,000.00	
Estimated fair mkt. value:	$200,000.00	
1st mortgage:	Parkvale Bank	$ 8,987.00
2nd mortgage:	Sky Bank	$30,089.00

SCHEDULE B

Listed Securities

Type/Description	Shares	Estimated Value
Waste Management Inc.	125	$ 3,289.00
Duquesne Capital L P	480	$12,076.00
Laser Vision Centers Inc.	200	$ 554.00
AIM Equity Funds Inc. Constellation Fund-Class A	229	$ 5,054.00
Delaware Tax Free PA Mutual Fund	1,982	$15,358.00
Davis NY Venture Fund Inc. Class A	794	$20,104.00
Delaware Group Decatur Fund Inc. Growth and Income Fund-Class A	858	$12,978.00
MFS Series Trust V Research Fund-Class A	692	$13,106.00
American Balanced Fund-529B	2,951	$48,016.00
Total Value		$130,535.00

SCHEDULE C

U.S. Government Securities

Type/Description	Estimated Value
U.S. Savings Bonds	$5,450.00

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FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Cercone, David S.	U.S. District Court-Western District of Pennsylvania	3/22/2002
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
U.S. District Judge (Nominee)	x Nomination, Date 3/21/2002 __ Initial __ Annual __ Final	1/1/2001 to 3/1/2002
7. Chambers or Office Address	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.	
702 City-County Building Pittsburgh, PA 15219	Reviewing Officer _____ Date _____	

IMPORTANT NOTE: The instructions accompanying this form must be followed. Complete all parts. Check 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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	Director	Boys and Girls Club of Western Pennsylvania
2	Visitor	Graduate School of Public and International Affairs, University of Pittsburgh
3	Custodian	Account #1 Under Pennsylvania Uniform Gift to Minors Act

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		PA State Employees' Retirement System-would be eligible to receive pension benefits including monthly payments for life and a lump sum payment.
2		Administrative Office of PA Courts-would be eligible to receive health care benefits for life.
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	Administrative Office of PA Courts-judge's salary	$ 113,789.00
2	2000	University of Pittsburgh-teaching salary	$ 12,700.00
3	2001	Administrative Office of PA Courts-judge's salary	$ 116,117.00
4	2001	University of Pittsburgh-teaching salary	$ 13,100.00
5	2001	University of Pittsburgh-royalties	$ 660.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Cercone, David S.	3/22/2002

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

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
[ ]	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
[ ]	NONE (No such reportable gifts.)		
1	Exempt		$
2			$
3			$
4			$

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

	CREDITOR	DESCRIPTION	VALUE CODE*
[x]	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-Over

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Cercone, David S.	3/22/2002

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

Description of Assets (Including trust assets)	Income (Amount, Code, Type)	Gross value at end of reporting period		Transactions during reporting period				
	(1) Amount Code (A-K)	(2) Type (Int., Div., Rent, Royl.)	(3) Value Code (J-P)	(4) Value Method Code (Q-W)	(1) Type (Buy, Sell, Merger, Redemption)	(2) Date Month-Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets,									
1 AIM Constellation Mutual Fund		None	J	T					
2 Delaware Tax Free PA Mutual Fund	B	div.	K	T					
3 Davis NY Venture Mutual Fund	A	div.	K	T					
4 Delaware Growth and Income Mutual Fund	A	div.	J	T					
5 MFS Research Mutual Fund-A		None	J	T					
6 FT Target 15 Nasdaq Unit Trust		None			Exempt				
7 Laser Vision Common Stock		None	J	T					
8 Custody for dependant child Waste Mgmt Common Stock	A	div.	J	T					
9 Custody for dependant child Evergreen Money Market	A	div.	J	T					
10 Custody for dependant child Duquesne Cap Pref.Stock	B	div.	J	T					
11 Custody for dependant child Hartford CapII Pref.Stock	A	div.			Exempt				
12 Custody for dependant child Evergreen Money Market	A	div.	J	T					
13 Mellon Bank Account 1#	A	int.	L	T					
14 Mellon Bank Account 2#	A	int.	J	T					
15 Mellon Bank Account 3#	A	int.	J	T					
16 U.S. Savings Bonds		None	J	T					
17 PA State Employees' Retirement Account		None	O	T					

1. Income/Gain Codes: (See Col.B1/D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; 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 (See Col.C1/D3): 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=More than $50,000,000
3. Value Method Codes (See Col.C2): 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
Cercone, David S.	3/22/2002

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (div., rent, int.)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (buy, sell, exch., redemption)	(2) Date Month-Day	(3) Value Code (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
						If not exempt from disclosure			
NONE (No reportable income, assets, or transactions)									
18 Centennial Money Market	A	div.	J	T	Exempt				
19									
20									
21									
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									
35									

1 Income/Gain Codes: (See Col. B1) 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: (See Col. C1, D3) 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=More than $50,000,000

3 Value Method Codes: (See Col. C2) 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
	Cercone, David S.	3/22/2002

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

Asset 13 (Parkvale Bank CDs) under Part VII listed on my first Financial Disclosure Report For Nomination Filing dated 8/1/2000, matured during a non-reporting period.

Asset 16 (U.S. Savings Bonds) and Asset 17 (PA State Employees' Retirement Account) under Part VII of my current report were inadvertently omitted from my first Financial Disclosure Report For Nomination Filing dated 8/1/2000.

IX. CERTIFICATION.

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

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

Signature David S Cercone Date 3/22/2002

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS

Mail signed original and 5 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

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Cercone, David S.		3/22/2002
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type) ___ Nomination, Date ___ ___ Initial ___ Annual ___ Final	6. Reporting Period
7. Chambers or Office Address	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. See last page.

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

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1	Custodian	Account #2 Under Pennsylvania Uniform Gifts to Minors Act
2		
3		

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

	DATE	PARTIES AND TERMS
☐	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)
☐	NONE (No reportable non-investment income.)		
1	2002	Administrative Office of PA Courts-judges salary	$ 19,886.00
2	2002	University of Pittsburgh-teaching salary	$ 2,650.00
3	2000	Administrative Office of PA Courts-magistrate's salary	$
4	2001	Administrative Office of PA Courts-magistrate's salary	$
5	2002	Administrative Office of PA Courts-magistrate's salary	$

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

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

   Kenneth Anthony Marra.

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

   United States District Court, Southern District of Florida.

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

   Office: Palm Beach County Courthouse
   205 N. Dixie Highway
   West Palm Beach, Florida 33401
   (561) 355-2441

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

   August 1, 1951; Queens, New York.

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

   Deborah Louise Reid, also known as Louise Reid Marra (maiden name Reid). My wife is trained and educated as an attorney, but she is not employed and is the primary caregiver to our children. I currently have 7 dependent children.

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

   Stetson University College of Law
   January, 1975 – May, 1977, J.D. Magna Cum Laude, May 1977.

   State University of New York at Stony Brook
   September, 1969 – May, 1973, B.A., May, 1973.

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships,

institutions and organizations, nonprofit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

1. 1996 – Present, Circuit Judge, Fifteenth Judicial Circuit, Palm Beach County, Florida. Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, FL 33401, (561) 355-2441.

2. 2001 - Present, Director at Large of the Board of Directors, The Craig S. Barnard American Inn of Court LIV.

3. 1989 – 2000, Director, Guild of Catholic Lawyers of the Diocese of Palm Beach, Inc. 1993, President; 1992, Vice-President; 1990 – 1991, Secretary.

4. 1984 – 1996, Partner/Associate in the law firm of Nason, Gildan, Yeager, Gerson & White, P.A. n/k/a Nason, Yeager, Gerson, White & Lioce, P.A., 1645 Palm Beach Lakes Blvd., Suite 1200, West Palm Beach, Florida 33401, (561) 686-3307.

5. 1980 – 1983, Associate with the law firm of Wender, Murase & White (no longer in existence), former address, 1120 20th Street, N.W., Washington, D.C. 20036.

6. 1983, American University of Rome (non-profit corporation, District of Columbia) Secretary and Treasurer.

7. 1977 – 1980, Trial Attorney with the United States Department of Justice, 10th and Pennsylvania Avenue N.W., Washington, D.C. 20530.

8. 1976, Law Clerk with Jacobs, Robbins & Gaynor, 445 31st Street No., St. Petersburg, Florida.

9. 1974 – 1975, Social Studies teacher and substitute teacher, Elmont Memorial High School, 500 Ridge Road, Elmont, N.Y.

10. 1973 – 1974, Teacher's aid, Locust Valley High School, 98 Horse Hollow Rd, Locust Valley, N.Y. 11560.

11. 1973 – 1974, Met-Air Installers, c/o General Electric Co., Northern Blvd., Long Island City, N.Y. I drove a truck and picked up and delivered malfunctioning air-conditioners during the summers.

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

I have not had any military service.

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

I received a partial academic scholarship while in law school.

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

The Florida Bar, 1977 – present.

The Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases, 1998 to the present.

The Florida Bar - Civil Procedure Rules Committee, 1995 to 1996.

Palm Beach County Bar Association - 1984 to present.

Committees with the Palm Beach County Bar Association:

Judicial Relations Committee, Chairperson 1993 to 1996;

Client Relations Committee, 1990-1992, Chairperson 1992, Vice-Chairperson 1991.

Circuit Court Civil Rules Practice Committee, 1987, 1988, 1990 to 1999.

Appellate Practice Committee, 1989-1994.

Family Law Practice Committee, 1999.

Criminal Law Committee, 2000 to present.

The Craig S. Barnard American Inn of Court LIV, Member, 1996-1997; 2000-2001; 2001-2002 (Director at Large of the Board of Directors).

Guild of Catholic Lawyers of the Diocese of Palm Beach, Inc. 1984 to present. President 1993, Vice-President 1992, Secretary 1990-1991, Director 1989 to 2000.

Italian-American Lawyers Association of Palm Beach County, Inc. 1989 to 1998 (approximation).

American Bar Association, 1977 to 1982, 1998 (approximation).

American Judicature Society, 1977 to 1984 (approximation).

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

Florida Bar, November 18, 1977.

District of Columbia Bar, August 6, 1980 (I resigned my membership after I became a Circuit Judge in 1996).

United States District Court, District of Columbia, February 2, 1981.

United States Court of Appeals, District of Columbia Circuit, November 23, 1981.

United States Claims Court, November 30, 1981.

United States Court of Appeals, Ninth Circuit, June 14, 1982.

United States Court of Appeals, Second Circuit, November 10, 1982.

United States Supreme Court, January 10, 1983.

United States District Court, Southern District of Florida, February 27, 1985.

United States Court of Appeals, Eleventh Circuit, April 6, 1987.

United States Court of Appeals, Fifth Circuit, July 6, 1987.

United States Tax Court, June 8, 1988.

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

At one time, the Guild of Catholic Lawyers of the Diocese of Palm Beach, Inc. required that members be of the Roman Catholic faith. In 2000, the by-laws of the Guild were changed to allow non-Catholics to be non-voting members of the organization. It is my recollection that while I was a member of the Board of Directors, I was involved in raising the question of restricted membership as an issue for possible amendment. I have been a member of that organization since 1984.

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

"Domestic Relations: The Wife's Contribution Toward Child Support", VI *Stetson Intramural Law Review*, 21 (1976). Copy in attachment.

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

I have never testified before any committee or subcommittee of the Congress.

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

I am in excellent health. My last physical examination was in July, 2001.

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

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

Mintus v. City of West Palm Beach, 711 So. 2d 1359 (Fla. 4th DCA 1998). In this case, the plaintiff filed a law suit against the defendant city seeking the production of documents under the Florida Public Records Act. The plaintiff alleged that he had properly requested the documents from a custodian of the records, and that the city had wrongfully denied them to him. At the trial court, I ruled in favor of the city. I held that the plaintiff had not made a proper request from a custodian of the records. The Court of Appeal adopted and published as the opinion of the court the order I entered at the trial court.

Woods v. Nova Companies Belize Ltd., 739 So. 2d 617 Fla. 4th DCA1999),*rev. denied,*766 So. 2d 222 (Fla. 2000) (Marra, J., dissenting). This case was initiated by a citizen of Belize against a Belize corporation for negligence in the operation of an airplane which crashed in Costa Rica. The plaintiff's only contact with the state of Florida was his receipt of medical treatment for injuries he sustained in the crash. The trial court dismissed the case based on the doctrine of *forum non conveniens.* I sat as an Associate Judge with the Court of Appeal in this case. I dissented from the majority opinion which ruled that the trial court abused its discretion in dismissing the case.

Segall v. Segall, 708 So. 2d 983 (Fla. 4th DCA 1998). In this divorce proceeding, I sat as an Associate Judge with the Court of Appeal. I authored the opinion of the court which reversed the trial court's final judgment on numerous grounds, including improper distribution of the parties' assets and improper calculation of awards of alimony and child support.

Hochhauser v. Jacobson, 795 So.2d 232 (Fla. 4th DCA 2001). This case was brought by the beneficiary of a trust against the trustee of the trust for breach of fiduciary duty. The trial court found that the trustee had breached his fiduciary duty in many respects, and awarded the plaintiff damages. I sat as an Associate Judge with the Court of Appeal in this case. I authored the opinion of the court which affirmed, in all but one respect, the final judgment. The court reversed one aspect of the damage award based on insufficient evidence to support that aspect of the award.

Lasala v. Lasala, 2001 WL 1131127 (Fla. 4th DCA September 26, 2001). This was a divorce proceeding. I sat as an Associate Judge with the Court of Appeal in this case. I authored the opinion of the court which reversed the trial court for failing to include historical income received by the husband as part of his income for purposes of calculating alimony and child support for the wife.

Stamford at the Village of Palm Beach Lakes Homeowner's Association, Inc. v. Shell Construction Company of Palm Beach County, Inc., 4 Fla. L. Weekly Supp. 361 (Fla. Cir. Ct. 1996). Copy in attachment. In this case, the plaintiff homeowner's association brought suit against the defendant developer for damages relating to alleged defects in the construction of the roofs of the homes within the development. The plaintiff sought to certify a plaintiff class consisting of the homeowners. This opinion is the order I wrote denying class certification.

Aponte-Parsi v. Daimler-Benz, A.G., 4 Fla. L. Weekly Supp. 460 (Fla. Cir. Ct. 1996). Copy in attachment. This case was initiated by the plaintiffs, the parents and natural guardians of a child injured in an automobile accident in Puerto Rico. The defendant was the manufacturer of the vehicle, a German corporation, and the parent corporation of the American distributor of the vehicle. The defendant moved to dismiss the case based upon lack of personal jurisdiction. This opinion is the order I wrote granting the defendant's motion to dismiss.

Cope v. Berger, 5 Fla. L. Weekly Supp. 251 (Fla. Cir. Ct. 1997). Copy in attachment. This case was brought by the plaintiff, a resident of Florida, against the defendant, a resident of New York, for damages based upon the defendant's tape recording of a telephone conversation with the plaintiff. The defendant, from New York, telephoned the plaintiff in Florida. The defendant, while in New York, taped recorded the conversation. One party consent to the tape recording of a conversation was legal in New York and did not violate federal law. However, it was illegal in Florida, which required two party consent to any tape recording of an oral communication. Because of the Florida prohibition, the plaintiff sued the defendant claiming the defendant committed a tort in the state of Florida. This opinion is the order I wrote granting the defendant's motion to dismiss for lack of jurisdiction over the person.

Romer v. Tocci, 4 Fla. L. Weekly Supp. 850 (Fla. Cir. Ct. 1996). Copy in attachment. This case was initiated by the plaintiffs against various defendants for damages for allegedly failing to advise the plaintiffs correctly as to their potential to conceive a child with Tay-Sachs disease. The defendants moved to dismiss the case because the plaintiffs failed to comply with the presuit notice requirements of Florida law relative to the initiation of medical malpractice claims. The plaintiffs asserted that presuit notice was not required because, in part, the case did not claim medical malpractice, but rather, simple negligence. This opinion is the order I wrote granting the defendants' motions to dismiss, concluding that medical malpractice was alleged, and that there must be compliance with the presuit notice requirements.

Alexander v. Albertson's, Inc., 4 Fla. L. Weekly Supp. 460 (Fla. Cir. Ct. 1996). Copy in attachment. This case was initiated by the plaintiff, the personal representative of the estate of a deceased, seeking damages against the defendants for wrongful death. The defendant corporation had been indicted for alleged criminal conduct in connection with the death of the decedent. The individual defendants had not had criminal charges filed against them, but they were potentially subject to criminal prosecution. The individual defendants refused to provide answers to the allegations of the complaint, asserting their Fifth Amendment privilege against self-incrimination. This order sets forth my ruling as to how the defendants would be required to file answers to the complaint, yet maintain their constitutional right against self-incrimination.

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

Lopez v. State, 2001 WL 1578740 (Fla. 4th DCA December 12, 2001). The defendant was tried and convicted of burglary with intent to commit a battery or assault. The defendant entered the victim's home without her permission and sat on her bed while she was sleeping. The victim was touched by the defendant while she slept, which awakened her. The defendant did not object to the burglary jury instruction during the charge conference, which read that the State had to prove that the defendant had to "enter or remain" in the victim's home with a fully formed intent to commit an offense in the dwelling. The

appellate court ruled that the burglary instruction was incorrect in that the words "remain in" should not have been included in the instruction. The court held that the words "remain in" can only be used where the defendant entered the premises with consent. The court also ruled that the error was fundamental. Therefore, the defendant was permitted to raise the error despite the failure to object at the time of trial.

Conforti v. State, 800 So.2d 350 (Fla. 4th DCA 2001). In 1989, the defendant was placed on probation after being convicted of sexual battery on a boy less than twelve years of age. The defendant was charged with violating his probation by engaging in an "unnatural and lascivious act with another." The defendant encountered an undercover police officer in a park, asked the police officer what he liked to do. The defendant had the police officer follow him to his vehicle and then proceeded to pull down his pants and masturbate in the presence of the officer. I found that the defendant had committed an unnatural and lascivious act, revoked his probation and sentenced him to prison. The appellate court reversed the sentence, concluding that the defendant had not violated the statute with which he was charged because the act in which he engaged was not done with another.

Borjas v. State, 790 So. 2d 1114 (Fla. 4th DCA 2001). This was a post-conviction proceeding initiated by the appellant challenging the sentence he received for lewd and lascivious contact with a minor child. The appellant contended that his sentencing guideline scoresheet incorrectly included victim injury points for sexual contact with the minor child based upon his intentional fondling of the minor child's buttocks and breasts. At the trial level, I ruled that the victim injury points were properly included in the appellant's guideline scoresheet. The appellate court agreed in part and disagreed in part. The court affirmed the inclusion of the victim injury points for the fondling of the minor child's breasts, but reversed the addition of points for the fondling of the buttocks. The court ruled that because there was no definition of sexual contact in the applicable statute, that an ordinary person of common intelligence would not know that fondling of the buttocks would be sexual contact.

State v. Contreras, 793 So. 2d 51 (Fla. 4th DCA 2001). In this case, the defendant moved to suppress his confession. Based upon a controlling decision from the court of appeal from my district, *Glatzmayer v. State,* 754 So. 2d 71 (Fla. 4th DCA 2000), I granted the motion to suppress. My decision was affirmed by the court of appeal. *State v. Contreras,* 780 So. 2d 1034 (Fla. 4th DCA 2001). Subsequent to the decision affirming my ruling, the Florida Supreme Court reversed the *Glatzmayer* decision. *State v. Glatzmayer,* 789 So. 2d 297 (Fla. 2001). Because the controlling precedent upon which I relied was reversed, the court of appeal reversed my ruling.

Lauro v. Lauro, 757 So. 2d 523 (Fla. 4th DCA 2000). This was a divorce proceeding. I entered a divorce judgment equitably distributing the parties' assets and liabilities, awarding the wife alimony, child support and partial attorney's fees and costs. The court of appeal ruled that in calculating the wife's need for alimony, I improperly failed to consider pension benefits she was to begin receiving as part of the equitable distribution of the parties' assets. The court also ruled that in calculating the husband's net income, I improperly included per diem pay he received while traveling for his employment. Because the financial figures on

which I based my rulings would have to be revisited on remand, the court also reversed the awards of child support, attorney's fees and costs to be reconsidered after the net income figures were recalculated.

Richardson v. Department of Revenue, 742 So. 2d 445 (Fla. 4th DCA 1999). In this case, an inmate filed a motion to vacate a paternity judgment on the basis that he did not receive notice of the proceeding. Although the reported decision does not reflect these facts, the judgment had been entered over ten years before the motion was filed, and the judgment, on its face, indicated that the appellant was present for the final hearing. The court file also reflected that the appellant previously had been held in contempt of court for failing to have paid child support pursuant to the paternity judgment. The appellant failed to appear for the hearing on his motion, although he was permitted to do so by telephone due to his incarceration. As a result of his failure to appear, his motion was denied. The appellant then filed a motion for rehearing asserting, under oath, that he did not receive notice of the hearing. The motion for rehearing was denied without a hearing, and based upon a review of court file. The appellate court ruled that I should have held an evidentiary hearing as to whether the appellant had, in fact, received notice of the hearing.

McCaw Cellular Communications of Florida, Inc. v. Kwiatek, 763 So. 2d 1063 (Fla. 4th DCA 1999). In this case, the plaintiff filed a suit against his employer alleging that he was harassed because of his HIV status in violation of the Florida Civil Rights Act of 1992. I denied the employer's motion for a directed verdict at the close of the plaintiff's case. The jury returned a verdict in favor of the plaintiff. On appeal, the court held that I should have granted the employer's motion for a directed verdict.

Pinder v. Pinder, 740 So. 2d 579 (Fla. 4th DCA 1999). In this post-judgment dissolution of marriage proceeding, the former husband withheld alimony payments from the former wife and applied the funds toward car payments the former wife was obligated to pay by the final divorce decree. The former wife failed to make the car payments. I disallowed the former husband's unilateral decision to disregard the provisions of the final judgment. The appellate court ruled that the former husband could make the car payments if the former wife failed to pay, and credit those payments against his alimony obligation in order to maintain his good credit.

American Real Estate Holdings Limited Partnership v. Twin Cities Investors, Inc., 740 So. 2d 562 (Fla. 4th DCA 1999). This case involved a dispute between owners of adjacent parcels of property that comprised a shopping center. The issues presented involved the enforcement and interpretation of numerous documents affecting title to the property, including a parking easement and license agreement entered into years before by the predecessors in interest of the parties. As the appellate court indicated, I "entered a comprehensive judgment" determining the respective rights and obligations of the parties. The appellant appealed one aspect of my ruling. The appellate court held that in one respect, I misinterpreted the controlling documents. The court reversed that one aspect of the judgment. The remainder of the judgment was "left undisturbed".

R.C. Storage One, Inc. v. Strand Realty, Inc., 714 So. 2d 634 (Fla. 4th DCA 1998). The issue in this case was whether the defendant was entitled to a change of venue. I denied the motion to change venue. The appellate court affirmed. However, one judge filed a dissenting opinion.

Fisher-McGann, Inc. v. Gene B. Glick Company, Inc., 715 So. 2d 994 (Fla. 4th DCA 1998). This case arose out of a dispute between a general contractor and a subcontractor. In a prior appeal from a judgment which was entered by my predecessor, the court remanded the case with directions for further proceedings. In directing the trial court relative to the further proceedings, the court cited to a specific case. After inheriting the case on remand, I attempted to follow the holding of the case cited by the court. On appeal from my ruling, the appellate court held that I "misapplied our reference" to the case cited "by relying on its primary holding rather than on the narrower proposition for which it was cited." *Id.* at 996. As a result, the court ruled that my order was erroneous and reversed.

Thomas Jefferson University v. Romer, 710 So. 2d 67 (Fla. 4th DCA 1998). In this case, I denied the defendant's motion to dismiss for lack of personal jurisdiction, concluding that the defendant had sufficient minimum contacts with the state of Florida to satisfy due process. The appellate court affirmed, but it relied upon a different provision of Florida's long-arm statute than I did. One member of the appellate panel filed a dissenting opinion.

Brooks v. Watchtower Bible and Tract Society of Florida, Inc., 706 So. 2d 85 (Fla. 4th DCA 1998). This case involved the question of whether the citizens of the City of West Palm Beach were entitled to a referendum relative to an ordinance authorizing the sale of a city auditorium and surrounding property. I ruled, based upon established precedent, that because the ordinance was administrative in nature, and not legislative in nature, a referendum was not authorized. The appellate court disagreed. The court held the ordinance was legislative in nature and ordered a referendum.

Lageman v. Furman, 703 So. 2d 520 (Fla. 4th DCA 1997). In this case, my predecessor judge granted a motion for summary judgment in favor of the defendant. By virtue of that judgment and an offer of judgment made by the defendant, it was entitled to attorney's fees. I entered an order awarding fees to the defendant. Subsequent to my order, the summary judgment entered by my predecessor was reversed. Due to the reversal of the summary judgment, the attorney's fee award was necessarily reversed.

Kirkland v. Miller, 702 So. 2d 620 (Fla. 4th DCA 1997). In this case, the issue was whether the parties had entered into an Illinois land trust, which would have constituted an interest in personal property, or whether the parties entered into a mortgage, which would have constituted an interest in real property. The appellant defaulted on her obligations under the transaction. The appellee sought to evict the appellant since he contended a mortgage foreclosure was not required. The appellant asserted that a mortgage foreclosure proceeding was necessary, because an interest in realty was involved. I ruled that a valid Illinois land trust was created, and therefore a mortgage foreclosure was not required. The appellate court

held that an Illinois land trust was not created, but rather a mortgage. Therefore, the court ruled that a mortgage foreclosure was required.

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

Aponte-Parsi v. Daimler-Benz, A.G., 4 Fla. L. Weekly Supp. 460 (Fla. Cir. Ct. 1996).
See description above.

Cope v. Berger, 5 Fla. L. Weekly Supp. 251 (Fla. Cir. Ct. 1997).
See description above.

Alexander v. Albertson's, Inc., 4 Fla. L. Weekly Supp. 460 (Fla. Cir. Ct. 1996).
See description above.

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

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

None.

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

No, other than my unopposed campaign for reelection to my current position of circuit Judge in 1996. I was the candidate. I filed the appropriate papers and filing fee and won by default.

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

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

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

Not applicable.

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

Not applicable.

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

1. Circuit Judge, Fifteenth Judicial Circuit, Palm Beach County, Florida. February 12, 1996 to present. I began my career as a circuit judge in the civil division, where I was assigned for nearly two years. I then was assigned to the family division for two years. In January, 2000, I began my current assignment in the criminal division.

2. I was a partner in the law firm of Nason, Gildan, Yeager, Gerson & White, P.A. n/k/a Nason, Yeager, Gerson, White & Lioce, P.A., 1645 Palm Beach Lakes Blvd., Suite 1200, West Palm Beach, Florida 33401, (561) 686-3307. I was with that firm from January 4, 1984 through February, 1996.

3. I was an Associate with the law firm of Wender, Murase & White (no longer in existence), former address, 1120 20th Street, N.W., Washington, D.C. 20036. I was with that firm from September, 1980 through December, 1983.

4. I was a trial attorney with the United States Department of Justice, 10th Street and Pennsylvania Avenue N.W., Washington, D.C. 20530. I was with the Justice Department from August 29, 1977 through September, 1980.

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

My practice with Nason, Gildan, Yeager, Gerson & White, P.A., which covered the period from January, 1984 through February, 1996, was completely devoted to representing the firm's clients in civil litigation, both at the trial and appellate levels. My litigation practice was devoted substantially to commercial litigation.

Nason, Gildan, Yeager, Gerson & White, P.A. had a very diversified client base. I have represented in litigation both publicly and closely held corporations, private individuals, banks, municipalities, condominium and homeowner associations, real estate developers, and subcontractors.

Because the client base was diverse, I was involved with many substantive legal areas in litigation. Some of the substantive areas were antitrust, contracts, construction defects, condominium and homeowner association disputes, employment and housing discrimination, covenants not to compete, mechanics' liens, securities fraud, torts (negligence, fraud, slander, battery, emotional distress), trade secrets, real estate

and zoning. Due to the broad nature of the litigation practice, I had extensive experience representing both plaintiffs and defendants.

In my prior private practice with Wender, Murase & White of Washington, D.C., which covered the period from September, 1980 through December, 1983, I was also primarily involved in civil litigation. The nature of the practice was similar to my litigation practice at Nason, Gildan, *et al.* Although I was not involved with condominium or homeowner associations, or construction and lien related litigation, I was involved in patent and trademark litigation, and I spent a considerable amount of time litigating in the obscure but fascinating area of Federal Indian law.

In addition to the litigation practice, I was involved in a corporate office practice. This principally consisted of negotiating and drafting contracts, including franchise agreements and the required prospectus, giving advice relating to compliance with federal regulations and conducting due diligence in connection with mergers and acquisitions.

During my first three years of practice, from August, 1977 through September, 1980, I was a trial attorney with the United States Department of Justice under its honor law graduates program. I worked in the Lands and Natural Resources Division and was assigned to the Indian Resources Section. The Indian Resources Section represented the United States and the Department of the Interior in fulfilling the trust obligations owed to Native Americans that were created by treaty or statute. While with the Department, I was involved in litigation which sought to protect the land, water and mineral rights of Native Americans from encroachment, and in litigation which sought to regain such resources that had been wrongfully lost over the years.

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

See answer to the prior question.

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

While practicing law, I regularly appeared in court as an attorney for clients. During the first six years of my practice, my court appearances were less frequent due to the fact that the cases I handled were almost exclusively civil proceedings in federal district court. Hearings are not scheduled on all motions in federal district court, as is the practice in the Florida state courts. Upon relocating to West Palm Beach in 1984, the nature of my practice changed from a predominately federal practice to a predominately state court practice. As a result, my court appearances increased significantly. The frequency of my court appearances remained fairly consistent from 1984 until I was appointed to the circuit court in 1996.

2. Indicate the percentage of these appearances in:

(A) federal courts; 5%
(B) state courts of record; 95%
(C) other courts. 0%

During the first six years of my practice, 99% of my court appearances were in United States District Courts, and 1% were in state trial courts. All of my court appearances (100%) were in civil cases.
During the next twelve and one-half years of my practice, 93% of my court appearances were in state courts or before arbitrators, and 7% of my court appearances were in federal courts. All of my court appearances (100%) were in civil cases.

3. Indicate the percentage of these appearances in:

(A) civil proceedings; 100%
(B) criminal proceedings 0%.

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

I have tried forty-two (42) cases to verdict or judgment in federal or state courts, and I have tried two (2) cases before arbitrators.

In thirty-four (34) of the trials, I was sole counsel. In five (5) of the trials, I was lead counsel. In three (3) of the trials, I was associate counsel.

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

Thirteen (13) of my trials, or approximately 31%, were jury.

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

I never practiced before the United States Supreme Court.

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

I provided pro bono legal work when employed as an attorney to the Palm Beach County Legal Aid Society. As a member of the Palm Beach County Bar Association, I had the option of handling one pro bono case per year or contributing a specified amount of money. I always chose to handle a case.

19. **Litigation**: Describe the ten most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

1. *Winn v. Edna Hibel Corporation*, Case No. 85-8205 (S.D. Fla. 1987), *aff'd*, 858 F. 2d 1517 (11th Cir. 1988). In this case, I represented the Defendant, Edna Hibel Corporation, which was being sued for alleged price fixing in violation of the federal antitrust laws. I was lead counsel at trial and argued the case on appeal.

My client produced and distributed art works of the artist Edna Hibel. The plaintiff was a distributor of my client's products who sold below the suggested retail price. The case involved allegations that my client illegally conspired with plaintiff's competitor to terminate plaintiff as a distributor in exchange for an agreement by the competitor to fix prices at the suggested retail price level. The plaintiff sought damages approaching $1 million.

The case was significant because at the time of the trial it was unclear what quantum of proof was necessary for a plaintiff to establish a prima facie case for price fixing. Even though evidence was produced tending to show that my client had agreed with plaintiff's competitor to terminate plaintiff as a distributor because he was a discounter, we convinced the trial court and the appellate court that this evidence was insufficient under the standards enunciated by the United States Supreme Court. This case, along with the others that did reach the Supreme Court, helped to establish the legal principle that evidence of termination due to discounting was insufficient, and that evidence of an agreement to fix prices at a specific level must be presented. The appellate decision has been cited in at least four antitrust treatises of which I am aware; namely: 1 J. von Kilinowski, *Antitrust Counseling and Litigation Techniques*, § 7.05[2], at 7-95, n. 92.4 (1990); II P. Areeda, H. Hovenkamp and R. Blair, *Antitrust Law*, § 308g at 102 n. 103 (2d ed. 2000); I. Scher, *Antitrust*

Advisor, § 2.12, at 2-21 n. 82; § 2.49 at 2-123 n.497 (4th ed. 1995); II E. Kintner, *Federal Antitrust Law*, § 10.24, at 147 n. 452b (Cumulative Supp. 2000).

The case was tried in the United States District Court for the Southern District of Florida before Judge Kenneth L. Ryskamp in May 1987.

My co-counsel was Nathan E. Nason now of Nason, Yeager, Gerson, White & Lioce, P.A., 1645 Palm Beach Lakes Blvd., Ste. 1200, West Palm Beach, Florida 33410, (561) 686-3307.

The opposing attorneys in the case were:

Jeffrey A. Tew, Dennis A. Nowak, now of Tew & Nowak, 201 S. Biscayne Blvd., Ste. 2960, Miami, Florida 33131, (305) 577-3900;

Daniel A. Casey of Kirkpatrick & Lockhart, 201 S. Biscayne Blvd., Miami, Florida 33131, (305) 539-3324.

2. *Cayuga Indian Nation of New York v. Carey*, 89 F.R.D. 627 (N.D.N.Y. 1981). In this case, I represented the plaintiff, Cayuga Indian Nation of New York.. The case was brought by my client, a federally recognized Indian tribe, to regain possession of approximately 100 square miles of land reserved for it by treaty with the United States. My client alleged that the land was obtained by the State of New York in 1795 and 1807 through two illegal transactions. The case sought to void the two transactions with the State of New York because the transactions failed to comply with the requirements of what is known as the Trade and Intercourse Act of 1793, 25 U.S.C. § 177.

The suit was brought as a defendant class action against named representatives of approximately 7,000 land owners in the disputed area. In this particular decision, the court authorized the certification of the defendant class of landowners and approved notice to the class members through first class mail and publication.

The case is significant because, as one commentator has described it, the defendant class provision of Federal Rule 23 receives "relatively sparse use". 1 H. Newberg and A. Conte, *Newberg on Class Actions*, § 4.45 at 4-181 (3d ed. 1992). Additionally, this case applied the defendant class portion of the rule in an ejectment and damages case, which is "outside the most traditional use" of defendant class actions, that being "to enhance the effectiveness of a declaratory or injunctive decree". *Id.*, at 4-182. The significance of the case is recognized by its citation four times in Newberg's treatise. *Id.* at § 4.50 at 4-198 n. 581; § 4.64 at 4-240 n. 716; § 4.69 at 4-262 n. 781 and 2 H. Newberg and A. Conte, *Newberg on Class Actions*, § 8.15 at 8-53 n. 191 (3d ed. 1992).

In this case, I acted as co-counsel to Arthur J. Gajarsa, now Judge Gajarsa of the United States Court of Appeals for the Federal Circuit. Mr. Gajarsa argued this matter before the court with my assistance. Judge Gajarsa can be contacted at the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, (202) 633-6570.

This matter was argued before the court in January, 1981 before United States District Judge Neal McCurn of the Northern District of New York.

There were numerous attorneys involved in the case and I cannot name all of them. The case was handled primarily for the defendant class representatives by the following attorneys:

James D. St. Clair (now deceased) and William F. Lee of Hale & Dorr, 60 State St., Boston, MA. 02109, (617) 526-6000;

Allan van Gestel, formerly of Goodwin, Procter & Hoar, Boston, MA. Mr. van Gestel is now a judge of the Superior Court in Massachusetts. Judge van Gestel can be contacted at The Superior Court, 90 Devonshire St., Boston, MA 02102, (617) 788-8130.

3. *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983). This decision was the next major ruling made by the court arising out of the defendant class action described in the previous section. This particular decision dealt with, among other things, the question of whether a private right of action existed under the Trade and Intercourse Act. At the time, no published opinions on this question existed, and no court had fully considered the issue. I was responsible for researching, briefing and arguing this question. The Court ruled in my client's favor. The decision became the first published opinion on the subject, and the first thorough analysis of the question. Some of the same arguments that I presented and which were accepted by the court were later approved by the United States Supreme Court in a similar case. *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985).

The case was also argued in the United States District Court for the Northern District of New York before Judge Neal McCurn. The case was argued in the later part of 1982 and decided in 1983.

My co-counsel was once again Arthur J. Gajarsa. Judge Gajarsa can be contacted at the address listed in the previous section.

Once again, the principal opposing attorneys in the proceeding were James D. St. Clair and William F. Lee of Hale and Dorr of Boston, Massachusetts;

Allan van Gestel of Goodwin, Procter and Hoar of Boston, Massachusetts. The addresses of these attorneys are also included in the previous section.

4. *Cayuga Indian Nation of New York v. Fox*, 544 F. Supp. 542 (N.D.N.Y. 1982). As with the two previous cases, I represented the plaintiff Cayuga Indian Nation of New York in this matter. This was a separate case which arose out of the filing of the Cayuga land claim described above. At the time the land claim was filed, the plaintiff sought to record a lis pendens (or in New York, a notice of pendency) against all of the affected property. Almost immediately after the lis pendens was filed, land owners affected by the case brought suit against the clerks of the two counties in which the property was situated seeking to enjoin them from recording the lis pendens. My client was not joined as a party to either proceeding. The state court judges in both counties issued the injunctions. My client then initiated this action in federal court seeking to enjoin the two state court judges from enforcing their orders.

As with the immediately preceding case, I researched and drafted all pleadings and briefs and was lead counsel at the trial. The Court ruled in favor of my client. The court enjoined the state court judges and ordered the lis pendens recorded. The case was significant because my client was able to establish that the right to file a lis pendens was protected by the due process clause, and because my client was able to obtain an injunction against two state court judges despite the provisions of the Federal Anti-Injunction Act, 28 U.S.C. § 2283. This Act generally prohibits federal court judges from enjoining state court action.

The case was tried in the United States District Court for the Northern District of New York before Judge Neal McCurn. The case was tried in January, 1981.

My co-counsel once again was Arthur J. Gajarsa. Judge Gajarsa can be contacted at the address listed previously.

The principal opposing attorneys were, once again, James D. St. Clair and William F. Lee of Hale and Dorr of Boston, Massachusetts;

Allan van Gestel of Goodwin, Procter and Hoar of Boston, Massachusetts. The addresses of these attorneys are also listed in the previous section.

5. *Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987). This decision was the next major ruling arising from the Cayuga class action described in the three previous sections. This ruling was significant because the court granted partial summary judgment in favor of my client, the Cayuga Indian Nation of New York. The court ruled that my client had proven, as a matter of law, three of the four elements required for it to prevail.

In this proceeding, I was only involved in the drafting of the motion, the supporting affidavits and the brief in support of the motion. I did not have any involvement in arguing the motion or preparing any responsive briefs. I had relocated to West Palm Beach, Florida by the time those aspects of the case occurred.

This matter was heard in the United States District Court for the Northern District of New York before Judge Neal McCurn. I had the motion for summary judgment filed in the latter part of 1983.

While I was involved in this proceeding, Arthur J. Gajarsa was my co-counsel.

James D. St. Clair and William F. Lee of Hale & Dorr and Allan van Gestel of Goodwin Procter & Hoar, all of Boston, MA. were the opposing attorneys. All of their addresses are listed in the previous section.

6. *Tuttle's Design-Build, Inc. v. General Development Corporation*, 7 Fla. L. Weekly Fed. D358 (S.D. Fla. June 30, 1993). In this case, I represented the plaintiff, Tuttle's Design-Build, Inc., which was a landscaping and irrigation subcontractor. My client filed an adversary proceeding in bankruptcy against the debtor in bankruptcy, General Development Corporation. My client was seeking to foreclose on a mechanics lien filed for work performed prior to the commencement of the bankruptcy proceeding.

My client had not filed its mechanics lien until after the bankruptcy proceeding had been initiated, which jeopardized its position as a secured creditor. Under bankruptcy law, a lien filed after the initiation of the bankruptcy proceeding is a secured debt only if it can relate back to a date prior to the commencement of the bankruptcy proceeding. Under Florida state law, the filing date for a mechanics lien can relate back to an earlier date if the lienor records what is called a notice of commencement.

In this case my client had filed notices of commencement for only four of the lots on which it had provided services. The value of the work performed on these lots was minimal as compared to the total work performed on the entire project. My client filed its lien against the four lots for which it could validly argue that the lien related back to a date before the bankruptcy was filed.

However, the amount of the lien included the value of all the work performed on the entire project, not just the minimal amount performed on the four lots covered by the lien.

The debtor challenged the lien as being fraudulent because it included amounts claimed for work done on property not covered by the lien. The bankruptcy court agreed with the debtor and ruled that my client's lien was fraudulent.

On appeal to the district court, I succeeded in having the bankruptcy court's decision reversed and my client's lien enforced. The case is significant because I was able to convince the district court that under state law, a lien may include amounts for work done on property not covered by the lien, if all the work performed was pursuant to a single direct contract. I was also able to convince the district court that the bankruptcy judge erred in finding that my client was not working under a single direct contract.

The trial was conducted before visiting Bankruptcy Judge Gordon Kahn. The appeal was conducted before Judge Sidney M. Aronovitz of the United States District Court for the Southern District of Florida. The trial was held in November, 1991. The appeal was decided in 1993.

At the bankruptcy trial, I was assisted by co-counsel Gregory L. Scott of Nason, Yeager, Gerson, White & Lioce, P.A., 1645 Palm Beach Lakes Blvd., Ste. 1200, West Palm Beach, FL 33401, (561) 686-3307. I handled the appeal without co-counsel, and I was totally responsible for the briefing and oral argument.

General Development Corporation was represented by Kenneth B. Robinson, now with Rice & Robinson, P.A., 848 Brickell Ave., Ste. 1100, Miami, FL 33131, (305) 379-3121.

7. *Snellgrove v. Fogazzi*, 616 So. 2d 527 (Fla. 4th DCA 1993). In this case, I represented the defendant, Frank Fogazzi. My client was seeking to avoid the execution of a judgment against property which he had previously held individually, and which he had transferred to himself and his wife as tenants by the entirety. The issue in the case was whether the provisions of the Florida Uniform Fraudulent Transfer Act could be applied retroactively to transactions that occurred prior to the passage of the act. If the act could be applied retroactively, the statute of limitations contained in the act would have barred the plaintiff's claim against my client.

The case was significant because it presented a question of first impression in Florida. *Snellgrove*, 616 So. 2d at 529. The court held that the act could not be applied retroactively.

The trial proceedings were held before Judge James T. Carlisle of the Circuit Court, Fifteenth Judicial Circuit of Florida in approximately 1992.

The appellate decision was by the Fourth District Court of Appeal of Florida. I was sole counsel before the trial court and on appeal.

My opposing counsel was James C. Blanton, 1148 Seagull Park Dr. N., West Palm Beach, FL 33411, (561) 333-3691.

8. *Roberts v. Indian Trail Homeowners Association, Inc.*, Case No. CL 88-9937 AI, Fifteenth Judicial Circuit, Palm Beach County, Florida, reported at 577 So. 2d 998 (Fla. 4th DCA 1991). In this case, I represented the plaintiff against the defendant homeowner's association. My

client, among other things, challenged the validity of an increase in the monthly assessments imposed by the Association against the members. She contended that before the Association could increase assessments, approval of two-thirds (2/3) of the unit owners had to be obtained. She also sought an injunction permanently enjoining the Association from attempting to collect any increase in assessments imposed without the requisite approval. The Association, in addition to asserting that its Board of Directors had sole authority to increase assessments without unit owner approval, claimed that a permanent or perpetual injunction was not permitted by law. My client prevailed at both the trial and appellate levels. I was sole counsel before the trial court and appellate courts.

The case is significant because the appellate decision clarified the law relative to the issuance of permanent or perpetual injunctions. Prior to the appellate decision, there was case law indicating that a perpetual injunction was "unknown to the law". The appellate court's decision in this case resolved conflicting statements in various decisions and held that a perpetual injunction is permitted where it prohibits or restrains improper actions of a party. Perpetual injunctions are inappropriate where they seek to mandate affirmative action by a party.

The case was tried in the Circuit Court for the Fifteenth Judicial Circuit for Palm Beach County in January, 1990. The trial judge was Gordon A. Duncan, Jr. (Retired Visiting Judge).

I was sole counsel at the trial and appellate levels.

The opposing attorney was Michael J. Gelfand, now of Gelfand & Arpe, 250 S. Australian Ave., Ste. 1010, West Palm Beach, FL 33401, (561) 655-6224.

9. *Jensen v. Hollingsworth Properties*, Case No. 84-306 CA 17, Nineteenth Judicial Circuit, St. Lucie County, Florida, reported at 506 So. 2d 454 (Fla. 4th DCA), *rev. denied*, 518 So. 2d 1275 (Fla. 1987). In this case, I represented the plaintiffs. The plaintiffs had purchased units in a condominium which was to be developed by the defendant. More than two years after the contracts were signed, the defendant wanted to close the transactions. However, by that time, my clients became dissatisfied with the property and refused to close. They requested a return of their deposits, but the defendant refused. I initiated a claim against the defendant under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et. seq.*, seeking statutory rescission of the transactions. I was sole counsel before the trial court and appellate courts.

The case is significant because I was able to convince the trial and appellate courts that my client was entitled to statutory rescission even though such claims were required to be brought within two years of the signing of the contract. I successfully argued that because the defendant had violated provisions of the Act, it should be estopped to rely upon the statute of limitations. My clients obtained a judgment in excess of $350,000.00.

This case was litigated in the Circuit Court for the Nineteenth Judicial Circuit in St. Lucie County. Judge Burton C. Connor was the trial judge. The case was argued before the trial court in November, 1985. The appeal was before the Fourth District Court of Appeal of Florida.

I was sole counsel at the trial and appellate levels.

The opposing attorney was Steven L. Perry, 2081 E. Ocean Blvd., Stuart, FL 34996, (561) 286-1700.

10. *Pine Ridge at Haverhill Condominium Association, Inc. v. Hovnanian of Palm Beach II, Inc.*, 629 So. 2d 151 (Fla. 4th DCA 1993). In this case, I represented the plaintiff condominium association. My client was seeking damages against the developer of the condominium for construction defects. The issue before the appellate court was whether the trial court erred in failing to award prejudgment interest to the damages obtained from the jury. The case was significant because the appellate court ruled that prejudgment interest should have been calculated from a date prior to the time my client had expended any funds to repair the defective items. At the time this case was decided, the case law seemed to hold that the earliest date from which prejudgment interest could be calculated was the date the injured party incurred out-of-pocket expenses. See *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985) (when a verdict liquidates damages on a plaintiff's out of pocket pecuniary loss, prejudgment interest is due from the date of the loss). My client argued that to do so in this case would result in the developer receiving a wind fall. We contended that the developer had a legal responsibility to deliver a properly constructed condominium to the unit owners on the turnover date. As of that date, the developer should have expended the funds necessary to correct the defects. Instead, the developer held on to the funds and, presumably, was earning interest on the money which should have been applied to correct the defects. Thus, the developer was reaping the benefits of its wrongful delay in correcting the problems it was obligated to remedy. The court agreed and ruled that the jury's finding as to the amount of the recovery had the effect of fixing the damages at no later than the turnover date. Although it is not clear from the opinion, my client had no out of pocket expenses relating to the defects as of that date. In a more recent decision, the Fourth District Court of Appeal cited with approval the "wind fall" rationale which, I believe, was the underlying basis for this decision. See *Catalfumo v. Catalfumo*, 704 So. 2d 1095, 1100 (Fla. 4th DCA 1997), *rev. denied*, 717 So. 2d 529 (Fla. 1998).

The case was tried before the Honorable Edward Rogers, Circuit Judge, Fifteenth Judicial Circuit in approximately 1991. The appeal was before the Fourth District Court of Appeal of Florida.

I was lead counsel at trial and sole counsel on appeal. I was assisted at trial by co-counsel Gregory L. Scott, Nason, Yeager, Gerson, White & Lioce, 1645 Palm Beach Lakes Blvd., Ste. 1200, West Palm Beach, FL 33401, (561) 686-3307.

Opposing counsel was Timothy P. McCarthy, now Circuit Judge McCarthy, 205 N. Dixie Highway, West Palm Beach, FL 33401, (561) 355-2147, and James R. Merola, 11380 Prosperity Farms Rd., Ste. 204, Palm Beach Gardens, FL 33410, (561) 622-1433.

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

I have never been convicted of a crime.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected

in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

None.

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

I am currently unaware of any categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I hope to be confirmed. I expect to recuse myself from any cases in which I have an actual conflict of interest. In cases where it appears that I have a potential conflict of interest, I expect to make a disclosure to the parties and their counsel of all relevant information so that I can obtain additional information to determine whether the potential conflict of interest is, in fact, actual, and to allow the parties to file a motion to recuse if they deem it appropriate. I will resolve any conflict of interest in accordance with the Code of Judicial Conduct.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

See attached Financial Disclosure Report.

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

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

Yes, there is a Florida Federal Nominating Commission.

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

Yes, the nominating commission recommended me as one of three (3) candidates to be considered to receive the nomination from President Bush.

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

I submitted my application to the nominating commission for consideration, and I was granted an interview. After the interview, I was notified that I was one of the three (3) potential nominees. I was then invited to Washington, D.C. for interviews with Senators Bob Graham and Bill Nelson, and also with two (2) members of the Office of Counsel to the President and one (1) representative of the Department of Justice. I was then notified by a member of the Office of Counsel to the President that I was to be nominated for the position.

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

At no time during the nomination process has anyone discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how I would rule on such case, issue or question.

FINANCIAL STATEMENT

This Financial Statement should be completed and placed at the end of an application. Provide complete, current information, in dollars,, adding schedules as necessary, for yourself, spouse and other immediate members of your household. This is the Financial Statement as requested by the Senate Judicial Committee.

ASSETS		LIABILITIES	
Cash on hand and in banks	$4,000.00	Notes payable to banks - secured	-0-
U.S. Government securities - add schedule	-0-	Notes payable to banks - unsecured	-0-
Listed Securities - add schedule	See Schedule "A "	Notes payable to relatives	-0-
Unlisted Securities - add schedule	-0-	Notes payable to others	See Schedule "D"
Accounts and notes receivable	-0-	Accounts and bills due	I have no past due bills.
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	See Schedule "E"
Real estate owned - add schedule	See Schedule "B"	Chattel mortgages and other liens payable	See Notes Payable to Others – Auto Loan
Real estate mortgages receivables	-0-		
Autos and other personal property	$52,600.00	Other debts: itemize:	See Schedule "F"
Cash value - life insurance	-0-		
Other Assets - Itemize:	I.R.A. $42,910.25		
		Total Liabilities	$ 158,929.45
		Net Worth	$ 117,847.80
Total Assets	$ 276,777.25	Total Liabilities and Net Worth	$ 276,777.25

CONTINGENT LIABILTIES		GENERAL INFORMATION	
As endorser, co-maker or guarantor	-0-	Are any assets pledged: (Add schedule)	None other than as listed above.
On Leases or contracts	See Schedule "C"		
Legal Claims	-0-	Are you defendant in any suits or legal actions?	No.
Provision for Federal Income Tax	-0-		
Other special debt	-0-		

SCHEDULE "A"

Listed Securities

Securities	Value
Avnet, Inc.	$333.00
The Coca-Cola Company (as custodian for Andrew Marra)	$580.00
Hershey Foods Corporation (as custodian for Andrew Marra)	$354.00
Janus Worldwide Fund (as custodian for Andrew Marra)	$750.00
Alliance Quasar Fund, Inc. – Classic (as custodian for Annalise Marra)	$250.00
Total	$2,267.00

SCHEDULE "B"

Real Estate Owned

Real Property	Value
Lot 15, Block 70, Plat 6, City of Palm Beach Gardens, Palm Beach County, Fl. (Residence)	$175,000.00

SCHEDULE "C"

On Lease or Contract

	Monthly Payments
1. Automobile Lease with Nissan Motor Acceptance Corporation (ending April, 2003).	$253.64
2. Automobile Lease with General Motors Acceptance Corporation (ending May, 2003).	$200.34

SCHEDULE "D"
(Notes Payable to Others)

	Outstanding Balance
American Honda Finance Corporation (Automobile Loan)	$ 1,019.05 (as 1/28/02)
General Motors Acceptance Corporation (Automobile Loan)	$31,276.60(as of 1/28/02)
Total Automobile Loans	$32,295.65

SCHEDULE "E"

Real Estate Mortgages

All Mortgages are on
My Residence

Mortgagee	Outstanding Principal
1. Crown Bank	$ 111,795.71 (as of 12/31/01)
2. First Union National Bank (Second Mortgage)	$ 10,401.92 (as of 1/28/02)
3. First Union National Bank (Secured Equity Credit Line)	$ 1,907.47 (as of 1/28/02)
Total Mortgage Liability	$ 124,105.10

SCHEDULE "F"

Other Debts

	Outstanding Balance
First Virginia Bank (Credit Card-Unsecured)	$ 2,528.70 (as of 1/28/02)
Total Credit Card Debt	$ 2,528.70

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* Marra, Kenneth A.	**2. Court or Organization** Southern District of Florida	**3. Date of Report** 01/26/2002
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 01/23/2002 __ Initial __ Annual __ Final	**6. Reporting Period** 01/01/2001 to 01/01/2002
7. Chambers or Office Address Palm Beach County Courthouse 205 North Dixie Highway West Palm Beach, FL 33410	**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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Director at Large	Craig S. Barnard American Inn of Court LIV
2		
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	02/13/02	On that date I will be vested in the Florida Retirement System. Upon eligibility, I will receive an annuity.
2		
3		

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2000	State of Florida, salary as Circuit Judge	$118,434.48
2	2000	Interest on bank account with First Union National Bank of Florida	$562.67
3	2001	State of Florida, salary as Circuit Judge	$130,579.56
4			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Marra, Kenneth A.	01/26/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
☐ NONE (No such reportable reimbursements.)		
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
☐ NONE (No such reportable gifts.)			
1	Exempt		
2			
3			

VI. LIABILITIES

Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
X NONE (No reportable liabilities.)			
1			
2			
3			
4			
5			
6			

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Marra, Kenneth A.

Date of Report: 01/26/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Putnam Voyager Fund CI-A(IRA)	D	Dividend	K	T	Exempt				
2 First Union National Bank of Florida (Accounts)	A	Interest	J	T	Exempt				
3 Janus Worldwide Fund	A	Dividend	J		Exempt				
4 As of 2/13/02, vested interest in the Fla.Retirement System	A	Distribution	J	W	Exempt				
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Inc/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(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 Marra, Kenneth A.	Date of Report 01/26/2002

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Marra, Kenneth A.	01/26/2002

IX. CERTIFICATION

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

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

Signature _____ Date 1/26/02

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

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

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

   Morrison Cohen England, Jr.

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

   United States District Court Judge, Eastern District of California

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

   Sacramento Superior Court
   720 9th Street, Department 20
   Sacramento, California 95814
   (916) 874-7201

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

   December 17, 1954, St. Louis, Missouri

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

   I am married. My wife's maiden name is Nancy Irene Phillips. My wife is a pharmacist, and is employed by Pharmaceutical Care Network (PCN), 9343 Tech Center Drive Suite 200, Sacramento, California 95826-2563.
   I have three dependent children.

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

   California Judicial College, June 1997
   University of the Pacific, McGeorge School of Law (Night School), 9-78 to 6-83, Juris Doctor (6-83)
   California State University, Fullerton, 1-77 to 1-78 (Masters Program)
   California State University, Sacramento, 6-75 (Summer Session)
   University of the Pacific, 2-74 to 6-76, Bachelor of Arts (6-77)
   Sacramento City College, 9-71 to12-73

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

All of the following were paid positions:

State of California-1996 to present:
720 9th Street
Sacramento, CA 95814
Superior Court Judge

County of Sacramento-1996 to present
720 9th Street
Sacramento, CA 95814
Superior Court Judge

United States Army Reserve-1988 to present
22nd Legal Support Organization
612 E. Davis Street
Mesquite, TX 75149
Senior Defense Counsel for Team 18, located in Sacramento, CA

County of Sacramento, Juvenile Court-1991 to 1996
9601 Kiefer Blvd.
Sacramento, CA 95826
Referee & Judge Pro Tem

Quattrin, Johnson Campora & England-1988 to 1996
A Professional Corporation
25 Cadillac Drive, Suite 100
Sacramento, CA 95825
Shareholder, Director, Officer and Employee

Quattrin, Clemons & England-1983 to1988
A Professional Corporation
25 Cadillac Drive, Suite 100
Sacramento, CA 95825
Shareholder, Director, Officer and Employee

Quattrin & Clemons-1980-1983
25 Cadillac Drive
Sacramento, CA 95825
Law Clerk

County of Sacramento, Juvenile Court-1980-1981
9601 Kiefer Blvd.
Sacramento, CA 95826
On-Call Counselor

FPI Management, Inc.-1978 to 1980
25 Cadillac Drive
Sacramento, CA 95825
Assistant Resident Manager & Law Clerk

California State University, Sacramento-1978-1982
6000 J Street
Sacramento, CA 95819
Assistant Football Coach

California State University, Fullerton-1976-1978
800 N. State College Blvd.
Fullerton, CA 92634
Assistant Football Coach

New York Jets Football Club-1976
New York, NY
Free agent

California Department of Motor Vehicles-1973
2570 24th Street
Sacramento, CA 95818
Electronic Data Processing Clerk

In addition, please see my responses to Question 12, below.

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

I am a member of the United States Army Reserve, Judge Advocate General's Corps and have held that position since May 1988. My current rank is Major.

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

I was awarded the Army Meritorious Service Medal (MSM) in March 1998.

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

I am the Vice President and member of the Executive Board of the California Judge's Association. I have been a member of the Executive Board since 1999. I am also a member of the Anthony M. Kennedy American Inn of Court and currently hold the position of Master of the Bench (Emeritus). I have been a member of the Kennedy Inn since October 1997. Additionally, I am a member of the Federalist Society of Sacramento, the Wiley Manuel Bar Association and the Asian/Pacific Bar Association of Sacramento. I am the Chair of the Sacramento Superior Court Technology Committee as well as a member of the Court's Executive Committee, Criminal Law Committee, Community Focused Strategic Planning Committee and Security Services Committee.
I also serve on the New Judge Orientation Committee and New Judge Education Curriculum Committee with California Center for Judicial Education and Research (CJER) and the Judicial Services Task Force, all of which operate under the auspices of the California Administrative Office of the Courts (AOC).

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

I was admitted to both the California Bar and the United States District Court, Eastern District of California in November 1983.

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

Anthony M. Kennedy American Inn of Court
McGeorge School of Law, University of the Pacific
3200 Fifth Avenue
Sacramento, CA 95817
Master of the Bench (Emeritus)

Capital Athletic Club
1515 8th Street
Sacramento, CA 95814
Member (open to the general public)

Child Abuse Prevention Council of Sacramento (Non-profit)
1808 Tribute Road
Sacramento, CA 95815
Member of the Board of Directors and Vice President

Leukemia Society of Sacramento (Non-profit)
3105 Fite Circle
Sacramento, CA 95827
Member of the Board of Directors

Pacific Athletic Foundation (Non-profit)
3601 Pacific Avenue
Stockton, CA 95211
Member of the Board of Directors

Christian Brothers High School (Non-profit)
4315 Martin Luther King Jr. Blvd.
Sacramento, CA 95820
Member of the Board of Regents

Hornet Stinger Foundation (Non-profit)
6000 J Street
Sacramento, CA 95819
Member of the Board of Directors

None of the above organizations have ever discriminated on the basis of race, sex, or religion either through formal membership requirements or the practical implementation of membership policies. In addition, I have not received any compensation from any of the above organizations.

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

    I have not published any books or articles. I teach courses at the Judicial College of California and the California Continuing Judicial Studies Program. I prepare materials for the courses, but they are not published and I have not retained copies.

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

    I have not testified before a committee or subcommittee of the Congress

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

    I am in excellent health. My last physical examination was on January 29, 2002 as a part of this application process. Prior to that, my last physical examination was on June 22, 2001.

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

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

    The vast majority of the cases I hear in the Superior Court are criminal and so not require written opinions. The following cases are the more significant cases I have handled in my judicial career:

1. Case Name/Number:
People v. Richard Anthony Brewer, Bobby Marion Dixon, James David Glica and Rickie Antonio Martinez, No. 97F00253

Description:
The defendants were charged with first degree murder with special circumstances (robbery), personal use of a firearm and assault with a deadly weapon in an incident that occurred at an establishment known as The Bread Store in Sacramento, California on December 23, 1996. During the robbery attempt, one of the store's employees was shot and killed. As a result of pre-trial statements made by two of the defendants, three separate juries were impaneled to hear the case concurrently. Each of the juries found their defendant(s) guilty on all counts.
Defendant Brewer was sentenced to life without the possibility of parole and the remaining defendants were sentenced to 25 years to life plus consecutive determinate terms of seven to ten years.

Counsel:
Prosecutor: Deputy District Attorneys Steven Harrold and Dawn Bladet, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814, (916) 874-6637.
Defense Attorneys: Karol Repkow, 700 H Street Sacramento, California 95814, (916) 874-6411; Jan Karowsky, 901 F Street, Sacramento, California, 95814; (916) 447-1134; Ron Peters, 50 Fullerton Court, Sacramento, California 95825 (916) 922-9270; and Jon Lippsmeyer, 2240 Tamarack Way, Sacramento, California 95821, (916) 924-3733.

Court and Dates:
Sacramento Superior Court, November 2000-September 2001.

2. Case Name/Number:
People v. Hung Huynh, Thuy Nguyen, Hiep Tran and Sang Tran, No. 99F05625

Description:
The defendants were charged with home invasion robbery, burglary and false imprisonment. The charges arose out of an incident where the defendants took a mother and father and their two young children hostage in their home in an attempt to obtain cash and other valuables. During jury deliberations, events occurred outside the control of the court, the defendants and/or the attorneys (the court reporter misplaced one half day of testimony) which resulted in the court declaring a mistrial based on legal necessity. The defendants eventually entered pleas to certain charges and were sentenced to stipulated prison terms of 9 years each.

Counsel:
Prosecutor: Deputy District Attorney Stephen Choe, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814, (916) 874-6218.
Defense Attorneys: Robert Holley, 801 K Street, Sacramento, California 95814, (916) 443-2213; Troy Ellerman, 816 H Street, Sacramento, California 95814, (916) 442-5061; Howard McEwan, 906 G Street, Sacramento, California 95814, (916) 444-4472; and Chris Haydn-Myer, P.O. Box 204, Sacramento, California 95812, (916) 315-9296.

Court and Dates:
Sacramento Superior Court, June 21, 1000-July 21, 2000.

3. Case Name/Number:
People v. Larry Steven Schenkel, No. 99F03948

Description:
The defendant was charged with multiple counts of statutory rape, sodomy, penetration with a foreign object and oral copulation. He was also charged with two counts of murder for hire for attempting to have his girlfriend (the victim of the sexual assaults and mother of his baby) killed along with their 6 month old child for turning him in to the police. The defendant was found guilty on one count of murder for hire, and four sexual assault counts and was sentenced to 125 years to life in state prison.

Counsel:
Prosecutor: Deputy District Attorney Eugene Balonan, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814.
Phone (916) 874-8019.
Defense Counsel: Jay R. Greiner, 555 University Avenue, Sacramento, California 95825.
Phone (916) 444-2742.

Court and Dates:
Sacramento Superior Court, May 18, 2000-June 22, 2000.

4. Case Name/Number:
Raymond L. Brosterhouse, II v. The State Bar of California, No. 527974

Description:
I was assigned this case on remand from the California Supreme Court which upheld a decision by the California Court of Appeal, Third District. The original case was brought by twenty-four members of the California State Bar challenging the amount of annual mandatory dues paid by each member.

The plaintiffs alleged that a large portion of the annual mandatory dues were used to fund improper political activities of the State Bar.
A court trial was held in May of 1999 to determine whether the use of the annual mandatory dues violated the standard set forth in Keller v. The State Bar of California (1990) 496 U.S. 1. I concluded that a number of the charges included in the member's mandatory annual dues violated the standard set forth in Keller and ordered that those charges were to be refunded to the Plaintiffs.

Counsel:
Attorneys for the Plaintiff: Anthony T. Caso, Sharon L. Browne, Deborah J. La Fetra, Michele L. Justin, Pacific Legal Foundation 2151 River Plaza Drive, Suite 305 Sacramento, California 95833.
(916) 641-8888.
Attorneys for the Defendant: Mark W. of General Counsel The State Bar of Danis, Morrison & Foerster 425 Market Street San Francisco, California 94105.
(415) 268-7000.
Lawrence C. Yee & Dina E. Goldman, California State Bar Office, 555 Franklin Street San Francisco, California 94102.
Phone (415) 561-8200.

Court and Dates:
Sacramento Superior Court, June 1997-November 2000.

5. Case Name/Number:
People v. Robert Haynes, No. 99F00362

Description:
This defendant was charged with multiple counts of oral copulation, penetration with a foreign object and sodomy against not only his natural daughter, but young girls who rode on the bus he operated for AMTRAK. The defendant was found guilty after a jury trial of all counts and sentenced to 80 years in state prison.

Counsel:
Prosecutor: Deputy District Attorney Eugene Balonan, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814.
Phone (916) 874-8019.
Defense Attorney: David Muller, 819 F Street, Sacramento, California 95814.
Phone (916) 444-7595.

Court and Dates:
Sacramento Superior Court, November 4, 1999-November 18, 1999.

6. Case Name/Number:
People v. Alvin Vancil, No. 98F09538

Description:
This case involved a defendant charged with the premeditated murder of his mother. The first degree murder charge carried special circumstances as well. The defendant was found guilty after a jury trial and sentenced to 25 years to life in state prison.

Counsel:
Prosecutor: Deputy District Attorney Charles Gonzales, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814.
Phone (916) 874-5103.
Defense Attorney: Assistant Public Defender Norman Dawson, 700 H Street Sacramento, California 95814.
Phone (916) 875-5077.

Court and Dates:
Sacramento Superior Court, October 25, 1999-November 1, 1999.

7. Case Name/Number:
People v. Demiantra Clay & Larnell Flemings, No. 97F08683

Description:
The defendants in this case were charged with multiple counts which included first degree murder with special circumstances, attempted murder and robbery. The defendants were found guilty after a jury trial of all counts. Defendant Flemings was sentenced to life without the possibility of parole and defendant Clay, who was a minor at the time of the incident was sentenced to 25 years to life in state prison.

Counsel:
Prosecutor: Deputy District Attorney Paul Durenberger, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814.
Phone (916) 874-7017.
Defense Attorneys: Assistant Public Defender Donald Manning, Sacramento, California 95814, Phone (916) 874-5975 and Court Appointed Counsel, Howard McEwan, 906 G Street, Sacramento, California 95814.
Phone (916) 444-4472.

Court and Dates:
Sacramento Superior Court, July 6, 1999-July 29, 1999.

8. Case Name/Number:
People v. Terry Joe Burton, No. 98F00673

Description:
In this case, the defendant was charged with multiple counts of rape and false imprisonment. The defendant was found guilty after a jury trial of all counts as charged. The defendant was sentenced to 75 years to life in state prison with an additional 11 years to be served consecutive to the life term.

Counsel:
Prosecutor: Deputy District Attorney Lori Earl, Sacramento County District Attorney's Office, 901 G Street, Sacramento, California 95814.
Phone (916) 874-6218.
Defense Attorney: Keith Staten, PO Box 932382, MSE-128,2415 1st Avenue, Sacramento, California 94232-3820. (Mr. Staten is currently employed by the California Department of Motor Vehicles.)
Phone (916) 657-6469.

Court and Dates:
Sacramento Superior Court, January 25, 1999-February 5, 1999.

9. Case Name/Number:
In Re Cassandra P. and Nikuia W. (formerly Keisha T.), No. 204172

Description:
This case involved a petition by the Sacramento Bee newspaper to obtain confidential dependency court records. Initially, the Presiding Judge of the Juvenile Court issued a ruling on the request by the Sacramento Bee which called for me to act as a Special Master and review all of the dependency court records prior to their disclosure. (I was a pro-tem referee at the time.) The ruling of the Presiding Judge was taken for review by the Court of Appeal, Third Appellate District which ultimately disapproved of the Presiding Judge's plan and remanded the case for further proceedings. The Court of Appeal issued its ruling in a published opinion entitled In re Keisha T., (1995) 38 Cal. App. 4th 220, 44 Cal. Rptr.2nd 822. When the case was returned from the Court of Appeal, I was assigned as the judge to handle the case for all purposes. I thereafter developed a procedure for the disclosure to the media of confidential dependency court records in accordance with the Court of Appeal's ruling.

Counsel:
Counsel for Petitioner: (McClatchy Newspapers) Charity Kenyon, Riegels, Campos & Kenyon 2500 Venture Oaks Way, Sacramento, California 95812-3034.
Phone (916) 779-7100.

Counsel for Minors: Carol Chrisman, formerly with Sacramento Child Advocates, Inc., currently Referee of the Sacramento Superior Court, 3341 Power Inn Road, Sacramento, California 95826. (916) 875-5256.
Kenneth C. Mennemeir, Mennemeir, Glassman & Shroud, 980 9th Street, Suite 1750, Sacramento, California 95814. Phone (916) 446-4469;
Valerie R. Park, Morrison & Foerster, 755 Page Mill Road, Palo Alto, California 94304-1018. Phone (415) 813-5600.

Court and Dates:
Sacramento Superior Court, October 1996 through April 1999.

10. Case Name/Number:
William Dennie v. Tabloids, No. 97AS03899

Description:
This was a personal injury case brought by the plaintiff as a result of actions taken by defendant's employees to prevent a physical altercation while the plaintiff was a patron at defendant's establishment.
The plaintiff was cut when he was pushed into a plate glass window by an employee in an effort to reach the altercation. The plaintiff suffered a lacerated ulnar nerve in his right arm. The plaintiff was attempting to obtain a basketball scholarship to college, but the injury affected his playing ability and thereby severely reduced his ability to secure a scholarship. The jury found in favor of the plaintiff and awarded $251,017.00.

Counsel:
Plaintiff's Attorney: Timothy J. Ryan, Mackenroth, Ryan and Fong, 1331 Garden Highway, Sacramento, California 95833.
Phone (916) 924-1912.
Defense Attorney: Donald S. Walter, Bolling, Walter & Gawthrop, 8880 Cal Center Drive, Sacramento, California 95826.
Phone (916) 369-0777.

Court and Dates:
Sacramento Superior Court, June 7, 1999-June 16, 1999.

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

(i) I was reversed in a law and motion matter where I granted a motion for summary judgment and denied a further motion for leave to amend the complaint. The appellate court affirmed my ruling on the summary judgment motion but reversed my ruling denying leave to amend the complaint. (Mona Joy Kafati v. Allwyn Metherell, Case No. C036619, Superior Court case No. 98AS05123. Filed December 18, 2001.

(ii) I was reversed when I dismissed a civil case for failure to prosecute under the case management rules of our court. (Pal Chima v. William Weniger, Case No. C037392, Superior Court Case No. CV541146. Filed December 11, 2001.)

(iii) I was reversed in part of my sentencing decision involving the California Three Strikes Law. At the time of my decision, the law was relatively new and guidance from the California Supreme Court on its implementation was just being developed. The case was remanded for me to acknowledge that I had discretion to sentence concurrently or consecutively and in this particular case, elected to sentence consecutively. (People v. Terrence Wernicke, Case No.C026891, Superior Court Case No. 95F08915. Filed October 27, 1998.)

Copies of the unpublished opinions are included with these responses.

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

I wrote an opinion in a case that involved the significant Federal constitutional issue of freedom speech and mandatory membership dues in the California State Bar. The case was entitled Raymond L. Brosterhouse, II v. State Bar of California, Case No. 95AS03901. My decision was based on the United States Supreme Court's ruling in Keller v. The State Bar of California (1990) 496 US 1. Copies of my Decision and Order and Final Judgment are included with these responses.

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

A copy of the ruling is attached.

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

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

I have not held public office other than Superior Court Judge. I was appointed by Governor Pete Wilson to the Municipal Court on August 7, 1996. I was elevated by Governor Wilson to the Superior Court on August 21, 1997. As required by California law, I ran at the next general election after my appointment to the Superior Court in 1998 and was unopposed and re-elected. I assumed office for my current six year term on January 1, 1999.

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

No.

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

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

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

I have never served as a clerk to a judge.

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

I have never practiced alone.

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

January, 1988 to August 1996:
Quattrin, Johnson, Campora & England
25 Cadillac Drive, Suite 100
Sacramento, California 95825
Shareholder, Partner & Employee

December 1983 to December 1987:
Quattrin, Clemons & England
25 Cadillac Drive, Suite 100
Sacramento, California 95825
Shareholder, Partner & Employee

January 1980 to November 1983:
Quattrin & Clemons
25 Cadillac Drive, Suite 100
Sacramento, California 95825
Law Clerk

2.

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

Prior to my assumption of judicial office, my practice was primarily transactional in nature, with specific emphasis on business and real estate transactions, commercial and residential rental agreements, formation of closely held corporations, Housing and Urban Development (HUD) transactions and estate planning. I was also involved in litigation for my clients which included but was not limited to, breach of contract actions, discrimination actions, unlawful detainers.

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

My primary clients were real estate contractors and developers with an emphasis in Federally subsidized housing programs. I prepared corporations and qualified individuals and corporations as Broker/Dealers pursuant to the rules of the Securities and Exchange Commission and the National Association of Securities Dealers. I also had clients for whom I provided advice on estate planning (preparation of wills, living and testamentary trusts, powers of attorney and related documents) and the probate of decedent's estates.

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

I appeared in court frequently. The majority of my appearances were either court trials or administrative proceedings.

1) Indicate the percentage of these appearances in

(1) federal courts; 1%
(2) state courts of record; 95%
(3) other courts. 4%

2) Indicate the percentage of these appearances in:

(1) civil proceedings; 99%
(2) criminal proceedings. 1%

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

100 plus as sole counsel

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

3% were decided by jury

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

I have not practiced before the United States Supreme Court.

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

While in private practice, I provided *pro bono* legal services on behalf of the Voluntary Legal Services Panel. Prior to my appointment, I made a point of providing at least ten hours per month of *pro bono* legal services to various individuals who could not otherwise afford an attorney. The services I provided on a *pro bono* basis included drafting of wills and powers of attorney (estate planning) and eviction defense work.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;
(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
(3) the party or parties whom you represented; and
(4) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Prior to taking the bench, my practice focused primarily on transactional matters. Specifically, my practice emphasized real estate and business transactions with an emphasis on Federally subsidized housing programs. In addition, I was involved in estate planning which entailed the preparation of wills, trusts, powers of attorney and the probate of decedents' estates.

Based upon the nature of my practice, I did not have a large number of litigated matters. In response to this question, I have provided a list of cases that will provide information on the litigation portion of my practice.

1. Case Name/Number:
STW, LP, a California Limited Partnership v. Quanterra Incorporated, et al. Yolo County Superior Court Case NO. 95000002

Description:

I represented the plaintiff in this action to recover rent and damages to commercial property. My client received the sum of $400,000.00 as part of a pre-trial settlement.

Counsel:
Counsel for defendant was Maureen Lenihan, Esq., 2500 Venture Oaks Way, Sacramento, California 95833, (916) 488-5388. This case was settled just prior to my taking the bench in 1996.

Date:
March 1995.

2. Case Name/Number:
United States of America v. Bryte Gardens Associates, et al., United States District Court, Eastern District of California, Case No. CIV-S-95-652-LKK/GGH

Description:
I represented the defendants in this action which alleged that defendants discriminated against persons applying for Federally subsidized housing on the basis of race. This case was resolved by a consent decree issued by United States District Court Judge Lawrence K. Karlton in 1996.

Counsel:
The Assistant United States Attorney who handled the case was Yoshinori H.T. Himel, Esq., United States Attorney's Office, 501 I Street, Suite 10-100, Sacramento, CA 95814, (916) 554-2760.

Date:
March 1995

3. Case Name/Number:
Normac, Inc. v. Butler, et al., Sacramento County Superior Court Case No. CV513420

Description:
I represented defendants Lorelei Productions, Inc. and Douglas Carson. My clients were the victims of an embezzlement/fraud scheme perpetrated by an employee, Nina Butler. Ms. Butler fraudulently obtained funds from Normac, Inc., a client of Lorelei Productions, and "laundered" those funds through Lorelei Productions without the knowledge of my clients. Ms. Butler was convicted of embezzlement in the criminal court and sentenced to state prison. Plaintiff thereafter filed suit requesting that a constructive trust be imposed on the assets of Lorelei Productions, Inc. The case went to jury trial and plaintiff was awarded $3,000,000.00 against Ms. Butler.

Counsel:
The plaintiff was represented by Roland Candee who is now a Judge on the Sacramento Superior Court. Judge Candee can be reached at 720 Ninth Street, Department 27, Sacramento, California 95814, (916) 874-6697.

Date:
Filed February 1990.

4. Case Name/Number:
In re Beverly K. Thee dba Upper Crust Pizza, United States Bankruptcy Court, Eastern District of California, Case No. 95-24969-A-13

Description:
I represented MIG Promenade Shopping Center, one of the creditors of the debtor. I am unaware of the final disposition of this case as it was resolved after I left my firm to take the bench.

Counsel:
The debtor was represented by Daniel S. Weiss, Esq., 83 Scripps Drive, Suite 360, Sacramento, California 95825, (916) 569-1610. Another creditor was represented by Thomas M. Glasheen, Jr., Esq., 1012 19th Street, Sacramento, California 95814, (916) 498-1860.

Date:
Filed 1995.

5. Case Name/Number:
Mitchell Roofing v. FPI Management, Inc., et al., Yuba County Superior Court, Case No. C25038

Description:
I represented defendant FPI Management, Inc. in this breach of contract action... This case was settled prior to trial and just prior to my taking the bench.

Counsel:
The plaintiff was represented by Robert Fruitman, Esq., 322 First Street, Marysville, California 95901, (530) 742-1312.

Date:
Filed April 1996.

6. Case Name/Number:
John Villegas v. Waterford Cove Apartments, Sacramento County Superior Court Case No. 96AM00964

Description:
I represented defendant Waterford Cove Apartments. This was an action for breach of contract. This matter was settled prior to trial.

Counsel:
Counsel for plaintiff was James D. Taylor, Esq. 3101 I Street, Sacramento, California 95816, (916) 443-6115.

Date:
Filed May, 1996.

7. Case Name/Number:
Controlled Access Consultants v. Point West Partnership.

Description:
I represented defendant, Point West Partnership in this action for breach of contract and foreclosure of mechanic's lien. This case was settled prior to the filing of a court action.

Counsel:
Plaintiff was represented by W. Stuart Home, Esq., 1329 H Street, Sacramento, California 95814, (916) 447-7771.

Date:
1996.

8. Case Name/Number:
Diane Reams v. Continental Apartments

Description:
I represented defendant Continental Apartments in this action to recover damages to personal property. This case was settled prior to the filing of a court action in May, 1996.

Counsel:
Plaintiff was represented by Steve Burlingham, Esq., 5330 Madison Avenue, Suite F, Sacramento, California 95841, (916) 332-8122.

Date:
May 1996.

9. Case Name/Number:
Tina Pratt v. Windscape Apartments.

Description:
I represented defendant Windscape Apartments in this action for property damage and personal injury. This case was settled prior to the filing of a court action.

Counsel:
Plaintiff was represented by Susan Sheridan, Esq., 3600 American River Drive, Suite 145, Sacramento, California 95864, (916) 488-5388.

Date:
June 1996.

10. Case Name/Number:
Estate of Rockland Handy, Kern County Superior Court Case No. 228715.

Description:
Mr. Handy was killed in a tragic car accident in 1995. His wife Cynthia was suffering from terminal cancer at the time of the accident. Our firm handled the wrongful death action probate of his estate. I was responsible for the filing of all probate documents with the Kern County Superior Court as well as preparation of all documents necessary to assist the widow in transferring community and separate property to the eventual heirs of the estate. Unfortunately, the decedent's wife has since succumbed to her cancer. The surviving heirs to the estate are David and Alaina (Handy) Divine who can be reached at (916) 985-3899.

Counsel:
There were no opposing counsel involved in the probate matter or estate planning.

Date:
April 1995.

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

    I have no criminal history.

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

    I was named as a defendant along with three of my former clients in a lawsuit filed in 1997. The plaintiff was a tenant who I previously evicted in my professional capacity as an attorney. The action was entitled Joy H.S. Moon v. Rosswood Manor Apartments, FPI, Ken Hunt and Morrison C. England, Jr., Sacramento, Superior Court Case No. 96AS00146.

    The plaintiff never served the summons or complaint on any of the defendants but nonetheless attempted to obtain a default judgment. (It should be noted that the service of the summons and complaint was alleged to have taken place at my former law firm when in fact, I was a judge and no longer associated with that law firm.)

The plaintiff attempted to take a default judgment against me. When the plaintiff appeared to "prove up" her case, the court refused to hear the case, noting, among other things, that the "purported proof of service was filed 45 minutes before the alleged service took place."

Thereafter, the court, on its own motion, stayed the entire case to determine if the plaintiff was a "vexatious litigant." The plaintiff filed one more motion the court determined to be in violation of the stay which was summarily denied. The entire case was thereafter dismissed by the court on its own motion.

I was also a party to a court proceeding in 1995 which involved a request by my ex-wife to modify a child visitation schedule. This action was a continuation of a dissolution of marriage action which began more than ten years prior to my nomination.

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

I have no arrangements that may present potential conflicts of interest. I will maintain a list of all financial holdings I have with my spouse and if there is a potential for a conflict of interest, it will be immediately disclosed to all counsel and I will take the necessary steps to comply with all ethical considerations up to and including recusal from the case, if necessary. I will also comply with the Judicial Code of Conduct and relevant statututes.

23. Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

See attached financial disclosure statements.

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

The Statement of Net Worth and Schedules are attached.

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

(1) If so, did it recommend your nomination?

Yes.

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

I was interviewed by a six person bipartisan selection committee for the Eastern District of California who submitted my name to the Chair of the California Republican party. I was then interviewed by the Chair who made a recommendation to the White House. I was then interviewed by White House Counsel and completed all requested forms.

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

No.

FINANCIAL STATEMENT

NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	$35,000	Notes payable to banks-secured	$14,000
U.S. Government securities-add schedule	None	Notes payable to banks-unsecured	None
Listed securities-See schedule 1	$20,000	Notes payable to relatives	None
Unlisted securities–add schedule	None	Notes payable to others	None
Accounts and notes receivable:	None	Accounts and bills due	$2,000
Due from relatives and friends	None	Unpaid income tax	None
Due from others	None	Other unpaid income and interest	None
Doubtful	None	Real estate mortgages payable-See schedule 4	$230,000
Real estate owned-See schedule 2	$693,500	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts-itemize:	None
Autos and other personal property	$75,000		
Cash value-life insurance	None		
Other assets itemize:			
Retirement & 401(k) Accounts See schedule 3	$475,000		
Education Funds	$25,000		
		Total liabilities	$246,000
		Net Worth	$1,077,500

Total Assets	$1,323,500	Total liabilities and net worth	$1,303,500
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	No	Are any assets pledged? (Add schedule)	No
On leases or contracts	No	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	Cash		
Other special debt	None		

Schedule 1

Listed Securities

Alliance Premier Growth Fund	$11,264
Massachusetts Investment Trust	$ 8,840

Schedule 2

Real Estate Owned

Current personal residence	$212,500
Real property, Sacramento, CA	$136,000
Improvements to real property, Sacramento, CA	$345,000

Schedule 3

Retirement & 401(k) Accounts

Humana Hospital	$ 50,000
Pharmaceutical Care Network	$ 60,000
Lincoln Financial Group	$130,000
Wells Fargo Securities	$ 30,000
Wells Fargo Securities	$ 75,000
Judge's retirement System	$130,000

Schedule 4

Real Estate Mortgages Payable

Wells Fargo Bank	$230,000

'D-19 (w)
'ev. 1/2000

FI NCIAL DISCLOSURE REP T

Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* England, Jr., Morrison C.	2. Court or Organization Eastern District of California	3. Date of Report 03/21/2002
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 03/21/2002 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2001 to 03/21/2002
7. Chambers or Office Address 720 9th Street, Dept. 20 Sacramento, CA 95814	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
X	NONE (No reportable positions.)	
1		
2		
3		

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

	DATE	PARTIES AND TERMS
	NONE (No reportable agreements.)	
1	03/21/02	California Judicial Retirement System II-Will provide for return of my 8% contribution and 10% state contribution for rollover into qualified retirement plan
2		
3		

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
	NONE (No reportable non-investment income.)		
1	03/21/02	State of California	145,108
2	03/21/02	County of Sacramento	11,875
3	03/21/02	Pharmaceutical Care Network	
4			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: England, Jr., Morrison C.

Date of Report: 03/21/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1		EXEMPT	
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Wells Fargo Bank	Construction Loan	M
2	Wells Fargo Bank	Credit Card	J
3	First USA Bank	Credit Card	J
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: England, Jr., Morrison C.

Date of Report: 03/21/2002

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependant 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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Rental Property, Garden Grove, Orange County, CA	D	Rent			Sell	08/01	M	A	Todd/Michelle Stockham, Buyers
2 Alliance Premier Growth Fund		None	K	T	EXEMPT				
3 Massachsetts Investment Trust		None	K	T	EXEMPT				
4 Dreyfus Premier Worldwide		None	K	T	EXEMPT				
5 Dreyfus Premier Large Stock		None	K	T	EXEMPT				
6 Dreyfus FDS Premier Balanced		None	K	T	EXEMPT				
7 MFS Cap Opportunities		None	K	T	EXEMPT				
8 Mainstay FDS Equity Index		None	J	T	EXEMPT				
9 Columbia Balanced fund		None	K	T	EXEMPT				
10 Columbia Growth Fund		None	J	T	EXEMPT				
11 Columbia International Fund		None	J	T	EXEMPT				
12 Columbia Small Cap Fund		None	J	T	EXEMPT				
13 Lincoln Financial Group		None	J	T	EXEMPT				
14 Lincoln Financial Group		None	M	T	EXEMPT				
15 American Home Products Common Stock		None	J	T	EXEMPT				
16 DuPont Common Stock		None	J	T	EXEMPT				
17 Microsoft Common Stock		None	J	T	EXEMPT				

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: England, Jr., Morrison C.

Date of Report: 03/21/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Pfizer Common Stock		None	J	T	EXEMPT				
19 Sun Microsystems Common Stock		None	J	T	EXEMPT				
20 Edison Common Stock		None	J	T	EXEMPT				
21 Dreyfus Premium Worldwide Growth B	D	Distribution		T	Sell	07/01	J		
22 Goldman Sachs Cor US Equity B	D	Distribution		T	Sell	08/01	J		
23 Massachsetts Investment Stock Growth B	D	Distribution		T	Sell	07/01	J		
24 Massachsetts Investment Trust B	D	Distribution			Sell	08/01	J		
25 Wells Fargo Money Market Fund	A	Dividend	J	T	EXEMPT				
26									
27									
28									
29									
30									
31									
32									
33									
34									

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
(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

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
(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

Value 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 England, Jr., Morrison C.	Date of Report 03/21/2002

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	England, Jr., Morrison C.	03/21/2002

IX. CERTIFICATION

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

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

Signature _____ Date 3.25.02

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

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

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

   Lawrence Albert Greenfeld

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

   Director, Bureau of Justice Statistics, U.S. Department of Justice

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

   Office: 810 7th Street, N.W., Washington, D.C. 20531, 202-616-3281
   Residence: Maryland

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

   August 15, 1947; Washington, D.C.

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

   Barbara Carol Greenfeld (maiden name: Weinstein). Director of Admissions and Advising, Howard Community College, 10901 Little Patuxent Parkway, Columbia, MD 21044. No dependent children.

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

   1. American University—Washington, D.C.; 02/1970-06/1973; M.S awarded 06/1973
   2. Carnegie-Mellon University—Pittsburgh, PA; 01/1973-01/1973; Certificate in Systems Analysis awarded 01/1973.
   3. University of Maryland—College Park, MD; 09/1967-06/1969; B.A. awarded 06/1969.
   4. Temple University—Philadelphia, PA; 09/1965-06/1967; no degree awarded, transferred to University of Maryland.

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

   1. Bureau of Justice Statistics, U.S. Department of Justice; 1982 to present; 810 7th Street, N.W., Washington, D.C. 20531.
      Positions held:
      a. Acting Director—Jan, 2001 to Present
      b. Principal Deputy Director—Sep, 1996 to Jan, 2001
      c. Deputy Director for Statistical Programs—Sep, 1994 to Sep, 1996
      d. Acting Director—Jan, 1993 to Sep, 1994
      e. Acting Deputy Director and Associate Director—Jan, 1992 to Jan, 1993
      f. Chief, Corrections Statistics Programs—April 1983 to Jan, 1992
      g. Statistician—April, 1982 to April, 1983
   2. National Institute of Justice, U.S. Department of Justice; 1976 to 1982; 810 7th Street, N.W., Washington, D.C. 20531; Social Science Analyst.
   3. MITRE Corporation; 1973 to 1975; 7515 Colshire Drive, McLean, VA 22102; Technical Staff Member
   4. Maryland Governor's Commission on Law Enforcement and the Administration of Justice; 1972 to 1973; Agency no longer exists; Planning Coordinator.
   5. Fairfax County Juvenile and Domestic Relations Court; 1969 to 1972; 4000 Chain Bridge Road,

Fairfax, VA 22030; Probation Officer
6. Served continuously on the Advisory Board of the Criminology Program at Howard Community College, Columbia, Maryland, since 1992 (no compensation for service).
7. Served in a variety of capacities as an officer, committee chair, and committee member of B'nai B'rith, Columbia Chapter, from 1972 (no compensation for service).
8. Served as a member of the religious committee and occasional cantor at synagogue continuously since 1983, B'nai Shalom of Olney, in Olney, Maryland (no compensation for service).

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

None.

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

In January, 1993, I was the recipient of the Peter P. Lejins Award for Research from the American Correctional Association, the highest award given for research in the field of corrections and was selected as the "Best of the Best" in the field of corrections by Corrections Today Magazine. I have served on numerous national panels and commissions including providing assistance to the Surgeon General's National Advisory Commission on Drunk Driving. In 1996, I received the Alumnus of the Year Award from the Department of Criminology and Criminal Justice at the University of Maryland.

I have been the recipient of numerous annual performance and achievement awards over my 26 years in the Department of Justice. I have twice received the Assistant Attorney General's Award (1981, 1985). Since entering the SES in 1996, I have received an outstanding performance appraisal in each year.

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

Not applicable.

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

Not applicable.

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

1. B'nai Shalom of Olney Synagogue—Member Religious Committee; occasional Cantor
2. American Correctional Association—Member Research Committee
3. American Society of Criminology—General membership
4. B'nai B'rith Men's Organization—Secretary, Treasurer, Vice-President
5. University of Maryland Alumni Association—General membership

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered

by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Publications

Greenfeld, Lawrence A. Comprehensive Plan for Reducing Crime and Improving the Administration of Justice 1973--Volumes I and II, Cockeysville, Maryland: Maryland Governor's Commission on Law Enforcement and the Administration of Justice, October 1972.

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Greenfeld, Lawrence A. and Patrick A. Langan and Steven K. Smith. "Revising and Fielding the Police-Public Contact Survey" in Use of Force by Police. Washington, D.C.: National Institute of Justice, U.S. Department of Justice, p. 15-18, May 1999.

Greenfeld, Lawrence A. "Juvenile Offending as Reported by Victims of Violence" National Research Council, Panel on Juvenile Crime, Racial Disparity Workshop, Washington, D.C., June 29, 1999.

Greenfeld, Lawrence A. "Juvenile Offending and Case Processing: An Examination of Racial Disparity and the Juvenile Justice System" Justice Research and Statistics Association, Baltimore, Maryland, November 4, 1999.

Greenfeld, Lawrence A. and Snell, Tracy L. Women Offenders. Washington, D.C. Bureau of Justice Statistics, U.S. Department of Justice, December 1999.

Greenfeld, Lawrence A. and Maureen A. Henneberg. "Alcohol, Crime and the Criminal Justice System" in Alcohol and Crime: Research and Practice for Prevention. Washington, D.C.: National Crime Prevention Council, June 2000, p. 23-40.

Greenfeld, Lawrence A. "Women Offenders, Crime and the Criminal Justice System" BJA Policy Workshop: The Challenge of Preparing Female Offenders to Return to the Community, Providence, Rhode Island, July 27, 2000.

Greenfeld, Lawrence A., Patrick A. Langan, and Steven K. Smith. Contacts Between the Police and the Public: Findings from the 1999 National Survey. Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice, March, 2001.

Greenfeld, Lawrence A. "Current Developments in National Data Policy on Policing" Proceedings of the Police Executive Research Forum National Symposium: Data Systems for Policing

in the 21st Century. Baltimore, Maryland, July 19, 2001. Submitted for Proceedings.

Greenfeld, Lawrence A. and Maureen A. Henneberg. "Victim and Offender Self-Reports of Alcohol Involvement in Crime" in Journal of Alcohol Research and Health. Washington, D.C.: National Institute on Alcohol Abuse and Alcoholism, Volume 25, Number 1, 2001.

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

Testimony on "Correcting Revolving Door Justice: New Approaches to Recidivism" in a Hearing before the House Subcommittee on Crime and Criminal Justice, March 1, 1994. I provided the Subcommittee with estimates of the number of offenders entering Federal and State prisons who would fit the definition under consideration at that time for eligibility for the "Three Strikes and You're Out" sanctions. Based upon sample data collected from State and Federal inmates, I estimated that less than 2% of offenders admitted to Federal prisons and just under 5% of those admitted to State prisons would qualify.(Copy attached)

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

In excellent health. Last examined by my physician 10/12/2001.

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

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

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

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

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

I have not been a judge.

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

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

The position I held at the Maryland Governor's Commission on Law Enforcement and the Administration of Justice from July 1972 to June 1973 was that of Planning Coordinator. My primary responsibility was to manage the development of the 1973 Maryland Comprehensive Criminal Justice Improvements Plan as required for receiving funds from the Law Enforcement Assistance Administration's block grant program as authorized by the Omnibus Crime Control Act of 1968. The position, though excepted from State civil service, was not a political position.

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

No.

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

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

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
Not applicable.

(2) whether you practiced alone, and if so, the addresses and dates;
Not applicable.

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

1. Bureau of Justice Statistics, U.S. Department of Justice; 1982 to present; 810 7th Street, N.W., Washington, D.C. 20531.
Positions held:
a. Acting Director—Jan, 2001 to Present
b. Principal Deputy Director—Sep, 1996 to Jan, 2001
c. Deputy Director for Statistical Programs—Sep, 1994 to Sep, 1996
d. Acting Director—Jan, 1993 to Sep, 1994
e. Acting Deputy Director and Associate Director—Jan, 1992 to Jan, 1993
f. Chief, Corrections Statistics Programs—April 1983 to Jan, 1992
g. Statistician—April, 1982 to April, 1983
2. National Institute of Justice, U.S. Department of Justice; 1976 to 1982; 810 7th Street, N.W., Washington, D.C. 20531; Social Science Analyst.
3. MITRE Corporation; 1973 to 1975; 7515 Colshire Drive, McLean, VA 22102; Technical Staff Member
4. Maryland Governor's Commission on Law Enforcement and the Administration of Justice; 1972 to 1973; Agency no longer exists; Planning Coordinator.
5. Fairfax County Juvenile and Domestic Relations Court; 1969 to 1972; 4000 Chain Bridge Road, Fairfax, VA 22030; Probation Officer

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

My professional career in criminal justice has spanned nearly 33 years, beginning as a probation and parole officer responsible for the preparation of presentence reports to the court as well as the supervision of adult and juvenile offenders placed under the jurisdiction of the court. I have been employed by county, State, and Federal criminal justice agencies and I have worked as a consultant to government in the evaluation of city-level initiatives to address street crime. For the last 20 years, I have had progressively increasing responsibility for the management of BJS. When the Clinton Administration came into office, I was asked to serve as the Acting Director of BJS for the first 21 months. Since the Bush Administration began, I have once again been asked to serve as Acting Director for nearly a year. I believe that I have been nominated to be the next Director of BJS because of my intimate knowledge of the operations and programs of the agency, my very clear understanding and strong commitment to the need to protect the statistical programs from any appearance of manipulation and the unequivocal requirement to insulate statistical data from political interference, and because I have demonstrated a capability to enter into productive partnerships with both the criminal justice and statistical communities at all levels of government.

My 26 years in the Department of Justice have brought me into contact with a wide variety of components within the Department and across the Federal government. Over the last 20 years, I have authored dozens of national statistical reports which have been used by various Administrations, by the Congress, and by the public to achieve a better understanding of the scope and reach of crime and the administration of justice into our lives. I have responsibility to statistically describe

the 25 million criminal victimizations which occur annually and the workload and operations of the nearly 50,000 agencies, institutions, and offices that provide some form of criminal justice service. The demand for this statistical information has been extraordinarily high—we receive requests for more than a million copies of our reports each year and our website receives up to 12,000 user visits per day.

The range of publications I have authored or co-authored on crime and justice has included chapters in books, journal articles, special analytic presentations, as well as many BJS reports. I have authored or co-authored BJS publications on offenders who victimize children, the incidence and prevalence of domestic violence, use of force and racial profiling in police contacts with the public, crime affecting American Indians, and the role of alcohol in crime. At this time, I am directing an effort to develop new national estimates of computer crime and its consequences for both individuals as well as companies doing e-commerce. I am also authoring a statistical report on prison inmate participation in religious activities while confined in State and Federal institutions.

In addition to my statistical responsibilities, I also have had the privilege to manage the National Criminal History Improvement Program (NCHIP), the funding initiative designed to assist States in building the criminal records infrastructure necessary to provide more accurate and more accessible information for law enforcement purposes and to help States to identify ineligible firearms purchasers. Under this program, I have had the opportunity to observe the more than 72% increase in the number of records accessible through the FBI's Interstate Identification Index (III), the 65% increase in the number of States participating in III, the involvement of 35 States now participating in the FBI's Integrated Automated Fingerprint Identification System (IAFIS), the more than 30 million presale firearms checks conducted since NCHIP began and the nearly 700,000 ineligible purchasers who have been stopped by the National Instant Background Check System (NICS), the rapid growth of the National Sex Offender Registry (NSOR) which now holds records on nearly 200,000 registered sex offenders, and the swift development of the National Protection Order File (NPF) in which 34 States have now contributed nearly 600,000 protection order records. In just the short period of time since the implementation of the BJS NCHIP Program in 1995, I believe much has been achieved by the States in moving the technology forward and protecting the public safety by making better records available at key decision points for law enforcement and criminal justice officials.

(2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.
Not Applicable.

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

(2) Indicate the percentage of these appearances in:

(A) federal courts;
(B) state courts of record;
(C) other courts.
Not Applicable.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.
Not Applicable.

(4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.
Not Applicable.

(5) Indicate the percentage of these trials that were decided by a jury.
Not Applicable.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.
Not Applicable.

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

Although not an attorney, I have devoted considerable time to a variety of community activities. As a member of B'nai B'rith, for example, I was involved for many years in providing Christmas Eve and Christmas Day relief to Howard County Police personnel so that they could be home with their families. My wife and I have been major supporters of the Howard Community College Educational Foundation and have provided scholarships to many students in need of financial assistance. Through my synagogue, I have been an active proponent of Hebrew literacy giving courses in reading Hebrew to newly arrived Russian immigrant families.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.
Not Applicable.

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

Never arrested or convicted of any crime.

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

Yes---An employee of the Bureau of Justice Statistics claimed anti-Semitic conduct on my part in a complaint he filed with our EEO office at the Office of Justice Programs. The EEO offices in the Office of Justice Programs and in the U.S. Department of Justice found absolutely no basis for his complaint. The complaint, to my knowledge, was also found to be groundless by the EEOC (I never received a formal finding of this but was orally advised of this conclusion). After this finding, the employee filed in U.S. District Court for the District of Maryland (Jacob Perez, Plaintiff v. Janet Reno, Defendant---Civil Action No. CCB00-914); the District Court found no basis for the complaint.

22. **Potential Conflict of Interest**: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the

categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

In the event of a potential conflict of interest, I will consult with the Department of Justice Ethics Office.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

See SF 278 attached.

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

See attached net worth statement.

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

(a) If so, did it recommend your nomination?
Not Applicable.

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

I received a call from the White House Personnel Office in mid-August 2001 inquiring about my potential availability to be nominated. My understanding was that my name was discussed in a White House staff meeting and that there had been consideration given to the value of nominating a non-political, long-time government employee to head the Bureau of Justice Statistics (BJS) in order to establish a precedent for having professional leadership in this statistical agency. I was subsequently interviewed by a White House Personnel employee and by Deborah Daniels who had been nominated for the position of Assistant Attorney General for the Office of Justice Programs. An interview with the Attorney General's staff was scheduled for September 11, 2001 but was canceled as a result of the terrorist attack that day. There was one subsequent interview with the same White House Personnel officer in early October and then an announcement was made that the President intended to nominate me for the position of Director of BJS.

Following the "intent to nominate" I completed the required SF 86, a fingerprint card, and Personal Background Statement for the Office of the White House Counsel. An extensive FBI background check was conducted involving my co-workers, neighbors, friends, my wife's workplace, and inquiries to prior supervisors and employers. I received a number of calls from the FBI special agent handling the check in terms of specific items on the forms or alternative contacts and he conducted an in-depth interview with me in my office.

On November 27, 2001, I received a call from the White House Personnel Office that my name was being placed in nomination with the U.S. Senate. Following that notification, I received a variety of forms to be completed for the Senate as a part of the confirmation process.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.
Not Applicable.

19. Persons who could provide additional information on my professional credentials:

a. Mr. Gary Cooper, Executive Director
SEARCH: The National Consortium for Justice Information and Statistics
7311 Greenhaven Drive, Suite 145
Sacramento, CA 95831
(916) 392-2550

b. Professor Alfred Blumstein
School of Public Policy and Management
Carnegie Mellon University
Pittsburgh, PA 15213-3890
(412) 268-8269

c. Professor James Allan Fox
College of Criminal Justice
Northeastern University
360 Huntington Avenue
Boston, MA 02115
(617) 473-6063

d. Professor Michael D. Maltz
University of Illinois at Chicago
1007 West Harrison Street (M/C 141)
Chicago, Il 60607-7140
(312)413-2473

e. Ms. Laurie Robinson, Senior Fellow
Program on Crime Policy
University of Pennsylvania
Jerry Lee Center of Criminology
1015 Eighteenth Street, N.W.
Suite 925
Washington, D.C. 20036
(202) 296-8887

f. Professor David P. Farrington
Institute of Criminology
University of Cambridge
7 West Road
Cambridge, England CB3 9DT
011-441-223-872-555

FINANCIAL STATEMENT
NET WORTH

Lawrence A. Greenfeld

ASSETS		LIABILITIES	
Cash on hand and in banks	$23,500	Notes payable to banks-secured	
U.S. Government securities-add schedule	$12,000	Notes payable to banks-unsecured	$1,400
Listed securities-add schedule		Notes payable to relatives	
Unlisted securities-add schedule		Notes payable to others	
Accounts and notes receivable		Accounts and bills due	$61,000
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable	$161,000
Real estate owned-add schedule	$300,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	$150,000		
Cash value-life insurance	$10,000		
Other items itemize:		Total liabilities	$223,400
American Century Fund	$2,000	Net worth	$691,100
Legg Mason Value Trust Mutual Fund	$60,000	Total liabilities and net worth	$914,500
TIAA-CREF Retirment Fund	$244,000	GENERAL INFORMATION	
Federal Retirement Contributions	$113,000	Are any assets pledged?	No
Total assets	$914,500	Are you defendant in any suits or legal actions?	No
CONTINGENT LIABILITIES		Have you ever taken bankruptcy?	No
As endorser, comaker, or guarantor	None		
On leases or contracts	None		
Legal Claims	None		
Provision for Federal Income Tax	None	Real estate mortgage payable to: Washington Mutual	
Other special debt	None		

Schedule for above:

U.S. Government Securities	Series EE Savings Bonds
Real Estate Owned	Principal residence, value is the Howard County, MD Assessment for Property Tax

U.S. Department of Justice

Washington, D.C. 20530

NOV 30 2001

Ms. Amy L. Comstock
Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Comstock:

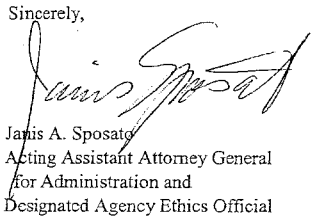
In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Lawrence A. Greenfeld who has been nominated by the President to serve as Director, Bureau of Justice Statistics, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. § 208, requires that Mr. Greenfeld recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute has a financial interest. We have counseled him to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

We have advised him that because of the standard of conduct on impartiality at 5 CFR 2635.502 he should seek advice before participating in a particular matter having specific parties in which a member of his household has a financial interest or in which someone with whom he has a covered relationship is or represents a party. He will have a covered relationship with Howard County Community College because of his wife's position there and because of his current uncompensated position as a member of the Criminal Justice Curriculum Advisory Committee at the College from which he has agreed to resign upon confirmation. He understands that he should seek advice before participating in matters involving Howard County Community College.

Based on the above agreement and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,



Janis A. Sposato
Acting Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

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U.S. Office .. nment Ethics

Executive Branch Personnel PU FINANCIAL DISCLOSURE REPORT

pproved:
. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination *(Month, Day, Year)*	Reporting Status (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☑	Termination Filer ☐ Termination Date *(If Applicable) (Month, Day, Year)*
Reporting Individual's Name	Last Name: GREENFELD			First Name and Middle Initial: LAWRENCE A.	
Position for Which Filing	Title of Position: Director Bureau of Justice Statistics			Department or Agency *(If Applicable)*: Department of Justice	
Location of Present Office (or forwarding address)	Address *(Number, Street, City, State, and ZIP Code)*: 810 7th ST. N.W. WASH, D.C. 20531			Telephone No. *(Include Area Code)*: 202-616-3281	
Position(s) Held with the Federal Government During the Preceding 12 Months *(If Not Same as Above)*	Title of Position(s) and Date(s) Held: Principal Deputy Director, BJS, DOJ - 1996-present				
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Judiciary Committee			Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☑ No	
Certification: I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Signature of Reporting Individual: Lawrence A. Greenfeld			Date *(Month, Day, Year)*: May 15, 2001	
Other Review (If desired by agency)	Signature of Other Reviewer: Mary Sullivan			Date *(Month, Day, Year)*: 11/27/01	
Agency Ethics Official's Opinion: On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	Signature of Designated Agency Ethics Official/Reviewing Official: Lewis Morris			Date *(Month, Day, Year)*: 11/30/01	
Office of Government Ethics Use Only	Signature			Date *(Month, Day, Year)*	

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing
Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, 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.

Reporting Periods
Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

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Reporting Individual's Name: LAWRENCE A. GREENFIELD

SCHEDULE A

Page Number: 1

For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income.

For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse).

None ☐

Assets and Income (BLOCK A)	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*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type: Dividends	Type: Rent and Royalties	Type: Interest	Type: Capital Gains	Amount: 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*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples: Central Airlines Common				x												x						x										
Examples: Doe Jones & Smith, Hometown, State			x																												Law Partnership Income $130,000	
Examples: Kempstone Equity Fund					x								x										x									
Examples: IRA: Heartland 500 Index Fund							x						x											x								
1 U.S. SAVINGS BONDS		X																X			X											
2 Commonwealth One Federal Credit Union Alexandria, VA		X																X			X											
3 Commercial & Farmers Bank, Columbia, MD		X																X			X											
4 LEGG MASON VALUE TRUST			X										X											X								
5 S TIAA/CREF PENSION PLAN						X							X												X							
6 AMERICAN CENTURY Global Growth FUND		X											X								X											

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

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Reporting Individual's Name: LAWRENCE A. GREENFIELD

SCHEDULE A continued
(Use only if needed)

Page Number: 2

Assets and Income (BLOCK A)	Valuation of Assets at close of reporting period (BLOCK B)															Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C)															
																Type				Amount											
	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*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	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*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Howard County Community College, Columbia MD																															Salary
2																															
3																															
4																															
5																															
6																															
7																															
8																															
9																															

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

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Do not complete Schedule B if you are a ntrant, nominee, or Vice Presidential or Presidential Canc

Reporting Individual's Name: LAWRENCE A. GREENFIELD

SCHEDULE B

Page Number: 3

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" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x): Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (x): $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*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
Example	Central Airlines Common	x			2/1/99			x									
1																	
2																	
3																	
4																	
5																	

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

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 tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts 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 official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source (Name and Address)	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1			
2			
3			
4			
5			

Prior Editions Cannot Be Used

SF 278 (P 001
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U.S. Offi. ernment Ethics

Reporting Individual's Name: GREENFIELD LAWRENCE A.

SCHEDULE C

Page Number: 4

Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None ☐

	Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x): $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	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.			x								
	John Jones, 123 J St., Washington, DC	Promissory note	1999	10%	on demand					x						
1	MBNA WILMINGTON, DE	REVOLVING	1995	19%	on demand		X									
2	FIRST USA BANK WILMINGTON, DE	REVOLVING	1996	14%	on demand	X										
3																
4																
5																

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☑

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1			
2			
3			
4			
5			
6			

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SF 278 (R 9)
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U.S. Office of Government Ethics

Reporting Individual's Name: GREENFELD, LAWRENCE A.

SCHEDULE D

Page Number: 3

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.

None ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	HOWARD COMMUNITY COLLEGE COLUMBIA MD. 21044		UNPAID CRIMINOLOGY ADVISOR	1991	PRESENT
2	Criminal Justice Curriculum Advisory Committee	Advisory Committee	on curriculum		
3					
4					
5					
6		* Will resign upon confirmation			

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.

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None ☑

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1		
2		
3		
4		
5		
6		

[Whereupon, at 4:00 p.m., the committee was adjourned.]
[Questions an answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Questions from Chairman Patrick Leahy for John Marshall Rogers

1. **Stare Decisis.** In your 1995 law review article titled, "Lower Court Application of the 'Overruling Law' of Higher Courts," you assert your belief that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. When questioned about this article by Senator Feingold at your hearing, you stated that this was a "legal theory article" and that judges do have a duty to follow the holdings of the Supreme Court. However, as I read your article, the idea is that the Supreme Court has rules it follows about when and whether to overturn precedent (what you call "overruling law"), and you believe that lower courts should follow this body of law in the same way they follow other laws of the higher court.

- *Professor Rogers, when you said that, as a judge, you will follow the holdings of the Supreme Court, will you also follow what you call "overruling law"? If so, will you reverse higher court precedent on your own when you think that the higher court would?*

It is clearly wrong for a lower court to "reverse higher court precedent," and if I am confirmed to the Sixth Circuit, I will seek to follow the most applicable Supreme Court precedent in each case before me.

- *What factors would you use, if confirmed to the Sixth Circuit, to determine whether the Supreme Court will overturn precedent in any particular case? In particular, what weight will you give to the political views of individual justices in making this determination?*

Using traditional legal analysis, a lower court would have to find it very clear from existing precedent that the higher court would apply newer, more general law to a case before it.

In my article, I discussed the possibility of taking the political views of justices into account in making the determination you suggest. In thinking about the issue in subsequent years, I have come firmly to the conclusion that lower courts should follow the opinions of Supreme Court justices only as they are reflected in official opinions, and not look to the views of justices expressed anywhere else.

- *Given these views, can you give the Committee any assurances that you will uphold and apply the Constitution and the law as interpreted by the Supreme Court?*

I assure the Committee that I will uphold and apply the Constitution and the laws as interpreted by the Supreme Court. The structure of the court system, as set up by the

interpreted by the Supreme Court. The structure of the court system, as set up by the Constitution and laws, imposes that legal obligation on court of appeals judges. I noted this in my article when I stated that our legal system "would not work well if lower courts persisted in their own sincere legal analyses regardless of the decisions of higher courts."

- *Professor Rogers, in your academic writings you strongly emphasize the importance of sound logic and consistency in the law, which you define as "obtaining identical legal results in legally indistinguishable cases." In fact, in one article you compare law to mathematics and advocate for clear legal rules. Please explain to the Committee how your theory achieves this goal of consistency. How can identical results be obtained when different lower courts are each trying to predict when, and on what grounds, a higher court will overturn precedent, and when such courts are relying on such subjective and undefined factors as the political views of the individual judges on the higher court?*

Subjective and undefined factors should not be relied upon, for exactly the reason you suggest. Consistency is maintained when courts are all applying the same law as that applied by the Supreme Court. "Prediction" as I used that term in the article, is a term that is regrettably abstract. I certainly did not mean speculation or intuition.

- *You have been a law professor for over 20 years and, among other classes, teach courses on jurisprudence. The syllabus for your class on Jurisprudence, available on your website, describes the topics you teach in that course. One of the topics is "Some Problems of Stare Decisis." Please describe in more detail for the Committee what, in your view, are some of the problems with the doctrine of stare decisis.*

I believe that stare decisis is one of the most important principles underlying our justice systems, and that judges are duty-bound to follow that principle. As I explain below in my answer to Question 4, I have never actually taught a course on jurisprudence. If I am still a professor this fall, I plan to teach a course entitled "Jurisprudence" for the first time. The heading "Some Problems of Stare Decisis" was taken directly from the textbook that I plan to use, section 4 of Chapter 3 of the famous Hart & Sacks materials on *The Legal Process*. That text notes some of the following issues related to stare decisis which have been of interest to academics and attorneys: the reasons supporting a general practice of adherence to prior holdings, whether a high court that overrules cases should do so prospectively or retrospectively, and whether there are constitutional limitations upon changes in the grounds of legal decisions.

2. **Privacy.** Personal privacy is one of the top issues of concern for most Americans. They are concerned about government intrusion into their personal decisions. They are concerned about how the government obtains and handles personal information.

- *What is your understanding of the right to privacy as recognized by the Supreme Court?*

The Fourth Amendment protects against unreasonable searches and seizures. In addition, the Supreme Court has made it clear that other provisions of the Constitution, including the Fourteenth Amendment, protect privacy rights related to marriage, access to birth control, and reproductive health, including a woman's access to abortion services.

- *Do you believe that the Constitution permits the Court to recognize rights that are not specifically enumerated in the Constitution, such as the right to privacy and the right to choose?*

Under the Constitution as definitively interpreted in *Marbury v. Madison*, the Supreme Court has the power to interpret the Constitution. The Supreme Court accordingly has the power to identify which rights are embodied in the Constitution, doing so by using interpretative means that the Supreme Court deems appropriate. Certainly as an appellate judge it would not be up to me to second-guess such holdings, but rather only to follow them.

3. **Women's Rights.** In reviewing a book about women in the military, you wrote "Whether women should be sent into combat may turn not so much on the effectiveness of sexually integrated combat units as on who has the burden of proof: Should 'equal opportunity without regard to gender' (or even 'equal power to women') be the norm from which deviation must be justified, or should the norm be the way our culture has expected it to be done, the way our adversaries and allies do it, and the way we have won (and lost) battles in the past?"

- *With regard to both the military and in other spheres of our society, do you believe that equal opportunity with regard to gender should be the norm from which deviation must be justified?*

I believe definitively that equal opportunity with regard to gender should be the norm.

- *Do you think that the Constitution has adequately protected the rights of women? Do you agree with the Supreme Court that discrimination on the basis of gender should be subject to exacting scrutiny?*

The Constitution protects the rights of women through, among other provisions, the 19th Amendment, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause, as interpreted by the Supreme Court. Certainly any discrimination on the basis of gender should be subjected to the level of scrutiny prescribed by the Court.

4. **Academic Experience – Jurisprudence.** Mr. Rogers, as the Thomas P. Lewis Professor of Law at the University of Kentucky College of Law since 1978, you have taught classes

on administrative law, jurisprudence, international law, and constitutional law. The syllabus for your class on Jurisprudence describes the topics that the course will cover and some fundamental questions that the course will address. To better understand your views about the law and jurisprudence, we would like to ask you some of the fundamental questions that you pose for discussion in your class.

First, how do you think legal processes affect the stability and legitimacy of the law?

There is a direct and fundamental connection between legal processes and the stability and legitimacy of the law. I was planning to teach, for the first time this coming fall, a course out of Hart & Sacks' famous casebook on The Legal Process. Five current justices on the Supreme Court reportedly took a course with these materials in law school, and I wanted to become familiar with the casebook by teaching out of it. The course was to be styled "Jurisprudence" for curriculum administration reasons. I have never before taught a course in legal process or jurisprudence.

When do you think it is legitimate (moral) to violate the law?

I believe that individuals have a moral obligation to obey the law, except in very rare circumstances, such as civil disobedience in opposition to racist regimes. That observation is quite different from my obligation as a jurist, which would be to follow the laws as written by Congress and interpreted by the Supreme Court.

In your view, how are courts different from legislatures? Should law be considered as science, or interpretation, or history, or ideology?

Law may be affected by science. Law is in substantial part interpretation. Law is rooted in history. And law can be affected by ideology. But law is not simply any one of those things.

According to the genius of the Constitution, public policy is made by the Congress, carried out by the Executive, and adjudicated by independent courts. It is the job of legislators to make the laws for our society. It is the job of the courts interpret those laws, and what the Constitution requires. Judges should strive in a disciplined manner to ascertain what the law is, not what they think the law should be.

5. **Sixth Circuit.** Professor Rogers, as you know, there has been a great deal of press about bitter disputes among the judges on the closely divided Sixth Circuit. It appears that some of your articles, such as the one in response to Professor Tushnet regarding the appropriate reasons for Senators to vote for or against judicial nominees, have a harsh tone. Such an approach to disagreements among colleagues on the bench would seem to be counterproductive and would only serve to divide further that already divided bench. What assurances can you give the Committee that you will not approach the process of reaching decisions in appellate cases as you have some of the scholarly topics you have

written about with a harsh tone?

I regret that some of my writings may have seemed harsh; it was not my desire. As a scholar, I seek to write in a way that is nuanced and balanced. Stridency is counter-productive and I seek to avoid it. In all my professional activities, I strive to respect the views of everyone.

I recognize the enormous value of a collegial court to the lawyers and people of the Sixth Circuit. I respect all of the members of the Sixth Circuit, and if confirmed I will work diligently to maintain the utmost cordiality and respect among my colleagues, and also with the lawyers who practice before the court.

6. **Federalism.** In the past few years, the Supreme Court has struck down a number of federal statutes, most notably several designed to protect the civil rights and prerogatives of our more vulnerable citizens, as beyond Congress's power under Section 5 of the Fourteenth Amendment. The Supreme Court has also struck down statutes as being outside the authority granted to Congress by the Commerce Clause. These cases have been described as creating new power for state governments, as federal authority is being diminished. At the same time, the Court has issued several decisions, most notably in the environmental arena, granting states' significant new authority over the use of land and water, despite long-standing federal regulatory protection of the environment. Taken individually, these cases have raised concerns about the limitations imposed on Congressional authority; taken collectively, they appear to reflect a "new federalism" crafted by the Supreme Court that threatens to alter fundamentally the structure of our government. I would like to know what your view is of these developments. I note that, in the constitutional law course that you teach at the University of Kentucky College of Law, you examine "the limits of federal court power to decide constitutional issues." Please describe for the Committee what, in your view, are such limits.

As a former attorney for the federal government, and as a law professor who for years taught cases like *Wickard v. Filburn* and *Heart of Atlanta Motel*, I found it somewhat surprising when the Supreme Court interpreted the limits of federal legislative power as it did in *United States v. Lopez*. The precise contours of that limit are not yet entirely clear. As an appellate judge, I would endeavor as closely as possible to follow the holdings of the Supreme Court in this developing area.

The phrase "the limits of federal court power to decide constitutional issues" in my course description refers to case-or-controversy requirements such as standing, ripeness, mootness, and political question. In that part of the course I focus most on standing law. A litigant cannot bring a case in federal court, no matter how important the issue, if he or she would obtain nothing by winning other than the satisfaction of winning. Article III requires that there be a "case or controversy."

7. **Cases of First Impression.** As a federal court of appeals judge, you will be called upon to not only interpret case law as it applies to the cases before you, but also to rule on issues that are of first impression for your circuit. How do you approach cases of first impression?

I would look at the text of the statutory or constitutional provision, recognizing that acts of Congress are presumed constitutional. If unclear, with great caution I would look at a statute's legislative history. I would look at how the Supreme Court and the Sixth Circuit have interpreted similar or analogous provisions. If the interpretation is still unclear, I would look at accepted canons of interpretation, especially those accepted by the Supreme Court and the Sixth Circuit. In all of this I would not manipulate these techniques to interpret the law as I would prefer, but would seek genuinely to ascertain the law as enacted by the Congress or the Framers.

8. **Law and Economics.** Professor Rogers, you have been active in the law and economics movement. You a former member of the American Law and Economics Association, an organization whose stated purpose is "the advancement of economic understanding of law and related areas of public policy and regulation." In your view, in what situations, if any, is it appropriate for judges to apply economic analysis to questions of law and to what extent should economic factors be considered in jurisprudence?

Actually, I have not been active in the law and economics movement. A couple of my articles required some discussion of "public choice theory," in which some law-and-economics scholars are interested. After a couple of years of totally inactive membership in the ALEA, I let my membership lapse.

I have no particular inclination toward economic analysis. I would respectfully suggest, for instance, that my book on international law would not be characterized as law-and-economics analysis. With respect to the last part of your last question, economic factors should be considered in jurisprudence precisely to the extent that the law requires them to be considered.

9. **Experience.** Given that you have only six years of experience in the active practice of law, little experience with trying cases, and virtually no experience handling criminal matters, what steps do you intend to take to prepare yourself to review lower court trials and decisions, and address the complex federal criminal matters that will be before you as a U.S. Court of Appeals judge?

I am very proud of the intensive litigating experience that I had in two stints at the U.S. Department of Justice. While my cases were at the appellate level, I worked closely with trial attorneys and had to be very familiar with trial records. Moreover, my teaching of tort law and administrative law has required me to become familiar with a number of trial litigation issues, such as burdens of proof and scopes of review.

Although I have done some scholarly writing on criminal jurisdiction issues, and while at

Justice I worked on some cases that involved criminal law issues, I recognize that I have more to learn about federal criminal law and criminal procedure. Should I be confirmed, I plan to use the resources of the Federal Judicial Center, to read energetically, and to seek the advice of my colleagues on the court.

Senator Edward M. Kennedy's Questions for John M. Rogers, Nominee to the U.S. Court of Appeals for the Sixth Circuit

Overruling Law

In your article, Lower Court Application of the "Overruling Law" of Higher Courts, you argued that lower courts should apply the principles of the "overruling law" of higher courts to anticipate whether the higher court will overrule its prior precedent.

A. *If you are confirmed to the Sixth Circuit, how would you determine whether the Supreme Court would overturn a particular precedent?*

Using traditional legal analysis, a lower court would have to find it very clear from existing precedent that the higher court would apply a newer, more general precedent to the case before it rather than an earlier case that has not been expressly overruled.

B. *In Hopwood v. Texas, 78 F.3d 932 (1996), the Fifth Circuit declined to follow the Supreme Court's decision in Regents of Univ. of Cal. v. Bakke (1978) which held that racial and ethnic diversity in education is a compelling governmental interest. Quite apart from the question of whether Justice Powell's opinion in Bakke commanded a majority of the Court, the Hopwood panel declined to follow Bakke on the theory that several of the Justices who had joined the Court since Bakke had stated or suggested in their opinions that diversity was not a compelling governmental interest. Do you believe that it is appropriate to consider the strength of particular Supreme Court precedent given personnel changes on the Court?*

I do not believe it is appropriate to consider the strength of a particular Supreme Court precedent in light of changes in the composition of the Court. Lower courts should follow the opinions of Supreme Court justices only as they are reflected in official opinions, and not look to the views of justices expressed anywhere else.

C. *As you recognized in your article, the Supreme Court has consistently made clear that lower courts should not engage in the practice of disregarding Supreme Court precedent that has been overruled by implication. The Court stated in Rodriguez de Quijas v. Shearson/American Express (1989) that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." The Court recently reiterated this directive in Agostini v. Felton (1997). In your article, you argued that such statements were mere dictum "inherently outside of the power of the Court to decree."*

Do you believe that it is appropriate for a lower court to ignore Supreme Court

precedent that has direct application to the case before it where subsequent Supreme Court decisions have cast serious doubt on that precedent?

Subsequent Supreme Court decisions casting serious doubt on older precedent would not be sufficient to justify ignoring a Supreme Court decision. A lower court should apply more general recent precedent over more specific older precedent only where that course is very clearly required by the more recent precedents of the Supreme Court.

Do you continue to hold the view that the Supreme Court has no power to forbid a lower court from anticipating overruling? Do you believe that the Supreme Court's directives in Rodriguez de Quijas and Agostini v. Felton should be followed by lower courts?

Lower courts are bound by the holdings of the Supreme Court, and should give great deference even to statements that are dictum. In my article I made the technical, theoretical argument that the Court's statements in *Rodriguez de Quijas* are dicta, because the Supreme Court affirmed the lower court's ruling in that case. Nonetheless, even admonitions which are dicta carry great weight.

I would take the Supreme Court's admonitions in these cases seriously. Only where it is very clear may a lower court interpret more recent, general precedent to have overruled older, more specific precedent.

Privacy

In 1986, along with four officials in the Department of Justice, you prepared and filed an *amicus* brief for the United States in the case of Thornburgh v. American College of Obstetricians and Gynecologists (1986). In that brief, the United States urged the Supreme Court to reverse the decision of the Third Circuit finding that several provisions of Pennsylvania's Abortion Control Act were unconstitutional and argued that the Supreme Court's decision in Roe v. Wade should be overruled.

A. *Please describe your role in this case. In particular, what role did you play in deciding to submit an amicus brief for the United States in this case? What role did you play in determining the scope of the arguments made by the United States?*

I was a visiting professor who had the same responsibilities as a line attorney in the Appellate Staff of the Civil Division. I helped prepare a draft amicus brief for use by the Office of the Solicitor General, but the Solicitor General's Office made the decision to file the brief, and what arguments to make.

B. *You stated in your Senate questionnaire that, in almost all of your cases, you had primary responsibility for writing the brief and presenting the oral argument. Did you have primary responsibility for writing the brief in the Thornburgh case? If not, what role did*

you play? Were you concerned about advocating for the reversal of the landmark decision in Roe v. Wade?

I did not have primary responsibility for writing the brief in the *Thornburgh* case. That primary responsibility went to an attorney or attorneys in the Office of the Solicitor General. The statement in my Senate questionnaire referred to my handling of court of appeals cases, not Supreme Court cases.

In the *Thornburgh* case I helped prepare a draft that the Solicitor General's office could use in preparing the final brief. I believe that the final brief was actually filed after I had left the Department of Justice. At the time that brief was filed, the government's position was not without support. Many scholars and lawyers, including Supreme Court Justice Byron White, believed that *Roe* did not rest on firm constitutional grounds. While I knew that the government's position was controversial, I chose to fulfill my professional obligation to the Department of Justice to assist in preparing the brief.

C. *The United States' brief in this case states that Roe should be abandoned because "the textual, doctrinal and historical basis for Roe v. Wade is so far flawed and, as these cases illustrate, is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it." More than just attack Roe's trimester system, the brief stated that a right to choose whether to have an abortion was not grounded in previous privacy decisions because those decisions were "applications of accepted principles, whether of equal protection or of freedom of expression," and none of these principles applied to laws regulating abortion.*

Has your thinking on whether the fundamental right to privacy encompasses the right to have an abortion changed since you urged the Supreme Court to abandon Roe v. Wade in 1986?

The brief reflected the thinking of the U.S. Department of Justice in 1985, and not necessarily my thinking. Since that time, the Supreme Court in *Casey* reaffirmed Roe's central holding in the clearest of terms. It is clearly the duty of a lower court to follow *Roe* as affirmed in *Casey* and more recent cases involving the right to choose an abortion. If confirmed, I will follow the Supreme Court's holdings in these cases.

D. *During your career, have you ever handled any other cases involving the interpretation of Roe v. Wade or the right to choose?*

No, I have not.

SUBMISSIONS FOR THE RECORD

STATEMENT OF U.S. SENATOR BARBARA BOXER ON THE NOMINEE FOR THE U.S. DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA: MORRISON COHEN ENGLAND

Mr. Chairman, Senator Hatch, and members of the Senate Committee on the Judiciary, I am pleased to offer my support for the nominee for the Eastern District Court of California before you today -- Morrison Cohen England. I also wish to thank you for the quick pace with which you are confirming California district court nominees. I have no doubt you will find Judge England impressive and capable, and I look forward to yet another speedy confirmation process.

Morrison England brings to the bench a strong legal background, and an intimate familiarity with the area he has been nominated to serve. Judge England received his undergraduate and legal educations in California. Since passing the California state bar nearly twenty years ago, he has served Californians as both an attorney and a judge. In private practice, he specialized in business and real estate transactions, and commercial and residential rental agreements. In1996 he was appointed to the Sacramento Municipal Court by then Governor Pete Wilson, and one year later was elevated to the Sacramento County Superior Court, where he currently presides. Judge England is widely respected and is well known for his fairness and objectivity.

Judge England also currently holds the rank of Major in the Judge Advocate General's Corps for the United States Army Reserve.

His enthusiasm for the law extends beyond his work on the Superior Court. He has been involved in judicial education for California judges, teaching new judge orientation, advanced criminal procedure and criminal voir dire at the California Judicial College.

In addition, Judge England sits on the Boards of many non-profit community organizations, including the Child Abuse Prevention Council of Sacramento, the Leukemia Society of Sacramento, and the Pacific Athletic Foundation.

The nominee before you today will serve with integrity and distinction in the Eastern District of California. I support the consensus process that brought him here, and endorse his quick confirmation.

BOB GRAHAM
FLORIDA

United States Senate
WASHINGTON, DC 20510-0903

Statement of Senator Bob Graham
Senate Judiciary Committee Hearing on the Nomination of Mr. Kenneth A. Marra to Serve as a Federal Judge in the Southern District of Florida
June 13, 2002

Mr. Chairman, thank you for scheduling this hearing. I would also like to thank the Committee for recognizing the needs of Florida. It is my pleasure to introduce Judge Kenneth Marra.

Ken Marra, a skilled and respected Judge in Florida's Fifteenth Circuit, has been nominated to serve as a federal judge in the busy Southern District of Florida. If confirmed, he will fill a newly created and much needed judgeship position.

Mr. Chairman, Judge Marra's solid qualifications make him an ideal candidate for service on the federal bench. A circuit judge since 1996, he currently serves in the Palm Beach County Court's civil, family and criminal divisions. Before his tenure as a circuit judge, Judge Marra spent 16 years practicing commercial litigation in Palm Beach County and Washington, DC. He also served as a trial attorney with the United States Department of Justice.

Judge Marra is a graduate of the State University of New York at Stony Brook and earned his law degree from the Stetson University College of Law in 1977. Before attending law school, the Judge taught social studies to high school students in New York.

The strength of Judge Marra's nomination is evident from the strong support that he has earned from his local bar. When asked to comment on his nomination for a January 4 Palm Beach Post article, Amy Smith, president of the Palm Beach County Bar Association, said, "He is an absolutely perfect choice: impeccable background, extremely intelligent, consistently one of the highest rated judges in the judicial evaluations done here." Ms. Smith said Marra's judicial demeanor "is gracious and humble. The president couldn't have made a better choice."

When the Palm Beach County Bar Association released its biennial survey of circuit and county judges earlier this Spring, Judge Marra ranked the highest in the neutrality and fairness category, with 63 percent of the attorneys rating him as "outstanding."

In Florida, Judge Marra submitted his application to a judicial nominating committee comprised of a diverse group of Floridians, who in turn recommended three candidates to the President for consideration. Senator Bill Nelson and I interviewed these candidates. In summary, Mr. Marra is an intelligent, well-respected, and qualified candidate for the federal bench.

I appreciate the Committee's consideration of Judge Marra's nomination and look forward to working with you for quick consideration of the Joe Martinez, the next nominee for a judgeship in Florida's southern district, one of the largest and busiest judicial districts in the country.

Opening Statement of Chairman Patrick Leahy
on the Nominations of
John Rogers to the U.S. Court of Appeals for the Sixth Circuit,
David S. Cercone to the U.S. District Court for the Western District of Pennsylvania,
Morrison C. England for the Eastern District of California,
Kenneth A. Marra to the U.S. District Court for the Southern District of Florida
Lawrence Greenfeld to be Director of the Department of Bureau Justice Statistics
June 13, 2002

I would like to welcome the nominees to today's hearing. The nominees before us come from Kentucky, California, Pennsylvania, Florida, and Maryland. Many of the nominees' family members have made this journey with them, and I extend the welcome of this Committee to the friends and families in attendance.

With today's hearing, in 11 months, the Senate Judiciary Committee will have held 20 hearings involving a total of 75 judicial nominations. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In fact, the number of hearings we have held in less than a year of controlling the Senate is two more hearings than they held in the two years of the 104th Congress, only two fewer than they held in the two years of the 105th Congress, and five more hearings than the Republicans held in the two years of the 106th Congress. We have included more judicial nominees in hearings in this much shorter period than were accorded hearings in 1999 and 2000 combined. Indeed, one-sixth of President Clinton's judicial nominees – more than 50 – never got a Committee hearing and Committee vote from the Republican majority, which perpetuated longstanding vacancies into this year.

I am glad to say that the swift pace with which we have been moving judicial nominees is bringing down the high number of vacancies I inherited when I took over the Committee.

On July 10, 2001, the day the Senate was permitted to reorganize, there were 110 judicial vacancies. Today there are 87, and the trend continues downward. I should note that we do not have nominees from the White House for almost half of those vacancies. Forty-one of the current vacancies are without a nominee. That includes 17 judicial emergency vacancies.

Today, we are considering Professor John Rogers for the U.S. Court of Appeals for the Sixth Circuit. By having a hearing for Professor Rogers today, we are trying to move forward in providing some much needed help to the Sixth Circuit. Earlier this year, we held a hearing for Judge Julia Gibbons to a seat on the Sixth Circuit. She has been voted out of the Senate Judiciary Committee and is pending on the floor.

Half of the seats on the Sixth Circuit are vacant. Most of those vacancies arose during the Clinton Administration and before the change in majority last summer. None, zero, not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership. The Sixth Circuit vacancies are a prime and unfortunate legacy of the past partisan obstructionist practices under Republican leadership. Vacancies on the Sixth Circuit were perpetuated during the last several years of the Clinton Administration when the Republican majority refused to hold hearings on the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to vacancies in the Sixth Circuit.

One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of the Michigan Court of Appeals was nominated in January 1997 and did not receive a hearing on her nomination during the more than 1,500 days before her nomination was withdrawn by

President Bush in March of last year. Judge White's nomination may have set a record. Her nomination was pending without a hearing before this Committee for more over four years -- 51 months. She was first nominated in January 1997 and renominated and renominated through March of last year when President Bush chose to withdraw her nomination. Under Republican control, the Committee averaged hearings on only about eight Courts of Appeals nominees a year and, in 2000, held only five hearings on Courts of Appeals nominees all year.

In contrast, Professor Rogers will be the fifteenth Court of Appeals nominee to receive a hearing by the Committee in less than a year since the reorganization of the Senate Judiciary Committee. He is being treated much better than Kathleen McCree Lewis, a distinguished lawyer from a prestigious Michigan law firm. She never had a hearing on her 1999 nomination to the Sixth Circuit during the years it was pending before it was withdrawn by President Bush in March 2001.

Professor Kent Markus, another outstanding nominee to a vacancy on the Sixth Circuit that arose in 1999, never received a hearing on his nomination before his nomination was returned to President Clinton without action in December 2000. While Professor Markus' nomination was pending, his confirmation was supported by individuals of every political stripe, including 14 past presidents of the Ohio State Bar Association and more than 80 Ohio law school deans and professors. Others who supported Professor Markus include prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, and Congressman David Hobson; the National District Attorneys Association; and virtually every major newspaper in the state.

In his testimony to the Senate last month, Professor Markus summarized his experience as a

federal judicial nominee, demonstrating how the "history regarding the current vacancy backlog is being obscured by some." Here are some of things he said:

> "On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began. . . . At the time my nomination was pending, despite lower vacancy rates than the 6th Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the 3rd, 9th and Federal Circuits. . . . No 6th circuit nominee had been afforded a hearing in the prior two years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees than the 6th Circuit.
>
> With high vacancies already impacting the 6th Circuit's performance, and more vacancies on the way, why, then, did my nomination expire without even a hearing? To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me. Over and over again they told me two things: 1) There will be no more confirmations to the 6th Circuit during the Clinton Administration, and 2) This has nothing to do with you; don't take it personally – it doesn't matter who the nominee is, what credentials they may have or what support they may have – see item number 1. . . .
>
> The fact was, a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for another President to fill, instead of proceeding fairly on the consensus nominees pending before the Senate. Some were unwilling to move forward, knowing that retirements and attrition would create four additional seats that would arise naturally for the next President. That is why there are now eight vacancies on the Sixth Circuit, why it is half empty.

Long before some of the recent voices of concern were raised about the vacancies on that court, Democratic Senators in 1997, 1998, 1999, and 2000 implored the Republican majority to give the Sixth Circuit nominees hearings. Those requests, made not just for the sake of the nominees but for the sake of the public's business before the court, were ignored. Numerous articles and editorials urged the Republican leadership to act on those nominations.

Fourteen former presidents of the Michigan State Bar pleaded for hearings on those nominations. The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask that the nominees get hearings and that the vacancies be filled.

The Chief Judge noted that, with four vacancies – the four vacancies that arose in the Clinton Administration – the Sixth Circuit "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." He predicted: "By the time the next President in 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." Nonetheless, no Sixth Circuit hearings were held in the last

three years of the Clinton Administration, despite these pleas. Not one. Since the shift in majority last summer, the situation has been exacerbated further as two additional vacancies have arisen.

The Committee's April 25th hearing on the nomination of Judge Gibbons to the Sixth Circuit was the first hearing on a Sixth Circuit nomination in almost 5 years, even though three outstanding, fair-minded individuals were nominated to the Sixth Circuit by President Clinton and pending before the Committee for anywhere from one year to over four years. Today we are holding a second hearing on a Sixth Circuit nominee, just a few short months later.

Just as we held the first hearing on a Sixth Circuit nominee in many years, the hearing we held on the nomination of Judge Edith Clement to the Fifth Circuit last year was the first on a Fifth Circuit nominee in seven years and she was the first new appellate judge confirmed to that Court in six years. When we held a hearing on the nomination of Judge Harris Hartz to the Tenth Circuit last year, it was the first hearing on a Tenth Circuit nominee in six years and he was the first new appellate judge confirmed to that Court in six years. When we held the hearing on the nomination of Judge Roger Gregory to the Fourth Circuit last year, it was the first hearing on a Fourth Circuit nominee in three years and he was the first appellate judge confirmed to that court in three years.

Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half – 56 percent – of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session.

From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than

doubling.

Democrats have broken with that recent history of inaction. Today, we will hold our 20th judicial nominations hearing and our 15th hearing for a circuit court nominee. Additionally, Professor Roger's hearing will be the fourth judicial nomination from Kentucky to be considered by the Committee this year, and the eighth nomination from Kentucky overall. A professor from the University of Kentucky College of Law, Mr. Rogers has experience as a litigator and a teacher, and is a prolific author on a number of difficult legal topics. I look forward to hearing him further explain his views on some of them.

We will also hear from David Cercone, nominated to the U.S. District Court for the Western District of Pennsylvania. His will be the ninth nomination from Pennsylvania to be considered this year. Nine – this is more nominees than we have considered for any other state and is in stark contrast to the treatment President Clinton's Pennsylvania nominees received under Republican leadership. So many of President Clinton's Pennsylvania nominees were not granted hearings, despite the valiant efforts of the senior Senator from Pennsylvania, that this large number of vacancies remained for President Bush to fill. I say this to illustrate the progress being made under Democratic leadership and the fair and expeditious way this President's nominees are being treated.

Morrison England comes to us as a nominee to the U.S. District Court for the Eastern District of California, a seat that has been vacant since May of 2000. President Clinton's nominee for the seat, Marion Johnston, was nominated in September 2000, but never received a hearing or a vote by the Republican controlled Senate.

Kenneth Marra, nominated to fill a vacancy on the U.S. District Court for the Southern District

of Florida, is here today as well. Until this Administration, there had been a fine tradition of bipartisan commissions working to agree on district court nominations in Florida. I am hopeful that this White House will be able to see its way clear to restoring that method of all important consultation with Florida's Senators, no matter what their political party.

Lawrence Greenfeld , nominated to be the next Director of the Bureau of Justice Statistics, has extensive knowledge of the operations and program of the agencies and has demonstrated a capability to enter into productive partnerships with criminal justice and statistical communities at all levels of government. He is well-qualified and committed, and we welcome him to our hearing today.

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NOMINATION OF DENNIS SHEDD, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT; ARTHUR SCHWAB, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA; AND TERRENCE MCVERRY, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THURSDAY, JUNE 27, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:04 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl presiding.

Present: Senators Kohl, Leahy, Schumer, Edwards, Hatch, Thurmond, Specter, and Sessions.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good afternoon, ladies and gentlemen. The Committee on the Judiciary will now proceed. Senator Kohl, who is scheduled to chair this hearing, will be a little late, so I have been asked to move forward.

We have the distinction today of having Senator Thurmond, along with Senator Hollings, introduce the nominee for the Court of Appeals for the Fourth Circuit. When I joined the Judiciary Committee on January 3, 1981, Senator Thurmond sat in this chair and was an inspirational leader. I will tell only one short story.

When he presided at a hearing not long after I became a member, he asked a nominee if the nominee promised to be courteous if confirmed, and the nominee said yes. And I thought to myself, what would any nominee say to that question? I have since learned that that is the most important question I have heard asked in the Judiciary Committee.

Senator Kohl has arrived, but I will continue the introduction of America's greatest, most distinguished, long-serving Senator who will celebrate his 100 birthday on December 5 of this year, in advance of completing his term on January 3 of next year. I, for one, am still anxious to know if Senator Thurmond is going to run for reelection.

Senator Thurmond?

PRESENTATION OF DENNIS SHEDD, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, I am pleased to welcome Judge Dennis Shedd here today. He is a fine judge who will be an excellent addition to the Fourth Circuit Court of Appeals. Judge Shedd will follow the law and protect the rights of all people under the Constitution. I am proud to recommend him and I urge you to move his nomination quickly.

I ask that my full statement be placed in the record.

[The prepared statement of Senator Thurmond appears as a submission for the record.]

Senator KOHL [PRESIDING.] Senator Hollings?

PRESENTATION OF DENNIS SHEDD, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. FRITZ HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Thank you, Senator Kohl, Senator Specter. Let me ask unanimous consent that my full statement be included in the record.

Senator Thurmond and distinguished members of the Committee, it is a privilege to recommend for elevation from the district to the Circuit Court of Appeals in Richmond Judge Dennis Shedd. He is familiar to most of the members of the Committee, having staffed this Committee for several years, and then working, of course, with Senator Thurmond himself.

Since I have filed my full statement, let me acknowledge the fact that I have received communications both from the NAACP, the conference in South Carolina, and from one women's group nationally. I have looked into those situations and I find them wanting with respect to any real opposition to the distinguished Judge Shedd.

His record over 11½ years will prove that he has had almost 6,000 civil and criminal cases before his court and was reversed less than two dozen times in the entire 11½ years—an outstanding record of sound judgment.

When I got these epistles from the NAACP and the ladies group, I immediately started checking. We in the law know that you never have a character witness come up and tell what he knows of his own association, but rather in the trial of a case you bring witnesses who give hearsay testimony, namely his reputation in the particular community.

In that regard, having checked it out, Judge Shedd is my kind of judge. He is hard, he is tough, but he is hard and he is tough on both sides. We who practice law before the courts appreciate that because we know what the score is, and we are not playing any games and the judge is not going to allow any games to be played on you. I have said so often that more than a balanced budget, we need some balanced Senators. I present to you my friend, Judge Dennis Shedd, a balanced judge.

I will be glad to try to respond to any questions.

Senator THURMOND. I might state that with Dennis will be his wife, Elaine, and children Sarah and Michael.

Senator HOLLINGS. Yes. Do you want to stand up here and be recognized, Sarah and Michael?

[Sarah and Michael Shedd stood.]

Senator HOLLINGS. Thank you.

Thank you very, very much.

Senator KOHL. Thank you, Senator Hollings.

Senator HOLLINGS. Thank you very much, Senator Kohl. I appreciate it.

[The prepared statement of Senator Hollings appears as a submission for the record.]

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Senator Thurmond, we thank you for gracing us with your attendance today. We appreciate it very much. We appreciate your statement.

We welcome the distinguished members of the Senate who have been and will be here today to introduce particular nominees. Of course, we welcome the nominees, as well as your families.

Judicial nomination hearings are among the most important duties of the Judiciary Committee. A Federal judgeship is a lifetime appointment and a job that affects the lives of many, many people throughout the course of the judge's tenure. The job is a great responsibility entrusted to very few people, and all we ask, of course, is that you administer impartial justice and obey the Constitution. So we congratulate all of the nominees on their selection.

We would like to proceed in the following manner. After opening statements, if there are any, from Committee members, we would like for the Senators to present and introduce their nominees. Then we will invite all of the nominees forward together to appear before this Committee.

These nominees will include Judge Dennis Shedd, to be United States Circuit Judge for the Fourth Circuit; *Terrence* v. *McVerry*, to be United States District Judge for the Western District of Pennsylvania; and Arthur Schwab, to be United States District Judge for the Western District of Pennsylvania.

I would like to recognize members of the Senate who are here today to introduce any of the nominees.

Senator Specter?

PRESENTATION OF ARTHUR SCHWAB AND TERRENCE MCVERRY, NOMINEES TO BE DISTRICT JUDGES FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

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

Senator Santorum and I have the pleasure to introduce two very distinguished lawyers who have been nominated by the President to be district judges for the Western District of Pennsylvania. These two men have been recommended by the bipartisan nominating commission which Senator Santorum and I have estab-

lished, and I will be brief in the introductions, although a great deal could be said about these two men.

Arthur J. Schwab is a graduate of Grove City College in 1968, cum laude, and the University of Virginia Law School in 1972, Order of the Coif. Mr. Schwab has had an extraordinarily distinguished career in the practice of law, having tried cases in more than 22 states in State and Federal courts.

He is chief counsel of the complex litigation department at the Buchanan Ingersoll firm in Pittsburgh, a larger, very distinguished firm, and his practice has been really extraordinary in the areas of trade secrets, confidential information, employment agreements, software copyright infringement, trademark, unfair competition, and various corporate matters.

I have known Arthur Schwab for more than 15 years and I have had many legal discussions with him and can personally attest to his great depth as an attorney.

Judge Terrence McVerry is another outstanding nominee, a graduate of Duquesne University in 1962, also the law school in 1968. He has judicial experience, having served on the Court of Common Pleas from 1998 to the year 2000. He serves as solicitor to the Allegheny County, Pennsylvania, governmental unit, and was rated unanimously "well qualified" by the American Bar Association; very extensive public service, a member of the United States Reserves in the Pennsylvania Air National Guard. He began his career in the Allegheny County district attorney's office.

I am confident that both Mr. Schwab and Judge McVerry will be outstanding additions to the Western District bench.

Thank you, Mr. Chairman.

The CHAIRMAN. We thank you, Senator Specter.

Senator Santorum?

PRESENTATION OF ARTHUR SCHWAB AND TERRENCE MCVERRY, NOMINEES TO BE DISTRICT JUDGES FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman, and it is a great pleasure and honor for me to join my colleague, Senator Specter, in presenting to the Committee these two fine gentlemen. As Senator Specter said, I think they will make outstanding additions to the Western District bench.

Let me start in the same order that Senator Specter did with Art Schwab. Senator Specter, I think, commented about his incredible litigation experience, his work at a large, major law firm in Pittsburgh, and the outstanding work that he has done within the firm, but also with the Pennsylvania Bar Association. He is very active in the Pennsylvania Bar Association, very active also in teaching and education.

He has been active in the community on a variety of different fronts. He has been one of Pittsburgh's leading citizens in the philanthropic work that he has done, as well as the work that he has done, I know, on the board of a university in Western Pennsylvania.

He is a true scholar, someone who has great knowledge of the law and has incredible depth of practice experience, and will bring a vibrancy to the court that is obviously important to the health of our judiciary.

He has an incredible family. I know his son, John, is here, who was an intern for me years ago and who is now a Marine lieutenant. He has a terrific family that is a great part of the fabric of Western Pennsylvania, and I am very, very excited to be here to recommend him to the Committee.

Terry McVerry is someone whom I have known for better than 15 years. At one time, he was a neighbor and lived a couple of streets away from me. When I first moved into the Pittsburgh area he was my State Representative, and I got to know him as a State Representative, as someone who was a very conscientious legislator and public servant. He served with great distinction and had enormous bipartisan support in the time that he served as a legislator, and frankly, in a very competitive district, never had particularly serious contests because of Terry's incredible self-effacing demeanor and wonderful temperament and ability to work with people in a very constructive way.

In fact, I can think back to the time when Terry decided not to run again. One of the reasons he decided he didn't want to run again is he felt that the legislative arena was just a little too combative for him, that it was too partisan for him. So he decided to leave and go back to the practice of law, which he had been engaged in as an assistant district attorney before he ran for office, and practiced law until he decided to run—well, actually was appointed to a judgeship in Allegheny County, and served with great distinction on the bench for 3 years.

He then went on to become the solicitor and head of the law department for Allegheny County, which is the county which Pittsburgh is in. It is over a million people. He continues to serve, again, with great distinction in public service.

He, too, married well above himself. His wife is a very dear friend and someone who has been very close to Karen and our family. They are a terrific family, terrific people, and I think will be a tremendous asset to the Western District of Pennsylvania.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Santorum.

Senator Sessions, do you want to make a comment before we start our proceedings?

Senator SESSIONS. I just would note that this is a good group of nominees. It is great to see Senator Santorum here. I respect his opinion and that of Senator Specter so very much on these nominees in their State. And I know Senator Thurmond is strongly supportive of Judge Shedd.

Senator KOHL. Thank you.

At this time, we would like to ask that the nominees step forward and raise your right hands.

Do you swear the testimony you shall give in this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Judge SHEDD. I do.

Mr. MCVERRY. I do.

Mr. SCHWAB. I do.

Senator KOHL. Thank you. Be seated, gentlemen.

If any of the nominees would like to make a statement or introduce their families before we start, you are welcome to do that.

We will start with you, Mr. Shedd.

STATEMENT OF DENNIS SHEDD, OF SOUTH CAROLINA, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge SHEDD. Thank you, Mr. Chairman. I don't have a statement to make. I would like to thank Senator Thurmond and Senator Hollings for their kind introductions, and I would like to introduce my family. Again, my wife, Elaine Wiggins Shedd, kind of a homecoming for her because she served here as a Senate staffer for both Senator Henry "Scoop" Jackson and Jeremiah Denton, from Alabama. Our children: Sarah, our daughter. She is 11 next month. And Michael. He just turned 9.

We also have some other friends with us: Tom Jones, who is practicing law in Baltimore, a former clerk of mine. Jim Bayless, a former staffer here, who is a family friend as well. I think Mark Goodin is here, who used to be the spokesperson for this Committee staff, and also I think Judge Bob Hodges from the Court of Claims is here as well.

Thank you very much, Mr. Chairman.

Senator KOHL. We thank you, Judge Shedd.

Mr. Schwab?

STATEMENT OF ARTHUR SCHWAB, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Mr. SCHWAB. Good afternoon. Thank you, Mr. Chairman. I don't have a statement, but I appreciate the kind remarks of Senator Specter and Senator Santorum.

I would like to introduce my family. My wife, Karen, my wife of a wonderful 30-plus years, and my daughter, Ellen, and her new husband, Bryan, and my oldest son, John, and my son, David.

I have a friend from law school, Rob Rhodes, and Rob and I went through law school for 3 years at UVA together, and law review, and we have been good friends over the last 30 years. So I am really thankful that he could be here.

Also, I have two friends from Philadelphia, Margarite and her daughter Emily Walsh. Emily, if I may say, just finished 8th grade and was the Cinderella in her class play, so I am really delighted that she could be here. We e-mail back and forth, so I am glad that her schedule permitted that both of them could visit us from Philadelphia.

Thank you.

Senator KOHL. Thank you very much. We welcome all your family and friends.

Mr. McVerry?

STATEMENT OF TERRENCE F. MCVERRY, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Mr. MCVERRY. Thank you, Mr. Chairman. I appreciate the opportunity to be here today. I would like to extend my sincere gratitude to Senator Specter and Senator Santorum for the kind words of introduction and support throughout the nomination process.

I would also like to introduce my wife of 36 years, Judy, and our oldest daughter, Erin Crowley. Unfortunately, her husband is detained in Bloomington, Indiana, on a new job. And our first grandson, 14-month-old Aidan, couldn't be here today. He had a prior engagement.

My daughter, Bridget, is with me today, and my son, Bryan. And my daughter-in-law, Cindy, has arrived, who just trained in from New York City.

So I am so happy to have my family here with me today and I appreciate the opportunity to answer any questions you may have.

Senator KOHL. Thank you, and we welcome members of your family and friends.

We will start with questions for you, Judge Shedd.

Judge Shedd, you are aware that the Fourth Circuit is considered the most conservative court in the Nation, especially on civil rights and constitutional issues. For example, the court found that police need not follow *Miranda* warnings, only to be reversed by the Supreme Court. The court authorized drug testing for pregnant women without their consent, only to be reversed by the Supreme Court. The circuit upheld your decision finding the Driver Privacy Protection Act unconstitutional, only to be reversed unanimously by the Supreme Court. These are just a few of the cases that we could offer as examples.

Can you tell us whether you believe that the Fourth Circuit is out of the mainstream today, and if so, how you would go about being a moderating force on the court?

Judge SHEDD. Thank you, Mr. Chairman. May I also add that I overlooked another former clerk, Garry Malphrus, who was a staffer here who has joined us as well. I wanted to add that.

Let me, in answer to that question, say to you I am always a little concerned about characterizing other judges and what they do. But I do think that the Fourth Circuit has a wealth of different ideas through judges on there that I think people would consider more liberal, more moderate.

And I think, quite frankly, the experience that I have as a trial judge—I think I would bring more Federal trial experience to the court than anyone there. And my background, which is kind of really, as best as I can tell, more similar as growing up and background to Judge Gregory—I think that will bring some balance to that court.

Senator KOHL. Judge Shedd, almost 5 years ago you held the Driver's Privacy Protection Act unconstitutional in the *Condon* v. *Reno* case. You said that Congress overstepped its bounds in forcing the States to implement Federal policy. Your decision was reversed by a unanimous Supreme Court ruling written by Chief Justice Rehnquist.

Beginning with the *Lopez* decision, the Supreme Court has struck down a number of Federal statutes, including several designed to protect the civil rights of our more vulnerable citizens, as beyond Congress' power. Taken individually, these cases have raised concerns about the limitations imposed on congressional authority. Taken collectively, they appear to reflect a new federalism crafted by the Supreme Court that threatens to fundamentally alter the structure of our Government.

If you were back in your role as Chief Counsel of the Judiciary Committee, how would you advise us to draft laws that would satisfy constitutional analysis? How much deference do you believe courts should give when Congress finds an issue is of national importance?

Judge SHEDD. Thank you very much. That is a very good question. Let me say, Mr. Chairman, first as to the DPPA case which I did have—and then you mentioned *Lopez*, which was the guns out of schools act—I had a challenge to that very same Act, which I upheld the constitutionality of the congressional enactment earlier than *Lopez*. The Supreme Court went the other way from me on that Act, as well, but I said it was constitutional.

I think what I would advise you if you were to ask me to and I could do that—I would just say that Congress has to be clear in what they are attempting to do, and Congress is going to have to do what we judges will have to do, is to look very closely at the test the Supreme Court applies.

You would look to that test to try to fashion legislation to meet the objectives that you want to meet, and then we would have to look at that test to see if you have done that properly.

Let me say I believe part of my jurisprudence is first you presume acts of Congress to be constitutional. And, second, under the approach in TVA v. Ashwander, is the doctrine of constitutional avoidance. If a judge can figure a way not to confront the constitutionality of a statute and risk declaring it unconstitutional, that is what a judge should do.

Senator KOHL. Thank you.

Judge Shedd, in September 2000 you ruled on an immigration case involving a suspected terrorist who was on a hunger strike. The strike had lasted for 6 weeks and the INS wanted to force-feed that person. You held that the detainee had a constitutional right to inaction, even if it could lead to his death, and that the refusal to eat was the last and ultimate form of protest against the U.S. Government. Many judges have disagreed and ordered forced feeding.

So is it fair to assume that you believe the Constitution recognizes a right to die? We don't have your decision in this case, so can you tell us whether the right to privacy played a role in the decision and more generally what you understand a constitutional right to privacy to be?

Judge SHEDD. It is a several-part question, Mr. Chairman. I will say first my decision in the protest case—I didn't so much focus on the right to die, but I focused on the right to protest Government action. I thought of that as a very valid, maybe one of the prime civil rights an individual has.

And if he wanted to protest treatment by the Government to the point that he expired, I thought that he had the right to do that. I thought that is the last, final form of protest, and I looked at that as an individual right issue, that a citizen could do that if a citizen wanted to do that.

On the right to privacy, I would say that I didn't really consider that to be a right to privacy. I thought that was more a right to protest governmental action. But if I understood your question correctly, I do see a right to privacy in other contexts in the Constitution.

Senator KOHL. One more question. In 1994, you considered a lawsuit brought by several South Carolinians who asserted that flying the Confederate flag over the State house was unconstitutional. In that case, you suggested that the American flag, or even the palmetto tree, could be just as objectionable as the Confederate flag.

In addition, at the end of the proceedings you expressed your frustration with the time being spent on discussing the flag when there were other, quote, "real problems which merited more attention."

Judge Shedd, we don't need to tell you that the Confederate flag and the ideas that it represents offend a great number of people who live in the area covered by the Fourth Circuit. They believe the presence of the Confederate flag over the State house is a real problem, and these people turn to you and the system of justice in which you serve for a fair hearing of their complaints.

It sounds like you were minimizing the importance of the issue at the time. Looking back at the comments you made at that time, would you change some of those comments if you could today?

Judge SHEDD. Let me say this, Mr. Chairman. Thank you for that question. I think quite frankly, taken in context, that I did not make light of their constitutional claim. I said specifically to them I do not denigrate your constitutional claim. There are people of goodwill on both sides of this issue, and also I think the record will reflect I didn't say that the American flag was objectionable. I didn't say that the palmetto flag was. I was just probing them on their constitutional theory.

And one of the lawyers told me that the flag had to come down under his constitutional theory because it was controversial, and I just pointed out by way of sort of Socratic exchange with lawyers and a judge—that is sort of my style—I pointed out there had to be some other standard I would have to apply because a lot of things are controversial.

I said during the Vietnam era, some thought the American flag to be controversial, and the reason I said that is I can remember from college days burning—I didn't do it, but people burning the American flag in protest. Then the lawyer also said as part of his constitutional argument that, well, people would not come to South Carolina and associate with him because they were concerned about that flag.

And I just made the point I didn't think that was a strong enough theory either because people might object to—our State flag has a tree on it and that tree represents the fact it was cut down to make a fort during the Revolutionary War which helped defeat

the British. I was just making the point that I didn't think that was quite a strong enough argument to him. I didn't rule against him. I was just having an exchange with him about what his theory was.

And then at the end or that part of the discussion, I said very clearly there are people of goodwill on both sides of this issue, that I did not denigrate that constitutional claim at all. I didn't even dismiss it. I just retained jurisdiction over it. I thought there was a parallel case in State court. I said I have great confidence in the courts and the elected officials in South Carolina to solve that problem. I would say now I think that prediction was right. It was solved in a political manner.

And then quite frankly as to those other comments, Mr. Chairman, if I could put those in context, I looked up at that hearing and in front of me in that court hearing I had really all the powers that be in South Carolina. I had the Budget and Control Board. They run the State of South Carolina. I had representatives from the Governor, the attorney general.

And I had had in the previous month, month-and-a-half, three enormously egregious circumstances affecting, quite frankly, African American citizens in the State. And it wasn't planned or anything, but after I said I don't denigrate your claim on the flag and we will get back to that and let me talk about these other real-life problems that I wish somebody would address—and I took that opportunity to comment on them because, quite frankly, Mr. Chairman, I thought the circumstances that those African Americans who had appeared in front of me in other cases had explained to me—I thought they were so outrageous and egregious that I was just trying to say take a look at those and we need to do something about those as well.

Senator KOHL. We thank you very much.

Judge SHEDD. Thank you.

Senator KOHL. As we move forward at this time, I would like to ask first Senator Hatch if he wishes to make a statement, and then we will turn to the members of the House who are here who wish to make a statement.

Senator Hatch?

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

Senator HATCH. Well, thank you for your courtesy, Senator Kohl. I appreciate it, Mr. Chairman. I would like to make a statement because there are, I think, some matters that need to be somewhat cleared up, some accusations, that I would like to spend a little bit of time on. So it will be a little longer than usual and I hope my colleagues will bear with me.

This is important stuff. We are talking about Federal judges here. Of course, I am aware of our two colleagues from Pennsylvania, having practiced law in the Western District of Pennsylvania myself. We welcome you all to the Committee.

I would like to ask that I be able to put statements for Mr. Schwab and Judge McVerry into the record, if I can, Mr. Chairman, if I could put those statements in the record with regard to those judges.

Senator KOHL. It will be done.

[The statements of Senator Hatch appear as submissions for the record.]

Senator HATCH. I look forward to voting for all these nominees in Committee and on the Senate floor. Now, I am going to have to spend some time welcoming Judge Dennis Shedd, for whom this moment must surely be both a life's milestone and a sentimental homecoming.

I also know this is a proud moment for our dear friend, Senator Thurmond, for whom Judge Shedd served in various positions, including as chief counsel to this Committee. Senators feel very strongly about their staffs, and our legal counsels make uncounted sacrifices to work for us and for the American people.

We are surrounded by very talented lawyers who forego larger salaries for the sake of public service. Sometimes, they put their personal opinions aside to advocate ours. We Senators take very personally when they are nominated and given the opportunity for yet higher public service. We take personally our friendship with them.

It has been the tradition of this Committee to give great courtesy to former staffers. I certainly take it very personally, and I know that Senator Thurmond does too. But we two former chairmen are not alone in our good impressions of Dennis Shedd.

When Judge Shedd was nominated to the Federal trial bench, Chairman Biden had this to say to him, quote, "I have worked with you for so long that I believe I am fully qualified to make an independent judgment about your working habits, your integrity, your honesty, and your temperament. On all these scores, I have found you to be beyond reproach," unquote. I have to echo that.

This is high praise indeed, and from a colleague from the other side of the aisle for whom we all have the greatest respect and who is a former chairman of this Committee as well.

Judge Shedd has strong bipartisan support in his home State as well, and not only from Senators Thurmond and Hollings, who know him the best. He is also strongly supported by Dick Harpootlian, South Carolina State Chairman of the Democratic Party, and himself a trial lawyer.

Dennis Shedd has served as a Federal jurist for more than a decade, following nearly 20 years of public service and legal practice. While serving this Committee, Judge Shedd worked, among many other matters, on the extension of the Voting Rights Act, RICO reform, the Ethics in Post-Employment Act, and the 1984 and 1986 crime bills. As Senator Biden put it, "His hard work and intelligence helped the Congress find areas of agreement and reach compromises," unquote. It is no wonder to me that during his service on the district court he has sat by designation on the Fourth Circuit Court of Appeals on several occasions.

That leads me to address a few issues that have been raised in the press and on the websites of the usual suspects in the last few days. First, let me address the more ludicrous attempt to discredit Judge Shedd that was brought to my attention that when he was confirmed to the district court bench, he had little experience in the practice of law.

To ignore the remarkable experience Dennis Shedd had in legislative practice crafting historic laws while serving this Committee is some chutzpah, is all I can say.

Senator SCHUMER. What was that word?

Senator HATCH. Whatever it is, I know that you understand it. And you not only understand it, you have plenty of it yourself.

[Laughter.]

Senator SCHUMER. Touche.

Senator HATCH. I have been told I have some myself. I have a limited amount myself, I am sure.

Senator SCHUMER. It is a compliment where I come from.

Senator HATCH. It is for me.

To raise an objection like that 12 years after the fact is just plain silly.

But let's be clear. When Judge Shedd joins the other members of the Fourth Circuit, he will not only have unmatched legislative experience, he will also have the longest trial bench experience on the Fourth Circuit. He will also add some diversity to that court. The last five circuit nominations have all been Democrats.

Interestingly, the last Democrat confirmed, Judge Gregory, has affirmed Judge Shedd's rulings in 11 appeals. Notably, Judge Gregory also agreed with Judge Shedd's ruling in the *Crosby* case, which found that the Family and Medical Leave Act was improperly adopted by Congress, a case which the liberal groups seem worked up about. I find it curious that no one asked Judge Gregory about his ruling in *Crosby* when he was before this Committee.

Judge Shedd has heard more than 5,087 civil cases, reviewed more than 1,406 reports and recommendations of magistrates, and has had before him more than 929 criminal defendants.

Judge Shedd's record demonstrates that he is a mainstream judge with a low reversal rate. In the more than 5,000 cases Judge Shedd has handled during his 12 years on the bench, he has been reversed fewer than 40 times. That is remarkable, less than 1 percent.

Detractors have made much of the fact that he has a relatively few decisions that he has chosen to publish. But, in fact, he falls in the middle of the average for unpublished opinions in the Fourth Circuit. One Carter appointee has published all of seven cases. One Clinton appointee has published only 3, and another Carter appointee has published just 51, only one more than Judge Shedd, despite being on the court 10 years longer.

Mr. Chairman, Judge Shedd is known for his fairness, total preparation, and for showing no personal bias in his courtroom. This is not just my opinion; this reflects the opinions of lawyers who practice before him. Judge Shedd is well respected by the members of the bench and bar in South Carolina.

According to the Almanac of the Federal Judiciary, attorneys said that Judge Shedd has outstanding legal skills and an excellent judicial temperament.

Here are a few comments from South Carolina lawyers: "You are not going to find a better judge on the bench or one that works harder." "He is the best Federal judge we've got." "He gets an A all around." "It's a great experience trying cases before him." "He's polite and business-like."

Washington's professional nominee detractors, of course, have been particularly misleading on Judge Shedd's record on employment cases, and I take particular offense at that. They have misleadingly pointed out that the judge seldom grants summary judgment in employment cases in favor of the employee. Of course, few judges do. Such cases are inherently fact-laden and go to trial or settle, or the plaintiff too often fails to state a claim.

They could have noticed that he has only twice been reversed in employment cases in all of this work he has done, but they didn't. They might have pointed out that in one of the appeals that he was invited to hear for the Fourth Circuit, he reversed a summary judgment and remanded for trial a political discrimination case against a worker who was a Democrat. But, of course, they didn't notice this.

Detractors have also tried to make irresponsible claims as to the judge's criminal case record. In criminal cases, Judge Shedd has strongly defended citizens' due process rights from violation by the state. He has frequently chastised law enforcement for errors in search warrants and the questionable use of seized property. In fact, he has sanctioned the State for discovery problems. He is known for aggressively informing defendants and witnesses of their Fifth Amendment rights. Remarkably, Judge Shedd has never been reversed on any ruling considered before or during trial, or on the taking of guilty pleas.

The cases that come before a judge are often difficult. He has not been exempted; he has had plenty of tough cases. In one case, Judge Shedd allowed a detainee to engage in a hunger strike as a protest against government's attempt to force-feed him.

Though some would seek to question Judge Shedd's respect for privacy, in two cases he protected HIV blood donors' confidentiality. In another case, he ordered special accommodations to an HIV-positive defendant to ensure his continued clinical treatment. As one of the coauthors of the three AIDS bills, I personally appreciate that.

Of course, a smear campaign against a nominee is not complete without the suggestion that they are a foe of environmental rights. Judge Shedd's detractors have ignored the wetlands protection case, where he handed down tough sanctions against a violator and ordered wetlands restoration.

They also skipped over his decision in favor of National Campaign to Save the Environment, and they missed his ruling to grant standing to a plaintiff challenging a road construction project on its environmental impact. They missed his ruling in favor of a woman protesting possible waste-dumping in her community.

But the most breathtaking charge against Judge Shedd was the NAACP's earlier this week that he has, and I quote, "a deep and abiding hostility to civil rights," unquote. I have to tell you I was outraged by this, and I am not the only one who has been outraged by this on this Committee. It is a distortion far beyond the pale of decency, and I hope that my colleagues will be quick to repudiate such rabid practices. In part, I am outraged because there are some who would profile Judge Shedd as merely a white male from the South and start from there to give him a certain treatment.

I should note that no less a figure than Ralph Neas noted in the National Journal in 1987 that the Judiciary Committee during Dennis Shedd's tenure had a good civil rights record. Now, I am not one who often quotes Ralph Neas, although we have been friends and still are. The fact of the matter is that Ralph knows he is a good man.

If his record working for civil rights legislation on the Judiciary Committee were not enough of an accomplishment for one lifetime for any man or woman, the truth is that in each of the cases that have come before Judge Shedd involving the Voting Rights Act of 1965, plaintiffs have won their claim.

In the *Dooley* case, a one person/one vote case, Judge Shedd gave the plaintiff a clear and strong decision. In another political rights case, he ruled to protect plaintiff's right to make door-to-door political solicitations.

You know a lot about a judge by how they conduct their courtroom. As you know, Mr. Chairman, I have been a strong advocate for the protection of religious practices in the public square. It says a lot about Judge Shedd, especially in these times, that he allowed religious headdress in his courtroom.

Judge Shedd also led efforts to appoint the first African American woman ever to serve as a magistrate judge in South Carolina and has sought the selection Committee to conduct outreach to women and people of color in filling such positions. He pushed for an African American woman to be Chief of Pre-Trial Services. He has actively recruited people of color to be his law clerks.

Because of Judge Shedd's work in an award-winning drug program that aims to reverse stereotypes among 4,000 to 5,000 school children, he was chosen as United Way School Volunteer of the Year.

Mr. Chairman, I would like to place in the record a very touching letter from one of Judge Shedd's former clerks, Thomas Jones, who happens to be a person of color, an African American, written in favor of Judge Shedd and sent just yesterday to Senator Leahy.

He says, quote, "It is apparent to me that the allegations regarding Judge Shedd's alleged biases have been propagated by individuals without the benefit of any real, meaningful interaction with Judge Shedd. . .I trust the allegations are given the short shrift they are due," unquote.

[The letter referred to appears as a submission for the record.]

Senator HATCH. Last, I would like to address the most repugnant attempt to smear Judge Shedd by taking his words entirely out of their context with regard to the neuralgic issue of the Confederate flag.

According to one group's website and an NAACP release, Judge Shedd is accused of having made, quote, "insensitive comments as he dismissed a lawsuit aimed at removing the Confederate flag from the South Carolina statehouse," unquote.

Nothing could be further from the truth. In fact, in the *Alley* case—a complaint brought by white plaintiffs, not African Americans—Judge Shedd never addressed the merits of the Confederate flag issue. Instead, he stayed the Federal case to permit a parallel State action to go forward. The statements attributed to him were, in fact, questions to the counsel.

Judge Shedd explained that he was merely asking questions to explore the lawyer's legal theory. He stated, quote, "Let me make it very clear to everybody. I'm not determining now whether or not the flag should be there at all," unquote.

Mr. Chairman, I would like to place into the record a portion of the transcript from the *Alley* case which places in context what Judge Shedd thinks about the issue of the Confederate flag in relation to other issues facing the African American community. His is a view shared by many African American leaders concerned with the issues facing their community.

[The information referred to appears as a submission for the record.]

Senator HATCH. Remarkably, although taking Judge Shedd to task for a Confederate flag case in which he never reached the merits of the issue, the liberal groups starkly ignore Judge Shedd's ruling in the *Vanderhoff* case, in which he did reach the merits of the issue concerning the Confederate flag.

In *Vanderhoff*, Judge Shedd dismissed the claim of a fired employee who repeatedly displayed the Confederate flag on his toolbox in violation of company policy. Judge Shedd rejected the plaintiff's contention that he was dismissed because of his national origin as a, quote, "Confederate Southern American," unquote.

In sum, Judge Shedd's detractors have a habit of ignoring the positive and accentuating the negative. For these irresponsible liberal groups, fair is foul and foul is fair, and the truth is what works for them.

I look forward to this hearing, and I want to thank Chairman Leahy and Chairman Kohl for scheduling it and holding it. It is important that we treat our former staffers with dignity and decency and honor and honesty.

So I want to thank you, Chairman Kohl, for being the chairman of this hearing and for being willing to get this hearing done because Judge Shedd has been sitting there now for well over a year and he deserves better treatment than this.

I just want to personally say I know this man. I worked very closely with this man, as I have worked with his mentor, Senator Thurmond, one of the all-time great Senators of this body, a man who has stood up in so many ways for so many good people throughout this country.

I know Judge Shedd very well. He is a man of integrity, he is a man of personal perspicacity, and he is a person that I have total confidence in. I have watched his record and I have been very proud of him. If we had more Federal judges like Judge Shedd, this country would be better off. We ought to be looking for more like him who will do it the way it is, do it the way it should be done, and who literally is honorable in everything he does.

Thank you, Mr. Chairman. Sorry to take so long, but I felt like I had to set some of this record straight.

Senator KOHL. Thank you, Senator Hatch.

At this time, we would like to ask for statements from two members of the House who are with us here.

PRESENTATION OF DENNIS SHEDD, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. JOE WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Representative WILSON. Mr. Chairman, I am Congressman Joe Wilson from South Carolina and I am just very honored to be here with you and the other members of the Senate who are present. This is the first time I have ever been invited to appear before a Senate Committee. It is a great honor for me, but it is a particularly great honor to be here and speak as to the integrity and standing of Judge Dennis Shedd in South Carolina.

I have multiple perspectives that I can tell you about. The first is that Judge Shedd used to be a law clerk in the office that I worked in until I was elected to Congress, and so I know firsthand as a student not too many years ago when the judge was just a person that you could count on in our office and we are very, very proud of his success.

Additionally, I have the perspective of having been a former employee myself of Senator Strom Thurmond, and we have an alumni association of persons who worked with Senator Thurmond. It is called the Strom Thurmond University Alumni Association, and the reason we call it that is because those of us who have worked for the Senator are constantly being taught and that is why we call it a university.

So I have had the wonderful experience of working with Judge Shedd for getting the alumni together where we honor the Senator and we tell Strom-isms, stories about Senator Thurmond, and they are all true. So it is a wonderful experience that we have of camaraderie of what we have learned from Senator Thurmond.

Additionally, I can tell you that I was Judge Shedd's State Senator for 17 years, and I know of his standing in the community. I almost know it, Mr. Chairman, too well, in that I was in his court one time as a member of the delegation as a defendant.

We had passed a law, and it was in good faith, to provide for a designated seat on a school board for a rural community. Judge Shedd was very fair in hearing the evidence. He showed no partiality to his former employer and he ruled against us that, in fact, we had inappropriately designated a seat and it should not have been done. So I know firsthand, again, of his integrity and his knowledge and background.

And then, of course, as a member of the State Senate and knowing him in the community, I appreciate his volunteer work with the schools, with the sports programs of the community that I represented.

And now I am very honored. I was elected December 18th and sworn in on December 19th, and I am now U.S. Representative for Judge Dennis Shedd and I am just very honored to be here on his behalf. In so many ways, I can point out to you from so many perspectives that this is a very fine person, a very constructive person in our community, a person of the highest integrity, and I urge his confirmation.

I would be happy to answer any questions.

Senator KOHL. Thank you very much.

We need to recess for just a few minutes, but before I do, I will give you, Ms. Hart, 2 minutes to make a statement if you would like.

PRESENTATION OF ARTHUR SCHWAB AND TERRENCE MCVERRY, NOMINEES TO BE DISTRICT JUDGES FOR THE WESTERN DISTRICT OF PENNSYLVANIA BY HON. MELISSA HART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Representative HART. Thank you, Mr. Chairman, and I will be brief, as I know you have a lot of work before you today.

I have the honor of having two of my constituents, or one-and-a-half of my constituents here today. First, I would like to introduce Art Schwab, who is my constituent from suburban Pittsburgh. Art is to my right. Good to see you today.

He has been a long-time colleague, as I have been an attorney in Allegheny County, and I am pleased that the Committee has decided to have a hearing for him. He has sought this appointment for a long period of time, and as we know, that would be a financial sacrifice for his family, but he has been enthusiastic about public service.

He has acquired tremendous experience in the law and he has been a long-time litigator, obviously very well prepared. He is known in our bar association as a dedicated and intellectually gifted attorney. His diverse experience includes trying cases in Federal courts in 22 different states. His cases have included wide-ranging areas of the law, including securities, banking, employment, labor, and antitrust. He has offered his legal expertise to others through a variety of seminars throughout his career.

In addition to this distinguished service, he has also dedicated an extremely large amount of time to his alma mater, Grove City College, serving on their board of trustees. He has worked to ensure that today's students gain the same high-quality education from one of Western Pennsylvania's best schools, as he did.

He has been devoted to his family. He is known as a wonderful family man and has been quite involved in the lives of his children. I am certain he would show that same dedication to the district court. His skill and his balanced judgment would serve both the court and the Nation well.

I also have the pleasure of knowing Terry McVerry quite well. Terry also is an attorney practicing in Allegheny County, and I am pleased that this Committee has decided to have a hearing on his nomination, also to the District Court for the Western District of Pennsylvania. Terry is especially suited for the position as an accomplished attorney, also, and a dedicated public servant, as well as a husband and father.

He worked as an attorney in Pittsburgh for 33 years. He is a skilled litigator, trying a variety of cases. He served as a trial prosecutor in the Allegheny County district attorney's office, where he successfully prosecuted hundreds of cases.

He has gained varied experience, in civil litigation, trying many cases, including medical malpractice, custody cases, and business and real estate claims. He is currently serving as the Allegheny County Solicitor, so he has been on both sides—public service

lawyering and also private practice. He has also served on charitable boards, such as the Neighborhood Legal Services Association, United Mental Health, and Performing Arts for Children.

I know Terry quite well. He was departing the State House of Representatives as I was joining the State Senate in 1991. He ended his service briefly, though, only to shortly thereafter take on a very difficult project, which was the drafting of a charter for our county of Allegheny, 1.3 million constituents there, a very difficult task that he took on, one that took lots of hours and a lot of legal skill, and successfully prepared a charter for that county to proceed with a much more modern form of government.

His varied experience as a trial attorney also led him to be nominated to serve in a vacancy on our family court, where he served with much distinction as well. I know that he will also serve Western Pennsylvania and the Nation well on the district court.

I thank you for the opportunity today and I wish both of my friends good luck.

Senator KOHL. Thank you so much.

There is a vote that will require a 10-minute recess. We will be back.

[The Committee stood in recess from 2:55 p.m. to 3 p.m.]

Senator SCHUMER [PRESIDING.] At Senator Specter's request, I am substituting for Senator Kohl to chair this hearing until Senator Kohl returns, which should be forthwith.

Senator SPECTER. I ratify that statement, notwithstanding my lack of authorization.

Senator SCHUMER. It is Thursday afternoon before recess and lack of authorization does not stop much around here.

Senator SPECTER. As I said to Senator Schumer, I was asked to begin these hearings, as those who were present notice, and it is our practice to proceed when the chairman has to go vote.

Senator SCHUMER. OK, good. Well, then, I will ask my two questions of Judge Shedd. They are both related to federalism issues, which you know I care about, and let me first talk about the *Condon* v. *Reno* privacy case, which I know Senator Kohl touched on, but I would like to go into it in a little more length. I guess I would have to tell you I would be concerned about what they mean regarding your views on two things, both privacy and the limits of congressional power.

As you know, in *Condon* v. *Reno*, you struck down the Driver's Privacy Protection Act of 1994. That is a bill I cosponsored and strongly supported in the House of Representatives. The law protected citizens' privacy rights by limiting the kinds of information that could be put in the public motor vehicle records. It was, and still is, an important law because personal information taken from these records has been used to hunt down and murder people, including the well-known case of Rebecca Schaffer, the actress who was stalked and killed in California.

As you noted in your opinion, quote, "Congress established that criminals had used such information to locate victims and commit crimes." Nonetheless, you held this important privacy law to be unconstitutional because it was an unauthorized exercise of Congress' power.

You held that Congress was powerless to protect individuals' private personal information, including an individual's name, address, phone number, medical and disability and other personal information required in order to get a driver's license. That ruling, if it had remained law, would have imposed a broad restriction on Congress' power that would, in essence, have prevented Congress from using its Commerce Clause power to regulate the conduct of employees of the State government. Your ruling also would have gutted our ability to protect privacy rights through Section 5 of the 14th Amendment.

As you know, you were reversed 9–0 by the Rehnquist Court, I guess at that point both Justices Thomas and Scalia voting obviously with the majority. They were members of that Court.

So I guess you can see that some of us in this branch of Government would be especially troubled by this ruling, and people like myself who have been troubled by this general trend to what I would call conservative judicial activism going back maybe to the 1930's, in some cases the 1890's, about what Congress' power was and what the Federal Government's power was in this privacy case.

So just as today there is lot of criticism about how liberal the Ninth Circuit is—I share the revulsion of just about everybody at their ridiculous—there is also a lot of criticism about how conservative the Fourth Circuit is. I have always tried to keep the courts balanced. I would say the Ninth and the Fourth, some would argue anyway, are Exhibits A and B in why we need moderation in the courts.

So I would like to ask you two things. First, specifically, do you agree with the Rehnquist Court reversal of you in *Condon* or—and I think it is perfectly fair for you to disagree—do you disagree with the reversal, with the caveat that, of course, you will abide by it because it is the law of the land?

Second, would you tell me your general views on privacy? If you had been on the Court back in 1965 and Chief Justice Warren had turned to you in conference about *Griswold*, what would you have said? Would you have ended up in the majority or the minority, and what are your thoughts on that?

Judge SHEDD. Thank you, Senator Schumer. As to the Driver's Privacy Protection Act, as I remember it, I was the court in the country that got that case. I looked at it very carefully. I looked at the issues very carefully. I didn't rush to judgment on it. As a matter of fact, attorneys from the Justice Department came down to argue that case in front of me.

There were two lines of precedent really to follow. After thoughtful consideration, I thought the *Printz* line of cases controlled. The second half of that case, by the way, I did acknowledge that there is a right to privacy in information and the category of information that the government requires that you give them. Some circuits didn't agree with that. The Fourth Circuit did and I did agree with that part of it.

Now, it went to the Fourth Circuit and they affirmed me. It went to the Supreme Court. And you asked if I support it. I certainly do, and I would say to you I tried as hard as I could to get it right, but I got it wrong. I missed it.

Senator SCHUMER. Just before we get to the second part of that first question, explain to me, then, where you got it wrong. I mean, did you think Congress didn't have the power? Did you think Congress didn't make the right findings? It is clearly not on a privacy basis. You have just said that?

Judge SHEDD. Right. This is the *Printz* line of cases that I followed. The Supreme Court had said that the Federal Government could not commandeer State officials to undertake their objectives. In my analysis, I thought by fining State officials if they didn't follow the dictates of Congress, I thought that was the precedent that I should follow. And the Supreme Court said in their opinion this is not commandeering.

I would say, Senator Schumer, as these issues come up and I look back, I think I was the first judge in the country to have it. I looked back to sort of wonder did I miss it that badly and what other judges might have thought about it. And I checked to see that at the time that issue got to the Supreme Court, 16 judges had ruled on that issue. Eight had ruled constitutional, and eight, including me, had ruled unconstitutional. So there was just a split among judges.

But the Supreme Court said I followed the wrong precedent. They actually commented more on the Fourth Circuit decision affirming me, but I accept that, too, as a comment on my ruling.

I would say this, though. Also, Professor Chemerinski from Southern California, who filed an amicus brief with the Supreme Court asking them to overturn the Fourth Circuit—I recently read a law review article by him saying they got the decision right. The result was right, but he thought that the Supreme Court had not done a good case in which precedent you are to follow. And he wanted them to overturn all the precedents that I had followed. I just followed the wrong precedents, but that was my reasoning for doing it.

Senator SCHUMER. Because I am not familiar with the *Printz* case and its detail, your objection was the method by which they required States to——

Judge SHEDD. Yes, sir.

Senator SCHUMER. Had they withheld money to States, you would have had a different ruling?

Judge SHEDD. Let me say this, Senator, in a general response. I think that would have been a different analysis.

Senator SCHUMER. How about the next part of my question? What would you see if Chief Justice Warren pulled you aside in 1965 and asked you about the right of privacy in general and as it affected the *Griswold* case, in particular?

Judge SHEDD. Let me say this. In 1965, what would I have said, or what would I say now?

Senator SCHUMER. Well, I asked in 1965, but you can add what you would think now.

Judge SHEDD. I am not trying to be coy, but I would want to say this. I am reluctant to talk about a specific fact situation. I would like to tell you why. First of all, I have found out you can think of any kind of fact situation that may never come in front of a court and it likely can. And I would feel if I commented on a fact situa-

tion, I would have to recuse myself if I were on the court that considered it.

Second, I am a little concerned about general characterizations because I have found out in reviewing cases—just as you, I think, made a very sharp observation about withholding money and would that change the analysis, you have to be careful about the specifics of the law and what the law is at that point and the fact situation.

I can say this to you, I can say this to you. I think I would have said then and I say now I think it is beyond doubt that the Constitution does contain the concept of privacy.

Senator SCHUMER. And how about as it affects a woman's right to choose? Does the penumbra of privacy extend that far, in your opinion?

Judge SHEDD. Let me say this. Again, I would rather not comment and I want to tell you why, rather than give you my personal views about an issue that is not in front of me. I don't comment on issues because if somebody were to raise such an issue in front of me sitting, I think it does a——

Senator SCHUMER. Well, let me go to the *Griswold* case, in particular. That is already resolved. We have no trouble with you talking about that because that is resolved. And I have to tell you—and I am just speaking for me as one member of the 19 members of this Committee—I think you have an obligation to tell this Committee, to tell the Congress, and to tell others.

You are being considered for elevation to an extremely important position, a lifetime position, and to simply say that you don't want to comment, you are sort of giving it to me both ways. You are saying, on the one hand, you don't want to comment based on a specific fact situation because it might come before the court. That is a 1 in 20 million chance. Then you are saying you don't want to comment generally because you don't know the specific facts. So you are just saying you don't want to comment and to me that is not acceptable, at least to get my vote.

Judge SHEDD. Well, just let me say this, Senator Schumer. I just feel like judges should not give their personal views on hypotheticals. As to *Griswold*, I complete support that decision.

Senator SCHUMER. You do?

Judge SHEDD. Yes, I do.

Senator SCHUMER. So you believe that the right to privacy, as embodied in the Constitution, would support a woman's right to choose?

Judge SHEDD. Let me explain. I am not trying to be coy with you. I am just saying from my perspective I accept that. That is the law. I would not do anything other than apply the law. And what I personally think—you might well like my personal views. I just don't think that that is what I should be doing. I understand your position. People don't know my personal views because my personal views have not a whit to do with how I decide cases.

Senator SCHUMER. Judge Shedd, do you know what we have found? I know there are some who view, well, the law is interpreted from on high and it is objective, regardless of the person's views. We find certain exceptions. We find one judge who was nom-

inated who was conservative becomes a liberal, or a liberal becomes a conservative.

But, overwhelmingly, people end up interpreting the law and it ends up being fairly consonant with their views. It is not that you have random scattering of liberals and conservatives on issues. So to me it is not exactly accurate to say there is just some interpretation of the law apart from ideology that is divined as we priests of the law divine it.

I am going to submit these questions to you in writing and ask you to think about it and elaborate. But I would say to you again, if you are unwilling to answer them in any more specific way, I don't think you are fulfilling your obligation as you come before this hearing.

We are not just here to find out if you are a nice fellow, a good family man, and never violated the law. We are here to find out what kind of judge you would be, and the way you would judge involves your legal abilities and it also involves your views, because legal abilities don't inexorably lead to the same decision. That is why we don't have just one judge, or some computer by now or some textbook interpreting this. So I am just telling you I feel strongly about it. I don't feel it is fair to ask us to vote yes or no on you without understanding those views.

I have one more question and I am going to be brief about it because I know Senator Specter is waiting. Since I had one two-part question, now I have my second question, because I promised him it would be two questions.

Senator SPECTER. I count 14.

[Laughter.]

Senator SCHUMER. Well, they have subparts, as well.

Just tell me a little bit about *Crosby* v. *South Carolina*. I add your ruling in that privacy case with your ruling in *Crosby*, where you held the Family Medical Leave Act to be unconstitutional on 11th Amendment grounds, and that makes me nervous. Again, I think that you sort of usurped Congress' power in that regard.

Do you want to explain to me your decision on that one and what assurances you can give us that you will show proper deference to the elected body's power here?

That will be my last question and I will not ask any sub-questions so Arlen can get to his quick, single question.

Judge SHEDD. Thank you, Senator Schumer, and I will accept those questions and if I can give you an answer to make you more comfortable on the other questions you asked, I will undertake that.

Second, let me say maybe to make you a little more comfortable, I think you probably do know, but on the Gun-Free School Zone Act, which was overturned by the Supreme Court in *Lopez*, I had that case presented to me as a case of first impression in the Fourth Circuit and I upheld the constitutionality. Now, the Supreme Court said I got it wrong, not my case, but the idea. But I upheld that against constitutional challenge. I just tell you that.

Senator SCHUMER. That is interesting and matters to me.

Judge SHEDD. And I do believe—I have great respect for the legislature, for Congress. Both having served here as a staffer and just my general jurisprudence, I do indeed.

Senator SCHUMER. Tell me a little bit about *Crosby*.

Judge SHEDD. I will tell you about *Crosby*. Senator Schumer, in our district we have a—maybe it is only in our district—we have a local rule that says all employment cases are referred automatically to the magistrate judge. So we don't get those cases on first blush.

I will tell you this, that over the last three or 4 years I have tried to encourage my colleagues to change that rule. I think those employment cases should be treated the same as others.

But this *Crosby* case went to a magistrate judge on automatic referral. When it came back up, in that his recommendation—I have to accept it, but it is his recommendation to me—he said that the Family Medical Leave Act was unconstitutional because Congress overstepped its bounds.

The plaintiff didn't object in that case. I could have just probably rubber-stamped that and nobody maybe would have ever learned about it. But I noticed that that call of the constitutionality of an act of Congress into question—I asked the Justice Department to intervene and give us their views, to argue that case.

By our practice, that goes back to the magistrate judge. It came back up from him. He reached the same conclusion. I saw the Justice Department brief; I read it at that time. I looked at all the cases, and I remember specifically having discussions about this and I was sure the case was going to go to the circuit courts. I was sure it wasn't going to move up. I thought his analysis was right.

Now, just let me say, as I understand it now, either seven out of eight or eight out of nine circuits who have looked at that issue are in accord with that. But that is what I did in that case, Senator.

Senator SCHUMER. I may just ask, Mr. Chairman, that I ask additional questions in writing on *Crosby* as well.

Thank you, Mr. Chairman.

Senator KOHL [PRESIDING.] Thank you very much.

Senator Specter?

Senator SPECTER. Judge Shedd, just one more question on the *Condon* v. *Reno* case, and I really mean one question. You had come to your conclusion based upon two Supreme Court decisions, *New York* v. *United States* and *Printz* v. *United States*. And as noted, you were reversed nine to nothing.

What were the principles in those two cases which you misapplied?

Judge SHEDD. It was a concept, Senator Specter, and I appreciate that question, that Congress could act, but Congress could not commandeer State officials to carry out a Federal objective. And I thought, looking at the Privacy Protection Act, where Congress decided to protect that information and thereby fine State officials who released that information—I thought that was, in essence, the principles the Court was setting out in the *New York* and *Printz* cases.

Senator SPECTER. Judge Shedd, in *United States v. Brown*, you upheld the authority of Congress to legislate on a gun-free area near schools, and you were reversed by the Supreme Court five to four. I think you got it right, not wrong, five to four. I understand that you are bound by that decision, but you may be bound by a

different interpretation 1 day because the exercise of the Commerce Clause had gone on for 60 years and we may find that swinging back just a little differently.

Judge Shedd, I am advised that the South Carolina NAACP opposes your nomination. Do you think that is justifiable opposition?

Judge SHEDD. Honestly, Senator Specter, I don't think that it is. I don't think that at least when I have looked at the cases that they point to, I don't think they provide a factual basis to draw the inference that they say.

Senator SPECTER. What cases are they pointing to, as you understand their position?

Judge SHEDD. Well, there are a number of cases. It is the *Schults* decision that I had. There is a *Tessman* decision. There is a *Lowry* v. *Seamless Sensations*. They claim, as I understand it, that those cases and ones like them indicate that somehow I don't like employment cases and I don't treat——

Senator SPECTER. Judge Shedd, we are very close to the time when another vote is going to be called and we have some more nominees.

Judge SHEDD. OK.

Senator SPECTER. Those are very important answers, but what I would like you to do is submit that for the record.

Judge SHEDD. Sure.

Senator SPECTER. I think that is going to require a detailed analysis, but I would like you to pick those cases up, because that is a very significant consideration, and identify those matters and give us a detailed written response.

Judge SHEDD. May I say one thing about that?

Senator SPECTER. Sure.

Judge SHEDD. Those cases—there was no comment by me on the merits. Those were jurisdictional matters. They had jurisdictional defects, but I will be glad to answer that for you in writing.

Senator SPECTER. Well, jurisdictional cases have a way of sliding across the line sometimes, depending upon the facts and depending upon the legal conclusions, but I would be interested in the details of your reasoning.

Judge SHEDD. Sure.

Senator SPECTER. Just one final question, and I mean just one final question. On the case involving the palmetto trees, this is an extract of a quotation which may be out of context, quote, "What if an environmentalist is upset that the palmetto tree is on the State license tag? An environmentalist says I am very upset about that because that reminds me that palmetto trees were cut down to make Fort Moultrie and I find that offense. It chills my rights to have environmental groups come to South Carolina. Isn't that the same constitutional claim," close quote.

Would you prefer that you hadn't used that analogy, or can you explain the justification for it?

Judge SHEDD. Senator Specter, what I was doing there was I was probing them on their constitutional challenge to the government action of flying that flag. And part of their answer was—this is give-and-take and just to probe to see what their answer was. I didn't rule on it. I was just trying to understand the parameters of their argument.

And the lawyers said to me basically the flag should come down because it is controversial. I was pointing out, I thought quite properly, at least in an exchange with them that just because government action is controversial, that is not enough to state a constitutional claim.

And I think at some point the counsel said to me, well, there is also a right of association because people who are offended by that flag won't travel in-state to meet with me. And I was just showing him that that may not be a strong enough constitutional argument on that point. That was all. It was just by way of analogy.

Senator SPECTER. A final question. You commented that you would bring moderation to the Fourth Circuit. Could you amplify what you mean by that?

Judge SHEDD. I think that I would be an influence maybe that is not exactly there. I have a background that I think is different from most of the judges who are there now. As I said, I think my background as best I can tell probably closely mirrors Judge Gregory, very much a working-class background, and also that I bring more Federal trial experience. I would bring that if I am confirmed to the Fourth Circuit than anybody sitting with them now.

Senator SPECTER. Thank you, Judge Shedd. Thank you, Mr. Chairman.

Judge SHEDD. Thank you.

Chairman LEAHY. [presiding.] Thank you.

You haven't gone yet?

Senator EDWARDS. No.

Chairman LEAHY. Well, you go right ahead.

Senator EDWARDS. Thank you, Mr. Chairman. I appreciate that.

Chairman LEAHY. You are on my blind side. I apologize.

Senator EDWARDS. Good afternoon, Judge. How are you?

Judge SHEDD. Good afternoon. Thank you.

Senator EDWARDS. Glad to have you with us.

I just wanted to make one comment about your upholding the Gun-Free Schools Act. If I remember correctly, that decision was before the series of cases out of the Supreme Court that struck down laws under the Commerce Clause. I think around the time you reached that decision, it would have probably been 40 or 50 years since a U.S. Supreme Court decision had struck it down. So you were following pretty clearly established precedent in that regard, although the law itself was new to you, correct?

Judge SHEDD. I think that is correct. I remember there was a very vigorous argument against the constitutionality of that statute. I can't say otherwise. I think you are right on——

Senator EDWARDS. I believe it had been decades since a law like that had been struck down.

Judge SHEDD. It may well have been.

Senator EDWARDS. I want to ask you about a couple of specific cases, if I can. The first one is the Amanda Roberts case, a sexual harassment case, and I am going through a series of facts as I understand them and if any of these are wrong, I want you to tell me and then I want to get your explanation about why you reached the decision you did.

This was a case that she brought where she swore that her supervisor had commented on her breasts, asked her graphic sexual

questions, bought her panty-less pantyhose, frequently stood behind her and rubbed her shoulders while trying to look down her shirt. Actually, there is more than that; it goes on from there.

The case was first before the magistrate on a motion for summary judgment. The magistrate ruled that that be denied and that the case go to trial. You disagreed with the magistrate and entered a judgment for the company on summary judgment.

Your analysis, as I understand it, was that she had objectively, based on an objective look at the evidence, suffered harassment, but, and I am quoting now from your decision, "there was no evidence she perceived her environment to be abusive."

Let me just ask you about a few facts that we saw in this case. One, she did, with her co-worker, report her boss' conduct to the corporate headquarters. She wore—I guess this is in an affidavit; I am not sure from what I have here—that she told her supervisor that she didn't want to hear these comments and that she found them offensive, but he paid no attention to her objections. Third, she quit her job. Fourth, she filed a lawsuit saying she had suffered discrimination.

As you well know from all your experience, on a motion for summary judgment you are required to give the plaintiff the benefit of the doubt, without going through the legal terminology, including any inferences from the facts the evidence shows.

Can you tell me whether you are aware of other cases—and I wondered if this was the basis for your ruling—are you aware of other cases holding that a jury could not find that a plaintiff who had reported misconduct and complained about it, quit her job and filed a lawsuit as a result, subjectively felt that she had been harassed?

First, you should tell me whether I properly understand the reasoning that you had, because I just got this from your decision.

Judge SHEDD. Thank you very much, Senator Edwards. Let me give you a little more background and tell you how I got to that decision.

Senator EDWARDS. Sure.

Judge SHEDD. As to other lawsuits, I don't know about this. But as I understand the law and I understood the law, for a hostile work environment there is a two-pronged test. It is the objective view of it, what would a reasonable person think of it.

Senator EDWARDS. Whether she subjectively felt harassment.

Judge SHEDD. And whether she subjectively felt that herself.

Senator EDWARDS. Right.

Judge SHEDD. I said in my opinion it was objectively a hostile work environment.

Senator EDWARDS. Right. I saw that.

Judge SHEDD. But I read her deposition very carefully in this case and this is what I saw, that she said she left her job, the environment, because she wanted to go to work for her boyfriend at a convenience store, and that she—the questions were asked, well, why didn't you want to work? She said, well, things are wishy-washy, and she also recommended to her friend that her friend, a female, go to work in the position she was leaving. And when asked about the boss that supposedly did those things, she said he is a nice guy to work for.

So that is what I looked at for her subjective intent, and I thought that necessarily, Senator Edwards, it has to be more than a filing of the action or making the complaint because that is part of the objective side of the equation.

Senator EDWARDS. I agree with that.

Judge SHEDD. I just looked at it on the subjective side as to what she did, and I thought that—as you know, you can't make a material issue of fact by having dispute on the same side of the issue.

Senator EDWARDS. Right, right.

Judge SHEDD. And that is how I analyzed that case.

Senator EDWARDS. I guess what troubled me about it was it is a state of mind thing that you are talking about. At least in my experience, those cases are usually—and probably in your experience, too, those are usually left for the jury to determine.

It looked to me from looking through the evidence that there was, at worst case for the plaintiff, some conflicting evidence on that subject. That is what troubled me about it.

Judge SHEDD. But if the conflicting evidence is on her side, I think the summary judgment standard is a little bit different. The standard is one side—you can't have a deposition—not that she did, but you can't have a deposition in which you state a fact and then come back later and file an affidavit to contradict that and make that a material issue of fact, I think the law is.

But I want to make clear to you now, if she had said a friend of mine wanted that job and I said absolutely it is terrible, don't go to work for that guy, I think quite frankly the decision would have been different because that was the evidence I looked at as to her subjective view of what happened.

Senator EDWARDS. Let me ask you a broader question. I got a letter from law professors in North Carolina, 16 of them, I guess, who talked about some of your opinions. And in fairness to you, I think I also just got a letter from some law professors in South Carolina who——

Judge SHEDD. How many?

Senator EDWARDS. I don't remember the number, but they were very supportive of you. The ones in North Carolina were not.

But I wanted to ask you about an assertion that they made and whether this is accurate or not because I don't have any way of knowing. They said that in the 66 cases that presently appear in the Lexis online system—I am reading from the letter now—"Judge Shedd appears never to have granted relief to a plaintiff in an employment discrimination case, although he has granted summary judgment motions in favor of employers."

Let me just ask you first, is that accurate? Have you granted relief to a plaintiff in an employment discrimination case?

Judge SHEDD. Senator Edwards, I would say now it depends on what those law professors mean by relief, because as you probably know, in an employment discrimination case almost never does a plaintiff file for summary judgment.

Senator EDWARDS. Right.

Judge SHEDD. So is relief meaning that I have ruled for the defendant? Absolutely not. I have denied summary judgment. I have given plaintiffs a chance to modify their filing. I have refused to grant defense motions to dismiss, absolutely.

Senator EDWARDS. As opposed to not allowing the defendant to win on a motion, have you ever had occasion to rule on the merits of the case yourself as the judge, as opposed to it being a jury question?

Judge SHEDD. Not that I can think of because if summary judgment fails, then it becomes a jury question.

Senator EDWARDS. So in the cases that you did not rule in favor of the defendant, what you are saying is they went to trial, to a jury?

Judge SHEDD. Or settled, something like that.

Senator EDWARDS. Do you have any idea what percentage of the cases you allowed to go to trial, as opposed to being decided summarily?

Judge SHEDD. I do not know that.

Senator EDWARDS. Do you know whether a plaintiff has ever prevailed in your courtroom in an employment discrimination case?

Judge SHEDD. Yes, sir, they have on a number of occasions. Often, those cases don't go all the way to trial. They get settled, they get settled.

Senator EDWARDS. Has the plaintiff prevailed in a case that was decided either by you or by the jury?

Judge SHEDD. I can't ever think—quite frankly, I am not even aware of very many employment cases ever finishing in a jury trial. I have had them start and the plaintiff settled the case, received a settlement, to end the litigation. It is very, very rare, I think, from my experience that it gets that far. I have had cases where plaintiffs—yes, sir, I have had cases where plaintiffs have recovered, not by my ruling because it is not in a posture that I can rule that I can think of in an employment case.

Senator EDWARDS. What I am trying to ask you is you rule for the defendant and they get out on your ruling. Scenario one. Scenario two: the case is settled and the plaintiff recovers. Scenario three: the case goes either to you or to a jury, depending on the nature of the case.

Judge SHEDD. I have never had one come to me.

Senator EDWARDS. In the third category, has the plaintiff ever won?

Judge SHEDD. Let me say I can't ever remember that I have had an employment case that was tried to me as a judge.

Senator EDWARDS. OK. Well, then, let's go to the jury.

Judge SHEDD. And then to the jury, I can't remember, but I am just saying the practice is in our district—I just can't even think of any case in our district wherein the employment case goes to a verdict for the plaintiff. Those cases—at least my experience has been they settle; they settle those cases. But I can't think of one right off. I could see, but I have had plaintiffs be successful in front of me because of my rulings, not granting the defense what they wanted.

Senator EDWARDS. Mr. Chairman, do I have time for one more?

Chairman LEAHY. We do have a vote on, as you know, but go ahead, of course.

Senator EDWARDS. Let me just do this one last area and then I will be finished. Bear with me, Judge.

The last thing I want to followup on is the questions that you got from—I will followup on some questions that Senator Schumer just asked about this case involving—I guess it is the *Condon* case involving the Driver's Privacy Protection Act.

I am aware of, I think, eight to ten cases since 1995 where the Supreme Court has struck down a congressional statute on federalism grounds. Can you tell me whether you are aware of any case where a lower court, such as you were sitting in this case—where a lower court has struck down a statute, a congressional statute, on federalism grounds and then the Supreme Court reversed it, which is what happened in this case?

Judge SHEDD. Let me think. Well, on *Lopez*, I guess that was Commerce Clause. Would you consider that, the guns out of school Act? I think the lower court struck that. I did not.

Senator EDWARDS. Right.

Judge SHEDD. Senator Specter said that the Supreme Court, you know, reversed me five to four, but that wasn't my decision. That wasn't my decision. They dealt with the other decision. I would have to think about that to be sure.

Senator EDWARDS. OK. So we don't take too much time on this now, would you mind finding out that information and giving me an answer to that?

Judge SHEDD. Sure.

Senator EDWARDS. Basically, the question is a case where a lower court rules, the Supreme Court says it is unconstitutional, and the Supreme Court reverses and finds, in fact, that the statute is OK. I am just asking you whether that happened any other times during this timeframe.

The second thing is you found, as I understood it, and I am reading from your opinion now, that the law was unconstitutional because it—I am paraphrasing now—invades the rights of States. And then you say—this is a quote; what I am about to read is a quote—"Unquestionably, the States have been and remain the sovereigns responsible for maintaining motor vehicle records, and these records constitute property of the States."

And then you went on to say the Act was unconstitutional because, quote, "Instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of their property"—i.e., motor vehicle records—"and to require the States to regulate their citizens' access to and use of these records."

Here is my question: It is my understanding that a lot of the airports in this country are private airports, that they are operated by State and municipal entities, much like these drivers' records in South Carolina. They are especially regulated by the Congress and by the FAA, and the Congress can say, for example, that you can't have a runway shorter than 7,000 feet, or you can't have an airport without a barb wire fence, or you can't allow airplanes from particular places like Cuba or Libya to land. I am just trying to figure out whether, under your reasoning, that kind of regulation and control would be a problem.

Let me give you an example. Let's suppose you use the language and the reasoning in your case and instead of talking about records, which your case was about, let's say commercial airports.

So we say instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed these airport rules specifically to regulate the States' control of their property—i.e., commercial airports—and to require the States, in turn, to regulate their citizens' access to and use of these commercial airports.

I guess my question is whether the reasoning that you use—and I want to be clear now that I am talking about State-owned airports here—whether the reasoning that you use would limit our ability to impose at a national level security measures in those airports, which, of course, we have been doing recently, particularly since 9/11.

Can you talk about that?

Judge SHEDD. May I address that in general terms?

Senator EDWARDS. Sure.

Judge SHEDD. Off the top of my head, that question—I would say to you the analysis would have to look at those airport regulations, considering the fact that Congress has regulated in that area. I know you are talking about separate State-owned or community-owned airports, but I think under the scheme of not really a preemption, but the fact that there is Federal regulation of Federal aviation generally—I think that would lead to a different analysis.

Senator EDWARDS. I don't know how closely you followed the argument in your case in the Supreme Court, but this is not original thought by me. This is an argument that the Solicitor General made, I think, in the Supreme Court with respect to that. So it apparently concerned the Solicitor General under these circumstances that this was a possibility.

Can you tell me something that would alleviate that concern?

Judge SHEDD. I could say this: I think the analysis is entirely different. I think the analysis would be different because, again, I pointed out that those State——

Senator EDWARDS. You think the analysis is different because the Federal Government had regulated in this area before. Is that what you are saying?

Judge SHEDD. Yes, yes, sir.

Senator EDWARDS. OK, all right. Has the Federal Government regulated privacy before this statute, the Driver's Privacy Protection Act?

Judge SHEDD. Well, they have, but they haven't done it in the context of a driver's license. That is information that the State requires you to give them. I separated it out on that. Yes, the Federal Government has regulated privacy—wiretapping statutes and other things.

Senator EDWARDS. Right, right.

Judge SHEDD. Yes, they have.

Senator EDWARDS. Thank you, Judge. Thank you very much.

Judge SHEDD. Thank you.

Chairman LEAHY. We have a vote on. We will stand in recess. Senator Kohl is on his way back.

[The Committee stood in recess from 3:39 p.m. to 3:43 p.m.]

Senator KOHL [PRESIDING.] At this time, we will renew our hearing and I will call on Senator Sessions for his questions.

Senator SESSIONS. Thank you, Mr. Chairman.

I am really pleased to see all of you fine nominees here. Judge Shedd, it is a particular pleasure to see you. I know that they want to ask you a lot of questions about a lot of tough cases, but I don't think "tough" is maybe the perfect word for it. It is just cases that are complex and require judicial wisdom and the best judgment you can give it, and it is not always clear what the Supreme Court is going to come out and say ultimately.

But your reputation across the board, as counsel on this Committee, was above reproach. When I was a member of the Department of Justice, I knew of your reputation and it was extraordinary and sterling. You had a great reputation here and you have had a great reputation as a judge.

People can knit-pick your record, but they won't find anything, in my view, that is unworthy. It is particularly distressing, and I think unhealthy and wrong—I almost want to use the word "despicable"—to take somebody's comments in a Socratic-type discussion with lawyers and try to twist that so as to represent an opinion and distort a person's testimony. Those comments, if anybody had been present in the room, would never have been interpreted that way, and I am sorry that you have had to undergo some of that.

It has been really impressive to see this group of South Carolina law professors who submitted a strong, strong letter on your behalf, signed by almost one-third of the faculty members at the University of South Carolina School of Law, including Professor Dennis Nolan, the Webster Professor of Labor Law and Chair of that department; Professor Ladson Boyle, Charles E. Simon Professor of Federal Law; Professor Ralph McCullough, II, Distinguished Professor of Law and American Trial Lawyers Professor of Advocacy, and Chair of the American College of Trial Lawyers—that is the plaintiff group—and David G. Owen, Carolina Distinguished Professor of Law and Director of the Office of Tort Studies.

So this is a bipartisan group of professors that have endorsed you with a strong comment, and actually dealt with several of the issues in depth that I think clearly justify your position.

I will just say, Mr. Chairman, I know that there might be a temptation or tendency to say that the Fourth Circuit is somehow a particularly conservative circuit. I think it is a solid circuit that is hard-working, carries one of the heaviest caseloads in America, and they follow the law consistently.

They do not have anything like the reversal record that the Ninth Circuit has. That is the circuit out of which we have the Pledge of Allegiance matter that caused so much disturbance. One year, the Ninth Circuit was reversed 27 out of 28 cases. I have studied this. Over a decade, no circuit approaches their reversal record. One year, they had 13 unanimous opinions by the U.S. Supreme Court reversing their opinions.

So I think the Ninth Circuit is a circuit that has problems. No other circuit has anything like the consistent record of reversals of the Ninth Circuit, and that is because it is an activist circuit. The Supreme Court has felt an obligation to contain their opinions and not allow them to run, although they have so many cases in that huge circuit that they are really not able to monitor it closely enough, I am afraid.

Judge Shedd, with regard to the Gun-Free School Zones Act, which was an interstate commerce case in which the U.S. Supreme Court concluded that the Congress had overreached, when that case came before you, you voted to uphold the congressional enactment. Is that right? You voted, I guess, as somebody would say today, on the liberal side or the left side.

Judge SHEDD. Well, I will let you characterize it, but I did vote to sustain the Act. That is correct.

Senator SESSIONS. Later, the Supreme Court concluded that there was not sufficient interstate commerce nexus. Now, I know some lawyers here want to forget that there is in part of our Constitution a requirement of interstate commerce connection on many of the matters that are legislated.

Could you just simply tell us in your opinion what the Supreme Court was saying, as you understand it, in that Gun-Free School Zones Act and maybe give us a perspective of what this commerce issue is about and why people could disagree on something this complex?

Judge SHEDD. I can do that, in part, Senator Sessions, by talking about some of the arguments in front of me as I was asked to decide the constitutionality, and that is just as sort of a primer on the law. I am sure you understand this, but you asked me to say it, so I will.

Senator SESSIONS. No, not well enough.

Judge SHEDD. Well, under the Commerce Clause, Congress has—under the Constitution, has tremendous power. It is just that the Supreme Court sees that under the Commerce Clause that power is not a hundred percent complete that Congress can act and do anything they want to; that if there is an interstate nexus—and basically it is even broader than that; that is, if an activity touches on or affects interstate commerce.

Quite frankly, we can take it back to some of the very valid desegregation cases; I think the one with Ollie's Barbecue in Atlanta, which the Court reached to them because I think maybe the mustard or catsup on the table of the barbecue place had come interstate, and maybe travelers went there, as well. But as long as there is some connection or affecting of interstate commerce, then, in fact, Congress has broad authority to act.

Let me say what commentators have said because I am trying very much to stay away from me adding anything else to my rulings. It would be that in that schools free of guns zone act, the *Lopez* case, that there wasn't the nexus, there wasn't the interstate nexus that was required.

And, quite frankly, you know—and I know you prosecuted cases as a U.S. Attorney—felon in possession is a Federal charge, but—and I have had these cases—you have to show the interstate nexus. You have to show that that gun at some point traveled in or about or across the State line. You have to show that.

Senator SESSIONS. That is correct, Mr. Chairman. I became somewhat of an expert in my office when I was an Assistant United States Attorney and I learned to prosecute the cases under 1202(a) Appendix. Somehow, that was one of the possible charges you could utilize on it because of the complexity of that thing.

But, fundamentally, Congress cannot act on an activity that is solely in-state and has no outside connection to it, and to rule otherwise would be a historic expansion of Federal power that we have never had. So this Supreme Court is wrestling with where that line should be.

The statute did not require in the Gun-Free School Zones Act that the gun travel in interstate commerce. It simply made it illegal, a Federal crime, for a person to possess on a schoolyard a gun. The Supreme Court said it wasn't even an element that it be transported in Interstate Commerce and they couldn't do that.

You were wrestling with that same issue to some degree with the driver's license deal, and I guess you turned out to be wrong on both counts, didn't you?

Judge SHEDD. I am sorry you said that, but that is correct.

Senator SESSIONS. But that is all right. I mean, that is the way life is. I mean, you have to call opinions. On the driver's license case, you concluded there was not sufficient nexus, and the Supreme Court found that there was. On the other one, you approved it. So I just think that is a pretty weak basis to complain about your fitness for the bench.

Judge SHEDD. May I say, Senator Sessions, I want the Committee to understand I wasn't trying to reach any result because of what I felt. I think "wrestling" is a good word to describe it, what judges have to do. And I was trying to get it right; that is what I was trying to do. And as you pointed out, I didn't get it right in either case, but I was sure trying to.

Senator SESSIONS. And with the DPPA case, if another one came before you today, would you hesitate to follow the Supreme Court ruling?

Judge SHEDD. Not in the slightest.

Senator SESSIONS. You are not obsessed with some States' rights view here that would cause you to not follow a Supreme Court ruling, are you?

Judge SHEDD. Absolutely not.

Senator SESSIONS. It has been made clear now and you would follow it?

Judge SHEDD. I said I got it wrong. I would follow Supreme Court precedent, and I would do that without any bitter feeling about it. Of course, I would apply the law.

Senator SESSIONS. With regard to that case, the professors at South Carolina wrote in some depth about it and they said, "While the Supreme Court ultimately ruled that DPPA represented a valid exercise of Congress' commerce power, 7 of the other 15 lower court judges who considered the issue prior to the Court's decision agreed with Judge Shedd."

So 7 of the 15, almost half of the 15 lower court judges who had the same question you did agreed with you. Among those were Judge Barbara Crabb, the Chief Judge of the Western District of Wisconsin, an appointee of President Jimmy Carter, and Judge John Godbold, of the Eleventh Circuit, one of the great judges in America, a Johnson appointee who headed the Judicial Conference and who was chief judge in both the Fifth and the Eleventh Circuit and is a brilliant judge and certainly not considered a conservative.

In addition, several Governors, including Governor Jim Hunt, of North Carolina—I know my good friend here, Senator Edwards, is from North Carolina. His Governor agreed with you, and so did his attorney general, Mike Easley, I believe, who had joined in the brief on the side of your opinion.

These law professors note, "To us, the disagreement among lawyers, judges, and scholars regarding whether DPPA was constitutional in the wake of the Supreme Court's decisions in the *Printz* and other opinions reflects the difficult question presented in this case. Judge Shedd's opinion represents a reasoned, albeit later overruled, approach to the question." So I think that is important for us.

Do we have a time limit here? I wanted to mention a couple of things.

Senator SPECTER. Senator Sessions, we have a Judiciary Committee briefing on the FISA matter which was scheduled to begin at 3:30.

Senator SESSIONS. I will be glad to yield if you need to go.

Senator KOHL. We will submit any other questions you may have for the record.

Senator SESSIONS. I will be glad to do that.

Senator KOHL. We thank you so much.

We appreciate your being here today, Judge Shedd. I am particularly impressed with your wisdom in upholding the constitutionality of the Gun-Free School Zones Act. I wrote it, so you made a good decision.

Judge SHEDD. You did a good job writing it, too. Let me commend you.

[Laughter.]

Senator KOHL. Thank you for being here.

Senator SESSIONS. That was a good answer.

Judge SHEDD. Mr. Chairman, may I leave?

Senator KOHL. Yes, you may.

Judge SHEDD. Thank you very much.

Senator KOHL. Thank you so much.

[The biographical information of Judge Shedd follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Dennis Wayne Shedd

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

Residence: Columbia, South Carolina 29212

Office: United States District Court
1845 Assembly Street
Columbia, South Carolina 29201

3. Date and place of birth.

1/28/53
Orangeburg, 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 to Carol Elaine Wiggins Shedd.
Spouse's occupation: Housewife

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

(1) Wofford College, Spartanburg, SC 1971-1975
B.A. Government - May 1975

(2) University of South Carolina - Columbia, SC 1975-1978
J.D. - May 1978

(3) Georgetown University - Washington, D.C. 1978-1980
LL.M - May 1980

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

May 1976-September 1977
Law Clerk
Dent, Kirkland, Taylor & Wilson

September 1977-August 1978
Law Clerk
Harry Dent & Associates

1978-1988 - United States Senate
Staff of U. S. Senator Strom Thurmond in various positions, including:
Administrative Assistant,
Counsel to the President Pro Tempore, and
Chief Counsel and Staff Director, Committee on the Judiciary.

1988-1991
Of Counsel to Bethea, Jordan & Griffin, P.A.

1989-1991
Sole Practitioner
Law Offices of Dennis W. Shedd

1989-1992
Adjunct Professor of Law
University of South Carolina

1991-Present
United States District Judge
District of South Carolina

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.

College:
Phi Beta Kappa
National Merit Scholar
Summa Cum Laude Graduate
Government Department Award
American Legion Award
Blue Key (President)
College Attorney General
Pi Gamma Mu (President)
Hyperopics (Interdiscipline discussion group)
Senior Order of Gnomes (Students who most typify ideals of the college)
Who's Who

Law School:

South Carolina Law Review
Society of Wig & Robe
Phi Delta Phi (President)
Dean's Scholar
Spartanburg County Foundation Scholarship

Other:

Wofford Young Alumnus, 1985
Recognition by School District 5 of Lexington & Richland Counties for Drug Program

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

(1) South Carolina Bar
(2) Richland County (S.C.) Bar Association
(3) Associate Editor, S.C. Lawyer, the official South Carolina Bar publication. March, 1989 - approximately 1991

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.

Murraywood Swim & Racquet Club
The Faculty Club, University of South Carolina

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

(1) Supreme Court, State of South Carolina, November 8, 1978
(2) U. S. Court of Appeals for the Fourth Circuit, January 2, 1979
(3) United States District Court, District of South Carolina, February 25, 1988

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

None.

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

Excellent. Last physical was on March 13, 2001.

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

United States District Judge
District of South Carolina
Appointed
Jurisdiction: 28 U.S.C. § 1300 *et seq.*

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 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 ten of the most significant opinions I have written

Jones v. Owens-Corning Fiberglas Corporation, 69 F.3d 712 (4th Cir. 1995) (sitting by designation).

N.L.R.B. v. Peninsula General Hospital Medical Center, 36 F.3d 1262 (4th Cir. 1994) (sitting by designation).

United States v. Henderson, 1992 WL 36801 (4th Cir. 1992) (Shedd, J. sitting by designation, dissenting) (copy attached).

Branch v. Coca-Cola Bottling Company Consolidated, 83 F. Supp.2d 631 (D.S.C. 2000).

United States v. Grice, 37 F. Supp.2d 428 (D.S.C. 1998).

Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

Shakespeare Company v. Silstar Corporation of America, Inc., 906 F. Supp. 997 (D.S.C. 1995), *aff'd*, 110 F.3d 234 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

Phoenix Mutual Life Insurance Company v. Adams, 828 F. Supp. 379 (D.S.C. 1993), *aff'd*, 30 F.3d 554 (4th Cir. 1994).

Rouse v. Nielsen, 851 F. Supp. 717 (D.S.C. 1994).

N.A.A.C.P. v. Kershaw County, 838 F. Supp. 237 (D.S.C. 1993).

(2) A short summary of and citations for all appellate opinions where my decisions were reversed or where my judgment was affirmed with significant criticism of my substantive or procedural rulings

Opinions Reversing My Orders

Reno v. Condon, 528 U.S. 141 (2000): In a case of first impression, I held the Driver's Privacy Protection Act unconstitutional (*see* 972 F. Supp. 977 (D.S.C. 1997)). The Supreme Court subsequently reversed the Fourth Circuit judgment which had affirmed my order.

Mazzell v. Evatt, 88 F.3d 263 (4th Cir. 1996): I granted a state prisoner's habeas petition based on ineffective assistance of trial counsel because of the counsel's failure to object to a particular jury instruction (order is attached). The Fourth Circuit concluded otherwise and reversed.

Phillips v. Nielsen, 1996 WL 597834 (4th Cir. 1996) (copy attached): I granted summary judgment in favor of the defendant in this employment case. The Fourth Circuit concluded that an issue of fact existed for trial and reversed.

Shakespeare Company v. Silstar Corporation of America, Inc., 9 F.3d 1091 (4th Cir. 1993): Following a bench trial, I found that the plaintiff failed to prove that the defendant had infringed on the plaintiff's trademark and I ordered the cancellation of the plaintiff's trademark based on the doctrine of functionality (*see* 802 F. Supp. 1386 (D.S.C. 1992)). A divided panel of the Fourth Circuit reversed my order cancelling the trademark and remanded the case for further consideration. Congress subsequently amended the Lanham Act and effectively overruled the Fourth Circuit opinion.

Sverdrup Corporation v. WHC Constructors, Inc., 989 F.2d 148 (4th Cir. 1993): I held that the Federal Arbitration Act provision authorizing parties to apply for confirmation of an arbitration award within one year after the award was made is a statute of limitations, and thus is mandatory, rather than permissive (*see* 787 F. Supp. 542 (D.S.C. 1992)). The Fourth Circuit concluded otherwise and reversed.

Mid-American Waste Systems, Inc. v. Williams, 1993 WL 165306 (4th Cir. 1993) (copy attached): I granted summary judgment in favor of one defendant in this defamation case based on the fact that the evidence in the record indicated that the defendant was not responsible for the alleged defamatory statement. The Fourth Circuit concluded that an issue of fact existed for trial and reversed.

C.P. Chemicals, Inc. v. Exide Corporation, Inc., 1993 WL 535277 (4th Cir. 1993) (copy attached): The Fourth Circuit reversed a summary judgment and remanded this case for further factual findings relating to an indemnity agreement.

Opinions Vacating My Orders/Judgments

United States v. Lawrence, 2001 Westlaw 434390 (4th Cir. 2001) (copy attached): I conducted the resentencing of an inmate currently housed at Florence, Colorado ("Supermax") by video-conferencing because of the significant danger which transporting this inmate would create. The Fourth Circuit vacated this resentencing.

Holder v. Woodman of the World, 2001 Westlaw 369680 (4th Cir. 2001) (copy attached): I granted summary judgment in favor of the ERISA plan administrator based on my determination that the administrator did not abuse its discretion in denying benefits. The Fourth Circuit vacated this judgment based on its conclusion that a factual issue exists concerning the denial of the benefits.

United States v. Miller, 2001 WL 218752 (4th Cir. 2001) (copy attached): The Fourth Circuit (affirming in part) vacated the sentence I imposed on this criminal defendant and remanded for further factual findings concerning the defendant's ability to make restitution.

United States v. Strachan, 2001 WL 208470 (4th Cir. 2001) (copy attached): The Fourth Circuit (affirming in part) vacated the sentence I imposed on this criminal defendant, finding that the enhancement for obstruction of justice which I gave the defendant based on his use of counsel to put improper material before the jury was not warranted under the sentencing guidelines.

Stonehenge Engineering Corporation v. Employers Insurance of Wausau, 201 F.3d 296 (4th Cir. 2000): A divided panel of the Fourth Circuit vacated (in part) the summary judgment I entered (order is attached) and remanded for entry of judgment for a different damages amount based on its conclusion that the damages portion of the judgment was incorrectly calculated.

United States v. Gade, 2000 WL 1281158 (4th Cir. 2000) (copy attached): Upon joint motion of the parties, the Fourth Circuit vacated the fine plus costs of incarceration I imposed on this criminal defendant because they exceeded the maximum fine range. The issue had not previously been raised in the district court.

United States v. Davis, 184 F.3d 366 (4th Cir. 1999): The Fourth Circuit (noting that it was a close issue) vacated the sentence I imposed on the criminal defendant and remanded for resentencing because a statutory factor which I found to be a sentencing factor is, instead, an element of the offense which was not alleged in the indictment.

Forehand v. Westinghouse Savannah River Company, 1999 WL 511045 (4th Cir. 1999) (copy attached): The Fourth Circuit (affirming in part) vacated the summary judgment in this case and remanded for further proceedings, finding that I erred in dismissing some of the claims based on the statute of limitations.

United States v. Murray, 1999 WL 187192 (4th Cir. 1999) (copy attached): The Fourth Circuit vacated (in part) the judgment in this federal habeas case, finding that the movant had established one of his ineffective assistance of counsel claims. The counsel had failed to object at sentencing to an enhancement which later was determined to be erroneous under the sentencing guidelines.

United States v. Smith, 1999 WL 273450 (4th Cir. 1999) (copy attached); *United States v. Smith*, 1998 WL 1345 (4th Cir. 1998) (copy attached): The Fourth Circuit vacated the sentences I imposed on this criminal defendant and remanded for resentencing based on separate sentencing guidelines issues pertaining to cross-referencing and upward departure.

United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998), *cert. denied*, 526 U.S. 1031 (1999): The Fourth Circuit (affirming in part) vacated the sentence I imposed on this criminal defendant and remanded for resentencing, finding that I did not adequately state the reasons I used for departing upward from the sentencing guidelines range.

Lawrence v. Swanson Inmate Commissary Services, 1998 WL 322671 (4th Cir. 1998) (copy attached): The Fourth Circuit vacated the judgment and remanded for further consideration of one issue which the plaintiff had not fully developed prior to appeal.

Liberty Mutual Fire Insurance Company v. Hayes, 1997 WL 568673 (4th Cir. 1997) (copy attached): The Fourth Circuit vacated and remanded for dismissal, finding that federal jurisdiction did not exist in this declaratory judgment action (order is attached).

United States v. White, 1996 WL 327174 (4th Cir. 1996) (copy attached): The Fourth Circuit (affirming in part) vacated the summary judgment in this federal habeas case and remanded for consideration of whether the movant had established an ineffective assistance of counsel claim which was not readily apparent in the initial filings.

Williams v. McAbee, 1996 WL 226103 (4th Cir. 1996) (copy attached): The Fourth Circuit vacated the order of dismissal and remanded this case for consideration of the plaintiff's objections to the magistrate judge's report and recommendation. Those objections had not been presented to me on the initial review of the case due to a clerical error.

United States v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995): The Fourth Circuit vacated the sentence I imposed and remanded for resentencing because it found that the restitution order was not authorized for the crime of perjury under the Victim and Witness Protection Act.

Steele v. Richland County D.S.S., 1994 WL 200807 (4th Cir. 1994) (copy attached): The Fourth Circuit vacated a sanctions order (attached) that I entered against an attorney.

United States v. Dixon, 998 F.2d 228 (4th Cir. 1993): The Fourth Circuit vacated the sentence I imposed on this criminal defendant and remanded for resentencing because it found that the government breached its plea agreement by not moving for a downward departure at the sentencing hearing.

Opinions Affirming My Orders But With Significant Criticism (i.e., dissenting opinions)

In re Pavilion Properties Limited Partnership, 2001 WL 30446 (4th Cir. 2001) (Widener, J., dissenting) (copy attached).

Drew v. United States, 217 F.3d 193 (4th Cir. 2000): I dismissed a Federal Tort Claims Act case because the plaintiff had not provided the United States with proper notice of her claim. A divided panel of the Fourth Circuit reversed my order, but the opinion reversing my order was later vacated and the district court judgment affirmed by an equally divided *en banc* court (231 F.3d 927 (4th Cir. 2000)). A petition for certiorari is now pending.

Condon v. Reno, 155 F.3d 453 (4th Cir. 1998) (Phillips, J., dissenting), *rev'd sub nom., Reno v. Condon*, 528 U.S. 141 (2000): In a case of first impression, I held the Driver's Privacy Protection Act unconstitutional. A divided panel of the Fourth Circuit affirmed my order, with Senior Judge Phillips dissenting. The Supreme Court subsequently reversed (see above).

Shakespeare Company v. Silstar Corporation of America, Inc., 110 F.3d 234 (4th Cir. 1997) (Widener, J., dissenting): Following a bench trial, I found in favor of the defendant in this trademark infringement case. A divided panel of the Fourth Circuit affirmed my order, with Judge Widener dissenting.

General Drivers, Warehousemen & Helpers Local Union No. 509 v. Ethyl Corporation, 68 F.3d 80 (4th Cir. 1995): I granted summary judgment in favor of the defendant in this labor arbitration case. A divided panel of the Fourth Circuit affirmed my order, with Judge Hall dissenting.

Butler v. Mutual Safe Company, Incorporated, 1994 WL 463416 (4th Cir. 1994) (Russell, J., dissenting) (copy attached): I granted summary judgment in favor of the defendant in this negligence case. A divided panel of the Fourth Circuit affirmed my order, with Judge Russell dissenting.

Coffey v. Chemical Specialties, Inc., 1993 WL 318886 (4th Cir. 1993) (Wilkins, J., dissenting) (copy attached): I granted summary judgment in favor of the defendant in this products liability case. A divided panel of the Fourth Circuit affirmed my order, with Judge Wilkins dissenting.

Simpson v. Jefferson-Pilot Life Insurance Company, 1994 WL 567901 (4th Cir. 1994) (Hall, J., dissenting) (copy attached): Following a bench trial, I entered judgment in favor of the defendant in this ERISA case. A divided panel of the Fourth Circuit affirmed my order, with Judge Hall dissenting.

United States v. Sheek, 990 F.2d 150 (4th Cir. 1993) (Hall, J., dissenting): I dismissed criminal charges against a biological mother, finding that the parent exception to the Federal Kidnapping Act applies to a biological parent whose parental rights have been permanently terminated. A divided panel of the Fourth Circuit affirmed my order, with Judge Hall dissenting.

(3) Citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions

Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

Mitchell v. South Carolina Senate, C.A. No. 3:95-369-19 (D.S.C. Mar. 9, 1995) (copy attached).

Rouse v. Nielsen, 851 F. Supp. 717 (D.S.C. 1994).

United States v. Brown, Crim. No. 3:94-168-19 (D.S.C. May 3, 1994) (copy attached).

Notaro v. Evatt, 831 F. Supp. 518 (D.S.C. 1993).

N.A.A.C.P. v. Kershaw County, 838 F. Supp. 237 (D.S.C. 1993).

In re P.S. Charleston Corp., C.A. No. 2:92-1405-19 (May 28, 1995) (copy attached).

Doe v. American National Red Cross, 790 F. Supp. 590 (D.S.C. 1992).

Pritchett v. Lanier, 766 F. Supp. 442 (D.S.C. 1991).

South Carolina Citizens For Life, Inc. v. Davis, C.A. No. 3:00-124-19 (D.S.C. Feb. 9, 2000) (copy attached.)

Dooley v. Lexington County School District 1 Board of Trustees, C.A. No. 3:94-2697-19 (D.S.C. Oct. 24, 1994).

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 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 served as a law clerk to a judge.

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

1989-1991
Sole Practitioner
Law Offices of Dennis W. Shedd
Suite C-100, 914 Richland Street
Columbia, SC 29201

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;

1978-1988 United States Senate
Washington, D.C. 20510
Staff of U.S. Senator Strom Thurmond in various positions, including:

Administrative Assistant.
Counsel to the President Pro Tempore.
Chief Counsel and Staff Director, Committee on the Judiciary.
Minority Chief Counsel and Staff Director, Committee on the Judiciary.

1988-1991
Of Counsel to Bethea, Jordan & Griffin, P.A.
47 Sheridan Drive, Suite F
Hilton Head, SC 29910

1989-1992
Adjunct Professor of Law
University of South Carolina
School of Law
701 S. Main Street
Columbia, SC 29208

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?

<u>1978-1988: United States Senate</u>

During this period, I served in a variety of positions on the staff of Senator Strom Thurmond. The vast majority of my work was legislative.

As Counsel to the President Pro Tempore, I was responsible for following and supervising almost all of Senator Thurmond's Senate floor activities and was an advisor in most substantive and procedural matters.

As Administrative Assistant, I handled a broad range of issues and responsibilities. I was responsible for the operation of Senator Thurmond's personal office staff of approximately 50 employees. I also handled a broad range of issues such as constitutent matters, political issues, ethics filings and general election law matters. During this period, I maintained a heavy involvement with almost all legislative matters -- both substantive and procedural -- for Senator Thurmond, and advised the Senator on most legislative issues where he played a leading role. I also acted as a personal legal advisor to the Senator.

As Chief Counsel and Staff Director for the Senate Judiciary Committee, I was responsible for substantive, personnel, and budgetary matters. I helped organize numerous hearings on a variety of issues addressed by the Committee during this time. At a staff level, I was responsible for the Committee business meetings. I oversaw a staff of approximately 140 members, and the annual Committee budget of around $4 million. During this period, my major responsibility was the legislative activity of the Committee, and I was deeply involved in such legislation as the Ethics in Post-Employment Act, the Low Level Nuclear Waste and Waste Compacts issue, RICO reform, and numerous judicial and executive branch nominations. I was also very involved in floor strategy for many issues which had been approved by the Committee.

1988 - 1991: Private Practice

My legal practice changed in early 1988 from being legislative to that of a private practice in Columbia, South Carolina. During this period, I practiced both as a sole practitioner and as "of counsel" to Bethea, Jordan & Griffin, P.A., a 13-member law firm with offices then in Columbia and Hilton Head, South Carolina. During this time, the nature of my practice focused on such matters as estate planning, tort cases, and business and commercial law. In my practice, I had a strong emphasis on legislative work and bankruptcy law. I was also involved in election law and specifically with the Voting Rights Act.

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

My practice was a general one; many of my clients were from the general working public. On many occasions, I performed this work free or at a reduced fee for individuals who really could not afford to pay for my services. However, the mainstay of my practice, which I performed for a fewer number of clients, was bankruptcy work and legislative work, which was based on my personal knowledge and understanding of what laws and their legislative history mean and how such laws and history are created.

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.

For the period 1988 to 1991, I appeared in court basically every four to six weeks, although more frequently at times, with the vast majority of these appearances coming in the PTL case. However, prior to that time, the nature of my work was helping to develop civil and criminal law and its relevant legislative history.

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

   (a) Federal courts - Approximately 80%
   (b) State courts of record - Approximately 5%
   (c) Other courts - Approximately 15%

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

   (a) Civil - Approximately 90%
   (b) Criminal - Approximately 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.

   Four cases, three as co-counsel, one as third counsel. Two of these cases were in summary courts.

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

   (a) Jury - 50%
   (b) Non-jury - 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.

A. Trustee of Heritage Village Church and Missionary Fellowship, Inc. v. James O. Bakker, Tammy Faye Bakker and David A. Taggart, 92 B.R. 1000 (1988).

This action was a claim for over-compensation and breach of fiduciary duty

within the PTL bankruptcy. As associated local counsel, I served as third counsel in this Bankruptcy Court trial which was held September 12-15, and October 17-20, 1988. A verdict of $6.7 million was awarded to our client, the PTL estate. This case was tried before Judge Rufus Reynolds, now retired, and Tom White, Esquire, and R. Bradford Leggett, Esquire, of the Allman, Spry firm, 380 Knollwood St., Winston-Salem, North Carolina (336) 722-2300 were lead counsel for the estate. I was at counsel's table throughout the proceeding and worked with co-counsel on strategy daily. Counsel for Mr. Bakker was Mr. Ryan Hovis, P. O. Box 10269, Rock Hill South Carolina (803) 366-1916.

B. City of Columbia v. Glenn Moseley

This was a criminal case of DUI tried in Municipal Court in Columbia, South Carolina on March 1 and 2, 1990. Mr. Garry Wooten, 1313 Elmwood Ave., Columbia, South Carolina (803) 254-5563 was lead counsel and I was co-counsel. My primary activity involved discussions with the client and discussion of case theory and tactics with Mr. Wooten. I was present for the entire trial, which lasted one and one-half days, and was involved with pre-trial motions. The defendant was found guilty by a jury.

The prosecutor was Mark Hall, Esquire, one of the attorneys for the City of Columbia. The Judge was Municipal Judge Danny Crowe.

C. State v. David M. Bryant

This was a criminal case of DUI before Lexington County Magistrate Cameron Crawford. I was co-counsel to Mr. Garry Wooten,1313 Elmwood Ave., Columbia, South Carolina (803) 254-5563 who was lead counsel. I was present at the entire trial, which lasted one day, and made a pre-trial motion. Defendant was found guilty by a jury.

D. Trustee of Heritage Village Church and Missionary Fellowship, Inc. v. U.S.

I was co-counsel in this appeal from Bankruptcy Court to United States District Court, Judge Karen Henderson presiding. This appeal centered on the Bankruptcy Court's authority vis-a-vis the Anti-Injunction Act. Bankruptcy Judge Rufus Reynolds had enjoined the IRS from revoking PTL's tax-exempt status, and IRS appealed. I became involved in this matter within a month of entering private practice, and led off our side's presentation before Judge Henderson. R. Bradford Leggett of the Allman, Spry firm, 380 Knollwood St., Winston-Salem, North Carolina (336) 722-2300 was our lead counsel. Opposing counsel was Richard Mitchell with the Department of Justice in Washington, D.C., (202) 272-6549.

After the District Court's decision was announced, I successfully moved for a

stay from the District Court, and was then integrally involved in our receiving a stay from the Fourth Circuit. We received an expedited hearing at the Fourth Circuit, and I participated in the brief and appeared at counsel table during our argument.

E. NAACP v. Richland County

This was an action under Section 2 of the Voting Rights Act, seeking single-member districts for the capital county of South Carolina. The County Council retained me and my firm to defend them. Joseph Barker, Esquire, of my firm led our successful opposition to plaintiff's request to preliminarily enjoin the primary elections. I then took over management of the case, negotiated a satisfactory settlement with the NAACP, who was represented by Mr. John Harper, P. O. Box 843, Columbia, South Carolina (803) 771-4723 and Mr. Willie Abrams of the National NAACP. The judge was Honorable Clyde Hamilton, United States District Judge for the District of South Carolina. The negotiations in this case were extremely tedious and centered on interpretation of state and federal law. I think it is fair to say my ability to convince the Court and the plaintiffs of my interpretation of S. C. Code § 4-9-10(C) was critical to the resolution of this case. The case lasted from May to August of 1988.

After the settlement was reached and approved by the Court, I proceeded at the court's direction to personally seek Department of Justice approval of the settlement. I travelled to Washington, D.C., where I was joined by Mr. Harper and Mr. Abrams for my presentation to the Civil Rights Division in behalf of preclearance. Preclearance was received in less than three weeks.

F. U.S. v. One 1988 Chevrolet Corvette

This case involved a civil forfeiture under 19 U.S.C. 1602 et seq. Garry Wooten, Esquire, 1313 Elmwood Ave., Columbia, South Carolina (803) 254-5563, was lead counsel and I served as co-counsel. I researched the case law under the statute in preparation for depositions and prepared our constitutional arguments which were used in the negotiations which led to a settlement of this case.

G. PTL/Heritage Bankruptcy Case

After serving as associated local counsel in this case for more than two years, I was appointed Trustee on March 12, 1990. As Trustee, I was responsible for all aspects of this multi-million dollar business, which included a major satellite network. In supervising all legal work for the estate, I had as many as a dozen lawyers working under my direction and kept hands-on involvement in all legal work. These legal matters included environmental law, intellectual property law, communications law, real estate law, law

involving the rights of Native Americans, bankruptcy law, and contract law. A great deal of my legal activity for these two and a half years revolved around this case and the following is a synopsis of some of my major activities in this case:

1. As Trustee, on May 31, 1990, I gained the court's approval of a contract to sell the PTL Satellite Network to Morris Cerullo World Evangelism (MCWE) for $7,000,000. This was a controversial and disputed hearing. I had personally negotiated the contract with the principal of MCWE.

   A second hearing, on the balance of this $52,000,000 contract, began on July 10, 1990, and was continued until July 18, 1990. During this period, I personally worked with creditors' attorneys to gain their approval of the balance of this sale. Because this sale was made pursuant to 11 U.S.C. § 363, I had to obtain consent of the nearly forty secured creditors in this case. It was very difficult to arrive at a consent arrangement when these creditors were to share $38.5 million, and these creditors had varying collateral, negotiating styles, and degrees of commitment to this sale. I obtained the necessary consent, and negotiated an Order which accommodated all of these varying interests.

2. Catawba Indian Tribe of South Carolina, Inc. v. State of South Carolina, et al.

   I appeared in the United States District Court for the District of South Carolina, before visiting Judge Willson. This was oral argument on defendants' motion for summary judgment. I supervised preparation of affidavits for the estate based on South Carolina law on adverse possession and the Fourth Circuit opinion in this case, and I appeared in order to ask the Court to quickly resolve this adverse possession issue. This case involved law governing the rights of Native Americans, specifically the Catawba Tribe's claims arising out of an unratified treaty with the state of South Carolina. This case had already been to the United States Supreme Court on earlier-raised issues.

3. Appearance in the Bankruptcy Court to oppose a motion by General Electric Capital Corporation to lift automatic stay. I successfully argued for only a modified lifting of stay.

Because all of the above listed activity occurred before I came to the bench more than ten years ago, the following are members of the legal community who have had recent contact with me:

Vance J. Bettis, Esquire
Gignilliat Savitz and Bettis
900 Elmwood Avenue, Suite 100
Columbia, SC 29201
(803)799-9311

E. Bart Daniel, Esquire
P. O. Box 856
Charleston, SC 29402
(843)722-2000

Elizabeth Van Doren Gray, Esquire
Sowell Gray Stepp and Laffitte, LLC
P. O. Box 11449
Columbia, SC 29211
(803) 929-1400

James M. Griffin, Esquire
Simmons Griffin and Lydon
P. O. Box 5
Columbia, SC 29202
(803)779-4600

J. Edward "Punky" Holler, Esquire
Holler Dennis Corbett Ormond & Garner
P. O. Box 11487
Columbia, SC 29211
(803)765-2968

Steve A. Matthews, Esquire
Haynsworth Sinkler and Boyd
P. O. Box 11889
Columbia, SC 29211
(803) 779-3080

Marshall Prince, Esquire
U.S. Attorney's Office
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3000

John E. Schmidt, Esquire
Nelson Mullins Riley & Scarborough
P. O. Box 11070
Columbia, SC 29211
(803) 799-2000

John S. Simmons, Esquire
Simmons Griffin and Lydon
P. O. Box 5
Columbia, SC 29202
(803) 779-4600

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, SC 29201
(803) 765-2626

Jane B. Taylor, Esquire
U. S. Attorney's Office
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3000

Scarlett Wilson, Esquire
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5853

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.)

In addition to the issues discussed in my previous answer, I have been involved in other important legal activities. As a District Judge, I was appointed by the Chief Justice to serve on the Judicial Conference Committee on the Judicial Branch as the representative for the Fourth Circuit. I served from 1993 to 1998. This Committee has a broad purview dealing with any issues that are important to the Federal Judiciary. During my tenure with the Committee, I made an unusual presentation on Judicial Branch issues to my colleagues at the Fourth Circuit Judicial Conference.

I served on the Committee's Subcommittee on Judicial Independence. The Subcommittee produced a report on this important issue. Based on this effort, at the invitation of Chief Judge Sam Ervin III, I arranged a presentation on Judicial Independence for the judges of the Fourth Circuit at our annual Judicial Conference.

In 1990, I was appointed by President Bush to serve as Chair of the South Carolina Advisory Committee to the U. S. Civil Rights Commission. In this position, I encouraged public discussion of the issue of voting rights and minority

representation in elected representative bodies.

When I was in private practice, shortly after my involvement in the Richland County Voting Rights Act (See 18E), I was retained by the S. C. Democratic Party (which had been an adverse party in the Richland County case) in a voting rights case. This employment recognized my ability to put aside partisan differences, emphasized my expertise in Voting Rights matters, and most importantly, allowed me to underscore my personal commitment to the important principle of the right to vote.

When I was in private practice, I served the South Carolina bar as the Associate Editor of South Carolina Lawyer, the newly unveiled publication of the state bar, from 1988 to 1990. I was to become Editor, but left the publication when I was appointed to the District Court.

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.

   The Fourth Circuit has a comprehensive procedure to review cases for any conflict, and I have used that procedure when I sat with the court by designation. At the District Court, I have a recusal list, which I would continue at the Circuit level. I would continue to address any conflicts in the manner that I have on the District Court. If there were any question of a conflict, I would review the Code of Judicial Conduct and if I felt necessary, consult with my colleagues, and possibly others whose integrity is unquestioned and whose judgment I value. I would never knowingly do anything to bring the impartiality of the law or my own impartiality into question, so if there were any potential problem, I would recuse myself. I will continue to notify, on the record, all counsel of any connection to a case, even if it is not a conflict.

   Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I am not aware of any specific instances, other than cases I ruled on as a District Judge.

   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.

   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 AO-10 Financial Disclosure Forms.

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

   See 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.

   Treasurer, Re-Elect Senator Strom Thurmond Committee, 1988-1990.

AO-10 (w, Rev. 1 2000)

FINANCIAL DISCLOSURE REPORT

Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* S' ', Dennis W.	2. Court or Organization U.S.Court of Appeals -4th Cir.	3. Date of Report 05/11/2001
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* U. S. Circuit Court Nominee	5. Report Type (check type) X Nomination, Date 05/09/2001 __ Initial __ Annual __ Final	6. Reporting Period 01/01/2000 to 04/30/2001
7. Chambers or Office Address 1845 Assembly Street Columbia, S.C. 29201	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
X	NONE (No reportable positions.)	
1		
2		
3		

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

DATE	PARTIES AND TERMS
__ NONE (No reportable agreements.)	

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
__ NONE (No reportable non-investment income.)		

FINANCIAL DISCLOSURE REPORT | Name of Person Reporting: Shedd, Dennis W. | Date of Report: 05/11/2001

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

[ ] NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

[ ] NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

[X] NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1			

VALUE 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: Shedd, Dennis W. | Date of Report: 05/11/2001

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Parcel of land	D	Rent	N	S 271,000					
2 IRAs - Vanguard Mutual Funds:									
3 U.S. Growth	D	Dividend	K	T					
4 International Growth	B	Dividend	J	T					
5 Explorer Fund	C	Dividend	K	T					
6 Wellesley Fund	A	Dividend	J	T					
7 LifeGrowth Fund	A	Dividend	J	T					
8 Richland County (S.C.) hospital bonds - zero coupon		None	K	T					
9 Richland County (S.C.) hospital bonds - zero coupon		None	K	T					
10 Columbia (S.C.) water & sewer bonds - zero coupon		None	J	T					
11 BB&T, Irmo, SC - savings & checking accts	A	Interest	J	T					
12 Aetna Life Insurance - universal policy	A	Interest							
13 Pacific Corinthian Life Insurance - universal policy	A	Interest							
14									
15									
16									
17									

nc/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
ol. 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

des: 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
ol. 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

al Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
ol. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Shedd, Dennis W.	Date of Report 05/11/2001

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

NONE

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Shedd, Dennis W.	Date of Report 05/11/2001

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or endent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any ...formation 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 Dennis W. Shedd Date May 11, 2001

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	3	000	00	Notes payable to banks—secured			00
U.S. Government securities—add schedule			00	Notes payable to banks—unsecured			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			00
Due from relatives and friends			00	Unpaid income tax			00
Due from others			00	Other unpaid tax and interest			00
Doubtful			00	Real estate mortgages payable—add schedule	42	000	00
Real estate owned—add schedule	1,160	000	00	Chattel mortgages and other liens payable			00
Real estate mortgages receivable			00	Other debts—itemize:			
Autos and other personal property	19	000	00	Equity line — residence	25	000	00
Cash value—life insurance			00	Loan from siblings	6	000	00
Other assets—itemize:				Car loan	16	000	00
Bonds	60	000	00				
IRAs - Mutual funds	75	000	00				
401(k)	22	000	00	Total liabilities	89	000	00
				Net Worth	1,250	000	00
Total Assets	1,339	000	00	Total liabilities and net worth	1,339	000	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				

REAL ESTATE SCHEDULE

REAL ESTATE OWNED

Residence Columbia, SC	$350,000
Parcel, SC	750,000
Parcel (1/3 interest)	60,000
	$1,160,000

REAL ESTATE MORTGAGES PAYABLE

Residence Columbia, SC Mortgage Citicorp	$ 42,000
Residence Columbia, SC Equity line BB&T	$ 25,000
	$ 67,000

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.

When I was in private practice, I participated in the *pro bono* program, offered free legal services to an individual who works with the needy and homeless in the Columbia area, and was active in fund-raising for charitable causes.

Since I have been on the District bench, I have developed a highly acclaimed drug education awareness program. This presentation requires three hours in preparation and performance each time it is done, and I have arranged and presented it approximately a dozen times. I have presented the program to more than 4,000 people, mostly elementary and middle school children.

Additionally, I encourage students and Scout groups to attend special sessions of court to see criminal sentencings firsthand. I usually seat these children in the jury box. These actual sentencings are then followed by question and answer sessions with the Court, the attorneys, probation officers, and Deputy United States Marshals. Each sentencing/question session lasts two to three hours. I have held four or five such sessions, and more are scheduled.

In association with my Sunday School class, I originated and orchestrated a plan to provide Christmas presents to needy families in our community. Under this plan, guidance counselors at local elementary schools are asked to provide anonymous selections of students and their families with a list of gifts they need or desire. Our Sunday School class then secretly fills these lists. Each year, we assist 50-75 people in this manner.

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

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination?

No.

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).

Senator Strom Thurmond recommended me to the President for appointment to the Fourth Circuit Court of Appeals. I was interviewed by the Office of White House Counsel and the Department of Justice. President Bush nominated me at the White House on May 9, 2001, and my nomination has now been forwarded to the Senate.

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

No.

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 purpose of the judiciary is to decide specific cases within the limitations placed upon the courts by the Constitution and its Separation of Powers. Courts are charged with resolving disputes in ripe, concrete, justiciable cases which have arisen between specific entities which have the requisite standing. A court should resolve these disputes narrowly, while ensuring protection of rights which clearly exist.

The role of forging consensus on political and social questions is one which is rightfully left to the Executive and Legislative Branches, which are responsive to the people through elections. It is the role of the Legislative Branch to enact statutes, and the courts should interpret the statutes faithfully by giving the words their plain, ordinary meaning.

Senator KOHL. We will now proceed with our two nominees from Pennsylvania, and I will defer my questions until you finish, Senator Specter.

Senator SPECTER. Well, no. Let me defer to you, Mr. Chairman.

Senator KOHL. Go ahead, go ahead.

Senator SPECTER. Judge McVerry, one of the critical issues which this Committee is concerned about is judges interpreting the law, as opposed to being legislators, and not establishing new laws in accordance with whatever predisposition the individual judge may have.

What assurances can you give this Committee and the full Senate that on the bench you will interpret rather than make the law?

Mr. MCVERRY. Thank you, Senator Specter. I have been a practitioner of the law for 33 years, and for 12 of those years I served in the Pennsylvania General Assembly and I jealously protected at that time, and to the extent that I was able since that time, the legislature's prerogative to pass and enact laws, and those laws are to be respected by the courts, in my view.

We have a very milestone or cornerstone precept of our law that is stare decisis, which is that we at the district court level must follow the decisions of appellate courts, the Third Circuit Court of Appeals and the U.S. Supreme Court. And it is not the prerogative of the court, especially at the district court level, to make law. It is their prerogative to interpret law.

And I bring with me my experience as a member of the legislative body who was very concerned about that very thing relative to judges interpreting laws differently than they were intended by the General Assembly, or Congress in this instance. And I pledge to you that I will not let that happen in my courtroom.

Senator SPECTER. What if you had a case before you on the facts which was very compelling, leading you to be strongly inclined as a matter of intuitive justice to find for, say, the plaintiff and the reading of the appellate decisions led you to the conclusion that judgment ought to be entered for the defendant as a matter of law?

Would you seek to exercise any so-called wiggle room to try to find a way to put your own stamp of justice on the case, at variance with the legal precedents to the contrary?

Mr. MCVERRY. Senator, I would not, and I would not simply for the reason of stare decisis that I just enunciated. It would be my duty, if confirmed, to be aware of the status of the law from a statutory perspective, and also from case interpretations of the circuit and Supreme Court, and those would be applied. It is not my place to attempt to interpret the facts of a case in a way to avoid the law as has been enunciated by Congress and the appellate courts.

Senator SPECTER. Judge McVerry, you will be coming to a court which is very, very busy, and one of the great problems in the administration of justice has been delays. The courts in America, perhaps more the circuit courts than the district courts, are sometimes very, very tardy, sitting on some cases for a matter of years. We took a look at the case involving the spill in Alaska. It has been 11 years in litigation over the issue of punitive damages.

What assurances can you give this Committee that you will undertake whatever hours it takes to keep a very current docket?

Mr. MCVERRY. Frankly, Senator, the only assurance I can give you is the materials that I have provided to show you that I have demonstrated a work ethic comparable to any productive lawyer in Allegheny County, in Western Pennsylvania, over the course of the last 33 years. I have never been questioned in my work ethic, both as a prosecutor, as a trial lawyer, as a member of the General Assembly, and more recently as the solicitor of the county and a judge on the court.

Now, I know that, if confirmed, I will be going into a court where justice has been delayed, and justice delayed is denied. And the reason it has been delayed is that there haven't been appointments to make our court a full complement for quite some time, and I will dedicate myself and the staff that I assemble to try to keep our caseload manageable and to keep it moving through monitoring of the cases with case management orders, with monitoring by law clerks and myself, and attempt to expedite matters that come before us and not leave them languish without decision.

Senator SPECTER. When I started the hearing today a moment or two before Senator Kohl arrived, I commented about what Senator Thurmond, when chairman, had said on questioning a nominee—do you promise to be courteous—and I noted that I thought that was not a very meaningful question, because what could the nominee say but yes?

But as I said, I have come to find that that is the most important question that I have heard, and I have been here for 22 years and we have had more than 50 judges confirmed in Pennsylvania. Senator Heinz and I had a nominating Committee, and Senator Santorum and I do, and I am sorry to have to say that I have had reports back about people who had made that pledge who haven't kept it.

There may be sort of an inevitable quality when you assume that black robe and you have a lifetime appointment and you have a bad day and you have litigants before you or lawyers before you to be impatient or to be rude.

I have a good idea what your answer will be if you promise to be courteous, but I really expect you to do that as the imprimatur of the Senate and those of us who have worked to secure your nomination, and I think confirmation, and to really take it seriously.

If you are inclined someday on a bad day, on a bad morning, in an argument which is frivolous, will you promise under the most trying circumstances to be courteous?

Mr. MCVERRY. I do promise to do that, Senator Specter, and I worked diligently to do that for the 19 months that I served as a Common Pleas Court judge in Allegheny County. One of the admonitions that lawyers give one another in the camaraderie of anticipation to a position such as this is don't forget where you came from, Terry; don't forget who you were, don't forget that you were a practicing lawyer before a judge and you have had those experiences where you have been treated inappropriately by a judge and your client has been treated inappropriately by a judge.

I will never lose sight of the fact, Senator Specter, that I am a public servant. I am there to serve the people and I want people who come through my courtroom, be they lawyers, litigants, or ju-

rors, to have a meaningful, positive experience in the judicial branch.

Senator SPECTER. When you were a Common Pleas judge, did you have to stand for election, retention, or otherwise?

Mr. MCVERRY. I did. I had to stand for election.

Senator SPECTER. Senator Kohl and I might point out to you that standing for election gives you a somewhat different perspective from a lifetime appointment. But I have your commitment, and we also have another hearing on the FISA oversight work.

May I proceed with Mr. Schwab or should I defer to you, Mr. Chairman?

Senator KOHL. Go ahead. You can finish.

Senator SPECTER. Mr. Schwab, you have had all this time to prepare your answers because you know my questions. If you have something where you have very, very strong philosophical views, and however strongly you may feel about something, are you prepared to make a firm, irrevocable commitment that you will follow the law as articulated by the appellate courts and be bound by that without any deviation to any personal views you may have about a substantive subject?

Mr. SCHWAB. Senator Specter, I give you my word that I will follow what the law is and I will work hard to discern what that law is from the Third Circuit and from the Supreme Court. I also assure you that I will work hard to listen to the facts, to listen to the testimony, to understand as best I can, judge the witnesses' demeanor, and apply the law as I understand it, the best I can to the facts as I find them, and to make my decision. I give you my word in that regard.

Senator SPECTER. While it might be considered a softball, on the issue of not legislating from the bench but interpreting the law, give me a brief statement of your judicial philosophy on that issue.

Mr. SCHWAB. As I said in the material I submitted, I am committed to interpreting the law, not legislating. I am committed to judging statutes that come before me, if you are so gracious to confirm me, in a way that gives deference to those statutes on a constitutional basis.

Senator SPECTER. Someday, when it is late in the day and you have some lawyer before you on a trademark case and the lawyer doesn't understand the issues in trademark as you do and there is some frivolous argument made which tries your patience beyond endurance, will you remain courteous?

Mr. SCHWAB. I will work hard to remain courteous. My wife says that I have been making improvement in that training, so I can assure that I will——

Senator SPECTER. Well, beyond working hard, Mr. Schwab, will you remain courteous?

Mr. SCHWAB. Yes.

Senator SPECTER. Just remember the commitment you made today.

Mr. SCHWAB. I will, Senator.

Senator SPECTER. It is four o'clock, past four. It has been a long day and there is a lot more to today, and Senator Kohl and I sometimes become a little impatient ourselves, but we have to run for reelection.

I know you are a hard worker, but I want your commitment that on the Western District you will tackle all those cases and watch your backlog and make timely decisions and not be on the delinquent sheet.

Mr. SCHWAB. I can assure you that that will occur. And if it is a comfort, on the courteous issue you know my record and you know the bar positions I have occupied, and I don't believe one would get consistently elected to those type of positions if one had not dealt courteously over many years with the people that place you and elect you into those positions. So I think there is a record that you can judge in that regard.

Senator SPECTER. All right. We have your commitments, gentlemen. These nomination proceedings are recollected sometimes long after the fact, and not too long ago Justice Souter said to me, I still remember the question you asked me about whether Korea was a war or not and I still haven't made up my mind. That has been more than 10 years ago.

Justice O'Connor had her confirmation hearing 21 years ago. She was here 21 years ago, in 1981. So these confirmation hearings have an effect and an impact, and I don't expect to hear any comments from attorneys or litigants before you contrary to your promises today, gentlemen.

Mr. MCVERRY. Thank you, Senator.

Mr. SCHWAB. Thank you, Senator.

Senator SPECTER. Thank you. Thank you very much, Senator Kohl.

Senator KOHL. We thank you very much, Senator Specter, for your thoughtful questions.

For both of you, two questions. In the past few years, there has been a growth in the use of so-called secrecy or protective orders primarily, as you know, in product liability cases. We saw this, for example, in the recent settlements arising from the Bridgestone/Firestone lawsuits. Critics argue that these protective orders oftentimes prevent the public from learning about the health and safety hazards of the products that they use.

Should a judge be required to balance very carefully the public's right to know against a litigant's right to privacy when the information sought to be sealed could keep secret a public health and safety hazard?

Mr. McVerry?

Mr. MCVERRY. Mr. Chairman, I believe that that is the case. In other words, I believe that the court should make an independent inquiry into requests for protective orders, especially when the health, safety and welfare of the public is at risk.

I think historically, or at least often—maybe I shouldn't say historically—often, protective orders are the result of a negotiated settlement between the parties to the litigation, and maybe the court doesn't look into those matters, or hasn't historically looked into those matters when maybe it should, cases that are settled outside of the court's domain, and maybe they are not—sometimes, I think things that are characterized as protective orders may really be confidentiality agreements between consenting settlers of litigation which might be outside the realm of the court.

But to the extent, however, that a request for a protective order is addressed to the court, I think that judges do have a responsibility to look into the interests of the public from a health and safety perspective.

Senator KOHL. Should those interests be primary in a judge's consideration, or secondary?

Mr. MCVERRY. I don't know that I can answer that they should be primary or secondary. I think they should be part of the overall consideration that is being presented. I don't think that a court should simply, because the lawyers want the matter to be confidential, rubber-stamp that request and make it confidential. I think that——

Senator KOHL. Well, if the judge determines that public health and safety is involved, should he then take the position that the secrecy agreement is not to be permitted?

Mr. MCVERRY. Well, it is hard to make a generalized statement that in every statement where you make a level of determination that the health and safety of the public is at some degree of concern. So I can't make a generalized statement, but I can say to you that in matters of that sort, when I review them as a judge, if I am confirmed, that they will be a major consideration of mine.

Senator KOHL. Thank you.

Mr. Schwab?

Mr. SCHWAB. Mr. Chairman, I thank you for the question and I appreciate your sensitivity to this issue. As you know, I spent a substantial amount of my time in trade secret cases, and I would say 90 percent or more of those cases involve confidentiality agreements. So I appreciate the question and I understand the sensitivity to the issue.

I think as a judge one would have to examine each case and determine whether the entering of this order has an effect on the public. If it has an effect on the public, then it has to be approached differently than a situation where there is no public interest and there are just two litigants that are fighting over a trade secret or a patent or some other matter. And then when that matter comes before the court, you would sign the consented-to confidentiality agreement.

But in the case, in particular, of a settlement in which into the settlement agreement was placed confidentiality provisions relating to discovery that related to public health or safety, then I think a judge has to be very sensitive to what is going on. And it may be necessary—and I am speaking generally, but it may be necessary at that time to find a separate counsel to somehow—either a governmental body or some other entity that would provide counsel on that issue so at least that issue as to the confidentiality of that information as it relates to the public, that that issue would be litigated somehow before the court.

Senator KOHL. Thank you.

Gentlemen, Federal judges serve a meaningful role in their communities beyond hearing and deciding cases. Our vision of trial court judges today is of people who are actively involved beyond their courtrooms and understand the importance of such things as drug diversion programs and alternative punishments for juvenile offenders.

Will you each take a moment to discuss your vision of what it means to be a Federal judge, with a focus on the importance of each judge in their community?

Mr. McVerry?

Mr. MCVERRY. Mr. Chairman, I think that it is important for all members of the profession, the legal profession, be they judges or not, to be active participants in their community to the extent that it is not inconsistent with their duties and responsibilities as a member of the court.

I can think of particular instances where my wife and I are active in church activities, and I would see that we would continue to do that. I suppose that there are certain community activities in which we can be involved. I can't think of any off the top of my head right now, but I would not abrogate my responsibility in my community simply by becoming a Federal district court judge.

Senator KOHL. Mr. Schwab?

Mr. SCHWAB. Mr. Chairman, consistent with the judicial ethics, I would remain active in the community, and I mean community in a broad sense. Subject to the proper approvals, I would intend to still teach at UVA at the trial advocacy program that is taught every year there, and that includes not only attorneys, but students that attend that course.

I would continue, if permitted, to teach the intellectual property course that I currently teach that I think keeps one not only active in the community, but before college students and dealing with college students on a regular basis.

I have taught, as indicated in my material, a course on several different occasions to about 150 women on finances as it relates to particular women's issues, and I would continue to teach those courses as I have the opportunity.

Senator KOHL. Mr. Schwab, in April of this year the Committee received a letter from Jerome Shestack, a former President of the American Bar Association and a former Chair of the ABA's Standing Committee on the Federal Judiciary. In that letter, he pointed out that in your testimony before the Committee in 1988 you alleged that the ABA rated you as not qualified for the U.S. Court of Appeals for the Third Circuit because of your religion.

With the benefit of hindsight and knowing that Mr. Shestack has categorically denied that any such discrimination occurred, do you still believe you were singled out because of religion?

Mr. SCHWAB. Mr. Chairman, I believe my testimony—and I have re-read it—at that time was accurate. I did not mean to offend anybody by that testimony, but I sincerely believe that it was accurate. And I believe my testimony at that time was not a statement against the entire Committee in any way, and that those people, I believe, operated in good faith.

What I did say at that hearing—and I believe it was the truth—was that that gentleman asked me questions about my children attending a Christian school and whether that school engaged in any discrimination. I assured him that it did not and that in its bylaws it expressly provided for non-discrimination.

I was asked questions in the questionnaire that I had to complete relating to religion, and I believe his position was there was never any question raised at any time about religion. And I pointed

out to Senator Biden—Chairman Biden at that time—at the Committee that there was a particular question that did ask about religion, and I did disclose religious information that I was an elder in a church and other religious information in that questionnaire as it existed at that time, which I think was in 1987. And that testimony, also, I gave with the support and with the permission of Senator Specter.

Senator KOHL. Mr. McVerry, in the past few years, beginning with the *Lopez* decision, the Supreme Court has struck down a number of Federal statutes, including several designed to protect the civil rights of our more vulnerable citizens, as beyond Congress' power.

Taken individually, these cases have raised concerns about the limitations imposed on congressional authority, and taken collectively they appear to reflect a new federalism crafted by the Supreme Court that may threaten to alter fundamentally the structure of our Government.

What advice would you give Senators who are drafting legislation to comply with the new federalism?

Mr. MCVERRY. Mr. Chairman, I don't presume to be an advice-giver to Members of Congress. I think that, however, I will insofar as I think that Members of Congress need to look at the reasoning of the Supreme Court in making those decisions and make a determination, as has been earlier said by Judge Shedd, as to whether there was an effect on interstate commerce or whether it had been proven in the preamble of the legislation.

I can't speak to the specific statutes or that case, but I think that working with the direction of the Supreme Court in its observations of the congressional action will give guidance to Congress to be able to accomplish the goal that it set out to accomplish in another form, I presume.

Senator KOHL. All right, we thank you very much, gentlemen.

Before we adjourn the hearing, we would like to place a statement from Senator Leahy in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator KOHL. We appreciate your being here and we wish you the best. Thank you so much.

Mr. MCVERRY. Thank you very much, Senator.

Mr. SCHWAB. Thank you so much.

[The biographical information of Mr. McVerry and Mr. Schwab follow.]

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

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

   Arthur James Schwab

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

   United States District Judge for the Western District of Pennsylvania

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

   Buchanan Ingersoll
   Professional Corporation
   One Oxford Centre
   301 Grant Street, 20th Floor
   Pittsburgh, PA 15219-1410
   412-562-1438

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

   December 7, 1946 in Pittsburgh, PA.

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

   Married -- September 2, 1967. Karen Jenny Schwab. Maiden name -- Karen Jenny (no middle name). Karen was a Registered Nurse. She has not worked outside of the home since 1976. No dependent children.

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

   University of Virginia School of Law (Charlottesville, VA)
   September 1969 to June 1972 -- Juris Doctor

Grove City College (Grove City, PA)
September 1965 to June 1968
A.B. cum laude

Muskingum College (New Concord, OH)
September 1964 to June 1965
Transferred to Grove City College

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

From October 1990 to Present:
Buchanan Ingersoll Professional Corporation,
One Oxford Centre, 301 Grant Street, 20th Floor,
Pittsburgh, PA 15219-1410
Chief Counsel - Complex Litigation (2000 to present)
Chair of Litigation (1990 to 1999)
Litigation Partner/Shareholder -- extensive litigation experience in federal and state courts throughout the nation

From January 2002 to Present: Part-time Professor
Grove City College, 100 Campus Drive, Grove City, PA 16127
(teach one evening course in the Spring semester and one evening course in the Fall semester)

From September 1973 to October 1990:
Reed Smith Shaw & McClay,
435 Sixth Avenue, Pittsburgh, PA 15219
Deputy Head -- Litigation Group
Litigation Partner -- litigation experience in federal and state courts throughout the nation
Founding Chairman of the TECHLEX (technology law) Group of Reed Smith

From September 1972 to August 1973: Law Clerk,
then-Chief Judge Collins J. Seitz, United States Court of Appeals for the Third Circuit

From June 1972 to September 1972: Summer law clerk,
Reed Smith Shaw & McClay, 435 Sixth Avenue, Pittsburgh, PA 15219
(dealt with matters relating to litigation, labor/employment law, and corporate law)

From June 1971 to September 1971: Summer law clerk,
Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, OH 44114
(dealt with matters relating to federal securities law, trustee and pension law, and general corporate law)

From June 1970 to September 1970: Summer law clerk,
Tremblay and Smith, 105-109 East High Street, P.O. Box 1585, Charlottesville, VA 22902
(dealt with matters relating to corporate and personal income tax, personal injury, and personal service contracts)

From June 1968 to August 1969: Financial Management Trainee,
General Electric Co., Speed Variator Department, Financial Analysis Section, Building 50, 2901 East Lake Road, Erie, PA 16531
(dealt with matters relating to financial management and accounting)

I received payment for services in each of the above employment.

I serve on the Board of Trustees of Grove City College (since 1990) (and on its Executive Committee since 1999 and as Chair of its Academic Program Committee since 1999) (no payment for services).

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

May 26, 1968 to October 4, 1969 -- Pennsylvania Army National Guard -- Medical Corpsman (Private to Private First Class) (Honorable Discharge) -- Serial Number: NG 23 784 999.

October 5, 1969 to September 10, 1972 -- Virginia Army National Guard -- Medical Specialist (Private First Class to Corporal), Operating Room Specialist (Sergeant), and Ambulance Platoon Sergeant (Staff Sergeant) (Honorable Discharge).

September 11, 1972 to June 30, 1974 -- Army Reserve (USAR) -- Chief Administrative Clerk (Staff Sergeant), and Judge Advocate (First Lieutenant -- Direct Commission).

July 1, 1974 to March 31, 1978 -- Inactive Standby Reserve (USAR) (Honorable Discharge).

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

I am the Co-Chair of the Senator John Heinz Level Division of the United Way of Allegheny County (2001) and served as a member of this Committee in 2000. I received Certificate of Appreciation for the United Way 2000 Campaign.

I was honored with the William J. Brennan, Jr. Award of the Trial Advocacy Institute, School of Law, University of Virginia in January, 2001. The Brennan Award was established in 1987 in honor of Justice William J. Brennan, Jr., United States Supreme Court, for his unsurpassed contributions to the United States legal system and, in particular, to the enhancement of trial advocacy skills. Members of the faculty of the Trial Advocacy Institute, School of Law, University of Virginia, receive this award. The honorees -- judges, public officials, and private practitioners -- are selected on the basis of 1) their outstanding skills as trial lawyers and members of the judiciary and 2) their invaluable contributions to the Trial Advocacy Institute and the legal profession. The Trial Advocacy Institute was founded more than twenty (20) years ago by Professor Stephen A. Saltzburg and the Honorable Herbert J. Stern, who made the award presentation.

University of Virginia School of Law:
- Order of the Coif;
- Virginia Law Review -- Editorial Board;
- tied for 1st in the class at end of first year;
- graduated approximately 5th in a class of 308 students; and
- recipient of the Lawyers Title Award for 1972 at the University of Virginia School of Law -- awarded for the highest grade in property law class.

Grove City College:
- cum laude;
- graduated with Honors in Business Administration;
- Pi Gamma Mu (Honorary Society);
- Dean's List (5 of 6 semesters);
- G.P.A. of 3.5; and
- graduated approximately 34th in a class of 450 students.

I became an Eagle Scout in 1961.

I am listed in the Directory of Litigation Attorneys and the Directory of Intellectual Property Attorneys, both published by Prentice-Hall Law & Business. I am also listed in Who's Who in America, 55th Edition (2001) (and earlier editions), and Who's Who in American Law, 12th Edition (2002-2003) (and earlier editions), both published by Marquis Who's Who.

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

I am past President of the American Inns of Court - Pittsburgh Chapter (1997-1999), as well as a member of the organizing committee and one of the original Masters of the American Inns of Court - Pittsburgh Chapter, founded in 1992, and served on its Executive Committee as Treasurer (1994-1995) and served as its President-Elect (1995-1997).

I am past Chair of the Civil Litigation Section of the Pennsylvania Bar Association (PBA) (2000-2001). I previously served as its Chair (1999-2000), Chair-Elect (1998-1999), Vice-Chair (1997-1998), and Secretary (1996-1997) and on its Council (1995-2001) and as the Chair of its Commercial and Securities Litigation Committee (1992-1994) and Vice Chair of its Intellectual Property Litigation Committee (1991-1992). I served on the PBA Discovery Rules Committee (1995-1998); the PBA Code of Evidence Committee (1995-1997); and the PBA Ad Hoc Committee on Local Court Rules (1997).

I served on the Board of Governors of the Academy of Trial Lawyers of Allegheny County (1992-1994) and (1995-1996), and as Chair of its Certification Committee (1993-1994) and as its Vice Chair and then-Chair of its Retreat Committee (1994-1996), and since October 2000, I also serve on its Court Liason Committee.

I am past Chair of the Council of the Civil Litigation Section of the Allegheny County Bar Association (1993) and previously served as a member of its Council (1986-1992), Chairperson-Elect (1991), Vice-Chairperson (1990), and Secretary (1989); and previously served on its Proposed Chancery Court Committee (1994-1995).

I am a Charter Fellow of the Allegheny County Bar Foundation.

I am a member of the Academy of Trial Lawyers of Allegheny County and of the following professional organizations: Allegheny County Bar Association (Civil Litigation Section and Federal Court Section), Pennsylvania Bar Association (Civil Litigation Section), and American Bar Association (Section of Litigation and Section of Intellectual Property).

I was appointed to the Special Committee on Product Liability of the Pennsylvania Bar Association (1977-1979).

I have served as a Special Master in the Civil Division of the Court of Common Pleas of Allegheny County, trying one jury trial in 1993 and another jury trial in 1994.

I have been appointed to serve in the Mediation/Neutral Evaluation Program of the United States District Court for the Western District of Pennsylvania.

I completed the American Arbitration Association's Mediator Training Program on April 1-2, 1993, and have served as an American Arbitration Association mediator and as an American Arbitration Association arbitrator.

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

(a) Supreme Court of Pennsylvania (11/10/72).
(b) United States District Court for the Western District of Pennsylvania (11/10/72).
(c) Supreme Court of the United States (12/08/72).
(d) United States Court of Appeals for the Third Circuit (12/05/72).
(e) United States District Court for the Eastern District of Pennsylvania (03/30/78).
(f) United States Court of Appeals for the Eleventh Circuit (02/02/82).
(g) United States Court of Appeals for the Fourth Circuit (08/26/82).

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

I served as member of the faculty of the Trial Advocacy Institute of the University of Virginia School of Law (1995, 1996, 1997, 1998, 1999, 2001, and 2002).

I am on the Board of Advisors of the Employment Law Counselor, published by Business Laws, Inc.; the Board of Editors of the Intellectual Property & Technology Law Journal, published by Aspen Law & Business, formerly Prentice Hall Law & Business; and the Advisory Committee of Georgetown University CLE for Employment Law.

I serve on the Board of Advisors, Pittsburgh Federalist Society (since 1994) and am a member of the James Madison Club, The Federalist Society for Law and Public Policy Studies (1995 to present).

I am a member of Gospel Fellowship Presbyterian Church (PCA) in Valencia, PA, and serve as a Ruling Elder since January 1, 2000.

I am a member of the Duquesne Club and the Treesdale Golf & Country Club (social memberships).

I serve on the Board of Trustees of Grove City College (since 1990) (and on its Executive Committee since 1999 and as Chair of its Academic Program Committee since 1999).

I served on the Three Rivers Arts Festival Committee (1990-1994).

None of the above organizations formerly discriminated or currently discriminate on the basis of race, sex, or religion, at any time while I was a member.

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

1. Co-author of Chapter 1, " Introduction to Federal Practice," Federal Civil Procedure Before Trial -- 3rd Circuit, American Inns of Court Series, Federal Practice Guide, Lawyers Cooperative Publishing Company (1996);

2. Co-author/organizer of a series of six articles, entitled "Understanding Y2K's Legal Impact, A Guide for Corporate Counsel" (1999);

3. Co-author/organizer of a series of twelve articles on trade secrets entitled, "How to Protect Trade Secrets in Black and White" (2001); and

4. Co-author of "Guarding the Crown Jewels: A Handbook for Protecting Trade Secrets and Proprietary Rights" to be published in early 2002 by the Washington Legal Foundation.

The following are the articles which I have written, co-authored, or edited:

5. "Proving and Defending a Y2K Claim: A Practical Discussion," ABA Section of Litigation, Committee on Business Torts Newsletter, July 1999;

6. "How to Handle a Violation of the Economic Espionage Act," Technology Times (Eastern Technology Council), Vol. XIX, No. 2, April 1999;

7. "Year 2000 Litigation," ACBA Federal Court Section, Vol. 9, Issue 1, March 1999;

8. "How to Understand the Economic Espionage Act," Technology Times (Eastern Technology Council), Vol. XIX, No. 1, February 1999;

9. "Understanding the Economic Espionage Act of 1996," PBA Civil Litigation Section Newsletter, Winter 1998;

10. "Protecting Trade Secrets Requires Many Approaches, Economic Espionage Act A New Tool in War on Intelligence Theft," Corporate Legal Times, October 1998;

11. "Federal Protection of Trade Secrets: Understanding the Economic Espionage Act of 1996," The Journal of Proprietary Rights, April 1998, and Pittsburgh Legal Journal, August 1998;

12. "Illustrative Clauses for Employment Contracts (Focusing on Covenants not to Compete and Additional Protection Provisions)," Employment Contracts, Business Laws, Inc. at 1501 (July 1995) and at 1508.2 (March 1996);

13. "How Has Technology Affected Your Business," Small Business News - Pittsburgh, March 1995;

14. "Protecting the Crown Jewels -- Safeguarding Your Proprietary Information," Greater Philadelphia Technology Times, February 1995;

15. "Protect Trade Secrets with Security Measures," Central Penn Business Journal, October 1994;

16. "A Lesson in Noncompete Covenants," Small Business News (Pittsburgh, PA), July 1994;

17. "Employee Privacy in an Electronic Workplace," Successful Women, July 1994, Volume 1, Number 3;

18. "Trademark Rights and Remedies Under State Law," The Journal of Proprietary Rights, June 1993, Volume 5, Number 6;

19. "A Checklist for Enforcing Non-Competition Agreements," The Practical Litigator, January 1993;

20. "Employment Agreements Can Protect Investments in Intellectual Property," Pittsburgh Business Times, July 6-12, 1992, Vol. 11, No. 48;

21. "Microchip Rules, Import Controls," Europe 1992 Law & Strategy, March/April 1990;

22. "The Challenges of International Competition, the Markets and the Law," Legal Backgrounder, Washington Legal Foundation, September 1989;

23. "Comparative Legal Aspects of the Environment for Innovation in the Canada-U.S. Context," Canada-United States Law Journal, Volume 15 (1989);

24. "Review of Local Rulings Reveal Pro-Employer Bias," In Technology, published by the Pittsburgh High Technology Council, November 1988;

25. "Defending Antitakeover Poison Pills in Court," Pittsburgh Legal Journal, July 1988;

26. "High-Tech Brings New Language to Employment Contracts -- Can it be Enforced?," Executive Report Magazine, July 1988;

27. "High Tech Firms Need to Protect Trade Secrets," The Pittsburgh Business Times-Journal, June 1987;

28. "Protecting Technology Through Litigation," The Computer Lawyer, April 1986; and

29. "Law and Technology Transfer, An Analysis of the Laws Affecting Businesses Engaged in the Transfer of Technology," in Proceedings of the International Congress on Technology and Technology Exchange: Technology and the World Around Us (Pittsburgh) (International Technology Institute, 1984).

I have authored the following newsletter articles as the Chair of the Civil Litigation Section of the Pennsylvania Bar Association (1999-2000):

30. Message from the Chair, "Service to Members Tops 1999-2000 Agenda," Civil Litigation Update, Summer 1999;

31. Message from the Chair, "Our Three "R's": Retreat, Rules and Regional Dinners," Civil Litigation Update, Fall 1999;

32. Message from the Chair, "Thanks for a Fine Year," Civil Litigation Update, Spring 2000; and

33. Message from the Chair, "Attend our Section Retreat, April 6-9 in Baltimore," Civil Litigation Update, Winter 2000.

Over the last ten (10) years, I have spoken at the following seminars relating to trial strategies, evidence, litigation ethics, transfer of technology, law and technology, trade secrets, and employment agreements:

34. Georgetown University Law Center Continuing Legal Education Employment Law and Litigation Institute, May 10-11, 2001 in Washington, DC -- (contained in the above referred No. 3, "How to Protect Trade Secrets in Black & White");

35. Glasser LegalWorks' Eleventh Annual Institute on Cyberspace Licensing in the Electronic Age, on E-Commerce Litigation, on November 30 - December 1, 2000 in New York, NY;

36. 2000 PricewaterhouseCoopers Intellectual Property Leadership Forum, on "Valuing Trade Secrets and Confidential Information," on February 25, 2000 in Palm Desert, CA -- (contained in the above referenced No. 3, "How to Protect Trade Secrets in Black & White"; speech focused on Paper 7);

37. Glasser LegalWorks' Tenth Annual Institute on Cyberspace Licensing in the Electronic Age, on E-Commerce, on Litigation Issues, on November 4-5, 1999 in New York, NY;

38. U.S. Chamber of Commerce, National Chamber Foundation Symposium, on "Economic Espionage -- A Threat to Shareholder Value," on February 9, 1999 in Washington, DC -- (contained in the above referenced No. 9 and No. 11 reprint from the Journal of Proprietary Rights, April 1998, "Federal Protection of Trade Secrets Understanding the Economic Espionage Act of 1996" (long and short reprints), and No. 10 reprint from Corporate Legal Times, "Protecting Trade Secrets Requires Many Approaches," October 1998);

39. Glasser LegalWorks' Trade Secret Controversies, on "Trade Secret Litigation," on June 3, 1998 in New York, NY;

40. Academy of Trial Lawyers of Allegheny County, on "Ethical Considerations -- Unauthorized/ Inadvertent Disclosure of Confidential or Privileged Materials," on April 28, 1998 in Pittsburgh, PA;

41. American Society for Industrial Security Seminar, on "Safeguarding Proprietary Information," on February 24, 1997 in Arlington, VA -- (contained in "How to Protect Your Investment in Technology and Employees through Contracts and Litigation"; the speech focused on the first 4 papers);

42. American Bar Association, Section on Antitrust Law, on "Restrictive Covenants - An Overview," at "Litigation Between Competitors: Antitrust and Tort Limits on Marketplace Rivalry" Seminar, on September 21-22, 1995, in San Francisco, CA, and on November 2-3, 1995 in Boston, MA;

43. Pennsylvania Bar Association, Civil Litigation Section Retreat, on "Ethics and Commercial Litigation," on March 31, 1995 in Baltimore, MD;

44. Association of Corporate Patent Counsel Annual Meeting on "Enforcement of Employment Agreements," on February 5-8, 1995 in Naples, FL -- (contained in the above referenced No. 41, "How to Protect Your Investment in Technology and Employees through Contracts and Litigation");

45. Pennsylvania Bar Institute Seminar on "General Practitioners' Update on Evidence," on November 30, 1994 in Pittsburgh, PA;

46. The National Intellectual Property Law Institute on "Jury Trials in Intellectual Property Litigation" and "Employee/Vendor Issues," on April 13-16, 1994 in Washington, DC (contained in the above referenced No. 41, "How to Protect Your Investment in Technology and Employees through Contracts and Litigation");

47. Prentice-Hall Law & Business' Fifth Annual Licensing Law Institute, Current Issues in Multimedia (contained in the above referred No. 41, "How to Protect Your Investment in Technology and Employees through Contracts and Litigation");

48. Pennsylvania Bar Association, Civil Litigation Section, on "Effective Advocacy: Simplified and Efficient Pretrial and Trial Techniques," and "Trade Secrets and Covenants not to Compete: The Law and Model Pleadings, Briefs and Orders", on July 23, 1993 in Hershey, PA;

49. Allegheny County Bar Association, Civil Litigation Section, on "Ethics and Professionalism," on October 5, 1993, March 3, 1993, and December 2, 1992 in Pittsburgh, PA;

50. Spring Meeting of the ABA Section of Business Law, Committee on Technology and Intellectual Property, on "Coping with Disaster: Protecting Trade Secrets Through Litigation," on April 11, 1992 in Orlando, FL -- (contained in the above referenced No. 41, "How to Protect Your Investment in Technology and Employees through Contracts and Litigation"); and

51. American Law Institute of the American Bar Association, Committee on Continuing Professional Education, on "Trademark Rights and Remedies Under State Law," on April 11, 1991 in Washington, DC (contained in the above referenced No. 41, "How to Protect Your Investment in Technology and Employees through Contracts and Litigation").

I also was the co-author of Virginia Law Review Note, entitled "Capital Punishment in Virginia", 58 Va. L. Rev. 97 (1972). (Item 52.)

Copies of all of the above publications and speeches are attached hereto and marked with indicated number.

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

I testified before the Committee on the Judiciary of the United States Senate at a hearing on June 2, 1989 concerning the ABA role in the judicial nomination process. The witnesses included the Honorable Dick Thornburgh, Attorney General of the United States. I testified with the concurrence of Senator Arlen Specter. I have attached copies of the transcript of my statement on the record. (Item 53.)

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

Excellent. January 15, 2001.

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

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

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

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

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

Not applicable.

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

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

Not applicable.

(2) 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 finance committees and host committees for United States Senators Arlen Specter (R) and Rick Santorum (R) and United States Representative Melissa Hart (R). I worked on the election committees of two candidates for Superior Court of Pennsylvania for the November 1997 election, Superior Court Judges Joan Orie Melvin (R) and Debra A. Todd (D). I served on the Lawyers' Committee for the Election of Superior Court Judge John L. Musmanno (D) in November 1997 and on the earlier Musmanno for Supreme Court finance committee for the May 1995 election.

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

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

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

Law Clerk, then-Chief Judge Collins J. Seitz (deceased), United States Court of Appeals for the Third Circuit, from September 1972 to August 1973.

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

From October 1990 to Present:
Buchanan Ingersoll Professional Corporation,
One Oxford Centre, 301 Grant Street, 20th Floor,
Pittsburgh, PA 15219-1410
Chief Counsel - Complex Litigation (2000 to present)
Chair of Litigation (1990 to 1999)
Litigation Partner/Shareholder

From September 1973 to October 1990:
Reed Smith Shaw & McClay,
435 Sixth Avenue, Pittsburgh, PA 15219
Deputy Head -- Litigation Group
Litigation Partner
Founding Chairman of the TECHLEX (technology law) Group of Reed Smith

From September 1972 to August 1973: Law Clerk,
then-Chief Judge Collins J. Seitz, United States Court of Appeals for the Third Circuit

From June 1972 to September 1972: Summer law clerk,
Reed Smith Shaw & McClay, 435 Sixth Avenue, Pittsburgh, PA 15219

From June 1971 to September 1971: Summer law clerk,
Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, OH 44114

From June 1970 to September 1970: Summer law clerk,
Tremblay and Smith, 105-109 East High Street, P.O. Box 1585, Charlottesville, VA 22902

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

I am a trial attorney and have been responsible for hundreds of cases involving practically every area of the law during my years of practice.

During my early years of practice at Reed Smith, I worked in both the litigation and labor groups, and I was responsible for a heavy caseload, including jury and non-jury matters, in federal and state courts. These matters involved antitrust, banking, corporate, product liability, state and federal taxation, shareholder's rights, labor, assault and battery, construction, trade secrets, Title VII, OSHA, workers' compensation, franchise, embezzlement, breach of contract, admiralty, collection, civil rights, insurance subrogation, real estate, personal injury, and property damage litigation. These cases required frequent appearances in the Courts of Common Pleas of the Commonwealth of Pennsylvania, in the United States District Court for the Western District of Pennsylvania, and at civil and labor arbitrations.

These cases often involved complex factual and legal issues requiring a thorough knowledge of federal and state rules of civil procedure. They also included different forms of actions or relief (e.g., class actions, criminal contempt, civil contempt, declaratory judgments, temporary restraining orders, preliminary injunctions, permanent injunctions, accounting, damages, and habeas corpus petitions).

During these early years, I also assisted in the preparation and trial of numerous significant cases with more experienced trial attorneys.

In the early 1980's, I began to serve as a chief counsel in complex litigation -- e.g., cases involving five to twenty-five parties, numerous opposing counsel and co-counsel, myriad legal and factual issues, hundreds to thousands of documents, tens to hundreds of interrogatories and requests for admission, and ten to fifty depositions. These complex cases included litigation of commercial, contract, construction, corporate takeovers (e.g., securities law), EEOC and labor, franchise, securities fraud, tax, antitrust and Robinson-Patman, shareholders' derivative, copyright infringement, and class action issues. These cases where I acted as a chief counsel required the application of case management techniques and extensive dealings with numerous parties with varying degrees of common and differing interests.

By the mid-1980's, my practice became nationwide in scope, and my practice shifted from a state court practice to a federal court practice. I have litigated cases throughout the country, including in California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Massachusetts, Maryland, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Virginia. Also, I have been responsible for cases which have involved appeals to the United States Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. These federal court cases provided extensive experience in federal rules of civil procedure, federal rules of appellate procedure, rules of evidence, and local rules and practices throughout the nation.

Also, by the mid-1980's, I began to specialize in the areas of trade secrets, copyright infringement, trademark, employment agreements (covenants-not-to-compete and secrecy agreements), unfair competition, and confidential information, and have developed a national practice in these areas. I have served clients throughout the continental United States and have handled cases involving both national and international transactions. These cases have required an understanding not only of the law and trial strategies, but also of the applicable technology.

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

I have represented both businesses and individuals in the legal subject matters mentioned above.

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

Regularly.

(2) Indicate the percentage of these appearances in

(1) federal courts - Rough estimate of 50%
(2) state courts of record - Rough estimate of 50%
(3) other courts - 0%.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings - 100%
(B) criminal proceedings - 0%.

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

(a) Since January 1, 1996, I served as chief trial counsel in approximately three (3) cases, including an approximately 24-day jury trial and an approximately 23-day permanent injunction trial, and I served as chief trial counsel in an AAA arbitration of approximately 13 hearing days.

(b) Between January 1, 1991 and December 31, 1995, I served as chief trial counsel in approximately eight (8) cases, including preliminary and permanent injunction trials/hearings. All cases were non-jury. I also served as associate trial counsel in a 29-day jury trial in the United States District Court for the District of Maryland.

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

Jury trials - Rough estimate of 33%.

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

Not applicable.

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

Child Advocacy Program. I have long been concerned with the interests of children and particularly those who have been caught up in custody, abuse, or paternity cases. In some of these cases, children require separate representation; in others, the mothers of children need assistance in proving paternity and receiving child support. In order to address this need, in 1979, I began recruiting Reed Smith attorneys to participate in the Child Advocacy Program of the Young Lawyers' Section of the Allegheny County Bar Association, a program which was later transferred to the Legal Aid Society upon its formation. Throughout Reed Smith's participation in this program, over 60 Reed Smith attorneys have devoted in excess of 3400 hours to the representation of indigent children and others, through January 1988.

In addition to initiating Reed Smith's participation in the program, I actively coordinated Reed Smith's involvement from approximately January 1979 through October 1984. Thus, I acted as liaison between the Young Lawyers' Section and Reed Smith; I sought out Reed Smith attorneys to act on cases which were assigned to Reed Smith; and, particularly in cases where the assigned attorney was a new associate, I actively supervised and guided the attorney's handling of the case.

Accordingly, in June 1982, John P. Vetica, Esquire, then-Chairman of the Young Lawyers' Section of the Allegheny County Bar Association wrote a letter of commendation to me, as did Dale Hershey, Esquire, President of the Legal Aid Society of Pittsburgh in October 1985.

Williams Counsel. I was appointed by the United States Court of Appeals for the Third Circuit to act as counsel *(pro bono)* for Ronald A. Williams in the prosecution of his appeal in *Williams v. Hepting, et al.*, C.A. No. 87-3333 (3d Cir.). Mr. Williams was an indigent prisoner in the State Correctional Institution at Huntington, Pennsylvania. In 1986, he filed a civil rights action under 42 U.S.C. §§ 1981, 1983, 1985, and 1988, as well as under the Fourteenth Amendment of the United States Constitution. This action was dismissed by the United States District Court for the Western District of Pennsylvania, and affirmed by the United States Court of Appeals for the Third Circuit. Williams v. Hepting, 844 F.2d 138 (3d Cir.), cert. denied, 488 U.S. 851 (1988). Over $23,000 of professional time was spent in the prosecution of Mr. Williams' appeal.

Community Development. While I was an attorney at Reed Smith, and in connection with the TECHLEX Group, I was active in the formation of the high technology community in Pittsburgh. The TECHLEX Group was a charter member of the Pittsburgh High Technology Council, a nonprofit organization which seeks to strengthen the existing technology-intensive industry in Western Pennsylvania and actively to foster the start-up of new advanced technology enterprises. I personally worked with the Pittsburgh High Technology Council in

its formative years. Similarly, I and the TECHLEX Group assisted in the formation of and provided services to The Enterprise Corporation of Pittsburgh, a nonprofit corporation affiliated with Carnegie Mellon University and the University of Pittsburgh, which provides direct hand-on assistance to entrepreneurs in structuring and organizing their businesses.

Further, through the TECHLEX Group and my other activities in connection with the development of the high technology industry in Western Pennsylvania, I have been actively involved in helping new businesses. Many TECHLEX clients are unable to pay standard legal rates and, as part of an effort to assist in the development of the region, the TECHLEX Group has agreed to reduced rates for services. Further, the establishment of the Reed Smith Technology Law Center in the Oakland section of Pittsburgh also aids companies without extensive resources. By providing these businesses with access to the Center's facilities, including telecommunications, word processing, and research materials, the TECHLEX Group provides start-up businesses with legal resources and support services of a quality and scope which are generally only available to much larger enterprises. I served on the Advisory Council of the Saint Vincent College Small Business Development Center for the Venture Capital Subcommittee. Through these activities, I believe that I was not only able to help particular individuals struggling to establish a new business, but also was able improve the economic base of Western Pennsylvania, with resulting benefits for all of its residents.

My non-legal community service includes the following:

United Way. I am the Co-Chair of the Senator John Heinz Level Division of the United Way of Allegheny County and served as a member of this Committee in 2000. The amount of time is approximately 35 to 40 hours per year.

Course on Financial Planning. In May 2000, in June 2000, and in February 2001, I taught a personal finance workshop consisting of four (4) sessions each to a total of approximately 130 Buchanan Ingersoll staff personnel, primarily secretaries, using the text "Smart Women Finish Rich," by David Bach. The amount of time for preparation and for teaching the classes was approximately 40 to 50 hours.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

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

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

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

A. I have been responsible, as chief trial counsel, for numerous cases involving the improper transfer of technology, trade secrets, covenants-not-to-compete, and unfair competition. A brief summary of several of these cases, which were tried in federal and state courts, follows:

1. *Union Electric Steel Corporation v. John R. Colosimo and Fortech, Inc.* -- This case was commenced and tried in the United States District Court for the Western District of Pennsylvania (District Judge Alan N. Bloch) (412-208-7360) (Civil Action No. 91-1891).

The causes of action were as follows: Breach of Fiduciary and Common Law Duties, Misappropriation of Trade Secrets and Confidential Information, Fraud, Tortious Interference with Contractual and Business Relations, Unfair Competition, and Civil Conspiracy.

The complaint alleged that Colosimo, while still an employee of Union Electric, and before his resignation from Union Electric (in conspiracy with his prospective new employer, Fortech, Inc.), surreptitiously obtained and removed confidential information of Union Electric, including computer files containing technical data and customer data, to enable Colosimo and Fortech to unfairly compete with Union Electric and to interfere with Union Electric's relations with its customers.

The FBI had discovered printouts of the Union Electric computer files at Colosimo's house, which files Colosimo had stolen via computer access over interstate telephone lines.

Upon filing of a motion for temporary restraining order, and the hearing thereon, on November 4, 1991, the Court granted the temporary restraining order on the same day. Thereafter, the parties engaged in expedited discovery.

The preliminary injunction hearing was held on November 18, 19, 21, and 25, 1991, before Judge Bloch. The Court, by Order dated December 11, 1991, with related findings of facts and conclusions of law, enjoined Colosimo and Fortech from maintaining an employment relationship and from making any use of the

confidential information of Union Electric; directed Colosimo and Fortech to return all information and property of Union Electric to Union Electric; and enjoined Colosimo from entering into or maintaining an employment relationship or association of any nature with any person or entity engaged in the manufacturer of hardened steel rolls in competition with Union Electric.

The decision in this case is not reported.

Thereafter, the defendants appealed the Order to the United States Court of Appeals for the Third Circuit. The appeal was later dismissed because of defendants' failure to order a transcript of the proceedings before the trial court. Subsequently, the defendants agreed to settle the case, and an appropriate Consent Decree and Order was entered on July 6, 1992.

I represented, as chief trial counsel, the plaintiff, Union Electric Steel Corporation, together with Pamela A. McCallum, and Lisa Silverman, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (412-562-8800). Lisa Silverman is currently with Babst, Calland, Clements and Zomnir, P.C., Two Gateway Center, Pittsburgh, PA 15222 (412-394-5400). Robert F. Schultz, Vice President Industrial Relations and Senior Counsel, AMPCO - Pittsburgh Corporation, 600 Grant Street, 46th Floor, Pittsburgh, PA 15219 (412-456-4491), was our client contact at Union Electric.

Counsel for defendant Colosimo was Stanley W. Greenfield, Greenfield, Brewer, Bailor & Kay, Greenfield Court, 1035-37 Fifth Avenue, Pittsburgh, PA 15219 (412-261-4466).

Counsel for defendant Fortech, Inc., was Susan A. Yohe, Strassburger, McKenna, Gutnick & Potter, Suite 700, 322 Boulevard of the Allies, Pittsburgh, PA 15222 (412-281-5423). Susan A. Yohe is currently with Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, Pittsburgh, PA 15219 (412-562-8485).

2. *LCI Communications, Inc., and LiTel Telecommunications Corporation, v. Peter M. Buonaiuto, Dale E. Bauer and Matthew N. Riehl* -- This case was commenced and tried in the United States District Court for the Southern District of Ohio, Eastern Division (District Judge James L. Graham) (614-719-3200) (Case No. C-2-88-1301).

The causes of action were as follows: Copyright Infringement, Breach of Non-Competition Agreements, Unfair and Competition, and Tortious Interference.

After the preliminary injunction hearing on February 8, 9, and 10, 1989, the Court entered an Order, on February 10, 1989, with related findings of fact and

conclusions of law, on February 22, 1989, enjoining the defendants, three former employees of the plaintiffs, from accepting employment with any competitor of the plaintiffs within the seven (7) states of the Ameritech region. The Court also enjoined the defendants from copying, disclosing, or otherwise using confidential information obtained during their employment with plaintiffs.

The decision in this case is reported at 1989 U.S. Dist. LEXIS 18296.

No appeal was taken, and the case thereafter was settled with the entry of a Consent Decree and Order.

I represented, as chief trial counsel, the plaintiffs, LCI Communication, Inc., and LiTel Telecommunications Corporation, along with the Honorable Robert M. Duncan, then-Managing Partner of the Columbus office of Jones, Day, Reavis & Pogue, 1900 Huntington Center, Columbus, OH 43215 (former United States District Court Judge) (home: 614-231-9086).

Counsel for the defendants, Peter M. Buonaiuto, Dale E. Bauer and Matthew N. Riehl, were Thomas H. Grace, Locke Liddell & Sapp LLP, 600 Travis Street, 3400 Chase Tower, Houston, TX 77002 (713-226-1200), and Gary D. Greenwald, Shayne & Greenwald Co., L.P.A., 221 South High Street, Columbus, OH 43215 (614-221-1111), as co-counsel.

3. *Campbell Soup Co. v. Daniel J. O'Neill and H.J. Heinz Co.* -- This case was litigated in the United States District Court for the District of New Jersey (District Judge Joseph E. Irenas) (856-757-5223) (Civil Action No. 97-178).

This complex litigation was initiated on January 6, 1997 in the Court of Common Pleas of Allegheny County, Pennsylvania by Daniel J. O'Neill and the H.J. Heinz Company ("Heinz"). Mr. O'Neill was a former senior executive of Campbell Soup Company ("Campbell Soup") who on January 6, 1997 resigned from Campbell Soup and commenced employment with Heinz. That same day, Mr. O'Neill and Heinz filed their Complaint in state court, seeking a declaratory judgment that his employment with Heinz did not violate a non-competition covenant contained in his Campbell Soup employee agreement and other relief. Allegheny County Common Pleas Judge Judith L.A. Friedman scheduled a hearing on plaintiffs' motion for preliminary injunctive and declaratory relief for January 30, 1997.

On January 9, 1997, Campbell Soup filed a complaint in the United States District Court for the District of New Jersey against Mr. O'Neill, seeking to enjoin Mr. O'Neill from working for Heinz in any capacity for a period of eighteen (18) months, the time period stated in the Campbell Soup non-competition covenant. The Honorable Joseph E. Irenas was assigned to the case. Campbell Soup did not

initially name Heinz as a defendant in the New Jersey action.

Judge Irenas established a discovery schedule, scheduled a preliminary injunction hearing for February 3, 1997, and stayed discovery in the case until January 17, 1997, pending court-ordered mediation. Judge Irenas also referred the case to mediation, designating John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit, as the mediator.

Mr. O'Neill, Campbell Soup and Heinz (which was not yet a party to the New Jersey action, but was a party in interest by virtue of its lawsuit pending in Pennsylvania state court) mediated their dispute before Judge Gibbons. The parties failed to resolve their dispute through mediation.

On the last day of the mediation, Campbell Soup removed the Pennsylvania state court action to the United States District Court for the Western District of Pennsylvania, where it was assigned to United States District Judge Gary L. Lancaster. Thereupon, both parties moved to transfer, stay or dismiss the federal actions pending in the other party's home jurisdiction.

The parties then commenced a three-week period of intensive discovery in the New Jersey action, including approximately twenty (20) depositions and the production of numerous documents.

Campbell Soup thereafter filed its first amended complaint in the New Jersey action, adding Heinz as an additional defendant.

Judge Irenas denied Heinz and O'Neill's motion to transfer, stay or dismiss the New Jersey action, and indicated that he would proceed toward the previously scheduled preliminary injunction hearing. By order dated January 23, 1997, Judge Lancaster transferred the Pennsylvania action to New Jersey, where it was consolidated with the action pending before Judge Irenas.

On the eve of the preliminary injunction hearing, on February 7, 1997, Campbell Soup moved for leave to file a Second Amended Complaint, attempting to add new claims against Mr. O'Neill and joining an executive search firm as an additional defendant.

Judge Irenas heard live testimony, received evidence, and entertained argument on Campbell Soup's motion to enforce the alleged settlement agreement, on February 10, 1997. The Court received testimony from two witnesses: John M. Coleman, Senior Vice President - Law and Public Affairs for Campbell Soup; and Lawrence J. McCabe, then-Senior Vice President and General Counsel for Heinz. I conducted the examination of Mr. McCabe, and presented the closing argument on behalf of Heinz and Mr. O'Neill. On February 11, 1997, Judge Irenas denied

Campbell Soup's motion to enforce the alleged settlement agreement.

On the afternoon of February 11, 1997, Judge Irenas commenced the hearing on Campbell Soup's motion for a preliminary injunction. I presented the opening argument on behalf of Heinz and Mr. O'Neill, and was responsible for any examination of the Heinz business witnesses. Co-counsel Martin Flumenbaum of the Paul, Weiss law firm was responsible for any examination of the Campbell witnesses on behalf of Heinz and Mr. O'Neill. The testimony of David Johnson, Chairman of Campbell Soup, was received on the afternoon of February 11, 1997.

The parties again engaged in intense settlement discussions, with intermittent assistance provided by Judge Irenas, and on the afternoon of February 13, 1997, the parties executed a settlement agreement pursuant to which Mr. O'Neill remained employed by Heinz in a senior executive capacity, subject to certain restrictions for a six (6) month period.

This was an extraordinarily fast-paced case. During the five (5) week period from the date Heinz and Mr. O'Neill initiated the litigation on January 6, 1997 until the case settled on February 13, 1997, there was a total of approximately one hundred and one (101) docket entries in three different Courts.

None of the decisions rendered in this case are reported.

Discovery in this case was hard-fought. The parties filed numerous discovery motions, including motions to compel the production of documents, to compel answers to deposition questions, and to make witnesses available for depositions.

I represented Heinz and Mr. O'Neill as co-lead trial counsel with Martin Flumenbaum of Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, 26th Floor, New York, NY 10019 (212-373-3191). We were assisted by Pamela A. McCallum, David B. Fawcett, III, and David J. Porter of Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219 (412-562-8800), and Mary Kay Brown, Buchanan Ingersoll Professional Corporation, Eleven Penn Center, 14th Floor, 1835 Market Street, Philadelphia, PA 19103-2895 (215-665-3851); Arthur L. Liman (deceased) and Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison (212-373-3000); and a number of Heinz corporate attorneys, including then-Senior Vice President and General Counsel, Lawrence J. McCabe (retired) (home: 412-935-3942), Mark V. Matera, Daniel F. Shaw (412-456-6010), and Scott D. Thayer of the H.J. Heinz Company, World Headquarters, 600 Grant Street, 60th Floor, Pittsburgh, PA 15219 (412-456-5700).

Campbell Soup's lead trial counsel were Mari Gursky Shaw of Akin, Gump, Strauss, Hauer & Feld, L.L.P., One Commerce Square, Suite 2110, 2005 Market Street, Philadelphia, PA 19103 (215-405-3500); Mari Gursky Shaw is currently with Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, PA 19103 (215-963-5000); and Forrest A. Hainline, III, Law Office of Forrest A. Hainline, III, 5335 Wisconsin Avenue, N.W., Suite 440, Washington, D.C. 20015 (202-966-1962). Campbell Soup also was represented by John M. Coleman, Faith R. Greenfield, and Cary A. Metz of Campbell Soup Company, One Campbell Place, Camden, NJ 08103 (856-342-4800).

4. *Henkel Corporation v. Thad Piatkowski and Houghton International, Inc.* -- This case was litigated in the Court of Common Pleas for the Commonwealth of Pennsylvania, Montgomery County (Judge Bernard A. Moore) (610-278-3188) (Civil Action No. 97-17342). Related matters were litigated in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 97-4668), the United States District Court for the Northern District of Georgia (Civil Action No. 97-CV-3358), and the Superior Court of Georgia, Fulton County, Georgia (File No. E-62395).

This complex case was initiated by Henkel Corporation on June 23, 1997 in the Court of Common Pleas of Montgomery County, against four former employees who resigned from Henkel to join Houghton in February 1997. Houghton is a direct competitor of Henkel in the metal surfaces technology business, as well as a customer of Henkel. An amended complaint was filed on July 11, 1997, adding two more defendants and alleging the following causes of action: breach of contract (including noncompete, nondisclosure, and nonsolicitation provisions); trade disparagement; tortious interference with contractual relations; breach of fiduciary and common law duties; conversion and misuse of confidential information; unfair competition; and, civil conspiracy.

Henkel filed a motion for special and/or preliminary injunction seeking to enjoin defendants from: contacting, soliciting, or servicing certain customers of Henkel; engaging in certain competitive activities in specified geographical areas in accordance with covenants-not-to-compete contained in their employment agreements; soliciting Henkel employees; and, disclosing or using Henkel trade secrets and confidential information.

Prior to any decision on plaintiff's motion, defendants removed the matter to the United States District Court for the Eastern District of Pennsylvania (the "Pennsylvania federal court action"). Defendants filed a Motion to Dismiss for Lack of Personal Jurisdiction or, alternatively, to Transfer Pursuant to 28 U.S.C. § 1404(a). The parties agreed to defer discovery on the substantive issues in the case while they conducted discovery and briefed the issues on personal jurisdiction and venue. The six former Henkel employees were deposed on

jurisdictional contacts. The parties did not press the Pennsylvania federal court issues because of another Pennsylvania Court of Common Pleas action by Henkel, filed on September 9, 1997. The subsequent action was against Houghton and Thad Piatkowski, in the Court of Common Pleas of Montgomery County (the "Pennsylvania state court action"). Piatkowski was a former high-level executive at Novamax, a subsidiary company that Henkel acquired in November of 1996. Novamax provided manufacturers with chemicals and lubricants to treat the surfaces of metal products as well as support services in those areas. Piatkowski left Henkel to head up Houghton's metal surfaces technology business and, thereafter, Houghton and Piatkowski hired twenty-one (21) former Henkel/Novamax employees, including the six former Henkel employees named in the earlier action. This matter was again assigned to Judge Bernard Moore.

The complaint in this second action alleged that, inter alia, in the course of a due diligence investigation for the purchase of Novamax (which Henkel ultimately acquired), Houghton entered into an agreement with Novamax's parent company, as agent for Novamax, which precluded it for a term of two years from hiring any Novamax employee (the "Novamax No-Hire Agreement"); that Houghton breached this Agreement by hiring Piatkowski and the other twenty-one (21) former Henkel/Novamax employees; and that Piatkowski breached his severance agreement with Henkel containing a covenant-not-to-compete as well as his fiduciary duties to Henkel/Novamax.

Henkel thereafter filed a motion for special and/or preliminary injunction seeking, inter alia, to enjoin Houghton and Piatkowski from soliciting or hiring any employee of Henkel; to enjoin defendants from using or disclosing Henkel's confidential information; to require defendants to preserve and return to Henkel all material obtained by former Henkel employees during the course of their employment with Henkel; and, to order all Houghton employees formerly employed with Henkel who had covenants-not-to-compete with Henkel to cease all contacts with certain customers.

After argument on the motion for special injunction, Judge Moore granted Henkel's motion and substantially all the relief requested, including enjoining Defendants from: hiring Henkel employees; using or disclosing Henkel confidential information; and soliciting or contacting certain Henkel customers via Houghton employees having covenants-not-to-compete with Henkel. Defendants were also ordered to return to their counsel all Henkel material obtained by the twenty-one former Henkel employees and Piatkowski during the course of their employment. The Court also granted Henkel's motion to expedite discovery and scheduled a preliminary injunction hearing.

The parties conducted intensive discovery, including the production of more than 120,000 pages of documents and numerous depositions. Discovery was hard-

fought, with the parties filing various motions to compel and Henkel filing a petition for contempt.

Defendants also filed preliminary objections to the Complaint, seeking to invalidate certain causes of action as legally insufficient. Judge Moore deferred ruling on these preliminary objections prior to the scheduled preliminary injunction hearing. Because defense counsel was attached for trial in another matter, the preliminary injunction hearing was postponed for three days until November 13, 1997.

Prior to this hearing, nineteen (19) former Henkel employees employed by Houghton filed a Complaint in state court in Georgia, seeking a declaratory judgment that their employment agreements with Henkel, including the covenants-not-to-compete, were unenforceable under Georgia law and further, that the Novamax No-Hire Agreement was unenforceable as to these plaintiffs (the "Georgia Plaintiffs").

The Georgia Plaintiffs also filed a motion for a temporary restraining order seeking to enjoin Henkel from attempting to enforce the Henkel employment agreements against the Georgia Plaintiffs, threatening third parties with suits for tortious interference or commencing any new suits based upon covenants-not-to-compete. A hearing on the temporary restraining order was scheduled for November 6, 1997.

Henkel then removed that action to the United States District Court for the District of Georgia, District Judge Thomas W. Thrash presiding. A hearing was held on November 7, 1997, at which time the case was remanded to the state court in Georgia, Judge Philip Etheridge presiding. Thereafter, the parties to the Georgia action agreed not to schedule immediately the hearing on the Georgia Plaintiffs' motion for a temporary restraining order and attempted to negotiate the terms of a Consent Order to that effect.

In the early morning hours of November 13, 1997, the day of the preliminary injunction hearing in the Pennsylvania state court action, all parties to the three lawsuits settled all matters.

None of the decisions rendered in these cases are reported.

I represented Henkel Corporation, as chief counsel, in the Pennsylvania state and federal court actions together with Marguerite S. Walsh, Buchanan Ingersoll Professional Corporation, Eleven Penn Center, 1835 Market Street, 14th Floor, Philadelphia, PA 19103. Marguerite Walsh is now with Littler Mendelson P.C., Two Penn Center, Suite 200, 15th & JFK Boulevard, Philadelphia, PA 19102 (215-854-6338). Marvin L. Wilenzik, Elliott Reihner Siedzikowski & Egan, P.C.,

925 Harvest Drive, Union Meeting Corporate Center V, Blue Bell, PA 19422 (215-977-1050), acted as Montgomery County trial counsel. We were assisted by Mary Kay Brown, Buchanan Ingersoll Professional Corporation, Eleven Penn Center, 1835 Market Street, 14th Floor, Philadelphia, PA 19103-2985 (215-665-8700).

I also represented Henkel Corporation as chief counsel together with Marguerite S. Walsh in the Georgia state and federal actions. Marguerite Walsh is now with Littler Mendelson P.C., Two Penn Center, Suite 200, 15th & JFK Boulevard, Philadelphia, PA 19102 (215-854-6338). Arthur H. Glaser, Drew Eckl & Farnham, LLP, 880 West Peachtree Street, P.O. Box 7600, Atlanta, GA 30357 (404-885-6229), acted as Georgia counsel. Arthur H. Glaser is currently with Self, Glaser & Davis LLP, Suite 1650, Platinum Tower, 400 Interstate North Parkway, Atlanta, GA 30339 (770-563-9300). We also were assisted by Susan Kircher, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219. Susan Kircher is currently Corporate Counsel, Qualex Inc, Eastman Kodak, 343 State Street, Rochester, NY 14650 (716-724-5408).

Defendant Piatkowski and the Houghton employees in the Pennsylvania state and federal court actions were represented by John S. Summers, Hangley Aronchick Segal & Pudlin, One Logan Square, 27th Floor, Philadelphia, PA 19103 (215-568-6200). Defendant Houghton was represented by Daniel S. Bernheim, III and Jonathan J. Bart, Silverman Bernheim & Vogel, Two Penn Center Plaza, Suite 910, Philadelphia, PA 19102 (215-569-0000). Irwin W. Stolz, Jr. and Bryan M. Cavan, Gambrell & Stolz LLP, SunTrust Plaza, Suite 4300, 303 Peachtree Street N.E., Atlanta, Georgia 30308 (404-577-6000), represented the Houghton employees in the Georgia state and federal court actions.

5. *LifeCor, Inc. v. Randall W. Fincke and Cadent Medical Corp.* -- This case was litigated in the Court of Common Pleas of Allegheny County, Pennsylvania (Judge Alan S. Penkower) (412-350-5444) (No. GD97-242). Judge R. Stanton Wettick, Jr. (412-350-5953) handled the numerous pre-trial matters.

This complex litigation was initiated in January, 1997 in the Court of Common Pleas of Allegheny County, Pennsylvania by LifeCor, Inc. ("LifeCor") and Zoll Medical Corporation ("Zoll") against Randall W. Fincke and Cadent Medical Corporation ("Cadent"). LifeCor was founded in 1986 to design and develop a wearable cardioverter defibrillator to treat fatal heart arrhythmias. In 1995, LifeCor sought to develop a strategic partnership and/or obtain an investment from Zoll. Zoll is in the business of designing and developing external (non-wearable) defibrillators (e.g., crash carts used in emergency rooms). To that end, Zoll conducted due diligence of LifeCor's business and technology. Mr. Fincke, then Zoll's Vice President of Advanced Product Development, spearheaded the

due diligence effort. During his due diligence of LifeCor, Mr. Fincke obtained trade secret and confidential information. In May of 1996, Mr. Fincke resigned from Zoll. In July of 1996, Mr. Fincke founded Cadent for the purpose of designing and developing a wearable cardioverter defibrillator. On January 6, 1997, LifeCor and Zoll filed a complaint against Mr. Fincke seeking injunctive relief and damages for, among other things, the misappropriation of trade secret and confidential information, unfair competition, diversion of corporate opportunity and unjust enrichment.

LifeCor and Zoll thereafter amended their complaint to add Cadent as a party. Mr. Fincke and Cadent filed fifteen (15) preliminary objections, three (3) of which challenged the court's subject matter jurisdiction and personal jurisdiction over Mr. Fincke (a Massachusetts resident) and Cadent (a Delaware corporation conducting business in Massachusetts). Following jurisdictional discovery and after considering the parties' written submissions and oral arguments, on June 26, 1997, Judge Joseph A. Jaffe overruled all of the defendants' preliminary objections except for the preliminary objection directed to plaintiffs' breach of an implied agreement. Judge Jaffe ordered plaintiffs to state in separate counts Mr. Fincke's breach of an express agreement and his breach of implied agreements with LifeCor. LifeCor subsequently filed a second amended complaint to comply with Judge Jaffe's Order.

Mr. Fincke and Cadent then filed an Answer, New Matter and Counterclaims. In their counterclaims, the defendants alleged claims for civil conspiracy, unfair competition, interference with prospective economic advantage and violation of the Massachusetts Unfair Trade Practice Act.

Earlier, Mr. Fincke and Cadent filed a complaint in the Superior Court of Middlesex of the Commonwealth of Massachusetts against Zoll, seeking a declaration that Mr. Fincke had not violated his contractual obligations to Zoll in connection with his due diligence of LifeCor and his formation of Cadent; had not misappropriated any trade secrets and/or confidential information of Zoll or LifeCor; and had not diverted any corporate opportunity belonging to Zoll (Civil Action No. 9700921). Mr. Fincke and Cadent thereafter amended their Massachusetts complaint, adding LifeCor as a defendant.

LifeCor and Zoll moved to dismiss, or alternatively to stay, the Massachusetts action arguing that it was the mirror image of the Pennsylvania action, and that allowing the Massachusetts action to proceed would result in a waste of judicial resources, potentially inconsistent judgments and an unnecessary protraction of the controversy between the parties. Justice Margot Botsford stayed the Massachusetts action pending the completion of discovery of the Pennsylvania action.

Discovery in the Pennsylvania action was comprehensive and contentious. LifeCor and Zoll initiated discovery two (2) days after the complaint was filed, serving a request for the production of documents. Prior to October 13, 1998, the parties exchanged extensive written discovery, with the plaintiffs serving an additional request for the production of documents and approximately thirty-six (36) interrogatories. Similarly, the defendants served two (2) requests for the production of documents seeking fifty-eight (58) categories of documents and approximately seventy-seven (77) interrogatories. On September 14, 1998 and pursuant to an August 4, 1998 Order of Court, LifeCor and Zoll also submitted to defendants a written trade secret submission, with LifeCor identifying at least eighteen (18) trade secrets that Mr. Fincke and Cadent had misappropriated. On September 14, 1999, LifeCor supplemented its trade secret submission by identifying an additional trade secret.

In an effort to minimize discovery disputes and ensure that discovery would continue to proceed in an orderly and expeditious fashion, Judge R. Stanton Wettick, Jr. ordered that discovery would proceed in phases, with the first phase being limited to the issue of the disclosure of LifeCor's trade secrets to Mr. Fincke. During this discovery phase, LifeCor and Zoll produced nearly 17,000 pages of documents, and Cadent and Mr. Fincke produced nearly 42,000 pages of documents.

LifeCor filed a Motion for a Pretrial Scheduling Order in an effort to expedite the trial of the case and ensure that the remaining discovery would not proceed in phases, and Judge Wettick granted LifeCor's Motion.

Following that Order of Court, discovery intensified. LifeCor served two (2) additional sets of requests for the production of documents and an additional forty-three (43) interrogatories. The defendants served upon LifeCor four (4) additional sets of requests for the production of documents and an additional fifty-one (51) interrogatories. Over the next three months, the parties spent twenty-nine (29) days either taking or defending depositions. LifeCor produced an additional approximately 31,500 pages of documents, and Cadent produced an additional approximately 50,000 pages of documents (38 boxes).

During the nearly two years of discovery, the parties presented numerous motions to Judge Wettick, including motions to compel the production of documents, to compel answers to written discovery, and to limit the scope of depositions.

Following the completion of discovery, Mr. Fincke and Cadent filed a Motion for Partial Summary Judgment seeking the dismissal of five counts of the second amended complaint. This Motion did not address any of Zoll's claims since on or about May 27, 1999, Zoll, Mr. Fincke and Cadent settled their claims against one another in both the Pennsylvania and Massachusetts actions.

After briefing and argument, Judge Wettick ordered the dismissal of LifeCor's diversion of corporate opportunity claim against the defendants, its breach of express contract claims against Mr. Fincke and its implied-in-law contract claim against Mr. Fincke (based upon LifeCor's agreement to dismiss this count). Judge Wettick did not dismiss LifeCor's implied-in-fact contract claim against Mr. Fincke.

Following the submission of the parties' pretrial statements and the exchange of expert reports (LifeCor filed two (2) expert reports and the defendants filed seven (7) expert reports), the trial of this action began on January 11, 2000. LifeCor filed a Motion to Bifurcate defendants' counterclaims arguing that these claims were not ripe and defendants' damages (attorneys' fees) were not cognizable. Mr. Fincke and Cadent filed a Motion to Bifurcate Liability and Damages and Opposition to Plaintiff's Motion to Bifurcate Defendants' Counterclaims. Judge Penkower granted LifeCor's Motion and granted the defendants' Motion with respect to the bifurcation of liability and damages of LifeCor's case.

At the close of all of the evidence, on February 8, 2000, Mr. Fincke and Cadent filed a Motion for a Directed Verdict. Judge Penkower granted defendants' Motion with respect to LifeCor's breach of implied-in-fact confidentiality agreement, diversion of corporate opportunity, unfair competition, tortious interference, and breach of fiduciary duty claims. Judge Penkower denied defendants' Motion with respect to the misappropriation of trade secrets claim, allowing twelve (12) of the nineteen (19) trade secrets to be considered by the jury. Judge Penkower also reserved ruling on LifeCor's unjust enrichment claim pending a decision by the jury.

After an approximately five-week trial with respect to liability, the jury returned a verdict in LifeCor's favor finding that six specific LifeCor technologies were trade secrets, and that Mr. Fincke and Cadent had misappropriated five of the six trade secrets. Following the jury's verdict, Judge Penkower, upon LifeCor's Motion for Summary Judgment, dismissed all of defendants' counterclaims against LifeCor.

The damage phase proceeded for an approximately one week trial. The jury awarded LifeCor $1.3 million in compensatory damages against Mr. Fincke and Cadent. The jury also awarded LifeCor $1 million in punitive damages, allocating $650,000 against Mr. Fincke and $340,000 against Cadent.

Following the jury's award of $2.3 million in damages, the parties engaged in settlement negotiations and agreed to settle the Pennsylvania and Massachusetts actions. Under the terms of the settlement, Mr. Fincke and Cadent agreed to pay $2.2 million to LifeCor. LifeCor, Mr. Fincke and Cadent agreed that no appeal in the Pennsylvania action would be taken and that the verdict would be marked as

satisfied. The parties further agreed that the Massachusetts action would be dismissed with prejudice.

None of the decisions rendered in this case are reported.

I represented LifeCor, as chief trial counsel, together with Jeffrey J. Bresch and Gretchen L. Jankowski of Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219 (412-562-8800). We were assisted by Kristi A. Davidson, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219 (412-562-8800). We also represented Zoll and were assisted by Paul F. Ware, Jr. and Jennifer Miller Oertel of Goodwin, Procter & Hoar LLP, Exchange Place, Boston, MA 02109 (619-570-1000).

Mr. Fincke's and Cadent's lead trial counsel were Richard J. Innis and Michael R. Heyison of Hale and Dorr LLP, 60 State Street, Boston, MA 02109 (617-526-6000). Mr. Fincke and Cadent were also represented by Paul A. Manion and Robert D. Finkel of Manion McDonough & Lucas, P.C., 600 Grant Street, 8th Floor, Pittsburgh, PA 15219 (412-232-0200).

B. I served as chief trial counsel in numerous challenges by taxing authorities to the tax-exempt status of certain not-for-profit entities in Western Pennsylvania, including:

The Mercy Hospital of Pittsburgh
Forbes Health System
Mercy Providence Hospital of Pittsburgh
Divine Providence Hospital
Mercy Psychiatric Institute
Magee-Womens Hospital
Braddock Medical Center
The Rehabilitation Institute of Pittsburgh
Mount Macrina Manor

Each case required an understanding of the operations and finances of the respective entities, and the different factual bases, trial exhibits, and tactics. At least three taxing authorities, and in one case eight taxing authorities, were involved in each case. The loss of tax-exempt status would cost these not-for-profit entities millions of dollars. The following is a list of some of the individuals who were involved in these matters:

Court of Common Pleas of Allegheny County:

Judge James H. McLean
Then-Administrative Judge
Court of Common Pleas of Allegheny County
822 City-County Building
414 Grant Street
Pittsburgh, PA 15219
(412-350-5440)

Judge John L. Musmanno
Then-Administrative Judge
Court of Common Pleas of Allegheny County
Now-Superior Court of Pennsylvania
One Oxford Centre
301 Grant Street, Suite 3150
Pittsburgh, PA 15219
(412-880-5800)

Assistant Legal Counsel and Solicitor for the Board:

Craig Stephens, Esquire
Board of Property Assessment,
Appeals & Review
345 County Office Building
542 Forbes Avenue
Pittsburgh, PA 15219
(412-350-4600)

Former Legal Counsel and Solicitor for the Board:

Stephen A. Zappala, Jr., Esquire
Now-District Attorney
County of Allegheny
Allegheny Courthouse, Room 303
Pittsburgh, PA 15219
(412-350-4400)

Assistant City Solicitor for the City of Pittsburgh:

Ronald H. Pferdehirt, Esquire
414 Grant Street
313 City-County Building
Pittsburgh, PA 15219
(412-255-2043)

Assistant County Solicitor for the County of Allegheny:

John Mulroy, Esquire
Allegheny County Law Department
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412-350-1169)

Solicitor for the School District of the City of Pittsburgh:

Ira Weiss, Esquire
Law Offices of Ira Weiss
503 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412-391-9890)

Other attorneys of Buchanan Ingersoll Professional Corporation:

Stanley J. Parker, Esquire
Buchanan Ingersoll Professional Corporation
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412-562-3740)

6. A *summary of the Tax Exemption Hearings for (a) The Mercy Hospital of Pittsburgh, (b) Forbes Health System, and (c) Magee-Womens Hospital follows:*

Each of these three hospitals has historically been exempt from real estate taxes. In 1992 and 1993, the taxing authorities (county, local and school district) filed challenges to such tax-exempt status with the Allegheny County Board of Property Assessment, Appeals and Review in an effort to have the Board revoke the tax-exempt status of each hospital so as to require the hospitals to pay real estate taxes.

In September and November 1994, in March and April 1995, and again in September and October 1996, the Board held a separate hearing as to each hospital to consider the taxing authorities' challenges. (Forbes - September 21, 1994, November 22, 1994, and September 24, 1996; Mercy - March 13, 1995, and September 24, 1996; and Magee-Womens - April 13, 1995, and October 29, 1996).

I represented all of the above hospitals as lead counsel at the respective hearings. In each case, potentially millions of dollars of real estate taxes were at stake.

In each case, the burden of proof was on the hospital to prove that it is entitled to tax-exempt status and that it meets the constitutional and statutory requirements to be entitled to tax exemption. Under such requirements, the hospital must prove that it advances a charitable purpose, donates or renders gratuitously a substantial portion of its services, benefits a substantial and indefinite class of persons who are legitimate subjects of charity, relieves the government of some of its burden, and operates entirely free from private-profit motive, and that it was founded, endowed, and is maintained by public or private charity.

Following the hearings, the Allegheny County Board of Property Assessment, Appeals and Review issued rulings in which it affirmed the tax-exempt status of The Mercy Hospital of Pittsburgh, Forbes Health System, and Magee-Womens Hospital.

The respective taxing authorities filed appeals to the Court of Common Pleas of Allegheny County, Pennsylvania. These cases were settled in May 1998, before Judge McLean.

C. I was responsible, as chief trial counsel, for litigation which involved four interrelated cases in state court in Nebraska (with appeals to the Court of Appeals of Nebraska and the Supreme Court of Nebraska), in the United States District Court for the District of Nebraska (with appeal to the United States Court of Appeals for the Eighth Circuit), in the United States District Court for the District of Missouri (with appeal to the United States Court of Appeals for the Eighth Circuit), and in the United States District Court for the District of Rhode Island, as follows:

7 a. *Alexander & Alexander Inc. v. Richard M. Coffey, et al.* -- This case was commenced and tried in the District Court of Douglas County, Omaha, Nebraska (Doc. 892 No. 719). The case involved a 14-day preliminary injunction hearing and then a 5-day permanent hearing in the state trial court, before Judge Donald J. Hamilton (retired) (402-330-0825), with subsequent appeals to the

Court of Appeals of Nebraska and the Supreme Court of Nebraska.

I represented, as chief trial counsel, the plaintiff, Alexander & Alexander Inc., a national insurance brokerage and consulting corporation (now owned by AON Corporation), in this action for injunctive relief and damages arising out of breaches of employment agreements (noncompetition, nondisclosure, and nonsolicitation covenants), misappropriation of confidential information, breach of common law and fiduciary duties, and the conspiracy in connection therewith.

The action was commenced on November 19, 1990 by verified petition against eleven (11) individual defendants (the "individual defendants"). A&A sought a temporary restraining order and then a temporary [preliminary] and permanent injunction, together with damages, to restrain the individual defendants and those acting in concert with them from breaching noncompetition/nonsolicitation/ nondisclosure covenants and common law and fiduciary duties owed to A&A. The individual defendants were former employees of A&A in its Omaha, Nebraska office.

The individual defendants resigned from A&A, virtually en masse, and established a competing office in Omaha for their new employer, Frank B. Hall & Co., Inc. ("Hall"). Almost immediately upon the resignation of the individual defendants, four (4) A&A accounts transferred their business from A&A to Hall. Thus, A&A sought the requested relief.

The Court entered a Temporary Restraining Order against the individual defendants and those acting in concert with them, restraining them from acting to breach their contractual, common law, and fiduciary duties. On November 28, 1990, a hearing commenced on extending the temporary restraining order. The hearing continued on November 29 and December 4, 5, 6, and 7, 1990, with the Court extending the temporary restraining order on December 7, 1990, until the final ruling on the motion for temporary injunction. The hearing continued on December 10, 11, 12, 13, and 14, 1990. Hall filed a petition in intervention on November 26, 1990.

Thereafter, the individual defendants and Hall removed the action to the United States District Court for the District of Nebraska (Civil No. 90-0-837) on December 17, 1990, which stayed the state court's hearing on the motion for temporary injunction. In its petition, Hall asserted that it was the real party in interest and that a settlement agreement dated May 23, 1990, which was executed by A&A and Hall in settlement of litigation in Colorado, Connecticut, New York, Texas and Oklahoma, acted as a bar to A&A's state court proceeding against the individual defendants. Hall further asserted that A&A's attempt to enjoin the individual defendants, and thereby Hall's business activities, constituted an attempt to monopolize trade in commerce, violative of 15 U.S.C. § 2 (Sherman

Act) and Neb. Rev. Stat. §§ 59-802, 58-1604.

On December 26, 1990, the federal district court (Judge Lyle E. Strom) remanded the case to the state court, finding that the settlement agreement did not bar A&A's right to seek relief in state court against the individual defendants.

The parties engaged in expedited discovery consisting of numerous depositions, interrogatories, and the production of documents (including 11 boxes of documents that the individual defendants misappropriated from A&A upon their resignation).

After the remand, the hearing on A&A's motion for temporary [preliminary] injunction then commenced again on January 14, 1991, and continued on January 15 and 16, 1991.

The trial in total consisted of fourteen (14) trial days, more than 3,000 pages of transcript, 246 exhibits, and 38 witnesses.

The Court entered a Memorandum Order and Temporary [Preliminary] Injunction Order against the individual defendants and Hall, dated February 15, 1991, pending a permanent injunction hearing, restraining them from further breach of their contractual and common law duties. Thus, the Court found that A&A's covenants were reasonable and enforceable and that the individual defendants and Hall had engaged in a civil conspiracy and unfair competition against A&A. The decision is not reported.

Throughout the spring and summer of 1991, the parties engaged in additional discovery in preparation for the trial on A&A's petition for permanent injunction, which was held on July 8, 9, 10, 11, 12, and 15, 1991. The hearing was limited to the issue of permanent injunctive relief as a result of bifurcation. The parties thereafter submitted lengthy findings of fact and conclusions of law.

The Court entered a Memorandum Opinion and Judgment Order, dated September 5, 1991, permanently restraining defendants' unlawful activity until October 29, 1992. The Court found that the covenants were reasonable and enforceable, the individual defendants and Hall had engaged in a civil conspiracy that began prior to the en masse resignation, and the individual defendants had violated the Preliminary Injunction Order entered against them.

Thereafter, the individual defendants and Hall filed their notices of appeal from the Permanent Injunction Order to the Nebraska Court of Appeals. The parties proceeded to file extensive briefs, and oral argument was held before the Court of Appeals of Nebraska on April 21, 1992 (No. A-91-0918) (Sievers, C.J., Hannon, Wright, J.J.). The Court of Appeals issued its Order and Opinion dismissing the

appeal on July 14, 1992 (1 Neb. Ct. App. 871) (1992 WL 179452 (Neb. Ct. App.)). The Court held that when a plaintiff seeks both injunctive relief and damages, the case is not appealable until the trial court has issued an order which finally determines both issues. Thus, since the trial court's order included only the issue of injunctive relief, it was not final for purposes of appeal, and the Court of Appeals was without jurisdiction.

The individual defendants and Hall continued the appeal process by filing a petition for further review to the Supreme Court of Nebraska, which the Supreme Court sustained by Order dated September 30, 1992. However, insofar as the Permanent Injunction Order expired on October 12, 1992, A&A filed for dismissal of the petition due to mootness. On December 31, 1992, the Supreme Court indeed dismissed the appeal as moot.

Thus, after in excess of two full years of litigation, the only issue remaining to be resolved between the parties was damages.

Thereafter, A&A, Hall, the individual defendants, and certain other parties entered into a settlement agreement and release to resolve the pending litigation between them, which consisted of four (4) separate actions. Accordingly, the parties submitted a stipulation for dismissal and the Douglas County action was thereafter dismissed with prejudice.

I represented, as chief trial counsel, the plaintiff, Alexander & Alexander Inc., together with the following attorneys from Buchanan Ingersoll Professional Corporation: David B. Fawcett, III and Susan M. Kircher, along with Warren S. Zweiback (deceased) and Edward D. Hotz, Hotz Weaver Flood & Breitkreutz, 444 Regency Parkway Drive, Suite 310, Omaha, NE 68114 (402-397-1140); and Michael G. Gallagher, then-Senior Attorney, Alexander & Alexander Inc., 10461 Mill Run Circle, Owings Mills, MD 21117 (410-363-5000). Michael G. Gallagher is currently Acting Area Counsel - Washington, Office of Chief Counsel, Internal Revenue Service, 950 L'Enfant Plaza, SW, 2nd Floor, Washington, DC 20024 (202-283-7900) (home: 410-893-7740).

Counsel for defendants, Richard M. Coffey, John D. Diesing, James L. Arts, Connie D. Magni, David B. McCue, Mark P. Reilly, Timothy A. Huber, Darryl K. Moore, Diana K. Neth, Phyllis E. Lee, and Kelly A. Hanson, were Thomas H. Dahlk and David S. Houghton, Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., 100 Scoular Building, 2027 Dodge Street, Omaha, NE 68102 (402-344-4000); Thomas H. Dahlk is currently with Blackwell Sanders Peper Martin, 13710 FNB Parkway, Suite 200, Omaha, NE 68154 (402-964-5000); and Frederic A. Kauffman and Shawn D. Renner, Cline, Williams, Wright, Johnson and Oldfather, 1900 U.S. Bank Building, Lincoln, NE 68508 (402-474-6900).

Counsel for intervenor-defendant, Frank B. Hall & Co., Inc., were Thomas H. Dahlk and David S. Houghton, Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., 100 Scoular Building, 2027 Dodge Street, Omaha, NE 68102 (402-344-4000), and Blair C. Fensterstock, Fensterstock & Partners LLP, 30 Wall Street, New York, NY 10005 (then-General Counsel of Frank B. Hall & Co., Inc.) (212-785-4100).

7 b. *Frank B. Hall & Co., Inc. and Frank B. Hall* Insurance *Brokers, Inc. v. Alexander & Alexander Inc.* -- This case was commenced and tried in the United States District Court for the District of Nebraska (Omaha) (Judge Lyle E. Strom) (C.A. No. 90-0-836).

This action for damages and injunctive relief under the federal antitrust laws was a parallel action to the above-described Nebraska state court action.

Frank B. Hall & Co., Inc., and Frank B. Hall Insurance Brokers, Inc. (collectively, "Hall") commenced this action by complaint on or about December 17, 1990 against Alexander & Alexander Inc. ("A&A"), with jurisdiction based upon both federal question and diversity of citizenship. In its complaint, Hall asserted causes of action, including, Sherman Act § 2, 15 U.S.C. § 2 and Sherman Act § 1, 15 U.S.C. § 1.

In essence, the dispute between the parties was sparked by an action commenced by A&A against eleven individuals (former A&A employees who commenced employment with Hall) in Nebraska state court. (See A&A v. Coffey, et al. case summary, above.)

Hall contended that Hall and A&A had entered into a settlement agreement dated May 23, 1990 regarding other litigation between the parties in various districts and that the settlement agreement precluded A&A from suing the eleven individuals in the state court action. Hall further contended that A&A's action against the eleven individuals, and the temporary restraining order issued against the individuals, was a restraint of trade in violation of the Sherman Act. Thus, Hall sought damages and an injunction to preclude A&A from its alleged restraint of trade.

Of significance to Hall's action was the status of the proceedings in the state court. In that case, Hall intervened as a defendant and sought removal to federal court, also taking the position as part of its removal argument that the settlement agreement precluded A&A's action against the eleven individuals. The federal court (Strom, J.) remanded the case, finding that the settlement agreement did not apply to the state court action. (On November 23, 1990, Hall had also filed an action in the United States District Court for the District of Colorado to enforce the settlement agreement. The Court denied Hall's motion to enforce the

agreement, finding that identical issues were pending in other courts.)

In response to Hall's complaint, A&A filed a motion to dismiss or stay based upon the pending state court action and the substantial similarity of issues being addressed therein. The federal court denied A&A's motion on February 14, 1991.

On January 18, 1991 (three days after the completion of the preliminary injunction hearing in the state court action), Hall filed a motion for preliminary injunction in this federal court action, seeking to require A&A to prospectively comply with the settlement agreement.

In opposition to Hall's motion, A&A filed a brief in opposition to motion for preliminary injunction and also incorporated therein supporting authority for summary judgment on Count VII of Hall's complaint. A&A asserted that granting the injunctive relief would necessarily require a finding that the settlement agreement voided all of A&A's noncompetition covenants that it maintained with employees, in the event an employee were to leave A&A and join Hall. A&A asserted that this issue was the precise issue that Hall had raised in the state court action. Thus, A&A argued that Hall's motion was an attempt to circumvent the state court proceedings and secure a prior ruling from federal court.

The parties thereafter engaged in expedited discovery, and the hearing on the preliminary injunction motion was held March 19, 20, and 21, 1991.

In an Opinion and Order issued April 19, 1991, the district court denied Hall's motion for preliminary injunction and denied A&A's motion for summary judgment on Count VII as moot. The Court held that the plain terms of the Settlement agreement did not discharge actions or claims which A&A had against its former employees who breached their covenants-not-to-compete, and thus the Court held that A&A could still seek to enforce its covenants-not-to-compete. 1991 WL 424609 (D. Neb.)

Hall appealed the decision to the United States Court of Appeals for the Eighth Circuit. I argued this case (together with the appeal of the Starr case (described below)), on December 12, 1991, in St. Paul, Minnesota, before Circuit Judges C. A. Beam, Gerald W. Heaney, and James B. Loken. The appellate court affirmed the district court's decision on September 10, 1992. 974 F.2d 1020 (8th Cir. 1992).

Thus, as of the fall of 1992, only the antitrust issues of Hall's complaint remained outstanding. However, on February 12, 1993, A&A, Hall, and certain other parties entered into a Settlement Agreement and Release to resolve the pending litigation between them, which consisted of four (4) separate actions. Accordingly, the parties entered a stipulation for dismissal of the action, and an

Order of Dismissal with Prejudice was entered on March 26, 1993.

I represented, as chief trial counsel, the defendant, Alexander & Alexander Inc., together with Wendelynne J. Newton of Buchanan Ingersoll Professional Corporation, along with Warren S. Zweiback (deceased) and Edward D. Hotz, Hotz & Weaver, 444 Regency Parkway Drive, Suite 310, Omaha, NE 68114 (402-397-1140), and Michael G. Gallagher, then-Senior Attorney, Alexander & Alexander Inc., 10461 Mill Run Circle, Owings Mills, MD 21117 (410-363-5000).

Counsel for plaintiffs were Thomas H. Dahlk and David S. Houghton, Lieben, Whitted, Houghton, Slowinczek & Cavanagh, P.C., 100 Scoular Building, 2027 Dodge Street, Omaha, NE 68102 (402-344-4000), David M. Stryker, Associate General Counsel, Siemens Corporation, 153 East 53rd Street, 56th Floor, New York, NY 10022 (212-258-4000), Blair C. Fensterstock, Fensterstock & Partems LLP, 30 Wall Street, New York, NY 10005 (then-General Counsel of Frank B. Hall & Co., Inc.) (212-785-4100), and Daniel M. Dibble, Lathrop & Gage L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108 (816-292-2000).

7 c. *J. Philip Starr, Danny O. Rose and Frank B. Hall & Co., Inc. v. Alexander & Alexander Inc.* -- This case was commenced and tried in the United States District Court for the Western District of Missouri (District Judge Scott O. Wright) (Civil Action No. 91-0215-CV-W-5).

In this related case, Frank B. Hall & Co., Inc., and several former A&A employees filed a declaratory judgment action against A&A on March 11, 1991, seeking a court ruling that the applicable A&A covenants-not-to-compete were unenforceable. Defendant A&A answered the complaint and counterclaimed to enforce the covenants-not-to-compete on April 10, 1991. Thereafter, on April 22, 1991, A&A filed a Motion for Temporary Restraining Order and/or Preliminary Injunction.

After a period of intensive discovery, the district court conducted a preliminary injunction hearing on May 13 and 14, 1991, and, by Order dated May 16, 1991, denied A&A's request for injunctive relief, ruling that under the above-described settlement agreement, A&A had an adequate remedy at law. This decision is not reported. This decision was in conflict with the foregoing decision of Judge Strom.

Both decisions were appealed to the United States Court of Appeals for the Eighth Circuit. After argument and briefing on this consolidated appeal, the appellate court ruled in A&A's favor and reversed Judge Wright's decision, as set forth above. 974 F.2d 1020 (8th Cir. 1992). The case thereafter was settled and dismissed by an Order dated April 20, 1993.

I represented, as chief trial counsel, the defendant, Alexander & Alexander Inc., along with Pamela A. McCallum and David B Fawcett, III, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (412-562-1412), and Russell W. Baker, Jr., and Michael L. McCann, Spencer, Fane, Britt & Browne, 1000 Walnut Street, Suite 1400, Kansas City, MO 64106 (816-474-8100).

Counsel for plaintiffs, J. Philip Starr and Danny O. Rose, were Daniel M. Dibble, Lathrop & Gage L.C., 2345 Grand Boulevard., Suite 2800, Kansas City, MO 64108 (816-292-2000), and Blair C. Fensterstock (then-General Counsel of Frank B. Hall & Co., Inc.), Fensterstock & Partners LLP, 30 Wall Street, New York, NY 10005 (212-785-4100).

Counsel for plaintiff, Frank B. Hall & Co., Inc., were Daniel M. Dibble and Douglas R. Dalgleish, Lathrop & Gage L.C., 2345 Grand Boulevard., Suite 2800, Kansas City, MO 64108 (816-292-2000), and Blair C. Fensterstock (then-General Counsel of Frank B. Hall & Co., Inc.), Fensterstock & Partners LLP, 30 Wall Street, New York, NY 10005 (212-785-4100).

7 d. *Anthony Emilio, Frank B. Hall and Co. of Rhode Island, Inc., and Frank B. Hall Insurance Brokers, Inc. v. Alexander & Alexander Inc. (Maryland) and Alexander & Alexander Inc. (Massachusetts)* -- This case was commenced in the United States District Court for the District of Rhode Island (Magistrate Judge Jacob Hagopian) (Civil Action No. 91-0143B).

As in the foregoing Starr case, the plaintiffs, a former employee of A&A, and Frank B. Hall & Co., Inc., filed a declaratory judgment action against A&A on March 20, 1991, seeking a court ruling that the settlement agreement between A&A and Hall barred A&A from enforcing its covenant-not-to-compete with Emilio (Count I) and that Emilio's covenant-not-to-compete with A&A was unenforceable (Count II). Defendant A&A filed its Answer on April 25, 1991.

A&A thereafter moved for summary judgment, arguing that Judge Hamilton's ruling in the Coffey state court case in Nebraska barred plaintiff's challenge based upon the Settlement Agreement (Count I). By a Report and Recommendation, dated May 5, 1992, Magistrate Judge Jacob Hagopian agreed and granted summary judgment on Count I of the Complaint in A&A's favor.

Thereafter, this case was settled as part of the settlement agreement which encompassed all four of the above cases, with dismissal with prejudice entered on May 6, 1992.

I represented, as chief trial counsel, the defendants, Alexander & Alexander Inc. (Maryland) and Alexander & Alexander Inc. (Massachusetts), along with Pamela A. McCallum, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (412-562-1412), and Rosemary Healey, Powers Kinder & Keeney Incorporated, 1400 Turks Head Building, Providence, RI 02903 (401-454-2000), and S. Michael Levin, Japonica Partners, 30 Kennedy Plaza, Providence, RI 02903 (401-861-6160).

Counsel for plaintiffs were Gerald J. Petros, Hinckley, Allen & Snyder LLP, 1500 Fleet Center, Providence, RI 02903 (401-274-2000), and Blair C. Fensterstock, Fensterstock & Partners LLP, 30 Wall Street, New York, NY 10005 (then-General Counsel of Frank B. Hall & Co., Inc.) (212-785-4100).

D. I have been responsible, as chief trial counsel and co-counsel, for several securities class actions and corporate takeover litigation, including the following cases:

8. *Zeffiro v. First Pennsylvania Bank, N.A. v. Capital First Corp., et al. and Bernard v. First Pennsylvania Bank, N.A. v. Capital First Corp., et al.* -- These consolidated class action cases were commenced and tried in the United States District Court for the Eastern District of Pennsylvania (Judge Louis C. Bechtle) (Civil Action Nos. 78-3294 and 78-4316).

The plaintiff class was comprised of the holders of $1.5 million worth of debentures sold in 1972 by Capital First Corporation ("Capital First"), an equipment leasing company located in Philadelphia. Capital First defaulted on the debentures in 1976.

I represented, as chief trial counsel, Edward E. Cohen, a third-party defendant, who was an officer and director of, and an outside attorney for, Capital First.

After Capital First's default, several debentureholders brought actions against First Pennsylvania Bank, N.A. ("First Pennsylvania"), the indenture trustee for the debentures. The debentureholders contended that First Pennsylvania had failed to ensure that adequate collateral in the form of lease receivables had been pledged by Capital First for the debentures. Plaintiffs sought over $2 million in damages. The cases were certified as class actions on January 6, 1983. 96 F.R.D. 567 (E.D. Pa. 1983).

First Pennsylvania moved to dismiss those counts of the complaints that were asserted under the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa, on the ground that there is no private cause of action under that statute. The district court found

that such a cause of action exists, 473 F. Supp. 201 (E.D. Pa. 1979), and certified the issue for interlocutory appeal. In a decision reported at 623 F.2d 290 (3d Cir. 1980), the United States Court of Appeals for the Third Circuit affirmed. First Pennsylvania unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. 456 U.S. 1005 (1982).

After remand, First Pennsylvania filed a third-party complaint against Capital First and its accountants, attorneys, officers, and directors, including Mr. Cohen and his law firm, contending that the third-party defendants defrauded the bank and misrepresented the adequacy of collateral pledged for the debentures. First Pennsylvania also contended that the officers and directors of Capital First engaged in wasting and looting Capital First's assets through a series of complex transactions between Capital First and affiliated companies, and that Mr. Cohen and his law firm committed legal malpractice.

Extensive discovery was conducted by all parties, thousands of documents were produced, and 38 depositions were taken. Following discovery, most of the third-party defendants moved for summary judgment. The district court denied the motions, except those of our client, Mr. Cohen, and his law firm with respect to the malpractice claims. The district court ruled that First Pennsylvania's claims of legal malpractice against our client were barred because of the absence of privity (i.e., our client and his law firm owed no duty to First Pennsylvania in connection with their performance of legal services for Capital First).

The decision granting our motion for summary judgment is reported at 566 F. Supp. 1391 (E.D. Pa. 1983).

After First Pennsylvania settled with the plaintiff debentureholders, First Pennsylvania's third-party claims, including the remaining claims against our client, Mr. Cohen, were tried before Judge Bechtle for seven trial days from March 7 through March 20, 1984. Following the close of First Pennsylvania's case-in-chief on March 20, 1985, the third-party defendants moved for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. Each of these motions, including that of our client, was granted. No appeal was filed.

Counsel for other parties in the case were as follows:

(a) Michael P. Malakoff
Malakoff Doyle & Finberg, P.C.
The Frick Building
Suite 200
Pittsburgh, PA 15219-6002
(412-281-8400)
(attorneys for plaintiffs)

(b) Edward F. Mannino
Akin, Gump, Strauss, Hauer & Feld, LLP
One Commerce Square
2005 Market Street, Suite 2200
Philadelphia, PA 19103
(215-965-1200)

Mark J. Levin
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215-665-8500)
(attorneys for First Pennsylvania)

(c) Theodore R. Mann
Mann, Ungar & Spector & Labovitz, P.C.
1709 Spruce Street
Philadelphia, PA 19103
(215-732-3120)
(attorneys for third-party defendant Laventhol & Horwath)

(d) Richard M. Jordan
White and Williams LLP
One Liberty Place, Suite 1800
1650 Market Street
Philadelphia, PA 19103-7395
(215-864-7000)
(attorneys for third-party defendants Babbitt & Myers, Robert C. Arthurs, and Karl F. Myers)

(e) Allan D. Windt
950 Haverford Road
Bryn Mawr, PA 19010
(610-527-5105)
(attorneys for third-party defendants Spector, Cohen, Gadon and Rosen, Arthur Spector, Philip M. Comerford, and Harmon S. Spolan)

9. *Joy Manufacturing Co. v. The Pullman-Peabody Company* -- This case was commenced in the United States District Court for the Western District of Pennsylvania (Senior Judge Gustave Diamond) (412-208-7390) (Civil Action No. 86-2592).

I represented the plaintiff, Joy Manufacturing Co. ("Joy"), as co-counsel in the Pittsburgh litigation with chief trial counsel, J. Tomlinson Fort (Reed Smith LLP, 435 Sixth Avenue, Pittsburgh, PA 15219 (412-288-3174)).

This case arose as a result of an unsolicited tender offer and hostile takeover attempt of Joy by the defendant, Pullman-Peabody Company ("Pullman"), on December 1, 1986. On that date, Pullman announced an unsolicited tender offer for all of the outstanding shares of Joy common stock at a price of $31.00 per share. Pullman simultaneously filed suits in five states, attempting to enjoin the enforcement of the respective state anti-takeover statutes.

Pullman also instituted an action in the United States District Court for the District of New Jersey (Judge Clarkson S. Fisher) (Civil Action No. 86-4802) which sought to enjoin Joy from effectuating the terms of Joy's employee pension plan. The plan essentially provided that in the event of a hostile change of control of Joy, certain overfunded pension assets would be distributed to participants in the pension plan pursuant to a set formula. This so-called "pension parachute," if triggered, would have resulted in millions of dollars in overfunded pension assets being distributed to participants of the plan and therefore becoming unavailable to Pullman. Joy moved to dismiss the action, contending that Pullman had failed to meet the prerequisites set forth in Rule 23.1 of the Federal Rules of Civil Procedure. On December 9, 1986, after a hearing, the Court granted Joy's motion to dismiss.

During the same period of time, Joy took the offensive against Pullman's outstanding tender offer, which was due to expire on December 30, 1986. On December 8, 1986, Joy instituted an action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin Pullman's tender offer on the grounds that it violated federal securities laws and further seeking a judgment declaring that the pension parachute and a shareholders' rights plan (referred to as a "poison pill") were valid. Pullman filed counterclaims against both Joy and its directors, alleging, among other things, that by adopting and maintaining the pension parachute and poison pill, the directors had breached their fiduciary duties to the shareholders. Two distinct issues were thus raised by the claims and counterclaims: (a) whether Pullman had complied with the securities laws and (b) whether Joy's directors had complied with their legal obligations as fiduciaries. I was principally involved in defending the actions of Joy's directors.

The district court scheduled a preliminary injunction hearing for December 22, 1986, and granted the parties' joint requests for expedited discovery. Intensive discovery, including simultaneous depositions in Pittsburgh, New York, and New Jersey, followed.

I was responsible for preparing and representing Joy's outside directors in connection with their depositions. During a ten-day period, I prepared and represented the following outside directors at their depositions: Mr. Robert Dickey, III, a director of Joy and then-Chairman and Chief Executive Officer of Dravo Corporation; Mr. Richard P. Simmons, a director of Joy and President and then-Chief Executive Officer of Allegheny Ludlum Corporation; Mr. James W. Wilcox, a Joy director and its former Chairman, and then-Chairman and Chief Executive Officer of Pace Industries, Inc.; and Mr. James E. Lee, a Joy director, former Chairman and Chief Executive Officer of Gulf Oil Corporation, and then-Vice Chairman of Chevron Corporation. I also prepared Mr. John M. Arthur, a Joy director and then-Chairman of Duquesne Light Company, for his deposition, at which he was represented by Mr. Fort.

These critical depositions established that, in accordance with Pennsylvania law, Joy's directors had adopted the pension parachute and the poison pill after appropriately considering the interests of Joy's shareholders, employees, suppliers, and constituents, as well as the communities in which Joy resided, rather than out of a desire to entrench themselves in office.

On December 22, 1986, prior to the scheduled preliminary injunction hearing, Joy received and accepted a friendly bid by a group, including Adler and Shaykin, a New York investment company, which offered to pay $35.00 per share -- $4.00 more per share than had been offered by Pullman -- for all the outstanding shares of Joy's common stock. This increased offer resulted in an additional $70 million being distributed to Joy's shareholders as compared to the Pullman offer. The agreement with the Adler-Shaykin group resulted in the maintenance of the Joy corporate name and the preservation of the Joy headquarters in Pittsburgh. Thereafter, Joy and Pullman settled and discontinued all litigation, including the Pittsburgh litigation.

During the Pittsburgh litigation, an owner of 30 shares of Joy common stock sought to intervene in the case. While the petition to intervene was never ruled upon by the court, counsel for the shareholder-intervenor was granted the right to participate in discovery. After the case was discontinued, counsel for the shareholder-intervenor filed a petition for counsel fees and expenses in excess of $250,000. Joy's response to the petition for counsel fees and expenses was filed on February 20, 1987. I was the principal author of the supporting affidavits of the Controller of Joy and four outside directors. Counsel for the shareholder-intervenor filed a reply brief in March of 1987.

By an Opinion dated December 1, 1989, Judge Diamond granted the motion for counsel fees and expenses, and ordered discovery on the issue. 729 F. Supp. 449. Judge Diamond thereafter, by an Opinion dated August 7, 1990, awarded counsel

fees and expenses of $229,072 (742 F. Supp. 911), and awarded additional fees of $10,124 by Order dated August 17, 1990. These Orders of the district court were affirmed by the United States Court of Appeals for the Third Circuit by a Judgment Order dated May 20, 1991.

Milton R. Ackman, Fried, Frank, Harris, Schriver & Jacobson, One New York Plaza, New York, NY 10004 (212-859-8000), a nationally prominent securities attorney, was co-counsel for Joy. William M. Wycoff, Thorp Reed & Armstrong, One Riverfront Center, 20 Stanwix Street, Pittsburgh, PA 15222 (412-394-7711), served as counsel for Pullman. Michael P. Malakoff, Malakoff Doyle & Finberg, P.C., The Frick Building, Suite 200, Pittsburgh, PA 15219-6003 (412-281-8400), represented the shareholder-intervenor.

E. I have been responsible, as chief trial counsel, for approximately nine (9) covenant-not-to-compete cases for Barnes Group Inc. against former sales agents who make sales in violation of these agreements. These cases often involve tortious interference claims against the new employer of the sales agents.

Barnes Group Inc. (of Bristol, Connecticut) ("Barnes Group"), through its Bowman Distribution division (of Cleveland, Ohio), sells industrial and maintenance products using a nationwide system of approximately 1200 sales agents. Each Barnes Group sales agent signs an agreement containing a covenant-not-to-compete, stating that the sales agent will not sell to his or her customers for two years after his/her resignation from Barnes Group, as well as a provision that the sales agent will not disclose any confidential information of Barnes Group at any time.

In every one of these cases, now extending over a twenty-year period, I have obtained injunctive relief enforcing the covenants-not-to-compete either by consent decree or by Order of Court after hearings/trials and sometimes appeals.

These cases have been tried in federal courts throughout the nation. They have required an extensive knowledge of the Federal Rules of Civil Procedure and local rules and practices in order to conduct accelerated discovery and a prompt trial.

The trial strategy and tactics are critical in these cases. The cases are generally tried within four to eight weeks of the filing of the complaint, and there is no time to correct any error.

A brief summary of one of these cases follows:

10. *Barnes Group Inc. v. David A. Robinson, III* -- This case was commenced and tried in the United States District Court for the Middle District of Georgia, Athens Division (District Judge Duross Fitzpatrick) (478-752-3500) (Civil Action No. 93-50-ATH(DF)).

The causes of action were as follows: Breach of Restrictive Covenants, Breach of Contractual, Fiduciary, and Common Law Duties, Misappropriation of Confidential Information, Breach of Georgia Trade Secret Act of 1990, and Unfair Competition.

After a period of intensive document production and depositions, the Court held a preliminary injunction hearing on July 28, 1993. Thereafter, by an Order dated August 5, 1993, the Court granted Barnes Group's motion for preliminary injunction and enjoined Robinson from selling to any customer to whom he had made one or more sales for Barnes Group in the last year of his employment with Barnes Group.

The seventeen (17) page decision is not reported.

No appeal was taken, and the case was thereafter settled by the entry of Consent Decree with certain terms binding upon defendant's new employer.

I represented, as chief trial counsel, the plaintiff, Barnes Group, along with Lisa G. Silverman, Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410. Lisa Silverman is now with Babst, Calland, Clements & Zomnir, P.C., Two Gateway Center, 8th Floor, Pittsburgh, PA 15222 (412-394-6520). Our Georgia counsel was Sylvia King Kochler, Nelson Mullins Riley & Scarborough, First Union Plaza, Suite 1400, 999 Peachtree Street NE, Atlanta, GA 30357 (404-817-6000), and former Of Counsel, Mary Louise Beardsley, then-Associate General Counsel and Secretary, Barnes Group Inc., 123 Main Street, Bristol, CT 06010 (203-583-7070).

Counsel for defendant, David A. Robinson, III, was Arthur H. Glaser, Self, Glaser & Davis, LLP, Suite 1650, Platinum Tower, 400 Interstate North Parkway, Atlanta, GA 30339 (770-563-9300).

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

None.

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

My wife and I were the plaintiffs in a personal injury case resulting from an automobile accident in which our automobile was struck in the rear while stopped at a red light on July 22, 1980. *Arthur J. Schwab, et ux. v. William A. Zeleznock, et ux.*, No. G.D. 82-11690 (Court of Common Pleas of Allegheny County). An arbitration hearing was held on February 5, 1987, resulting in an award of $19,999.99, plus delay damages of $8,499.95. Defendants appealed the arbitration award on or about February 26, 1987. A trial was held on October 13-15, 1987, resulting in a defense verdict.

My wife and I were plaintiffs in a lawsuit against Kettler Brothers, Inc., relating to a loss sustained as a result of the sale of a house in the Hidden Valley Resort. The case was an action for fraud, misrepresentation, and breach of Pennsylvania Unfair Trade Practices and Consumer Protection Law, and was filed in the United States District Court for the Western District of Pennsylvania at Civil Action No. 96-422, on March 8, 1996. The matter was settled pursuant to an Order of Court at the settlement conference before U.S. Magistrate Judge Francis X. Caiazza on June 4, 1997. Our counsel was Frederick N. Egler, Jr., formerly of Egler, Garrett & Egler, 2100 Lawyers Building, 428 Forbes Avenue, Pittsburgh, PA 15219. Fred is currently Chief Counsel - Litigation, PNC Financial Services Group, Inc., One PNC Plaza, 21st Floor, Fifth Avenue and Wood Street, Pittsburgh, PA 15222 (412-768-3312). Counsel for defendant was Gerard J. Cipriani, Cipriani & Werner, P.C., 2500 Two PNC Plaza, Pittsburgh, PA 15222 (412-281-2500).

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

If a conflict arises relating to my current law firm, Buchanan Ingersoll Professional Corporation, or a current client, I will comply with the Code of Judicial Conduct. I further will recuse myself as necessary and proper in any particular situation.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Yes. I would like to continue to serve on the Board of Trustees of Grove City College (non-compensated). I would like to continue to teach one evening course per semester at Grove City College for compensation within the applicable judicial guidelines. I would like to continue to serve as the trust protector under the Deed of Trust No. 1 (non-compensated) and as Executor of Estate No. 1 (non-compensated).

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

Please see attached copy of Financial Disclosure Report (dated 01/25/02) (7 pages).

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

Please see attached Financial Net Worth Statement (2 pages).

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

(1) If so, did it recommend your nomination?

Yes.

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

I was interviewed and approved by the Federal Judicial Nominating Commission of Pennsylvania in 2001. I was interviewed by the Office of Counsel to the President in 2001.

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

No.

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Schwab, Arthur J.	Dist. Court-Western D. of PA	01/25/2002
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check type)	6. Reporting Period
U.S. District Judge (nominee)	X Nomination, Date 01/23/2002 ___ Initial ___ Annual ___ Final	01/01/2001 to 12/31/2001
7. Chambers or Office Address	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.	
Buchanan Ingersoll, P.C. One Oxford Centre, 20th Floor Pittsburgh, PA 15219-1410	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Shareholder; Chief Counsel - Complex Litigation	Buchanan Ingersoll Professional Corporation (BIPC) (Law Firm)
2	Part-time Professor (evening course)	Grove City College
3	Trustee (non-compensated)	Grove City College

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2002	BIPC Severance Agreement (no actual agreement yet -- the amount will be a sum certain and will not be based upon the sharing of (cntd Part 8)
2	2002	BIPC Pension Plan and Profit Sharing Plan (no control)
3	08/07/01	Grove City College - Part-time Professor - evening course - intellectual property law (compensation will be within the applicable judicial (cntd Part 8)

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

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2001	BIPC compensation	$789,380
2	2000	BIPC compensation	$967,266
3			
4			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Schwab, Arthur J.	01/25/2002

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

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	EXEMPT		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☒ 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	Date of Report
Schwab, Arthur J.	01/25/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 ROLLOVER IRA No. 1:	D	Dividend/ Int	O	T	EXEMPT				
2 -SPDR Trust Unit Ser 1 (S&P 500 Index Fund)					EXEMPT				
3 -Blackrock Fund Core Bond Total Return					EXEMPT				
4 -RS Investment Mgmt - Microcap Growth Fund					EXEMPT				
5 -Fidelity Gov't Money Mkt					EXEMPT				
6 -Riverfront Capital Fund (A) See VIII					EXEMPT				
7 ROLLOVER IRA No. 2:	C	Dividend/ Int	M	T	EXEMPT				
8 -SPDR Trust Unit Ser 1 (S&P 500 Index Fund)					EXEMPT				
9 -Blackrock Fund Core Bond Total Return					EXEMPT				
10 -Fidelity Gov't Money Mkt					EXEMPT				
11 RETIREMENT PLAN No. 1:	D	Dividend/ Int	M	T	EXEMPT				
12 -Armada Equity Index Fund (S&P 500 Index Fund)					EXEMPT				
13 -Oak Associates Aggressive Growth Fund					EXEMPT				
14 -Putnam Income Fund (Money Market)					EXEMPT				
15 CASH BALANCE PENSION FUND	A	Interest	K	T	EXEMPT				
16 IRA No. 3 (spouse) - FIDELITY SPARTAN 500 INDEX FUND	A	Dividend	K	T	EXEMPT				
17 LIFE INSURANCE (CASH VALUE)	D	Interest	M	T	EXEMPT				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 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: (Col. C1, D3)	J=$15,000 or less 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: (Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Schwab, Arthur J.	01/25/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 RIVERFRONT CAPITAL FUND (B) See VIII		None	K	U	EXEMPT				
19 LAW FIRM CAPITAL ACCOUNT		None	K	U	EXEMPT				
20									
21									
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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 Schwab, Arthur J.	Date of Report 01/25/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

PART 2: Parties and Terms re: BIPC Severance, cntd ...profits earned by the Firm after my departure).

PART 2: Parties and Terms re: Grove City, cntd ...guidelines)(started part-time teaching on 01/21/02).

PART 7: Regarding Riverfront Capitol Fund -- I am inclined to invest all IRAs and Retirement Accounts in mutual funds, index funds, or money market funds, except the two existing investments in Riverfront Capital Fund (Limited Partnership with investment in CENTRIA). I have no managerial responsibilities therein -- solely passive investments.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Schwab, Arthur J.	Date of Report 01/25/2002

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	Executor (non-compensated)	Estate No. 1 (assets were distributed by 12/31/2001)
5	Trust Protector (non-compensated)	Deed of Trust No. 1 (sole asset is a life insurance policy)(my wife and I are not beneficiaries under this Trust)

PART 2. AGREEMENTS (cont'd.)

Line	Date	Parties and Terms
4	07/11/91	Annuity with a life insurance company through prior employer, Reed Smith LLP, beginning monthly on 01/01/2012.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Schwab, Arthur J.	01/25/2002

IX. CERTIFICATION

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

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

Signature Date 01/25/2002

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 (est.) (1/25/02)	$	13	000	Notes payable to banks-secured (1/25/02)	$	117	000
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities–add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule (12/31/01) (on personal residence only)		275	000
Real estate owned-add schedule (12/31/01) (personal residence only)		600	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property (est.)		460	000				
Cash value-life insurance (12/31/01)		103	000				
Other assets itemize: Law Firm Capital Account (12/31/01 - est.)		33	000				
Cash Balance Pension Fund (12/31/01 - est.)		24	000				
Retirement Account - (12/31/01)		238	000				
Rollover IRAs (12/30/01)		821	000				
Traditional IRA (12/12/01)		23	000				
Riverfront Capital (cost)		50	000	Total liabilities		392	000
				Net Worth	1	973	000
Total Assets	2	365	000	Total liabilities and net worth	2	365	000
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			NO	Are any assets pledged? (Add schedule)			NO

On leases or contracts			NO	Are you defendant in any suits or legal actions?			NO
Legal Claims			NO	Have you ever taken bankruptcy?			NO
Provision for Federal Income Tax			NO				
Other special debt			NO				

All IRAs and Retirement Accounts will be invested in mutual funds, index funds, or money market funds except the passive investment in Riverfront Capital Fund (Limited Partnership with investment in CENTRIA). CENTRIA is a Pennsylvania general partnership formerly known as Smith Steelite, which was formed in February 1993, upon the purchase of the assets of the E.G. Smith Products division of E.G. Smith Construction Products, Inc. and Steelite, Inc. CENTRIA is a designer, manufacturer and installer of metal wall, roofing and floor systems for commercial, industrial and institutional markets. I also have an annuity with a life insurance company, dated 07/11/91, and purchased by prior employer, with monthly payments beginning on 01/01/2012.

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

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

   Terrence Francis McVerry

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

   Judge, United States District Court for the Western District of Pennsylvania

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

   300 Fort Pitt Commons
   445 Fort Pitt Blvd.
   Pittsburgh, PA 15219
   (412) 350-1120

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

   September 16, 1943
   Pittsburgh, PA

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

Married:	August 13, 1966
Spouse:	Judith Marie McVerry
Maiden Name:	Judith Marie Kausek
Occupation:	Treasurer/Controller
Employer:	Santorum 2000 Campaign Committee 46 Ordale Boulevard Pittsburgh, PA 15228
Dependent Children:	None

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

Duquesne University School of Law
Pittsburgh, PA
September 1965 – June 1968
Juris Doctor in June 1968

Duquesne University
Pittsburgh, PA
September 1961 - June 1965
Bachelor of Arts in June 1965

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

2000 (January) – Present
Allegheny County, PA
300 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
Solicitor/Law Department Director

2000 (January) – Present
Community College of Allegheny County
800 Allegheny Avenue
Pittsburgh, PA 15212
Solicitor/General Counsel

May, 1998 – January, 2000
Court of Common Pleas of Allegheny County, PA
3rd Floor Frick Building
Pittsburgh, PA 15219
Judge

1989 – 1998
Grogan, Graffam, McGinley & Lucchino, P.C.
22nd Floor
Three Gateway Center
Pittsburgh, PA 15222
Attorney/Shareholder

1988 – 1989
Tucker Arensburg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
Attorney/Of Counsel

1987 – 1995
Neighborhood Legal Services Association
928 Penn Avenue
Pittsburgh, PA 15222
Director - unpaid

1984 – 1992
Sterling Title-Strip Graphics, Inc.
2100 E. Ohio Street
Pittsburgh, PA 15209
Director/Officer/Shareholder

1972 – 1988
McVerry, Baxter & Cindrich
McVerry, Baxter, Cindrich & Mansmann (1974)
1000 Lawyers Building
Pittsburgh, PA 15219
Attorney/Partner

Gondleman, Baxter, McVerry & Mansmann (1978)
6th Floor, Porter Building
Pittsburgh, PA 15219
Attorney/Shareholder

Gondleman, Baxter, McVerry, Mansmann & Cindrich (1981)
Gondleman, Baxter, McVerry, Mulvihill & Smith (1981)
Gondleman, Baxter, McVerry, Smith, Yatch & Trimm (1983)
718 Fifth Avenue
Pittsburgh, PA 15219
Attorney/Shareholder

There were changes in the firm name and reorganizations in 1974, 1978, 1981 and 1983.
The firm dissolved in 1988.

1970 – 1972
Mansmann, Beggy, McVerry & Baxter (defunct)
1801 Law & Finance Building
Pittsburgh, PA 15219
Attorney/Partner

1969 – 1973
District Attorney of Allegheny County
303 Courthouse
436 Grant Street
Pittsburgh, PA 15219
Assistant District Attorney (Prosecutor)

1966 – 1970
Eddy & Osterman
Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Law clerk (1966 – 1968)
Associate attorney (1969-1970)

1965 – 1966
Hills Tavern
Georgetown Road
Lawrence, PA 15055
Bartender

1965
MAC Coal Co.
c/o C. Teodori
Georgetown Road
Lawrence, PA 15055
Laborer

1965 (Summer)
Mosites Construction Co.
4839 Campbells Run Road
Robinson Township, PA 15108
Laborer

* See answer No. 12 for additional unpaid Board memberships of non-profit organizations.

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

Dates:	August 28, 1968 to June 5, 1969
Branch:	United States Army and Reserves
Rank:	Private (E-2)
Serial No.:	E170-34-7777
Discharge:	Honorable

Dates:	June 6, 1969 to October 21, 1974
Branch:	Pennsylvania Air National Guard
Rank:	Airman First Class, 1st Lieutenant and Captain
Serial No.:	170-34-7777
Discharge:	Honorable

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

1999	Allegheny County Bar Association Judiciary Committee	Rated Highly Recommended To Hold Federal Judicial Office
1999	Allegheny County Bar Association Family Law Section ```	Special Recognition Award as a Family Division Judge
1999	League of Women Voters	Good Government Award as a member of the Allegheny County Charter Drafting Committee
1989	Martindale-Hubbell	AV rating
1988	Neighborhood Legal Services Association	Equal Justice Under Law Award
1968	U.S. Army	Expert Rifleman

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

Allegheny County Bar Association
1969 – Present
Public Service Committee (1970s – exact dates unknown)
Legislative Committee (1980s – exact dates unknown)
Funding of Legal Services for Indigents Committee (Co-Chair 1995)

Pennsylvania Bar Association
1970 – Present
Legislative and Governmental Affairs Committee

American Bar Association
1975 – 1985

American Arbitration Association
1975 - Present

Pennsylvania Commission on Sentencing
1981 – 1988

Neighborhood Legal Services Association
1987 – 1995 (Treasurer 1994 – 1995)

Allegheny County Charter Drafting Committee
1997 – 1998

American Inns of Court
1998 – 1999 Master, University of Pittsburgh Chapter

Pennsylvania Conference of State Trial Judges
May 1998 – January 2000

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

PENNSYLVANIA

November 19, 1968	Superior Court of Pennsylvania, Court of Common Pleas of Allegheny County, Pennsylvania, and the United States District Court for the Western District of Pennsylvania
March 25, 1969	Supreme Court of Pennsylvania

1970 – 1998	Admission Pro Hac Vice (on a case by case basis) Court of Common Pleas of Beaver County, PA Court of Common Pleas of Butler County, PA Court of Common Pleas of Cambria County, PA Court of Common Pleas of Clarion County, PA Court of Common Pleas of Crawford County, PA Court of Common Pleas of Erie County, PA Court of Common Pleas of Fayette County, PA Court of Common Pleas of Lawrence County, PA Court of Common Pleas of Mercer County, PA Court of Common Pleas of Somerset County, PA Court of Common Pleas of Venango County, PA Court of Common Pleas of Washington County, PA Court of Common Pleas of Westmoreland County, PA
November 8, 1995	United States Court of Appeals for the Third Circuit

No lapses of membership in any court.

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

Civic Organizations:	United Mental Health, Inc. Board Member	 1983 – 1989
	Music for Mt. Lebanon Board Member	 1982 – 1988, 1998 – Present
	Performing Arts for Children Board Member	 1981 – 1988
	Mt. Lebanon Civic League Board Member	 1970's
Service Organizations:	Neighborhood Legal Services Association Board Member Treasurer	 1987 – 1995 1994 – 1995

	Duquesne University Alumni Association Board of Governors	1970's
	Duquesne University Law Alumni Association	1970 - Present
	Mt. Lebanon School P.T.A.	1980's
	Ancient Order of Hibernians* South Hills Division #1	1999 - Present
Religious Organization:	St. Anne Catholic Church Pre Cana and Homebound Eucharistic Minister Programs	1972 - Present

*The Ancient Order of Hibernians is an Irish cultural heritage organization which restricts membership to males of Irish birth or descent who are practicing Roman Catholics over the age of sixteen. There is a comparable affiliated organization for women, the Ladies Ancient Order of Hibernians. I have not taken any action to change the policies and practices of this organization.

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

I have not written or edited any books, articles, reports or other material which has been published. I have not delivered any speeches over the past ten years. However, during 1999 as I campaigned for election to the Court of Common Pleas, I presented remarks to various civic groups regarding my qualifications to be a judge, but no formal speeches.

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

I have never testified before a committee or subcommittee of the Congress.

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

The present state of my health is good. My last physical examination was on June 14, 2000.

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

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

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

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

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

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

1. James J. Menegazzi v. Holly A. Shields
147 Pittsburgh Legal Journal 213 (June 4, 1999)

Superior Court of Pennsylvania, No. 1824 Pittsburgh 1998
Judgment affirmed by Memorandum Opinion* of January 18, 2000.

After lengthy and extensive hearings regarding the rights of the parties for equitable distribution of marital property, alimony and counsel fees under the Divorce Code, a Masters Report and Recommendation was adopted by this Court over objections by defendant/wife-mother. Wife/mother was awarded 75% of the marital property and alimony for five (5) years. No counsel fee award was recommended or ordered. Wife/mother contended that her alimony award should have been substantially higher in amount and of permanent or indefinite duration because of her custody of the parties two children (ages 11 and 9), the latter of whom is a "special needs" child. He suffers from Williams Syndrome, a congenital genetic defect associated with mental and physical

developmental delays. Wife-mother believes she can only work twenty hours per week because of her son's needs, however, he is in school everyday with full aid and assistance.

The opinion details the reasoning of the court in determining that the earning capacity of this highly-educated mother is greater than twenty hours per week and also the limited applicability of the nurturing parent doctrine to mother's earning capacity in view of the full-time school support services provided to her son daily. In addition, mother's rejection of father's parenting role and the impact of this custodial attitude on the alimony award is also reviewed in conjunction with an alimony needs analysis.

2. Kristin S. Oxbrough v. Michael J. Oxbrough
147 Pittsburgh Legal Journal 255 (July 16, 1999)

Superior Court of Pennsylvania No. 2177 Pittsburgh 1998
Appeal of Kristin S. Oxbrough discontinued at request of appellant on February 25, 1999.

Plaintiff/mother and defendant/father resided together in Tennessee since their marriage in 1994 with their two minor children, ages 2 and 3. On September 19, 1998, mother unilaterally and without notice to father "fled the marital residence in Tennessee" and with the minor children relocated to Allegheny County, Pennsylvania, mother's home prior to marriage.

Five days later, on September 24, 1998, mother filed a Complaint for Custody in the Court of Common Pleas of Allegheny County. On October 13, 1998, counsel for defendant/father presented a Motion to Dismiss Custody Complaint arguing that Pennsylvania lacked jurisdiction to adjudicate the custody claim. On October 23, 1998, after review of the pleadings, oral argument of counsel and a telephone communication with a judge in Tennessee (where father had also filed a custody action), this Court ordered that mother's Complaint for Custody be dismissed for lack of jurisdiction.

The opinion details the factual and legal basis upon which the Court concluded that there was no significant connection of the children with this Commonwealth and therefore Pennsylvania lacked jurisdiction under the Uniform Child Custody Jurisdiction Act (23 Pa. C.S.A. § 5348(a)) to adjudicate the custody claim of mother.

3. **Rosalie Cohen v. Leonard Cohen**
147 Pittsburgh Legal Journal 258 (July 16, 1999)

Superior Court of Pennsylvania, No. 2103 Pittsburgh 1998
Judgment affirmed by Memorandum Opinion* of January 14, 2000.

Plaintiff/wife and defendant/husband separated in 1965 and an alimony order of $100.00 per month was entered in wife's favor against husband. For the next 27 years, husband did not pay the alimony and wife did not initiate or pursue any legal action to enforce payment despite knowing husband's whereabouts.

In 1992, wife petitioned the court to have the alimony arrearages ($32,400.00) reduced to judgment with interest at market rate and requested a significant counsel fees award. Hearings before a Master took place periodically over the next several years followed by a recommendation in 1998 that laches precluded an award of interest for the 27 year period when wife didn't pursue enforcement and that an interest rate of 6% would be applied to all post-1992 alimony arrearages. A modest counsel fee award was included for husband's obdurate and vexatious conduct.

The opinion confirms the application of the doctrine of laches to bar wife's claim for prejudgement interest based upon her failure to exercise due diligence to pursue collection of the alimony payments which resulted in prejudice to husband. The statutory interest rate in Pennsylvania is six (6%) percent (41 P.S. § 202) and nothing in the Divorce Code changes that rate for alimony awards. Also addressed are counsel fees, unjust enrichment of husband and his limited ability to pay the judgment.

4. **Frank J. DeMarco v. Barbara A. DeMarco**
148 Pittsburgh Legal Journal 77 (April 7, 2000)

Superior Court of Pennsylvania No. 1380 WDA 1999
Appeal quashed as interlocutory. Per curiam January 27, 2000.

Following trial, the court entered an order which adjudicated the rights of the parties for equitable distribution of marital property, alimony and counsel fees under the Divorce Code. The most significant asset of the marital estate was plaintiff/husband's pension from the Pittsburgh Police Department. Although the pension became vested with full benefit eligibility at age fifty with twenty years of service, plaintiff/husband at age 52 intended to continue his employment as a city police officer to an indefinite time in the future. Maintaining such employment into the indefinite future would have the effect of reducing the value of the marital component of the pension resulting in detriment to defendant/wife. The major issue was the date on which the pension was to be valued for marital property purposes.

The opinion sets forth the rationale and justification for the ruling of the court that the value of the marital component of plaintiff/husband's pension should be established on the date of vesting and full benefit eligibility (age fifty with twenty years of service) rather than some speculative future date of retirement.

5. Marlyn Overton v. James Overton
148 Pittsburgh Legal Journal 89 (April 7, 2000)
Appeal withdrawn by appellant.

Following a trial, the court entered an order which adjudicated the rights of the parties for equitable distribution of marital property, alimony and counsel fees under the Divorce Code. Marital property was equitably distributed and alimony was awarded to plaintiff/wife-mother for a short term of 2½ years. A child support order was also established.

Several months later, newly revised Child Support Guidelines promulgated by the Pennsylvania Supreme Court became effective statewide. Plaintiff/mother petitioned the court for an increase in child support based on the new guidelines. Anticipating the likelihood of an increase in child support, defendant/father petitioned for a modification and decrease of the alimony award which was denied. The opinion details the circumstances under which an alimony order is subject to modification and why plaintiff/mother's request for an increase in child support due to a revision of guidelines does not constitute a basis for modification of an alimony award.

6. Kelly Wilton v. David Wilton
148 Pittsburgh Legal Journal 92 (April 7, 2000)

Superior Court of Pennsylvania, Nos. 1180, 1181 WDA 1999
Judgment affirmed in part and dismissed in part by Memorandum Opinion* of April 25, 2000.

Plaintiff/mother sought an increase in child support which a hearing officer recommended based upon defendant/father's increased earning capacity. Defendant/father contended that the parties divorce settlement agreement which established a child support payment amount was binding and not modifiable and that his income did not justify an increase in child support.

The opinion iterates the clear statutory and case law of Pennsylvania that child support agreements "shall be subject to modification by the court upon a showing of changed circumstances" (23 PA C.S.A. § 3105(b).

Also discussed are the circumstances under which one's earning capacity rather than

alleged income is the appropriate basis for a child support order, contempt for enforcement of such an order and the imposition of security to assure compliance with an order of court.

7. Kimberly Holleran v. Terrence Holleran
148 Pittsburgh Legal Journal 95 (April 21, 2000)

Superior Court of Pennsylvania, No. 1663 WDA 1999
Appeal dismissed for Appellant's failure to file a brief.

Plaintiff/mother who resides permanently in Florida, sought primary physical custody of the parties two daughters, ages 15 and 8, who reside with father in Allegheny County, Pennsylvania. The parties separated in December, 1994 and agreed upon shared custody of the children. In January, 1995 mother petitioned the court to permit her to relocate with the children to Florida. After a hearing, the court denied mother's request in July 1995. In June 1997 mother moved to Florida by herself and the children remained here with father. In February, 1998 mother again petitioned the court and requested primary custody of the children in Florida which was denied following a two day trial.

The opinion details the reasoning of the court in concluding that the best interests of the children would be served by remaining in the primary physical custody of their father in Pennsylvania. Even though the teenage daughter expressed a strong desire to live with her mother in Florida, the preference of a child is but one factor of many which must be considered by a court in determining the best interests of a child. Similarly, a court is not compelled to adopt the custody recommendation of a court-appointed psychologist who wasn't presented to testify as a witness at trial. The overall best interests of the children is the polestar in custody proceedings and all relevant factors must be taken into account when making a custody determination.

8. Sherri D. Hicks v. Joseph E. Kubit
148 Pittsburgh Legal Journal 103 (April 21, 2000)

Superior Court of Pennsylvania, No. 1734 WDA 1999
Judgment affirmed by Memorandum Opinion* of August 4, 2000.

Plaintiff/wife filed exceptions to the report and recommendation of a Master regarding the respective claims of the parties for equitable distribution of marital property and alimony. Wife's primary objections related to the denial of her alimony claim and the allocation to her of responsibility for payment of a significant percentage of her personal education debt which was incurred individually, but during marriage.

The opinion addressed the difference between individual debt and marital debt in the context of education loans which inure exclusively to the benefit of one party to the marriage. Irrespective of the ultimate characterization of the education debt as marital or not, our statutory scheme of factors to be considered in equitable distribution of marital property justified the allocation of the debt between wife and husband. Also discussed are the statutory factors to be considered in the award or denial of alimony.

9. Lisa Ann Rader v. Howard A. Zaren, M.D.
148 Pittsburgh Legal Journal 104 (April 21, 2000)

Superior Court of Pennsylvania, Nos. 1709 and 1768 WDA 1999
Judgment affirmed in part and reversed in part by Memorandum Opinion*
of October 2, 2000.

This was a hotly contested child support case in which plaintiff/mother petitioned for an increase in child support for the parties two sons, ages 13 and 11, who reside with her in New Jersey. The defendant/father who resides in Pittsburgh with his new wife and child, sought a decrease in child support payments. The primary issues were the income of father (a highly compensated surgical oncologist), the reasonable needs of the children and a counsel fee award.

A Masters Report and Recommendation found father's 1998 income to be $79,366.00 per month while mother was imputed an earning capacity of $874.00 per month. The reasonable needs of the children were assessed at $11,177.00 per month and father was directed to pay ninety-nine (99%) percent of same. Counsel fees of $10,000.00 were awarded to mother.

Upon review of the record, this court increased father's 1998 income to $119,783.00 per month by including a non-taxable payment of $485,000.00 which father received from his former employer to fund start-up costs and expenses of his new medical professional corporation ($485,000 ÷ 12 months = $40,417 + $79,366 = $119,783). The Master's recommendations were affirmed in all other respects, i.e. mother's earning capacity, childrens reasonable needs and the counsel fee award. Also, arrearages were ordered to be paid within thirty days.

The opinion details the reasoning of the court for including in father's 1998 income the additional $485,000 payment which father received from his former employer. Father may have used that money to establish his medical practice, however, the use to which one applies money received is not determinative as to whether the money constitutes income for support purposes under the applicable statute. See 23 PA C.S.A. § 4302 which includes in the definition of income "other entitlements to money or lump sum awards, without regard to source ... and any form of payment due and collectible by an individual regardless of source." The court concluded that the definition of income was broad enough to include this payment. Also addressed are the childrens reasonable needs

as related to the parents' ability to pay, statutory authority for the counsel fee award and father's ability to pay arrears within thirty days.

10. Frederick A. Kress v. Kay M. Kress
Court of Common Pleas of Allegheny County, PA No. FD 95-11325

Superior Court of Pennsylvania No. 02246 Pittsburgh 98
Judgment affirmed by Memorandum Opinion* February 1, 2000.

The primary issue in this action involved the determination of plaintiff/father's disposable income for child support purposes. In calculating father's net income, the hearing officer added back to his earnings certain business depreciation deduction amounts reflected in the tax returns of two business partnerships (Kress Service Center and Kress Enterprises) which father owns with his father. Testimony established that the actual cash expenditures for equipment which constituted the business depreciation deductions were not made by father or Kress Service Center, but rather individually made by father's father, an owner/partner who does not receive any financial distributions or profits from the partnership.

The opinion upholds the findings and action of the hearing officer based upon the case of Cunningham v. Cunningham, 548 A.2d 613 (Pa. Super 1998) in which the Superior Court of Pennsylvania held that depreciation deductions should be excluded from an individual's gross income only where such deductions are reflective of an actual reduction in personal income of the person claiming the deductions. In this instant matter, the cash outlay was from father's father and plaintiff/father clearly did not experience a reduction in personal income as a result. Accordingly, the amounts added back to father's earnings were appropriate in the determination of his disposable income under the circumstances.

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

1. James Christopher Post v. Kathryn Nolan Post
Court of Common Pleas of Allegheny County, No. FD 96-8633-006

Superior Court of Pennsylvania No. 882 WDA 1999
Judgment reversed in part and affirmed in part by Memorandum Opinion*
of March 2, 2000.

Following a trial on the respective claims of the parties for equitable division of marital property, alimony and counsel fees under the Divorce Code, I issued Findings and an Order on March 5, 1999. Counsel for plaintiff requested clarification as to the effective date for the commencement of alimony and child support and I affirmed the date of the original Order, March 5, 1999, as the effective date. Unfortunately, I was in error as an order for alimony cannot become effective until the parties are divorced and the parties were not yet divorced as of March 5, 1999. The Superior Court reversed only this aspect of my Order and remanded for the entry of a corrected effective date. All other aspects of the trial court decision were affirmed.

2. Lisa Ann Rader v. Howard A. Zaren, M.D.
148 Pittsburgh Legal Journal 104 (April 21, 2000)

Superior Court of Pennsylvania, Nos. 1709 and 1768 WDA 1999
Judgment affirmed in part and reversed in part by Memorandum Opinion*
of October 2, 2000.

See opinion summary in prior section (a) (9).

On appeal before the Superior Court of Pennsylvania, father argued and the Superior Court agreed that in the trial court's analysis of the childrens' reasonable needs "inadvertantly failed to delete $33 per month toward this expense" for medical and dental care of the children upon which the parties had agreed. Accordingly, through an oversight, I made a finding that the reasonable needs of the children were $11,177.00 per month, rather than $11,134.00 per month. The Superior Court reversed my determination of the childrens' reasonable needs and remanded this aspect of the matter back to the trial court for an adjustment of $33 in the reasonable needs provision of the support order. All other aspects of the trial court decision were affirmed.

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

None

*Memorandum opinions of the Superior Court of Pennsylvania are not officially reported or published. Copies are provided.

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

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

Public Offices Held:

1969 – 1973	Assistant District Attorney of Allegheny County. Appointed by Robert W. Duggan, District Attorney of Allegheny County , PA.
1978 – 1990	Elected member of the Pennsylvania House of Representatives for six two year terms.
1981 – 1988	Legislative member of the Pennsylvania Commission on Sentencing. Appointed by the Honorable H. Jack Seltzer, Speaker of the Pennsylvania House of Representatives.
1997 – 1998	Member of the Allegheny County Charter Drafting Committee. Appointed by the Honorable Robert Jubelier, President Pro Tempore of the Pennsylvania Senate.
2000 – Present	Solicitor of Allegheny County, PA (Law Department Director). Appointed by James C. Roddey, Chief Executive of Allegheny County with confirmation by the County Council.

Unsuccessful Candidacies For Elective Public Office:

1974	Lost primary election for nomination to the office of District Justice of the Peace
1999	Lost general election for Judge of the Court of Common Pleas of Allegheny County, PA

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

I was a candidate in six successful political campaigns and was elected to the Pennsylvania House of Representatives (1978 – 1990). I have also been a candidate in two unsuccessful campaigns, one for District Justice in 1974 and one for Judge of the Court of Common Pleas in 1999. During my years as an elected public official, I often attended events to assist or help advance the campaigns of fellow candidates who were seeking office at varying levels, however, I had no specific title or official fundraising role in such campaigns. In the Pennsylvania gubernatorial campaign of 1986, however, I was a titular Allegheny County Co-Chairman of the Mike Fisher Campaign for Lt. Governor. I assisted others in organizing and attending a number of public and fundraising events for the Scranton/Fisher ticket throughout Allegheny County and specifically in my legislative district. The campaign spanned the year 1986 and ended unsuccessfully in November 1986.

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

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

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

I did not serve as a clerk to a judge.

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

I have never engaged in the practice of law alone.

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

1968 – 1970
Eddy & Osterman
Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Associate Attorney

1969 – 1973
District Attorney of Allegheny County, PA
303 Courthouse
436 Grant Street
Pittsburgh, PA 15219
Assistant District Attorney (Prosecutor)

1970 – 1972
Mansmann, Beggy, McVerry & Baxter (defunct)
1801 Law & Finance Building
Pittsburgh, PA 15219
Attorney/Partner

1972 – 1988
McVerry, Baxter & Cindrich
McVerry, Baxter, Cindrich & Mansmann (1974)
1000 Lawyers Building
Pittsburgh, PA 15219
Attorney/Partner

Gondleman, Baxter, McVerry & Mansmann (1978)
6th Floor, Porter Building
Pittsburgh, PA 15219
Attorney/Shareholder

Gondleman, Baxter, McVerry, Mansmann & Cindrich (1981)
Gondleman, Baxter, McVerry, Mulvihill & Smith (1981)
Gondleman, Baxter, McVerry, Smith, Yatch & Trimm (1983)
718 Fifth Avenue
Pittsburgh, PA 15219
Attorney/Shareholder

There were changes in the firm name and reorganizations in 1974, 1978, 1981 and 1983. The firm dissolved in 1988.

1988 – 1989
Tucker Arensburg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
Attorney/Of Counsel

1989 – 1998
Grogan, Graffam, McGinley & Lucchino, P.C.
22nd Floor - Three Gateway Center
Pittsburgh, PA 15222
Attorney/Shareholder

1998 (May) – 2000 (January)
Court of Common Pleas of Allegheny County, PA
3rd Floor Frick Building
Pittsburgh, PA 15219
Judge

2000 (January) – Present
Allegheny County, PA
300 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
Solicitor/Law Department Director

2000 (January) – Present
Community College of Allegheny County
800 Allegheny Avenue
Pittsburgh, PA 15212
Solicitor/General Counsel

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

1969 – 1973 My practice concentration was criminal law as an Assistant District Attorney prosecuting general criminal cases for a year and thereafter primarily jury trials of major felonies and homicides. I tried hundreds of bench and jury trials over these years. Occasionally I had appellate court argument opportunities and enjoyed these experiences. I also engaged in private general civil practice on a part-time basis during these years.

1973 – 1989 I was engaged in a broad based general civil practice including representation of individuals in personal injury and contract litigation, real estate, family related matters including divorce, custody, support and equitable distribution of marital property, estate planning and administration and small business and professional corporations.

1979 – 1990 During this period, I was a member of the Pennsylvania House of Representatives and my practice was more heavily concentrated and specialized in family law and estate matters along with ongoing business clients. I maintained an active law practice during my years of legislative service.

1989 – 1998 I specialized in civil litigation trial practice with concentration in the representation of doctors, hospitals and other healthcare providers in the defense of professional negligence/medical malpractice lawsuits throughout western Pennsylvania. My representation would commence with notice of the claim and continue through ultimate resolution either by voluntary discontinuance, non prosequitur, summary judgment, negotiated settlement, jury trial to verdict and/or appeal.

May 1998 – January 2000 I served as a judge on the Court of Common Pleas of Allegheny County, Pennsylvania, assigned to the Family Division.

January 2000 - Present As Solicitor of Allegheny County, the focus of our law department is in the municipal law field, however, I continue to practice civil litigation while managing the department.

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

1969 – 1973 My primary client was the Commonwealth of Pennsylvania through which all state and local criminal prosecutions are advanced with the assistance of law enforcement agencies and civilian witnesses. I specialized in criminal law as a prosecutor. In my part-time general civil practice my clients were individuals.

1973 – 1989 My clients were primarily individuals, professionals and small business entrepreneurs. I concentrated in general civil, family and probate litigation.

1989 – 1998 Our firm's clients were primarily healthcare providers through their insurance carriers and the Pennsylvania Medical Professional Catastrophe Loss Fund. I specialized in the defense of healthcare providers in professional medical negligence malpractice claims.

2000 – Present The County Law Department represents all branches and departments of the government of Allegheny County, Pennsylvania. I also serve as solicitor/general counsel to the Community College of Allegheny County. I personally concentrate in the fields of civil litigation, municipal law and management of the department attorneys and personnel.

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

1969 – 1973 I appeared in court on a regular basis in the prosecution of criminal bench and jury trials every week.

1973 – 1978 I appeared in court on a regular basis through motions court, arbitration, bench or jury trials of civil matters and/or bench motions or hearings on family or estate matters virtually every week.

1979 – 1990 I appeared in court on a less regular, but more than occasional basis during my years in the legislature. My availability to appear in court was limited to bench motions and hearings on family, estate and civil matters several times per month with a family or civil court jury trial once or twice a year.

1990 – 1998 I appeared in court on a regular basis as my concentration was exclusively civil litigation trial practice. Motions court presentations occurred weekly and complete jury trials were presented approximately four times per year. Preparation of civil matters for trial was continuous with ongoing pretrial resolution efforts to discontinue actions, negotiate settlements, summary judgment motion arguments or ultimate trial and appeal.

1998 – 1999 As a judge in the Court of Common Pleas, I presided over non-jury trials, hearings, arguments and motions every week for nineteen months.

2000 – Present As Solicitor of Allegheny County, my personal court appearances are less frequent than in prior years, however, I'm in court every month on motions, arguments or hearings.

(2) Indicate the percentage of these appearances in

(A) federal courts: 10%

(B) state courts of record: 85%

(C) other courts: 5%

(3) Indicate the percentage of these appearances in:

(A) civil proceedings: 80%

(B) criminal proceedings: 20%

(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.
1969 – 1973 As a sole prosecutor, I tried hundreds of criminal bench trials and approximately eight-twelve jury trials of major felonies and homicides each year during this period.

1973 – 1978 I tried numerous criminal and civil bench and jury trials to verdict at least twice per month during this period along with family court motions and hearings on a weekly basis. I was sole counsel for my client in virtually all instances.

1979 – 1990 While a member of the legislature, my civil trial practice included only four or five jury trials to verdict over this period. I would try several civil arbitration hearings and bench trials each year. My appearances on family court motions, hearings and trials continued on a regular weekly basis.

1990 – 1998 As sole counsel, I represented healthcare providers in approximately four civil jury trials to verdict per year during this period.

1998 – 1999 As a judge in the Court of Common Pleas, I presided over and decided the verdict in approximately fifty non-jury trials.

2000 – 2001 Along with other attorneys in the law department, I have tried four non-jury civil trials and presented numerous arguments.

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

Jury: 60%

Non-jury: 40%

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

I have never practiced before the United States Supreme Court.

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

During the 1970's and early 1980's, I was a volunteer attorney on the indigent divorce and mental health civil court commitment panels of the Allegheny County Bar Association. We provided free legal advice and representation to clients in uncontested divorce cases who met certain income guidelines and were unable to afford to engage private counsel. These case assignments averaged one or two per month. I also volunteered representation for indigent mental health clients who were the subject of involuntary civil court commitment actions. Interviews would take place at the hospital followed by a hearing in Orphan's Court. These assignments approximated one per month.

From 1987–1995, I was a member of the Board of Directors of the Neighborhood Legal Services Association which provides free legal services to the indigent and disadvantaged members of our community. This legal representation includes, but is not limited services for landlord/tenant matters, consumer protection and credit claims, social security, veterans benefits, victims of domestic violence, child support, custody and dependency proceedings, etc. I have also since worked to maintain and continue government funding for these legal services for the less fortunate members of our society.

In addition, I was a member of the Pennsylvania House of Representatives from 1979-1990 and involved in serving the needs of the disadvantaged through constituent service, legislation and the annual state budget appropriations.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

1. In re Estate of Fay Earhart Dobson, a/k/a Fay E. Dobson

   Appeal of Mary Virginia Dobson, Sarah Jane Troy and the Catholic-Negro American Mission Board

Date of Representation;
1977 - 1983
Four days of trial in January and February, 1978

Appeal argued before the Supreme Court of Pennsylvania
March 6, 1980

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania before Judge Hugh Boyle (deceased) without a jury.

Supreme Court of Pennsylvania – Court en banc
Argued before:
The Honorable Michael J. Eagen, Chief Justice
The Honorable Henry X. O'Brien, Justice
The Honorable Samuel J. Roberts, Justice
The Honorable Robert N.C. Nix, Justice
The Honorable Rolf Larson, Justice
The Honorable John P. Flaherty, Justice
The Honorable Bruce Kaufmann, Justice

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Trial co-counsel	Honorable Robert J. Cindrich U.S.P.O and Courthouse Pittsburgh, PA 15219 (412) 208-7370
Appeal co-counsel	Jane Dale Ressler, Esquire (deceased)
Executor	Abraham Fishkin, Esquire (deceased)
Counsel for Executor	Alice Dobson Fishkin, Esquire (retired – address unknown) Clyde P. Baily, Esquire (deceased)

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. 1377 of 1977 – filed in 1977
In the Court of Common Pleas of Allegheny County (Orphans Division)

417 A2d 138 (PA 1980)
In the Supreme Court of Pennsylvania

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

This action arose through objections to an executor's valuation and redemption sale of stock to a closely held corporation which the decedent had bequeathed by will to her four daughters and a charity. Our office represented the charity and two daughters who objected to the value ascribed to the stock and sought a surcharge against the executor. The executor was the attorney for the estate and married to one of the decedent's four daughters who was also an attorney and an individual shareholder of the closely held subchapter S corporation to which the stock had been redeemed.

The assets of the corporation consisted primarily of real estate which was readily appraisable to establish a value for the corporation's stock. However, the executor refused to have the real estate appraised, and in valuing the stock for estate purposes, he theorized its sale at an estimated price and inappropriately deducted hypothetical capital gains tax and the decedent's cost basis in arriving at a final value. We objected and proved through a real estate appraiser and certified public accountant that the stock was grossly undervalued. However, the trial court upheld the discretionary valuation of the stock by the executor and refused to surcharge him.

On appeal, the Pennsylvania Supreme Court reversed the lower court with respect to the executor's valuation methodology holding that it was improper to deduct capital gains tax and the decedent's cost basis from the potential sales price of the real estate. The court remanded the case for calculation of a new value of the stock and assessment of a surcharge upon the executor.

After remand and protracted proceedings before a different lower court judge, the stock value was recalculated correctly and a surcharge was assessed against the executor. Unfortunately, the surcharge was never collected as the executor filed for bankruptcy and later died without assets.

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

Mary Virginia Dobson
Sarah Jane Troy
Catholic-Negro American Mission Board

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

I personally represented our clients throughout the administration of the estate and prepared the initial objections to the executors methodology and valuation of the stock in addition to raising the conflict of interest in the relationship between the executor and his attorney/wife, co-heir of the estate. At trial my partner presented our real estate valuation expert and I cross-examined the executor, presented our accountant expert and argued the closing. I also argued the post hearing exceptions before the lower court en banc. In the appeal to the Supreme Court of Pennsylvania my associate and I prepared the brief and I presented oral argument.

Although the Supreme Court ruled in favor of our clients and remanded the case for the calculation and imposition of a surcharge on the executor, no money was ever recovered from the executor. After protracted proceedings before a new lower court judge, a surcharge was ultimately assessed against the executor, however, it became uncollectable due to the bankruptcy and ultimate death of the executor who lacked attachable assets.

2. Elizabeth A. Sommers, individually and on behalf of the Estate of Glenn F. Sommers, Deceased v. John Robinson, M.D.

Date of Representation;
1996 - 1998
Trial on January 16, 20, 21, 22, 23 and 26, 1998

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Robert Gallo

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiff Elizabeth A. Sommers

John Gismondi, Esquire
606 Grant Building
Pittsburgh, PA 15219
(412) 281-2200

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 96-012954 – filed in 1996
In the Court of Common Pleas of Allegheny County, Pennsylvania

Superior Court of Pennsylvania – No. 1880 Pittsburgh 1998
Judgment reversed and remanded by Memorandum Opinion* on September 3, 1999.

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

Plaintiff's decedent was brought to the hospital emergency room with severe chest pain, respiratory distress and what was later determined to be diabetic shock. He had a history of two (2) broken ribs ten (10) days earlier. He was diagnosed upon X-ray as having a right hemothorax and my client, a cardiothoractic surgeon, was consulted for the placement of a chest tube to drain the hemothorax. Upon placement of the chest tube, a large volume of dark bloody fluid was drained and the patient immediately went into cardiac arrest. Vigorous cardiopulmonary resuscitation efforts persisted for one-half hour afterwhich the patient was pronounced dead. During CPR, an additional large volume of dark bloody fluid drained from the patient's chest tube.

Plaintiff contended that the chest tube was inappropriately placed by the surgeon and ruptured the patient's liver causing him to bleed to death and that the 4600 cc of blood was much more than the capacity of the chest cavity and virtually all of the patient's blood. We contended that the chest tube was properly placed and that the drainage was from internal bleeding due to rib fractures over the previous week and major bleeding during CPR which fractured an additional five (5) ribs and lacerated the liver.

I presented the pathologist that performed the autopsy who testified that she personally observed the chest tube in the pleural space and not in the liver. After this witness left the jurisdiction, counsel for plaintiff attempted to challenge the pathologist's credibility with autopsy photographs of the decedent which purportedly did not depict the presence of a chest tube protruding from the body. Upon my objection, the court did not permit the photographs to be exhibited to the jury because counsel for plaintiff did not attempt to exhibit the photographs while the pathologist was on the witness stand and she was no longer present to explain.

The jury returned a defense verdict in favor of my client, Dr. Robinson. Upon plaintiff's appeal, however, the Superior Court of Pennsylvania granted a new trial over the issue of the autopsy photographs having not been exhibited to the jury. A copy of the opinion of the Superior Court at No. 1880 Pittsburgh 1998 is provided.

*Memorandum Opinions of the Superior Court of Pennsylvania are not officially reported or published. A copy is provided.

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

John Robinson, M.D.

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

I was sole counsel to Dr. Robinson from the initial filing of the complaint through discovery, verdict at trial and post trial motions. Another attorney from my former firm represented Dr. Robinson in the appeal as I had been appointed to a judgeship on the Court of Common Pleas in May 1998. Upon remand the case was tried again before a jury in March 2001 and another defense verdict in favor of Dr. Robinson was rendered. Post verdict motions were denied and no appeal was filed.

3. Michael J. Blackwell v. Charles Lebovitz, M.D.

Date of Representation;
1990 - 1997
Trial on January 27 and 28, 1997

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Joan Orie Melvin

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiff Michael J. Blackwell

Wendel G. Freeland, Esquire
1111 Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
(412) 471-5287

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 90-00647 – filed in 1990
In the Court of Common Pleas of Allegheny County

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

Dr. Lebovitz performed bilateral hernia repair surgery upon Mr. Blackwell on January 26, 1989. The patient later developed recurrent pain in the right groin and was ultimately diagnosed as having suffered a scar tissue entrapped ilioinguinal nerve. The patient went through a great deal of pain therapy and ultimately had the scar tissue resected by another surgeon a year later. His pain allegedly persisted thereafter and he again underwent surgery with yet another surgeon for release and rerouting of the nerve in 1991. Plaintiff claimed negligent performance of the initial surgery against Dr. Lebovitz and alleged lack of his informed consent as to this particular risk of surgery, i.e. scar tissue nerve entrapment.

At trial, counsel for plaintiff failed to present an expert witness to opine as to the applicable standard of medical care for informed consent to surgery and the failure of the doctor to perform in accordance with the standard of care. Instead, counsel attempted to satisfy his burden for expert opinion by calling Dr. Lebovitz as per cross-examination which was ineffective due to extensive pre-trial preparation in anticipation of this tactic. I argued that counsel for plaintiff failed to meet his burden as to the probability of occurrence of the risks inherent in this surgery and without such probability testimony, the jury must not be allowed to speculate as to what risks of this surgery are material.

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

Charles Lebovitz, M.D.

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Dr. Lebovitz from the initial filing of the complaint through discovery and trial. At the conclusion of the presentation of plaintiff's witnesses and testimony, I moved for a compulsory nonsuit on the basis that plaintiff had not met his burden for expert medical testimony regarding the medical standard of care for informed consent to surgery. The court granted the defense motion and the trial ended. No post trial motions or appeal were filed.

4. Darlynn Miller and Ralph Miller, her husband v. Ruthellen Weeks, M.D., Ralph Nazzaro, M.D. and Titusville Area Hospital

Date of Representation;
1993 - 1997
Trial on February 12-16, 1996

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Crawford County, Pennsylvania
before Judge Gordon Miller

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiffs Darlynn Miller and Ralph Miller

James Flaherty, Esquire
Bruce Getsinger, Esquire
P.O. Box 196, Route 322
Cranberry, PA 16319
(814) 677-6000

Counsel for Defendant Ralph Nazzaro, M.D.

Terry C. Cavanaugh, Esquire
Dickie, McCamey & Chilcote
Suite 400 – Two PPG Place
Pittsburgh, PA 15222
(412) 281-7272

Counsel for Defendant Titusville Area Hospital

Patrick L. Mechas, Esquire
Burns, White and Hickton
2400 Fifth Avenue Place
Pittsburgh, PA 15222
(412) 394-2587

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. AD 1993-783 – filed in 1993
In the Court of Common Pleas of Crawford County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

Dr. Weeks was wife-plaintiff's obstetrician and performed successful C-section surgery upon her with Dr. Nazzaro assisting on August 12, 1991. The surgery was uneventful and a healthy baby was delivered.

Two days later, upon routine x-ray, a metallic string was noted in the patient's upper abdomen which proved to be a retained surgical sponge which was removed through a second surgical procedure. During this second operation in which Dr. Weeks assisted Dr. Nazzaro, wife-plaintiff suffered an injury to her nose from the placement of a nasogastric tube by the hospital anesthetist. The parties sought damages for negligent performance of the surgeries against the three defendants.

An issue in this case involved whether the retained surgical sponge was from the C-section surgery or from previous abdominal surgeries which the patient had undergone. Also at issue was the responsibility for properly counting all sponges used during surgery and the responsibility for the patient's nose injury during the second surgery.

On behalf of Dr. Weeks, we contended that the retained sponge was not from the C-section surgery as the hospital nurses had reported an accurate count of all sponges used before the patient's incision was closed and a doctor is entitled to rely on the nurses' count of sponges. Also, as to the second surgery nose injury, Dr. Weeks was an assisting surgeon and had nothing to do with placement of the nasogastric tube. Numerous legal issues arose during this trial regarding admissibility and extent of testimony of expert witnesses, the doctrines of res ipsa loquitur and captain of the ship and the effect of a pre-trial joint tortfeasor release granted to the hospital by plaintiffs.

Ultimately, the court granted a nonsuit to Dr. Weeks on the nose injury claim afterwhich the jury granted plaintiffs a verdict of $37,000 against Dr. Nazzaro and the hospital.

As to the retained surgical sponge, the court refused to permit our expert witness to testify that it could have been left from a prior surgery. The jury awarded a verdict in favor of plaintiffs against Dr. Weeks and the hospital jointly in the amount of $63,000.

(c) the party or parties whom you represented; and

Ruthellen Weeks, M.D.

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Dr. Weeks from the initial filing of the complaint through discovery and trial. Post trial motions were filed on behalf of Drs. Weeks and Nazzarro and numerous allegations of trial court error were argued vigorously, but ultimately denied. Thereafter, an appeal to the Superior Court became obviated on behalf of my client as the case was resolved through a confidential negotiated compromise settlement of the verdict.

5. Kenneth Lee v. John Robinson, M.D. and Western Pennsylvania Hospital

Date of Representation;
1992 - 1997
Trial on December 2, 3 and 4, 1996

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Joan Orie Melvin

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiff Kenneth Lee

Fred Jug, Esquire
4990 USX Tower
600 Grant Street
Pittsburgh, PA 15219
(412) 255-6500

Counsel for Defendant Western Pennsylvania Hospital

Richard J. Federowicz, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburgh, PA 15222
(412) 281-7272

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 92-21575 – filed in 1992
In the Court of Common Pleas of Allegheny County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

On December 17, 1990, Dr. Robinson performed a repeat left carotid artery angioplasty upon plaintiff at West Penn Hospital following the same surgery which had been performed ten (10) years earlier. The surgery and post-op exams in the hospital and office were normal, uneventful and the patient had no complaints. Sometime later, the patient developed hoarseness of his voice for which he sought medical treatment in September, 1991 and thereafter. No injury to any nerves in the patient's throat was ever diagnosed or confirmed by the patient's subsequent treating physicians, however, his hoarseness was confirmed as having resulted from vocal chord paralysis.

Plaintiff contended at trial through his expert witness that the hoarseness followed the carotid artery surgery in the patient's throat and therefore Dr. Robinson must have injured the vagus nerve during the surgery which caused the vocal chord paralysis.

We contended that there was no nerve injury at surgery and clearly no evidence or proof of such an injury at, after or since the surgery. There was no post-operative complaint or evidence of hoarseness. Our expert witnesses confirmed that there was no deviation from the standard of medical care by Dr. Robinson and that there are other potential causes of vocal chord paralysis in this elderly man. The jury returned a defense verdict in favor of my client.

(c) the party or parties whom you represented; and

John Robinson, M.D.

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Dr. Robinson from the initial filing of the complaint through discovery and trial. Plaintiff filed post trial motions which were argued and denied. An appeal to Superior Court of Pennsylvania was filed, however, it was later withdrawn after plaintiff died from unrelated causes.

6. James Dawson v. Forbes Health System, Elliot Weinstock, M.D., Metropolitan Anesthesia Associates and James R. Browning, M.D.

Date of Representation;
1990 - 1994
Trial on May 23-27, 1994

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Joseph M. James

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiff James Dawson

William R. Caroselli, Esquire
312 Boulevard of the Allies - 8th Floor
Pittsburgh, PA 15222
(412) 391-9860

Counsel for Defendant Forbes Health System

Gilbert S. Solomon, Esquire
USX Tower
Pittsburgh, PA 15219
(412) 391-9600

Counsel for Defendant James R. Browning, M.D.

David B. White, Esquire
Burns, White & Hickton
2400 Fifth Avenue Place
Pittsburgh, PA 15222
(412) 394-2503

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 90-02998 – filed in 1990
In the Court of Common Pleas of Allegheny County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

Plaintiff underwent an outpatient arthroscopic surgical procedure on his knee at Forbes Health System on February 8, 1988. The procedure was performed under general anesthesia and my client, Dr. Elliott Weinstock was the attending anesthesiologist. Upon awakening in the post-anesthesia recovery room, plaintiff complained of a gritty sandy-like feeling in his eyes and a physician irrigated his eyes with a balanced salt solution, but the feeling persisted.

An opthalmology consult was ordered and defendant, Dr. Browning, examined the patient's eyes, diagnosed a condition of exposure keratitis (inflammation of the cornea sometimes called dry-eye syndrome) and prescribed a sulfa ointment to ease the symptoms. The patient was allergic to sulfa.

Plaintiff sued all of the defendants alleging that his condition was the result of inappropriate anesthesia procedure by failing to lubricate the eyes prior to surgery and failure to have them taped shut during surgery. He also claimed negligent application of a sulfa ointment to which he was allergic. Essentially, plaintiff's legal theory was based upon the testimony of his expert witness that there was "inadequate covering of the cornea during surgery" and there could have been no other cause.

Dr. Weinstock and numerous medical witnesses testified in specific detail to the appropriate eye care rendered to the patient prior to, during and after surgery which was confirmed by hospital records. The appropriate standard of medical care and treatment were also confirmed through the testimony of the expert witnesses of the defendants who also opined as to possible alternate causes to the development of exposure keratitis.

The jury returned a verdict in favor of all defendants.

(c) the party or parties whom you represented; and

Elliott Weinstock, M.D. and Metropolitan Anesthesia Associates

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Dr. Weinstock from the initial filing of the complaint through discovery and trial. Plaintiff accepted the verdict of the jury and did not file post trial motions or an appeal.

7. Richard Owens v. Gary L. Smith, M.D., Jonathan Hottenstein, M.D. and Sewickley Valley Hospital

Date of Representation;
1990 - 1993
Trial on May 26, 27, 28, June 1, 2, 3 and 4, 1993

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Maurice Louik (deceased)

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiff Richard Owens

Richard Catalano, Esquire
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412) 391-6363

Counsel for Defendant Sewickley Valley Hospital

George M. Weis, Esquire (retired)
1117 Foxcroft Lane
Pittsburgh, PA 15237
(412) 364-7723

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 90-15836 – filed in 1990
In the Court of Common Pleas of Allegheny County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

My client, Dr. Hottenstein, an orthopedic surgeon, performed an outpatient arthroscopic lateral retinacular release on the left knee of plaintiff at Sewickley Valley Hospital on September 14, 1988. There were no surgical complications. On September 17, 1988, the patient returned to the hospital emergency room complaining of fever, pain, swelling and discharge from the leg wound. Dr. Gary Smith, a partner of Dr. Hottenstein and also my client, examined the patient, drained a hemotoma, took a culture to check for infection and prescribed Keflex, an antibiotic as a protective step. The culture was sent to the hospital laboratory and a report two days later was positive for staphylococcus infection. However, the laboratory result was neither called to Drs. Smith or Hottenstein nor sent to their office through the hospital standard mail box delivery protocol.

Plaintiff next saw Dr. Hottenstein at his previously scheduled post-operative office visit on September 27, 1988, at which time he was in significant pain with swelling and no ability to move this knee. The patient had not been taking the Keflex as prescribed. Infection was suspected and the patient was immediately admitted to the hospital for debridment surgery. After a lengthy inpatient stay for treatment of the infection, plaintiff was discharged, but he had sustained permanent damage to his knee and was treated thereafter by several different specialists including a rheumatologist.

Plaintiff contended that the medical care and treatment rendered by the defendants was negligently performed in failing to diagnose and timely treat the infection which developed post-surgically. I defended the doctors by establishing that the arthroscopic surgery performed by Dr. Hottenstein was done properly and well within the applicable standard of medical care and that development of a post-operative infection is a risk of any surgery and plaintiff was aware and accepted that risk. The court granted a compulsory nonsuit in favor of Dr. Hottenstein at the close of plaintiff's case.

My defense of Dr. Smith was that he acted properly in testing the patient for infection and prescribing an interim antibiotic. Also, it was reasonable for him to expect to be notified by the hospital of the laboratory test results so that appropriate medical treatment could be initiated. Further, plaintiff did not take the prescribed medication or follow-up with any doctor as his condition worsened. The jury returned a defense verdict in favor of Dr. Smith.

However, the jury did return a verdict in favor of plaintiff in the amount of $275,000 against the hospital for its failure to transmit the laboratory results to the doctors in a timely fashion.

(c) the party or parties whom you represented; and

Gary Smith, M.D. and Jonathan Hottenstein, M.D.

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Drs. Smith and Hottenstein from the initial filing of the complaint through discovery and trial. Plaintiff did not file post trial motions as to the respective nonsuit and jury verdict in favor of my clients. The hospital filed post trial motions, but later withdrew them and paid the verdict.

8. Raymond J. Wengrzyn and Jacqueline Wengrzyn v. Forbes Regional Health System and Thomas R. Walsh,M.D.

Date of Representation;
1990 - 1996
Trial on October 30, 31, November 1 and 4, 1996

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge S. Louis Farino

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Plaintiffs Raymond J. Wengrzyn and Jacqueline Wengrzyn

David Watson, Esquire
3303 Grant Building
Pittsburgh, PA 15219
(412) 471-1200

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Docket No. GD 90-18670 – filed in 1990
In the Court of Common Pleas of Allegheny County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

Plaintiff alleged that Dr. Walsh failed to timely and accurately diagnose the plaintiff's condition of appendicitis upon his visit to the emergency room at Forbes Regional Hospital in the late night hours of Friday, May 12, 1989. Plaintiff presented with abdominal cramps and diarrhea and reported that he had eaten kielbasa earlier in the day. After taking the history, conducting a physical examination and a number of tests, including an abdominal x-ray, complete blood counts and urinalysis, Dr. Walsh diagnosed the plaintiff as suffering from gastroenteritis and possible food poisoning. Donatel and compazine were prescribed and administered and after resting, the patient's symptoms subsided. Dr. Walsh discharged the patient at 1:30 a.m. with instructions to follow-up with his family physician or return if his symptoms worsened.

The patient spent the next day on the sofa at home. Around noon, his previous symptoms reappeared and worsened over the next several hours, however, he did not return to the emergency room until approximately 6:00 p.m. Saturday evening. He was diagnosed as having appendicitis and surgery was immediately performed which revealed a ruptured appendix. He remained in the hospital for approximately 10 days, but otherwise had an uneventful complete recovery.

Plaintiff brought this action on the theory that Dr. Walsh failed to correctly diagnose appendicitis when the patient presented at the hospital emergency room on May 12, and that the missed diagnosis caused the rupture of his appendix and other medical complications. I defended by establishing through both Dr. Walsh and our expert witness that the diagnosis rendered on the first emergency room visit was correct at the time and such was confirmed by the subsidence of symptoms after medication and the absence of the classic rebound pain symptom of appendicitis. Also, the patient failed to timely return to the hospital when his symptoms worsened as he had been instructed.

The jury returned a verdict in favor of both defendants.

(c) the party or parties whom you represented; and

Forbes Regional Health System and Thomas R. Walsh, M.D.

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel to Forbes Regional Health System and Dr. Walsh from the initial filing of the complaint through discovery and trial. Plaintiffs accepted the verdict of the jury and did not file post trial motions or appeal.

9. Commonwealth of Pennsylvania v. Charles Kozakiewicz, et al.
Criminal Indictment: Official Oppression

Date of Representation;
1974
Trial March 11-28, 1974

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Livingstone Johnson

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Commonwealth of Pennsylvania

Lawrence N. Claus, Esquire
Manor Complex – Fifth Floor
Pittsburgh, PA 15219
(412) 565-3575

Counsel for Defendant Edward Krall

A. Bryan Campbell, Esquire
1700 Grant Building
Pittsburgh, PA 15219
(412) 642-7667

Counsel for Defendant John Jasek

James Wymard, Esquire
220 Grant Street
Pittsburgh, PA 15219
(412) 281-6225

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Indictment No. CC7305177 – filed in 1973
In the Court of Common Pleas of Allegheny County

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

In this action, I defended one of three prison guard officers from the Pennsylvania State Correctional Institution at Pittsburgh who were each charged with the crime of Official Oppression under the Abuse of Office Chapter of the Pennsylvania Crimes Code. At the time this case was believed to be a prosecution of first impression in the state.

The complainant was a law student who was serving as a legal intern for inmates at the prison. A rank and file prison guard reported to the sergeant of the guard (my client) and the captain of the guard that he saw the complainant pass something in silver paper to an inmate through a chainlink fence and that he suspected it to be narcotics. Another guard confirmed this account. Upon complainant's next visit to the prison, the defendant guard officers subjected him to a strip search before permitting entry to the facility. No contraband was found.

Complainant instituted charges against the guard officers on the basis that in their official capacity, they had knowingly subjected him to an illegal search. The defense contended that the guard officers were entitled to reasonably rely on credible information from other guards which justified the search. The jury believed that the guard officers acted reasonably and lawfully in conducting the search. The nine day jury trial ended with a verdict of not guilty for all defendants.

(c) the party or parties whom you represented; and

Charles Kozakiewicz

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole trial counsel for Charles Kozakiewicz from the initial filing of the indictment through trial. The case ended with the jury verdict of not guilty for all three defendants.

10. Commonwealth of Pennsylvania v. Ronald O'Shea
Criminal Indictment – Murder and Involuntary Manslaughter

Date of Representation;
1972
Four days of trial in February 1972

Appeal argued before the Supreme Court of Pennsylvania
No. 2 March Term, 1973

Name of the court and the name of the judge or judges before whom the case was litigated;

In the Court of Common Pleas of Allegheny County, Pennsylvania
before Judge Albert Fiok (deceased)

Supreme Court of Pennsylvania – Court en banc
Argued before:
The Honorable Benjamin Jones Chief Justice
The Honorable Michael J. Eagen, Justice
The Honorable Henry X. O'Brien, Justice
The Honorable Samuel J. Roberts, Justice
The Honorable Thomas Pomeroy, Justice
The Honorable Robert N.C. Nix, Justice
The Honorable Louis Manderino, Justice

Individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties;

Counsel for Defendant

Michael Levine, Esquire
633 N.E. 167th Street – Suite 501
N. Miami Beach, FL 33162
(305) 653-3800

(a) the citations, if the cases were reported, and the docket number and date if unreported;

Criminal Indictment Nos. 101 and 102 January Term 1972 – filed in 1972
In the Court of Common Pleas of Allegheny County

456 PA 288, 318 A.2d 713 (1974)
465 PA 491, 350 A.2d 872 (1976)
In the Supreme Court of Pennsylvania

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

Defendant, Ronald O'Shea, was charged with murder, voluntary and involuntary manslaughter in the death of Thomas Washington who had been found dead in his apartment bedroom by police following an anonymous telephone call. The victim was naked and exhibited cuts, bruises and burns indicative of a severe beating and/or sexual torture. He had been left in a hog-tied position with his neck tied to his feet and hands behind his back with neckties.

As the prosecutor, I was able to present evidence of a homosexual relationship between the white defendant and black victim, proof of the pair having been together that day, proof of the victim having engaged in homosexual activity proximate to the time of death, fingerprints of the defendant in the bedroom, blood of the victim on the defendant's clothes and inconsistencies in the defendant's statements regarding his whereabouts that evening. Also, defendant's confession was introduced at trial following a denial by the court of a motion to suppress.

The jury deliberated approximately fifteen minutes and returned a verdict of guilty of murder in the first degree. However, after the penalty phase of the trial, the jury deliberated between a life or death sentence for eleven hours before returning a verdict of life imprisonment.

(c) the party or parties whom you represented; and

Commonwealth of Pennsylvania

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

I served as sole counsel for the Commonwealth throughout the post indictment preparation and trial of this case. Although I prosecuted many murder trials, this

was the only capital case during my tenure as an assistant district attorney in which the Commonwealth sought a sentence of death. I personally argued the post trial motions filed by the defendant which was my final involvement in the case as the appeal was defended by attorneys in the appeals division of the office. In July 1973 I resigned from the office to engage in private practice.

After argument in 1973, the Supreme Court of Pennsylvania reversed the conviction and judgment of sentence and granted defendant a new trial. The court ruled that defendant's confession had been illegally obtained by the police who acted improperly in not having given the defendant his Miranda warnings during an initial custodial interrogation which occurred after the investigation had focused on him.

Although the case was remanded to the lower court for a new trial, the district attorney's office failed to schedule and commence the trial within the time period required by a Court Order and the Rules of Criminal Procedure. Therefore the court granted defendant's Motion to Dismiss the charges with prejudice which was upheld by the Supreme Court of Pennsylvania on January 29, 1976. Accordingly, Ronald O'Shea was released from custody and never retried for the murder of Thomas Washington.[1]

[1] In July 1986 Ronald O'Shea was convicted of robbery and first degree murder of a store clerk and sentenced to death. His conviction and sentence were affirmed on appeal. See Commonwealth v. O'Shea 523 PA 384, 567 A.2d 1023 (1989).

Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have never been convicted of a crime.

Party to Civil or Administrative Proceedings: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

I have been sued twice in thirty-three (33) years of practicing law and on both occasions, I did not previously know the claimant(s) and had no personal involvement whatsoever in any of the underlying legal representation which preceded initiation of the lawsuits. In each case, I and a number of other shareholder attorneys in our firm at the time were named as individual defendants in the lawsuits solely on the basis that my/our name(s) appeared in the firm name and not because I/we had any involvement in the underlying facts of the matters.

The initial suit in which I was named was essentially a fee dispute which arose from the compromise and settlement of litigation regarding the construction of a defective sewer system. The case was Peter C. Baggerman, et al. v. North and South Shenango Joint Municipal Authority, et al., in the Court of Common Pleas of Crawford County, Pennsylvania at No. 1987-830.

On March 21, 1996, the court granted summary judgment to me and all other individually named additional defendants except one attorney from our firm, Fred E. Baxter Esquire. Thereafter the Court also dismissed our former professional corporation as an additional defendant. Accordingly, I am no longer a party to this lawsuit. Copies of the pleadings, relevant Memorandum Opinions and Orders of Senior Judge P. Richard Thomas are of record in the proceedings at the office of the Prothonotary of Crawford County, Meadville, Pennsylvania 16335.

The second lawsuit in which I was named as a defendant was Carol Johnson and Larry Johnson v. Harold Gondelman, et al., in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 93-048.

This case involved the alleged failure of our senior shareholder to timely pursue a legally complex personal injury claim on behalf of plaintiffs even though a number of prior suits had been filed on their behalf, but each case had been dismissed by the court. Plaintiffs' First Amended Complaint was the subject of Preliminary Objections on behalf of all

defendants which were sustained by the Common Pleas Court and the Complaint was dismissed. The Superior Court of Pennsylvania affirmed the dismissal of the Complaint. The records of this case are in the office of the Prothonotary of Allegheny County, City-County Building, Pittsburgh, Pennsylvania 15219.

Potential Conflict of Interest: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

In all instances, I will abide by the Code of Judicial Conduct. On any matter which involves a former client whom I personally represented, a firm, institution or government entity of which I had been a member or attorney and/or an entity with which I had a continuing relationship, I will make a complete disclosure of my relationship and consider recusing myself from consideration of the matter. I will also disqualify myself under all circumstances set forth at 28 USCS Section 455.

Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments or arrangements.

Sources of Income: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See copy of my Financial Disclosure Report (AO-10) provided.

Statement of Net Worth: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached financial net worth statement

TERRENCE F. and JUDITH M. McVERRY
FINANCIAL STATEMENT
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		5	500	Notes payable to banks-secured	N/A		
U.S. Government securities-add schedule	N/A			Notes payable to banks-unsecured	N/A		
Listed securities-add schedule	N/A			Notes payable to relatives	N/A		
Unlisted securities–add schedule	N/A			Notes payable to others	N/A		
Accounts and notes receivable:	N/A			Accounts and bills due		1	200
Due from relatives and friends				Unpaid income tax	N/A		
Due from others				Other unpaid income and interest	N/A		
Doubtful				Real estate mortgages payable-add schedule		77	025
Real estate owned-add schedule		300	000	Chattel mortgages and other liens payable	N/A		
Real estate mortgages receivable	N/A			Other debts-itemize:	N/A		
Autos and other personal property		70	000				
Cash value-life insurance	N/A						
Other assets itemize:							
Profit Sharing & 401 (K) plans		136	426				
IRA		240	182				
IRA		22	875	Total liabilities		78	225
Money Market Accounts		82	072	Net Worth		778	830
Total Assets		857	055	Total liabilities and net worth		857	055
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		6	500	Are any assets pledged? (Add schedule)	No		
On leases or contracts	N/A			Are you defendant in any suits or legal actions?	No		
Legal Claims	N/A			Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	N/A						
Other special debt	N/A						

SCHEDULE A
ASSETS

Terrence F. McVerry
PNC Bank checking account
Balance: Approximately $1,500.00

Terrence F. McVerry or Judith M. McVerry
PNC Bank checking account
Balance: $0 – 4,000.00

Terrence F. McVerry and Judith M. McVerry

PNC Money Market	PNC Money Market
Account Balance: $11,429.27	Account Balance: $70,642.34

Real Estate

Terrence F. McVerry and Judith M. McVerry
Personal Residence
Mt. Lebanon, PA 15228
Purchased December 30, 1985
Value – Approximately $300,000.00

Automobiles

1997 Buick LaSabre
2000 Toyota Solara

Retirement

Grogan, Graffam, McGinley & Lucchino, P.C.
Employees Profit Sharing and 401(k) Savings Plans
Combined Value - $136,426.00
Administrators:

Profit Sharing Plan	401(k) Savings Plan
Mellon Trust Retirement Services	Capital Retirement Plan Services, Inc.
EB Stock and Intermediate Bond Funds	MFS Family of Mutual Funds

Terrence F. McVerry
Individual Retirement Rollover Account
c/o Paine Webber
Value - $240,182.00

Judith M. McVerry
Individual Retirement Account
American Funds Group
c/o Paine Webber
Value - $22,875.00

SCHEDULE B
LIABILITIES

Real Estate Mortgages

Bank of America
P.O. Box 26388
Richmond, VA 23260
Balance: $64,226.00

National City Bank
P.O. Box 1300
Franklin, PA 16323
Balance: $12,789.00

Contingent Note

Northwestern University
Co-signers of education loan for daughter
Balance: $6,500.00

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

(a) If so, did it recommend your nomination?

Yes

(b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

Senators Specter and Santorum convened a Federal Judicial Nominating Commission which conducted interviews of candidates in Pittsburgh on March 29, 2001. The Commission named me to a short list of candidates and I was thereafter interviewed by lawyers from the Office of White House Counsel and the Department of Justice on July 9, 2001. On October 11, 2001, I was advised by the Office of White House Counsel to complete the necessary and appropriate documentation for possible recommendation to the President for nomination to the federal judiciary. In November, I was again interviewed by an attorney from the Department of Justice and by an agent of the Federal Bureau of Investigation who conducted a background investigation. I have worked with representatives of the White House Counsel and the Department of Justice to complete and revise all necessary documentation. On January 18, 2002, I was advised that the President would submit my nomination to the United States Senate when it reconvened on January 23, 2002 and that has come to pass.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting *(Last name, first, middle initial)* McVerry, Terrence F.	**2. Court or Organization** U.S.District Court W.Dist.PA	**3. Date of Report** 01/29/2002
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 01/23/2002 __ Initial __ Annual __ Final	**6. Reporting Period** 01/01/2001 to 01/01/2002
7. Chambers or Office Address 300 Fort Pitt Commons 445 Fort Pitt Blvd Pittsburgh, PA 15219	**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.)*

[ ] **NONE** (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Director	Music for Mt. Lebanon
2	Attorney/Solicitor	Allegheny County, PA
3	Attorney/Solicitor	Community College of Allegheny County

II. AGREEMENTS *(Reporting individual only; see pp.14-16 of Instructions.)*

[X] **NONE** (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		
2		
3		

III. NON-INVESTMENT INCOME *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

[ ] **NONE** (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	12-31-00	Allegheny County, PA	85070.00
2	12-31-00	Community College of Allegheny County	24000.00
3	12-31-00	PA State Employees Retirement System	10329.00
4	12-31-01	Allegheny County, PA	92869.16

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting McVerry, Terrence F.	Date of Report 01/29/2002

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☒ 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: McVerry, Terrence F.

Date of Report: 01/29/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Paine Webber- IRA	A	Dividend	M	T	Exempt				
2 -American Funds Capital World Growth Inc.									
3 -American Mutual Fund									
4 -EuroPacific Growth Fund									
5 -Growth Fund of America									
6 -New Economy Fund									
7 -PW Growth & Income Fund									
8 -Washington Mutual Investment Fund									
9 Paine Webber - IRA	A	Dividend	K	T	Exempt				
10 -The New Ecomony Fund									
11 Grogan, Graffam etal Employees 401K/Profit Sharing Plan	A	Dividend	M	T	Exempt				
12 -MFS Emerging Growth Fund									
13 -MFS Global Equity Fund									
14 -MFS Gov't Securities Fund									
15 -MFS Large Capital Growth Fund									
16 PNC Money Market	A	Interest	J	T	Exempt				
17 PNC Money Market	B	Interest	L	T	Exempt				

1 Inc/Gain Codes: (Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; 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: (Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

3 Val Mth Codes: (Col. C2) 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
McVerry, Terrence F.	01/29/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Part III. NON-INVESTMENT INCOME amended to add spouse's supplemental source and type of gross income from Santorum 2000 Campaign Committee. Add #9. 12-31-01 Fight PAC

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	McVerry, Terrence F.	01/29/2002

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	12-31-01	Community College of Allegheny County	24000.00
6	12-31-01	PA State Employees Retirement System	10386.36
7	12-31-00	Santorum 2000 Campaign Committee	
8	12-31-01	Santorum 2000 Campaign Committee	
9	12-31-01	Fight PAC	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting McVerry, Terrence F.	Date of Report 01/29/2002

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature TMcVerry Date 1/29/02

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 KOHL. This hearing is adjourned.
[Whereupon, at 4:20 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR CANTWELL'S WRITTEN QUESTIONS

1. Personal privacy is one of the top issues of concern for most Americans. They are concerned about government intrusion into personal decisions. They are concerned about how the government obtains and monitors private communications. As a District Court judge you issued a decision in the case of Condon v. Reno that held that there was no 14th Amendment privacy interest in personal information submitted for purposes of obtaining a drivers license including name, address, phone number, photograph, social security number and medical or disability information, that justified Congressional protection of that information from redissemination.

Your decision in that case was unanimously reversed by the Supreme Court on other grounds, and the Court did not address the issue of privacy. In view of this decision please answer the following questions:

a) Do you believe there is a constitutional right to privacy?

b) If so, describe what you believe to be the key elements of that right?

c) What is your understanding of the right to privacy as it pertains to a woman's right to make personal decisions about her body including whether or not to terminate a pregnancy?

d) What is your understanding of the right to privacy as it relates to personal information including unique identifying information such as photographs and fingerprints?

RESPONSE: The Constitution does contain the right to privacy. This right is also defined in caselaw and statutes addressing this concept. The Supreme Court in *Roe v. Wade* and other cases has made it clear that the Constitution protects privacy rights related to marriage, access to birth control, and reproductive health, including a woman's access to abortion services. These decisions establish a woman's right to make personal decisions about her body, including the decision of whether or not to terminate a pregnancy.

As I commented in *Condon v. Reno*, there is a reasonable expectation of privacy in certain personal information. Depending on the circumstances involved, photographs and fingerprints may fall within the scope of protected privacy.

2. In the case of *Dinkins v. Blackmon & ComSouth*, an employment discrimination case

alleging sexual harassment, you reversed the recommendation of the magistrate judge and granted summary judgment to an employer, thus ending the case. In that case the record demonstrates that the plaintiff's supervisor had pulled on his penis whenever the plaintiff looked at him and grabbed his genital area while moving close to her on a multiple times per day basis, that he talked to her about other people's sexual activity, discussed movies featuring two men having sex with a woman, told her he wanted to show her nude photographs, and made inappropriate remarks about bathing his granddaughter. The plaintiff complained to two people in her office, to a female supervisor over a period of months, and to the Chief Financial Officer of the company. The CFO stated in response to her complaint that "I hope [he] is not back to his old ways" and changed the subject.

In reversing the report of the magistrate judge you held that because the plaintiff failed to complain to the company president in writing as required by the company policy which she had been provided, the employer had successfully established an affirmative defense. You reached this decision even though the company policy *also* required any supervisor to immediately report any noncompliance with the sexual harassment policy to the company president although neither the supervisor nor the CFO did so.

a) Is it your position that because the plaintiff in this case did not submit her complaint in writing to the proper person, that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunity provided by the employer even though she complained to two persons in a supervisory capacity, one of whom was the Chief Financial Officer?

b) Do you continue to take the position that whether or not the plaintiff "unreasonably" failed to take advantage of the "correct" reporting apparatus is not a question of fact that should have reached a jury?

c) Do you believe that this was a proper and fair resolution in a case where the plaintiff demonstrated a rather compelling case of prima facie harassment?

RESPONSE: As I stated in my written order, the *Dinkins* case involved serious and disturbing allegations of sexual harassment. The question of whether the plaintiff had properly alleged a prima facie case of sexual harassment was not at issue, and I treated that issue as established.

The law that applied to *Dinkins* was set forth by the Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which established that an employer could be held vicariously liable for harassment by its supervisors, subject to an affirmative defense, in cases

where the employee did not suffer any sort of tangible employment action. Because the plaintiff admitted that she had not been subjected to any tangible employment action, the employer could at least assert this defense. To establish this defense, the employer had to show: (1) that it had exercised reasonable care to avoid harassment and to eliminate it when it might occur; and (2) that the plaintiff had failed to act with like reasonable care to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Since the employer had exercised reasonable care to avoid sexual harassment by establishing and disseminating an anti-harassment policy, the focus was whether or not the plaintiff had taken reasonable care to take advantage of the employer's policy. It was clear from the record that the plaintiff did not contact either the company President or Chairman of the Board in writing, as required by the policy, or in any other manner to complain about her supervisor's conduct. In fact, when the plaintiff filed her grievance with the South Carolina Human Affairs Committee, she stated: "I have not made any internal complaints of sexual harassment. . . ." Under established law, any evidence that the plaintiff failed to utilize the employer's complaint procedure can suffice to establish the second element of the defense. Because that was the case here, it appeared to me that the plaintiff's claim could not go forward.

Nevertheless, and while it was unclear under the law that some degree of substantial compliance might overcome this affirmative defense, I wanted to give the plaintiff an opportunity to prove that she might have substantially complied with the employer's policy. In this context, the plaintiff argued that she attempted to comply with the policy by discussing the sexual harassment with the CFO of the company and with another coworker/supervisor.

However, the employer pointed out that the deposition transcript showed that the plaintiff had not asserted that she complained to the CFO about sexual harassment. I took affirmative steps to give the plaintiff an opportunity to clarify the record in this respect and to assert that she had complained to the CFO about *sexual* harassment. She informed me that she could not clarify the record. Therefore, the plaintiff could not factually support her claim of substantial compliance as to the CFO.

Next, I considered whether the plaintiff could overcome her failure to comply with the company's policy by showing that her friend, a fellow supervisor, had failed to comply. The plaintiff claimed that this coworker should have made a formal complaint on her behalf. In essence, this was a claim by the plaintiff that her own noncompliance was excused by another's noncompliance. This argument failed as well. I determined that, first, there was no evidence in the record that the plaintiff ever asked or ever expected her coworker to make such a complaint on her behalf. Second, by asserting that her coworker should have filed a complaint on her behalf, the plaintiff merely confirmed that she, as a supervisor with the same standing as her coworker, likewise failed to comply with the company's policy. This evidence further served to verify that the company had established the second element of the affirmative defense: *i.e.*, the plaintiff failed to utilize the company's complaint procedure in any reasonable way. In summary, although it appeared that plaintiff's claim failed as a matter of law, I endeavored to let the plaintiff establish the predicate for an argument of substantial compliance through the CFO, which she could not do factually, or through her supervisor/friend, which she could not do legally.

I applied the controlling law to the facts in the record in the *Dinkins* case. As I stated in my order, I believed that the plaintiff had made serious and disturbing allegations of sexual

harassment. I accepted all of the allegations as true for purposes of deciding the motion for summary judgment. Nevertheless, the evidence also established clearly that the company was entitled to the benefit of the affirmative defense created by the Supreme Court in *Faragher*.

As a judge, I believe a case resolution is proper and fair if the parties have been afforded due process and the decisions made in the case are based on a correct application of the law. In the process of deciding this case, I believe I was fair to both sides, and I provided the plaintiff an additional opportunity to clarify the record regarding a potentially important piece of evidence, which she was unable to do.

3. In the case of *Cleary v. Nationwide Insurance Company*, an employment discrimination case alleging retaliation as the result of filing of a claim of sexual harassment, you reversed the recommendation of the magistrate judge and granted summary judgment to an employer, thus ending the case. The plaintiff in the case demonstrated that after making her complaint against her supervisor, she was placed on administrative leave while her supervisor continued working. After his termination, she was initially assigned tasks comparable to work she had been dong previously, but that those tasks were reassigned, that after termination of the harassing supervisor, the office where the two of them worked was closed and she was transferred, that her job title and pay classification were lowered, that she was denied a transfer to another office when an opening occurred in direct violation of the company's policy, and that she was denied the transfer after her direct supervisor consulted with the person to whom the plaintiff had originally complained, that that person informed the direct supervisor that "she did not have to accommodate plaintiff's request." In addition the direct supervisor said to plaintiff: "I know you probably think I've been a real bitch to you and very mean to you, but I've received a lot of pressure from [the company]."

a) Please state whether you continue to take the position that a reasonable juror could not conclude from the facts above that the employer's stated reasons for the employment actions were false and that retaliation actually motivated the defendant.

b) In your opinion what type of evidence considered in the light most favorable to the plaintiff would have had to be presented in order for you to find that a reasonable juror could find that the reasons offered by the employer were a pretext for the adverse employment actions?

c) Do you believe that this was a proper and fair resolution?

d) In your ten years on the District Court bench have you ever allowed a case of

retaliation to reach a jury? If yes, please provide details of that decision.

RESPONSE: As a judge, I believe a case resolution is proper and fair if the parties have been afforded due process and the decisions made in the case are based on a correct application of the law.

My decision in this case was based on what I believed to be the correct application of the law. I do not have any reason to believe that the decision was unfair or improper, and the court of appeals affirmed that decision. *See Cleary v. Nationwide Mut. Ins. Co.*, 2001 Westlaw 585102 (4th Cir. 2001). In its decision, the court of appeals (Judges Wilkins, Motz, and King) analyzed my ruling in detail and concluded:

> In summary, even assuming that Cleary sufficiently established all of the elements of her prima facie case, . . . Nationwide proffered legitimate, non-discriminatory reasons for its actions. Cleary has failed to point to any evidence that Nationwide's explanations for these actions – except for its reason for closing the Lobbying Office – are false. Yet even if, as Cleary contends with support from the record, Nationwide shut down the Lobbying Office to cover up Herlong's behavior, no rational factfinder could conclude that this decision was motivated by an intent to discriminate against Cleary for reporting his harassment to the company. Therefore, we agree with the district court that Nationwide is entitled to summary judgment on Cleary's retaliation claim.

Concerning the question of what type of evidence I believe the plaintiff could have offered so that a reasonable juror could have considered the employer's proffered reasons pretextual, I believe the pertinent law is set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 148 (2000) (citations omitted):

> [T]he plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." Moreover, although the presumption of discrimination "drops out of the picture" once the defendant

> meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."
>
> . . .
>
> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

To the best of my recollection, I am unable to recall any claim of retaliation which was not disposed of by motion or by settlement.

4. In the case of *Roberts v. Defender Services*, an employment discrimination case alleging sexual harassment, a case you were questioned about at your hearing by Senator Edwards, you reversed the recommendation of the magistrate judge and granted summary judgment to an employer, thus ending the case. In that case, the plaintiff had a male supervisor who made sexual comments to her on a daily basis, bought her panty-less pantyhose, frequently rubbed her shoulders, neck, arms and would try to look down her shirt, and at least once made a gesture as if biting her breast. After speaking to a female coworker, plaintiff and the coworker decided that the harassment should be reported, and the coworker reported it. You found that because the plaintiff recommended the job to an acquaintance that she thought was an assertive and outspoken person who would not be harassed, and stated she left the job to work at her boyfriend's store, that the plaintiff did not subjectively find her workplace to be hostile. You made this finding although the plaintiff complained to at least one person, provided the names of other persons she believed to have been harassed to company investigators, and quit her job after the harassment resumed.

a) Do you continue to take the position that in the light most favorable to the plaintiff, no material question of fact existed as to whether she did or did not find the workplace to be hostile?

b) Do you believe that this was a proper and fair resolution?

RESPONSE: Under the Supreme Court decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), in order to be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive. That is, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived to be hostile and abusive. The question of whether harassment is sufficiently severe or pervasive

to alter the employee's working conditions must be determined by looking at all the circumstances, including whether the conduct is sufficiently severe and whether it interferes with an employee's work performance. As such, in *Roberts*, I was required to determine, viewing the evidence in the light most favorable to the plaintiff, whether the challenged conduct could be viewed as hostile and abusive from an objective viewpoint and whether the plaintiff subjectively perceived the challenged conduct as such.

First, I found that the plaintiff had offered sufficient evidence to establish the objective element. I ruled: "The Court notes that the alleged conduct clearly was, from an objective standpoint, sufficiently severe and pervasive to constitute a hostile and abusive work environment." Next, I turned to the issue of how the plaintiff subjectively perceived her supervisor's conduct. Because the defendant objected to the magistrate judge's conclusion that there was an issue of fact on this point, I had to review this issue *de novo*. Accordingly, my duty was to examine the evidence presented in the light most favorable to the plaintiff to determine if the plaintiff had subjectively perceived the conduct in question to be abusive or hostile so as to alter the terms and conditions of her employment.

Based on the evidence in the record, I concluded that the plaintiff failed to meet her burden of proof on this issue. The record showed that after her supervisor's conduct was reported to the company in March, the plaintiff, according to her deposition testimony, told the company official who investigated her complaint that she still liked her supervisor and that she thought she could continue to work with him. The company warned the supervisor to stop any harassing conduct. When he resumed similar conduct thereafter, the plaintiff did not report any of this new conduct. The company made personnel changes shortly afterwards and the supervisor, according to the plaintiff, quit all harassing conduct. The plaintiff said that

she had very little contact with her supervisor thereafter. The plaintiff continued in her job, and two and a half months after all objectionable conduct had stopped entirely, she filed her employment discrimination charge. She continued to work until she decided to resign the following month because she wanted to work with her boyfriend at his store. In preparation for leaving her job, the plaintiff recommended a longtime acquaintance to the offending supervisor as her replacement. According to the plaintiff, she made the recommendation because she liked her job and liked where she worked and did not want to leave the company in a bind. Although she did consider her replacement to be very outspoken and a person who would not tolerate untoward comments by the supervisor, the information she relayed to her replacement was that the supervisor was "a nice person" and that he was "pretty good" to work for. Finally, the plaintiff said that she decided to leave her job three months after all offensive conduct had stopped because her situation at work would always be "wishy-washy," not intolerable or even difficult.

After considering the evidence in its context, I concluded that no reasonable juror could find that the plaintiff subjectively considered her supervisor's sexually harassing conduct to be so extreme so as to alter the terms and conditions of her employment.

As a judge, I believe the resolution is proper and fair if the parties have been afforded due process and the decisions made in the case are based on a correct application of the law. In light of the requirements of the law, I believe I properly applied the controlling law to the facts in this case.

5. After a careful review of your record, I am unaware of any case alleging sexual harassment that came before you in your ten years on the district court that proceeded to a verdict, meaning that summary judgment was not granted for the defendant, or that the case was not settled. Please state whether this is correct and, if not, please provide information about any claim for sexual harassment assigned to you that

proceeded to jury trial and verdict.

RESPONSE: I have had at least two cases in which a claim of sexual harassment has proceeded to a jury trial and verdict. In *Hilliard v. Pallings*, C.A. No. 3:96-303-19 (D.S.C.), a female high school ROTC student claimed that her male adult ROTC teacher/supervisor sexually harassed her, and later lured her to the school after school hours to work on an ROTC project and sexually assaulted her. In *Ready v. Greenaway*, C.A. No. 3:98-104-19 (D.S.C.), the female plaintiff claimed that the male defendant, a police officer she originally met when she requested police assistance during a domestic dispute, sexually harassed her on repeated occasions while he was in uniform and on duty.

I would note that the number of civil cases of any kind that proceed to a verdict in this district is exceedingly low. A statistical analysis for the most recent 12-month period studied shows that 99.1% (3,821 of 3,856) of all civil cases that were closed in this district were disposed of without a jury verdict (e.g., by dismissal or settlement).

6. I am also not aware of any case of sexual harassment where you overrode a magistrate judge's recommendation and did not grant summary judgment. Please state if this is correct, and, if not, please provide information about any case alleging sexual harassment or any other type of gender discrimination in which you overrode a magistrate judge's recommendation to grant summary judgment.

RESPONSE: Based on my best recollection, I cannot recall overriding a magistrate judge's recommendation to grant summary judgment on such claims. However, I also cannot recall having been reversed on my decisions regarding claims of sexual harassment or gender discrimination.

7. You handled a series of cases resulting from the unauthorized taping of an attorney client conversation in 1995. The results of these cases were that the defense attorney who had confidential conversations with his client videotaped by local law enforcement officers was convicted of lying to the grand jury about leaking the tape to the media and sentenced to four months in federal prison. The police deputy who did the taping

pled guilty, agreed to testify against the prosecutor and received a $250 fine, and the prosecutor, who was present at the taping, was not convicted after you ruled that his lies to the grand jury about whether he knew the taping was occurring were not material.

a) Please provide a detailed explanation of your reasoning in reaching each of these outcomes.

b) Please comment on the apparent glaring disparity in the result.

c) Please explain what you meant by your comments at the sentencing of the deputy when you stated "Mr. Grice is caught up in a situation in which there's at least part of this criminal defense bar trying to get prosecutors and law enforcement punished."

RESPONSE: The facts in the series of cases you asked about are as follows:

The attorney, Mr. Duncan, pleaded guilty to a felony (perjury). The deputy, Mr. Grice, pleaded *nolo contendere* to a misdemeanor (Denying the Right to be Free From Unreasonable Searches and Seizures While Acting Under Color of Law). The prosecutor, Mr. Humphries, was charged with the felony of perjury, but maintained his innocence and went to trial. At the close of the government's case, the attorney for Mr. Humphries moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Under the law, the government was required to prove beyond a reasonable doubt that the alleged lies of Mr. Humphries were material to the grand jury's investigation. Because the government failed to produce evidence from which a reasonable jury could conclude beyond a reasonable doubt that Mr. Humphries' statements were material to the grand jury, the defendant was entitled to have his motion granted. This decision did not require me to rule, nor did I ever rule, that Mr. Humphries' alleged lies were not material.

As to the sentencing of Mr. Duncan and Mr. Grice, I sentenced both of these defendants within the range dictated by the United States Sentencing Guidelines. Mr. Duncan pleaded guilty to a felony charge, and his guidelines range for imprisonment was 6-12 months.

Exercising my discretion, I gave Mr. Duncan a split sentence of eight months, which meant he would be imprisoned for only four months. Mr. Grice was sentenced for a misdemeanor and faced a guideline imprisonment range of 0-6 months and a fine of $1,000 - $10,000. At his sentencing, the United States Attorney asked that I depart below the guideline range because Mr. Grice had provided substantial assistance to the government in its investigation and prosecution of Mr. Humphries. Under these facts, I was required to depart below the guidelines at sentencing. Under the law, a downward departure must result in a sentence below the otherwise required minimum. Since I obviously could not depart below "0" months as far as incarceration, I had to depart below the minimum fine of $1,000. Hence, I imposed a fine of $250 as a punishment for Mr. Grice's misdemeanor.

I believe the sentences imposed on Mr. Grice and Mr. Duncan were proper based on the charges for which the United States Attorney prosecuted them, their offenses' respective guideline ranges, and the sentencing recommendations of the government.

At Mr. Grice's sentencing, his wife made a heartfelt presentation about how Mr. Grice had been affected and how people had commented publicly about the entire incident without knowing all the facts. To let her know that I understood her presentation, I commented that her husband was but a part of a bigger issue. I was simply commenting on the obvious (and said so at the hearing) both from my dealings with these cases and from numerous news reports about these circumstances.

8. In my state of Washington, a U. S. District Court held last summer that Title VII requires that an employer that provides prescription coverage to employees is obligated to include prescription contraceptive coverage to women employees. The court held: "Bartell's prescription drug plan discriminates against Bartell's female employees by providing less complete coverage than that offered to male employees . . . the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees leaving a fundamental and immediate healthcare need uncovered." Do you

agree that Title VII's guarantee of equal treatment in the workplace may require that if an employer provides a prescription drug benefit to employees, that the benefit must include contraceptive coverage?

RESPONSE: Unlike the district judge in the case you reference, I have not had the benefit of reviewing legal arguments presented by the parties and an opportunity to carefully consider this issue in light of such arguments. However, to answer your question, I do believe that Title VII's guarantee of equal treatment in the workplace *may* require that if an employer provides a prescription drug benefit to employees, that the benefit must include contraceptive coverage. Whether Title VII actually *does* require this coverage is an opinion I must respectfully reserve until such time if, and when, I am presented with this issue in a case before me, Congress explicitly includes this coverage in Title VII, or a court that I am bound to follow rules on this issue.

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR EDWARDS' WRITTEN QUESTIONS

1. Please identify appellate precedents (preferably from the Fourth Circuit) affirming the grant of summary judgment to a defendant where the court found, as you did in *Roberts v. Defender Services, Inc.*, No. 0:00-1536-19BC, that a plaintiff alleging sexual harassment had sufficient evidence to go to the jury on the question whether she was objectively harassed, but insufficient evidence on the question whether she subjectively felt harassed. Please also briefly summarize the facts in those cases.

RESPONSE: In 1993, the Supreme Court held that in order to be actionable under Title VII, a sexually objectionable work environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Since 1993, several circuit courts have applied the *Harris* test in reviewing grants of summary judgment. These courts uniformly emphasize that a plaintiff has the burden of establishing both the objective and subjective prongs of this test. In many of these cases, the circuit court affirmed summary judgment because the plaintiff had failed to establish the first prong, that is the plaintiff failed to show the workplace was objectively hostile. *See, e.g., Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999); *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871 (5th Cir. 1999).

As for cases in which the objective prong has been met but the subjective prong has not, I generally believe this is a somewhat rare occurrence because (as I recall) this situation has presented itself in my court only once in the past nine years. However, I am aware of an appellate case from another circuit, *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001), where the court of appeals appears to have reached a similar conclusion. In limited discussion, the court of appeals indicated that while the store manager's act of pulling the plaintiff onto his lap and fondling her breasts could be considered a severe incident, the

plaintiff did not subjectively perceive the work environment to be abusive. Also, under the guidance of *Mosher*, another district court reached a similar disposition in *Martinez v. U-Haul Company of Illinois*, 2001 WL 648637 (N.D. Ill. 2001).

2. At your hearing, you noted that in *Roberts*, the plaintiff had recommended a female acquaintance take the job she quit. Plaintiff also affirmed that she "did not expect that [her former boss] would harass [her acquaintance] and that [her acquaintance] was a very assertive, outspoken person." These would seem to be explanations for the recommendation that a jury could accept. Please explain how your reliance on plaintiff's recommendation to her acquaintance is consistent with the requirement, on defendant's motion for summary judgment, that a judge view the evidence in the light most favorable to the plaintiff?

RESPONSE: In ruling on *Roberts*, the law required me to consider all the evidence relating to whether the plaintiff subjectively perceived the conduct to be sufficiently severe so as to alter the conditions of her employment. The record indicated that after her supervisor's conduct was reported to the company in March, the plaintiff, according to her deposition testimony, told the company official who investigated her complaint that she still liked her supervisor and that she thought she could continue to work with him. The company warned the supervisor to stop any harassing conduct. When he resumed similar conduct thereafter, the plaintiff did not report any of this new conduct. The company made personnel changes shortly afterwards and the supervisor, according to the plaintiff, quit all harassing conduct. The plaintiff said that she had very little contact with her supervisor thereafter. The plaintiff continued in her job, and two and a half months after all objectionable conduct had stopped entirely, she filed her employment discrimination charge. She continued to work until she decided to resign the following month because, as she testified, she wanted to work with her boyfriend at his store. In preparation for leaving her job, the plaintiff recommended a longtime acquaintance to the offending supervisor as her replacement. According to the plaintiff, she made the recommendation because she liked her job and liked where she worked and did not want to

leave the company in a bind. Although she did consider her replacement to be very outspoken and a person who would not tolerate untoward comments by the supervisor, the plaintiff testified that the information she relayed to her replacement was that the supervisor was "a nice person" and that he was "pretty good" to work for. Finally, the plaintiff said that she decided to leave her job three months after all offensive conduct had stopped because her situation at work would always be "wishy-washy," not intolerable or even difficult.

After considering this evidence in its context, I concluded that no reasonable juror could find that the plaintiff subjectively considered her supervisor's sexually harassing conduct to be so extreme so as to alter the terms and conditions of her employment.

3. This question concerns *Lowery v. Seamless Sensations, Inc.*, No. 0:96-3744-19BD. Ms. Lowery was an African-American woman who said she had been paid less and fired because of her race. After she filed her complaint and the defendant filed an answer, you ordered the defendant to file a motion to dismiss on two grounds – that the lawsuit had not been timely filed and that a charge with the EEOC had not been timely filed. You stated that these defenses "relate[d] to the Court's subject-matter jurisdiction" and accordingly that it was "appropriate to expedite consideration of these defenses." In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), the Supreme Court stated: "We hold that a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." In addition, defenses subject to estoppel and equitable tolling may require discovery and be difficult to address on a motion to dismiss. Please explain why you thought it appropriate to order the defendant to file a motion to dismiss.

RESPONSE: I believed it was appropriate to order the defendant to file a motion to dismiss on these two defenses because the defendant specifically asserted in its answer that the defenses barred the plaintiff's claims. I did not, and do not, believe the interests of the parties or the interests of justice are served for the parties to engage in unnecessary (and costly) discovery if, as the defendant contended, the claims are barred as a matter of law. Quite often, this type of defense may be considered without the need for discovery. However, as you correctly observe, in some cases discovery on this type of defense may be necessary. In recognition of

this latter observation, I noted in my order that in lieu of filing the motion to dismiss, the defendant could indicate that discovery was necessary on these defenses (the plaintiff could have indicated this fact as well). In response to my order, the defendant expressly abandoned one of its defenses – thereby removing that defense from the case and relieving the plaintiff of the burden of addressing it. As to the other defense, the defendant asserted that discovery was necessary, and the case proceeded accordingly. While it is not my role as a judge to help or hinder any litigant, some may consider that my order in this case actually benefitted the plaintiff because it exposed the fact that a potentially dispositive defense that the defendant specifically asserted in its answer was without merit.

4. I noticed several cases in which you brought your own motions or took other actions apparently on behalf of defendants. *See, e.g., Lowery, supra; Shulis v. Denny's Restaurant*, No. 9:95-475-19AJ (*sua sponte* motion for summary judgment for defendant); *Tessman v. Island Ford-Lincoln-Mercury*, No. 9:95-3087-19AJ (*sua sponte* motion to dismiss). Have you taken similar *sua sponte* actions to assist plaintiffs in obtaining judgments? If no, do you believe there are factors about litigation today that lead a good judge to intervene more frequently on the side of defendants?

RESPONSE: As a general matter, I strive to ensure that all litigants, regardless of the nature of their case, are treated fairly in all proceedings before me. I did not take the actions you reference in an effort to assist the defendants in obtaining judgments in those cases. Rather, I raised issues in those cases that the defendant had specifically asserted in the answer or that were otherwise apparent from the pleadings. I did so because those issues appeared to be jurisdictional or, at least, would operate as a bar to the case. I did not, and do not, believe the interests of the parties or the interests of justice are served for the parties to engage in unnecessary (and costly) discovery if jurisdiction is not proper or if the claims are otherwise barred as a matter of law.

I do not take actions – *sua sponte* or otherwise – for the purpose of assisting any party

in litigation. I act only when I believe that my action best serves the interests of justice, regardless of which party may actually benefit. My response to question number 3 emphasizes this point, as the net result of my action in the *Lowery* case benefitted the plaintiff. Nonetheless, I have acted *sua sponte* in a manner which could be viewed as assisting the plaintiff to obtain a judgment or similar relief.

For example, in *Lundeen v. Roche Biomedical Labos.*, C.A. No. 3:93-1889-19 (D.S.C.), I raised at the close of the presentation of evidence at trial whether the plaintiff should be awarded judgment as a matter of law as to liability on her tort claim, and I told the plaintiff's attorney that I was prepared to enter that judgment in her favor. The plaintiff declined my offer because (according to her attorney) she did not want to give the defendant a possible avenue for appeal. The plaintiff thereafter obtained a $100,000 jury verdict.

During another trial (*Maya v. McKittrick*, C.A. No. 9:91-2741-19 (D.S.C.)), the defendant moved for judgment as a matter of law at the close of the plaintiff's case, and cited a state court of appeals decision that appeared to support dismissal of the case. I pointed out to the parties *sua sponte* that the court of appeals case on which the defendant relied had recently been reversed by the state supreme court. I then denied the defendant's motion, and the case settled.

I have also *sua sponte* raised the propriety of a defendant's removal of a case from state court, thereby setting in motion the procedure for the plaintiff to return the case to his or her chosen forum. *See, e.g., Coker v. Wal-Mart Stores, Inc.*, C.A. 3:97-2240-19 (D.S.C.).

5. Has an individual alleging employment discrimination obtained a favorable final judgment in your courtroom?

RESPONSE: I recall two employment cases in which I denied (at least in part) the defendants'

motions for summary judgment, and those cases thereafter proceeded to verdicts, one in favor of the plaintiff and one in favor of the defendant (Note: I did not actually preside in the trial of those cases, as one case was transferred to a newly appointed district judge under our court's case equalization plan and the other was tried before a magistrate judge with the parties' consent. However, my summary judgment ruling allowed the cases to proceed to trial). *See Campbell v. BP Amoco Polymers, Inc.*, C.A. No. 0-00-810-19BD (D.S.C.); *Holder v. South Carolina Elec. & Gas*, C.A. No. 3:97-1734-19 (D.S.C.). I have also had employment cases in which I have denied a defendant's dispositive motion thereafter settle either before or during trial.

6. Other than *Reno v. Condon*, are you aware of any decisions since *United States v. Lopez*, 514 U.S. 549 (1995), in which a lower court invalidated a federal statute on federalism grounds and the Supreme Court reversed?

RESPONSE: This question appears to be a continuation of our discussion at my hearing, and although that discussion covered a broader range of cases, I trust my answer to this question is also responsive to your question at the hearing.

In *Lopez*, the Supreme Court found an Act of Congress to be unconstitutional on federalism grounds (*i.e.*, the Commerce Clause), reversing the lower court's finding that the statute was constitutional. Two years later, in *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court again invalidated a federal statute on federalism grounds. Soon thereafter, relying on *Lopez*, *Printz*, and *New York v. United States*, 505 U.S. 144 (1992), I found the Driver's Privacy Protection Act unconstitutional. Three other district courts were faced with a similar challenge to DPPA, and two agreed with me that the Act was unconstitutional. *See Travis v. Reno*, 12 F.Supp.2d 921 (W.D. Wis. 1998); *Oklahoma v. United States*, 994 F.Supp. 1358 (W.D. Okla. 1997). As these cases worked through the appeals process, four circuit

courts of appeals considered the constitutionality of DPPA and two circuits agreed with me by finding DPPA to be unconstitutional. *See Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999); *Condon v. Reno*, 155 F.3d 453 (4th Cir.1998). Of course, all of the lower courts which found DPPA unconstitutional were later reversed by the Supreme Court, either directly or indirectly. Therefore, in the instance of *Reno v. Condon* and related cases, five lower federal courts found an Act of Congress unconstitutional, only to have the Supreme Court find the Act to be constitutional.

I can recall no other such cases during the seven-year time frame of your question. To the best of my recollection, it has been somewhat unusual for the Supreme Court to directly decide this type of federalism issue during this time period. Between the *Lopez* decision in 1995, and *Condon* in 2000, the only such case I can recall is *Printz*. Since *Condon*, the only other Supreme Court decision that I recall directly addressing a similar challenge was *United States v. Morrison*, 529 U.S. 598 (2000), which invalidated the Violence Against Women Act.

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR FEINGOLD'S WRITTEN QUESTIONS

1. In your view, is it proper to grant summary judgment to a defendant on a ground not raised in the defendant's motion? If you believe it is appropriate in some circumstances, please explain how a plaintiff can adequately respond to a motion, if a decision to grant summary judgment might be based on issues not raised in the defendant's papers.

RESPONSE: Where appropriate, summary judgment should be granted only after the non-moving party has been provided adequate notice of the summary judgment request. I therefore do not view it as proper to grant summary judgment to a litigant on a ground on which the non-moving party has not been provided sufficient notice and a meaningful opportunity to respond, and I have endeavored to be vigilant in this regard. Whenever a non-moving party has made what I feel is even a colorable assertion that it has not been given proper notice or opportunity to respond, I have permitted the non-moving party additional time to address the issue. For example, in one case a plaintiff claimed after summary judgment had been granted that one of the summary judgment grounds had not been raised in the motion but, instead, was first raised in the defendant's reply brief. Although I felt that a fair reading of the record did not support the plaintiff's claim, I nevertheless set aside the summary judgment and permitted the parties to reargue the summary judgment motion anew.

I would note that as the Supreme Court recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), it is proper for district courts to grant summary judgment to a litigant *sua sponte* – that is, on a ground not raised in a summary judgment motion – if the parties are provided with sufficient notice of the issue and a meaningful opportunity to respond before summary judgment is granted. I have raised issues for summary disposition *sua sponte* where I believed it was necessary or helpful to the litigation (*e.g.*, jurisdiction), and I have always allowed the parties an adequate opportunity to address the issue.

2. Have you ever called defense counsel on the telephone in an employment discrimination case and suggested that the defendant file a motion to dismiss?

RESPONSE: To the best of my recollection, I have not called defense counsel on the telephone in an employment discrimination (or any other) case and suggested that the defendant file a motion to dismiss or any other motion. It would be contrary to my standard practice of avoiding these types of communications for such a call to have occurred. There have been occasions during a courtroom hearing or telephone conference – in which all counsel are present – that an attorney for a party may have indicated to me (again, in the presence of opposing counsel) that he or she intended to pursue some course of action. In these instances, I may have responded that the attorney should file a motion if he or she thought it was appropriate. I would have done this to ensure that the matter was reduced to writing and that all parties had an adequate opportunity to respond.

Rather than having this type of communication, it has been my practice in those situations where I observed that a potentially dispositive matter (*e.g.*, lack of jurisdiction) was not being addressed to raise the issue in a public order which is provided to all parties.

3. Do you consider it ethical behavior for a judge to communicate *ex parte* with counsel for one of the parties in a case and make recommendations on how the case should be litigated?

RESPONSE: Canon 3(A)(4) of the Code of Conduct for United States Judges indicates that such conduct would not be proper. To the best of my ability, I have always diligently endeavored to adhere to this ethical canon.

4. In *Crosby v. South Carolina DHEC*, you struck down portions of the Family and Medical Leave Act (FMLA) as beyond Congressional authority. Your one page order adopted the cursory analysis of a Magistrate Judge. The Magistrate had noted a split in authorities by other district courts on the constitutionality of the FMLA, but did not analyze or critique the rulings upholding Congressional authority.

A. What do you believe is the responsibility of a District Court judge in reviewing the

recommendations of a Magistrate Judge?

B. Can you explain why you thought it was sufficient to adopt the recommendations without further analysis or discussion in this kind of important case?

C. In response to a question by Senator Schumer during the hearing, you indicated that you asked the Department of Justice to intervene in this matter. Please explain why you asked for the involvement of the Department of Justice, what specifically you asked them to do, and what their response was. If you believed this case was significant enough to involve the Department of Justice, why did you not provide a more detailed analysis of the legal issues in your decision?

RESPONSE: I believe that when a district judge reviews a magistrate judge's recommendations, the district judge's responsibility is to review, under the appropriate standard, the record and controlling or pertinent law to ensure that the recommendations are correct.

In the *Crosby* case, I received the magistrate judge's original report and recommendation, which called for dismissal of the FMLA claim on constitutional grounds. Although the plaintiff did not file any objection to the report and recommendation, I noticed that the United States had not been notified of its right to intervene pursuant to 28 U.S.C. § 2403 and Rule 24(c) of the Federal Rules of Civil Procedure. I therefore entered an order holding the FMLA issue in abeyance, and I notified the United States of the pendency of the action and afforded it an opportunity to consider whether it wished to intervene in the case. I thereafter granted the United States' motion to intervene, and remanded the case back to the magistrate judge for further consideration of the FMLA issue. The magistrate judge reconsidered the issue in light of the United States' legal memorandum, and subsequently issued a supplemental report and recommendation in which he again recommended dismissal of the FMLA claim. The United States filed an objection to that report, and the defendant filed a response to that objection. I carefully considered the two magistrate judge reports, the United States' objections and the defendant's reply, and the cases cited in these documents,

and found the recommendation for dismissal to be correct. In reviewing all of these materials, I evaluated the magistrate judge's analysis to ensure that it was legally proper, thereby subjecting the issue to my own legal analysis. However, because I felt that the magistrate judge had properly addressed the issues, and the case was properly framed for review by the Fourth Circuit (which would review the constitutional issue *de novo*), I did not believe that there was any reason for me, in essence, to rewrite his report.

I would note that the plaintiff in *Crosby* did not file an appeal, and the United States voluntarily dismissed its appeal of my decision before the Fourth Circuit subsequently ruled in another case as I had ruled in *Crosby*. My decision in *Crosby* is consistent with later rulings by 8 of 9 circuit courts of appeals which have considered this issue.

5. During your time on the bench you have issued some decisions in constitutional cases of first impression that you have declined to publish. Yet, some of your published opinions, such as *Assaad-Faltas v. University of South Carolina*, seem to be less important than those unpublished constitutional cases. Please explain what made *Assaad-Faltas* important enough to be published, while the decisions you have reached in cases raising constitutional issues were not important enough to be published. What are the principles upon which you base your decision to publish an opinion?

RESPONSE: I cannot recall any case in which I had before me a constitutional issue of first impression (*i.e.*, where I was the first court to consider a particular constitutional issue) other than *Condon v. Reno*, which I sent to the West Publishing Company for publication. I have had cases besides *Condon* in which constitutional issues have been involved that I did not send for publication. While those cases were not less important than *Assaad-Faltas*, I did not believe that my decisions were significant enough to warrant inclusion in the Federal Supplement. As a district judge, my decisions do not carry any precedential value, and at the time I rendered those decisions, I felt that other courts had adequately addressed and analyzed the particular issues in question.

As I recall, I decided to publish the *Assaad-Faltas* case because I felt it was important to provide notice to other federal judges about my analysis of this litigant's *in forma pauperis* status. I was aware that this individual had an extensive history of litigating cases in various parts of the country and I simply believed that other federal judges should be aware of my ruling if and when the issue of her *in forma pauperis* status arose in their courts.

The decisions regarding publication addressed in this response are consistent with my general philosophy regarding district court publication of orders. While I do not have a rigid set of publication guidelines, generally speaking I decide to publish an order only when it presents a truly novel issue (*e.g.*, *Condon*), it addresses a significant issue that I encounter with some frequency and which may not always be addressed by appellate courts (*e.g.*, removal jurisdiction), or it otherwise involves an issue of law that I believe warrants publication because of some other specific reason. I would note that occasionally I am contacted by litigants or a legal publishing company and requested to publish a particular order, and I take these requests into account. I would further note that although this District Court does not have a policy concerning publication, I have published orders at a rate which is about average compared to my colleagues.

6. Some critics of your nomination have raised concerns about your handling of civil rights and employment discrimination cases as a District Judge. In particular, they allege that you seem to bend over backwards to assist the defense in such cases. Cases that some critics charge raise this perception are *Lowery v. Seamless Sensations, Inc.*, C.A. No. 0:96-3744-19BD; *Tessman v. Island Ford-Lincoln Mercury*, C.A. No. 9:95-3087-19AJ; and *Shults v. Denny's Restaurant*, C.A. No. 9:95-475-19AJ. Please discuss your handling of these cases and respond to the allegation that you were not evenhanded.

RESPONSE: As a general matter, I strive to ensure that all litigants, regardless of the nature of the case, are treated fairly in proceedings before me. I am gratified that I have earned a reputation (as reflected by attorney comments in the Almanac of the Federal Judiciary) for

fairness among the lawyers in this district. Therefore, I disagree with any allegation that I am not evenhanded in any type of case.

In each of the cases you have referenced, a potential problem that related to the plaintiffs' ability to maintain the lawsuit was apparent to me from the parties' pleadings. These potential problems related to the plaintiffs' apparent failure to comply with one or more jurisdictional or administrative prerequisites to employment litigation. *See, e.g., Davis v. North Carolina Dept. of Correction*, 48 F.3d 134, 140 (4th Cir. 1995) ("We have long held that receipt of, or at least entitlement to, a right-to-sue letter is a jurisdictional prerequisite that must be alleged in a plaintiff's complaint. Thus, where neither the complaint nor the amended complaint alleges that the plaintiff has complied with these prerequisites, the plaintiff has not "properly invoked the court's jurisdiction under Title VII" (citations omitted, internal punctuation modified)). For example, in *Tessman* the plaintiff had not alleged in her complaint that she had received a right-to-sue notice from the EEOC. Similarly, in *Lowery* the defendant asserted in its answer that the plaintiff had not filed a timely charge of discrimination with the EEOC and did not timely file the lawsuit. In *Skulls*, the defendant asserted that the plaintiff had failed to present her claim to the EEOC and did not timely file the lawsuit.

Because federal courts are courts of limited jurisdiction, I have a duty to inquire into whether subject-matter jurisdiction exists in all cases before me. *See, e.g., In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998) ("'It is a fundamental precept that federal courts are courts of limited jurisdiction,' constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute. A primary incident of that precept is our duty to inquire, *sua sponte*, whether a valid basis for jurisdiction

exists, and to dismiss the action if no such ground appears" (citations omitted)). Likewise, where, for case management purposes an issue that obviously should be addressed early in the litigation comes to my attention, I will highlight it for both parties to address to promote the interests of justice. I therefore raised the issues in the cases you have referenced and provided the parties with an opportunity to address them before I ruled. I did this early in the case to ensure that the parties did not engage in protracted litigation only later to have the case dismissed – by myself or an appellate court – on the bases that were apparent from the outset. I would note that where a plaintiff corrected the apparent defect (*e.g.*, as in *Teasman*) or the parties requested discovery (*e.g.*, as in *Lowery*), I allowed the case to proceed accordingly.

7. Are there instances where you have been particularly helpful to a plaintiff in an employment or other civil rights case? If so, please provide the details of such cases.

RESPONSE: Respectfully, I would initially like to emphasize that it is not my role as a judge to help or hinder any litigant. My role as a judge is to ensure that all parties are treated fairly according to the law, and I endeavor to do that in every case that I handle. I believe my extremely low reversal rate in these types of cases reflects the fact that I apply the law in a fair and even manner.

To address your question, I have made many rulings in employment or civil rights cases which some may consider to be helpful to the plaintiff. For example:

> I have on many occasions denied defendants' motions for summary judgment in employment and civil rights cases. One example is a case in which I rejected the recommendation of a magistrate judge and denied a defendant's motion for summary judgment on a claim where the plaintiff asserted that she was terminated from her employment because she was involved in an interracial relationship. *See Treacy v. Loftis*, C.A. No. 3:92-3001-19BD (D.S.C.). In another case, I denied a defendant's motion for summary judgment in a Fair Housing Act case where the plaintiff-spouses claimed that they were threatened with eviction from their home because of the HIV status of one of the spouses. *See Black v. Twin Lakes Mobile Homes Estates*, C.A. No. 97-3971-19 (D.S.C.). As I

recall, both of those cases eventually settled.

I recall two employment cases in which I denied (at least in part) the defendants' motions for summary judgment, and those cases thereafter proceeded to verdicts, one in favor of the plaintiff and one in favor of the defendant (Note: I did not actually preside in those cases at trial, as one case was transferred to a newly appointed district judge and the other was tried before a magistrate judge with the parties' consent. However, my summary judgment ruling allowed the cases to proceed to trial). *See Campbell v. BP Amoco Polymers, Inc.*, C.A. No. 0-00-810-19BD (D.S.C.); *Holder v. South Carolina Elec. & Gas*, C.A. No. 3:97-1734-19 (D.S.C.).

Sitting by designation with the Fourth Circuit, I joined with Judge Sam Ervin in reversing a summary judgment and remanding a case in order to allow the employment discrimination plaintiffs to proceed to trial. *See McKinney v. Board of Trustees of Mayland Comm. College*, 955 F.2d 924 (4th Cir. 1992).

I certified a question of state employment law to the Supreme Court of South Carolina, which court subsequently ruled on the legal issue in the plaintiff's favor. This ruling not only benefitted the plaintiff in my case, but it also expanded the remedy available for discharged employees in similar circumstances. *See Stiles v. American Gen. Life Ins. Co.*, 994 F. Supp. 712 (D.S.C. 1998), *certified question answered*, 516 S.E.2d 449 (S.C. 1999).

I presided over a civil rights jury trial in which a *pro se* prisoner-plaintiff obtained a verdict of nominal and punitive damages, and during this trial I made appropriate efforts to ensure that the *pro se* plaintiff understood the process. *See Muldrow v. King*, C.A. No. 4:90-1628-19 (D.S.C.). I have also presided over two other civil rights jury trials in which the plaintiffs obtained a verdict of actual and punitive damages. *See Wilson v. Loadholt*, 9:91-3660-19 (D.S.C.); *Skinner v. Singleton*, C.A. No. 3:91-957-19 (D.S.C.). I have presided over at least five other civil rights cases that went to a jury verdict, although the jury did not find for the plaintiffs. *See Vaughan v. Evatt*, 5:98-930-19 (D.S.C.); *Hillian v. Pullings*, C.A. No. 3:96-383-19 (D.S.C.); *Kennedy v. Oswale*, C.A. No. 3:95-1588-19 (D.S.C.); *Smith v. Helms*, C.A. No. 0:93-411-19 (D.S.C.); *Ruppe v. Spires*, C.A. No. 3:90-2431-19 (D.S.C.).

I have granted relief in at least five habeas corpus cases. *See Hope v. Moore*, C.A. No. 9:98-2966-19RB (D.S.C.); *Green v. U.S.A.*, C.A. No. 3:96-1787-19 (D.S.C.); *Mazzell v. Evatt*, 3:90-2651-19 (D.S.C.), *rev'd*, 88 F.3d 263 (4th Cir. 1996); *Smith v. Witkowski*, C.A. No. 3:91-600-19BC (D.S.C.); *Pruitt v. State of S.C.*, C.A. No. 3:91-336-19 (D.S.C.).

I ruled in favor of the plaintiff and upheld the one-person/one-vote principle in a case in which the plaintiff challenged the method of electing members to a

local school board. *See Dooley v. Lexington County School Dist. One Bd. of Trustees*, C.A. No. 3:94-2697-19 (D.S.C.).

I have handled a number of Voting Rights Act cases, and to my recollection, the plaintiffs in each case succeeded on their claim of a violation. *See, e.g., NAACP v. Lee County*, C.A. No. 3:94-1575-17 (D.S.C.) (three-judge panel); *NAACP v. Holly Hill*, C.A. No. 5:91-3034-19 (D.S.C.); *NAACP v. Town of Ellaree*, C.A. No. 5:91-3106-19 (D.S.C.).

Although your question is directed toward civil cases involving civil rights, I would note that I am vigilant in ensuring the protection of civil rights in criminal cases as well. I have, for example, granted judgment of acquittal on numerous occasions to defendants where I believed, as a matter of law, that the government failed to meet its burden of proof. I have also disallowed the government from using evidence at trial when I thought that its use would improperly disadvantage the defendant. It is also my practice during trial to ensure very specifically that defendants are aware of their constitutional right to testify or not to testify. Similarly, it is my practice to ensure that witnesses who I believe may incriminate themselves by their testimony are aware of their rights, and I have appointed counsel in some instances to advise these witnesses before they testify.

Finally, I would note that my overall record in civil cases demonstrates that I am fair to plaintiffs. I have, for example, awarded a bench trial verdict of over $2,000,000 in one case, *see Hart v. United States*, C.A. No. 3:93-402-19 (D.S.C. 1997), and over $1,000,000 in another case. *See Gaddis v. United States*, 7 F. Supp.2d 709 (D.S.C.). In addition, I have presided over jury trials which led to substantial verdicts in the plaintiffs' favor, *see, e.g., Jackson v. Owens-Corning Fiberglas Corp.*, 1995 Westlaw 456336 (4th Cir. 1995) ($373,000 product liability verdict); *Norman v. Allen*, 3:93-2763-19 (D.S.C.) ($380,000 product liability verdict); and I have on at least one occasion directed a verdict of liability in the plaintiff's favor. *See, e.g.,*

Scott v. Land Span Motor, Inc., 781 F. Supp. 1115 (D.S.C. 1991) ($84,000 personal injury verdict). I have also raised, *sua sponte*, the propriety of the removal of cases from state court, thereby setting in motion the procedure by which the plaintiffs could return to their chosen forum (*i.e.*, state court). *See, e.g., Coker v. Wal-Mart Stores, Inc.*, C.A. 3:97-2240-19 (D.S.C.). I have also assisted parties in civil cases in reaching a settlement, and often this has occurred where it appeared as though the plaintiff would otherwise gain no recovery.

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR KENNEDY'S WRITTEN QUESTIONS

FAMILY AND MEDICAL LEAVE ACT

In Crosby v. South Carolina Dept of Health and Environmental Control, you held that Congress did not properly enact the Family and Medical Leave Act (FMLA) under Section 5 of the Fourteenth Amendment and that therefore Congress had not properly abrogated the State's Eleventh Amendment immunity from private suits. It appears that you did not issue an opinion in this case, and instead simply adopted the opinion of the magistrate. The magistrate's discussion of whether the FMLA is a proper exercise of Congress's Section 5 power is not a long one. The magistrate cites from the conclusion of another district court that the FMLA is "substantive" legislation that fails the "congruence and proportionality test" as delineated in the Supreme Court's decision in City of Boerne v. Flores. After you permitted the Government to intervene to defend the constitutionality of the FMLA, the magistrate judge, again with little discussion, concluded that while the "Act was laudable" it was not within Congress's Section 5 power. You again adopted this supplemental recommendation.

1. Several courts have also come to the conclusion that States are immune from private suits to enforce particular provisions of the FMLA, but I was struck by the brevity of your discussion of this important issue – an issue that, at that time, had not been addressed by the Fourth Circuit. The FMLA, which was adopted with bipartisan support, contains substantial findings regarding the role that the provision of family and medical leave plays in promoting equal employment opportunity for women and men by relieving women of the disproportionate burden of taking care of family and accommodating the needs of workers with families. *See, e.g.*, 29 U.S.C. § § 2601(b)(5), (b)(4), (a)(5). Yet neither your order nor the magistrate's contains any serious discussion of this remedial goal of alleviating sex discrimination.

   Please explain why you did not discuss the legislative findings and history regarding the role family leave plays in promoting equal employment opportunity. In addition, why did you simply adopt the magistrate's conclusions without issuing an opinion of your own? Finally, please explain why you did not delineate your reasons for rejecting the United States' arguments in this case?

RESPONSE: Under the Local Rules of our District (and in accordance with 28 U.S.C. § 636), the *Crosby* case was automatically referred to a United States Magistrate Judge for the conduct of all pretrial proceedings, including the entry of a report and recommendation on any dispositive motions. As this case progressed, I received the magistrate judge's original report and recommendation, which called for dismissal of the FMLA claim on constitutional grounds. Although the plaintiff did not file any objection to the report and recommendation, I noticed

that the United States had not been notified of its right to intervene pursuant to 28 U.S.C. § 2403 and Rule 24(c) of the Federal Rules of Civil Procedure. I therefore entered an order holding the FMLA issue in abeyance, and I notified the United States of the pendency of the action and afforded it an opportunity to consider whether it wished to intervene in the case. I thereafter granted the United States' motion to intervene, and remanded the case back to the magistrate judge for further consideration of the FMLA issue. The magistrate judge reconsidered the issue in light of the United States' legal memorandum, and subsequently issued a supplemental report and recommendation in which he again recommended dismissal of the FMLA claim. The United States filed an objection to that report, and the defendant filed a response to that objection. I carefully considered the two magistrate judge reports, the United States' objections and the defendant's reply, and the cases cited in these documents, and found the recommendation for dismissal to be correct.

In reviewing all of these materials, I evaluated the magistrate judge's analysis to ensure that it was legally proper, thereby subjecting the issue to my own legal analysis. However, because I felt that the magistrate judge had properly addressed the issues, and (importantly) the case was properly framed for review by the Fourth Circuit (which would review the constitutional issue *de novo*), I did not believe that there was any reason for me, in essence, to rewrite the report. Nor did I deem it necessary to specifically delineate each reason for rejecting the United States' arguments, or to elaborate on the legislative history underlying the FMLA. I can assure you that the fact that I did not write an extensive order detailing these matters does not mean that I did not carefully consider them.

The parties to the case apparently considered my disposition of the FMLA claim to be adequate as they did not request that I clarify, or elaborate on, it. I would note that the

plaintiff in *Crosby* did not file an appeal, and the United States voluntarily dismissed its appeal. The Fourth Circuit subsequently ruled in another case as I had ruled in *Crosby*. My decision in *Crosby* is consistent with later rulings by 8 of 9 circuit courts of appeals which have considered this issue.

2. The plaintiff in the Crosby case claimed that the State agency had violated her rights under the FMLA by not returning her to her prior position or an equivalent position when she returned to work after taking leave due to respiratory problems. Presumably, the plaintiff's claims implicated section 2612(a)(1)(D) of the FMLA, which provides for sick leave occasioned by an employee's own illness.

   Was your holding in Crosby regarding the validity of private FMLA suits against the States limited to personal medical leave, § 2612(a)(1)(D), or does it also apply to family leave, § 2612(a)(1)(C) and parental leave, § 2612(a)(1)(A),(B)? If so, does the Crosby decision make clear that it is limited only to personal medical leave? Please explain.

   Would your conclusion in Crosby have been different if that case had explicitly concerned the family or parental leave provisions? Do you believe that the family and parental leave provisions of the FMLA are a valid exercise of Congress's Section 5 enforcement power?

RESPONSE: Although the *Crosby* plaintiff did not specifically identify in her complaint the FMLA provision upon which she relied, the factual circumstances of this case and the manner in which the parties litigated it made it clear that § 2612(a)(1)(D) was at issue. While that provision is not specifically delineated in the report and recommendation or the order, the parties were aware of the issue that was being addressed. Because that was the only FMLA provision before me, there was no reason for me to consider or address the validity of any other provisions. Because questions regarding the constitutionality of other FMLA provisions may come before me in future litigation, I believe it would be appropriate for me to address them only in the context of a judicial proceeding and only after I have had the full benefit of reviewing the parties' legal arguments. In addition, I would note that on June 24, 2002, the Supreme Court granted certiorari in *Nevada Department of Human Resources v. Hibbs*, a Ninth

Circuit case that appears to present the question of the constitutionality of § 2612(c)(1)(C) of the FMLA. Because your question relates to a matter currently pending before the Supreme Court, I believe that I should not comment in that regard. I can assure you that I will follow whatever decision the Supreme Court reaches in that case.

RIGHT TO PRIVACY

In Condon v. Reno, you ruled that the Driver's Privacy Protection Act (DPPA), which regulates the disclosure of personal information contained in state motor vehicle records, unconstitutional. You found that this federal protection of private information was not within Congress's power to enforce and protect the rights guaranteed by the Fourteenth Amendment, including the right to privacy, and that it violated the Tenth Amendment. The Supreme Court unanimously reversed the Fourth Circuit's decision affirming your ruling on the Tenth Amendment grounds, and thus did not reach the Fourteenth Amendment issue.

While you acknowledge that the Fourth Circuit recognized a constitutional right to privacy in the nondisclosure of some personal information, you concluded that information such as an individual's name, drive identification number, address, phone number and photograph were not information for which individuals had a reasonable expectation of privacy.

Yet, the legislative history of the DPPA makes clear that protecting the confidentiality of information possessed by state departments of motor vehicles was crucial to preventing violence against women, and a women's constitutional right to reproductive choice. The record revealed the many instances in which this information was used to stalk, murder or assault women or track down women attempting to flee abusive relationships. In addition, extreme anti-abortion groups used license numbers to gain the home addresses of doctors and nurses who perform abortions or of women who visit abortion clinics, and then harass or stalk these individuals.

Given this context, what were your reasons for finding that there was no reasonable expectation of privacy in personal information contained in the motor vehicle records? Do you believe that in some circumstances – such as when a woman is fleeing an abuser – an individual may have privacy interest even in directory-type information that is otherwise easily accessible? Did you consider the legislative history in arriving at your conclusion that the DPPA was beyond Congress's power to enforce the Fourteenth Amendment? Why or why not?

RESPONSE: There is no doubt that the purposes underlying the DPPA are laudable. However, my role in the *Condon* case required me to consider the legal arguments presented to me, and

those dealt with the DPPA's constitutionality.

I set forth my reasoning in the *Condon* order. I was presented with two primary issues based on the parties' contentions. The first issue related to Congress' power to enact the DPPA under the Commerce Clause. Having decided the Commerce Clause issue adversely to the United States, I was compelled then to consider whether the DPPA was otherwise constitutional (of course, all Congressional acts are presumptively constitutional). That is why I considered the privacy issue.

The Fourth Circuit – a court whose precedent I am bound to follow – had on at least three occasions addressed the level of privacy an individual possesses in personal information in the context of whether the individual must disclose such information to the government. *See Taylor v. Best*, 746 F.2d 220 (4th Cir.1984), *cert. denied*, 474 U.S. 982 (1985); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir.1990); *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir.1992). My review of those cases (particularly *Walls*) led to my conclusion that (at least in the Fourth Circuit) privacy protection for information depends on whether the information is within an individual's reasonable expectation of privacy, and the more intimate or personal the information, the more justified is the expectation of privacy. Moreover, those cases established that information that is freely available in public records is not protected by a right to privacy. As a district judge, I was not at liberty to disregard these principles.

Applying this precedent to the DPPA, I concluded that the information sought to be protected by the DPPA was not subject to constitutional privacy protection. In considering and deciding this issue, I reviewed all of the information that the parties presented to me, as well as any other legal materials that appeared at the time to be pertinent. While I do not have available to me the parties' legal briefs, my recollection is that I did review the legislative

history of the DPPA in arriving at my conclusion concerning this case. I certainly would have considered the legislative history if either party presented it to me or as I deemed it necessary or helpful.

To my knowledge, the precedent I relied on remains valid. Therefore, whether an individual would have a privacy interest in the information you mentioned would depend on the specific details of the "directory-type information." However, if that information is public or "easily accessible," I believe that a strong argument could be made under Fourth Circuit precedent that an individual probably would not have a reasonable expectation of privacy in that information.

I would note that when *Condon* was argued before the Supreme Court, the Solicitor General "expressly disavowed" any reliance on the Fourteenth Amendment in attempting to sustain the DPPA. *See Reno v. Condon*, 528 U.S. 141, 148 n.2 (2000).

REVERSAL OF JURY VERDICT IN PERSONAL INJURY CASE

Sitting by designation in Jones v. Owens-Corning Fiberglass, 69 F.3d 712 (4th Cir. 1993), you reversed a jury verdict finding in favor of workers who had been injured by asbestos-containing products. You ordered a new trial reasoning that, because the defendants were smokers, the district court was wrong in refusing to permit the defendants to establish the statutory defense of contributory negligence at trial. You were joined by Judge Luttig in your decision, but Judge Wilkinson dissented, stating that you had failed to follow the "plain language of North Carolina's product liability law." North Carolina law bars personal injury claims where the "claimant failed to exercise reasonable care under the circumstances in his use of the product." Quite clearly, the evidence that the plaintiffs were smokers would be relevant to the question of whether the product caused plaintiffs' injury, or in determining the extent of plaintiffs' damages. However, it seems less clear that evidence of smoking should operate to wholly bar plaintiffs' claims where North Carolina law only bars claims arising from failure to properly use the product at issue (in this case, the asbestos).

Please explain your conclusion that plaintiffs' smoking might operate to bar their claims under North Carolina law.

RESPONSE: In the case to which you refer, *Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712

(4th Cir. 1995), the plaintiffs sued an asbestos manufacturer ("OCF"), asserting that they contracted lung cancer because of their exposure to OCF's asbestos products. Prior to trial, the district court granted partial summary judgment against OCF on two issues: (1) whether the plaintiffs had been sufficiently exposed to OCF's asbestos product for purposes of rendering OCF liable and (2) whether the plaintiffs could be held contributorily negligent under North Carolina law because of their cigarette smoking. The jury thereafter returned verdicts in the plaintiffs' favor.

OCF appealed the district court's summary judgment rulings. The three-judge panel (on which I sat) rejected OCF's contention concerning the exposure ruling, thereby ruling in favor of the plaintiffs on that issue. As to the contributory negligence issue, the panel majority reversed.

At the time of the opinion in this case, North Carolina statutory law provided that a manufacturer or seller of a product may not be held liable in a product liability action if the claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant. As the North Carolina Supreme Court had recognized, this legislative enactment was a reaffirmation of the applicability of contributory negligence as a defense in product liability actions. That was a matter of North Carolina law that all judges who presided in the case were bound to apply.

The district court initially denied the plaintiffs' summary judgment motion on the contributory negligence defense. However, immediately prior to trial, the district court announced that it had reconsidered (*sua sponte*) the matter and granted the motion. The district court's ruling was not based on whether there was sufficient evidence in the record to

support the defense of contributory negligence, but instead was a legal ruling that the defense was not applicable to the case as a matter of North Carolina law. The district court thus prohibited OCF from presenting the contributory negligence defense to the jury.

At trial, the plaintiffs' theory was that their exposure to asbestos acted "synergistically" with their cigarette smoking to greatly increase their risk of lung cancer. The plaintiffs presented medical evidence to the jury to support this theory. However, the plaintiffs' medical evidence was inconclusive as to whether their lung cancer was caused by asbestos exposure, cigarette smoking, or both.

OCF argued on appeal that under North Carolina law, a jury could reasonably conclude that the plaintiffs were contributorily negligent if it found that (1) the plaintiffs failed to exercise reasonable care under the circumstances in their use of the asbestos-containing products because (2) they continued to smoke cigarettes after the hazards of cigarette smoking and the relationship between cigarette smoking and asbestos exposure became widely known, and (3) their smoking, combined with their exposure to asbestos-containing products, was a proximate cause of their injuries. In other words, OCF argued that if (as OCF contended) the plaintiffs were warned about the heightened danger of cigarette smoking and asbestos exposure but nonetheless continued over a long period of time to smoke cigarettes despite that warning, and if (as happened at trial) the plaintiffs argued to the jury that their lung cancer was caused (and/or aggravated) by asbestos exposure in conjunction with cigarette smoking, then North Carolina statutory law afforded OCF the opportunity to present the defense of contributory negligence to the jury.

The panel majority agreed with OCF's contention that it should be afforded an opportunity to present the statutory defense to the jury. Our conclusion was based on the fact

that North Carolina law specifically authorized this defense, and the facts and circumstances of the case made the defense potentially applicable. We did not rule as a matter of fact or law that the plaintiffs should be barred from recovery. Instead, our ruling simply required that OCF be permitted to present the defense to a jury for consideration.

I would note as a final matter on this question that in *Nicholson v. American Safety Utility Corp.*, 488 S.E.2d 240, 244 (N.C.1997) (citation omitted), the North Carolina Supreme Court favorably cited the ruling in *Jones*:

> At common law, "[a] plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury." N.C.G.S. § 99B-4(3) does not create a different rule for products liability actions; it clarifies the common law contributory negligence standard with respect to these actions. The statute clearly provides that one who is negligent "under the circumstances in the use of the product" will be barred from recovery. *See Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 721-22 (4th Cir.1995) (holding that the focus of N.C.G.S. § 99B-4(3) is not on a plaintiff's "use of the product" *per se*; rather, the focus is on whether a plaintiff "failed to exercise reasonable care under the circumstances in the use of the product").

UNITED STATES V. GRICE

You presided over criminal proceedings arising out of the *South Carolina v. Quattlebaum* case. Shortly before the defendant's state court trial in that case, it was revealed that law enforcement officers and prosecutors had secretly videotaped the defendants' conversations with his lawyer. The defendant was convicted of murder and sentenced to death, but the South Carolina Supreme Court overturned the conviction and sentence on the ground that this videotaping violated his Sixth Amendment right to counsel. The court held that the videotaping was "an affront to the integrity of the judicial system." *See State v. Quattlebaum*, 338 S.C. 441 (2000).

The U.S. Attorney's office then opened an investigation into the facts surrounding this case. As a result of the investigation, the U.S. Attorney brought several indictments over which you presided. The prosecutor was charged with lying to a grand jury about whether he knew about the video taping. You eventually dismissed this perjury charge on the grounds that untruthful statements were not material. The law enforcement officer, Grice, who actually did the videotaping, pled guilty and you fined him $250. The defense attorney, Duncan, who was videotaped, pled guilty to lying to the grand jury for saying that he had not given the videotape to the media. You sentenced the defense attorney to four months in federal prison, four

months of house arrest and twenty months of supervised probation.

1. In sentencing Grice, you stated that he "is caught up in something a lot bigger than one incident. . . . Mr. Grice is caught up in a situation in which there's at least part of the criminal defense Bar trying to get prosecutors and law enforcement punished. That's what's going on in the law. It is not any secret to anybody. I'm not sure what's driving them. . . . Some criminal defense lawyers feel like they have a chance to try to put law enforcement officers and solicitors in jail and that's what they want to see happening."

   Do you believe that there is a conspiracy among criminal defense lawyers to put prosecutors and police officers in jail? What is your basis for this conclusion? Please explain.

RESPONSE: No, I do not believe there is a conspiracy among criminal lawyers to put prosecutors and police officers in jail. I based my comments on my observations during pre-trial matters in this case and on contemporaneous news reports. It was clear that some defense lawyers had very strong feelings about the conduct of law enforcement officials in this incident. I never indicated I felt their views were unjustified, because I indicated I did not yet know all of the facts in the case.

2. Interestingly, you meted out your harshest sentence to the defense lawyer while giving him a stern lecture about the seriousness of his offense, and issued only a small fine to the law enforcement officer who conducted the actual videotaping. Did you disagree with the South Carolina Supreme Court's view of the Sixth Amendment and the severity of the violation that took place here? Did you conclude that the law enforcement officer's criminal civil rights violations were less serious than the defense attorney's perjury? Please explain.

RESPONSE: In my cases, I was not called upon to consider the South Carolina Supreme Court ruling. However, I take violations of the Sixth Amendment very seriously.

In sentencing these two defendants, I applied the United States Sentencing Guidelines to the offenses brought by the United States Attorney as I was required by law to do and as was agreed to by the lawyers for the parties. I drew no conclusion about the relative seriousness of these offenses. As a general matter, the defense lawyer received a tougher

sentence because he was sentenced for a felony, while the deputy was sentenced for a misdemeanor.

3. What were your grounds for dismissing the Prosecutor's perjury charges?

RESPONSE: In the case of the prosecutor, he asserted his innocence to the perjury charges against him. Therefore, as with any criminal charge, the government had the burden of proving each and every element of the charge against him beyond a reasonable doubt. One element in a perjury charge is materiality. In this case, that meant the government had to prove beyond a reasonable doubt that the prosecutor's statements, which the government asserted were false, were material to the grand jury's investigation. At the conclusion of the government's case, the attorney for the prosecutor moved for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Because the government had failed to produce evidence of the nexus between the defendant's statements and the scope of the Grand Jury's investigation, no reasonable juror could determine the issue of materiality beyond a reasonable doubt. Therefore, I felt it my duty under the dictates of the law to grant the defense motion. I never was required to rule, nor did I rule, that the statements by this defendant were not material.

SCHOOL INTEGRATION

1. In May 2001, a challenge was brought to a voluntary school integration program in Rock Hill schools in South Carolina, on the ground that it was unconstitutional to consider race in assigning students. You were originally assigned this case but shortly after the plaintiffs moved for a preliminary injunction, the case was reassigned to another district court judge. Why was the case reassigned? Did you issue any rulings in the case? If so, please detail your rulings.

RESPONSE: The case to which you refer was reassigned to another judge because I recused myself from participating in it. When I examined the allegations in this case, I realized that

the case involved a challenge to the rezoning of several elementary schools within the Rock Hill School District. My family lives in a school district which very recently underwent a somewhat similar rezoning (although without the legal challenge) and, in fact, my family is affected by that rezoning. While I personally had no doubt about my ability to preside over the case in a fair and impartial manner, I was concerned that someone could reasonably question my ability to be fair and impartial. *See* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Prior to recusing myself, I discussed this matter with several colleagues, and they concurred that I was making the correct decision. I did not make any rulings in this case.

2. Segregation in primary and secondary education continues to be a serious problem in many states. Have you presided over any cases involving school desegregation or race-based student assignment policies? If so, please describe the cases and explain how you ruled in these cases.

RESPONSE: I do not recall presiding over any other active cases involving school desegregation or race-based student assignments. During my tenure on the district court I have been assigned several different case dockets, and a case of this type (active or inactive) may have been assigned to me on one of these dockets. However, I do not recall ever having such a case or taking any action in a case of this type.

3. Do you believe that it is constitutional for a school system to voluntarily adopt a student assignment policy that considers race as a factor for purposes of promoting integration? Do you believe that there is a constitutionally compelling interest in integrating schools?

RESPONSE: I believe, as the Supreme Court has held, that some circumstances present a constitutionally compelling interest in integrating schools. However, I must respectfully decline to answer the question of whether I believe that it is constitutional for a school system

to voluntarily adopt a student assignment policy that considers race as a factor for purposes of promoting integration. I believe that is the precise issue in the Rock Hill School District case, which is pending before a district court colleague of mine, and I believe Canon 3(A)(6) of the Code of Conduct for United States Judges ("A judge should avoid public comment on the merits of a pending or impending action") makes it inappropriate for me to comment. In addition, a similar case could come before me in the future.

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR SPECTER'S QUESTION

During my June 27, 2002, hearing before the Senate Judiciary Committee, Senator Specter asked me if I believed that the NAACP's opposition to my nomination was fair. I responded that I do not think it is fair. Senator Specter then asked me to provide a written answer explaining my position. I trust that this will be responsive to the Senator's request.

In lodging its opposition to me, as I understand it, the NAACP has focused on a relatively small number of cases – primarily employment discrimination cases – in which the plaintiffs did not prevail. Relying on these cases, and ignoring my complete record, the NAACP has attempted to create the impression that I do not treat civil rights plaintiffs fairly. However, this is a complete mischaracterization of my record as a district judge, and it is based on a very limited – and misleadingly selective – sampling of my casework. My complete record as a district judge demonstrates that the charge is not accurate.

I do not wish to belabor this response with a case-by-case rebuttal of the employment cases for which, to my knowledge, I have been criticized. Of course, people are entitled to disagree about the outcome of a particular case depending on their viewpoint. However, as an initial matter, I would note that I have not been made aware of any criticism which suggests that my decisions in these cases are legally incorrect or improper. I do not claim to have been correct on every issue that has come before me, but I can tell you that I have conscientiously endeavored to be correct.

Moreover, contrary to the misimpression that the NAACP has attempted to create, I have on many occasions denied defendants' motions for summary judgment (or to dismiss) in employment cases. I have done so when a magistrate judge has recommended that I grant the motion, and I have done so over the defendant's vigorous objection. Typically, once a plaintiff

defeats a summary judgment motion in this type of case, the case settles, and that has happened often in my cases. However, I have also had employment cases, in which I denied the defendant's motion, thereafter proceed to verdict. Further, sitting by designation with the Fourth Circuit, I joined with Judge Sam Ervin in reversing a summary judgment and remanding a case in order to allow the employment discrimination plaintiffs to proceed to trial. I believe these examples alone refute the NAACP's criticism of me.

As I am sure you are aware, an individual's civil rights may be implicated in federal litigation in many contexts outside the realm of employment discrimination. I have been presented with countless cases of various types in which an individual's civil rights were implicated, including (but not limited to) criminal cases, voting rights cases, habeas corpus cases, and cases involving allegations of governmental misconduct of some type. My complete record in these types of cases further reflects the fact that I do not have any type of anti-civil rights bias.

For example, I have presided over trials in which civil rights plaintiffs have won jury verdicts or gained a settlement at trial. I have granted relief in at least five habeas corpus cases. I ruled in favor of the plaintiff and upheld the one-person/one-vote principle in a case in which the plaintiff challenged the method of electing members to a local school board, and I have handled a number of Voting Rights Act cases in which (to my recollection) the plaintiffs in each case succeeded on their claim of a violation.

I have always endeavored to be vigilant in ensuring the protection of civil rights in criminal cases as well. I have, for example, granted judgment of acquittal on numerous occasions to defendants where I believed, as a matter of law, that the government failed to meet its burden of proof. I have also disallowed the government from using evidence at trial when

I thought that its use would improperly disadvantage the defendant. It is also my practice during trial to ensure very specifically that defendants are aware of their constitutional right to testify or not to testify. Similarly, it is my practice to ensure that witnesses who I believe may incriminate themselves by their testimony are aware of their rights, and I have appointed counsel in some instances to advise these witnesses before they testify.

I would also note that my overall record in civil cases demonstrates that I do not have any bias against plaintiffs. I have, for example, awarded a bench trial verdict of over $2,000,000 in one case, and over $1,000,000 in another case. In addition, I have presided over jury trials which led to substantial verdicts in a plaintiff's favor, and I have on at least one occasion directed a verdict of liability in a plaintiffs' favor. I have also raised, *sua sponte*, the propriety of the removal of cases from state court, thereby setting in motion the procedure by which the plaintiffs could return to their chosen forum (*i.e.*, state court). I have also assisted parties in civil cases in reaching a settlement, and often this has occurred where it appeared as though the plaintiff would otherwise gain no recovery.

Apart from my case record, I believe that my commitment to ensuring fairness for all persons is exhibited by my conduct in other matters. For example, I have employed female and African-American law clerks. I have also actively recruited and supported minority and female candidates for magistrate judgeships.

Now in my twelfth year on the district court, I have handled thousands of civil and criminal cases in which I have issued countless rulings, all of which are public record. During this time, my concerted effort has been to ensure that all litigants are treated fairly according to the law. I do not approach any case, or any litigant, with any type of bias, and I do not decide issues before me on anything other than the pertinent law. I am gratified that I have

earned a reputation among lawyers in this district (as reported in the Almanac of the Federal Judiciary) for being fair and impartial. I believe my impartiality is reflected by the low number of cases in which I have been reversed, as one could reasonably expect that any type of bias on the part of a district judge would manifest itself over time in appellate response to that judge's work.

I would like to point out an incident that occurred earlier this year, as I believe it is akin to the current accusations against me. On May 3, an article appeared in the Washington Post stating, in essence, that I was insensitive to disabled persons because I would not allow a blind woman to be present in the courtroom during a trial over which I presided. That article was printed without anyone from the newspaper contacting me to verify the allegation, which I readily could have refuted. However, after the article ran, I was able to obtain a transcript of the trial in question, and it very clearly confirmed what I already knew: I had made special efforts to accommodate the woman in question, and I only ordered her to leave the courtroom (as I was required to do by the Federal Rules of Evidence) after the parties identified her as a potential witness and requested that all trial witnesses be sequestered. In other words, the woman was required to leave the courtroom because she was a potential witness, not because she was blind. Fortunately, when the actual facts came to light, the newspaper ran another story setting the record straight.

I mention this story not as a complaint, but as an example of how a perfectly legitimate set of facts can easily be misused to portray a false impression. I believe that this has occurred in this instance, and I am very appreciative to the Committee for providing me the opportunity to set the record straight about my judicial career.

In closing, I would add a personal comment. In my life, I have seen firsthand the

unfair and unequal treatment of disadvantaged people in society. That is one reason I have always cared so deeply for doing my best to treat all people fairly and with respect. Those who know me would emphatically agree that I have an abiding concern for fairness. I believe my record as a judge underscores my dedication to this principle and I will continue to show fairness and respect to all in my judicial actions, as well as in my public and private life.

1. Mr. Schwab, you have indicated that you hope to continue to serve on the Board of Trustees of Grove City College, if you are confirmed. Please explain the specific steps you will take to comply with Canon 5(b)(1)-(3) of the Code of Conduct for United States Judges, and any other applicable provisions of the Code related to such service.

Response

I have reviewed the Code of Conduct for United States Judges. Should I be confirmed, and continue to serve on the Board of Trustees of Grove City College, I would disqualify myself from deciding any matter to which the College was a party. This practice is required under Canon 3C(1)(d)(i). I will reassess on a periodic basis the actual litigation of the College as well as my other activities that may impact upon the restrictions of the Code of Conduct.

Canon 5B permits a judge to participate in civic or charitable activities if they do not reflect adversely on a judge's impartiality or do not interfere with the performance of judicial duties. The comment of the Judicial Conference Committee to Canon 5 provides that the "complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives." Accordingly, Canon 5B permits a judge to serve as a trustee of an educational organization as long as: (1) it is not likely that the organization will engage in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court, (2) the judge is not involved in the solicitation of funds for the organization, and (3) the judge does not provide investment advice to the organization. I do not believe that my position with Grove City College will conflict with the directives of Canon 5B.

When I was nominated for this position, I had informal discussions with colleagues on the Board of Trustees of Grove City College, including its outside general counsel, concerning my ethical obligations under Canon 5B of the Code of Conduct for United States Judges. If I am confirmed, I also will formally make known to the entire Board in writing that so long as I hold any judicial office, I cannot and will not: (a) solicit funds for the College; (b) use or permit the use of the prestige of my judicial office for that purpose; (c) personally participate in the College's fund-raising efforts or serve on the Board's Development Committee; or (d) give investment advice to the College or serve on the Board's Investment Committee. (In the past, I have not served on either the Board's Development Committee or Investment Committee and, to the best of my recollection, have not solicited funds for the College. Since the Board's reorganization in May of 1999, I have served as the Chair of the Academic Program Committee, a committee that does not raise funds for the College.)

2. Given that Grove City College has opted out of federal college financial aid programs due, in part, to its objection to the requirements of Title IX and therefore must rely significantly on private donations and loans to provide aid to students, what assurances can you give the Committee that you would follow the Code of Conduct and that:

1. you will not engage in any fund-raising for the College, such as hosting events, introducing fund-solicitors or donors, or soliciting contributions personally or in writing from friends, relatives, colleagues or others; and

2. the prestige of the office of federal district court judge will not be used to solicit funds for the College by, for example, serving as a speaker, guest of honor, or featured person at a fund-raising event, or allowing your title or status as judge, if confirmed, to be used in fund-raising letters?

Response

I have been a member of the Board of Trustees of Grove City College since 1990. During that time, I have not served on the Board's Development Committee (fund-raising committee) or Investment Committee. Since 1999, I have been Chair of the Board's Academic Program Committee, in which capacity I do not handle matters relating to fund-raising or investments. To the best of my recollection, I have not engaged in any fund-raising activities for Grove City College nor have I solicited contributions for the school, nor have I provided investment advice to the school.

Should I be confirmed, I will immediately advise the Board of Trustees of Grove City College in writing of the restrictions imposed by Canon 5B(2) to assure that my title or status is not used in connection with fund-raising activities without my knowledge. I also will request the Board of Trustees to adopt an appropriate resolution to insure compliance with my answers set forth to questions 1 and 2 above and with Canon 5B.

3. Some might say that while Grove City College has the legal right to withdraw from all federal programs, your continued involvement with the school as a federal judge would send the wrong message. You would be charged with upholding the Constitution, including the Equal Protection Clause and other federal equality laws, but you would be serving and supporting an institution that has expressed disagreement with such laws. What is your reaction? What analysis would you use if presented with a motion to recuse yourself from the cases involving the application of Title IX?

Response

With respect to questions 2 through 4 of this questionnaire, I wish to clarify that Grove City College's decision to withdraw from the Stafford Loan program and the Pell Grant program was not based on its objection to the requirements and aspirations of Title IX or to the principle of gender equality. As the College stated in its Statement of the Case portion of its principal brief in Grove City College v. Bell, No. 82-792, Supreme Court of the United States:

> The decision to forego participation in government assistance programs is premised on the College's belief in institutional self-sufficiency and autonomy. Committed to deliver a high quality alternative to state-supported education at minimal cost, the College is convinced that it could not do so if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding. This decision is not premised on any desire to discriminate. To the contrary, the College maintains that discrimination on the basis of race or sex is morally repugnant to its principles, a belief it has held voluntarily long before the advent of the nondiscrimination laws. Therefore, even before Title IX was passed, the College claimed no right to discriminate and has consistently maintained a policy of nondiscrimination.

As Justice Powell noted in his concurring opinion in Grove City College v. Bell, "the undisputed fact is that Grove City does not discriminate -- and so far as the record in this case shows -- never has discriminated against anyone on account of sex, race, or national origin. This case has nothing whatsoever to do with discrimination past or present." Grove City College v. Bell, 465 U.S. 555, 577 (1984).

As an alumnus, member of the Board of Trustees, and father of two recent graduates and one current senior of Grove City College (one daughter and two sons), my experience suggests that Grove City College's past and current policies and practices send a very positive message about gender equality. It is my belief that Grove City College's

commitment to gender equality is reflected in its programs and enrollment statistics and indeed the overall enrollment in the freshman class in the most recent five (5) year period (1998-2002) was split nearly evenly between male and female students.

Grove City College demonstrates its commitment to the principle of gender equality through its actions and public communications. As the College advertises in its promotional materials, Grove City College offers 20 varsity sports: 10 for men and 10 for women. It also offers over 100 extra-curricular activities and student organizations -- including organizations devoted to service, music, dance, drama, cultural and performance arts and social opportunities -- on an equal opportunity basis. Currently, for example, 19% of women and 9% of men enrolled at the College belong to a Greek organization (sororities and fraternities).

Moreover, Grove City College has not expressed disagreement with, and more importantly does not in fact disagree with, the principles of the Equal Protection Clause or other federal equality laws including Title IX. As indicated above, the College's decision to withdraw from federal loan and grant programs was premised solely upon its long-standing desire to maintain institutional self-sufficiency, and to avoid the regulatory scheme that, understandably, accompanies any federal financial aid statute.

Should my nomination be confirmed, I will make decisions by applying the law to the particular facts of the case. In so doing, I will consider myself bound by the precedent set by the United States Supreme Court and the United States Court of Appeals for the Third Circuit. This conviction does not change depending upon the issue at hand.

Thus, while any recusal motion would have to be evaluated on its own particular merits and factual basis, and the applicable law at that time, I would scrutinize carefully any motion requesting that I disqualify myself from any case in accordance with 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges.

Finally, it has been implied that the fact that Grove City College made the decision to withdraw from federal funding programs means that it views the constitutional guarantees, including equality under the law, as expendable. To the contrary, the philosophy of Grove City College is one of a strong commitment to quality education of all students on an equal basis.

4. Mr. Schwab, you have been a member of the Board of Trustees of Grove City College since 1990. As a member of the Board of Trustees of Grove City College in 1996, please describe your involvement in the decision to withdraw from the Stafford Loan program and whether you agree with that decision. Do you continue to believe that Grove City College should avoid receiving federal funds in order to avoid the requirements of Tile IX and other Department of Education requirements? How do you think that this decision has affected the opportunities for women at Grove City College, and do you believe that, without complying with Title IX, Grove City College adequately protects the equal rights of female students?

Response

On November 21, 1996, the Board of Trustees of Grove City College voted to approve the College's withdrawal from federal loan and grant programs. I attended that Board meeting and voted in favor of the proposal. In light of Grove City College's historic mission and character, its current desire to retain institutional self-sufficiency and autonomy and to avoid entanglement in federal regulatory programs, and the College's demonstrated commitment to the constitutional principles of equality, I continue to support the Board's decision. The decision of the Board was not based upon any desire to avoid the requirements of Title IX or other Department of Education regulations.

I believe the College's decision to substitute private student financing programs for federal financing programs, and to make such private financing programs available to all students without regard to race or gender, has not adversely affected opportunities for women at Grove City College. However, your question raises an issue that is of great importance to me, particularly since my daughter (Ellen) attended Grove City College from 1997-2001, immediately after the Board approved the College's withdrawal from federal loan and grant programs. I saw first-hand the opportunities that Ellen and her female friends and classmates enjoyed at Grove City College and that the College continued to be as diverse and robust as before the Board's decision. I thus believe that Grove City College adequately protects the equal rights of female students and, if I believed otherwise, I would resign from the Board. Furthermore, it is my belief that the students (including its women students) have actually benefited financially from this decision since the College has been able over the years to arrange loans from commercial bank lenders with terms more favorable than under the Stafford Loan program.

5. Do you think that the Constitution has adequately protected the rights of women? What standard do you think a court should use to review discrimination on the basis of the gender?

Response

The United States Constitution, including its amendments, as interpreted by federal courts, has increasingly been interpreted over the years to strongly protect the rights of women. The granting of additional protections for women is the role of the legislature. The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits discrimination on the basis of gender. In the case of United States v. Virginia, 518 U.S. 515 (1996), the Supreme Court held that the appropriate standard of review for discrimination on the basis of gender is the heightened review standard. 518 U.S. at 532-33; see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136 (1994); Breyer v. Meissner, 214 F.3d 416, 425-26 (3d Cir. 2000). As a federal district judge, if I am confirmed, I would apply that settled law to claims of gender discrimination.

6. Do you believe there is a constitutional right to privacy? If so, please describe what you believe to be the specific components of this right. If not, please explain.

Response

The Constitution, through the Bill of Rights, recognized a right of privacy, as the Supreme Court of the United States has repeatedly held, beginning in Griswold v. Connecticut, 381 U.S. 479 (1965) and continuing through that case's progeny. As explained by the Supreme Court, the right of privacy extends to decisions relating to marriage and procreation; the education of children; security against physical restraint and governmental searches of one's home or person except under certain circumstances; and other fundamental protections rooted in the history and tradition of our society. I would, if confirmed, adhere to precedent in connection with this and all other issues.

7. In April of this year, the Committee received a letter from Jerome Shestack, a former President of the American Bar Association and former Chair of the ABA's Standing Committee on the Federal Judiciary, pointing out that in your testimony before the Committee in 1988, you alleged that the ABA rated you "not qualified" for the U.S. Court of Appeals for the Third Circuit because of your religion. At your hearing on June 27, 2002, you stated that you still believe you were singled out because of religion. Mr. Schwab, with the benefit of hindsight and knowing that Mr. Shestack categorically denied that any such discrimination occurred, do you think that it is possible that at a time, in the 1980's, when it was rare for a 40-year old attorney with no judicial experience, no prosecutorial trial experience, and little experience trying cases in bench or jury trials, to be chosen for an appeals court, that this could have been the basis for the rating of "not qualified" for a lifetime to appointment to the court just below the Supreme Court?

Response

Although I believe that my nomination should be judged based upon my experience and qualifications today, I continue to believe that the rating I received in 1988 did not properly reflect my record.

While it is true that I did not have any judicial experience, I believed that an unqualified rating was not justified because of my outstanding educational background, federal clerkship, and my legal experience as of that time.

I graduated from the University of Virginia School of Law in 1972 with service on the Editorial Board of the Virginia Law Review. I also was a member of the Order of the Coif. I was tied for first in the class at the end of first year and graduated approximately fifth in a class of 308 students.

Thereafter, I served as Law Clerk for Chief Judge Collins J. Seitz, United States Court of Appeals for the Third Circuit, 1972-1973 Term.

I then worked for approximately fifteen (15) years with Reed Smith Shaw & McClay, Pittsburgh, PA, serving as Deputy Head of Litigation Section and as Litigation Partner with general litigation experience in federal courts throughout the nation, at the time of the 1988 ABA review.

I also was the Founding Chairperson of the TECHLEX Group of Reed Smith. The TECHLEX (technology Law) Group consisted of Reed Smith attorneys from offices in Pittsburgh, Philadelphia, Washington, D.C., and Northern Virginia, specializing in providing legal services to high technology businesses and emerging or established corporations involved in changing technology. As the Chairperson of this Group for the

first three years of its operation, I had administrative responsibility for the TECHLEX Group and devoted approximately half of my time in these administrative activities, including supervision of non-attorney staff.

As to the question of my experience trying cases in bench or jury trials as of that time, I was a trial attorney and had been responsible for hundreds of cases involving practically every area of the law.

During my early years of practice, I worked in both the litigation and labor groups at Reed Smith, and I was responsible for a heavy caseload, including jury and non-jury matters, in federal and state courts.

These matters involved antitrust, banking, corporate, product liability, state and federal taxation, shareholder's rights, labor, assault and battery, construction, trade secrets, Title VII, OSHA, workmen's compensation, franchise, embezzlement, breach of contract, admiralty, collection, civil rights, insurance subrogation, real estate, personal injury, and property damage litigation. These cases required frequent appearances in the Courts of Common Pleas of the Commonwealth of Pennsylvania, in the United States District Court for the Western District of Pennsylvania, and at civil and labor arbitrations.

These cases often involved complex factual and legal issues requiring a thorough knowledge of federal and state rules of civil procedure. They also included different forms of actions or relief (e.g., class actions, criminal contempt, civil contempt, declaratory judgments, temporary restraining orders, preliminary injunctions, permanent injunctions, accounting, damages, and habeas corpus petitions).

At the same time, I assisted in the preparation and trial of numerous significant cases with more experienced trial attorneys. I received unmatched training and experience from working with and against experienced trial attorneys. This training involved pleading strategy and tactics, discovery strategy and tactics, and trial strategy and tactics.

By the mid-1980's, I began to serve as a chief counsel in complex litigation -e.g., cases involving five to twenty-five parties, numerous opposing counsel and co-counsel, myriad legal and factual issues, hundreds to thousands of documents, tens to hundreds of interrogatories and requests for admission, and ten to fifty depositions.

These complex cases included litigation of commercial, contract, construction, corporate takeovers (e.g., securities law), EEOC and labor, franchise, securities fraud, tax, antitrust and Robinson-Patman, shareholder's derivative, software copyright infringement and class action issues.

These cases where I acted as a chief counsel required the application of case management techniques and extensive dealings with numerous parties with varying degrees of common and differing interests. These experiences provided training in the administration of a heavy caseload.

As my practice became nationwide in scope, my practice shifted from a state court practice to more of a federal court practice. By 1988, I had been responsible for cases in over thirty (30) United States District Courts. I also had been responsible for cases which have involved appeals to eight (8) United States Courts of Appeals. These federal court cases provided extensive experience in federal rules of civil procedure, rules of evidence, and local rules and practices throughout the nation.

While reasonable persons may differ on the proper words to describe my trial experience at that time, I do not believe a label of "little experience" was or is fair or accurate.

In conclusion, I hope that my current level of trial experience, my service as President/Chair of the American Inns of Court - Pittsburgh Chapter, Civil Litigation Council of Pennsylvania Bar Association, and Civil Litigation Section of Allegheny County Bar Association, my recent award of the William J. Brennan, Jr. Award of the Trial Advocacy Institute, School of Law, University of Virginia in January, 2001, and my promise to work hard and be courteous and fair to all, as a federal district judge, will be found worthy of you to support my confirmation.

8. Mr. Schwab, you wrote a 1972 note for the University of Virginia Law Review titled "Capital Punishment in Virginia." In this note, you discuss racial disparities in capital sentencing for various crimes and suggest that, for the period 1908-1962, "Virginia has implemented a policy of differential application of the death penalty to blacks for capital crimes *other than murder*," even though, according to your own statistics, a disproportionate number of African-Americans were executed for murder during this period than whites.

   0.1 Over the last few years, many prominent Americans have begun raising concerns about the death penalty. Some are current or former supporters of capital punishment. For example, in a speech last summer, Justice O'Connor said there were "serious questions" about whether the death penalty is fairly administered in the U.S., and added: "[T]he system may well be allowing some innocent defendants to be executed." What is your current view regarding whether the death penalty is fairly administered and what kinds of changes, if any, would you propose?

   0.2 Among your other conclusions in this note, you assert that legislative re-evaluation of capital punishment (for crimes other than murder) would be preferable to judicial intervention. Please describe for the Committee your views regarding the appropriate separation of powers between the courts and the legislative branch with respect to capital punishment as well as other issues.

   0.3 What role, if any, do you believe a federal district court judge plays, or should play, in balancing a criminal defendant's right to a full and fair trial, particularly in capital cases, against the government's interest in public safety?

Response

In 1972, while in law school and a member of the Editorial Board of the Virginia Law Review, I co-authored the note "Capital Punishment in Virginia." Based upon an analysis of the legislative history of capital crimes in Virginia, as well as a detailed statistical analysis of the defendant's race in capital convictions, we concluded that Virginia's capital punishment provisions were out of step with current constitutional standards. At that time, Virginia held a fairly unique position among the states in that it authorized the death penalty for ten offenses, making it mandatory for only one, treason.

We noted that "[t]he vast majority of persons executed in Virginia have been blacks. Of the two hundred thirty-six persons executed, two hundred two have been blacks and thirty-four have been whites. All thirty-four of the whites executed in

Virginia had been convicted of murder; thus, in the twentieth century no white man has been executed in Virginia for any of the ten other offenses for which the death penalty is an authorized punishment." *Virginia Law Review*, Vol. 58:97 at page 113.

The focus of the Note was on the clear racial disparity indicated in the statistics for capital crimes other than murder, however, that was not to the exclusion of murder. For example, we stated that "eighty percent of those executed for murder have been blacks. Of those sentenced to the penitentiary for murder, only sixty-six percent have been blacks." The differential in this statistic, though present, was simply not as overwhelming as the stark evidence that no white man had been executed for non-murder capital crimes in the twentieth century. In no way did the Note suggest that racial disparity did not exist in the murder category. Indeed, we concluded the section relating to the statistics in murder cases by stating "[t]he suggestion of discrimination that these figures impart, however, cannot be denied, and, in an age of increasing alienation of young blacks from the 'white man's law,' the cost in terms of lack of respect for the law may be greater than any deterrent or retributive effect the death penalty is thought to have." *Virginia Law Review*, Vol. 58:97, p. 118.

The research I did thirty years ago has certainly alerted me to the danger that capital convictions may be improperly influenced by racial considerations. It may stem from outdated criminal statutes that allow historical prejudice to seep through to current capital prosecutions. It may also derive from the actual application of the death penalty even under more modern criminal codes as revealed through statistical analysis. I believe it important that proportionality studies and other statistical analyses concerning possible racial bias in capital cases, perhaps at the prosecutorial or jury level, continue to be funded and supported. I believe that the legislature must seriously consider the outcome of such studies in connection with the creation, revision or repeal of capital crime statutes.

Finally, I believe that the legislature, as the body elected by the people, is vested with the power to make law. That power is checked by the courts that have the responsibility of protecting constitutional guarantees from dilution. As a federal district judge, I would apply the law made by the legislature but remain ever vigilant in assessing the defendant's constitutional right to a full and fair trial. In that regard, I would follow the decisional precedent set forth by the United States Supreme Court and the United States Court of Appeals for the Third Circuit.

SUBMISSIONS FOR THE RECORD

Statement of Senator Orrin G. Hatch
Ranking Republican Member

Hearing on the Nominations of
Dennis W. Shedd, to be U.S. Circuit Judge, Fourth Circuit
Terrence F. McVerry , to be U.S. District Judge, W. D. of Pennsylvania
Arthur Schwab, to be U.S. District Judge, W. D. of Pennsylvania

Before the United States Senate Committee on the Judiciary

June 27, 2002

Thank you, Mr. Chairman.

I want to welcome all the nominees today and ask that I be able to put statements for Mr. Schwab and Judge McVerry into the record. I look forward to voting for all the nominees in Committee and on the Senate floor.

You will forgive me, however, for spending some time welcoming Judge Dennis Shedd, for whom this moment must surely be both a life's milestone and a sentimental homecoming. I know this is a proud moment also for Senator Thurmond whom Judge Shedd served in various positions and including as Chief Counsel to this Committee.

Senators feel very strongly about their staffs. Our legal counsels make uncounted sacrifices to work for us and for the American people. We are surrounded by very talented lawyers who forego larger salaries for the sake of public service. Sometimes they put their personal opinions aside to advocate ours. We Senators take very personally when they are nominated and given the opportunity for yet higher public service. It has been the tradition of this Committee to give great courtesy to our former staffers. I certainly take it very personally, and I know that Senator Thurmond does too.

But we two former Chairmen are not alone in our good impressions of Dennis Shedd. When Judge Shedd was nominated to the federal trial bench, Chairman Biden had this to say to him: "I have worked with you for so long that I believe I am fully qualified to make an independent judgment about your working habits, your integrity, your honesty, and your temperament. On all these scores, I have found you to be beyond reproach."

This is high praise, indeed, and from a colleague from the other side of the aisle for whom we all have the greatest respect.

Judge Shedd has strong bi-partisan support in his home state as well, and not only from Senators Thurmond and Hollings. He is also strongly supported by Dick Harpootlian, South Carolina State Chairman of the Democratic Party, and himself a trial lawyer.

Dennis Shedd has served as a federal jurist for more than a decade following nearly twenty years of public service and legal practice. While serving this Committee, Judge Shedd worked, among many other matters, on the extension of the Voting Rights Act, RICO reform, the Ethics in Post-Employment Act, and the 1984 and 1986 crime bills. As Senator Biden put it: "His hard work and intelligence helped the Congress find areas of agreement and reach compromises."

It is no wonder to me that during his service on the District Court, he has sat by designation on the Fourth Circuit Court of Appeals on several occasions.

That leads me address a few issues that have been raised in the press and on the websites of the usual suspects in the last few days.

First, let me address the more ludicrous attempt to discredit Judge Shedd that was brought to my attention: that when he was confirmed to the District Court bench he had little experience in the practice of law. To ignore the remarkable experience Dennis Shedd had in legislative practice crafting historic laws while serving this Committee is some *chutzpah*
To raise an objection like that twelve years after the fact is just silly.

But let's be clear. When Judge Shedd joins the other members of the 4th Circuit, he will not only have unmatched legislative experience, he will also have the longest trial bench experience on the 4th Circuit. He will also add some diversity to that Court. The last five 4th Circuit confirmations have all been Democrats.

Interestingly, the last Democrat confirmed, Judge Gregory, has affirmed Judge Shedd's rulings in 11 appeals. Notably, Judge Gregory also agreed with Judge Shedd's ruling in the *Crosby* case, which found that the Family and Medical Leave Act was improperly adopted by Congress, a case which

the liberal groups seem worked up about. I find it curious that no one asked Judge Gregory about his ruling in *Crosby* when he was before this Committee.

Judge Shedd has heard more than 5,087 civil cases, reviewed more than 1406 Reports and Recommendations of Magistrates, and has had before him more than 929 criminal defendants.

Judge Shedd's record demonstrates that he is a mainstream judge with a low reversal rate. In the more than 5,000 cases Judge Shedd has handled during his twelve years on the bench, he has been reversed fewer than 40 times, less than one percent. Detractors have made much of the fact that he has a relative few decisions that he has chosen to publish. But in fact, he falls in the middle of the average for published opinions in the 4th Circuit. One Carter appointee has published all of 7 cases, one Clinton appointee has published only 3, and another Carter appointee has published 51, only one more than Judge Shedd, despite being on the court for 10 years longer.

Mr. Chairman, Judge Shedd is known for his fairness, total preparation, and for showing no personal bias in his courtroom. This is not just my opinion; this reflects the opinions of lawyers who practice before him. **Judge Shedd is well-respected by members of the bench and bar in South Carolina.**

According to the Almanac of the Federal Judiciary, attorneys said that Judge Shedd has outstanding legal skills and an excellent judicial temperament.

Here are a few comments from South Carolina lawyers: *"You are not going to find a better judge on the bench or one that works harder." "He's the best federal judge we've got." "He gets an A all around." "It's a great experience trying cases before him." "He's polite and businesslike."*

Washington's professional nominee detractors have been particularly misleading on Judge Shedd's record on employment cases. They have misleadingly pointed out that the Judge seldom grants summary judgment in employment cases in favor of the employee. Of course, few judges do. Such cases are inherently fact-laden and go to trial or settle, or the plaintiff too often fails to state a claim. They could have noticed that he has only twice been reversed in employment cases. But they didn't. They might have pointed out that in one of the appeals that he was invited to hear for the 4th Circuit, he reversed a summary judgment and remanded for trial a

political discrimination case against a worker who was a Democrat. But they didn't.

Detractors have also tried to make irresponsible claims as to the Judge's criminal case record. In criminal cases, Judge Shedd has strongly defended citizens' Due Process rights from violation by the state. He has frequently chastised law enforcement for errors in search warrants and the questionable use of seized property. In fact, he has sanctioned the State for discovery problems. He is known for aggressively informing defendants and witnesses of their 5th Amendment rights.

Remarkably, Judge Shedd has never been reversed on any ruling considered before or during trial, or on the taking of guilty pleas.

The cases that come before a judge are often difficult. He has not been exempted. In one case, Judge Shedd allowed a detainee to engage in a hunger strike as a protest against government's attempt to force feed him.

Though some would seek to question Judge Shedd's respect for privacy, in two cases he protected HIV blood donor's confidentiality. In another case he ordered special accommodations to an HIV positive defendant to ensure his continued clinical treatment.

Of course, a smear campaign against a nominee is not complete without the suggestion that they are a foe of environmental rights. Judge Shedd's detractors have ignored the wetlands protection case where he handed down tough sanctions against a violator and ordered wetlands restoration. They also skipped over his decision in favor of National Campaign to Save the Environment. They missed his ruling to grant standing to a plaintiff challenging a road construction project on its environmental impact. They missed his ruling in favor of a woman protesting possible waste dumping in her community.

But the most breathtaking charge against Judge Shedd was the NAACP's, earlier this week, that he has – and I quote— "a deep and abiding hostility to civil rights."

I have to tell you I was outraged by this. It is a distortion far beyond the pale of decency, and I hope my colleagues will be quick to repudiate such rabid practices. In part, I am outraged because there are some who would profile

Judge Shedd as merely a white male from the South and start from there to give him a certain treatment.

I should note that no less a figure than Ralph Neas noted in the *National Journal* in 1987 that the Judiciary Committee during Dennis Shedd's tenure had a "good" civil rights record.

If his record working for civil rights legislation on the Judiciary Committee were not enough an accomplishment for one lifetime for any man or woman, the truth is that each of the cases that have come before Judge Shedd involving the Voting Rights Act of 1965, plaintiffs have won their claims. In the *Dooley* case, a one person/one vote case, Judge Shedd gave the plaintiff a clear and strong decision. In another political rights case, he ruled to protect Plaintiff's right to make door-to-door political solicitations.

You know a lot about a judge by how they conduct their court room. As you know, Mr. Chairman, I have been a strong advocate for the protection of religious practices in the public square. It says a lot about Judge Shedd, especially in these times, that he allowed religious headdress in his courtroom.

Judge Shedd also led efforts to appoint the first African American woman ever to serve as a Magistrate Judge in South Carolina and has sought the Selection Committee to conduct outreach to women and people of color in filling such positions. He pushed for an African American woman to be Chief of Pretrial Services. He has actively recruited people of color to be his law clerks.

And because of Judge Shedd's work in an Award-winning drug program that aims to reverse stereotypes among 4,000-5,000 school children, he was chosen as United Way School Volunteer of Year.

Mr. Chairman, I would like to place in the record a very touching letter from one of Judge Shedd's former clerks, Thomas Jones, who happens to be a person of color -- an African American -- written in favor of Judge Shedd and sent just yesterday to Senator Leahy. He says: "It is apparent to me that the allegations regarding Judge Shedd's alleged biases have been propagated by individuals without the benefit of any real, meaningful interaction with Judge Shedd…I trust the allegations are given the short shrift they are due."

Lastly, I would like to address the most repugnant attempt to smear Judge Shedd by taking his words entirely out of their context with regard to the neuralgic issue of the Confederate flag. According to one group's website and an NAACP release, Judge Shedd is accused of having made "insensitive comments as he dismissed a lawsuit aimed at removing the Confederate flag from the South Carolina statehouse."

Nothing could be further from the truth.

In fact, in the *Alley* case, a complaint brought by white plaintiffs -- not African Americans -- Judge Shedd never addressed the merits of the Confederate flag issue. Instead he stayed the federal case to permit a parallel state action to go forward. The statements attributed to him were in fact questions to the counsel.

Judge Shedd explained that he was merely asking questions to explore the lawyer's legal theory. He stated: "Let me make it very clear to everybody. I'm not determining now whether or not the flag should be there at all."

Mr. Chairman, I would like to place into the record a portion of the transcript from the *Alley* case which places in context what Judge Shedd thinks about the issue of the Confederate flag in relation to other issues facing the African American community. His is a view shared by many African American leaders concerned with the issues facing their community.

Remarkably, although taking Judge Shedd to task for a Confederate flag case in which he never reached the merits of the issue, the liberal groups starkly ignore Judge Shedd's ruling in the *Vanderhoff* case, in which he did reach the merits of the issue concerning the Confederate flag. In *Vanderhoff*, Judge Shedd dismissed the claim of a fired employee who repeatedly displayed the Confederate flag on his toolbox in violation of company policy. Judge Shedd rejected the plaintiff's contention that he was dismissed because of his national origin as a "Confederate Southern American."

In sum, Judge Shedd's detractors have a habit of ignoring the positive and accentuating the negative. For these irresponsible liberal groups, fair is foul, and foul is fair, and the truth is what works for them.

I look forward to this hearing and thank Chairman Leahy for scheduling it.

Now, Mr. Chairman, let me welcome the two nominees to the District bench of Western Pennsylvania.

Terrence McVerry has a distinguished record of service in both the private and public sectors. After graduating from law school, Judge McVerry served in the United States Army Reserves and the Pennsylvania Air National Guard. Then he went to work as an Assistant District Attorney for Allegheny County, prosecuting hundreds of trials with an emphasis in major felonies and homicides. In 1972, Judge McVerry formed a private practice law firm where, for the next 17 years, he engaged in civil litigation representing individuals in a variety of matters including personal injury, real estate, contracts, family matters, estate planning, and small businesses and corporations. Judge McVerry was elected to the Pennsylvania House of Representatives in 1979 and served there for 21 years.

In 1998, Governor Tom Ridge appointed him to fill a judicial vacancy on the Court of Common Pleas of Allegheny County assigned to the Family Division. Currently, Judge McVerry is the Solicitor of Allegheny County where he is the chief legal officer and director of a governmental law department comprised of 36 attorneys.

Arthur James Schwab is a distinguished lawyer who has litigated and published extensively in the areas of protecting trade secrets, copyright infringement and employment agreements, including covenants not to compete. He graduated from the University of Virginia School of Law and served as a law clerk for then-Chief Justice Collins J. Seitz for the U.S. Third Circuit Court of Appeals. He then went to work at Reed Smith Shaw & McClay in Pennsylvania from 1973 to 1990, where he focused on both labor law and litigation involving complex corporate litigation, personal injury and civil rights matters. He litigated cases in approximately 24 different federal court jurisdictions and before 8 different federal circuit courts. From 1990 to the present, Mr. Schwab has worked for Buchanan Ingersoll P.C., a Pennsylvania law firm, as chair of litigation, chief council for complex corporate litigation, and partner.

Thank you, Mr. Chairman.

Portion of *Alley* Case Transcript

Mr. Able: It hasn't been . I filed, and it's been filed not served.
The Court: Listen to me, I'm not making any ruling as far as some action you want to be in, it is not going to be in this courtroom. I think it is pretty clear to you, you better see what else you want to do.
Mr. Able: I will be there.
The Court: I'm not telling you to do it. But the point is, I think I made it pretty clear, the state law question isn't going to be resolved in this court. Because I happen to agree, I think it was the Governor's position that federal courts shouldn't be dictating to states on state law matters. And that happens to be my philosophy as well. That's what I'm going to do.
Thank you very much.
Mr. Able: Thank you, sir.
The Court: Now, let me just make a few comments to you. And then I will issue a final ruling that I'm going to issue today. Let me say, we have people here today all of whom are good lawyers, all of whom have an interest i the community. Some have interest positions of power. Let me tell you three incidents that have happened in my courtroom in the last – in the last month and a half or so.

First, and I think I'm going to take a guilty plea in this case today, I have had the occasion to have before me a young man who shot his schoolmate at a school here in the capital city.

Second, I have had the occasion recently to take a guilty please of another young man who graduated from a high school in this city – Graduated from high school and he cannot read or write. And then last week, and this is unbelievable to me, I sentenced a man for brandishing a firearm. And then when I got the information, this is what happened, and i put this on the record because all of you folks are important people. And i think you need to know about the other issues out there that may require some attention. I' not going to denigrate the constitutional claim about the confederate flag. But it strikes me we are taking a whole lot of time in this whole state on the confederate flag, when there are other issues, every day issues that some may consider a little more important. This man came in, and mis house had burned down. And so he had to go to what he called the projects. But I can tell you it is housing units within blocks of that dome where those flags fly. He said – and all the testimony from all sides – crake cocaine is being sold everywhere in the presence of

children, guns present. This man said in his housing unit, when he and his wife would leave for any reason, people would break in every time they left and the would steal everything in their house, everything. One occasion he went to the police station here in Columbia to – And I'm not picking on Columbia, but this is the capital city in which they flag is flaying – went to the police station and complained about a burglary. And when he got back to his house with the police, strangers had moved into his house. They were in his bed, they were sitting on his furniture , and they would not leave. It sounds like something out of that movie Escape from New York City. And he said, please make them leave my house. And the police said you got to evict them. What do you mean I have to evict them? They don't live here. They don't live here. And so he's

concerned about his wife, quite frankly, who used crack. And crack dealers were giving her crack cocaine. And he didn't want his wife to have crack anymore. So he asked them to not give her any more crack. They were breaking into his house, threatening him, the crack dealers were, here in Columbia. Coming down to lure his wife away with crack cocaine. He said to the police, can i protect myself? The policeman said, yes, you sure can – so he got a gun to protect

...

In South Carolina.
I will just tell, you that's my opinion. And we ought to be using our time and efforts and resources to address those real problems . Those people I talked about, I dare say, they don't care – They don't care if any flag is on that dome. They don't care about that. They want there lives improved and be sure that children aren't going to be shot when they go to school here in Columbia. Now, let me say this, also, Mr. Shine. You and Mr. Elam pointed out and raised the question of abstention in this case, That is, if there is a state law matter that can be resolved and should be resolved and should be resolved in the state forum, that the federal court should do that. And under that Pullam decision which, quite frankly, Justice Scalia, in my opinion, cause deferential rather than abstention. Perhaps under Burford as well, I believe it is proper for this court to abstain any further in this matter. Let me make it very clear, let me make it very clear, I am deferring on Mr. White's constitutional claim. I want you to understand that, Mr. White. I don't know how that matter is going to be resolved. I don't know. I suspect some effort will be put into getting it resolved in court or in the general assembly or somehow.

Himself. He got into a scuffle with a couple of cocaine dealers, when he went after them brandishing a firearm. He's now in federal prison for having that firearm. He was a convicted felon, but he was charged with other things. Let me say this, it is a little difficult to sit here as a federal judge and hear and read about and see the effort that's being put in by the good people of south carolina on the confederate flag issue, when I will dare say those three examples I just mentioned – they don't care if that flag fli.. Or not. They want their life improved , and they want something else done to improve their life. And I just say that for what it's worth. Because believe this, I have great confidence in the people of South Carolina. I have great confidence in the officials, both elected and the judicial opinions who are elected by those elected officials. And I'm comfortable that can deal with the confederate flag issue in a way, on state law, that can deal with it. That's a proper forum for it. There are people...goodwill on all sides of the issues in South Carolina. The flag issue I just suspect and hope that the matter will be resolved, and be resolved in a manner so w... all – everybody can concentrate on the kind of problems pointed out to you. I just think it is disgraceful those conditions

Let me say, I don't know. But if whatever that resolution turns out to be, Mr. White. If you aren't satisfied with it, you can come back and present your constitutional claim here in this court. Now, I have already told you I think that claim is very tenuous and questionable. But I'm not ruling on it here and I will give you further chance to present if we get that far. I'm going to make it very clear, I'm giving the state court the time to deal with the court on questions of federal constitution law. If that matter comes up again, the parties can come back to me, and I will decide the questions of federal constitutional law. Let me say this: I thank all of you for being

here this morning. I appreciate your participation. I appreciate what you filled with the Court. All right. Anything further?
Mr. Shine: nothing further.
Mr. White: Nothing from the plaintiff at this time.
The Court: Thank you very much. Thank you all very much
The Marshall: All rise.

EFH - Introduction of Dennis Shedd
draft 2 - 6/27/02

It is my pleasure and delight to introduce a well-known face to this Committee and a very loyal and trusted friend of Senator Thurmond Judge Dennis Shedd, who has been nominated to the United States Court of Appeals for the Fourth Circuit.

In South Carolina, Senator Thurmond and I have a long tradition of working cooperatively to nominate judges. Senator Thurmond has made good choices in the past, and he has done so again.

This is a very smart and capable man. For the past decade, he has been a judge on the United States District Court for South Carolina, based in Columbia. He has a reputation as a hard worker on the bench as a straight-shooter and one who is up-to-date on the laws.

To be frank with you, he came to the bench with limited experience, and a sharp learning curve to tackle. But he has mastered the federal rules of evidence as a trial judge. He has achieved a fine record. By special designation, he has sat on the Fourth Court on several occasions. And I can say he has the support of a wide array of lawyers in South Carolina, and has received a well qualified rating by the American Bar Association.

In the late '80s and early '90s, Judge Shedd worked as a counsel to Bethea, Jordan & Griffin, and as an adjunct professor of law at the University of South Carolina.

But the senior members of this Committee know him best for the 10 years he served Senator Thurmond -- as Chief Counsel and Staff Director to this Committee, as Counsel to the President Pro Tempore, and as his Administrative Assistant.

He graduated Phi Beta Kappa from Wofford College, holds a law degree from the University of South Carolina, and a masters of laws from Georgetown.

A native of Cardova, he is here today with his wife, Elaine, who at one point worked for Scoop Jackson, his 10-year-old daughter Sarah, and his 9-year-old son, Michael. The Judge is active in scouting and camping with his children and he has helped to organize and promote drug education programs in the local schools.

Mr. Chairman, Judge Shedd has this Senator's full support. He served Senator Thurmond, and this body, with honor and distinction. He has a fine record on the bench. And I look forward to working with Senator Thurmond, and this Committee, to garner bi-partisan support, and to see that this Judge is confirmed.

-30-

ROSENBERG PROUTT FUNK & GREENBERG, LLP
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
2115 ALLFIRST BUILDING
25 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 727-6600
FACSIMILE: (410) 727-1115

THOMAS W. JONES, JR.
Email: tjones@rpfg.com

June 25, 2002

Senator Patrick Leahy
Chairman, United States Senate Judiciary Committee
The Dirckson Building, Room 224
Washington, D.C. 20510

Dear Senator Leahy:

My name is Thomas W. Jones, Jr. I am an African-American attorney currently practicing as a litigation associate in Baltimore, Maryland.

Upon my graduation from the University of Maryland School of Law, I had the distinct pleasure of serving as a judicial clerk for the Honorable Dennis W. Shedd ("Judge Shedd") on the U.S. District Court for the District of South Carolina. During my ***eighteen months*** of working with Judge Shedd, I never encountered a hint of bias, in any form or fashion, regarding any aspect of Judge Shedd's jurisprudence or daily activities.

It is apparent to me that the allegations regarding Judge Shedd's alleged biases have been propagated by individuals without the benefit of any real, meaningful interaction with Judge Shedd, his friends or family members. I trust the accusations of bias levied against Judge Shedd will be given the short shrift they are due, and trust further that this honorable Committee will act favorably upon the pending nomination of Judge Shedd for the United States Court of Appeals for the Fourth Circuit.

Thank you for your attention regarding this matter.

Respectfully,

Thomas W. Jones, Jr.

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Opening Statement of Chairman Patrick Leahy
on the Nominations of
Dennis Shedd to the U.S. Court of Appeals for the Fourth Circuit
Arthur Schwab to the U.S. District Court for the Western District of Pennsylvania
Terrence McVerry to the U.S. District Court for the Western District of Pennsylvania

June 27, 2002

I would like to welcome the nominees to today's hearing. The nominees before us come from South Carolina and Pennsylvania, both States with Senators who are respected members of this Committee. Many of the nominees' family members have made this journey, too, and we extend the welcome of this Committee to the friends and families in attendance.

With today's hearing, in 11 months, the Senate Judiciary Committee will have held 21 hearings involving a total of 78 judicial nominations. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In fact, the number of hearings we have held in less than one year is three more than Republicans held in the two years of the 104th Congress, only one fewer than they held in the two years of the 105th Congress, and six more hearings than the Republicans held in the two years of the 106th Congress. We have included more judicial nominees in hearings in this much shorter period than were accorded hearings in 1999 and 2000 combined. So when partisan critics contend that the Judiciary Committee has not been holding hearings or has been slow to hold hearings, they do so knowing that just the opposite is true. We have held more hearings faster this last year than in any of the six and one-half preceding years in which a Republican majority controlled the pace of hearings.

Over the last 11 months, we have had hearings for more judicial nominees than in seven of the eight years President Reagan was in office. We have held hearings for more judicial nominees than in any of the four years of the first President Bush. The Democratic-led Senate Judiciary Committee has held hearings for more district and circuit court nominees in less than a

year than received hearings in 20 of the past 22 years.

On July 10, 2001, when the Judiciary Committee was assigned new members following the delay in its reorganization, there were 110 judicial vacancies. Today there are 89, despite the 42 vacancies that have arisen since the reorganization of the Committee last July. I should note that this Committee has also favorably reported to the Senate another 16 nominees who await a final vote. When the White House and the Senate leadership work out differences over appointments to bipartisan boards and Commissions and Senator McCain removes his hold, we should be able to move forward. Unfortunately the White House's stance has now resulted in delaying votes on nominees for two months.

In addition, I must note that more than a dozen of the President's judicial nominations do not have home-state Senator support, several do not yet have ABA peer ratings and nearly half of the vacancies do not have nominees, including over a dozen judicial emergency vacancies.

Today, we are considering Judge Dennis Shedd for the U.S. Court of Appeals for the Fourth Circuit. By having a hearing for Judge Shedd today, we are moving forward in spite of the Republican obstruction of President Clinton's nominees to the Fourth Circuit over the last several years. Judge James Beaty, a sitting U.S. District Court Judge for the Middle District of North Carolina, was nominated by President Clinton in December of 1995, but he never received a hearing. Judge Beaty was renominated in 1997, and again, the Committee scheduled no hearing for him. Judge Beaty waited more than 34 months without a hearing.

President Clinton tried again in 1999, nominating another qualified African-American, Judge James Wynn. Judge Wynn, a North Carolina Court of Appeals Judge, was also denied a hearing before the Committee, but President Clinton sent him back to the Senate one more time, at the start of the 107th Congress in January this year. After pending for a total of 16 months

without a hearing, Judge Wynn's nomination was among those withdrawn by President Bush in March of last year.

Federal District Court Judge Andre Davis, an African American judge from Baltimore, was also nominated by President Clinton to the Fourth Circuit, but his nomination was also never acted on by the Republican controlled Senate.

Judge Roger Gregory was also first nominated by President Clinton and likewise was never accorded a hearing by the Republican majority. He was initially nominated by President Clinton in June of 2000. When no action was taken by the Senate on Judge Gregory's nomination, President Clinton used his power to make Roger Gregory the first African-American judge in history to sit on the Fourth Circuit by making him a recess appointment. He then renominated him at the beginning of the 107th Congress. Unfortunately, President Bush withdrew Judge Gregory's nomination in March of 2001.

With the strong support of Senator Warner, Judge Gregory was then renominated by President Bush. We included him in our first judicial confirmation hearing last July. It was the first hearing on a Fourth Circuit nominee in three years and he was the first appellate judge confirmed to that court in three years, and the first African American ever confirmed to that Court of Appeals.

We have already successfully broken the Republican-imposed moratorium on confirming judges to the Fourth Circuit when the Senate confirmed Judge Roger Gregory last year. Just as we broke through with respect to the Fifth Circuit with the confirmation of Judge Edith Clement, and with respect to the Eighth and Tenth Circuits after years without a new judge being confirmed by the Republican-controlled Senate.

Judge Shedd is the second Fourth Circuit nominee on which we have proceeded in less

than a year. He is also the second judicial nominee from South Carolina on whom we have proceeded. In August of last year we had a hearing for Judge Terry Wooten to be a U.S. District Court Judge. Judge Wooten was reported by the Committee and confirmed by the Senate last November. We have continued to do what our Republican predecessors would not by moving to consider fairly judicial nominees from circuits in which they had previously imposed a blockage.

Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half – 56 percent – of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling. Democrats have broken with that Republican history of inaction.

We will also hear from Arthur Schwab and Terrence McVerry, both nominated to the U.S. District Court for the Western District of Pennsylvania. Theirs will be the tenth and eleventh nominations from Pennsylvania to be considered this year. This is more nominees than we have considered for any other State and is in stark contrast to the treatment President Clinton's Pennsylvania nominees received under Republican leadership.

One example is the treatment of the nomination of Judge Legrome Davis. Judge Davis was first nominated on July 30, 1998. The Republican-controlled Senate took no action on his nomination and it was returned to the President at the end of 1998. On January 26, 1999, President Clinton renominated Judge Davis for the same vacancy. The Senate again failed to hold a hearing for Judge Davis and his nomination was returned after two more years. Under Republican leadership, Judge Davis' nomination languished before the Committee for 868

days (868!) without a hearing. Unfortunately, Judge Davis was subjected to the kind of treatment that befell so many other nominees to the district courts in Pennsylvania and to the Third Circuit during the Republican control the Senate. I note, however, that I know personally that the senior Senator from Pennsylvania, strongly supported Judge Davis's nomination and worked hard to get him a hearing and a vote. I give Senator Specter full credit for getting President Bush to renominate Judge Davis earlier this year. As Chairman, I moved expeditiously to consider Judge Davis, and he was confirmed within a few months of his renomination. The saga of Judge Davis recalls for us so many nominees from the period of January 1995 through July 10, 2001, who never received a hearing or a vote and who were the subject of secret anonymous holds by Republicans for reasons that were never explained.

As another example, I note that the hearing we had earlier this year for Ms. Joy Conti was the very first hearing on a nominee to the Western District of Pennsylvania since 1994 (in almost a decade), despite qualified nominees of President Clinton. No nominee to the Western District of Pennsylvania received a hearing during the entire period that Republicans controlled the Senate in the Clinton Administration. One of the nominees to the Western District, Lynette Norton, waited for almost 1,000 days, and she was never given the courtesy of a hearing or a vote. Unfortunately, Ms. Norton died earlier this year, having never fulfilled her dream of serving on the federal bench. Despite this history of poor treatment of Clinton nominees in Pennsylvania and elsewhere, we are moving fairly and expeditiously.

Large numbers of vacancies continue to exist, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than 50 of President Clinton's judicial nominees, many of whom waited for years and never received a vote on their nomination. It is the Democrats, not the Republicans, who have broken with that history of

inaction from the Republican era of control, delay and obstruction.

The Senate has already confirmed 57 of President Bush's judicial nominees and 16 others are awaiting votes by the full Senate. The number of judicial confirmations by the Republican controlled Senate is greater than the number of District Court nominees confirmed in five of the six full years of Republican control, 1995, 1996, 1997, 1999, or 2000. More district court nominees have been confirmed than were confirmed in seven of the eight years of the Reagan Administration and three of four years of the first Bush Administration.

Despite false claims by some, these facts demonstrate quite clearly that the Senate is working hard to evaluate and vote on President Bush's judicial nominees at a fair and fast pace.

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING THE NOMINATION OF JUDGE DENNIS SHEDD TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, THURSDAY, JUNE 27, 2002, SD-226, 2:00 PM.

Mr. Chairman:

Thank you for holding this important hearing today on judicial nominations. I am greatly pleased that we are considering the nomination of Judge Dennis W. Shedd to the United States Court of Appeals for the Fourth Circuit. He is a man of impeccable character and will make an outstanding addition to the Federal appellate bench. Judge Shedd possesses the highest sense of integrity, a thorough knowledge of the law, and a good judicial temperament. These qualifications have earned him widespread respect and bipartisan support in my home state of South Carolina. In addition to Republican support, Senator Ernest Hollings and state Democratic Party Chairman Dick Harpootlian have endorsed his nomination. I am confident that today's hearing will demonstrate that Judge Shedd is eminently qualified to serve as a Federal Circuit Court Judge, and I welcome him here today.

Judge Shedd has been successful at every stage of his professional life and has dedicated most of his career to public service. Upon graduation from the University of

South Carolina School of Law, he joined my staff and eventually rose to the position of Administrative Assistant. Thereafter, during my tenures as Chairman and Ranking Member of the Judiciary Committee, he served as the committee's Chief Counsel and Staff Director. As a staff member, he gained a well-deserved reputation for honesty and hard work. At Judge Shedd's district court nomination hearing before this committee, Senator Biden said the following,

> There are many other questions I would normally have of a nominee about his or her temperament and his or her working habits, but I have worked with you for so long, I believe I am fully qualified to make an independent judgment about your working habits, your integrity, your honesty and your temperament. On all of these scores, I have found you to be beyond reproach.

These kind remarks by Senator Biden typify the sentiments of those who know Judge Dennis Shedd.

Upon returning to South Carolina, Judge Shedd entered the private practice of law and also served as an Adjunct Law Professor at the University of South Carolina. In 1990, President Bush nominated Dennis Shedd to the United States District Court for the District of South Carolina, and he has served ably for more than a decade. On numerous occasions, Judge Shedd has been given the honor of sitting

on the Fourth Circuit by designation.

Judge Shedd's performance on the District Court has been marked by distinction. He has been assigned more than 5,000 cases during almost twelve years on the bench. Out of all these cases, he has only been reversed 37 times, resulting in a reversal rate of less than 1%. These numbers indicate both the skilled legal mind and the thorough preparation that he will bring to the Fourth Circuit. Judge Shedd also possesses a good judicial temperament, treating all litigants in his courtroom with dignity and respect. It is not surprising that a number of South Carolina lawyers have made very complementary statements regarding Judge Shedd.

Unfortunately, some groups have portrayed Judge Shedd's judicial career in a negative light. I would like to take this opportunity to address these allegations and concerns. A close examination of Judge Shedd's record indicates that he is not only fair and impartial, but personally dedicated to upholding the constitutional rights of all people.

Judge Shedd has been criticized for his handling of Alley v. South Carolina, a lawsuit wherein the plaintiffs sought to remove the Confederate flag from atop the

Statehouse dome in Columbia, South Carolina. In a press release by the South Carolina NAACP, the group asserts that Judge Shedd "made several derogatory comments about those opposing the flag, and minimized the deep racial symbolism of the Confederate flag by comparing it to the Palmetto tree, which appears in South Carolina's state flag."

These allegations are misleading and inaccurate. A close look at the transcript of the hearing reveals that Judge Shedd made a point of saying that his comments were not meant to be disparaging. In fact, he said, "I'm not going to denigrate the constitutional claim about the Confederate flag." Furthermore, Judge Shedd never ruled on the merits of the case. Rather, he abstained to allow a claim to go forward in state court, arguably the forum better equipped to handle the issue.

Additionally, it is important to note that Judge Shedd's comments about the Palmetto tree were made during his examination of the lawyer's legal argument in the case. The argument hinged on the offensive nature of the Confederate flag, and Judge Shedd pointed out that many symbols could be perceived as offensive, such as the Palmetto tree on the state flag. Judge Shedd then stated,

"I'm not determining now on whether or not the flag should be there at all. I'm just doing what--you lawyers have been with me before know, I'm exploring your legal theory." In this case, Judge Shedd was simply engaging in the Socratic method with the lawyers, and his words should not be twisted to insinuate any personal feelings about the propriety of flying the Confederate flag over the Statehouse dome.

I would like to point out the case of Vanderhoff v. John Deere, the one case involving the Confederate flag in which Judge Shedd did rule. In that case, an employee was fired because he refused to comply with company policy and remove the Confederate flag from his toolbox. The employee sued under Title VII, a statute designed to prohibit workplace discrimination based on race, sex, religion, and national origin. He argued that his national origin was a "Confederate Southern American" and that he had been the subject of discrimination. Judge Shedd rejected this argument and dismissed the plaintiff's claim. Thus, on the one Confederate flag case where he ruled on the merits, Judge Shedd's decision went against a flag proponent.

In addition to Judge Shedd's proven record of protecting civil rights, he has personally dedicated himself

to providing equal opportunities for women and minorities. As an example, Judge Shedd served as Chairman of the South Carolina Advisory Committee to the United States Commission on Civil Rights. He also played an instrumental role in the selection of Margaret Seymour as the first African-American U.S. Magistrate Judge in the District of South Carolina. When Judge Seymour was nominated by President Clinton to the district court, Judge Shedd fully supported her nomination. Furthermore, Judge Shedd has hired both African-American and female law clerks.

Judge Shedd has been accused of being hostile towards cases involving claims against employers. Again, this accusation is untrue. One commonly cited case is Roberts v. Defender Services, in which Judge Shedd dismissed a plaintiff's sexual harassment claim. In this case, Judge Shedd merely followed the law as established by the Supreme Court, which held in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), that the work environment must be both objectively and subjectively offensive. While the plaintiff had clearly shown that the work environment was objectively offensive, Judge Shedd determined that she had not made a showing that she perceived it to be offensive. He based his

determination on the fact that she had recommended the position to someone else and stated that the employer was "a nice person" who was "pretty good to work for." These comments by the plaintiff demonstrate that Judge Shedd's decision was reasonable under the circumstances of this case.

The truth is that there are numerous cases where Judge Shedd has refused to dismiss employment discrimination claims. For example, in Davis v. South Carolina Department of Health and Environmental Control, a black plaintiff sued under Title VII of the Civil Rights Act, alleging that she did not receive a promotion because of her race and that an unqualified white employee was promoted instead. Judge Shedd, in accordance with the law, refused to dismiss the claim. In another case, Treacy v. Loftis, Judge Shedd declined to grant summary judgment on a fired employee's claim of intentional infliction of emotional distress. In that case, the plaintiff claimed that her job was terminated due to her involvement in an interracial relationship. Again, Judge Shedd's ruling allowed the trial to go forward.

There are many other cases like these. A close look at Judge Shedd's record reveals that he has upheld important

rights protected by the Constitution. If elevated to the Fourth Circuit, Judge Shedd will continue to protect civil liberties.

I would like to turn to another accusation that has been leveled against Judge Shedd. He has been accused of espousing an unreasonably narrow interpretation of Congressional power based on his decision in Condon v. Reno, 972 F.Supp. 977 (1997), in which he struck down the Driver's Privacy Protection Act. The Act regulated the dissemination of state motor vehicle record information, and the state of South Carolina challenged its constitutionality. Judge Shedd ruled that under Supreme Court precedent, the Act violated the Tenth Amendment by impermissibly commandeering state governments, forcing them to regulate in a specific fashion. The Fourth Circuit upheld this decision, Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), but the Supreme Court ultimately reversed. Reno v. Condon, 120 S.Ct. 666 (2000).

It is important to stress that this case was one of first impression. Given the United States Supreme Court opinions in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997), Judge Shedd's ruling was entirely reasonable. In a very

persuasive opinion, he compared the Drivers Privacy Protection Act with those Acts invalidated in New York and Printz and found it to have similar constitutional defects.

Judge Shedd was not alone in his analysis. At least one liberal commentator, Erwin Chemerinsky, concluded that the Supreme Court's distinction of the Drivers Privacy Protection Act from the statutes struck down in New York and Printz was unconvincing. While Chemerinsky agreed with the final outcome of the case, he has argued that the Supreme Court should have overruled both New York and Printz in order to reach its decision in Reno. Professor Chemerinsky's argument lends support to the proposition that Judge Shedd, in striking down the statute, was correct in his interpretation of the law at that time. In short, there is nothing to indicate that Judge Shedd's decision in this case was out of the mainstream.

Another case that has been cited is Crosby v. U.S., in which Judge Shedd held that the plaintiff's claim under the Family and Medical Leave Act was barred by the Eleventh Amendment to the Constitution. Judge Shedd's detractors have argued that this case is another example of his narrow view of Congressional power. However, this accusation is

unfair and unwarranted. In this case, Judge Shedd sought to follow the law as established by the Supreme Court. He was not attempting to make new law, but was instead seeking to apply the law correctly. Furthermore, Judge Shedd was not alone in his decision. Out of nine circuit courts that have considered this same question, eight have agreed with Judge Shedd. It is interesting to note that Judge Roger Gregory, originally appointed by President Clinton, joined the Fourth Circuit's opinion that agreed with Judge Shedd's ruling.

It has been suggested that Judge Shedd is biased against plaintiffs and routinely considers matters *sua sponte*, or on his own motion, in order to benefit defendants. This charge is without merit for a few reasons. First, Federal judges face enormous caseloads. If an area of the law is clear, it is completely proper for the judge to act on his own motion, helping to move litigation along and clear the dockets. Second, the law clearly allows for district court judges to consider matters without prompting from lawyers. The Supreme Court has acknowledged this, stating in Celotex Corp. v. Catrett, 830 F.2d 1308 477 U.S. 317, 326 (1986), that district courts may properly grant

summary judgment *sua sponte* to a party that has not moved for summary judgment. As long as a judge is acting properly, which Judge Shedd has always done, *sua sponte* decisions are entirely appropriate.

Mr. Chairman, thank you for holding a hearing for Judge Dennis Shedd. I have known this fine man for over 24 years and can personally vouch for his integrity and high moral character. He is truly a man of knowledge, ability, and superior ethical standards. Judge Shedd will bring a wealth of trial experience to the Fourth Circuit, handling more than 4,000 civil cases and over 900 criminal matters as well as possessing unmatched legislative experience. It is no surprise that Judge Shedd received a majority rating of "Well Qualified" from the American Bar Association. I am proud to support my friend, Dennis Shedd, to the Fourth Circuit Court of Appeals.

NOMINATION OF PRISCILLA OWEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT; TIMOTHY J. CORRIGAN, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA; AND JOSE E. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE SOURTHERN DISTRICT OF FLORIDA

TUESDAY, JULY 23, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Feinstein, Kennedy, Leahy, McConnell, Sessions, Schumer, DeWine, Feingold, Durbin, Brownback, Cantwell, and Edwards.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. We will begin the hearing. Members will be coming in from time to time.

Before I make my opening statement, I would like to just quickly run through the protocol for this hearing. There are three panels that we will be hearing today. Members will be called on the basis of the early bird rule. We will alternate from side to side. For those that do not know the early bird rule, it is an incentive to get members to come to committee promptly.

There will be a vote, I think around 10:30. We will recess for that vote. This session will run from 10 to 12:15. We will begin again at 2 and go through to 5, at which point the hearing will end. If we need an additional hearing, that can be determined at that time. There will be two votes this afternoon, I believe at 2:45, and we will do a similar thing. We will simply adjourn and go and cast our votes and promptly return here.

I would like to begin by saying that there are three panels. We have three distinguished members on the first panel. Senator Kay Bailey Hutchison is traveling and will arrive a little late and I have agreed to take her statement as soon as she comes in, so we

will stop whatever we are doing and listen to her when she comes in.

We will then hear the statements from the members and then a statement from the chairman of the committee and the ranking member.

I would like to welcome Priscilla Owen on behalf of the Judiciary Committee. Justice Owen comes to us with a distinguished record and with the recommendations of many respected individuals within her State of Texas. She currently sits as one of nine Justices on the Texas Supreme Court, which is the court of last resort for civil cases in that State.

Justice Owen is a graduate of Baylor University and Baylor Law School, and before joining the Texas Supreme Court in 1995, she was a partner in the law firm of Andrews and Kurth.

As indicated by the large number of people in this room—in fact, as indicated by the size of the room itself—this is a nomination that has received a lot of interest. My office has received dozens of letters of support and of opposition from organizations within Texas and from national organizations, as well, on both sides of the debate, so feelings run very, very strong. We will, of course, keep order and we do not appreciate any comment from the audience.

I am keeping an open mind on this nominee, as I do with all nominees. I first met with her several weeks ago. I found her to be personable, intelligent, and well spoken. It is clear to me that Justice Owen knows the law, she is very capable, and that she would be an excellent advocate for a cause.

But the question this committee must answer for this and all nominees is whether this individual would make a good Federal judge, a Federal appellate judge, and that determination includes questions beyond intelligence and character. We must also ask about temperament and the ability to decide cases on the law, not on personal beliefs.

The concerns that have been raised about Justice Owen go to the heart of these questions. Accusations have been made that Justice Owen too often stretches or even goes beyond the law as written by the Texas legislature to meet her personal beliefs on several core issues, including abortion and consumer rights.

I have read through a great deal of the material about Justice Owen in preparation for this hearing, including a number of opinions she has written on a variety of subjects, so I am very interested to hear from Justice Owen on these issues today, after which I will carefully review the record and make what is sure to be a very difficult decision, as we all will do.

So now, I would like to turn to the ranking member and then to the chairman of the committee.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Madam Chairman. I want to welcome all nominees today, as well as the Members of the Congress who have come to testify on their behalf.

I ask that I be able to put statements for Messrs. Timothy Corrigan and Jose Martinez into the record. I would ask unanimous consent for that.

Senator FEINSTEIN. Without objection.

Senator HATCH. I would like especially to welcome Justice Priscilla Owen of Texas, our lone Circuit Court nominee. I intend today to comment on Justice Owen's qualifications and to address some of the deceptions, distortions, and demagoguery orchestrated against her nomination that we have all read in the national and local papers. I have long looked forward to this hearing, and I expect she has, as well.

I would like first to comment on the two jingoes that are being used about her record as if they had substance, namely that Justice Owen is "conservative" and that she is "out of the mainstream." Of course, this comes from the Washington interest groups that we have seen year after year, in many cases, who think that the mainstream thought is more likely to be found in Paris, France, than in Paris, Texas.

I must admit that it is curious to hear it argued that a nominee twice elected by the people of the most populous State in the circuit for which she is now nominated is "out of the mainstream." Texans will no doubt be entertained by whoever says that.

Listening to some of the commentary on judges, I sometimes think that mainstream for them is a Northeastern river of thought that travels through New Hampshire early and often, widens in Massachusetts, swells in Vermont, and deposits in New York City. Well, the mainstream that I know and that most Americans——

The CHAIRMAN. That is impossible to do geographically, but that is OK.

Senator HATCH. I understand. That was the point.

[Laughter.]

Senator HATCH. The mainstream that I know and that most Americans relate to runs much broader and further than that.

The other mantra repeated by Justice Owen's detractors is that she is "conservative." Now, I believe that the use of political and ideological labels to distinguish judicial philosophies has become highly misleading and does a misservice to the public's confidence in the independent judiciary of which this committee is the steward. I endorse the words of my friend and former Chairman Senator Biden when he said some years ago that, "Judicial confirmation is not about pro-life or pro-choice, conservative or liberal, it is not about Democrat or Republican. It is about intellectual and professional competence to serve as a member of the third co-equal branch of the government."

I believe it is our duty to confirm judges who stand by the Constitution and the law as written, not as they would want to rewrite them. That was George Washington's first criterion for the Federal bench and it is mine. I also want common sense judges who respect American culture. I believe that is what the American people want, as well.

I believe we do a disservice to the independence of the judiciary by using partisan or ideological terms in referring to judges. My reason was well stated by Senator Biden when he said that, "It is imperative not to compromise the public perception that judges and courts are a forum for the fair, unbiased, and impartial adjudication of disputes."

We compromise that perception, I believe, when we play partisan or ideological tricks with the judiciary. Surely, we can find other ways to raise money for campaigns and otherwise play at politics without dragging this nation's trust in the judiciary through the mud, as some of the outside groups continue to do.

All you have to do to see my point is read two or three of the fund-raising letters that have become public over the past couple of weeks that spread mistruths and drag the judiciary branch into the mud, as many recent political campaigns increasingly find themselves.

On a lighter note, while on ideology, let me pause to point out that one of the groups deployed against Justice Owen is the Communist Party of America, but then, I do not know that they have come out in favor of any of President Bush's nominees. I suspect after the fall of the Berlin Wall, they must have a lot of time on their hands these days.

Today, I wish to address just why a nominee with such a stellar record, a respected judicial temperament, and as fine an intellect as Justice Owen has, who graduated third in her class from Baylor's Law School, a great Baptist institution, when few women attended law school, let alone in the South, who obtained the highest score in the Texas Bar examination and who has twice been elected by the people of Texas to serve on their Supreme Court, the last time with 83 percent of the votes and the support of every major newspaper of every political stripe, I would like to address just why such a nominee could be here today with as much organized and untruthful opposition from the usual leftist Washington special interest groups that we see.

I will peel through what is at play for these groups. We need to expose and repel what is at play for the benefit and independence of this committee, and I would like to address also the reasons why I am confident that she will be confirmed notwithstanding, not least of which is that this committee has never voted against a Circuit nominee with the American Bar Association's unanimous rating of "well qualified," the highest rating they give. Justice Owen has that highest of ratings.

The first reason for the organized opposition, of course, is plain. Justice Owen is from Texas, and Washington's well-paid reputation destroyers could not help but attempt to attack the widely popular President of the United States at this particular time in an election year by attacking the judicial nominee most familiar to him, Justice Owen. Welcome to Washington.

But as I prepared more deeply for this hearing, the second reason became apparent to me. In my 26 years on this committee, I have seen no group of judicial nominees as superb as those that President Bush has sent to us, and he has sent both Democrats and Republicans, men and women, Hispanics, African Americans, and Caucasians.

In reading Justice Owen's decisions, one sees a judge working hard to get it right, to get at the legislature's intent, and to apply binding authority and rules of judicial construction. It is apparent to me that all of the sitting judges the President has nominated, that of all of them, Justice Owen is the most outstanding nominee.

She is, in my estimation, the best that every American, every consumer, and every parent could hope for.

Her opinions, whether majority, concurrences, or dissents, could be used as a law school textbook that illustrates exactly how, and not what, an appellate judge should think, how she should write, and just how she should do the people justice by effecting their will through the laws adopted by their elected legislatures. Justice Owen clearly approaches these tasks with both scholarship and mainstream American common sense. She does not substitute her views for the legislature's, which is precisely the type of judge that the Washington groups who oppose her normally want.

She is precisely the kind of judge that our first two Presidents, George Washington and John Adams, had in mind when they agreed that the Justices on the State Supreme Courts would provide the most learned candidates for the Federal bench.

So in studying her record, the second reason for the militant and deceptive opposition to Justice Owen became quite plain to me. In this world turned upside down, simply put, she is that good.

Another reason for the opposition against Justice Owen is the most demagogic, the issue of campaign contributions and campaign finance reform. Some of her critics are even eager to tie her to the current trouble with Enron. Well, she clearly has nothing to do with that. Neither Enron nor any other corporation has donated to her campaigns. In fact, they are forbidden by Texas law to make campaign contributions in judicial elections.

Despite the politics, I am certain that Justice Owen is quite eager to address this issue fully, and being a Texas woman, I trust she will not embarrass the questioner too badly—not that there is a need for more questions. The Enron and campaign contributions questions were amply clarified in a letter to Chairman Leahy and the committee dated April 5 by Alberto Gonzales, the White House Counsel. I ask, Madam Chairman, to place this and other related letters into the record at this point.

Senator FEINSTEIN. So ordered.

Senator HATCH. And I would place into the record a retraction from the New York Times saying that they got the facts wrong on this Enron story. Such retractions do not come often, although the misstatement of facts by the destroyer groups do. So I would ask unanimous consent that that go in the record.

Senator FEINSTEIN. Without objection.

Senator HATCH. I also hope that Justice Owen will get a chance to address her views on election reform and judicial reform, of which she is the leading advocate in Texas. She is also a leader in gender bias reform in the courts and a reformer on divorce and child support proceedings. I hope she will have an opportunity to address these matters and about her acclaimed advocacy to improve legal services and funding for the poor.

All of these are aspects of her record her detractors would have us ignore. I do not know about my other colleagues, but I certainly did not read these positive attributes in those fancy documents, or should I say booklets, released over the past several weeks by the People for the American Way and their co-conspirators in the Washington special interest lobby.

I ask, Madam Chairman, to place in the record letters from the leaders of the Legal Society and 14 past presidents of the Texas Bar Association, many of whom are Democrats. I ask unanimous consent for that, as well.

Senator FEINSTEIN. Without objection.

Senator HATCH. The fourth reason for the opposition to Justice Owen is the most disturbing to me. For some months now, a few of my Democrat colleagues have strained to point out when they believe they are voting for judicial nominees that they believe to be pro-life. I have disputed this when they have said it is because the record contains no such information of personal views from the judges we have confirmed. Each time they assert it, my staff has scoured the transcript of hearings and turned up nothing. What does turn up is that each time my colleagues have asserted this, they have done so only for nominees who are men.

I am afraid that the main reason Justice Owen is being opposed is not that personal views, namely on the issue of abortion, are being falsely ascribed to her—they are—but rather because she is a woman in public life who is believed to have personal views that some maintain should be unacceptable for a woman in public life to have.

Such penalization is a matter of the greatest concern to me because it represents, in my opinion, a new glass ceiling for women jurists, and they have come too far to suffer now having their feet bound up just as they approach the tables of our high courts after long-struggling careers. I am deeply concerned that such treatment will have a chilling effect on women jurists that will keep them from weighing in on exactly the sorts of cases that most invite their participation and their perspectives as women.

Ironically, the truth is that the cases that her detractors point to as proof of apparently unacceptable personal views are a series of fictions. This is what I mean about exposing the misstatements of the left-wing activist groups in Washington. I will illustrate just three of these fictions.

The first sample fiction is the now often-cited comment attributed to then Texas Supreme Court Justice Alberto Gonzales, written in a case opinion, that Justice Owen's dissent signified "an unconscionable act of judicial activism." Someone should do a story about how often this little shibboleth has been repeated in the press and in several websites of the professional smear groups. I would venture that some of my colleagues have it on the first page of their briefing memos even now. The problem with it is that it is not true. Justice Gonzales was not referring to Justice Owen's dissent, but rather to the dissent of another colleague in the same case.

The second sample fiction is the smear groups' misrepresented portrayal of a case involving buffer zones and abortion clinics. In that case, the majority of the Texas Supreme Court ruled for Planned Parenthood and affirmed a lower court's injunction that protected abortion clinics and doctors' homes and imposed $1.2 million in damages against pro-life protesters. In only a few instances, the court tightened the buffer zones against protesters. Justice Owen joined the majority opinion and was excoriated by dissenting colleagues, who were admittedly pro-life, by the way.

When describing that decision then, abortion rights leaders hailed the result as a victory for abortion rights in Texas. Planned Parenthood's lawyer said the decision "isn't a home run, it's a grand slam." Of course, that result has not changed, but the characterization of it has. This is how Planned Parenthood describes the same case in their fact sheet on Justice Owen. "Owen supports eliminating buffer zones around reproductive health care clinics." In fact, her decision did exactly the opposite, and I think this committee deserves and should demand a formal apology and full explanation.

The third and most pervasive sample of fiction concerns Justice Owen's rulings in a series of Jane Doe cases which first interpreted Texas's then-new parental involvement law. The law, which I think is important to emphasize was passed by the Texas legislature, not Justice Owen, with bipartisan support, requires that an abortion clinic give notice to just one parent 48 hours prior to a minor's abortion. Unlike States with more restrictive laws, such as Massachusetts, Wisconsin, and North Carolina, consent of the parent is not required in Texas. A minor may be exempted from giving such notice if they get court permission.

Since the law went into effect, over 650 notice bypasses have been requested from the courts. Of these 650 cases, only ten have had facts so difficult that two lower courts denied a notice bypass. Only ten have risen to the Texas Supreme Court. Justice Owen's detractors would have us believe that in these cases, she would have applied standards of her own choosing. Ironically, in each and every example they cite, whether concurring with the majority or dissenting, Justice Owen was applying not her own standards, but the standards enunciated in the *Roe* v. *Wade* line of decisions of the U.S. Supreme Court, which she followed and recognized as authority.

For example, detractors take pains to tell us that Justice Owen would require that to be sufficiently informed to get an abortion without a parent's knowledge, that the minors show that they are being counseled on religious considerations. They appear to think this is nothing more than opposition to abortion rights. They are so bothered with this religious language that various documents produced by the abortion industry lobby italicize the word "religious."

But this standard is not Justice Owen's invention but rather the words of the Supreme Court's pro-choice decision in Casey. Should she not follow one Supreme Court decision but be required to follow another? Is that what we want our judges to do, pick and choose which decisions to follow? That appears to be the type of activist judge these groups want, and this committee should resist all such attempts to get that type of a judge.

The truth is that rather than altering the Texas law, Justice Owen was trying to effect the legislators' intent. No better evidence of this is the letter of the pro-choice woman Texas Senator stating her "unequivocal" support of Justice Owen. Senator Shapiro says of Justice Owen, "Her opinions interpreting the Texas parental involvement law serve as prime example of her judicial restraint."

I am sorry I am taking a little longer, but I will finish in just a minute.

I understand why the Washington left-wing groups do not like that in a judge, but this committee should applaud and commend such restraint and temperament.

The truth is that rather than being an activist foe of Roe, Justice Owen repeatedly cites and follows *Roe* and its progeny as authority. Compare this to Justice Ruth Bader Ginsburg, who wrote in 1985 that the *Roe* v. *Wade* decision represented "heavy-handed judicial intervention" that was "difficult to justify."

Now, in relation to this, I would like to briefly comment on the mounting offensive of some to change the rules of judicial confirmation by asking nominees to share personal views or to ensure that nominees share the personal views of the Senator on certain cases.

To illustrate my view, I will tell you that many people have recently called on this committee to question nominees as to their views on the Pledge of Allegiance case. My full-throated answer to this is no, as much as I think that that case was wrongly decided. I also happen to think that the recent school voucher case is the most important civil rights decision since Brown, but I am not going to ask people what they think about that case, either.

Such questions threaten the heart of the independent judiciary and attempt to accomplish by hidden indirection what Senators cannot do openly by constitutional amendment. It is an attempt to make the courts a mere extension of the Congress.

I speak against this practice in the strongest terms, and in my view, any nominee who answers such questions would not be fit for judicial office and would not have my vote.

The truth is that there are many who, like Justice Ginsburg, think that cases like *Griswold* or *Roe* were wrongly decided as a constitutional matter, even if they agree with the policy result, just as the great liberal Justice Hugo Black did in his dissent in *Griswold*. A few weeks ago, we heard testimony that Chief Justice Warren thought Board of EducationBoard of Education was his worst ruling as a matter of constitutional law, but not his least necessary.

Again, I welcome Justice Priscilla Owen. Considering the opposition mounted so unfairly against you, I have to tell you that today, you may be the bravest woman in America. I hope that there are young women watching you right now. You are an excellent role model for anyone, and especially young women.

Some of Justice Owen's detractors have made much about the fact that she is not afraid to dissent. Of course, they fail to mention dissents like her opinion in *Hyundai Motor* v. *Alvarado*, in which Justice Owen's reasoning was later adopted by the U.S. Supreme Court on the very same difficult issue of law.

They also overlooked her dissent in a repressed memory sexual abuse case where she took the majority to task with these words: "This is reminiscent of the days when the crime of rape went unpublished unless corroborating evidence was available. The court's opinion reflects the attitudes reflected in that era."

Perhaps, Madam Chairman, they thought that dissent reflected too well the perspective of a woman to point out to Senators like all of us up here.

Despite deceptive opposition, I think that Justice Owen should be confirmed, first, because I believe that colleagues like many on this

committee, and hopefully all of us, will be fair. I also believe my Democratic colleagues will be led by the time-tested standards well stated by Senator Biden and look again to qualifications and judicial temperament, not base politics. Whether the Biden standard will survive past our time will be tested in this case. If we fail the test, we will breach our responsibility as auditors of the Washington special interest groups and the judiciary's stewards on behalf of all people and not just some.

I want to thank you, Madam Chairman. I know I took a little longer than I usually do, but I felt that it needed to be done in this case and I look forward to the testimonies here today.

Senator FEINSTEIN. Thank you, Senator Hatch.

The Chairman of the Committee, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Madam Chair, I will not do as my friend from Utah did and give a long speech that simply delays these proceedings. I will put my speech in the record.

I also have great respect for the chair of this committee, the Senator from California, and I know she will hold a fair hearing, and unlike my friend from Utah, I will make up my mind after hearing the facts and not decide them before we even have the hearing.

We will have hearings today on the 79th, 80th, and 81st judicial nominees since I took over on July 11. Justice Owen is the 17th Court of Appeals hearing we have had.

I would point out that Justice Owen has been nominated for the United States Court of Appeals for the Fifth Circuit, to a seat vacated by William Garwood in January 1997. President Clinton had nominated Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. He had a unanimous rating of "well qualified" by the ABA, something the Senator from Utah says is very important. But the Senator from Utah and the Republican-controlled Senate refused to give him a hearing, and after 15 months, his name was returned. He was never allowed to have a hearing.

So then President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, to fill the same vacancy. This committee, under Republican chairman, did not allow him to even have a hearing for the 17 months that his name was pending here, and then President Bush withdrew his name.

Now, we have Judge Owen, who is the third nominee. I trust the distinguished Senator from California to hold a fair hearing, something that the two nominees, the two Hispanic nominees, two extremely well-qualified Hispanic nominees nominated by President Clinton, were never allowed to have before this committee. I commend the Senator from California and this committee for holding a hearing and not doing as had been past practice—we have heard a lot about past practice—did not follow past practice and said, we are having a hearing. I will make up my mind based on what we hear.

I would hope that other Senators would refrain from the kind of name-calling we have heard about people who have expressed their views. I have heard a lot of views expressed on this both for and

against Justice Owen. While I may not have liked the tenor and even some of the things I was told in those views, I am one who defends the First Amendment.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator FEINSTEIN. We will now turn to the members of——

Senator SCHUMER. Madam Chair, there are a couple of things that I would just like to mention here in response to Senator Hatch. Could I have a minute or two to do that?

Senator FEINSTEIN. Well, we have a very long—I think every other member probably has something they would like to say. What we generally do is turn to the members and then hear. If you would not mind withholding, I think it would be appreciated.

Senator SCHUMER. I will defer to you, Madam Chair. I just thought certain things were on the record that were just so wrong that they need some refutation.

Senator FEINSTEIN. I will give you ample time to explain later.

Senator SCHUMER. Thank you.

Senator FEINSTEIN. We now have three Members of the Congress. I would like to begin with the senior Senator from Texas, the Honorable Phil Gramm, and then we will proceed right down the line. If you could keep your statement to 5 minutes or so, that would be appreciated.

PRESENTATION OF PRISCILIA OWEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT BY HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Madam Chairman, first, thank you very much. I appreciate having an opportunity to be here.

I am not going to waste your time telling you that Priscilla Owen is brilliant, that she is a distinguished student of the law. Everybody knows that. If she were a simpleton, there would not be all this opposition to her.

I just want to talk about the Priscilla Owen that I know and that the people of my State know. First of all, normally when there is an effort to attack somebody, you find one little thing about them and you blow it out of all proportion. What is so basically disturbing to me about this case is, there is no one little thing to blow out of proportion. This attack is created out of whole cloth.

Priscilla Owen is not a political person. Priscilla Owen, when she was recruited by people who wanted to have outstanding jurists, was probably our State's greatest commercial litigator. She was living in River Oaks, which is the richest neighborhood in our State. She was extraordinarily successful. She was totally non-political. When she was approached about running for the court, she was not sure what primary she had voted in. The idea that this good woman is some kind of political activist or kook is as far from the truth as it can be, as you can get from the truth.

She made an extraordinary decision. She gave up probably the most successful commercial litigation practice that any female lawyer in my State had or had ever had, moved out of River Oaks as a single mom to become a Justice of the Supreme Court of Texas.

Now, I want to address two areas that have been brought up. One is Enron. Now, Priscilla is from Houston. Enron was the largest and most successful company in my State. So is anybody shocked that people who worked for the largest and most successful company in Texas, a company domiciled in Houston, supported the most successful commercial litigator in the State when she ran for the Texas Supreme Court? What is amazing to me is that people who worked for Enron contributed only $8,600. That should have been the beginning of a message that maybe these were not good people.

[Laughter.]

Senator GRAMM. Now, there has been an accusation that somehow, because employees of the largest and most successful, at that point, company in my State contributed $8,600, that somehow this induced her to make a political ruling. Well, the case was pretty simple. The State law sets out a procedure whereby inventories are evaluated. The case came before the Supreme Court.

There was a unanimous decision, and even the lawyer, and I have got a copy of a letter from Robert Mott, who writes a letter and says, "Justice Owen authored the opinion of a unanimous"—this is the lawyer who represented the other side of the case—"Justice Owen authored the opinion of a unanimous court consisting of both Democrats and Republicans. While my client and I disagree with the decision, we were not surprised."

So you read this propaganda being put out, you would get the idea that this person is bought and sold by Enron and made a political ruling. You get down to the facts, it is insulting.

Second point, this abortion business, the Texas legislature wrote a law that basically said you have got to notify a parent when a minor is having an abortion. Now, to some people, that is an extremist position. To most Americans, that is a pretty straightforward position. I would have to say, loving many members of the legislature as I do, I would still have to say that the bill was written by people who were trying to be on three sides of a two-sided issue. It is a very poorly written law. It imposed very heavy burdens on the court.

But if you go back and look at Priscilla Owen's rulings, if you listen to her, whether you agree or you do not agree with her efforts to try to bring logic and reason and precedent to a very poorly written law, you have got to be basically struck by the fact that this is a person who tried to follow precedent, which is what courts are supposed to be about.

Finally, let me say that if you need evidence that this is an extraordinary woman who has done a good job, who is basically nonpolitical, let me just give you some. When she ran for office, she was endorsed by every major newspaper in the State of Texas. There are a lot of newspapers in the State of Texas that never endorsed me. Someone who is some kind of out-of-the-mainstream person is not endorsed by the Austin American Statesman. In fact, most mainstream people are not endorsed by the Austin American Statesman.

[Laughter.]

Senator GRAMM. The last Democrat who sat on the Texas Supreme Court is a strong supporter of Priscilla and paid to come up

here to tell people that. That was Raul Gonzalez. The most respected living former Chief Justice, John Hill, came to Washington on his own initiative, and he is a Democrat and was a Democrat candidate for Governor, was Attorney General, is one of the most loved former office holders in our State, came to Washington for the specific point of telling people that what they were saying about Priscilla Owen is simply not true.

So I want to urge my colleagues, I know how these things work. I have been in this town for 24 years and I have seen a lot of organized campaigns and I know that this creates tremendous political pressure on both sides of the aisle. But I just want to say that if a group of special interests can convince people that this good woman is some kind of extremist, then these same groups could convince people that Chuck Schumer was a conservative or I was a liberal.

There is no foundation to these charges that have been made, and I want to urge you to get the facts, look at them, and weigh them from the perspective of not what some advocate group says, but in simply looking at the facts. If you will do that, I am confident that Priscilla Owen will be confirmed and I think it will send a very good signal to America that when the facts do not comport to the charges, that the Senate goes with the facts, and I thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Gramm.

I should tell the witnesses that the light is now on. It is set at 5 minutes. Senator Nelson, you are next in line.

PRESENTATION OF TIMOTHY J. CORRIGAN, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA AND JOSE E. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE SOURTHERN DISTRICT OF FLORIDA BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. Madam Chairman, I am from Florida and I am here for two non-controversial nominations.

[Laughter.]

Senator FEINSTEIN. Yes. I should tell everybody that we have two additional nominees following Justice Owen.

Chairman LEAHY. And I want to thank both Senator Nelson and Senator Graham of Florida for working out the situation with the White House so that we could have some non-controversial nominees up here.

Senator NELSON. Madam Chairman, if you like, I will be merciful and I will take a total of 30 seconds.

Senator FEINSTEIN. We would appreciate that. Thank you for your mercy.

Senator NELSON. I am here on behalf of Jose Martinez and Tim Corrigan. They are non-controversial nominees to the District Court, one from the Southern District and one from the Middle District. They reason they are non-controversial, and I am here on behalf of Bob Graham and myself, and with your permission will insert both Senator Graham's and my written statements into the record——

Senator FEINSTEIN. Without objection.

Senator NELSON [continuing]. They are non-controversial because we have a selection process in Florida called a Judicial Nominating Commission appointed by distinguished members of the bar and prominent citizens of the community that screen the applicants. They go through an extensive formal written application, extensive interviews. Then the three nominees come to Senator Graham and me and we interview them and tell the White House if we have an objection, and then the White House makes its selection for a District Judge from the three.

So I am happy to be here on behalf of Senator Graham and myself to tell you that we enthusiastically support both of these nominees and they will be very good additions to the Federal bench.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you, Senator Nelson.

[The prepared statement of Senator Nelson appears as a submission for the record.]

Senator FEINSTEIN. Representative Granger?

PRESENTATION OF PRISCILIA OWEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT BY HON. KAY GRANGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative GRANGER. Thank you, Madam Chairman. I am honored to be here today to support the nomination of Priscilla Owen, a highly qualified nominee from my home State of Texas.

According to the Department of Justice, there are 91 vacancies in the Federal Courts. That is right, 91. Overall, the President has nominated 113 individuals to serve as Federal judges, but only 59 of them have been confirmed and 54 nominees are still pending. Specifically, the President has nominated 32 individuals for the Circuit Courts, but only 11 have been confirmed. Today, we have a chance to address that problem.

Today, we can move to fill a vacancy that has been classified as a judicial emergency. The time has come to fill this seat and fill it with a qualified, sensible nominee like Priscilla Owen, Priscilla Owen, who received a unanimous rating of "well qualified," the highest rating possible, from the American Bar Association.

Justice Owen's academic achievements are remarkable and her professional experience is exemplary. She graduated with honors from both Baylor University and Baylor Law School, and following graduation, she received, as has been noted here, the highest score for that year on the Texas Bar exam.

Justice Owen practiced commercial litigation for 17 years before her election to the Texas Supreme Court in 1994. She is well respected for her service to the highest State court. In 2000, she was endorsed, as has been said, by every major Texas newspaper for her successful reelection.

In her professional career, Justice Owen has worked to improve access to legal services to the poor and increased funding for these programs. She served as a Texas Supreme Court liaison to Statewide committees that strive to offer legal services to the poor. Justice Owen also participated in a State committee that successfully enacted legislation at the State level to significantly increase funding for indigent legal services.

Additionally, Justice Owen organized a group known as Family Law 2000. Family Law 2000 warns parents about the difficulties children face when parents go through a divorce. The program also teaches parents how to address those difficulties and how to make the divorce process as painless as possible for children.

Madam Chairman, Justice Owen has proven herself to be the right candidate for this position. She has served the State of Texas with distinction and I am confident she will serve our nation well on the Federal court. In short, Justice Owen is an excellent choice for the Fifth U.S. Circuit Court of Appeals, and I thank you for the opportunity to speak for her.

Senator FEINSTEIN. Thank you very much, Representative Granger. The chair will excuse the witnesses and will ask Justice Owen to come forward.

Justice Owen, before you sit down, if you would raise your right hand and affirm the oath when I complete its reading. Do you swear that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Justice OWEN. I do.

Senator FEINSTEIN. Please be seated. Thank you very much. I have put the clock on 10 minutes, but my intention would be to give you as much time as you require. Generally around here, people begin by introducing any family members they might wish to and we would be delighted to meet any of your family or friends you would care to introduce, and then the time is yours to say whatever you might like to the committee, and then we will proceed with rounds of questions and each member will have 10 minutes for their questions.

STATEMENT OF PRISCILLA OWEN, OF TEXAS, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Justice OWEN. Thank you, Madam Chair, Chairman Leahy, members of the committee. I do want to, before I introduce my family and some of my special guests today, I do want to take the opportunity to thank you very much for the hearing today and for being able to talk to you about some of the issues that have been raised.

I also want to thank the President, of course, for the honor of nominating me to the United States Court of Appeals for the Fifth Circuit, and I certainly want to thank Senator Gramm and Congresswoman Kay Granger for coming here today and for their kind words about me and for introducing me.

As you mentioned, Madam Chair, Senator Hutchison will be here later this morning, but I do want to take this opportunity to express my thanks to Senator Hutchison for all that she has done and for her friendship and support throughout this process.

I also want to thank—he is not here today, but the Counsel to the President, who is also my former colleague, Alberto Gonzales, for his support and assistance throughout this process.

Senator FEINSTEIN. I am going to stop you for a minute. Hold the mike—this is uni-directional. It has to be directly in front of you and you have to talk directly into it or else it blurs.

Justice OWEN. Is that better?

Senator FEINSTEIN. If you could put the mike directly in front of you——

Justice OWEN. OK.

Chairperson FEINSTEIN [continuing]. And then speak directly——

Justice OWEN. Is that better?

Senator FEINSTEIN. That is much better.

Justice OWEN. I would like to introduce my family and some folks who are with me today. My sister, Nancy Lacy, is here, and my pastor, Jeff Black, who is from my church in Austin.

Senator FEINSTEIN. If they would stand, we would like to acknowledge you.

Justice OWEN. And I would certainly be remiss if I did not introduce the former Chief Justice of the Texas Supreme Court and former Texas Attorney General John Hill, who is here today. I want to thank him for his support and all that he has done.

Some of my other friends who are here—and I would hope that someone would help me with this so I do not miss anyone, because it is hard for me to see who all is here—Pat Mizell, former judge from Harris County; my special friend Harriett Myers, who is a former President of the State Bar of Texas and who is now at the White House.

Who am I missing? Oh, Judge Levi Bitten from Houston, Harris County, Texas. I thank you, Levi, for coming. I know this is short notice and I appreciate it. Who else is—I am sorry, I am not able to recognize—to introduce everybody that is here, but thank you all for coming, and everybody who had been prepared to come last week and I thank you for changing your plans and getting here this week.

I also wanted to thank, although they could not make it this week, my former colleagues, Raul Gonzalez and Justice Jack Hightower. Jack Hightower was also a former Congressman from Texas, and the 15 past State Bar Presidents, both Democrat and Republican, who have signed a letter of support and given that to the committee. And then last week, there were a whole bunch of folks who came up from Texas to meet with Senators and with their staffs and I want to thank them for their effort and the time that they took to do that.

And Madam Chair, Mr. Chairman and members, I also appreciate the opportunity to make an opening statement today. I know that that is not usually done, but for the reasons that have been discussed this morning, I think it is appropriate and necessary for me to at least give a brief opening statement.

Madam Chair, I truly believe that the picture that some special interest groups have painted of me is wrong and I very much want the opportunity to try to set the record straight. I have been very honored to serve as a judge on the Supreme Court of Texas and I am extremely humbled that the President has nominated me to serve on the U.S. Court of Appeals, United States Court of Appeals for the Fifth Circuit. But I have never forgotten where I have come—where I came from and my basic values.

After my father died of polio when I was about 10 months old, my mother and I went to live with her parents and her brother on a farm in South Texas, and my family worked very hard for a living then, as they do now. That was a difficult time. But my mother

eventually remarried to a wonderful man and we moved to what I considered the big city, which was Waco. If some of you do not know where that is, it is near Crawford.

[Laughter.]

Justice OWEN. But even though we had moved to Waco, I missed my family in South Texas and I spent my summers growing up on the farm. And I worked alongside a lot of folks from a very different background than mine, but I learned through that that all of us have a whole lot in common. It does not really matter much where we came from or how we make a living, but it does matter that we all respect one another.

I was fortunate enough to be able to go to Baylor University and Baylor Law School and I started practicing law 24 years ago, when there were not very many women in the profession. The law was very good to me. But an opportunity came for me to run for the Supreme Court of Texas and I decided that I should pursue that opportunity. I believe that people like me who had the experience and who had the academic credentials and who did not have any kind of ax to grind should be willing to step out of private practice and serve the public as judges. So I ran for the Supreme Court of Texas and the people of Texas elected me in 1994 and reelected me in 2000.

Although I am a judge, I believe it is very important that I try to serve people in other ways, and one of the first things I did after I got to the court was to work to increase legal aid to the poor and to improve their access to the courts. I also, as you have heard today, helped form a group called Family Law 2000 that has been concerned about the adversarial nature of divorces.

I have also served on the board of Texas Hearing and Service Dogs, which is a charitable organization that provides and trains service dogs for paraplegics and quadriplegics and for those who are hearing impaired. As I mentioned, I am a member of St. Barnabas Episcopal Mission. I teach Sunday School there to elementary school children and I serve as head of the altar guild.

But as a judge, I have worked very hard to carry out my responsibilities to the people of Texas, and I believe that I have done so. There have been four, I would say, basic principles that have guided my work as a judge.

The first is, I always remember that the people that come to my court are real people with real problems and real issues and that when we decide their cases, we are going to decide cases that affect a lot of other real people because of the precedent those cases set. So when I decide a case, I must do so on the basis of the fair and consistent application of the law, and my decisions cannot be based and are not based on whether a party is rich or poor or who their lawyer is. My decisions are based on the law, whether that is a statute or a U.S. Supreme Court decision or a prior decision from my court.

Second, when it is a statute that is before me, I must enforce it as you in the Congress or a State legislature, as the case may be, has written it, unless it is unconstitutional. I believe my decisions demonstrate that I do respect the division between the judicial and the legislative branches of government. If I am confirmed, I will do my utmost to apply the statutes you have written as you have writ-

ten them, not as I would have written them or others might want me to interpret them.

Third, I must strictly follow U.S. Supreme Court precedent. I have taken a solemn oath to do so. I have upheld that oath in the past, and if confirmed, I will continue to do so as a Fifth Circuit judge.

Fourth and finally, judges must be independent, both from public opinion and from the parties and lawyers who appear before them. As you heard, Texas selects its judges through partisan elections. That means that judges necessarily preside over cases in which people appear before them as parties or lawyers when they have contributed to campaigns. That is a system that several other States have, but I do not believe it is the best system. I have long advocated that we change the way we select judges in Texas. I have advocated that we essentially follow an election—a retention election after the judge is initially appointed.

In the meantime, I have led reforms in the judicial campaign area. When I first ran for the Supreme Court of Texas, I voluntarily imposed limits on my campaign contributions when there were not any laws at all imposing any kind of limits. And when I ran for reelection in 2000, I returned over one-third of my contributions when I did not receive a major party opponent.

In closing, Madam Chair, Mr. Chairman, members of the committee, I recognize the tremendous responsibility that judges have and I have tried the very best I could for the last 7 years to carefully and faithfully execute those responsibilities. Those who know my record the best have written to you in my support and expressed their judgment that I have been a fair and impartial judge on the Supreme Court of Texas.

I thank you for allowing me to make this statement and I truly welcome the opportunity to answer all of your questions today. Thank you very much.

Senator FEINSTEIN. Thank you very much.

I note that Senator Hutchison has just arrived. If she would take her place, and while she is, I would like to spell out the early bird order. It is Feinstein, Hatch, Leahy, DeWine, Kennedy, Sessions, Feingold, McConnell, Schumer, Brownback, Durbin, and Cantwell.

Senator Hutchison, welcome. Your colleagues have all testified, but as you told me, you were going to be a little late and we are delighted to have you here. If you would like to make a statement, if you could possibly confine it to 5 minutes, we would be appreciative.

PRESENTATION OF PRISCILIA OWEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you very much, Senator Feinstein, and thanks to you and Senator Leahy for allowing me to make this statement a little late. I got the earliest flight out of Dallas this morning and it just arrived, so I do thank you for that.

Madam Chairman, I am here in total and full support of my friend, Justice Priscilla Owen. She is a 7-year veteran on the Supreme Court of Texas. I think you know her exemplary career, starting from when she graduated cum laude from Baylor Law

School in 1977. Justice Owen also made the highest grade on the State Bar exam that year. I think her academic credentials are unmatched.

She also has the experience to be a good Circuit Court of Appeals judge, having been reelected to the Supreme Court with 84 percent of the vote in Texas. She was endorsed by every major newspaper in Texas during her successful reelection bid.

I think she has the best qualifications of anyone that I have ever seen come before this committee for a Court of Appeals appointment. The Dallas Morning News called her record one of accomplishment and integrity. The Houston Chronicle wrote that she has the proper balance of judicial experience, solid legal scholarship, and real world know-how.

But despite the fact that she is a well-respected judge who has received high praise, her nomination has been targeted by special interest groups. Justice Owen's views have been mischaracterized and her opinions distorted. Today, this committee and Justice Owen have an opportunity to set the record straight.

One particular area of misinformation concerns Enron. In Texas, we have Statewide elections for judges. Whether any of us approve of that system or not, it is the current law in Texas and, as we all know, a person has to run a campaign and raise the funds to do that. Priscilla Owen has actually been a leader in trying to reform the way judges are elected in our State, having come out solidly against such elections.

Like six other Justices on the nine-member court, Justice Owen has received Enron contributions in her election bids. She not only received legitimate contributions from employees and the employee PAC—she did not take corporate contributions—but at that time, Enron was one of our State's largest employers and its employees were active. They were active politically, they were active civically, and they have been major charitable contributors in Texas and especially in Houston. So it should be understandable that they did make political contributions which were absolutely legitimate. She only took $8,800 in Enron contributions out of a total of $1.2 million raised for her bid. Her opponent actually raised $1.5 million.

During her 2000 campaign, Priscilla Owen imposed voluntary limits on herself, which included taking no more than $5,000 per individual and spouse, no more than $30,000 per law firm, and over half her total contributions were from non-lawyers. In fact, after she started the trend of voluntary limits, the State actually came in and made laws similar to her voluntary limits that she had led the way to make. After she did not have a major opponent in 2000, she returned over a third of her remaining contributions to her contributors.

I want to read the words of our former State Supreme Court Chief Justice John L. Hill, who is a Democrat and was also elected Attorney General of Texas as a Democrat, denouncing the mischaracterization of Priscilla Owen's record by outside special interest groups: "Their attacks on Justice Owen, in particular, are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups made no effort to assess whether her decisions are legally sound. I know

Texas politics and can clearly say these assaults on Justice Owen's record are false, misleading, and deliberate distortions."

As you know, Justice Owen enjoys bipartisan support and the ABA Standing Committee on the Federal Judiciary has unanimously voted Justice Owen "well qualified."

So, Madam Chairman, I thank you for allowing me to sit in full support of my friend, Justice Priscilla Owen, a member of the Texas Supreme Court with an outstanding judicial record.

Senator FEINSTEIN. Thank you, Senator, for the excellent statement. We appreciate it very much and you are welcome to stay or be excused, whatever you wish.

I am going to proceed and try to do two questions in this round, Justice Owen. The first relates to the *Searcy* case and the second has to do with comments that were made.

My understanding of the *Searcy* case is this. Willie *Searcy* was a 14-year-old in a Ford pickup with a seat belt when another car smashed into the pickup and the seat belt severed. As a result, he became a quadriplegic. He was on a respirator. The case went to court. He received a $30 million judgment, which was then reduced to a $20 million judgment, and the case came up on appeal.

The young man was in very difficult circumstances. He was on a respirator. I understand that his family could only pay for a nurse through 4 a.m. and then there was a quiet hour with nobody attending him, and then the parents attended him from 5 a.m. in the morning.

Well, he had been in there from the age of 14 to 22 and while the year and a half dragged by that you were supposed to be writing that opinion, one morning, the respirator went out and he died. You wrote an opinion and the opinion you wrote said that the appeal should not be granted on the basis of faulty venue, that it was brought in the wrong venue, which had never been argued in either of the lower courts that handled the case.

This was a very surprising case for me to read about you because I thought you, and hope I am right, were a person with a great deal of compassion, and yet here was someone that had two courts sustaining a verdict which could have gotten him the nursing help that he needed to sustain his life. But during the delay, he died, and there are those in the writings that have been presented that have said that the delay was unnecessary, a year and a half delay was unnecessary to write that opinion.

Could you respond to that, and could you also tell us the average length of time that you take to write an opinion like this?

Justice OWEN. Senator, I appreciate that question because I do—would like the opportunity to respond, since there has been so much in the press that is simply wrong about that case.

First of all, we remanded the case to the lower court and it was 3 years later that Mr. *Searcy*, unfortunately, passed away. The court—the case had been in the lower court system for quite a while before it got to our court and it was over a year after the accident before the lawsuit was even filed in the trial court. So he did not pass away while the case was pending in my court.

What—and I also want to specifically address the allegation, I guess you would say, not from you, Senator, but that has been printed in the press, that the issue of venue was never raised in

the lower courts or in my court, which is just ludicrous, frankly. I would be happy to produce the briefs all the way up in our court. Venue was argued in the trial court. It was briefed in the Court of Appeals. The Court of Appeals decision wrote on venue. Venue was in the briefs prominently in our court. It was definitely briefed.

And Senator, this is kind of a legal technical explanation, but I want to try to explain it as best I can. There were no rendition points in that case. In other words, Ford was not saying that, "We win as a matter of law." They were saying, "We want a new trial," and under those circumstances, our court had to address the venue issue. We had no choice, because there is a statute in Texas that says if the case is filed in the wrong trial court, then reversal is mandatory. It is not discretionary, it is mandatory.

And what happened in this case, the Ford vehicle, that is the pickup, was purchased in Dallas. The Miles, and Mr. *Searcy*, his family, lived in Dallas. The accident occurred in Dallas. Everybody agreed that all the operative facts centered around Dallas, Texas. Yet the plaintiff's lawyer decided to file in Rusk County in Texarkana, which is, I think, 180 or 200 miles northeast of Dallas in a county that had absolutely nothing to do with the vehicle or the accident. Everybody stipulated that. The only basis for filing in that other county a long way away from Dallas was that there was a Ford dealership there, as I am sure there is a Ford dealership in almost every county in Texas.

And we looked at existing precedent in Texas, my court did, and we said, Ford does not own the dealership. Under the statute, again, applying our prior Supreme Court precedent and other Courts of Appeals decision, we said venue was in the wrong county. This was essentially a forum-shopping issue and we were required by the statute, having concluded that venue was in error, to remand to the trial court, which we did.

Once it got back to the trial court, the trial court granted a partial summary judgment against Mr. *Searcy* and his family and that went up on interlocutory appeal. The Court of Appeals considered that and the case came back to our court. We denied the petition. It went back down to the trial court. And it was at that point, 3 years after decision remanding it to the trial court based on the venue ruling, that Mr. *Searcy* passed away. And to this date, there has been no, it is my understanding, trial to adjudicate whether Ford was liable in the first instance.

Senator FEINSTEIN. Thank you. Since the distinguished ranking member and my friend raised Justice Gonzales, I thought I would get his actual statement and read it in some context, because this relates around the *Jane Doe* cases, and this is where I think there has developed a feeling among some that you are, in a sense, a judicial activist, that you went beyond the law as the law was written in Texas with respect to notification in asking for additional things to be presented that the law itself and its three prongs on notification did not require.

But let me just quote this. "To the contrary, every member of this court agrees that the duty of a judge is to follow the law as written by the legislature. This case is no different." And then it goes on to say, "Our role as judges requires we put aside our own personal views of what we might like to see enacted and instead

do our best to discern what the legislature actually intended. We take the words of the statute as the surest guide to legislative intent. Once we discern the legislature's intent, we must put it into effect, even if we ourselves might have made different policy choices."

And then it goes on to say, "The dissenting opinions, of which you were one in this case", suggest that the exceptions to the general rule of notification should be very rare and require a high standard of proof. I respectfully submit that these are policy decisions for the legislature and I find nothing in this statute to directly show that the legislature intended such a narrow construction. As the court demonstrates, the legislature certainly could have written Section 33.033(i) to make it harder to bypass a 366 parent's right to be involved in decisions affecting their daughters, but it did not. Likewise, part of the statute's legislative history directly contradicts the suggestion that the legislature intended bypasses to be very rare. Thus, to construe the Parental Notification Act so narrowly as to eliminate bypasses or to create hurdles that simply are not to be found in the words of the statute would be an unconscionable act of judicial activism."

And, of course, in reading your opinions in these Doe cases, you did, in fact, insist on certain tests that were not present in the statute. Could you speak to that, please?

Justice OWEN. Well, Senator, let me start in reverse order with some of the things in your question. First of all, this was—this was the third in a series, or down the line in a series of *Doe* cases. The first *Doe* case that came to the court was, of course, *Doe I*, and in that opinion, I tried my very best to give effect to legislative intent, and Senator, I honestly believe that I did not go outside out of what the legislature intended.

I looked at the words they chose. The legislature said that a girl who is under 18 who wants to have an abortion without notifying one of her parents may get a judicial bypass if one of three prongs are met, and the language that they chose to put in the statute for the judicial bypass was language that was almost verbatim, if not verbatim, taken out of a U.S. Supreme Court opinion. The opinion had said—had blessed a judicial bypass provision in another, although it was a consent statute.

And so I looked at the context in which the legislature was deciding what to write and why and these words were not written in a vacuum. They had, to me, they had meaning within the context of all these U.S. Supreme Court cases.

So I looked at the U.S. Supreme Court decisions in this area, primarily *Casey* and *Akron I*—excuse me, the second decision in *City of Akron*, and looked at what the U.S. Supreme Court had said about what it is that States may have an interest in information being supplied about the abortion decision. So everything in my *Doe I* opinion tracked language from the U.S. Supreme Court's decision specifically, as I said.

Senator FEINSTEIN. I am going to have to stop you mid-sentence because we have 3 minutes to get to a vote. So I am going to recess the committee and we will take up just where we left off.

Justice OWEN. Thank you, Madam Chair.

Senator FEINSTEIN. Thank you.

[Recess from 11:18 a.m. to 11:37 a.m.]

Senator FEINSTEIN. Justice Owen, I interrupted you right in the middle of a response. Let me just quickly, I think, better state the question.

The issue here is not what some hypothetical State could impose but what, in fact, the State of Texas did enact into legislation, and while various Supreme Court cases may have indicated that requiring additional steps or information might be permissible, the Texas legislature, as Justice Gonzalez said, could have written that section, Section 33.033(i), to make it harder to bypass a patient's [sic] right to be involved in decisions affecting their daughters. But the point is it did not.

For instance, in one *Jane Doe* case, you suggested a minor must show she understands the impact the procedure will have on the fetus. I understand you point to the *Casey* case in support of this conclusion, but that case never said that such a requirement is mandatory.

So what in the Texas statute itself would justify such an expansion of this statute?

Justice OWEN. Well, Senator Feinstein, again, the words that the legislature used on the first prong were mature and sufficiently well informed, and they, in fact, took the entire bypass straight out of U.S. Supreme Court cases. If you look at the backdrop against which this whole statute was enacted, it seemed to me, and the majority of the court agreed on this, it is in their opinion, that they were looking at all of the U.S. Supreme Court precedent on this point, and the words "sufficiently well informed" connoted to me, at least, that they wanted us to look at what the U.S. Supreme Court has said is relevant to being fully informed.

I think the Texas legislature intended, as explained in another Supreme Court case, it is *H.L.* v—and I cannot remember the second name of it—that they realize that in these situations, there was not going to be a parent involved, that neither parent was going to be notified, that an adult standing in the shoes of the parent was not going to be able to give mature advice and information to this minor—again, we are talking about minors—and that the U.S. Supreme Court at one point in its opinion said the courts and the States are entitled to presume that parents would give this kind of information and counseling, but, of course, that is not going to happen in these situations.

So again, it seemed to me that the Texas legislature, when they said fully, or, excuse me, sufficiently informed, wanted us to look at what the U.S. Supreme Court had said States may encourage women to know about the abortion decision to be informed, to make an informed choice. And so I looked at, as I have indicated, primarily *Casey* and the second decision in *City of Akron* to see, what has the U.S. Supreme Court said about the words "informed"? When you go to those cases, I lifted directly out of the cases the issues that the Supreme Court had identified that they thought it was OK for States to look at in making this decision.

It seemed to me, again, you are talking about a minor here, that these legislatures were concerned that mothers and fathers would want their daughters to make this decision with as much information as they could have constitutionally, since there was not going

to be an adult involved in the process, only the courts, and that that is what the legislature intended, within constitutional bounds.

Senator FEINSTEIN. My time is up.

Senator Hatch?

Senator HATCH. Thank you, Madam Chairman.

Justice Owen, I will ask you more on this later, but let me make sure that everybody understands some of the answers that you have just given on the *Jane Doe* cases.

When you argued in *Jane Doe I* that for a minor to be "sufficiently well informed," a minor would need to "demonstrate that she has sought and obtained meaningful counseling from a qualified source about the emotional and psychological impact," and so on. This was not your personal standard that you were imposing, but an application of the U.S. Supreme Court standard, is that not correct?

Justice OWEN. Yes, Senator Hatch, that is correct. That came out of one of the U.S. Supreme Court decisions.

Senator HATCH. Can we presume that when the Justices of the Supreme Court, the U.S. Supreme Court, established these standards, that they had before them the best available medical and psychological information?

Justice OWEN. Yes, sir, I agree with that.

Senator HATCH. It just seems to me that your detractors are seeking, and I am not talking about people up here who have a right to ask any questions they want, but your detractors on the outside are seeking to retry *Casey* and every other Supreme Court case by attacking you. But what you were doing was applying *Roe* v. *Wade* and its progeny, am I right about that?

Justice OWEN. Yes, Senator. I have quoted *Roe* v. *Wade* as modified by *Casey* and I clearly recognized throughout the opinion that that is the law of the land and I was trying faithfully to follow it. And I also pointed out in the course of, I think it was the *Jane Doe I* opinion, that if we applied the rationale of those cases, that would probably mean some of our family law statutes were unconstitutional in this context.

Senator HATCH. Well, now, much has been made of your opinion that for a minor to be sufficiently informed for purposes of the judicial bypass, she must "exhibit an awareness that there are issues, including religious ones, surrounding the abortion decision." I have to tell you that nothing panics your detractors, that is, these liberal special interest groups, more than a judge suggesting that religion exists. I think they think that it is crazy talk.

To be clear, though, your language that a minor should "indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion" is nothing but a faithful—maybe I should not use that term—the mere application of Sandra Day O'Connor's language in the *Casey* decision, is that not right?

Justice OWEN. Yes, Senator. It was in *Casey*. I believe it was also in *Akron II*, and the specific word "religious beliefs" or "religion" was included in *H.L.* v. *Matheson*.

Senator HATCH. You did not wake up one morning and suddenly decide you were going to impose a standard that was all your own, did you?

Justice OWEN. No, Senator. Frankly, when this statute hit the court, we were all a little caught unawares and I went straight to the U.S.—I looked at the history of it and went straight to the U.S. Supreme Court decisions and started to reading to see what had they said about States' ability to see that a minor is sufficiently informed in making the choice.

Senator HATCH. It would seem to me that your detractors would like you to cherry pick among Supreme Court cases or precedents that you should follow and Supreme Court precedents you should ignore. Of course, that is typical of how some of them actually read the Constitution.

Now, let me ask you this. In your decision in *Ford Motor Company* v. *Miles*, is it not true that a bipartisan majority of the Texas Supreme Court held that lawsuit, which arose out of a car accident, was filed in the wrong county and, therefore, remanded for transfer and a new trial in a different county?

Justice OWEN. That is correct, Senator.

Senator HATCH. The decision did not eliminate the plaintiff's ability to sue for the injuries they had suffered. It simply ordered that the case be reassigned to the appropriate venue, is that correct?

Justice OWEN. That is correct, Senator.

Senator HATCH. OK. I just wanted to make that clear.

Justice Owen, I would like to ask you further about your decisions concerning the Texas statute that regulates the ability of minors to obtain abortions without telling their parents in certain circumstances. First, I want to make sure that we all understand exactly what that statute does.

As I understand it, the statute codifies the right of minors to obtain abortions without permission from their parents, but requires that one of the young woman's parents simply be notified of their daughter's decision 48 hours before the procedure is performed, is that correct?

Justice OWEN. That is correct, Senator. It is not a consent statute. It is a notification statute.

Senator HATCH. I see. In addition, the statute provides for what is called a judicial bypass, which means that a judge can allow the abortion to go forward without parental notification provided that the girl ask the trial judge to do so and proves with testimony or other evidence that she meets one of the stated reasons for such a bypass, is that correct?

Justice OWEN. That is correct.

Senator HATCH. Now, Justice Owen, do you know how many cases have been filed since that statute went into effect by girls seeking to obtain abortions without notifying their parents?

Justice OWEN. We do not know the precise number because they are confidential and some—we do know that there have at least been 650-some-odd since the statute went into effect in 2000, and the reason we know that is because the statute provides that the court can appoint counsel or appoint guardian ad litems for these girls at State expense, and so we know that that number of reim-

bursements in that number of cases have been applied for, but we also know that there are quite a number of lawyers that do these cases for free on a pro bono basis, so we do not know the exact number, but we do know at least that many bypass procedures.

Senator HATCH. And how many of these cases reached the Texas Supreme Court?

Justice OWEN. Ten different minors have come to our court in 12 different cases. *Jane Doe* in *Jane Doe IV* came back after the remand.

Senator HATCH. I see. And what happened to the rest of the cases, of the 650?

Justice OWEN. Well, the first two cases that came, *Jane Doe* and *Jane Doe II*, a majority of the court, including me, believed that she, based on the evidence, that she had not met the statutory standards. But because our court had never written on either the mature and sufficiently well informed prong of the statute or the best interest statute, that she did not—and those were sort of amorphous concepts standing alone—that she and her lawyer did not really know what standard they were trying to meet. So in the interest of justice, we remanded those cases to the trial court for another hearing.

In *Jane Doe III*, that case was remanded. We do not know what happened to *Jane Doe III*. We just do not know because of the confidentiality. *Jane Doe IV*, the court affirmed the two lower courts and denied the bypass.

And let me say, I think it has been said, but let me make clear that none of these cases ever get to my court unless both the trial court and the Court of Appeals have denied the bypass.

Senator HATCH. So I am correct in saying that the Texas Supreme Court hears such cases only after a trial court has heard them—that is the court that actually hears the testimony and the evidence—and that trial court denies the bypass, and then the Court of Appeals reviews the trial court decision and agrees that the bypass should be denied?

Justice OWEN. Or if they disagree and grant the bypass, that is the end of it. There are no further appeals. It would not come to my court.

Senator HATCH. Cases reaching the Texas Supreme Court are the tough cases because there have only been a few of them that have——

Justice OWEN. Well, yes, Senator, with this caveat, caveat or however you pronounce it. We have had some cases that came to the court that—there were five of them, actually—where the court affirmed the lower court's judgment without opinion, and it takes under our rules at least six judges to agree to do that, and if any judge had dissented and noted their dissent publicly, then we would have reflected that.

I cannot get into the deliberations on our court or disclose what was at issue in those cases, but I think it is a fair inference from those circumstances, given the number of opinions written in all those other cases, that these were not close cases in those five instances.

Senator HATCH. So these are the more difficult cases where evidence of maturity, best interests, or abuse happens to be not very clear, is that right?

Justice OWEN. Yes, Senator.

Senator HATCH. And where the precise definition of words used by the Texas legislature has to be determined?

Justice OWEN. That was the—we had never, obviously, construed the statute before and it needed to be construed by my court to give guidance to the trial courts and the Courts of Appeals.

Senator HATCH. Of course, some of the abortion rights advocacy groups would prefer that you simply always rule in favor of bypassing parents rather than look at the words of the statute. I have got to say, I think the method of your decisions, your principled examination of legislative intent is exactly the kind of judging that most Americans really want from their judges and expect.

Now, the judicial bypass law in Texas has been in effect for a relatively short time, am I right about that?

Justice OWEN. Senator, it came into effect in January of 2000.

Senator HATCH. OK, so it has already been a year or so. Therefore, disputes arising out of that law are cases of first impression, meaning that the court was deciding the proper standards that the Texas legislature intended for the first time, is that right?

Justice OWEN. Yes, Senator.

Senator HATCH. Justice Owen, some of the liberal interest group lobbyists that oppose your nomination have accused you of lacking sympathy for the girls whose cases made it all the way up to the Supreme Court for review. Some of those groups want the public to believe that your decisions reflect an opposition to abortion itself rather than a thoughtful and principled approach to applying the law as the legislature intended it or meant it.

I know that these accusations are false, but I have examined your record and your opinions, as I have done for a huge percentage of the judges sitting on the Federal bench today, and I have concluded that some of these groups have set out to ruin your reputation and they have simply gotten it wrong. But they do not always take my word for it, unfortunately, so let me just ask you.

When you were writing your judicial opinions in the *Jane Doe* cases, were you motivated simply by a desire to achieve a particular public policy result or was your objective to ascertain and enforce the intent of the Texas legislature?

Justice OWEN. No, my personal beliefs do not enter into any of my decisions. They certainly did not enter into these decisions. We had a statute in front of us that, again, was enacted after long debate in the Texas legislature against a background—backdrop of a series of U.S. Supreme Court decisions that kind of mapped out some of the parameters of this area.

Senator HATCH. I would like to pursue this further, but I just noticed the red light and my time is up.

Senator FEINSTEIN. Before recognizing Senator Leahy, after Senator Leahy, Senators DeWine, Kennedy, Sessions, it is my understanding, Senator McConnell, that you wanted to move up in that order. I will leave it up to you to work out with someone.

Senator DEWINE. That will be fine with me.

Senator FEINSTEIN. All right, excellent. Then we will move Senator McConnell up in place of Senator DeWine and DeWine will go into McConnell's place.

Senator Leahy?

Chairman LEAHY. Thank you, Madam Chair.

Justice Owen, it is good to have you here. I am glad you were able to have this hearing, and as I noted before, to cut through the basic rhetoric, when the other party was in charge of this committee, Jorge Rangel and Enrique Moreno, who had been nominated by President Clinton for this seat, were never even allowed to have a hearing. I mention that because as I hear some of the comments being made on my comment line by the White House supporters about you, they were probably unaware of that.

And also, to forestall some of the other comments that the White House is trying to get out on your behalf, we did notify the White House of the various cases I was going to ask you about, about a week ago, is that correct?

Justice OWEN. I am sorry?

Chairman LEAHY. About a week ago, we gave the White House a heads up of the type of cases I was going to ask you about, is that correct?

Justice OWEN. I really do not know, Senator Leahy.

Chairman LEAHY. Well, then that is—you should talk to them, because we did.

In *F.M. Properties* v. *City of Austin*, let me go into that a bit because you have developed a reputation for opinions which, if not every time, most of the time favor big business interests, and this is a case that does not change that reputation. A large majority of the Texas Supreme Court in *F.M. Properties* v. *City of Austin* found a section of the Texas Water Code unconstitutional because it gave too much legislative power to corporate landowners with large tracts of land.

As a majority of your court saw it, and I think very convincingly explained their legal reasoning for it, the code section simply went too far and allowed these large landowners to regulate themselves, even though that would affect their financial interest, even though it may adversely affect the environment of those around them, so the fox is guarding the hen house. The court said, and I am quoting, that your dissent in that case was nothing more than inflammatory rhetoric. The six justices in the majority explained why your legal objections were mistaken. They said that no matter what the State legislature had the power to do on its own, it was simply unconstitutional to give the power of the people to a landowner.

Now, could you tell me why you thought it was proper for the legislature to grant these large corporate landowners the power to regulate themselves, because under this, as I understand it, it would limit government review. There would be very little opportunity for citizens to challenge the regulations. There is clear financial interests in those who would be regulating themselves. If that is not giving up too much to a private interest, what would be?

Justice OWEN. Senator Leahy, I know that some have tried to characterize this case as involving a fight between the city of Austin and big business, but in all honesty, when you get down and look at it, what this was really a fight about was the State of Texas

versus the city of Austin, and when this case hit our court, the then-Attorney General of Texas, Dan Morales, intervened in the case and filed a long, thorough brief in support of the constitutionality of the State statute.

There had been a longstanding rivalry between the city of Austin and the State of Texas over Austin's trying to regulate within its extraterritorial jurisdiction, and the legislature came back and said, we want State regulations to apply in your ETJ, which they could not—that is a technical term, but it was not technically part of the city of Austin, but it was their ETJ. The State said, look, we gave you the ability to have an ETJ in the first place and we want State regulations, not city regulations, to apply in that area.

And this was not an unregulated area. The entire area was subject to all of the laws of the Texas Natural Resources Code, all of the other water laws and conservation laws that apply to every piece of land in the State of Texas, so it was not unregulated.

Chairman LEAHY. Justice Owen, that is not really the way the majority saw it. They did refer to your opinion as being inflammatory rhetoric, your dissent. There was very limited ability for the citizens to question this. Frankly, if you follow your dissent, one could argue that the problems on Wall Street right now, there would be no problem in delegating the power to the corporations and the accountants to regulate themselves, no matter what effect it might have on ordinary citizens, no matter the lack of regulation.

Let me ask you about another one, *Reade* v. *Scott Fetzer*. The Texas Supreme Court, by a vote of six to three, held a vacuum cleaner company liable when one of its dealers raped a customer after an in-home demonstration required by the company. Now, a jury of Texans found the company should be held accountable. The Supreme Court affirmed. The Texas Appellate Court had agreed first. They said the company had a duty to exercise reasonable control over their vacuum sales representatives because in this case it required in-home sales. In this case, you had a person who had enough in his record to raise warning flags to the company.

But you said this was wrong, if I understand the dissent that you joined, that it is a wrong view of corporate responsibility because it would impose liability on all in-home vendors, as if the outcome might provide too much justice and compensation of future victims, even though this case was a pretty blatant one. Do you think that is a fair basis to shield corporations from the actions of their agents?

Justice OWEN. Senator Leahy——

Chairman LEAHY. It seems to be going against basic hornbook tort law.

Justice OWEN. I was trying to follow basic hornbook tort law and I think this case was very sympathetic. There were terrible facts in the sense that this woman was raped in her home. But basic hornbook law is that when there are independent contractors involved, that you do not have respondeat superior liability, and here, we had not just one independent contractor but we had two layers of independent contractors.

The Kirby Vacuum Cleaner Company at the national level hired or engaged distributors—and this was all stipulated, that they were independent contractors. This was not my view. It was the

parties agreed to this. There was no issue about it, that Kirby's distributors were independent contractors, and that Kirby, in turn, contracted with other independent contractors to go door-to-door and make the sales. And under hornbook contract law, you are typically not liable for the acts of your independent contractors.

Chairman LEAHY. But the Texas trial court disagreed with you. The Texas Appellate Court disagreed with you. The Texas Supreme Court disagreed with you. I mention this only because I find so many of these things where you seem to be outside even the mainstream of what is arguably a very conservative Supreme Court, the Texas Supreme Court.

I saw this in the *City of Garland* v. *Dallas Morning News* on allowing—you seem to be wanting to write in such a large exception to any kind of public disclosure that anybody could hide anything from public disclosure. That is why, and I will submit a number of questions for the record because I understand that time is running out, but I will submit a number of questions on these where you seem to be outside of the mainstream even of your own court, the other area being the area of campaign contributions.

I realize that judges are allowed to raise campaign contributions. You have raised over $1 million for your 1994 and 2000 election campaigns from law firms, lawyers, litigants, including Enron and Halliburton, many of whom regularly appear or have interest before your court. It appears that many of the cases in which your past contributors were parties, you did not disqualify or recuse yourself. In our State, we would see this as a major conflict of interest. Apparently, it is not in Texas.

So I would just ask you this. While you do not have any duty to disclose contributions, did you make a full disclosure to the parties of campaign contributions that you received related to those who may have interest in the case?

Justice OWEN. Senator Leahy, all of my contributions are a matter of public record. For the 2000 election, they are all available on the Internet. Anybody—I had 3,000 of them, of individual contributors in my 1994 campaign and they are all——

Chairman LEAHY. But some of these are fairly significant. I mean, the Enron ones, for example, were significant, and yet you, shortly after receiving them, were hearing a case. In 1994, you got 21 percent of your total campaign funds from non-law firm businesses, including individuals and Political Action Committees of Enron, Halliburton, Shell, and Kinetic.

My question is, whether required or not, did you ever have a case, one where you recused yourself because of campaign contributions, first. Did you?

Justice OWEN. No.

Chairman LEAHY. Did you ever have a case where you noted, aside from whatever might be on a website, that you noted to the parties involved that you had had significant contributions from one of the parties?

Justice OWEN. Well, Senator, again, they are a matter of public record, and everybody——

Chairman LEAHY. I know, but that is an easy——

Justice OWEN. And no one is ever asking——

Chairman LEAHY. I am not trying to do a trick question, Justice Owen. It is a simple yes or no. Did you ever have a case where you went out of your way to make such a disclosure to the parties? And I would note that you are not required to. I am just asking, did you ever?

Justice OWEN. No, Senator. No one has ever asked me to recuse because of campaign contributions.

Chairman LEAHY. No, did you ever—no. That is not my question. I posit this by saying, in fairness to you, you are not required to do this, but did you ever have a case where you had had significant contributions from one of the parties involved where you noted that fact to the litigants when they were before you?

Justice OWEN. No, Senator, I did not.

Chairman LEAHY. Thank you. Thank you, Madam Chair.

Senator FEINSTEIN. Thank you——

Justice OWEN. Mr. Leahy——

Senator HATCH. Could the witness answer some of the other questions that Senator Leahy raised? He cut her off——

Chairman LEAHY. I wonder, Madam Chair, I tried to—I do not think I cut her off, but I——

Senator HATCH. I felt like——

Chairman LEAHY.—I will leave that to the chair to determine. I will have a number of questions for the record.

Senator HATCH. If she would like to say more, I would like her to have the opportunity.

Senator FEINSTEIN. Let me just ask, do you have anything else you would like to say on that——

Justice OWEN. I would like to make—there was a lot in there, but there are two points I would like to make quickly.

Senator FEINSTEIN. Please.

Justice OWEN. It is particularly about the comment that I am out of the mainstream on my own court. We have had 890-something decisions, or close to 900 that I have participated in since I have been on the court and I have been in the dissent apparently—I have not counted it myself, but according to some of my opposition, 86 times, which means I have been in the dissent on my court less than 10 percent of the time.

Chairman LEAHY. A lot of those cases, though, were unanimous, were they not, and there were no significant dissents?

Senator HATCH. So what?

Justice OWEN. I do not believe so, Senator Leahy.

Chairman LEAHY. OK.

Justice OWEN. We split up quite frequently on my court.

The second point I want—well, I can deal with F.M. Properties, I guess, in detail, but they were subject to a lot of regulation by the State, just like every landowner in the State of Texas, and so I would like the opportunity at some point to fully address all of that, if not today in the hearing, certainly in writing.

Chairman LEAHY. Please understand that on the time, you have the opportunity, and I am sure that Senator Feinstein would agree with this, you have an opportunity to expand on any of your answers, and nobody wants to cut you off. If you have an area where you feel you did not have an opportunity to fully answer, of course you can add that for the record, and I will be submitting other

questions. And, of course, if you feel that they are not clear and you need more information, we will do that, too.

Justice OWEN. I appreciate that.

Chairman LEAHY. Nobody is trying—as I said at the beginning, unlike Senator Hatch, I try to make up my mind after the hearing, not before.

Justice OWEN. I appreciate that, Senator Leahy.

Senator HATCH. I have noticed that.

Senator FEINSTEIN. Now, now, gentlemen. Now, now.

The next questioner is Senator McConnell, and directly finishing with his time, we will recess until 2:15. Senator McConnell?

Senator MCCONNELL. Justice Owen, I gather from your testimony and that of others that you share my view that judges ought not to be elected.

Justice OWEN. Yes, Senator McConnell. From the very first time that I—since I have been on the court, since the 1995 legislature upwards, I have advocated that we allow the people of Texas to amend the State Constitution, which is what it would take in Texas to change the way we pick judges, and allow them to choose to go to a system that is essentially an appointment system whereby the judges would then stand for retention in a totally nonpartisan manner.

Senator MCCONNELL. You probably noticed the U.S. Supreme Court decision a few weeks ago on the issue of whether or not States are permitted to have, in effect, gag rules on judges if they do elect them. The Supreme Court held that—I got the impression from reading Justice Scalia's opinion that he, too, was unenthusiastic about electing judges, but he said if you are going to elect them, you cannot say they cannot say anything. I was reminded, we have a similar rule in Kentucky, and I have noticed over the years judges showing up at events, standing up, introducing themselves, smiling sweetly, and sitting down because they are essentially not allowed to say anything.

I raise this because it is, of course, permissible to elect judges, and Texas has chosen to do that, and while that is maybe not how I would do it, the people of Texas did not consult me on that. This issue about your contributions, I find fascinating how one could run for office, unless taxpayers provide funding for an election, how one could run for office without speaking, and having the funds available to speak to a large audience like you have in Texas is beyond me.

You were successful in raising funds in order to carry your message to the people of Texas and now you are being, I gather, criticized for raising perfectly legal contributions to engage in perfectly permissible campaigns in order to hold the office that you have now.

You certainly received de minimis contributions from Enron, smaller amounts than at least one member of this committee, and there is no evidence whatsoever that Enron is given any favorable treatment in any of the cases that it might have had before you. All evidence indicates that you have acted ethically and ruled correctly with respect to any matters involving Enron. You never received any contributions from the company or from Enron-affiliated corporations, and while you received some contributions from

Enron employees, as I read it, it is less than 1 percent of the total amount of funds you raised.

The one opinion that I gather is frequently referred to relating to Enron that you wrote was unanimous and bipartisan and relied on two on-point Supreme Court decisions. So the notion that you somehow were tainted by any of these Enron employee contributions is utterly without any basis.

The committee has received a letter from two Democratic Justices on the Texas Supreme Court, Raul Gonzalez and Rose Specter, who joined in that unanimous decision and who confirmed that there was nothing extraordinary, let alone improper, about it, and if no one else has put that letter in the record to date, I would like to ask that that letter be put in the record.

Others have referred to the lawyer who lost that case and the letter he sent saying that he was disturbed by suggestions that your decision in the case was influenced by campaign contributions from Enron employees. The lawyer said, "I personally believe that such suggestions are nonsense." This was the guy who lost.

You could have taken a much more expansive view of what the contribution system allowed in Texas, but I hold up your pledge you made to the people of Texas when you ran in 1994, that you did not have to make, with regard to the parameters that you were going to superimpose over your contributions during that campaign. You unilaterally decided to accept no more than $5,000 from a PAC, a political party, any other entity, or an individual together with his or her spouse and independent family members. You did not have to do that, did you?

Justice OWEN. That is correct, Senator. At that time, there were no laws at all in Texas limiting judicial campaign contributions.

Senator MCCONNELL. And you pledged to have no more than half my contributors be lawyers, and in a Statewide race, accept no more than 60 percent of your total contributions from lawyers. You did not have to do that, did you?

Justice OWEN. I met all of the—I met my pledge.

Senator MCCONNELL. Yes, but you did not have to do that.

Justice OWEN. I did not have to do that.

Senator MCCONNELL. This was something you chose to do because you were troubled by having to raise funds in order to run for a judicial race, but, of course, if you did not, nobody would have known who the heck you were.

Justice OWEN. That is correct, Senator.

Senator MCCONNELL. Third, you said you would allow no PAC or political party to spend more than $5,000 pro-rated to aid my campaign. You did not have to do that, did you?

Justice OWEN. No, sir, I did not.

Senator MCCONNELL. You, fourth, said you would accept no more than $25,000 from a law firm and all its employees and members, their spouses and dependent family members. You did not have to do that, did you?

Justice OWEN. No, Senator.

Senator MCCONNELL. Fifth, you said you would accept no more than 15 percent of your total contributions from non-lawyer PACs. You did not have to do that, did you?

Justice OWEN. No, Senator.

Senator MCCONNELL. Sixth, you said you would use no funds raised for any non-judicial office. You did not have to do that, did you?

Justice OWEN. No, Senator.

Senator MCCONNELL. Seventh, you said you would spend or loan no more than $10,000 of my money on my campaign. You did not have to do that, did you?

Justice OWEN. No, sir.

Senator MCCONNELL. Eight, you said you would spend no more than $2 million. You did not have to do that, did you?

Justice OWEN. No, sir.

Senator MCCONNELL. And ninth, you said you would make a good-faith effort to report the occupation and employer of each person who contributes more than $50. Did you have to do that?

Justice OWEN. I was not required by law to do it, no.

Senator MCCONNELL. All right. So you were somewhat troubled by the fact that you had to run for office like a regular candidate here and you were, on your own, trying to impose some standards in order to diminish the appearance, at least, of undue influence on the part of these contributors to your campaign, is that correct?

Justice OWEN. Well, let me—let me do say that when you say I was on my own, Senator, one of my colleagues who was also running at the same time also took the same pledge, and Chief Justice Phillips had not done exactly that, but he had imposed limits when he had run prior to that. So I was certainly not the only one that had ever done it, but there were not many of us that had.

Senator MCCONNELL. That is nice of you to say that. The others obviously were troubled by the process in some ways, as well, and as several of the people who testified on your behalf pointed out, you have actually been a leader in trying to nudge Texas in the direction of adopting a different system, have you not?

Justice OWEN. I have.

Senator MCCONNELL. Frankly, I think you ought to be sainted for your exemplary conduct in running for this office. Some people are insisting on painting you as some kind of Ma Barker here of depression-era gangland fame and it is utterly absurd.

So just to explore how much attention you may have paid to these contributors, can you name for me your top five largest contributors?

Justice OWEN. I cannot. I can name the top one because it was my former law firm and the employees, including the mail room people, contributed and they exceeded the cap and I gave a bunch of their money back. But I know because of that that they were my largest contributor, but other than that, I do not know.

Senator MCCONNELL. You cannot remember any of the rest of them, right?

Justice OWEN. I can remember some—certainly, I can remember some of the law firms that contributed because they are people I practiced law with for 17 years. But I do not know where they fell in terms of were they 100th or tenth or—I do not remember.

Senator MCCONNELL. And so the suggestion is made that you should have somehow notified parties arguing cases before you of the fact that you had received contributions when, in fact, that is not required by Texas law and the contributions would be available

in publicly disclosed form to anybody who was curious enough to ask, and certainly including the lawyers who were appearing before you, correct?

Justice OWEN. That is correct.

Senator MCCONNELL. I think these suggestions that you have somehow engaged in rulings that favor your donors is absolutely absurd on its face, and I commend you for really traversing the waters here of elected politics for a judicial position in a very ethical manner.

As I said, at the risk of being repetitious, I do not think judges ought to be elected, but if we are going to elect them, they certainly ought to be free to speak, and the Supreme Court has made it clear they are free to speak. The Supreme Court also made it clear over 25 years ago that in order to speak, you have to reach the audience, and the only way you are going to reach the audience is to raise funds to reach the audience, particularly in an enormous State like yours with a population currently of what?

Justice OWEN. I do not know——

Senator MCCONNELL. Over 20 million.

Justice OWEN. Five million people, I think close to five million people voted in my 1994 race.

Senator MCCONNELL. Yes, over 20 million people in Texas. You managed to do that in an extraordinarily thoughtful and ethical manner, for which you ought to be commended, not condemned, and I think the suggestion that you have in any way been tainted by these contributions is completely and totally baseless—completely and totally baseless. It just troubles me greatly that you have even been subjected to this criticism because there is essentially nothing that I can find in the record that justifies it.

Senator FEINSTEIN. Senator, your time is up.

Senator MCCONNELL. Madam Chairman, I think we are about to the end of our time here anyway and I will save the balance of my observations for another round.

Senator FEINSTEIN. All right. Senator Hatch, you had a question?

Senator HATCH. Yes. Madam Chair, if I could, I feel compelled to respond to the questions raised earlier about the nominations of Judge Rangel and Enrique Moreno, because these nominations were made when I was chairman of this committee and I understand those remarks as some attack on my record of fairness.

Jorge Rangel voluntarily withdrew his nomination citing frustration with the pace of the confirmation process. Now, it is interesting to note that his nomination was pending for fewer in-session days than Justice Owen's. Mr. Rangel quit after waiting 192 days of Senate business, while Justice Owen is here after 212 Senate business days.

When Mr. Rangel quit, President Clinton decided not to allow the Texas Senators' Federal Judiciary Advisory Group to review and recommend potential candidates. Instead, President Clinton nominated Enrique Moreno. This put the Advisory Group in the unprecedented position of interviewing someone who had already been nominated to determine his qualifications, and when the Advisory Group voted, two-thirds of the voting members opposed the nomination. Now, anyone acquainted with the history of Senate consultation on nominations would fully understand that bypassing

the home State Senators is not an effective strategy for confirmation.

In contrast, Justice Owen enjoys the full and strong support of both of her home State Senators and, of course, many others in a bipartisan way, as well.

So I just wanted to set the record straight because I did not want anybody walking out of here thinking that there was a lack of fairness. Thanks, Madam Chairman, for letting me make that statement.

Senator FEINSTEIN. You are welcome.

Senator HATCH. Could I also put in the record, Madam Chairman, a letter to Senator Leahy concerning the *Ford Motor* case that was raised earlier——

Senator FEINSTEIN. The *Searcy* case.

Senator HATCH. Yes, written by Victor E. Schwartz, who, of course, is one of the true authorities on tort law in this country and knows what hornbook law really is.

Senator FEINSTEIN. Without objection.

[The letter appears as a submission for the record.]

Senator FEINSTEIN. The hearing will recess until 2:15. I earlier said 2, but the party conferences generally do not end until 2:15, so we will make it that. Thank you very much.

[Recess from 12:22 p.m. to 2:15 p.m.]

AFTERNOON SESSION [2:15 p.m.]

Senator FEINSTEIN. The hearing will come to order.

Justice Owen, just a reminder, you are still under oath, and we will resume the first round of questioning. I would remind the committee that we will recess for any floor votes that occur during the remainder of the day, and once again, we are following the early bird order, and it begins with Senator Kennedy. After Senator Kennedy, Senators DeWine, Feingold, Sessions, Schumer, Brownback, Durbin, Cantwell, and Edwards, is what I have so far.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Senator Feinsten. Welcome, Judge Owen.

Justice OWEN. Thank you.

Senator KENNEDY. I apologize for not being here earlier. I was here in the very beginning of the hearing. We are, as you have heard, considering the prescription drug issue, and as the floor manager of that, I needed to be on the floor. I am going to ask questions and then, with the permission of the Chair, submit some follow-on questions. But I would like to cover, if I could in the time that I do have, two areas.

As I look at your cases, I see that you have a pattern of siding against the consumer or the victim of personal injury in favor of business and insurance companies, and I am struck by the fact that when the court does rule in favor of consumers or victims of personal injury, you are frequently in dissent. In a few instances, you have gone along with the majority of the case and ruled in favor of injured individuals. But looking at the information over the last 3 years, you have dissented almost half the time that a consumer wins, and you have never dissented in a case in which the consumer loses.

Do you disagree that you are among the most likely on the Texas Supreme Court to dissent from favoring—or cases favoring a consumer or injured plaintiff?

Justice OWEN. No, Senator, I don't. I judge each case on its merits. I would like to address one thing you said. One case that comes to mind where I was in the dissent in favor of the plaintiff was *Saenz* v. *Fidelity Guarantee*, or I am not sure what comes after "Fidelity," but it was a workers' compensation case. And the woman entered into a settlement agreement of her workers' compensation claim, and she ultimately claimed that she was fraudulently induced into it and claimed damages for bad faith. And I agreed with the majority of the court that the bad faith claim couldn't stand, but I dissented because she should have been entitled to rescind that settlement agreement and go back and assert, reassert her original workers' compensation claim. And that is one that comes to mind. I could go back and——

Senator KENNEDY. Let's take the example where the majority found—over the objections of the majority, have you ever dissented over the objections of the majority and found for a consumer or plaintiff? Do you have any recollection of any cases?

Justice OWEN. Well, that would be one of them, the *Saenz* v. Fidelity.

Senator KENNEDY. That wasn't a majority case.

Justice OWEN. I was in the dissent in that case. Are you asking me if I've been in the majority for consumers?

Senator KENNEDY. Any time that—can you point to a case in which you stood up for a consumer or individual plaintiff over the objections of the majority?

Justice OWEN. Well, there——

Senator KENNEDY. That is, a case in which the consumer lost and you dissented.

Justice OWEN. Well, I think the *Saenz* case that I just described is one of them. I think there are probably others. Again, there are 900 of them, and I don't remember them all. But I could go look.

Senator KENNEDY. Well, if you could be good enough to provide some of those.

Justice OWEN. I certainly voted—there are a number of opinions where I have—obviously the consumer has recovered, and I joined those opinions.

Senator KENNEDY. In the past 2 years, the Texas Supreme Court has ruled on cases brought under the Texas Parental Notification Act and the law passed by the State legislature in 2000 to permit the young women to have an abortion without notifying her parents if she proves by a preponderance of the evidence that she is mature and sufficiently well informed to make the decision or if notification would not be in her best interest or if notification would lead to physical, sexual, or emotional abuse.

Many, if not most, would describe members of the Texas Supreme Court as conservatives, and as cases have come before the court, it is clear that its members have struggled with the task of restraining their personal beliefs about abortion and parental notification to ensure that they adhere to the letter of the law. In fact, former Texas Supreme Court member, current White House counsel Alberto Gonzales wrote, "I cannot rewrite the statute to make

parental rights absolute or virtually absolute, particularly when as here the legislature has elected not to do so. While the ramifications of such a law and the results of the court's decision here may be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of the State without imposing my moral view on the decisions of the legislature." That is all his quote.

Now, Justice Owen, a majority of the court have applied the plain language of the parental notification statute to the relevant cases, and they have refrained from legislating from the bench and placing new hurdles before young women who are already required to meet the stringent standards required by the statute. On the other hand, you have repeatedly tried to impose new standards, standards not found in the statute, on the young women whose cases come before you. For example, you would require young women to meet an unusually high standard to prove the "direct, clear, and positive" proof of abuse instead of showing that the notification may lead to abuse. Your standard is so high that four of your colleagues wrote, "Abuse is abuse. It is neither to be trifled with, nor its severity to be second-guessed."

Similarly, you would require a minor to exhibit an awareness of religious issues. In no place does the statute require such a showing.

So, Justice Owen, you seem to be making not interpreting the law, and, in fact, many might call your actions on the court activist. Can you tell the committee why, if you believe that your views reflect the plain language of the statute, you have been unable to persuade a majority of your colleagues to interpret the statute such that it includes the additional hurdles that you have grafted onto the parental notification law?

Justice OWEN. Senator, obviously my court disagreed. We divided up initially on these cases. Let me go back and address the clear, direct, positive. That was not the standard that—the statute says "abuse may occur," and I looked for a definition of emotional abuse in another piece of the same family code. And I didn't say that you would have to exhibit—you would actually have to have that. I said that's the definition of abuse if it may lead to that. That's all I was saying there.

The clear, direct evidence piece comes into—that's our standard of review as an appellate court, that—not in the trial court, not in the trial court. The trial court, the burden of proof is preponderance of the evidence, and if there's some evidence to support what the trial court did, that's that. But on appeal, if the trial court denies the minor the bypass and there—even if there's no evidence to support that denial, she still must, under established law that the majority agrees with, she must still establish by clear, direct evidence that's unequivocal as a matter of law that she's entitled to that bypass. And the majority agrees with that. It's in our case law. That's just the standard of review if she—for her to establish as a matter of law she's entitled to it on appeal. That's not the standard that would be applied in the trial court.

Senator KENNEDY. Well, are you saying that the four Justices didn't have a different position than you had on this particular case?

Justice OWEN. I'm saying there are two different inquiries. In Doe 1, I differed with the majority. I said that there were other factors that ought to be considered in deciding whether a minor is sufficiently informed. And once Doe was over, that was the standard that I applied in every case thereafter.

A separate issue that we don't disagree on——

Senator KENNEDY. These are other factors in the law? You were looking at the law and you found that there were other aspects of the law that you noticed that the other judges did not notice?

Justice OWEN. I looked again at everything that the U.S. Supreme Court had said that it's OK for States to include in ensuring that a minor is sufficiently well informed to make this decision without the knowledge of either of her parents. They're factors that appear in at least three Supreme Court cases that I thought the legislature intended to reference when they used the words "sufficiently informed and mature." And so I was looking again at what the U.S. Supreme Court had said in this whole area about being informed and being mature. The court did not agree with me, but after Doe 1, I applied the court's standards that they've pronounced. And then this clear, direct evidence is not—it's not tied to the statute. That's an appellate standard that the majority agrees with. That's just—she's not entitled to a bypass in our court unless she established by—well, in the record, the evidence established by clear, direct, positive testimony, free from doubt, as a matter of law she had met the standard.

Senator KENNEDY. Well, if you had that, you'd have the same ruling today as you had at that particular time? You still read that the way you did at that particular time?

Justice OWEN. No, Senator, I apply the—after Doe 1 and all the other Doe cases that have come up involving mature and sufficiently well informed, I apply the same—I only looked at the same factors that the court—the big controversy the second time Doe came up was whether there was any evidence at all to support what the trial court did. And I said it was a close case. But I said the trial court was actually there on the ground. He saw—he or she saw the minor testify, judged her credibility, and I think maturity is something that's particularly hard to do from a cold record. And I said there's some evidence, even though it's close, to support what the trial court did, and under appellate standards of review, I felt I was bound to uphold what the trial court did, even though I might have ruled a different way had I been the trial court.

Senator KENNEDY. Madam Chair, I thank you. My time is up. I will have a chance to examine this record further, but I am troubled by this conclusion. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Kennedy.

Senator DeWine?

Senator DEWINE. Justice Owen, thank you for being with us. I want to clarify something to followup on Senator Kennedy's questioning. You do now follow *Roe* 1?

Justice OWEN. Yes. That's—yes, that's our precedent.

Senator DEWINE. That is the law of Texas today.

Justice OWEN. It is the law, and that's——

Senator DEWINE. And you have followed that ever since *Roe* 1 was decided; is that correct?

Justice OWEN. Yes, Senator.

Senator DEWINE. Now, in *Roe* 1, both the minority and the majority were trying to decide what guidance to give the trial court.

Justice OWEN. Yes.

Senator DEWINE. Isn't that correct?

Justice OWEN. Yes. We were trying to——

Senator DEWINE. And isn't it correct that the only dispute was what guidance to give? It wasn't a dispute over whether you were going to give guidance?

Justice OWEN. That's correct.

Senator DEWINE. And, in fact, isn't it true that the majority did give guidance to the lower court?

Justice OWEN. They did.

Senator DEWINE. And that is the guidance that you follow today?

Justice OWEN. That's correct.

Senator DEWINE. There are a number of rules of construction that courts apply when interpreting a statute. Isn't it true that one of those rules is that a legislature is presumed to be aware of U.S. Supreme Court precedent in an area in which it has passed a statute?

Justice OWEN. That's one of the standard presumptions in statutory construction.

Senator DEWINE. Basic rule of construction the courts will follow.

Justice OWEN. Yes.

Senator DEWINE. So in the case of the Texas parental notification statute, the Texas court's presumption would be that the Texas Legislature was, in fact, aware of Supreme Court precedent when it crafted its judicial bypass process.

Justice OWEN. Yes, Senator, and we all agreed on that. The majority agreed that that was true.

Senator DEWINE. Now, I'm looking at the end of Section IV in the Texas Supreme Court's majority opinion in the first *Jane Doe* case. In Section IV, your court's majority is discussing a line of U.S. Supreme Court cases on parental bypass, starting with *Belotti*. Your court majority concludes, and I quote, "Our legislature was obviously aware of this jurisprudence when it drafted the statute before us." So you weren't alone in your conclusion that the Texas Legislature drafted the parental notification statute with the Supreme Court cases in mind, were you?

Justice OWEN. No, Senator.

Senator DEWINE. The majority had the same opinion.

Justice OWEN. They did.

Senator DEWINE. Let me really get back to basics in regard to this issue, and I want to go back to the statute that was passed by the Texas Legislature in this area, and I will quote from it. "When a minor files this application for a bypass"—in other words, saying "I do not want either one of my parents notified," and this is, in fact, a minor we are dealing with. "When a minor files such an application, the court shall determine"—I am quoting from the statute—"by a preponderance of the evidence whether, one, the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents; or, two, notification would not be in the best interests

of the minor; or, three, notification may lead to physical, sexual, or emotional abuse of the minor."

The statutes continues: "If the court makes any of these determinations"—that is my emphasis, "any of these determinations"—"the court shall enter an order authorizing the minor to consent to the performance of the abortion."

Now, you, as the Supreme Court, you are not the trier of fact, are you?

Justice OWEN. No, we're not.

Senator DEWINE. That is the lower court, the originating court.

Justice OWEN. Yes.

Senator DEWINE. And in Texas you have three layers?

Justice OWEN. That's correct.

Senator DEWINE. So before that case gets to you, any of these, what, 10 cases, 12 cases? Whatever they were.

Justice OWEN. There were 10 girls.

Senator DEWINE. About that. Before they got to you, the trier of fact had already determined that none of these three items applied, because if any of them would have applied, if the trier of fact who was watching the witness, who was talking to the young lady, who was taking all the circumstances into consideration, if that trier of fact had found any of these three, that case never would have got to you, would it?

Justice OWEN. That's correct.

Senator DEWINE. Now, is it my understanding under Texas law that once a lower court makes that determination, that ends the case, because——

Justice OWEN. That ends the case.

Senator DEWINE [continuing]. There is no one to appeal the case.

Justice OWEN. That's correct. There's no one to——

Senator DEWINE. The plaintiff has won or the person who's filing, the young lady who's filing or her lawyer, they've won the case.

Justice OWEN. And the statute specifically says there's no appeal from a grant of the bypass.

Senator DEWINE. So before these cases get to you, the lower court has found all three—or has found that none of the three apply. Then an appellate court has gone through and done a review.

Justice OWEN. That would be a three-judge panel.

Senator DEWINE. A three-judge panel. That is how it works in Texas. All right. Now, as all lawyers know and judges know—and I think many people know—when a case gets to an appellate court such as your Supreme Court, you are not re-trying that case.

Justice OWEN. No, Senator, we're not.

Senator DEWINE. And there are different standards. The majority came down with one standard. You came down with another standard of review. Those standards are not very dissimilar. Those are—what are the basic standards?

Justice OWEN. Well, in terms of the factors on mature and——

Senator DEWINE. What are you looking for to overturn the case? What do you have to find?

Justice OWEN. On the mature and sufficiently well informed that—there are two things. You first have to conclude that there was absolutely no evidence to support the trial court's failure to

find, but then you also have to take the second step and look at the evidence and see if the minor established from clear, direct, convincing evidence—I may not be quoting exactly, but it's in the majority opinion—and there's no factual dispute at all, that before she's entitled to a bypass——

Senator DEWINE. That is the law of Texas today?

Justice OWEN. Yes.

Senator DEWINE. That, though, in a sense is not totally dissimilar to what we have in many appellate cases where the basic principle of law that we have in this country is that we give deference to the lower court, the trier of fact, whether it is a jury or whether it is as judge, who has the opportunity to watch the witness, has the opportunity to judge the demeanor of the witness on the stand, has the opportunity to take all the totality of circumstances into account. Isn't that true?

Justice OWEN. That's correct.

Senator DEWINE. So I think, Madam Chairman, it seems to me that when we look at and judge these cases, these parental notification cases, it seems to me that as we see whether or not these have any bearing on this Justice' qualification to sit on the Federal bench, it is good for us to be mindful of the fact that all appellate courts give a great deal of deference to the lower courts, that all appellate courts understand that the trial court judge has his job or her job and they are the ones who are looking at the witnesses. And it would seem to me that particularly when we are dealing with such a very delicate case and a case where the understanding of the young lady involved is so important, and what not just she has been told but what she truly understands, that the trial court judge is in a unique position to make that decision. And I think that we all should consider that as we look at these cases.

Thank you very much.

Senator FEINSTEIN. Thank you, Senator DeWine.

Senator Feingold, you are next.

Senator FEINGOLD. I thank the Chair. Welcome, Justice Owen.

Justice OWEN. Thank you.

Senator FEINGOLD. Justice Owen, the independence of the Texas Supreme Court has recently been attacked for allowing its law clerks to accept large bonuses, as much as $45,000, from law firms that law clerks plan to join after completing their clerkships. And the potential for conflict of interest here is very real and serious, I think. The clerk's review and express opinion on cases brought by or against the firms paying their bonuses.

I am told this issue provoked an investigation by the Travis County Attorney into whether the practice violates Texas criminal law. The Texas Ethics Commission ruled last year that the bonuses could be in violation of the State's bribery laws.

In response, the Supreme Court issued new guidelines concerning these so-called clerk perks. I am told that you, however, defended the clerk perks and dismissed the criticism as a "political issue that is being dressed up as good government issue." Why do you believe that this was simply a political issue and not a genuine issue of ethics, fairness, and independence of the judiciary?

Justice OWEN. Senator, I'm glad you asked that question because, first of all, my quote, I do think I said it was a political

issue. I don't remember the second part of it. But let me give you some background, if I may, on the entire clerk issue.

First of all, the investigation was not of my accord or any judge on the court. That was an issue between the employers and the law clerks. The court or the Justices were never under any kind of scrutiny at all from the criminal law standpoint. But this is a long-standing practice that I would say many, if not most, Federal district courts, Federal circuit courts, and I think even some judges on the U.S. Supreme Court, law firms around the country typically give so-called clerkship bonuses to their lawyers who take their first year of practice and clerk for a court, not just my court but, as I said, Federal district courts, Federal courts of appeals, U.S. Supreme Court. And nobody—that was a practice that's been around for a long time.

Ever since I've been at my court, I mean, everybody—it was a clearly understood rule and certainly a hard and fast rule in my chambers that if you had clerked for any law firm, if you were even thinking about taking a job offer from any law firm, you were completely recused from all of their cases permanently, as long as you were an employee of the court. You didn't get near that file. You didn't work on memos. When the matters touching that case were brought up in conference, you have to leave the conference room, so that there's just no opportunity at all for a law clerk that has any connection or any potential connection as an employee with the law firm to come into contact with those files. So——

Senator FEINGOLD. So the clerks have recused themselves in each of the cases?

Justice OWEN. They have, and that's been a rule for years as far as to my knowledge on the Supreme Court.

Senator FEINGOLD. I appreciate that background. Let me just return to my original question. Do you believe this is a simply political issue or it is also a genuine issue of ethics, fairness, and independence of the judiciary?

Justice OWEN. The reason I said it was a political issue is because it was only my court that was singled out. This practice—they didn't criticize the Federal courts. They didn't criticize any of the lower State courts of appeals who do it. They didn't criticize the criminal court. They criticize the U.S. Supreme Court. It was just my court that was singled out by a group who routinely issues press releases accusing my court of ethical violations.

Senator FEINGOLD. Well, let me ask you more broadly, then, the broader practice. Is it simply a political question or is it a question of whether this creates potential problems, a legitimate question of ethics and fairness?

Justice OWEN. I didn't think, because of the way we had always structured the clerkship program, that it was an ethical issue. Because it was such a well-settled, long-standing practice and because these clerks had no access whatsoever, I didn't think it was an ethical issue. The way it was resolved is not—again, this is mainly an issue between the employers and our clerks, not the court. But we did say—put in new rules so that the clerks would be absolutely clear and wouldn't inadvertently get in trouble with anyone. We said—the authorities said that they can take the clerkships over—

the bonus over a period of a year after they leave the court. So it was—they still get the bonus. It's just a question of timing.

Senator FEINGOLD. I appreciate those answers. Let me turn to a different question.

I understand that you are a member of a local church in Austin, Texas, the St. Barnabas Episcopal Church.

Justice OWEN. I am.

Senator FEINGOLD. According to Alliance for Justice, in 1998, while you were a sitting Justice, you lobbied then-Governor George W. Bush in a private meeting with your pastor for State funds for an evangelical prison ministry program, Alpha Prison Ministries.

Now, according to Jose Juarez, a law professor at St. Mary's School of Law In Texas, this conduct is a violation of Canons 1, 2, 2A, 2B, 4A, 4B, 4C, and 5 of the Texas Code of Judicial Conduct. Canon 2B states that a judge "shall not lend the prestige of a judicial office to advance the private interest of the judge or others." Canon 4C states that a judge "shall not solicit funds for any educational, religious, charitable, fraternal, or civic organization."

Professor Juarez concludes by stating, "Any Texas judge should have known that such a meeting would violate the Texas Code of Judicial Conduct."

Would you please explain why you held this meeting in violation of the letter and the spirit of the Texas Code of Judicial Conduct?

Justice OWEN. Well, Senator, I respectfully submit that I didn't violate any ethical code at all. I facilitated a meeting between my pastor and then-Governor Bush to ask if—for my pastor to ask him if he would consider allowing a prison ministry headed up by my church in a prison. No State funds were asked for whatsoever. The whole prison ministry didn't cost the State any money. It was totally voluntary on the prisoners' part. They didn't get any special perks or any special treatment if they took part in the prison ministry. It was a small group of people, as I understand it—I didn't participate, but as I understand it, who ended up going to the women's prison in Burnet, Texas, on Friday evenings for a period of, I think, 6 weeks or so to do this prison ministry. Again, no funds were involved. It was simply on Friday evenings, again, as I understand it—Jeff is here. He can give you the details if necessary. But——

Senator FEINGOLD. So there was no solicitation for funds at all?

Justice OWEN. Absolutely none.

Senator FEINGOLD. And that is why it is your contention that none of the canons of ethics were violated.

Justice OWEN. That, and the fact that although I am a judge, I am also a friend of then-Governor Bush, and we had discussed some of these issues or some of our respective beliefs before, and I had told him about my pastor. And I guess in my mind it was more friend-to-friend as opposed to judge-to-Governor. But in either event, even if I had had my judge hat on, no funding was involved at all. It wasn't a lobbying effort. It was simply "Would you consider letting us do this prison ministry?"

Senator FEINGOLD. I appreciate your answers to my questions, Justice.

Justice OWEN. Thank you.

Senator FEINSTEIN. Thanks, Senator Feingold.

Senator Sessions is not here, Schumer, Brownback—Senator Durbin is. You are next up.

Senator DURBIN. Thank you very much, Madam Chair.

Justice Owen, thank you for joining us. I have followed in the news reports a suggestion that the Texas Supreme Court has changed rather dramatically over the last 10 or 15 years. There have been suggestions that because of active political campaigns that those Justices now serving on the court, at least a substantial majority, are certainly more sympathetic to business interests, to corporate interests, and insurance company interests than previous courts. In fact, some national news programs have suggested that it is nothing short of a statewide, coordinated, long-term campaign for those interests to make certain that they are well represented on that Texas Supreme Court.

Have you heard these same press reports?

Justice OWEN. Certainly.

Senator DURBIN. Do you believe they are true?

Justice OWEN. No, Senator, I don't.

Senator DURBIN. And so you would say that the court is—how would you describe the court today?

Justice OWEN. I would describe it as I think some of our colleagues in other States have described it, as a very good court. A Justice on the Massachusetts court has said when they start looking at common law issues, in particular, they start with the Texas Supreme Court because our opinions are well researched and thoroughly reasoned, and that's where they start.

Senator DURBIN. On the court itself, where would you place yourself on the spectrum? More conservative than majority or in the center position or more liberal?

Justice OWEN. Senator Durbin, I frankly don't—I don't think it's very instructive to apply words like "conservative" or "liberal" in terms of judging. I don't take a political viewpoint into my chambers or onto the bench when I judge cases as I am sitting there reading the briefs.

Senator DURBIN. Well, let me ask about a few of those cases to see if I can deduce my own conclusion for that. Let me ask you just directly: What is your position on abortion?

Justice OWEN. My position is that *Roe* v. *Wade* has been the law of the land for many, many years, now as modified by *Casey*. And none of my personal beliefs would get in the way of me applying that law or any other law.

Senator DURBIN. And yet if someone were to take a look at the opinions that you have written on the parental notification statute of Texas, they would find, would they not, that in the overwhelming majority of cases you have decided against allowing a minor to go forward with an abortion procedure under Texas law?

Justice OWEN. Senator Durbin, there are only five girls that my court has written on, and out of those five cases, I voted to grant the bypass in one case, and the first time that they came to the court in the other two, I voted to remand those cases to the trial court so that *Jane Doe* 1 and *Jane Doe* 2 could each get another shot at getting the bypass. And if the trial court had granted the bypasses the second time, that would have been the end of it.

The second time Doe 2 came back, I said it was a close call, but based on the record, I had—I felt like I had to go with the trial court's call.

In five of the cases, as I think I talked about earlier, they came up to the court and, without opinion, the court affirmed the lower courts. As I said, that would take at least six votes. There were no public dissents. If there had been, they would have had to—all the judges would have had to have noted where they lined up. And I think it's a fair assumption, given the amount of writing that occurred on the other five cases, that if they had been close cases, we would have written on them. So we are——

Senator DURBIN. Is it not true that you have ruled against abortion rights in every opinion you have authored and in 13 of the 14 cases you considered on the court?

Justice OWEN. No, sir, that's—I voted in the first two cases—I didn't say she doesn't get the bypass. I said she gets another chance to convince the trial court that she should get it.

Senator DURBIN. Do you understand——

Justice OWEN. And then I granted the bypass. I voted with the court with Doe 10 to outright grant the bypass.

Senator DURBIN. Do you understand the timeliness of the decisions that the courts are making in these cases?

Justice OWEN. The timeliness?

Senator DURBIN. Yes.

Justice OWEN. As soon as they come in, we drop everything and deal with these——

Senator DURBIN. And remanding them for another court review——

Justice OWEN. Within 2 days. We told them that you've got 2 business days under the statute to resolve it.

Senator DURBIN. In *Jane Doe* 2, you wrote in your concurrence, "The court has omitted any requirement that a trial court find an abortion to be in the best interest of the minor." The law says that the notification has to be in the best interest of the minor. Could you tell me where you came up with the notion that the legislature required that the abortion be in the best interest of the minor?

Justice OWEN. Yes, sir, I can. That's directly out of a U.S. Supreme Court case that said we construe notification to mean—I'm sorry, notification best interest to mean that abortion without notification is in the best interest, and it's straight out of a majority opinion from the U.S. Supreme Court.

Senator DURBIN. I find in each of these cases, though, that you have tended to expand and embellish on the State legislative decision in Texas. Now, Senator Gramm, your sponsor, one of your sponsors today, has said that he thinks the Texas Legislature was trying to take three sides on a two-sided issue. That is a statement that is fairly critical of his legislature. Clearly, they have taken a position, and I take it from what you have said to us today that these court decisions where you consistently find problems with the Texas parental notification statute, you are saying don't reflect any opposition on your part to a woman's right to choose?

Justice OWEN. No, Senator, I don't think they do. And, again, the exact language that's in the statute, "best interest," that exact same language was construed by the U.S. Supreme Court to mean

that the abortion without notification was in the best interest. So I followed what the U.S. Supreme Court had construed that to mean, and I thought that was a reasonable construction given that the legislature had taken the language out of—if not that very case—it may have been that very case.

Senator DURBIN. I would have to say that I have been on this committee for a few years, and the issue of judicial activism has arisen when there were Republican Chairs and Democratic Chairs. And I have come to conclude that it is in the eye of the beholder that Republicans only want judges who are actively pursuing their agenda and Democrats only want judges actively pursuing their agenda. I don't think it is an objective standard that is being used here. And so the term is being used back and forth here. What I am looking for really are some fundamentals in terms of your philosophy. I believe the President has a right to fill vacancies, but I also believe that the people of this country and certainly the people in this circuit that you are aspiring to deserve judges who are going to be moderate and centrist and try to be reasonable and balanced in their decisionmaking.

Let me go to a specific case if I can for a moment——

Justice OWEN. Senator, before we leave this area, could I make just one point on this activist—in this whole area of a woman's right to choose? Two cases have come before my court that I'd like you to be aware of. One, I believe it was *Sepulveda* v. *Krishnan*. In that case the question was: Can a mother and a father recover damages for the death of a fetus? And I think you could see the implications in all of this debate over that particular issue. And my court had for many years construed the Texas wrongful death statute and the survival statute to say, no, you cannot recover for the death of a fetus.

We were asked to reconsider that construction, and we pointed out that the vast majority of States now allow recovery in those circumstances.

But I agreed with the majority that, no, that had been Texas law, we were not going to change it. You cannot recover for the death of a fetus. That's the law in Texas——

Senator DURBIN. I am sorry to interrupt you, but I have very little time here, and if you would like to submit something along that point of view, I will be happy to consider it.

I want to go to one specific case, though, the *Provident American* v. *Castaneda* case. Do you remember it?

Justice OWEN. I do.

Senator DURBIN. I have read this and read your decision, and I often wondered how a court could come down, as you did, writing the majority opinion here, in a case involving coverage on a health insurance plan where, frankly, the insurance company decided to try to find anything it could in its policy to avoid paying for a critical surgery that was needed by this family. In fact, you came down and found on the side of the insurance company and said that there was an exclusion under their policy.

The dissent that was written in this case by Justice Raul Gonzalez I think went to great lengths to point out the facts that you chose to ignore. He said, "The court sustains"—let me find this here directly. "The court ignores important evidence that supports

the judgment, emphasizing evidence and indulging inferences contrary to the verdict, resolves all conflicts in the evidence against the verdict for the family that was denied coverage." And he goes on to say, "I want to cite the facts the court chooses to ignore in its decision."

The reason I raise this issue—and Justice Gonzalez was very forthright in believing that this was a slam dunk for the insurance company—that they got an opinion from you that he didn't believe was sustained by the policy or the evidence. In fact, he said he thought with your opinion you were destroying the bad-faith tort in the State of Texas.

Going back to my original point, I think it is fairly well known that the Texas Supreme Court is much more conservative today than it once was, that it was an all-out effort by major corporations and by insurance companies to try to build a majority on that court. And as I read this decision, sometimes it is hard for me to imagine how someone in good faith can look at the facts as in this case and basically say to a family, after they had pre-approval for a surgery, that an insurance company could come in and say no, we are not going to cover, and then have a Supreme Court in Texas stand behind him and say to the family, You are out of luck, they found a little provision in the policy here; you are not covered.

This troubles me because, frankly, that kind of a finding reflects a philosophy which does not tell me there is a well-balanced approach here, and certainly Justice Gonzalez felt the same way in his dissent. I would invite you to comment.

Justice OWEN. Thank you, Senator. I really do appreciate the opportunity because this case was not about coverage. They were covered—the only dispute here was bad faith. These people recovered under their policy. They got their attorney's fees for breach of contract, and they got either 12 percent or 18 percent penalty under the statute. I can't remember which one applied at the time. They lost on the coverage question, no doubt about it. That was not the issue in front of my court. The issue was whether in addition to their coverage, their full policy limits plus attorney's fees, plus the penalty, could they recover extra contractual damages for bad faith. And the standard there is that the insurance company had absolutely no reasonable basis whatsoever to deny the coverage.

And the facts in this case were the family had two children who had been jaundiced all of their lives. They called up an insurance company and applied for a policy after their uncle had told them that he had a hereditary blood disease called HS. The policy had a 30-day waiting period, and they didn't disclose to the insurance company anything about the hereditary disease. Three days after, or maybe it was two, after the 30-day——

Senator DURBIN. Three.

Justice OWEN. Three days after the 30 days had run, they took their children to a physician who on the spot diagnosed this hereditary disease and removed their—I believe it was their spleen. So the question was: Under those circumstances, not should the insurance—could they deny coverage, but was there any reasonable basis for them to delay in paying the policy limits. And we said under all those circumstances you can't say that there was no rea-

sonable basis to delay. But they were covered. That was not the issue.

Senator DURBIN. I could tell you that I think we are carping on a trifle here as to whether they are covered. The fact was the insurance company approved the surgery, did they not, before it took place?

Justice OWEN. Yes.

Senator DURBIN. And the fact is the insurance company then refused to pay, and you were arguing in your majority opinion here on behalf of the insurance company that waiting the 3 days after the 30-day period was not enough, that this family was deceiving the insurance company, was operating in bad faith, and I think Justice Gonzalez and Justice Specter make compelling argument here that the facts don't just come out that way.

I have represented insurance companies, and I have represented plaintiffs. You are the answer to an insurance company's prayer if you would buy this argument. If you would turn on a company—turn on a family that is facing this kind of peril and make this kind of interpretation, and that is what troubles me about what you are asking for, is to be elevated to a court where you can make significant decisions involving insurance companies and major corporations, which I am afraid if you follow the logic as you did in the *Provident* case would not be in the best interest of serving the people in the court.

Thank you for being here. Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much.

I don't see other Senators here at the moment, but I thought I might just say something. I am deeply concerned because I have read all the Doe cases, and I have read the notification law, and the notification law is pretty straightforward: one, the minor is mature, sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian; or the notification would not be in the best interest of the minor; or notification may lead to physical, sexual, or emotional abuse of the minor. That is it. And any one of the three factors has to be present. That is it. It seems to me on that basis you make a decision, but you really haven't done that. You have looked in other places, it seems to me, to find a rationale not to do what the Texas law called for, invoking a religious implication, invoking concern about the fetus, invoking, well, the emotional wrongdoing, was just threatened by the parents, it may not have happened.

It seemed to me that you—and maybe this is what being an activist means—that you worked to come out where you came out in your opinion. And that is a very deep concern because if the Texas Legislature wanted to change "may" to "must," they could have. They could have said, "Notification must lead to physical, sexual, or emotional abuse of the minor," but they didn't. They said it "may," which means it either may or may not. And this I find troubling.

Now, I had some Texas lawyers come to me who are consumer lawyers, and they said their concern was they didn't believe they could ever get a fair shot in your courtroom. And that was—in 10 years of serving on this committee, no one has ever said that be-

fore. And the case that Senator Durbin just raised, which I was going to mention as well, the fact is that there was a judgment. The fact is that the family was entitled to coverage. But your invalidation of the trial verdict completely threw out their entire award.

And, again, I mean, the law is there for little people. This is the remedy for little people, not for the—the Providents of the world certainly have the right to be taken at face value, but what disturbs me is that in so many places in these notification cases, in the health benefits cases, in other consumer-related cases, in the *Searcy* case, these are people very much harmed, and their redress was cutoff.

Could you respond to that?

Justice OWEN. Yes, Senator, I would like to. You know, there are a lot of cases that come before our court that I think tug at all of our heart strings, and that's the hard part of being a judge sometimes. But, again, I have committed and have got to apply the law, and there are guiding principles in contracts, in the bad-faith area, and other areas that have to dictate what the law says.

Again, in the Castaneda case, let me emphasize, it was not about their insurance coverage. They won on the coverage issue. They got all of their policy benefits. They recovered attorney's fees. There's a statutory penalty in Texas if the insurance company doesn't timely pay, and I'm assuming that they recovered that statutory penalty. The issue in my court was not policy benefits. The issue in my court was do they get extra contractual benefits for bad faith, which is a common law tort or sometimes it's brought under a statute, Article 2121. So it was not a coverage issue. They did get their policy benefits.

On the parental notification cases, let me make clear that I have never advocated in my opinion or anywhere else that a young girl has to have religious beliefs of any type at all. But, you know, I said at the U.S. Supreme Court has said, these are weighty decisions and that a minor ought to exhibit some awareness that there are philosophical and moral and religious issues out there. And I hasten to add, if she doesn't have any—it's not an inquiry what they are. Simply that if she has those beliefs, has she thought about them? Has she considered them? Has she considered the philosophical and social and moral arguments, whether she agrees with them or not, just an awareness that they exist. She doesn't have to adhere to any particular viewpoint. She doesn't have to explain or justify her viewpoint or her philosophy or her moral stance or whether she has religious beliefs. The U.S. Supreme Court has said—and I try to apply that—that it is simply she needs to exhibit some awareness as a mature person, an adult, you would hope an adult would exhibit, that there are at least these arguments out there on both sides, and that she's aware of both sides, not that she agrees with it or, again, has to justify any of this.

And, again, I really do—I did think that given that the legislature had lifted word for word what "mature and sufficiently well informed" meant, and "best interest" and all of this out of a statute that had been—from another State that had been approved by the U.S. Supreme Court, that they were trying to adhere to all of that precedent. And, Senator, I think it is hard if I were a trial judge

and I was told, well, decide if she's mature, decide if she's sufficiently well informed, well, without some guidance, I think you're going to get varying results around the State. What does that mean?

And so I think it was necessary for my court to speak and give—so that girls in West Texas wouldn't be held to a different standard that girls in East Texas were. My court ultimately—I didn't totally agree with the majority on every aspect, but I did my best to adhere to what I thought the legislature intended. It was not anti-anything. It was not activism. Once the court made its decision in Doe, those are the factors, and I abide by that.

Senator FEINSTEIN. Well, I believe that this completes the testimony. I am going to adjourn the hearing, and we have two other—oh, we have more people coming. I would recess for the vote then, go down and vote, and just ask you to forbear.

Justice OWEN. OK.

Senator FEINSTEIN. If you don't mind.

Justice OWEN. Not at all, Senator.

Senator FEINSTEIN. So we will take a brief recess. Thanks, everybody.

[Recess.]

Senator FEINSTEIN. The hearing will reconvene, and next on the list, Senator Schumer, then Brownback, Cantwell, and Edwards.

Justice OWEN. Madam Chair, before we proceed, can I amend an answer?

Senator FEINSTEIN. Certainly, go right ahead.

Justice OWEN. It was regarding the *Provident American* v. *Castaneda* case. I remembered that it was—the only issue in front of my court was bad faith, and I had thought—I incorrectly remembered, I just assumed that they had won on the contract claim in the trial court and that was not in front of us. I was right that the contract——

Senator FEINSTEIN. Are you talking about Castaneda now?

Justice OWEN. Yes.

Senator FEINSTEIN. All right.

Justice OWEN. I was right that the contract claim was not in front of us. They never pled breach of contract or asked for any jury findings on breach of contract. They only sued on a bad-faith denial of the claim. So I was wrong. I was incorrect. I had not read the case in quite a while. I said that they recovered their contract damages. They just never pled that. They were seeking solely a so-called bad-faith claim under the Texas Deceptive Trade Practices Act and under the insurance code. They were statutory claims not under the policy, but so-called extra-contractual claims.

Senator FEINSTEIN. Yes, but they did not get the extra-contractual claim.

Justice OWEN. That's right. They did not get the extra-contractual——

Senator FEINSTEIN. They did get the surgery paid for?

Justice OWEN. Well, that's my—I thought they did, but they never pled——

Senator FEINSTEIN. They did not?

Justice OWEN. No, because they never asked or pled for policy benefits under the contract.

Senator FEINSTEIN. So then they got nothing?

Justice OWEN. They ended—as it ended up, because they didn't ask or plead in the trial court or ask for the jury to find breach of contract of the policy, we didn't have that in front of us, so we couldn't grant that for them. In other words——

Senator FEINSTEIN. Didn't the trial court grant it?

Justice OWEN. No, Senator, they never pled it. They went solely on non-contractual claims. They never pled in the trial court or asked the jury to find that the insurance company owed the policy benefits under the policy. I don't know why that was, and I had just assumed that the only thing that they had—I assumed they'd gotten the contract benefits because I knew the only issue in front of us was bad faith. But as I re-read—someone handed me the opinion during the break, and they just didn't ever raise the contract claims in the trial court.

Senator FEINSTEIN. Thank you for clearing that up. I appreciate it.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Madam Chairwoman, and I very much appreciate the opportunity to testify, and thank you, Judge Owen.

Before I get into what I want to ask you, I did want to make a few points in reference to what Senator Hatch said in his opening remarks. Unfortunately, he is not here. I tried to make them while he was here, but—so he knows I am going to make them. Three points.

First, you know, let's try to keep this debate at a reasonable level. Senator Hatch keeps saying left-wing pressure groups, left-wing pressure groups. Don't hear anything about right-wing pressure groups or moderate pressure groups. There are a whole bunch of groups that support Judge Owen's nomination. They are doing their civic duty, but anyone who opposes it is a left-wing ideological pressure group. Enough of that. That kind of foolishness should not go on in this committee room or anywhere else. Let's be fair about it. There are groups on both sides pushing everybody, and we are all independent and have to make our own decisions. We may be influenced by them on one side of the aisle or the other. But this idea that the only pressure groups are from the left is a joke.

Second, related, Senator Hatch talked about something that I agree with, which is, well, we are picking, we are looking for little personal things about people, and they are going to put you through the wringer. "Welcome to Washington," he said to you, Judge. I am aghast. After 8 years of them looking and turning President Clinton, his family, and everyone who worked for him inside out about every single issue under the sun, now all of a sudden it is "welcome to Washington." Again, what is good—I don't believe in it on either side. But let's have some semblance of fairness about this. About not nominating women? What a canard. What kind of argument is that? I mean, I don't think anybody can—any cursory look at what this committee has done has stood up to that. We have on the floor voted for 12 women. My guess is that is about

as high a percentage in terms of the gender as the men who were sent to us.

How about not voting for anyone who is pro-life? My guess is of the 78 judges I voted for, the majority are pro-life in this session. So let's cut out the games. Let's not try to beat people up with two-by-fours, with specious arguments. Let's have a real discussion about what makes a good judge. And we will have differing views on that, and that is fair, and that is why we have a Senate.

But I will tell you, I am not going to bamboozled by arguments like that, and I don't think anybody should be. And I just wanted the record to show that. I thought that kind of hyperbole is not fair.

OK. Now, to Judge Owen. Oh, and one other point which I will answer. I am glad Senator Hatch is here.

Senator FEINSTEIN. You just missed it.

[Laughter.]

Senator SCHUMER. Yes, sorry.

Senator HATCH. Is he running me down again?

[Laughter.]

Senator FEINSTEIN. He is responding.

Senator SCHUMER. I am just responding.

Senator HATCH. Oh, that is what we call it now.

[Laughter.]

Senator FEINSTEIN. You are terrible.

Senator SCHUMER. He is, but he is a nice guy. He is truly a nice guy.

Senator HATCH. Not nearly as terrible as him.

Senator SCHUMER. His arguments are not as nice as he is.

In any case, the other point that Senator Hatch made, which I will address as I address you, Judge Owen, is what kind of questions are legitimate to ask and not ask to a candidate for a high, lifetime position. But let me say this to you, Judge Owen, and then I am going to make some statements and ask some questions and weave them in together.

Last week, we had the pleasure to meet privately, and when we talked, I told you I have had, I think since I have come here, three standards in terms of nominating, choosing, voting for judges. They are: excellence, legal excellence; moderation—I don't like judges too far left, too far right; and diversity. I don't think the bench should be all white males.

I don't think there is any question about your legal excellence. You have had a distinguished academic and professional career, and the ABA, whose ratings review the nominee's legal excellence, no more, no less, has rated you well qualified, with good reason. I think anyone who has listened even to 10 minutes of this hearing today has no doubt about the excellence in terms of the quality of your legal knowledge and your intelligence, your articulateness, et cetera.

On the diversity front, the population of the Fifth Circuit, the court you have been nominated to, the population within the body of the Fifth Circuit is the most racially diverse in the country, even more so than the Fourth Circuit. And President Clinton, let the record just show, made three nominations to that circuit, two of whom were Latino—there is a large Latino population within the

Fifth Circuit, mainly in your home State of Texas. None of them received confirmation hearings. So one of the reasons we don't have diversity on this court is that reason. But, obviously, in terms of gender diversity, you get an A-plus.

The third standard is moderation, and that is really where I have concerns, and that is where my focus will be.

Now, there is some idea out there that all of a sudden has sort of taken root, among people of a particular ideology, I might add, that you can look deep into space and divine the correct legal interpretation of a statute that we all would come out in the same exact place, that our ideology has nothing to do with how we interpret the law. We all know that is bunk. It is obvious when you look at any court. Judges bring their experiences, their biases, their ideology to the table when they decide cases. Whether it happens consciously or subconsciously, we know it happens. If it didn't, why would Justices Scalia and Thomas come out exactly—almost the same way on so many cases, so different than, say, Justice Breyer and Justice Ginsburg? If ideology made no difference, the number of times—they are all very smart people. They are all great lawyers. The number of times that Scalia would agree with Thomas would be about the same as the number he agreed with every one of the judges.

Look at the nominees that Presidents Reagan and Bush made to the court versus the nominees that President Clinton made to the court. How come they all seem to vote so similarly? It is because ideology does matter. We all know it. This administration knows it. How come they haven't sent up a single so-called liberal judge? If they were just looking for legal excellence, they would send some judges from the left, some judges from the center, some judges from the right. The President said it himself. He said that he wanted to send judges up in the mold of Scalia and Thomas. I give him credit for honesty. He is doing that. Whether that is good for the country or not is the debate at least that I have chosen to engage in over the last few years that we have been here.

That happens on your—it happened in the Texas Supreme Court as well. You and Judge Hecht have frequently come down on the same side on the Texas Supreme Court. It is not accident. It is not simply that you went to the same law school, read the same law books. Philosophically, you are in the same place, similar places.

So this idea that ideology shouldn't matter, that we shouldn't ask questions about someone's judicial philosophy, which is what my good friend from Utah said, I think is so, so wrong that it is almost hard to accept if you look at it in any way at all. And my guess is if we looked at the way my good friend from Utah voted on judges over the last years he has been in office and the way I voted on judges, we would agree on most of them because we agree on most judges as we vote. But it is clear that his philosophy would dictate he voted against certain judges and for others, and I probably did the mirror image because our philosophy does influence how we vote. We are just not simply interpreting the legal excellence of the mind. I do agree with him, as I said before you came in, that I don't like this "gotcha" stuff. I think that has become a substitute for all of this, but how come it is, when there is a Republican nominee, it is the Democrats who focus on the "gotcha" stuff,

and when it is a Democratic nominee, it is the Republicans who focus on the "gotcha" stuff?

Again, if we weren't doing ideology, whether someone smoked marijuana in college or went to some book shop and got a certain book or movie, the vote should be even disbursed through the political spectrum. It is not because it is sort of a kabuki game.

Well, what I have tried to do in the year that I have been chairman of the Courts Subcommittee is bring some level, at least I would call it, of honesty to the debate. Let's admit that ideology should play a role. Let's ask those questions. I think it is my obligation to ask those questions, and I will tell you, I am opposite of Senator Hatch. Any judge who doesn't answer questions about their philosophy, their views on the First or Second or Fourth Amendments, should not be put in such an important and august position where there is a lifetime appointment.

So let me——

Senator FEINSTEIN. Senator, your significant treatise took 10 minutes and 32 seconds.

Senator SCHUMER. May I ask one question?

Senator HATCH. Could I as a point of personal privilege just make one note for the record? I only voted against one Clinton judge out of the 378 that we passed. So I hardly used ideology——

Senator SCHUMER. I bet it wasn't a conservative.

Senator HATCH. Well, I don't know what he was, to be honest with you, other than I didn't feel he was right.

Senator SCHUMER. Could I ask one question, Madam Chair?

Senator FEINSTEIN. Yes, one question and then we go to Senator Sessions.

Senator SCHUMER. OK. So here is my question, and maybe if we have a second round, I would like to ask some specific ones. I did not intend to take that long, but this is a subject that excites me.

Now, let us assume—because I think choice is a very legitimate issue for us to question judges on, and so I would like to know your views, and here is the way I would phrase it: It is 1965. You are sitting in the Supreme Court of the United States. Chief Justice Warren comes into your chambers with a copy of the opinion in *Griswold* v. *Connecticut*, the seminal case that held there is a right to privacy in the Constitution. He asks for your thoughts on the opinion. Now, there is no law to follow right now, but he is asking for your opinion in terms of everything that has been part of you. What do you tell him?

Do you agree with the holding? Do you agree with the outcome but get there in a different way, in other words, that there is a constitutional right to privacy, the penumbra of which extends to at least the first two trimesters of a woman's pregnancy? What do you tell Judge *Griswold* [sic]?

Justice OWEN. Well, Senator, again, I've responded somewhat to this question before, but I can assure you that nothing in my personal views on any topic has influenced or would influence my ability to read the U.S. Supreme Court precedent and to apply it. And, frankly, I don't——

Senator SCHUMER. But this time there was no precedent. That is why I am asking you the question as I did.

Justice OWEN. I don't see it as my role as a judge on the Supreme Court of Texas or as an intermediate judge to delve into decisions and critique them or say this was wrong on the law or this was right on the law. And, frankly, when I have read those decisions, that is not the way I approached them as a lawyer, and that is not the way I've approached them as a judge, are they right on the law, are they wrong on the law. I've always approached them with trying to figure out what did they say in these opinions, what was the basis for their opinion, and how does that play out in the factual situation that either my client, when I was a lawyer, has or now as a judge in the case before me.

Senator SCHUMER. Judge Owen, being on the Texas Supreme Court, certainly being on the Fifth Circuit, as you know, the Supreme Court only deals with about 75 cases a year. You are going to be asked, when you are a judge, questions like this every day. To say, to duck the question—and that is what you did, and I am not trying to surprise you; my staff told the people in the Justice Department I would ask you this very question—I don't think is fair to us. I don't think it is fair to me. I don't think it is fair to the 19 million people I represent in New York. I want to know your opinion. This was a case where there was very little precedent that was directly relevant. The Supreme Court made a decision that is still with us in terms of its controversy, in terms of the heat that it generates on both sides.

I think the American people, the people of the Fifth Circuit, are entitled to know how you would advise Judge *Griswold* [sic] on that opinion because it shows your view, something very important about whether you think there is a constitutional right to privacy, how far you think it extends, et cetera. And this is a case that has already been decided, but it can tell us how you think and where you come down. And I don't think your answer—I understand that you do that, but on the Texas Supreme Court—you are much more familiar with it than I am—you had to make decisions like this all the time. You certainly will on the Fifth Circuit.

So I would ask you again: Can you give me something more specific rather than telling me that your methodology is not to answer questions like that?

Justice OWEN. Well, let me tell you——

Senator SCHUMER. Because you would have to answer them when you sat on the court, when you wrote opinions, when you agreed with the majority opinion, when you dissented, and you have done it and we all know you have done it.

Justice OWEN. But I don't approach decisionmaking that way. I've never—I'm not asked to come in in a vacuum and say, well, what do you think is——

Senator SCHUMER. I am not giving you a vacuum question. I am giving you the specific facts of a case. I mean, we have talked a lot about parental consent. I mean, I am sure you have read the *Griswold* decision.

Justice OWEN. Yes, I have.

Senator SCHUMER. OK.

Justice OWEN. It's been a long time, but I've read it, yes.

Senator SCHUMER. I am asking—OK. Well, it is an important decision even in terms of talking about parental consent. Obviously

you are dealing with a different Constitution here, Texas versus the United States. But you have to be able to tell us more than this is not the way I think. I mean, I just don't——

Justice OWEN. Well, I was going to expand on my answer, but——

Senator SCHUMER. Please do.

Justice OWEN. When you say that that's the way—you're going to have to think that way, and I respectfully——

Senator SCHUMER. I am asking you——

Senator SESSIONS. Senator Schumer, let the lady answer the question. You have asked her——

Senator SCHUMER. Well, I am just trying to—OK. Go ahead.

Justice OWEN. The way I would approach that case had I been on the court then is the same way that I approach constitutional issues today, and that is, I read everything that the U.S. Supreme Court has written up to that point on the issue. And, frankly, Senator, I don't know—I didn't read the briefs in *Griswold*. And I'm, frankly, so influenced by the existing body of law that we've had the right to privacy for so many years, my court has recognized a right to privacy under the Texas Constitution, I think it's kind of hard at this point for me to erase all of that out of my mind and put myself back in their shoes without all of this case law that's come down the pike, not having the benefit of the briefs or the arguments, to say how would you have written, were you writing on a clean slate, it's very difficult for me to write on a clean slate when I have all of this historical law now out there.

And, again, I don't write on a clean slate when I answer constitutional issues.

Senator SCHUMER. What I would like to do, because I know my time is up—and I appreciate the indulgence, Madam Chairperson. I would like to submit some written questions that specifically ask some of these things and see if we can get a more specific answer and give you a little time maybe to review the case law, whatever you would have to review as if you were being a judge on the case in some sense.

Senator FEINSTEIN. Thank you, Senator Schumer.

Senator Sessions, you are next up.

Senator SESSIONS. Justice Owen, you recognize *Griswold* to be the law and would follow it?

Justice OWEN. Yes, Senator.

Senator SESSIONS. And if called upon to apply its principles, you would apply them in your decisionmaking process?

Justice OWEN. Absolutely.

Senator SESSIONS. Well, I think you handled this precisely right, and I am sorry Senator Schumer was unhappy with your answer. But you handled it precisely like a jurist should answer it. How could you be expected to put yourself back into that circumstance without having read all the briefs, without having studied the law carefully, and to render an opinion on a case of that importance? I note Senator Schumer left, and recently he complimented Justice Hugo Black of the Supreme Court on his views on the Constitution. And, of course, Hugo Black dissented in *Griswold*. So these things are of interest and, I guess, fun to talk about. But, in reality, as the person who is being considered for a judgeship, I think you

have demonstrated the right characteristics in a judge, that is, to be cautious not to express opinions until you have fully studied all the briefs, all the law involved, as your record demonstrates you do so skillfully.

I would just note that your testimony has been extraordinary. I have been very impressed with your command of the cases you have handled, the hundreds that you have handled. I have been very impressed with your ability to articulate your thoughts in a reasoned and fair way. I see no hint of extremism or activism or some obsession with forcing some political agenda on anybody, not one hint of it. And it is disturbing, actually, to have those comments be made. I just don't believe there is one hint of it.

Justice Owen, I have also been impressed, as Senator Gramm and Senator Hatch noted, that you came at this service to the Supreme Court of Texas because of a desire to serve. It cost you, I am sure, financially significantly. You have won re-election with 84 percent of the vote. The American Bar Association, who certain members of this committee insisted must have a bigger role than they have had in recent years in the process, has unanimously rated you "well qualified." That is the highest rating you can get, and a unanimous vote for "well qualified" is very rare. And they had the opportunity to study your record. They have seen you on the bench, and they have talked to your former law partners. They have talked to lawyers who have litigated against you. They know your reputation and your ability, and I think they made a well and a wise choice in rating you "well qualified" unanimously.

I have to be impressed with your academic record: No. 2 or three in your class, made the highest score on the bar exam. What an accomplishment that is, in a big State like Texas, particularly. So I just think you have so much to be proud of, and I particularly like your demeanor and the way you have handled yourself under some of the questions that have been brought forward.

And I also note, it seems to me, that you have not been just a potted plant. You have been a reformer in your life in the law about the rule of law. Tell me how you feel about the responsibility of a judge or a public official. What is their responsibility about defending and strengthening the rule of law in America?

Justice OWEN. Well, I think that's the ultimate responsibility, is to defend and strengthen the rule of law in America. I think we all understand that our society is built on laws and that that is what basically orders our society. That helps us plan. That helps us have predictability. It helps us have stability. It helps us know that cases won't be decided randomly based on sympathy or passion, when they should be decided another way under the law. So I think the rule of law is very important, that it's consistently and fairly but with common sense applied in every case.

Senator SESSIONS. Well, now, is that why when you are asked to rule on a case you just don't spout off the answer, as some would have you do in this hearing? Is that why you go back and you take the Texas statute on notification, parental notification, and then you know that it is passed during a time in which they were considering the Supreme Court rulings as they tried to craft a statute for Texas? Is that why you went back and studied the U.S. Supreme Court cases to try to understand what Texas was trying to

do so that you could give a fair and objective answer as to what the statute really meant and what the legislature intended?

Justice OWEN. Yes, Senator. Let me—if I can explain this. Maybe I have not done a very good job of it yet. But when the legislature used the words "mature and sufficiently well informed," that could mean a lot of different things to different judges all across Texas. And so given that that was kind of an amorphous definition, I thought, Where did they come up with these words? What definition did they have in their minds when they picked these words?

And then when I went and read the Supreme Court cases that they pulled the exact language out of, I looked at how did the U.S. Supreme Court define "informed." What did they say is relevant to an informed consent? How did they define "informed consent"? And I believed that the legislature was looking to the cases out of which it picked the words "mature and sufficiently well informed" for us to glean what the actual definition was, what the factors that courts were to consider in deciding if someone was making an informed decision.

Senator SESSIONS. Well, I think that is what a great jurist does, and I think you handled that. You did it exactly right. That is precisely what should be done.

You know, looking at your background, I see a person who has worked hard to reform and improve the system. Senator McConnell noted your voluntary limiting of your contributions. He did not mention the fact that after you had a relatively easy race last time, you gave back one-third of the contributions. I don't know anybody in this body that has ever done that. And that is a remarkable thing, indeed.

I notice that you worked hard to encourage the Texas Legislature to secure more Legal Service funding for the poor and were successful in that.

Justice OWEN. Yes, Senator. We were particularly hard hit in Texas when legal funding for LSC, the Legal Services Corporation, nationwide was cut back. Texas kind of got a double whammy. Not only were our traditional Legal Services offices cut back in budget, but Texas has a large migrant worker population, and funding for the migrant workers particularly hard hit. And a lot of people, including me, were concerned that the basic infrastructure through which legal services to the poor were delivered in Texas was going to collapse because we were that close to the line.

So we had to look for ways to put more money in the system to keep the professionals who were involved in sort of the backbone of the delivery system in place, because if we lost that, we would not be able to anywhere come near meeting the legal services needs of the poor in Texas. And so a group of folks, not just me, certainly—I was the court's liaison and was involved in it, but explored ways that we could put—get more funds, and ultimately the legislature passed the statute that put more money in legal services for the poor.

Senator SESSIONS. And I noticed you helped organize Family Law 2000, a conference, an effort to educate parents about the effects of divorce on children. I have heard a lot of people in the know in the legal system express concern that too often a divorce proceeding becomes an adversarial gladiator sport and that children

are hurt unnecessarily in the process. Is that what you were dealing with there?

Justice OWEN. Yes, Senator. I did not practice family law, but when I got to the court, it was clear to me that 51 percent of the civil cases in Texas are family law matters, and that's sort of where the rubber hits the road, if you will, for most citizens in Texas. And almost—you know, so many people have experience with the family law courts, and a lot of lawyers and a lot of family law judges and psychologists have been concerned that this is—that the adversarial process is really hard on the children, and that sometimes lawyers escalate the process. Sometimes the way the laws are designed escalate the process. And we were sort of a think tank to try to think outside the box to the point of maybe really restructuring the way legal services are delivered, the family laws, to try to make this more of a unified approach to divorces, not just from the legal standpoint but from other aspects, and, again, try to focus on getting people to make consensus decisions, particularly for their children in the divorce context, and not in such an adversarial way.

Senator SESSIONS. Well, I think that is good, and I know you have served on the board of the Texas Hearing and Service Dogs program that helps the blind and those with disabilities. You teach Sunday school at St. Barnabas Episcopal Mission. You have given back to your community in a lot of different ways.

Let me ask you this: I know that my friend Dan Morales, the Attorney General of Texas, we served together, intervened for the state of Texas in an environmental case. You were asked about the *City of Austin* case and it was suggested that you were somehow doing something to help polluters or evil groups. But I noticed—and I assume Texas is like Alabama where the Attorney General represents the State in legal matters and speaks for the State in court. Is that correct?

Justice OWEN. That's correct.

Senator SESSIONS. And the Attorney General, Dan Morales, intervened in that case on the side of the State of Texas, and he took the position, as I understand it, that Texas State had entered into this area and their law predominated, and that cities, the city of Austin did not have authority. And you eventually agreed with him in general on that opinion?

Justice OWEN. I did, absolutely. I agreed that the State—the State basically trumps the city, it was my view, and there were extensive regulations in this area above and beyond the water regulations that applies to everybody in the State. This was not a nonregulated area. This is the same regulations that apply to any landowner in Texas apply to these folks, plus they had to have a water quality plan under the TNRCC, where they were subject to the TNRCC. They were subject to ongoing Federal regulations. So this was far from an unregulated area. The question was whose law was going to control, the State statute or the city's ordinances. And it seemed to me that the State certainly could take away the ETJ, extra-territorial jurisdiction, in its entirety. And if that were so, why couldn't they regulate here and tell the city no, our regulations—we choose how to regulate. We don't want you to regulating here.

Senator SESSIONS. Well, I think you are right, and, of course, Mr. Morales is a Democrat and a capable Attorney General who was advocating for the State's interest. And, of course, a lot of people don't think about this and a lot of cities don't like to think about it, but cities are creatures of the State. The States are sovereign, have a sovereign power within that constitutional scheme, as does the National Government, but cities are total creatures of the State. And if there is a conflict, I think you came down on the right side between which is the pre-eminent authority within a State.

Well, there are several other cases that I could go through. I do want to say that I think your ruling with regard to the *Ford Motor* Company case and venue was important. Venue is important. It is not correct or just to allow a plaintiff to choose any county in the State of Texas to file a lawsuit just because there is a Ford dealership in that county. In this case, as I understood it, you ruled consistent with Texas law that the case should be filed where the plaintiff lived, where the car was purchased, and where the accident occurred. All of those occurred in the county where venue was proper, and you did not deny them relief, but you simply sent the case back with the order to go to the correct county for venue purposes. Is that correct?

Justice OWEN. That's correct.

Senator FEINSTEIN. Senator, your time is——

Senator SESSIONS. My time is up, and I would just say that I appreciate your candor. I appreciate your ability. I am impressed with the American Bar Association's evaluation of your performance. I am impressed with the evaluation of the people of Texas of your performance when you got 84 percent of the vote. And I believe we have had few nominees come before this committee ever who have testified more ably or who have better qualifications for the Federal bench.

Justice OWEN. Thank you.

Senator FEINSTEIN. Thank you, Senator.

Senator Edwards?

Senator EDWARDS. Thank you, Madam Chairman.

Good afternoon, Ms. Owen. You have been here a long time. I want to focus, if I can, your judicial decisions.

Justice OWEN. OK.

Senator EDWARDS. Tell me first, in cases involving the intentional infliction of emotional distress, whether you agree with the decisions in your court, in the Texas Supreme Court, that say—and I am reading now from one of those—that the overwhelming weight of authority, both in Texas and around the country, is that conduct involved in any particular case should be evaluated as a whole in determining whether it is extreme?

Justice OWEN. I think that's generally true, yes.

Senator EDWARDS. The case that I want to ask you about that I have not heard others ask you about today, is a case involving three women who brought a case against GTE. The lead plaintiff Was Bruce, Rhonda Bruce, Linda Davis and Joyce Polstra. Based upon what they contended was extreme conduct in the workplace. And the evidence in the case—I am looking at the opinion now—was that the employer's manager, who was the person involved in the case, the defendant's manager, "soon after arriving at work en-

gaged in a pattern of grossly abusive, threatening and degrading conduct." And again I am reading from the decision now. "He began using the harshest vulgarity shortly after his arrival. He regularly heaped abusive profanity on the employees," including these three women. On one occasion when he was asked to curb his language because it was offensive, he positioned himself in front of one of the plaintiffs, one of the women, and screamed, "I'll do and say any" blank "thing I want, and I don't give a" blank "who likes it."

At one point another female employee raised a question, and he said, "I'm tired of walking on" blank "eggshells, trying to make people happy around here." The opinion says, "More importantly, the employees testified that Shields repeatedly physically and verbally threatened, abused and terrorized them."

And then the court, in considering that conduct as a whole, as you have just indicated the law provides, found that the jury verdict against the defendant was appropriate. And you wrote a concurring decision, where you agreed in part with the majority decision and dissented in part—disagreed in part. You did not dissent, but you disagreed with some of the conclusions that the majority had raised. And among those disagreements you found that the following conduct is not a basis for sustaining a cause of action of intentional infliction of emotional distress.

And before I go through this long list of things that you said was not evidence to be considered, taken as a whole, and whether the defendant had acted outrageously, because I understand that you have told me that that is the legal standard. The question is whether any of these things taken as part of the overall case is something that would constitute extreme behavior under the law. The first thing you listed was—not to be included——

Justice OWEN. But, Senator, may I?

Senator EDWARDS. Sure.

Justice OWEN. I just want to make clear what—that you understand, that everybody understands what I was saying here. I was not saying that you can't consider the totality of the circumstances, and I absolutely agreed with the majority that this guy was way over the line in this case. My only point in writing this was if you take—my only point was if you take these things that I listed out of that, the context of all of the other things that happened and standing alone, that you can't—this would not support a judgment standing alone. And I was concerned particularly——

Senator EDWARDS. Excuse me. Did you say that, what you just said?

Justice OWEN. I said, "That the following conduct is not a basis for sustaining a cause of action for intentional infliction of emotional distress, even when the employees who were upset by the conduct were women."

And my point here was that if this is all that happened, I mean, if you just have someone—and we can go through them—cursing, that it's not accompanied by sexual harassment, or cursing, but it's not directed at the woman, that by itself will not give you, I don't think, sufficient grounds for intentional infliction of emotional distress. And I was concerned that people would read all the laundry

list of what happened in the majority opinion, and say, "Well, if I can prove any one of these things, then I'm there."

And I wanted to make it clear that I did not agree that if this is what you had without all of the other things that this man did——

Senator EDWARDS. Let me—excuse me. I am sorry.

Justice OWEN. That you wouldn't get there. And that was all I was trying to make clear, because there were some statements that I thought conflicted particularly with very recent decisions out of our court and people might get confused, and so I wrote separately to point that out.

Senator EDWARDS. Well, I guess I would first point out that the majority opinion I do not think ever said that any of those things standing along would be enough. They applied the law as you have recognized it to be, which is if you look at the totality of the circumstances.

Justice OWEN. And I agree with that.

Senator EDWARDS. And they listed these things as things to be considered as part of the totality of the circumstances. And what you said, if I am reading it correctly in your decision, "The following conduct is not a basis for sustaining a cause of action."

Can I just go through them and ask you about each one?

Justice OWEN. Sure.

Senator EDWARDS. The first one you said was cursing, profanity or yelling and screaming unless when it is not simultaneously accompanied by sexual harassment or physical threatening behavior. The second you listed was pounding fists on a table when requesting employees to do things. Third was going into a rage when employees leave an umbrella or purse on a chair or a filing cabinet. The fourth you listed was screaming at employees if they do not get things picked up. Five—I am jumping around; you have got a long list, and I am not going to read them all—is requiring an employee to clean a spot off the carpet while yelling at her. Another one is telling an employee that she must wear a post-it note that says, "Don't forget your paperwork."

So this is a list of things that the majority, as I understand it, consider taken as a whole, as evidence that would support a verdict in favor of this three women, which the jury had found, as I believe.

You have listed these things and said that they—in the language of your decision, that they are not a basis for sustaining a cause of action. And what I understand you to be saying to day is that standing alone, these things are not a basis for a cause of action. Is that correct?

Justice OWEN. That's correct. And I also want to make it clear that we're not talking about sexual discrimination here or anything of the sort because lots of things obviously would be grounds. We were talking about a tort that's been reserved by my court for very extraordinary circumstances, the so-called tort of intentional infliction of emotional distress, as defined by the restatement. So we're not—this is not conduct that I would say that is OK in the workplace under other causes of action. We're looking at one——

Senator EDWARDS. But you specifically said that each of those things that I just read——

Justice OWEN. I specifically said standing—again, my point was that if this is what a plaintiff shows, that would be insufficient. You can't just say, "In GTE-Bruce they said this," so therefore I've met the standard. I'd want to make sure there wasn't any confusion about what else would have to accompany that conduct to get to intentional infliction of emotional distress.

Senator EDWARDS. Yes, ma'am. But I believe, as you said a few minutes ago, the majority never suggested that any of those things standing alone would be enough. And you didn't specifically say—unless I am missing it in your opinion—that any of those things standing alone would not be——

Justice OWEN. I didn't use the words standing alone——

Senator EDWARDS. What you said was they would not sustain or form a basis for a cause of action, which has legal meaning as I understand it; is that correct?

Justice OWEN. That's correct.

Senator EDWARDS. Can I ask you about another area?

Justice OWEN. Sure.

Senator EDWARDS. There are some cases where you have dissented. I will just mention some. Some have already been mentioned today and I will not go over those again. But they are primarily cases where a child or a family or someone was involved, bringing a case against either an insurance company or a manufacturer, or a corporate defendant of some kind. And in several of these cases that I am looking at now, you dissented, you disagreed. And in each case you sided with the defendants. Your ruling was against the person who brought the case, the individual who brought the case. One was a boy who brought a malpractice case from having surgery with serious complications, the *Weiner* v. *Wasson* case.

Another was the *Wilkins* v. *Helena Chemical Company*, where a farmer sued a seed manufacturer because the seeds he had bought did not work, they did not grow. Again, you sided with the chemical company.

Another was a worker's arm, the *Sonnier* v. *Chisholm-Ryder Company*, where a worker's arm was severed by a tomato chopper. He brought a case against the manufacturer. You dissented against the worker on behalf of the manufacturer.

And another was a man who was injured changing a tire when the tire exploded, and he brought a case against Uniroyal-Goodrich Tire.

And in some of these cases, and some of the other cases that have been mentioned during the course of the day, your dissent was pretty sharply criticized by those in the majority as—for different reasons.

Senator FEINSTEIN. Senator?

Senator EDWARDS. Yes.

Senator FEINSTEIN. Not only is your time up, but just so everybody knows, I am really going to be strict on the time limit because we have two other judges to go. It is 10 minutes after 4 and we are going to adjourn at 5.

Senator EDWARDS. Sure, that is fine. Let me get an answer to this question.

In these cases, all of which you dissented in favor of manufacturers companies against individuals, and in some of these cases at least there were some pretty sharp criticism of your decision, your dissent, I should say, as there were in some of the other cases that have been mentioned in the course of the day. I just wondered if you can point us to any cases where you have been criticized by your colleagues on the court for having gone too far in favor of an individual, a child, a family, who brought a case against a defendant, a manufacturer, a corporation, and if you do not know—in fairness to you, I know you cannot remember everything sitting here today—if you can tell me of any today, I would appreciate that. If you cannot, I will give you a chance to provide that information to us, because I would like to see it.

Justice OWEN. One case that comes to mind, and let me talk about it for a minute, is the *Saenz* v. Fidelity, I want to say its Guaranty, I'm not sure. It's Fidelity something. It was a Worker's Compensation case. And the plaintiff ended up settling with the Worker's Comp carrier. And she later contended that she had been defrauded into entering that settlement, and she sued for bad faith. And the court, a majority of the court ended up saying, for various reasons, that she didn't have a bad case cause of action. I agreed with that, but I dissented from the case because I said she's established fraud, and under the law she's entitled to rescind that Worker's Comp decision and go back and claim her benefits and start all over again. And a majority of the court disagreed with me and said, no, she does not get to rescind, she does not get to go back and start all over. And I have certainly ruled for—you've named four cases. I can name cases where I've ruled in favor of workers, consumers——

Senator EDWARDS. Can I interrupt you? I want to be very specific about, very specific cases where you have in fact been criticized. Some of these cases are cases where you have been criticized by your colleagues for going too far on one side of the equation.

I am just asking now whether you can point us to cases where—you have just indicated one case, where I believe you actually ruled with the majority against the jury verdict, if I remember correctly, the Sands case.

Justice OWEN. That's correct, that I thought she should get a remand and be able to set aside the agreement and proceed with her cause of action.

Senator EDWARDS. Let me just ask you if you can—I know my time is up and we need to let other people ask questions. If you have cases such as that, I would actually like to see them. I think all of us would like to see them.

Justice OWEN. You want me to find cases where my colleagues are criticizing—even if I—you don't care about the cases where I——

Senator EDWARDS. Or disagreed with you, disagreed with you is also OK.

Justice OWEN. So if there—you just want cases—you don't care if I ruled for the consumer, as long as it has to be a case where I was criticized for doing so. Is that the question?

Senator EDWARDS. No, ma'am. There are a series of cases where your colleagues on the court have been critical and strongly dis-

agreed with what you did where you ruled for one side. Some of the ones I have mentioned today and some of the ones that have been mentioned by others.

I am asking you are there cases on the other side of that equation?

Justice OWEN. Well, there are certainly cases where I ruled large verdicts for injured people. And I guess I don't remember if people criticized that or not, but we've upheld—and I've been part of it—upheld holding rules of law and verdicts for plaintiffs of significant rules of law, in statutes of limitations areas, of independent contractor area. I don't remember if they were dissents. I don't remember if I was criticized for doing it. But I have certainly——

Senator FEINSTEIN. What you are asking is that she send those cases to us in writing.

Senator EDWARDS. Right, that is correct.

Senator FEINSTEIN. If you would.

And thank you very much, Senator Edwards.

Senator EDWARDS. Thank you, Madam Chair.

Senator FEINSTEIN. Senator Brownback?

Senator BROWNBACK. Thank you Madam Chairman.

And thank you as well, Justice Owen for appearing here, and you have waited a long time for the hearing, 14 months, to be able to get in front of the Committee, so I am delighted that we are holding the hearing and going to be able to talk with you today about your qualifications, your background, and your service on the Circuit Court, which I hope we are able to affirm and move forward with.

If I could point out one thing, just in listening to the last discussion on the case, I believe that was *GTE* v. *Bruce*, the case you were talking about. I believe in that case you joined a unanimous court, ruling on the court, and affirming a $275,000 jury verdict for the female employees that had been sexually harassed; is that correct?

Justice OWEN. I did. I did.

Senator BROWNBACK. So we are talking about a unanimous opinion by the court. You wrote a concurring opinion on that, that did hold for the female employees; is that correct?

Justice OWEN. Yes. And the reason I wrote the concurring opinion, again, is we had just recently issued, in the last few years, right in front of this case, cases involving intentional infliction of emotional distress in the workplace, and I was concerned that people would pick up *GTE* v. *Bruce*, pick up our prior decision and say there's an inconsistency here. How could you have said in these cases it's not intentional infliction of emotional distress, and then list the things that I listed and say that is. And I wanted to try to square——

Senator BROWNBACK. You did not want to redefine the common law tort. You did not want to try to redefine that.

Justice OWEN. No, I did not. I was just trying to make sure that I was explaining how I could square our prior decisions, again which were fairly recent, in the employment context, with the specific evidence that was in this case.

Senator BROWNBACK. I just did not want anybody to get the impression that you ruled against the females employees or held against their case. You held for their case.

Justice OWEN. I did, absolutely.

Senator BROWNBACK. You upheld a $275,000 verdict in that case by the plaintiffs against the defendant. Is that correct?

Justice OWEN. That's correct.

Senator BROWNBACK. I think that is important because we sometimes lose it in the factual setting, that somehow you did not find this bad behavior. You did, and you agreed with the court that this was illegal, wrongful behavior and that jury verdict should be upheld, and I think that is important for us to get clear.

Another thing I want to go to, because a lot of the outside groups that really try to derail nominations in this town and pick apart people's records who are very well qualified, and you certainly are well qualified for this position, is the parental notification Texas law, and we visited this a couple times today. But I just want to make sure that I am clear and that we are all clear on this.

The only cases that got appealed on up to the Texas Supreme Court were those where the judicial review had been denied. In other words, the easier cases were taken at the lower court, and at the lower court, if a girl had come forward, wanted an abortion, wanted not to have her parents informed, the court had already ruled yes, you can do that. The only cases that were appealed were the ones where that had been denied. Is that correct?

Justice OWEN. That's correct. If either the Trial Court or the intermediate court granted the bypass, that was the end of it.

Senator BROWNBACK. So if the judicial bypass was granted, motions granted, it moves on forward. And if I understand your numbers correctly, about 600 of those were done at the lower court level in the time period we have been talking about in your service in the Texas Supreme Court.

Justice OWEN. We know that at least 650 bypass proceedings have occurred. There may be a lot more. We just don't know. But we know at least that many bypass proceedings have occurred.

Senator BROWNBACK. Where the court ruled that the girl did not have to inform he parents to obtain the abortion; is that correct?

Justice OWEN. Well, we don't know because they're confidential, so we don't know the outcome. Out of the 650, only 10 girls have appealed to my court.

Senator BROWNBACK. So somewhere in there, but out of 650, 10 were appealed to the Texas Supreme Court where judicial bypass had been denied?

Justice OWEN. That's correct.

Senator BROWNBACK. And it was a requirement that it had to have been denied. So you had 10 cases that got in front of you of 650. So you are looking at a small percentage. You are looking at less than 2 percent of the cases that get to the Texas Supreme Court.

And in those 10 cases, now, how did you rule; what was your opinion on the 10? Do you recall how you split on those?

Justice OWEN. Yes, I do. The first *Jane Doe* came to our court twice, *Jane Doe* 1. The first time that she came, I agreed with the majority of the court—everybody on the court actually agreed that

she did not meet the statutory standard. But I agreed with the majority of the court was because ''mature and sufficiently well informed'' was such a loose definition, and trial courts could apply it. That could mean so many different things to so many different trial courts that we needed to put some parameters on it. And because she didn't have the benefit of that, she should be remanded to the trial court and get anther—have another hearing.

So if the trial court had granted her a bypass on the remand, I would never have seen the case again. The trial court denied the bypass again. The Court of Appeals again denied it. And the second go-round I said it was a close call, but I looked at the record, and under our evidentiary standards I said there's some evidence to support what the trial court did, so I would have denied it and the majority granted it.

Doe 2. I voted with the majority to remand it for the same types of reasons, only this time it was a best interest issue. We don't know what happened to Doe 2. We never heard from her again.

Doe 3. I voted to deny the bypass.

Doe 4. I agreed with the majority of the court that she did not meet the statutory standard.

And then Doe 10, which was the last Doe to come to our court, I agreed unanimously—or the court did, that she was entitled to the bypass as a matter of law. And I think I've mentioned this before today, that there were five other Does that came in between Doe 4 and Doe 10, where the court did not write an opinion. We affirmed the lower judgment of the courts, and as I explained, it takes at least six voted to do that. No dissents were published or were noted. If they had been noted, we would have had to have wound up and said, who vote which way?

But I think it's a fair inference, given our opinions on either side of those five Doe cases, that these probably weren't close cases or somebody would have written something.

Senator BROWNBACK. Because of the ten cases, these were already 10 cases where two courts, the trial court and the appellate court had already voted, already ruled to deny judicial bypass. So they had said, no, you cannot bypass your parents. Two courts had already ruled that in these 10 cases; is that correct, in all 10 of the cases?

Justice OWEN. Correct, in all of them, yes.

Senator BROWNBACK. And then in the 10 that came to you, and on to the Texas Supreme Court, you and the court split on some of these cases and voted to remand to the lower court, to look at again to see if they should grant the judicial bypass, and in a majority of the cases you agreed with the lower two courts in essence that a judicial bypass should not be granted. Would that be a correct characterization of the——

Justice OWEN. That's correct, and I believe that out of the 12 cases, I had a different view of the judgment than the majority did in 3 cases, so I was with the majority I guess that means 9 out of 12 times in terms of the judgment.

Senator BROWNBACK. Just it seems to me, to make something about this in your record as being outside the philosophical mainstream is really a far stretch, where you have 600 some cases, 10 that have been ruled against a judicial bypass at two lower courts,

and then it comes in front of you, and the court splits and you vote with the majority most of the time, and some of the cases are remanded for this reconsideration. Others are not. It just seems to striking that this would somehow say that you should be set apart on the issue of abortion, when you are interpreting the law in tough cases, is what these cases amounted to, and I would hope that my colleagues would look at the factual setting here and how you have ruled, I think very common sense and very broad-based and non-ideologically in these cases. Some cases you voted to remand, for it to be looked at again for judicial bypass, to other cases not. I think that is a very fair-minded way on your part.

Let me just say, Justice, I thank you for putting yourself through this process. You are extraordinarily qualified for this position. And to wait for the 14 months that you have, and then go through having narrow points on cases picked apart and your record maligned, abused, and then trying to somehow to point you out as an ideologue in any instance is totally unfair to you and something you did not need to go through, and could have remained absent from, but yet you have gone ahead and submitted yourself to this process to be able to serve the public, and I appreciate you doing that. You did not have to do that. A lot of people do not like going through these sort of process, and I do not blame them. But thank you for staying in here and staying in the process. And I think you are going to make an outstanding Circuit Court Judge. I hope we can move this on through the Committee process and through the floor.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you, Senator.

Senator Cantwell?

Senator CANTWELL. Thank you, Madam Chair.

And thank you, Justice Owen, for your time today and patience in answering these many questions.

I think several of my colleagues have brought up the specific issues relating to some of your decisions on parental consent. And I think some of my colleagues have also posed broader questions on the issue of privacy. But I am hoping that I can expound a little bit on and understand your judicial philosophy on these important issues. I think the issues of privacy are growing in magnitude in our country. Whether it is government intrusion in personal decisions, or government acquiring information about activities of American citizens, or businesses handling some of your most personal information, this issue is just growing in magnitude. So understanding your broad philosophy on this is, I think, very helpful for this Committee and for the Congress.

My first question is really about your general thoughts on the right to privacy. Do you believe that that right exists in the Constitution, and where you think that right to privacy does exist in the Constitution?

Justice OWEN. Well, of course, I'm guided by the U.S. Supreme Court cases that have recognized the right to privacy. I think *Griswold* is one we discussed earlier that clearly recognizes that. And there are cases from my court that construe the Texas Constitution as having a right to privacy.

Senator CANTWELL. I am asking you whether—we have had lots of nominees come before the Committee, who have recited the same

things about following precedent and the recognition in various decisions. But after being confirmed, they have not followed those exact decisions or interpretations. That is why I am asking the broader question of whether you believe that the Constitution guarantees a right to privacy.

Justice OWEN. Well, I think—that's the law of the land, and there's nothing in my personal beliefs at all that would keep me from understanding and applying that law.

Senator CANTWELL. And where do you think that exists within the Constitution?

Justice OWEN. I wish I—because I do not want to misstep here, I would like to have some of the U.S. Supreme Court precedent in front of my on that particular issue because that is just—I don't want to—that's not a question I would answer as a judge off the cuff if I were deciding a case. I would certainly go pull the U.S. Supreme Court precedent. I would pull the Constitution. I would sit down and read it, and then give an answer.

Senator FEINSTEIN. Senator, if you will excuse me just for a moment, was not your question, does the Supreme Court guarantee a right to privacy?

Senator CANTWELL. My question was about the Constitution.

Senator FEINSTEIN. I mean the Constitution guarantee a right to privacy?

Senator CANTWELL. Yes.

Senator FEINSTEIN. You cannot answer that yes or no?

Justice OWEN. Well, yes, clearly it does. The U.S. Supreme Court has said it does. That's been the law for a long, long time. I thought that she was asking me specifically, can you tell me where that is derived from, the specific language——

Senator CANTWELL. I am asking whether you believe that there exists such a right to privacy in the Constitution, because in interpreting these cases—and I will follow up with some of your other cases and comments—that is the issue. We are trying to find out whether you will follow precedent, and obviously in a variety of cases you have dissented, and dissented in such a way that it has left a question mark, at least in my mind, and I think perhaps some of my colleagues. Questions as to why you dissented and some of the issues that you brought into the dissent.

So this particular issue,—we have had nominees who have said that they believe in upholding a woman's right to choose, and then when it came to major decisions, went in an opposite direction.

That is why I am trying to understand your personal belief in this right.

Justice OWEN. Well, again, I don't let my personal views get into it, but I very clearly pointed out at several junctures, particularly in my Doe 1 case, that there is a right to choose recognized by the U.S. Supreme Court. It applies to minors, that you cannot prevent a minor from going to court without the knowledge of her parents to get a judicial bypass. I pointed out that I had concerns about some of the Texas Family Code Provisions in the divorce context, when a minor—a parent would be required to notify another parent under a divorce decree, that that might lead to some of the problems under the sexual, physical or emotional abuse. I said that that would probably be unconstitutional. I think I had clearly dem-

onstrated that I have thought about the U.S. Supreme Court decisions and how they apply in this context, and also how they might apply under other Texas laws that impact this area, and that I am willing and able to follow it.

Senator CANTWELL. Well, let us go specifically to the Doe cases. I am sorry, I do not know exactly—what you said earlier about the Doe cases. In Doe 1, you wrote that a woman seeking a judicial bypass should demonstrate that she has considered philosophical, social, moral and religious arguments that can be brought to bear when considering abortion. And that you were following the decision of the Supreme Court in *Casey*. However, in *Casey* the court ruled that states can enact rules designed to encourage a woman to know that there are philosophical and social arguments of great weight that can be brought to bear in considering an abortion, but there is never any mention of religious implications.

Justice OWEN. That is in *H.L.* v. *Matheson*. The reference to religion is in *H.L.* v. *Matheson*. I think they said—I can give you the cite, but they talked about—let me see if I can read it here for you, that that was a factor that they said that there are religious concerns. Let's see. "As a general proposition that such consultation"——

Senator CANTWELL. That is not in *Casey*.

Justice OWEN. It is in the U.S. Supreme Court decision *H.L.* v. *Matheson*. In my opinion, these were—I hope you understand, were drafted fairly quickly. I did cite *H.L. Matheson* in my Doe 1 decision, not on this point. I cited *Casey* and I cited the second decision in *City of Akron*. And I cited *Matheson* on another point, but in *Matheson* they talk about that for some people it raises profound moral and religious concerns, and they're talking about the desirability or the State's interest in these kinds of considerations in making an informed decision. They don't say you have to have religious beliefs, and I don't for a minute advocate that. The only point I was making——

Senator CANTWELL. There was also a detail in your Doe I dissent that basically said that you did not think that a physician would be the person who could give that kind of input or advice to a woman. So I think you can see our concern. You are dissenting in these decisions about a major issue of privacy, and you are injecting, where others on the court did not, this issue of religion. On parental notification, I mean these laws have been fought and passed by legislatures with an eye to the extreme cases. Obviously, we have talked about the abuse issues, but now we are saying to a young woman that she has to sit down, not with her doctor, but some religious leader, and have an explanation about this issue before she is going to have the ability to get the approval to proceed without parental notification.

Justice OWEN. Well, let me make sure that we're talking about the same thing. If there's abuse, this all goes out the window. It's a separate ground. You don't——

Senator CANTWELL. Say it is two 18-year-old cousins.

Justice OWEN. I am sorry?

Senator CANTWELL. Say it is two 18-year-old cousins.

Justice OWEN. Well, 18-year-olds are not covered by the statute. Oh, you mean that she is consulting. Again, the U.S. Supreme

Court has talked about getting counseling from a qualified source, and it was not me, but Justice White——

Senator CANTWELL. What if I am not religious?

Justice OWEN. I am not saying you have to get religious counseling. I never advocated that.

Senator CANTWELL. Well, who delivers the counseling?

Justice OWEN. I have advocated that you have the have religious counseling. What the U.S. Supreme Court said, and what I followed, what I agreed was a part of the definition of information, that it is not just information about the physical impact on the girl or the physical risks. And what Justice O'Connor wrote for the Court was that there are profound—and that's her word, not mine—philosophical and moral and other considerations that go into an informed choice, as in the——

Senator CANTWELL. That is exactly right, and that is where in your dissent, you threw in the word "religious considerations." So I am trying to figure out——

Justice OWEN. That came from *H.L.* v. *Matheson*.

Senator CANTWELL. And you believe that religious consideration it should be a required factor. If you were the majority how would the statute have been implemented?

Justice OWEN. It would have been implemented the that girl who is seeking an abortion should indicate to the trial court an awareness that there are arguments and issues. She doesn't have to agree with any of them. She doesn't have to explain what her philosophy is. She doesn't have to rationalize or justify her philosophy or her moral code or her religion if she has any.

But all that I said was, in what I think is a fair reading of what Justice O'Connor said, is we're talking about awareness that there are arguments out there on both sides, philosophical, moral, and in *H.L.* v. Matheson arguments, religion. If she doesn't have religious, that's no business of the courts. The only question is, if she does, has she thought about her own beliefs. Is she aware of the philosophical debate, the moral debate? Just the issues, not—she doesn't have to get into does she agree with them, and debate it with the judge, but simply is she aware——

Senator CANTWELL. Is the doctor capable of giving that advice or not?

Justice OWEN. I think it depends. I think it depends. I think it depends on—I'm not sure she has to identify where she got—where she obtained her understanding of the philosophical and other issues. That doesn't necessarily have to be from a counselor. As long as she exhibits an understanding of it. I think she may need a counselor to give her some helps on her options, the physical risks, that sort of thing. But I'm not advocating that she have any particular set of values or morals or religious beliefs.

Senator CANTWELL. Madam Chair, I see my time has expired. So I do not know if we are going, on——

Senator FEINSTEIN. Do you have one more question, because this will be the last question.

Senator CANTWELL. I do, just quickly.

Justice Owen, obviously, if you are confirmed to the Fifth Circuit, you will be responsible for determining when a law is in fact the types an undue burden on a woman's right to choose. Given your

record in this area, you know, I have some questions about your ability to recognize when a statute impinges on the right to privacy, particularly given some of the laws that are still on the books in the Fifth Circuit. So I guess I am asking you, do you believe that you really have the ability to recognize what the Court recognized in *Casey*, that there are some law that can prevent a woman from obtaining abortion just as surely if abortion were outlawed. Do you think you are going to be able to recognize that?

Justice OWEN. Senator, I do. I would point to you again other places in my Doe 1 decision, where I have recognized that in some situations even a notification statute can amount to a consent statute but it is because of the particular girl's situation, and I quote the Supreme Court on that.

As I pointed out, I expressed concern about the impact, the undue burden on a minor's right to choose that might occur because of particular provisions in our family code that deal with divorce decree. So, yes, I do believe that I can apply *Casey* and Akron and the other decisions of the U.S. Supreme Court, I believe faithfully.

Senator CANTWELL. Thank you.

Thank you, Madam Chairman.

Senator FEINSTEIN. Justice Owen, believe it or not, this is going to come to an end, and you have held up very well, and I want to say the audience has held up very well. I did not note anybody going to sleep. And we have two additional judges to do, so I am going to excuse you and thank you very much.

Justice OWEN. Thank you.

Senator FEINSTEIN. And ask the two other judges to please come forward, and those leaving the room, if you could do so quietly, we would be very appreciative.

Justice OWEN. Thank you, Senator Feinstein, very much.

[The biographical information for Justice Owen follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Priscilla Richman Owen; prior to marriage, I used my maiden name Priscilla Richman

2. Address: List current place of residence and office address(es).

   Residence:
   Austin, Texas

   Office:
   Supreme Court of Texas
   201 West 14th Street
   Austin, Texas 78701

3. Date and place of birth.

   October 4, 1954
   Palacios, Matagorda County, Texas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Divorced.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   University of Texas at Austin
   Fall 1972-Spring 1973

   Baylor University
   Summer 1973-Summer 1975
   Bachelor of Arts, cum laude, awarded May 14, 1976 (pursuant to a three-year plan with the Baylor University School of Law)

   Baylor University School of Law
   Fall 1975-November 1977
   Juris Doctor, cum laude, awarded November 11, 1977

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment:

1976-1977
Sheehy, Lovelace & Mayfield
Waco, Texas
Law clerk

1978-1994
Andrews, Kurth, Campbell & Jones, subsequently Andrews & Kurth L.L.P.
Associate; became a Partner in January 1985

1995-present
Justice, Supreme Court of Texas

Board Memberships:

1995-present
Texas Hearing & Service Dogs, Member of the Board

1996-present
Litigation Section of the State Bar of Texas, Ex Officio Member of the Council

1997-present
A. A. White Dispute Resolution Institute, Member of the Board

1998-present
Federalist Society, Houston Chapter, Member of the Board

1999- present
Baylor University Alumni Association, Member of the Board and Executive Committee
1999-2000 Member of the Budget and Finance Committee

2000-present
Federalist Society, Austin Chapter, Member 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.

Gibson, Dennison, Ross, Williams Memorial Scholarship
(awarded while attending Baylor University School of Law)

Baylor Law Review
Baylor University Outstanding Young Alumna, 1995
Baylor Young Lawyer of the Year, 1995
Waco Independent School District Distinguished Alumni, 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.

American Law Institute
American Bar Association
State Bar of Texas
American Judicature Society
American Bar Foundation, Fellow
Houston Bar Foundation, Fellow
Houston Bar Association
Supreme Court of Texas liaison to Judicial Section Long Range Planning Committee 1999 to present
Supreme Court of Texas liaison to Family Law 2000-1995 to present
Supreme Court of Texas liaison to Court-Annexed Mediation Task Force-1995 to present
Supreme Court of Texas liaison to statewide committees regarding legal services to the poor and pro bono legal services-1996 to present
Supreme Court of Texas liaison to Gender Bias Reform Implementation Committee-1995 to 1998
Supreme Court of Texas liaison to Judicial Evaluation and Performance Standards-1995 to 1996
Supreme Court of Texas liaison to Judicial Efficiency Committee Task Force on Staff Diversity-1996 to 1997

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organization that is active in lobbying.

I am a member of St. Barnabas Episcopal Mission in Austin, Texas.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All state courts in Texas by virtue of my admission to the State Bar of Texas
admitted February 3, 1978
United States Court of Appeals for the Fourth Circuit
admitted September 20, 1990 to present

United States Court of Appeals for the Fifth Circuit
admitted December 21, 1981 to present
United States Court of Appeals for the Eighth Circuit
admitted June 10, 1986; I paid a $10 fee March 26, 2001 to become current
United States Court of Appeals for the Eleventh Circuit
admitted December 21, 1981; expired because of nonrenewal; the Clerk of the court does not have a record of when
United States District Court for the Southern District of Texas
admitted March 8, 1982; expired December 31, 2000 because of non-renewal
United States District Court for the Western District of Texas
admitted November 8, 1988 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None of the papers that I have prepared have been formally published. I have prepared a number of papers on issues that relate to natural gas litigation for various seminars that were included in course materials for those seminars. (I have found a copy of only two of those papers.) I have also prepared and presented many iterations of the Supreme Court of Texas Update, which summarizes decisions and cases pending before my court and has been included in continuing legal education course materials. (A representative copy is attached.) I have also prepared papers on interlocutory appeals in Texas and on appellate procedures that have been included in continuing legal education course materials and local bar newsletters. (I do not have a copy of some of these papers.) I also prepared an article on judicial selection in Texas for the Denton County Bar Association Newsletter.

I have not given a speech on issues involving constitutional law, other than to summarize cases decided by the Supreme Court of Texas while presenting Supreme Court of Texas Updates. The only speeches that I have given on legal policy were extemporaneous, and there were no press reports.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good. My last physical was on April 2, 2001.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was elected as a Justice on the Supreme Court of Texas in November 1994, and have served from January 1, 1995 to the present.
The Supreme Court of Texas is the state court of last resort in Texas on civil matters, and it

has discretionary jurisdiction.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Ten significant opinions that I have written:

1) *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)
2) *In re City of Georgetown*, 2001 WL 123933 (Tex., February 15, 2001)
3) *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668 (Tex. 1999)
4) *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423 (Tex. 1999)
5) *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1999)
6) *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998)
7) *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998)
8) *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1 (Tex. 1998) (Owen, J., dissenting)
9) *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex. 1998)
10) *Board of Trustees v. Toungate*, 958 S.W.2d 365 (Tex. 1997)

2) None of my decisions have been reversed or criticized by the United States Supreme Court.

3) Opinions that I have authored on state or federal constitutional issues include:

FM Properties Operating Co. v. City of Austin, 22 S.W.2d 868 (Tex. 2000) (Owen, J., dissenting)
Stier v. Reading & Bates Corp., 992 S.W.2d 423 (Tex. 1999)
Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1 (Tex. 1998) (Owen, J., dissenting)
In re D.A.S., 973 S.W.2d 296 (Tex.1998)
Board of Trustees v. Toungate, 958 S.W.2d 365 (Tex. 1997)
Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997)
Enron Corp. v. Spring Indep. Sch. Dist., 922 S.W.2d 931 (Tex. 1996)
Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995) (Owen, J., dissenting)

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) (Hecht, J., concurring and dissenting)
Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362 (Tex. 2000)

Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849 (Tex. 2000) (Hecht, J., dissenting)
State v. $217,590, 18 S.W.3d 631 (Tex. 2000)
Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000)
Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999)
In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998)
Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998) (Enoch, J., concurring and dissenting)
WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998)
Operation Rescue-National v. Planned Parenthood of Houston, 975 S.W.2d 546 (Tex. 1998)
Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998)
Appraisal Review Bd. of Galveston County v. Tex-Air Helicopter, Inc., 970 S.W.2d 530 (Tex. 1998)
Dawson-Austin v. Austin, 968 S.W.2d 319 (Tex. 1998)
Worthy v. Collagen Corp., 967 S.W.2d 360 (Tex. 1998)
Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (1998)
Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454 (1997)
Vinmar, Inc. v. Harris County Appraisal Dist., 947 S.W.2d 554 (Tex. 1997) (Hecht, J., dissenting)
Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997)
CMMC v. Salinas, 929 S.W.2d 435 (Tex. 1996)
Romero v. State, 927 S.W.2d 632 (Tex. 1996)
Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996)
Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996)
CSR Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996)
Central Appraisal Dist. v. W. V. Grant Evangelistic Ass'n, Inc., 924 S.W.2d 686 (Tex. 1996)
Buys v. Buys, 924 S.W.2d 369 (Tex. 1996)
Ex parte Swate, 922 S.W.2d 122 (Tex. 1996) (Gonzalez, J., concurring)
Continental Airlines v. Kiefer, 920 S.W.2d 274 (Tex. 1996)
Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995) (Hecht, J., dissenting)
Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) (Hecht, J., concurring and dissenting)
University of Texas Medical Sch. v. Than, 901 S.W.2d 926 (Tex. 1995)
Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995)
National Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769 (Tex. 1995)
Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504 (Tex. 1995)

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;

Response:
I did not serve as a clerk to a judge or court.

2. whether you practiced alone, and if so, the addresses and dates;

Response:
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;

Response:

Upon graduation from law school in November 1977, I practiced with Andrews, Kurth, Campbell & Jones, commencing January 2, 1978. At that time the firm was located in the Exxon Building in downtown Houston. The firm moved to 600 Travis, Suite 4200, Houston, Texas in approximately January 1981.

I was an associate until January 1985, when I became a partner. At some point, the firm changed its name to Andrews & Kurth L.L.P. I remained with Andrews & Kurth until December 31, 1994, when I became a Justice on the Supreme Court of Texas on January 1, 1995.

The current address of Andrews & Kurth L.L.P. is
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4200

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Response:

My private practice was primarily commercial litigation. It included

appearances in state and federal courts in Texas and other jurisdictions at the trial and appellate levels. I also represented clients in a few arbitrations. Most of the cases in which I was involved were complex matters, although I did handle a number of small cases and represented some individuals.

I handled only a few personal injury matters.

I practiced before the Federal Energy Regulatory Commission in connection with several matters, and I had limited involvement in proceedings before the Texas Railroad Commission.

From time to time throughout my practice, I assisted corporate securities attorneys in drafting SEC filings for a client that I represented. I also represented a client and some of its former officers in a non-public SEC insider trading investigation.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I was involved in oil and gas litigation throughout my practice. The majority of my clients were companies that were involved in the oil and gas industry in some way including interstate and intrastate natural gas pipeline companies, utilities, natural gas and oil producers, and an oil trader. Other clients included banks, a national accounting firm, construction companies, a hospital, a manufacturer, and some 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 appeared in court frequently.

2. What percentage of these appearances was in:

(a) federal courts;

Approximately 50% or more

(b) state courts of record;

Approximately 50% or less

(c) other courts.

None.

3. What percentage of your litigation was:

(a) civil;

My practice was devoted solely to civil law.

(b) criminal.

None.

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.

Not including final summary judgments and temporary injunction proceedings that essentially resolved the merits, I participated in at least nine cases that were tried to a verdict. I was sole counsel in four of those matters, co-counsel in one, and associate counsel in four.

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 name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) *Valero Interstate Transmission Company v. Transcontinental Gas Pipe Line Corporation*, Civil Action No. H-90-3939 in United States District Court for the Southern District of Texas, Houston Division

I was lead counsel for Transco, an interstate natural gas pipeline. The FERC had granted Transco authority to abandon purchases of gas from Valero, another interstate pipeline, after the parties' contract expired. The contract contained a minimum bill provision, and Valero sued Transco seeking to recover substantial sums (I believe it was in excess of $2,000,000, but I am not certain) for the fixed-cost portion of its minimum bill for periods of time both before and after the abandonment authorization. Transco asserted that it had no liability since the FERC granted abandonment retroactive to the date of contract expiration, and the Fifth Circuit had upheld the retroactive aspect of the abandonment. (I had input in the briefing before the Fifth Circuit on that issue.) Transco also asserted that a letter agreement with Valero resolved the dispute.

The case was originally filed in San Antonio in 1988. I represented Transco from the outset, and filed a motion to transfer which was ultimately granted. I drafted all pleadings and briefs, and represented Transco at all hearings.

Summary judgment in favor of Transco was granted on June 10, 1993, and the court issued an unpublished memorandum opinion on the same date. There was no appeal.

District Court:

Hon. Ewing Werlein, Jr.

Co-Counsel:

The pleadings list Ross Spence and Anne Hamman of Andrews & Kurth as my co-counsel, but to the best of my recollection, they did not participate in the case. Ms. Hamman no longer practices law. Mr. Spence's current address is:

W. Ross Spence
Crady, Jewett & McCulley, L.L.P.
Suite 1400, Two Houston Center
909 Fannin
Houston, Texas 77010
(713) 739-7007

Opposing Counsel:

R. Doak Bishop
(Fomerly of Hughes & Luce)
King & Spalding
1100 Louisiana, Suite 3300
Houston, Texas 77002-5219
(713)751-3200

2) *Lively Energy & Development Corp. v. Lone Star Gas Company, A Division of Enserch Corp.*, No. 3096 in 112th District Court, Sutton County Texas

Lively, a natural gas producer, sued my client Lone Star, an intrastate pipeline company, for breach of contract contending that Lone Star had failed to take or to pay for a minimum quantity of gas under so-called "take-or-pay" provisions of the parties' agreement. Lively sought several million dollars plus interest and attorney's fees. Suit was filed on April 9, 1985, and I represented Lone Star until all appeals were exhausted on December 12, 1990

Alfred H. Ebert, Jr. of Andrews & Kurth was designated lead counsel. I conducted most of the discovery and prepared virtually all pleadings, motions, and briefs. At trial, I presented and cross-examined witnesses, including Lively's chief expert witness. The case began as a jury trial, but about a week into the trial, the parties agreed to dismiss the jury and continue the case as a nonjury trial.

The trial court rendered a judgment against Lone Star on February 5, 1987 for in excess of $4,000,000 plus interest and attorney's fees. I prepared and presented all post-verdict motions and requests for findings of fact and conclusions of law and represented Lone Star at all post-verdict hearings. Lone Star successfully appealed:

Lone Star Gas Company v. Lively Energy & Development Corp., No. 04-87-00261-CV in the Fourth District of Texas at San Antonio (unpublished opinion dated October 11, 1989):

I drafted all appellate briefs. I was to argue the case but did not because I was slated to and did argue another case for another client before the United States Court of Appeals for the District of Columbia Circuit.

The court of appeals reversed the trial court and rendered judgment for Lone Star.

Lively filed an application for writ of error in the Supreme Court of Texas, and I authored all briefs on behalf of Lone Star in that court. The Supreme Court of Texas denied the writ on December 12, 1990.

Trial Court:	Court of Appeals Justices:
Hon. Brock Jones	Justice David Peeples (I have been unable to locate a copy of the opinion to determine who the other two justices were)

Co-Counsel:

Alfred H. Ebert, Jr.
Andrews & Kurth L.L.P.
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4150

Charles J. Wittenburg
Davis, Hay, Wittenburg, Davis & Caldwell, L.L.P.
One East Twohig, Third Floor
P.O. Box 27
San Angelo, Texas 76902-0271
(915) 658-2728

Opposing Counsel:

Rex H. White Jr.
812 West 11th Street, Suite 203
Austin, TX 78701-2022
(512) 472-7041

Jon David Ivey
Baker & Hostetler
1000 Louisiana, Suite 2000
Houston, Texas 77002-5008
(713)751-1600

3) *Felmont Oil Corporation and Essex Offshore, Inc.*, Opinion Nos. 245, 245-A, Docket No. CI84-10-000 before the Federal Energy Regulatory Commission; 33 F.E.R.C. ¶ 61,333 (1985), 34 F.E.R.C. ¶ 61,296 (1986)

I represented Transcontinental Gas Pipe Line Corporation, an interstate natural gas pipeline company, who purchased gas from Felmont and Essex (collectively Felmont). Some of Felmont's gas was price-regulated under the Natural Gas Act, and that price was substantially lower than then-prevailing market prices and Transcol's weighted average cost of gas. Transco's contract to purchase this gas had expired, but under the Natural Gas Act, Felmont could not discontinue sales of regulated gas unless it obtained abandonment authority from the FERC. Felmont filed for abandonment on October 7, 1983, and Transco opposed that request. I represented Transco from the beginning of this proceeding until its conclusion in approximately 1986.

I prepared all the briefing and other submissions in this matter, both to the presiding administrative law judge and the Commission. I prepared and presented witnesses at the hearing and cross-examined Felmont's witnesses. The FERC granted limited abandonment. It held that Transco had the right to purchase up to the full quantities available from Felmont, but that Felmont could market to others gas that Transco did not nominate.

The Commission's initial decision, Opinion No. 245, was issued on December 9, 1985. Its opinion on rehearing, Opinion No. 245-A, was issued February 28, 1986.

Some of the intervenors in this proceeding appealed to the United States District Court for

the District of Columbia Circuit. Transco did not take an active role in that appeal. The D.C. Circuit reversed and remanded, directing the FERC to provide a clearer explanation of its reasoning. *Consolidated Edison Co. of New York v. FERC*, 823 F.2d 630 (D.C. Cir. 1987).

FERC Commissioners:

Raymond J. O'Connor, Chairman
A. G. Sousa
Charles G. Stalon
Charles A. Trabandt
C. M. Naeve

Co-Counsel:

Robert G. Hardy
(Formerly of Andrews & Kurth's Washington office)
Cullen and Dykman
1225 Nineteenth Street, N.W., Suite 320
Washington, DC 20036
(202) 223-8890

Opposing Counsel:

Stephen A. Herman
(formerly of Kirkland & Ellis)
Senior Vice President and General Counsel
PG&E Corporation
One Market, Spear Tower, Suite 400
San Francisco, CA 94105
(415) 817-8200

Intervenor's Counsel:

Public Service Commission of the State of New York
Richard A. Solomon
(Formerly of Wilner & Scheiner)
Morrison & Hecker L.L.P.
1150 Eighteenth St., N.W.
Washington, D.C. 20036-3816
(202) 785-9100
(retired partner)

Consolidated Edison Company of New York
William I. Harkaway
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 393-5710
(No current information)

Shell Western E&P Inc.
Thomas G. Johnson
Shell Western E&P
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001
(713) 241-4742
(No current information)

Philadelphia Electric
Robert A. MacDonnell
(Formerly of Obermeyer, Rebman, Maxwell & Hippel)
Montgomery, McCracken, Walker & Rhoads, L.L.P.
123 South Broad Street
Philadelphia, PA 19109
(215) 772-7620

FERC Staff
Richard E. Kelly
Office of the General Counsel
Federal Energy Regulatory Commission
Washington, D.C.
(202) 357-8000
George G. Garikes
Kenneth M. Ende
(No current information)

4) *United States of America v. Great Plains Gasification Associates, et al.*, No. A1-85-237 in the United States District Court for the District of North Dakota, Southwestern Division

I was lead counsel for Transco Coal Gas Company and Transcontinental Gas Pipe Line Corporation, two of the defendants in this case. This matter arose in connection with the Great Plains Coal Gasification project, which was constructed under the Syn-Fuels Act. Transco Coal Gas and its partners built the coal gas plant and entered into agreements to sell the output to the four parent companies of the partners, which included Transcontinental. The partners in the coal gas plant defaulted on their federally guaranteed, non-recourse loan and terminated their participation in the project. The United States took over the project. Litigation between the United States and the pipeline purchasers, including Transcontinental, ensued over a number of issues. The principle issue was whether the pipelines were entitled to assurance under the UCC from the United States that it would operate the coal gas plant for the full twenty-five year terms of the gas contracts. The coal gas was priced well above market prices for natural gas, and the economic significance of this matter to the pipelines and their customers was substantial. The United States filed suit on August 29, 1985, and I represented the Transco entities until this case was concluded in 1987.

I conducted all discovery on behalf of Transco, prepared all pleadings and briefs, and appeared and presented argument at a lengthy hearing on the United States' motion for summary judgment.

The district court rendered summary judgment against the defendants, including

Transcontinental, on June 30, 1986 after issuing an unpublished memorandum and order on January 14, 1986. The defendants appealed, unsuccessfully:

United States of America v. Great Plains Gasification Associates, 819 F.2d 831 (8th Cir. 1987)

The Eighth Circuit affirmed the district court's judgment. I participated with counsel for the other defendants in drafting all appellate briefs, and filed a separate motion for rehearing on behalf of Transcontinental.

District Court:

Hon. Patrick A. Conmy

Co-Counsel:

John D. Kelly
Bogel, Branther, Kelley, Knutson, Weir & Bye, Ltd.
P.O. Box 1389
Fargo, North Dakota 58107
(701) 237-6983
(Former address)
Hanft & Fride
1000 U.S. Bank Place,
130 West Superior Street
Duluth, Minnesota 55802-2094
(218) 722-4766
(I am not certain this is correct)

Counsel for Co-Defendants:

Scott J. Davis
Robert A. Helman
Mayer, Brown & Platt
190 South La Salle Street
Chicago, IL 60603-3441
(312) 782-0600
(Counsel for Natural Gas Pipeline Company of America)

Steven R. Hunsicker
Baker Botts
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400
202-639-7700
(Counsel for Tennessee Gas Pipeline Company)

George L. Saunders, Jr.
(Formerly of Sidley & Austin)
Saunders & Monroe
3160 NBC Tower
455 North Cityfront Plaza Drive
Chicago, IL 60611
312-645-6000
(Counsel for ANR Pipeline Company)

Opposing Counsel:

Dean S. Cooper
Civil Division
U. S. Department of Justice
P. O. Box 875
Ben Franklin Station
Washington, D.C. 20004
(Former address)
Associate General Counsel
Federal Home Loan Mortgage Corporation
8200 Jones Branch Drive
McLean, VA 22102
703-903-2600
(This may not be correct)

Nicholas Spaeth
Assistant Attorney General
Bismarck, North Dakota 58505
Counsel for Intervenor, the State of North Dakota
(Former address)
Cooley Godward L.L.P.
Five Palo Alto Square, 3000 El Camino Real
Palo Alto, California 94306-2155
(650) 843-5000

5) *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, United States District Court for the Western District of North Carolina

This suit was filed in May 1977 by CF Industries, Inc. against my client Transco. I began representing Transco in January 1978 as one of the first cases that I worked on upon graduation from law school. The case was about the natural gas shortage that occurred in the 1970's on interstate pipelines, and specifically, the curtailment of gas supplies to a fertilizer plant owned or operated by CF. CF alleged that it was a third party beneficiary of a contract Transco had with its gas distributor, promissory estoppel, negligent performance of contract, and fraud.

The case was tried to a jury in the fall of 1978. I assisted lead counsel in the courtroom throughout the trial, but did not take an active role in front of the jury. I was involved in drafting pleadings and in briefing.

The district court rendered a judgment on the jury's verdict on April 25, 1979, awarding CF in excess of $23,000,000, prejudgment interest of about $2,000,000, and postjudgment interest.

I played a significant role in the post-verdict pleadings and briefing in the district court. Transco and CF appealed the district court's judgment to the Fourth Circuit. Transco also instituted proceedings before the FERC, which are described in paragraph 6) below.

CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp., Nos. 79-1359 and 79-1366 in the United States Court of Appeals for the Fourth Circuit

I assisted in drafting the briefs on the merits of the appeal, and I was the principle author of the section on federal preemption and the effect of Transco's certificates of public convenience and necessity and its FERC-approved tariffs on curtailment liability.

In the Fourth Circuit, Transco filed a motion to refer issues to the FERC under the doctrine of primary jurisdiction. I was one of the principle authors of the briefs on this issue. The motion to refer was argued before the Fourth Circuit, and that motion was granted in a published opinion, *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 (4th Cir. 1980) (before Butzner, J.; Field, J.; Widener, J.)

After lengthy proceedings in the FERC and the United States Circuit Court for the District of Columbia, described in paragraph 6 below, the case was settled on terms favorable to Transco.

District Court:

Hon. James B. McMillan, Jr.

Co-Counsel:

Alfred H. Ebert, Jr.
Andrews & Kurth L.L.P
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4150

Michael F. Butler
(formerly of Andrews & Kurth)
Washington, D.C.
(No current information)

William T. Covington, Jr.
Kennedy Covington Lobdell & Hickman
Bank of America Corporate Center
42nd Floor
100 North Tryon Street
Charlotte, NC 28202-4006

704-331-7400

E. Milton Farley, III (deceased)
Hunton & Williams
Richmond, Virginia

Opposing Counsel:

Nolan E. Clark
(Formerly of Kirkland & Ellis)
Washington, D.C.
(No current information)

Stephen A. Herman
(formerly of Kirkland & Ellis)
Senior Vice President and General Counsel
PG&E Corporation
One Market, Spear Tower, Suite 400
San Francisco, CA 94105
415-817-8200

6) *Transcontinental Gas Pipe Line Corporation*, Docket No. TC79-8 before the Federal Energy Regulatory Commission, Opinion Nos. 248 and 248-A, 35 F.E.R.C. ¶ 61,043 (1986), 35 F.E.R.C. ¶ 61,340 (1986)

At about the same time that Transco and CF Industries appealed a federal district court's judgment to the Fourth Circuit (*see* paragraph 5 above), Transco initiated proceedings before the FERC, requesting it to determine, among other things, the effect of Transco's tariffs and certificates of public convenience and necessity on claims for damages arising out of the natural gas shortage. The FERC proceedings were initiated in 1979, and I represented Transco, along with Al Ebert and Tom Brosnan, in that proceeding from its inception. Subsequently, the Fourth Circuit referred issues to the FERC under the doctrine of primary jurisdiction, and those issues became a part of the FERC proceeding.

I was one of the two principal authors of the submissions and briefing to the FERC, and met with witnesses to obtain their prepared, written testimony that was submitted prior to the hearing at the FERC.

The FERC issued Opinion Nos. 248 and 248-A in which it decided some but not all of the referred issues.

Transco sought review of the FERC's orders in the United States Court of Appeals for the District of Columbia Circuit in 1987. I was lead counsel in that appeal and drafted the briefs and argued the merits of the case to the D.C. Circuit in 1988 before a panel that included then Judge Ruth Bader Ginsburg. The D.C. Circuit did not decide the merits, but instead transferred the case to the Fourth Circuit. (I have been unable to locate a copy of this order.) This appeal subsequently settled as part of the settlement of the underlying *CF Industries*

suit.

Presiding Administrative Law Judge:

Steven M. Charno

FERC Commissioners:

Anthony G. Sousa, Acting Chairman
Charles G. Stalon
Charles A. Trabandt
C. M. Naeve

Co-Counsel:

Alfred H. Ebert, Jr.
Andrews & Kurth L.L.P.
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4150

Thomas F. Brosnan
Gallagher, Boland, Meiburger & Brosnan
1000 Vermont Ave., N.W.
Washington, D.C.. 20005
(202) 289-7200

Opposing Counsel:

Stephen A. Herman
(formerly of Kirkland & Ellis)
Senior Vice President and General Counsel
PG&E Corporation
One Market, Spear Tower, Suite 400
San Francisco, CA 94105
415-817-8200
Counsel for CF Industries

Jerome Feit
Solicitor
Federal Energy Regulatory Commission
(No current information)

Counsel for Intervenors

John H. Cheatham, III
Washington, D.C.
Counsel for Intervenor Interstate Natural Gas Association of America

W. Devier Pierson
Washington, D.C.
Counsel for Intervenor United Gas Pipe Line Company

Arnold Fieldman
Washington, D.C.
Counsel for Intervenor Pennsylvania Gas and Water Company

James R. Lacey
Newark, New Jersey
Counsel for Intervenor Public Service Electric & Gas Co.

Gregory Grady
Washington, D.C.
Counsel for Intervenors North Carolina Public Service Company of North Carolina, Inc. and North Carolina Natural Gas Corporation

Morton L. Simons
Simons & Simons
Washington, D.C.
Counsel for Intervenor North Carolina Utilities Commission

7) *IP Petroleum, Inc. v. Exxon San Joacquin Production Co.*, No. 90-05314 in the 164th District Court of Harris County, Texas

I represented IP Petroleum who had acquired certain assets, including oil and gas properties and over $1,000,000 in seismic data. IP sued the seller for damages in connection with this transaction. I was co-counsel with John Lee of Andrews & Kurth. In a bench trial that lasted about two weeks, I presented witnesses, including all expert witnesses on the seismic data. The trial court entered findings generally favorable to IP at the conclusion of trial. The parties then entered an agreed judgment awarding IP in excess of $1,000,000 plus attorney's fees, and extinguishing a $2,000,000 counterclaim against IP.

Trial Court:

Hon. Bradley Smith

Co-Counsel:

John Lee
Andrews & Kurth L.L.P.
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4200

Opposing Counsel:

Jesse R. Pierce
Clements, O'Neill, Pierce Nickens & Wilson
1000 Louisiana, Suite 1800
Houston, TX 77002-5009
713-654-7600

8) *Sherman v. Richardson*, No. 81-59022 in the 164th District Court of Harris County, Texas

I was sole counsel for Robert & Michele Sherman in a boundary dispute with their neighbors. Ms. Sherman was pregnant with when their next-door neighbors began blocking the driveway. I filed suit and by agreement, a trial on a temporary injunction was converted to a trial on the merits. After a jury trial in which the jury rendered a verdict for my clients, an agreed judgment was entered in favor of the Shermans, and the matter was not appealed. (Suit was filed in 1981 and the matter was resolved within a few months after that.)

I represented the Sherman's at a substantially reduced fee, although this would not qualify as legal services to the poor.

Trial Court:

Hon. Pete Solito

Opposing Counsel:

William W. Byrd
1900 Yorktown
Houston, Texas
(No current phone number)

9) *Vecchio v. Williams*, No. 84-21461 in the 125th District Court of Harris County, Texas

I was sole counsel for O'Banion Williams, Jr. and his wife in a suit that their next-door neighbor filed against them to enjoin certain improvements to their water-front property. There was a non-jury trial at which fact and expert witnesses were called. The trial court rendered judgment for my clients at the conclusion of trial in 1984, the same year that the case was filed.

Trial Court:

Hon. Michael L. O'Brien

Opposing Counsel:

R. Spencer Adams
3222 Burke, Suite 204
Pasadena, Texas 77504
(713) 943-9423

10) *Lone Star Gas Company of Texas, Inc. v. F.F.F. Corp.*, No. 2-90-284-CV in the Court of Appeals for the Second District of Texas at Fort Worth

I was retained as lead counsel on appeal to represent Lone Star in connection with an explosion that occurred after one of its gas pipelines was ruptured during highway construction. Counsel other than Andrews & Kurth tried the case, and a judgment of approximately $2,000,000 had been rendered against Lone Star. I did all of the legal research and briefing on appeal and argued the case. The court of appeals affirmed the trial court's judgment in an unpublished opinion on April 6, 1994. I thereafter withdrew from this matter with the client's consent because I had filed as a candidate for the Supreme Court of Texas. Other counsel pursued an application for writ of error to the Supreme Court of Texas, which was denied.

Members of the Court of Appeals Panel:

Hon. Tod Weaver
Hon. Farris
Hon. Meyers

Opposing Counsel:

J. G. Johndroe, III
Melody McDonald Wilkinson
Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102-6899
(817) 877-2800

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.)

These are a few of the cases on which I spent a substantial amount of time:

Texas Eastern Transmission Corporation v. Amerada Hess Corporation, et al., Civil Action No. CV892036, Section "L", Western District of Louisiana, Lafayette-Opelousas Division

I was lead counsel for Amerada Hess. Suit was filed in 1989 and was concluded in 1991. I supervised several attorneys from my firm and coordinated with counsel for co-defendants Marathon Oil Company and OKC Partnership in extensive discovery and pre-trial preparation. The issues involved primarily breach of contract and fraud. Texas Eastern was seeking to terminate its contracts with Amerada Hess and the other defendants. The amount at issue was several hundred million dollars. Just before we were to pick a jury, the claims against Amerada Hess and Marathon settled on terms that were very favorable to them, and OKC settled shortly after trial began.

District Court:
Hon. Putnam

Artoc Bank and Trust Limited v. Apex Oil Corp., et al., Civil Action No. H-81-3247 in the United States District Court for the Southern District of Texas, Houston Division

I was lead counsel for Saber Refining in this suit by Artoc from 1981 to 1985. The primary claim was that Artoc had received from Uni Refining an assignment of all its future accounts receivable and proceeds. Artoc contended that stamped notices on Uni's invoices were adequate notice to Saber and others who dealt with Uni of the assignment. Artoc sued to recover over $2,000,000 in payments Saber made directly to Uni rather than to a lock-box and for offsets between Saber and Uni. There was extensive discovery, which I conducted on behalf of Saber. I also represented Saber as a contingent creditor in Uni's bankruptcy proceeding, and Saber reached a favorable settlement with Artoc as part of the bankruptcy case after I filed a motion to subordinate Artoc's security interests in Uni's assets. In the district court case, the district court partially granted Saber's motion for summary judgment on the merits in an unpublished memorandum decision (November 5, 1984), which effectively resolved the case in favor of Saber. Artoc subsequently settled all issues with Saber.

District Court:
Hon. Gabrielle McDonald

Brumark Corporation v. Palo Duro Pipeline Company, Civ. No. 82-1414-K(H) in the United States District Court for the Southern District of California

Taylor Hicks, formerly of Andrews & Kurth, was lead counsel in this breach of contract case in which we represented Palo Duro. Brumark sued to recover in excess of $20,000,000. I conducted extensive discovery and represented officers of the client and other fact witnesses in their depositions. I worked with approximately six expert witnesses in connection with

their preparation for trial and defended their depositions. I was also responsible for much of the briefing. The case was filed in 1982 and ultimately settled.

Middleton v. Lone Star Gas Company, No. 37,196 In the District Court of Webb County, Texas 49th Judicial District

I was co-counsel with Al Ebert representing Lone Star in a gas contract dispute. Middleton sought approximately $2,000,000 in damages. Suit was filed in 1986. I conducted most of the discovery and began examination of Middleton's witnesses in a jury trial. The case settled during trial in 1988.

Trial Court:
Hon. Solomon Casseb, Jr.

I represented Transcontinental Gas Pipe Line Corporation, Lone Star Gas Company, United Texas Transmission Company and other clients in a many complex litigation matters other than those listed above.

I represented a client in a non-public Securities and Exchange Commission investigation into possible insider trading in that client's securities. My client was not involved in any wrongdoing. It is my understanding based on press accounts that a lawyer who represented a potential buyer of my client was indicted for insider trading.

I participated in preparing SEC filings for Transco Energy Company and some of its subsidiaries, including Form 10 K's, Form 10-Q's, and S-1's, and I participated in preparing annual reports to its shareholders.

As part of my responsibilities on the Supreme Court of Texas, I have been involved in attempting to improve civil legal services to the poor in Texas and access to our civil courts. I was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in additional funds for providers of legal services to the poor of about $3,000,000 to $5,000,000 per year. I and other members of the Court have been active in attempting to restructure how legal services are delivered to the poor in Texas and have been instrumental in facilitating coordination among providers of legal and other services to those who are economically disadvantaged. From 1996 to the present, I have served as the Court's liaison to statewide committees regarding legal services to the poor and pro bono legal services.

In 1995, I helped to form and have since been a member of an informal group called Family Law 2000. It is comprised of judges, attorneys, and mental health professionals. We have explored ways of improving the family law system and the laws themselves in Texas with the goal of making child custody matters less adversarial.

Since 1995, I have served as the liaison for the Supreme Court of Texas to a task force studying court-annexed mediation. That task force met frequently over a period of years to

draft ethical rules for mediators in court-annexed mediations in Texas. The task force also drafted proposals for minimum training, certification of training programs, continuing education for mediators, and a grievance process.

During the 1995 legislative session, the Texas Legislature created the Judicial Efficiency Commission. One of that commission's charges was to study and make recommendations regarding staff diversity in the judicial system. I served as the Supreme Court of Texas' liaison to a committee that was assigned that task. We increased efforts to recruit and hire minority law clerks in the appellate courts. One of the recommendations of the committee to the Texas Legislature was that it establish a student loan repayment program for law clerks. Legislation was passed to implement that recommendation.

I have been a frequent presenter at continuing legal education courses in Texas. Those presentations have primarily involved decisions of the Supreme Court of Texas and appellate procedure.

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 end 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.

   After I withdrew from Andrews & Kurth L.L.P. following my election to the Supreme Court of Texas, I rolled over my 401(K) assets into an IRA. For a period of time, I also received payments as a withdrawn partner under the partnership agreement. Those payments have been made in full. I have no further financial relationship with Andrews & Kurth, and I do not anticipate receiving any income or other compensation from that firm.

   I have participated in a 401(K) plan as an employee of the State of Texas. Upon leaving the employment of the State, those contributions can be left in a 401K with the State or rolled over to an IRA or qualified 401K. I am also part of the Employees Retirement System of Texas. If I were to leave my employment with the State of Texas before my tenth year of employment, it is my understanding that my contributions towards the retirement fund would be paid at age 65, or I could request payment upon withdrawal and pay taxes on those contributions.

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 served on the Supreme Court of Texas for over six years, and accordingly, most of the matters that were pending when I was at my former law firm have been resolved.

   In my present position, I read the disclosure statements that my court requires in all briefs to ensure that there is no potential for conflict with regard to parties or counsel. I would continue to do so in the position for which I have been nominated. I would follow the Code of Conduct relative to resolving conflicts.

   My financial holdings are primarily in mutual funds and government bonds and should not present conflicts issues. I intend to divest my holdings in the three stocks that I currently own.

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, way be substituted here.)

   Financial Disclosure Report AO-10(w) is attached.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

   It 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.

   Yes. I was a successful candidate for the Supreme Court of Texas in the 1994 and 2000 general elections in Texas. That has been my only position or role in a campaign.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)
Attachment in response to Question 4

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Owen, Priscilla R.	U.S. Court of Appeals, 5th Cir	05/11/2001
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Court of Appeals Judge	**5. Report Type (check type)** X Nomination, Date 05/09/2001 __ Initial __ Annual __ Final	**6. Reporting Period** 01/01/2000 to 05/11/2001
7. Chambers or Office Address Supreme Court of Texas P.O. Box 12248 Austin, Texas 78711	**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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Executrix	Estate of Jesse Allen Derrick
2	Trustee	Jesse Derrick Children's Trust
3	Director	Texas Hearing & Service Dogs

II. AGREEMENTS *(Reporting individual only; see pp.14-16 of Instructions.)*

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2000	Employees Retirement System of Texas, paid at age 65 or can withdraw contributions upon leaving employment and pay taxes
2	2000	State of Texas TexasSaver 401K Plan, can leave with the State, roll over to IRA or qualified 401K
3		

III. NON-INVESTMENT INCOME *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	1999	State of Texas, salary	113,471.54
2	2000	State of Texas, salary	113,869.88
3	2000	Andrews & Kurth L.L.P., distribution to pay tax on additional income assessed by IRS for 1990	11,397.00
4	2000	United States Department of Agriculture, Program 2000 Flexibility Contract	479.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Owen, Priscilla R.	05/11/2001

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☒ 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	Date of Report
Owen, Priscilla R.	05/11/2001

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 1/8 interest, surface, 640 acres, Matagorda County, Texas	C	Rent	K	T	exempt				
2 1/12 mineral interest, 640 acres, Matagorda County,			J	W	exempt				
3 7/24 mineral interest, est. 40 acres, Matagorda County, TX	B	Rent	J	W	exempt				
4 net royalty interest of .0016627, Harriman, C.E.(Unit)	A	Royalty	J	W	exempt				
5 net royalty interest of .0040779 (Apache)	A	Royalty	J	W	exempt				
6 1/4 interest in 40 acres, Matgorda County, TX	A	Rent	J	W	partitioned	8/200		D	Phillip Richman
7 1/4 undivided interest, 35 acres, Matagorda County, TX	A	Rent	J	W	exempt				
8 5 acres, Matagorda County, Texas	A	Rent	J	T	exempt				
9 royalty or mineral interests #2, Matagorda County, TX			J	W	exempt				
10 royalty or mineral interests, Brazoria County, Texas			J	W	exempt				
11 cash, Community Bank & Trust			J	T	exempt				
12 Pederated Prime Obligation (agency acct. CB&T)	D	Interest	J	T	exempt				
13 Federal National Mtg. Assoc. (agency acct. CB&T)	C	Interest	K	T	exempt				
14 Fidelity Equity Income II (agency acct. CB&T)	A	Dividend	J	T	exempt				
15 Janus Worldwide Fund (agency acct. CB&T)	A	Dividend	J	T	exempt				
16 T Rowe Price Blue Chip Fund (agency acct. CB&T)	A	Dividend	J	T	exempt				
17 T Rowe Price Mid-Cap Growth Fund (agency acct. CB&T)	A	Dividend	J	T	exempt				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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
Owen, Priscilla R.	05/11/2001

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Safeco Equity Fund (agency acct. CB&T)	A	Dividend	J	T	exempt				
19 Vanguard Index 500 Fund (agency acct. CB&T)	A	Dividend	J	T	exempt				
20 Intel Corp. common stock (agency acct. CB&T)	A	Dividend	J	T	exempt				
21 E M C Corp. Mass, common stock (agency acct. CB&T	A	Dividend	J	T	exempt				
22 Nortel Networks Corp., foreign equities (agency acct. CB&T)	A	Dividend	J	T	exempt				
23 Mercury Pan Euro GR CL C	A	Dividend	J	T	exempt				
24 Mercury U.S. Large Cap B	A	Dividend	J	T	exempt				
25 cash, Community Bank (agency account)	A	Interest	J	T	exempt				
26 Federated Prime Obligation (IRA)	B	Interest	K	T	exempt				
27 Small Business Invt. Corp. (IRA)	A	Interest	J	T	exempt				
28 Federal Home Loan Mtg. Corp. (IRA)	B	Interest	K	T	exempt				
29 Federated Stock Trust (IRA)	A	Dividend	K	T	exempt				
30 Federated Communication Tecnology Fund (IRA)	A	Dividend	J	T	exempt				
31 Harbor Capital Appreciation (IRA)	B	Dividend	J	T	exempt				
32 Janus Worldwide Fund (IRA)	B	Dividend	L	T	exempt				
33 Janus Enterprise Fund (IRA)	A	Dividend	J	T	exempt				
34 LKCM Small Cap Equity Port (IRA)	A	Dividend	L	T	exempt				

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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
Owen, Priscilla R.	05/11/2001

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions.)									
35 T Rowe Price Blue Chip Growth Fund (IRA)	A	Dividend	L	T	exempt				
36 T Rowe Price Mid-Cap Growth Fund (IRA)			K	T	exempt				
37 Safeco Equity Fund (IRA)	A	Dividend	L	T	exempt				
38 Vanguard Growth & Income Fund (IRA)	B	Dividend	M	T	exempt				
39 Vanguard Index 500 Fund (IRA)	B	Dividend	M	T	exempt				
40 Security First Trust Growth & Income Series (401K)	C	Dividend	J	T	exempt				
41 Fidelity VIP Growth Portfolio (401K)	A	Dividend	J	T	exempt				
42 Vanguard Funds GNMA (401K)	B	Interest	J	T	exempt				
43 cash, Chase Bank, checking	A	Interest	J	T					
44 Chase Bank, savings	A	Interest	J	T					
45 Community Bank, checking	A	Interest	J	T					
46									
47									
48									
49									
50									
51									

1 Inc/Gain Codes: (Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	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: (Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more
3 Val Mth Codes: (Col. C2)	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
	Owen, Priscilla R.	05/11/2001

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Part I, Positions

Jesse Allen Derrick was my stepfather. All assets in the Estate of Jesse Allen Derrick have been distrubited. I was not a beneficiary and was not compensated for serving as Executrix.

All assets in the Jesse Derrick Children's Trust have been distributed. I was not a beneficiary and was not compensated for serving as Trustee.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Owen, Priscilla R.	05/11/2001

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	Director	A. A. White Dispute Resolution Institute
5	Director	Baylor University Alumni Association
6	Director	Federalist Society, Houston Chapter
7	Director	Federalist Society, Austin Chapter
8	Member	State Bar of Texas Litigation Section Council

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	2001	State of Texas, salary	28,249.98

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Owen, Priscilla R.	05/11/2001

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature Priscilla R. Owen Date 5/11/2001

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

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)
Attachment in response to Question 5

FINANCIAL STATEMENT

NET WORTH
As of 3/20/2001

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	204.	17	Notes payable to banks—secured	9	870	51
U.S. Government securities—add schedule 1	29	715.	98	Notes payable to banks—unsecured	-	-	-
Listed securities—add schedule 2	35	515	98	Notes payable to relatives	-	-	-
Unlisted securities—add schedule	-	-	-	Notes payable to others	-	-	-
Accounts and notes receivable:	-	-	-	Accounts and bills due	2	573	30
Due from relatives and friends	+	-	-	Unpaid income tax	-	-	-
Due from others	1	000.	00	Other unpaid tax and interest	-	-	-
Doubtful				Real estate mortgages payable—add schedule @ $1,424.90/month	225	042	52
Real estate owned—add schedule 3	464	655.	00	Chattel mortgages and other liens payable	-	-	-
Real estate mortgages receivable	-	-	-	Other debts—itemize:			
Autos and other personal property	40	000.	00				
Cash value—life insurance	-	-	-				
Other assets—itemize:							
IRA - SCHEDULE 4	493	282	30				
401(K) SCHEDULE 5	29	909.	94				
				Total liabilities	237	486	33
				Net Worth	859	796	45
Total Assets	1,097	282	78	Total liabilities and net worth	1,097	282	78
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	-	-	-	Are any assets pledged? (Add schedule.) automobile	yes		
On leases or contracts	-	-	-	Are you defendant in any suits or legal actions? not personally	NO		
Legal Claims	-	-	-	Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax	-	-	-				
Other special debt	-	-	-				

Priscilla Owen

Schedule 1
to Financial Statement–Net Worth
(As of 3/20/2001)

U. S. Government Securities:

Federated Prime Obligations	$29,715.39

Priscilla Owen

Schedule 2
to Financial Statement-Net Worth
(As of 3/20/2001)

Description of Securities	**Market Value** (As of March 20, 2001)
Fidelity Equity Income II	2,810.89
Janus Worldwide Fund	3,620.20
T Rowe Price Blue Chip Growth Fund	3,463.21
T Rowe Price Mid-Cap Growth Fund	3,709.83
Safeco Equity Fund	2,919.13
Vanguard Index 500 Fund	3,455.72
E M C Corp. Mass	6,586.00
Intel Corp. Com	5,575.00
Nortel Networks Corporation (foreign equities)	3,376.00
Total	**$35,515.98**

Priscilla Owen

Schedule 3
to Financial Statement-Net Worth

Description of Real Property	Estimated Value
residence	406,000
1/8 undivided interest in 640 acres of farm and ranch land in Matagorda County, Texas	42,530.00
1/12 mineral interest in 640 acres in Matagorda County, Texas	1,200.00
1/4 interest in 35 acres pasture, farm land outside Palacios, Texas	8,925.00
Five acres of unimproved land outside Palacios, Texas	1,500.00
Net royalty interest of .0040779 in Holsworth Unit (Apache), Matagorda County, Texas	1,000.00
Net royalty interest of .0016627 in C. B. Harriman (Unit), Matagorda County, Texas	3,000.00
7/24 mineral interest in approximately 40 acres in Matagorda County, Texas	500.00
mineral interests in small parcels of land in Matagorda and Brazoria Counties, Texas	0
TOTAL	**$464,655.00**

Priscilla Owen

Schedule 4
to Financial Statement-Net Worth
(As of 3/20/2001)

Description of IRA Assets	**Market Value** (As of March 20, 2001)
Federated Prime Obligation	22,586.28
Federal Home Loan Mtg Corp.	24,929.75
Small Business Invt Corp.	10,691.90
Federated Stock Trust	17,245.40
Federated Communication Technology Fund	2,450.38
Harbor Capital Appreciation Fund	10,305.16
Janus Worldwide Fund	72,730.59
Janus Enterprise Fund	4,927.59
LKCM Small Cap Equity Port	55,304.49
T Rowe Price Blue Chip Growth Fund	71,559.52
T Rowe Price Mid-Cap Growth Fund	30,340.11
Safeco Equity Fund	56,244.49
Vanguard Growth & Income Fund	4,269.28
Vanguard Index 500 Fund	109,697.36
Total	**$493,282.30**

Priscilla Owen

Schedule 5
to Financial Statement-Net Worth

Description of 401K Assets	**Market Value** (As of December 31, 2000)
Security First Trust Growth & Income Series	9,516.47
Fidelity VIP Growth & Income Series	11,317.11
Vanguard Funds GNMA	9,076.36
Total	**$29,909.94**

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 in private practice, I did pro bono work in at least two family law matters. One was a divorce. In another, I began representing a woman after she had received notice of a show cause hearing to determine whether she should be held in contempt for violating the provisions of a child custody order. I successfully represented her in that matter. I then spent time counseling her about how to avoid future disputes and filled out a calendar for the next year so that she would know exactly when the child's father was entitled to possession.

As part of my responsibilities on the Supreme Court of Texas, I have been involved in attempting to improve legal services to the poor in Texas and access to our civil courts. I was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in additional funds for providers of legal services to the poor of about $3,000,000 to $5,000,000 per year. I and other members of the Court have been active in attempting to restructure how legal services are delivered to the poor in Texas and have been instrumental in facilitating coordination among providers of legal and other services to those who are economically disadvantaged. I have served as the liaison for the Supreme Court of Texas to statewide committees regarding legal services to the poor and pro bono legal services.

I serve on the board of Texas Hearing and Service Dogs. That organization provides service dogs to persons who are hearing impaired and to persons who are paraplegics or quadriplegics. Texas Hearing and Service Dogs receives funding through grants, private contributions, and special events such as the Mighty Texas Dog Walk. The cost of training a dog for service is approximately $10,000. The staff of this organization spends many months, and often more than a year, training a dog for a particular recipient, then working with the recipient and the dog. The dogs perform many tasks that their masters are not able to do, and they provide more independence for their masters.

I am member of St. Barnabas Episcopal Mission, where I teach Sunday School to children in grades three through five and serve as the head of the altar guild. One of the core values of our congregation is community outreach.

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 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).

No. A member of the White House Counsel's office contacted me and asked if I would be interested in interviewing as a candidate for nomination to the Fifth Circuit Court of Appeals. I intended to apply for that position, but was called before I had taken any steps to apply. I interviewed with members of the White House Counsel's office at the White House. Subsequently, the White House Counsel's Office and the Office of the Attorney General contacted me and requested that I complete a questionnaire similar to the questionnaire of the Senate committee on the judiciary. I also completed a draft of the Senate questionnaire, a draft of the Financial Disclosure Report (AO-10), and Form SF-86. My physician completed a medical questionnaire from the Department of Justice after performing a physical examination. I was interviewed over the telephone by members of the Office of the Deputy Attorney General from the Department of Justice. They requested information similar to the questions included in SF-86 and the Senate questionnaire, and I was asked to and did furnish additional names and telephone numbers of opposing counsel when I was in private practice, former clients, attorneys who have appeared before the Supreme Court of Texas while I have been a justice on that court, and law school deans. It is my understanding that most if not all of those I identified were contacted. I was interviewed by the FBI, and it is my understanding that an FBI background check was completed prior to my nomination.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking 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.

It is important for courts and the judges who serve on them to respect the separation of powers among the judicial, legislative, and executive branches of government. The role of the judicial branch is to resolve cases and controversies that come before the courts. The task of the federal judiciary focuses more on the construction and application of positive enactments by Congress, regulations promulgated by administrative or regulatory bodies, and of course, the United States Constitution. Courts should construe and apply these laws and our Constitution as they are written. Legislating broad duties and policies should be left to the legislative branch of government.

The requirement in our jurisprudence that there be an actual case or controversy and that the parties have a actual stake in the outcome is sound. Courts should not issue advisory opinions, nor should courts be used by parties who would collude to shape the law. Ripeness, standing, and the requirement of an actual case or controversy help to insure that cases are not decided in the abstract and that the courts will not be used as a political or quasi-legislative forum. These principles also help to insure that courts will not unduly interfere with the lives or businesses of our citizens or with the government in attempting to discharge its responsibilities. However, standing has historically been and should be accorded those who have a tangible stake or injury in a particularized controversy.

As a state court judge on a common-law court of last resort, I have exercised restraint in imposing new duties through the expansion of the common law or through an expansive, unwarranted interpretation of statutes or our State and Federal Constitutions. When the Texas Legislature has spoken in an area, I and my court have been reluctant to undercut the policies expressed through legislation by imposing broader or more sweeping common-law duties or remedies.

Senator HATCH. Madam Chairman, can I put some more material in the record?

Senator FEINSTEIN. Yes, certainly.

Senator HATCH. Thank you. And others as well.

Senator FEINSTEIN. Yes. The record will remain open for 1 week.

Timothy John Corrigan and Jose Expedicto Martinez, if you would raise your right hand and affirm the oath when I complete its reading.

Do you swear that the testimony that you are about to give before the Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge CORRIGAN. I do.

Mr. MARTINEZ. I do.

Senator FEINSTEIN. Please have a seat. Let me begin by apologizing to you for the long delay. And I hope you do not mind the fact that you are last, but if we could have a brief statement from each one of you, I should tell you that you are noncontroversial, which means this should go very quickly. So why do we not hear from you Judge Corrigan?

STATEMENT OF TIMOTHY J. CORRIGAN, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA

Judge CORRIGAN. Thank you, Madam Chair. I do not have an opening statement. I will be happy to respond to questions.

If it would be appropriate for me to introduce the people with me today, I would like to do that.

Senator FEINSTEIN. It certainly would.

Judge CORRIGAN. I have with me the Honorable Elizabeth Kovachevich, who is the Chief Judge of the United States District Court for the Middle District of Florida. My wife Nancy Corrigan is with me. I am proud that my sons, Brian and Kevin Corrigan, are with me here today; my sister Mary Pat Corrigan. And then my law clerk, Susanne Weisman, and my former clerk Frances McLaughlin-Keegan are here today.

And thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much, and I apologize to them for having to wait so long, but in a way you are lucky.

[Laughter.]

Senator FEINSTEIN. Mr. Martinez, might we hear from you?

STATMENT OF JOSE E. MARTINEZ, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Mr. MARTINEZ. Yes, Senator. I have no opening statement, but I would also like to introduce my wife, Mary Anne Martinez is here; my daughter Anne-Marie Martinez, my other daughter Jan Vair and her husband Jonathan Vair were here earlier, but they had to go catch a plane. And my granddaughter, Elizabeth Ann, was here also, but she had more important things to do; she had to take a nap. So they left, and they are on the way to the airport.

I also have present here today my daughter's mother-in-law, Betty Vair, and my friends, Jim Oliff and Rich Richards. And I think that is all. Everybody else has left.

Senator FEINSTEIN. Thank you. Mr. Martinez, since you are speaking at the moment, why do I not begin with you. You have worked as a general litigator in private practice for more than 30 years, and I am sure that your litigation experience will serve you well if you are confirmed as a District Court Judge. Please tell the Committee what you think will be the most challenging aspect of making the transition from being a litigator to being a Federal District Court Judge if confirmed?

Mr. MARTINEZ. Well, I think the most difficult thing would be the case management aspect of it because I have no experience doing that, but I fully intend to find out who in the Southern District is the best at doing that, go to them, freely pick their brain, and try to get as much information as I can, try to get whatever system works the best for them and utilize it until I can gain enough experience to modify it in a way that makes sense for me.

Senator FEINSTEIN. Now, you have had general litigation practice, as I said, for 30 years, and you have specialized in product liability litigation.

Mr. MARTINEZ. Yes, ma'am.

Senator FEINSTEIN. Given your experience advising and defending corporations in product liability suits, what are your views on tort reform efforts, for example, efforts to cap non-economic and punitive damages, or to limit the civil and criminal liability of certain groups such as State Governments?

Mr. MARTINEZ. When I was representing those particular companies, I was totally in favor of all of those things. But I do understand both sides of the issue, and I think I have an open mind as to the viability of some of those issues. I could be an advocate for either side, but I believe that I am smart enough to understand that there are both sides to an issue, and I can take either side equally well, and I think that I will do the right thing and the fair thing.

I have no particular opinion because I have never actually been involved in either presenting or pushing any of the reforms. I was never at that level.

Senator FEINSTEIN. Do you believe there is a constitutional right to privacy?

Mr. MARTINEZ. I think that it is well established in the United States that there is a constitutional right to privacy.

Senator FEINSTEIN. Thank you.

Judge Corrigan, you have written several articles concerning court ordered sanctions against lawyers and parties that pursue frivolous claims and argument. Please share your view on such sanctions, and explain how you would determine whether to impose sanctions in a particular case if confirmed?

Judge CORRIGAN. Well, if I was fortunate enough to be confirmed, Madam Chair, I have, as a Magistrate Judge now for the last 5–½ years, had to deal with this issue of sanctions, and I do think that sanctions have a place. However, I think they are not certainly the first resort of the court. The court needs to consider everyone's claim on its merit, but in a given case, if sanctions are required, I think it needs to be done on a sliding scale depending upon the severity of the conduct and how repetitious the conduct is.

Senator FEINSTEIN. Thank you. Now, you have been nominated to fill a seat that has been vacant since its creation nearly 3 years ago. It has been designated a judicial emergency vacancy, and it has been pending for 950 days. If confirmed, what steps will you take to handle the anticipated backlog of cases that you are obviously going to face, and to promptly address those cases that come before you? In other words, how are you going to handle this large docket?

Judge CORRIGAN. Well, Madam Chair, fortunately, as a Magistrate Judge in the same district, I have a intimate familiarity with the caseload. I have been handling my own caseload now as a magistrate judge, and so I am familiar with the caseload. And I do—as a District Judge, of course, I would have more primary responsibility for case management, and I have given that some thought, and I have some ideas in terms of early case management and other devices that I think would be helpful to me in addressing the caseload, but I do feel comfortable in that because it is the same court that I am currently working with at this time.

Senator FEINSTEIN. Thank you.

Mr. Martinez, how strongly should judges bind themselves to the doctrine of stare decisis, and does the commitment to stare decisis vary depending on the court?

Mr. MARTINEZ. Well, depending on the level of the court. I believe that a trial judge has total reliance upon stare decisis. We do not make the appellate decisions that we are bound by. We follow those appellate decisions, and consequently, it is total in the case of a trial judge.

Senator FEINSTEIN. Would you like to comment on that question, Mr. Corrigan?

Judge CORRIGAN. Yes, Madam Chair. I agree, and again, as a magistrate judge, I am every day applying binding precedent of both the Supreme Court and the Eleventh Circuit of Appeals, which is where I happen to come from, and so I am very accustomed to respecting the superior courts in my jurisdiction, and I think that is a vital—it is vital to our rule of law that that be—that stare decisis be followed.

Senator FEINSTEIN. Now I am going to ask you both the same question. In the past few years the Supreme Court has struck down a number of Federal statutes, most notably several designed to protect the civil rights and prerogatives of our more vulnerable citizens. And they struck them down as beyond Congress's power under Section 5 of the 14th Amendment. The Supreme Court has also struck down a statute as being outside the authority granted to Congress by the Commerce Clause. These cases have been described as creating new power for State Governments as Federal authority is being diminished.

At the same time, the Court has issued several decisions, most notably in the environmental arena, granting States significant new authority over the use of land and water despite longstanding Federal regulatory protection of the environment.

Taken individually, these cases have raised concerns about the limitations imposed on congressional authority. Taken collectively, they appear to reflect a new federalism crafted by the Supreme

Court that threatens to alter fundamentally the structure of our Government.

What is your view of these developments?

Judge CORRIGAN. Madam Chair, of course, as a trial judge, it would be my duty to follow the binding decisions of the U.S. Supreme Court, and while I recognize that there are those in Congress who differ with those decisions, it would be my duty and responsibility to follow them until and unless they were changed. And so I have no particular view apart from my duty to apply binding Supreme Court precedent.

Mr. MARTINEZ. I am only generally familiar with this area of the law because it is not something that comes up on a general basis when you're doing product liability defense, but I am familiar enough with it to obviously agree with Judge Corrigan. We have the responsibility of following the law as it is presented to us. We understand that Acts of Congress are presumed to be constitutional. If Congress wishes to change that, it is your prerogative, but at the present time we would have to follow whatever the law is as it is presented to us.

Senator FEINSTEIN. This is going to be a very short hearing. I want to thank you for putting up with what has been a very long day, and your reward is that I am going to adjourn the hearing.

And I thank your families and your friends for being here, and you as well.

Judge CORRIGAN. Thank you, Madam Chair.

Mr. MARTINEZ. Thank you, Madam Chair.

[The biographical information of Judge Corrigan and Mr. Martinez follow.]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1. **Name**: Full name (include any former names used).

   Timothy John Corrigan

2. **Position**: State the position for which you have been nominated.

   United States District Judge, Middle District of Florida

3. **Address**: List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

   United States Courthouse
   311 W. Monroe Street., Rm. 526
   Jacksonville, FL 32202

   (904) 549-1300

4. **Birthplace**: State date and place of birth.

   February 21, 1956
   Jacksonville, FL

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to the former Nancy Marie Mead on August 8, 1981. She is a physical therapist but does not currently work outside the home. Two dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Duke University School of Law, attended 1978-81.
   Awarded J.D. with Distinction 1981

   University of Notre Dame, attended 1974-78.
   Awarded B.A. with honors 1978

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Employment:

1996- present	**United States Magistrate Judge** **United States District Court** **Middle District of Florida** **311 W. Monroe St., Rm 526** **Jacksonville, Florida 32202**
1999	**Adjunct Professor** **Florida Coastal School of Law** **7555 Beach Blvd.** **Jacksonville, Florida 32216**
1982-1996	**Attorney and (later) Partner** **Bedell, Dittmar, DeVault & Pillans, P.A.** **101 E. Adams St.** **Jacksonville, Florida 32202**
1985-1986	**Adjunct Instructor (writing seminar via correspondence)** **Duke University School of Law** **Durham, North Carolina 27708**
1981-1982	**Law Clerk, Hon. Gerald B. Tjoflat** **United States Court of Appeals** **Eleventh Circuit** **311 W. Monroe St.** **Jacksonville, Florida 32202**
1981	**Law Clerk** **Bedell, Dittmar, DeVault & Pillans, P.A.,** **101 E. Adams St.** **Jacksonville, Florida 32202**

(approx.)	1980-1981	Intern Alexander & McCormick 203 ½ N. Church St. Durham, North Carolina 27701
	1980	Summer Associate Mayer, Brown & Platt 190 LaSalle St. Chicago, Illinois 60603
	1980	Summer Associate Morrison & Foerster 425 Market St. San Francisco, California 94105
(approx.)	1979-1980	self-employed part-time selling law books in law school, Failsafe Enterprises Durham, North Carolina
(approx.)	1979-80	Research Assistant Duke Law School Durham, North Carolina 27708
	1979	Summer Associate Rogers, Towers, Bailey, Jones & Gay 1301 Riverplace Blvd. Jacksonville, Florida 32207
	1978	Intern, Office of Senator Lawton Chiles United States Senate Washington, D.C. 20510
	1978	Runner Computer Power, Inc. 561 Riverside Ave. Jacksonville, Florida 32204

Board of Directors:

1998-present	**Guardian of Dreams** **134 East Church Street** **Jacksonville, Florida 32202**
2001-2001, 1986-88 (President 1987-88)	**[Homeowner] Civic Association Board** **P.O. Box 550706** **Jacksonville, Florida 32255**
1987-89	**Jacksonville Area Legal Aid, Inc.** **126 West Adams Street** **Jacksonville, Florida 32202**

8. Military Service: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

None

9. Honors and Awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Certificate from Jacksonville Bar Association for more than 100 hours of pro bono representation (1991); Certificate from Jacksonville Area Legal Aid, Inc. for membership on the JALA Board of Directors (1988); Certificate from Mayor's Commission on Bicentennial of the Constitution (1987); Member, Editorial Board, Duke Law Journal (1980-81).

10. Bar Associations: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

As a lawyer, I was a member of the following Bar associations and professional societies and held the following offices:

The Florida Bar (Executive Council, Trial Lawyers Section (1990-96); Trial Lawyers Section Professionalism Committee (1993-96); Member, Joint Committee, Trial Lawyers Section and Conferences of Circuit and County Court Judges (1994-95); Grievance Committee, Fourth Judicial Circuit (1991-1994) (Chair, 1993-1994); Rules of Civil Procedure Committee (1987-1988)). Academy of Florida Trial Lawyers (1983-90). Jacksonville Bar Association (Chair, Judicial Relations Committee (1995-96); Chair, Professionalism

Committee (1994-1995); Chair, Committee on Bicentennial of the Constitution (1987-1990); Member, CLE Committee (1990-1991); Member, Legal Aid Committee (1986-1989)). Chair, Citizen Review Panel, Fourth Judicial Circuit (1994-1995?). American Bar Association (Member, Trial Section). Federal Bar Association. Catholic Lawyers Guild. Barrister, Chester Bedell Inn of Court (1993-96). Florida Supreme Court Certified Mediator (1994-present).

As a Magistrate Judge, I have maintained my membership in The Florida Bar, the Jacksonville Bar Association, the Federal Bar Association, the American Bar Association and the Catholic Lawyers Guild. I was named a Master of the Chester Bedell Inn of Court in 1999 and now serve as an officer of that Inn. I am completing a two year term as Chair of the Jacksonville Bar Association Professionalism Committee and serve as an *ex officio* member of the Fourth Judicial Circuit Professionalism Committee. I also serve as a consulting member of the Middle District of Florida's Court Security Committee.

11. Bar and Court Admission: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court	Date of Admission
Supreme Court of Florida (Florida Bar)	**1982**
United States District Court, Middle District of Florida	**1982**
United States Court of Appeals for the Eleventh Circuit	**1982**
Supreme Court of the United States	**1985**
United States District Court, Northern District of Florida (allowed membership in Northern District to lapse because my practice no longer required membership)	**1986**

12. Memberships: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Mentor, Big Brothers (in school program) (1995-2001). Board of Directors, Jacksonville Area Legal Aid (1987-89). Volunteer, Special Olympics (1989-90). Volunteer, United Way Campaign (1989). Steering Committee, Bishop Kenny High School Development Fund (1990-92). Member, YMCA (approx. 1990-93, 2000-present). Board Member, Guardian of Dreams (organization providing scholarships to low-income students) (1998-present). Assumption Catholic Parish: Parish Council (1993-96, President 1995-96); School Board (1998-2001, President 2000); Youth Basketball program, Assumption Athletic Association (Coach and referee 1993-2002, Basketball Commissioner 1997-99). Homeowner Civic Association Board (1986-88, 2001, President 1987-88). Ponte Vedra Club (approx. 1987-99). University Club (approx. 1986-90). Notre Dame Club of North Florida (1982-present). Jacksonville Community Council, Inc. (1992-present). Jacksonville Historical Society (approx. 1995-present). Member, Editorial Board, Duke Law Journal (1980-81). Member, Duke Law School Moot Court Team (1980-81).

None of these organizations formerly or currently discriminates.

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Published Writings:

- **Chapter 22, "Sanctions on Appeal," included in Black, et al., Federal Appellate Procedure -- 11th Circuit, American Inns of Court Series (Lawyers Cooperative Publishing Co. 1996);**

- **"A Stress Reduction Proposal: Let's Eliminate the 'Default' Provision of the Requests for Admission Rule," The Advocate, Florida Bar Trial Lawyers Section (1994);**

- **Sanctions, Rule 11 and Other Powers, ABA (Eleventh Circuit Chapter) (3rd ed. 1992);**

- **Civil Practice in Federal Courts, "The Pretrial Conference in Federal Court," The Florida Bar (co-authored with John A. DeVault, III) (1983);**

- "Retail Gasoline Franchise Terminations and Non-Renewals Under Title I of the Petroleum Marketing Practices Act," 1980 Duke L.J. 522;

- "Professionalism Tip of the Month," column in Financial News and Daily Record, January 2001;

- Assisted in drafting 2001 revision to Civil Discovery Handbook, United States District Court, Middle District of Florida (with U.S. District Judge Steven Merryday).

Speeches (as complete as possible):

- Law Day Speech
  Ribault Senior High School, (April, 2002),
  Lee High School, (sometime in early 1990's);
- Federal Bar Association (Jacksonville Chapter), January 28, 1997;
- Federal Law Enforcement Officers Association (Jacksonville Chapter), July 21, 1997;
- Catholic Lawyers Guild (Jacksonville Chapter), January 13, 1998;
- Florida Coastal School of Law, November 10, 1998;
- Federal Bar Association (Jacksonville Chapter), May 26, 1999;
- St. Johns County Bar Association, May 28, 1999;
- Eleventh Circuit Social Security Seminar, July 30, 1999;
- I have a standard speech on Professionalism which I have given to various Bar groups and law school classes (no specific dates available);
- I have a standard speech I give at attorney admissions ceremonies and a different speech given at naturalization ceremonies (no specific dates available);
- I have given speeches to school groups who visit the Courthouse (no specific dates available);
- Over the years, I have spoken at various Continuing Legal Education seminars (this list is as complete as possible):

• Legal Writing	May 19, 1988
• Bridge-the-Gap Seminar	October 17-19, 1988
• Bridge-the-Gap Seminar	March 20-22, 1989
• A Study in Professionalism	September 7, 1995
• 1995 Reporters' Workshop	September 28, 1995
• Bridge-the-Gap Seminar	October 17, 1995
• Practicing with Professionalism	November, 1999
• Practicing with Professionalism	November, 2000

Copies of available speeches and writings are being provided.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None

15. **Health**: Describe the present state of your health and provide the date of your last physical examination.

The general state of my health is good and I do not have any physical or mental impairments which would limit the performance of judicial duties. My last physical was on December 17, 2001.

16. **Citations**: If you are or have been a judge, provide:

(a) a short summary and citations for the ten (10) most significant opinions you have written;

1. **Linea Naviera de Cabotaje, C.A. v. Mar Caribe de Navigacion, C.A., 1999 WL 33218589, 2000 A.M.C. 357 (M.D. Fla., Nov. 17, 1999) (NO. 99-471-CIV-J-10C). In this admiralty case, an intervening party filed a motion to dissolve the attachment of a vessel. I denied the motion to dissolve the attachment holding that there were reasonable grounds and probable cause for the attachment.**

2. **Teco Energy, Inc. v. United States, 1999 WL 1273727, 85 A.F.T.R.2d 2000-630, 99-2 USTC P 50,970 (M.D. Fla., Oct. 21, 1999) (NO. 98-430-CIV-J-TJC).**
With the consent of the parties, I conducted a non-jury trial on stipulated facts in a case in which a large electric utility sought a refund of over $850,000.00 (plus interest) in federal income tax it had paid for the tax years 1984 and 1985. The case raised questions of whether the disputed payments were taxable customer connection fees or nontaxable contributions in aid of construction and other complex tax issues. Post-trial, I entered a 47 page Final Order adjudicating all of the issues.

3. **Mims v. Old Line Life Ins. Co. of America, 46 F.Supp.2d 1251 (M.D. Fla. 1999).**
A beneficiary commenced an action to recover life insurance policy proceeds and the defendant insurer filed a counterclaim for rescission

based on the insured's alleged misrepresentations during the application process. I granted the insurer's motion for summary judgment concluding that the misrepresentations regarding the insured's medical history and treatment were intentional and material, so as to warrant rescission.

4. 20th Century Fox Film Corp. v. M.V. Ship Agencies, 992 F.Supp. 1434 (M.D. Fla. 1997)
A film production company filed an action against the claimant-owner of a vessel that the company used in the production of a movie, alleging breach of the parties' time charter agreement and seeking arrest and attachment of the vessel. After the vessel was attached, the film company filed a motion for interlocutory sale of the vessel. The District Judge issued an Order adopting my Report and Recommendation, which held that the interlocutory sale of vessel was warranted and the minimum bid would be set at $300,000.

5. United States v. Patino, 991 F.Supp. 1449 (M.D. Fla. 1997).
Defendant filed a motion for discovery of reports of polygraph examinations of a potential government witness. After reviewing the reports *in camera* and applying the relevant caselaw, I denied the motion.

6. Feldman v. Flood, 176 F.R.D. 651 (M.D. Fla. 1997).
Shareholders brought a derivative action on behalf of a corporation alleging damages for breach of fiduciary duty, usurpation of corporate opportunity and related claims. Defendants filed a motion to dismiss arguing the shareholders no longer had standing to bring the action and asked the Court to stay discovery pending a ruling on the motion to dismiss. I denied defendants' motion to stay discovery holding that the motion to dismiss was not likely to be dispositive.

7. 20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc., 992 F.Supp. 1429 (M.D. Fla. 1997).
In an admiralty case, defendant filed a motion to set bond and release the vessel. I granted the motion holding that bond would be set at $159,918 pursuant to Supplemental Admiralty Rule authorizing release of a vessel on the giving of security.

8. United States v. Block 44, Lots 3, 6, Plus West 80 Feet of Lots 2 and 5, 177 F.R.D. 687 (M.D. Fla. 1997), *affirmed*, 177 F.R.D. 692 (M.D. Fla. 1997). United States brought an eminent domain action to condemn a parcel of developed city property for a new federal courthouse. The

defendant landowner filed a discovery motion for an order compelling the government to produce information concerning the fair market value of the subject property and I granted the motion in part and denied it in part.

9. **20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc., 992 F.Supp. 1423 (M.D. Fla. 1997).**
Vessel was attached in an action for breach of maritime contract. Defendant, the alleged owner, moved to vacate the attachment and release the vessel while plaintiff moved for supplemental process of attachment and garnishment. I held that the vessel was properly attached because defendant could not be found in the district, the defendant's post-attachment presence did not preclude attachment, and there were reasonable grounds and probable cause for the issuance of attachment even though evidence of vessel ownership was conflicting.

10. **United States v. Hanania, 989 F.Supp. 1187 (M.D. Fla. 1997).**
Government moved for disqualification of defense counsel on grounds that defense counsel represented two persons who would be government witnesses at trial. (These witnesses had previously consented to the dual representation.) I found that defendant validly waived his right to conflict-free counsel and upheld defendant's waiver, holding that the potential problems of the dual representation did not overcome defendant's presumptive right to counsel of his choice.

(b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

I have made a good faith search of both my memory and my files concerning the thousands of decisions I have made as a Magistrate Judge. To the best of my knowledge, none of my rulings (whether in consent cases or cases where the District Judge adopted my report and recommendation) have been reversed by the Eleventh Circuit. However, I have been reversed by a District Judge on these occasions:

1. **United States v. Arnold, Case No. 3:98-cr-43(S1)-J-10C (Defendant charged with failure to appear before grand jury. My Order allowing defendant to be on pretrial release (with strict conditions) was reversed by the District Judge who, on de novo review, found defendant to be a serious risk of flight.) (copy attached);**

2. **United States v. Lewis, Case No. 3:98-cr-83-J-10C (Defendant charged with credit card fraud. I ordered him detained pretrial without bond because he had repeatedly engaged in the same conduct in the past and I found him to be an "economic danger" to the community. In a case of first impression in this District, the District Judge, while not disagreeing that defendant was an "economic danger," nevertheless held that detention was not authorized by the Bail Reform Act.) (copy attached);**

3. **United States v. Powell, Case No. 3:98-cr-166-J-21C (In a drug conspiracy case, I granted in part and denied in part the defendant's motion for bill of particulars. The District Judge affirmed my Order in all respects except that he reversed the portion of the Order which required the government to identify any "overt acts" it was alleging against the defendant.) (copy attached);**

4. **United States v. Delancy, Case No. 3:98-cr-336-J-21C (Defendant was charged in a drug conspiracy. After a lengthy detention hearing, I granted defendant pretrial release (on strict conditions). The District Judge, on de novo review, reversed and held that defendant should be detained.) (copy attached);**

5. **United States v. Koivisto, Case No. 3:98-cr-399-J-20C (In this marijuana case, I recommended to the District Judge that he suppress certain evidence because law enforcement did not have sufficient basis to make a Terry traffic stop. The District Judge, while explicitly recognizing that reasonable judges might disagree, rejected my recommendation and held that the stop was valid.) (copy attached).**

(c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

Although my duties as a Magistrate Judge regularly require me to apply fourth, fifth and sixth amendment precedents, I cannot point to any of my written opinions which I would consider to be cases of first impression or otherwise "significant."

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

17. **Public Office, Political Activities and Affiliations**:

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

None

(b) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No

18. **Legal Career**: Please answer each part separately.

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I served as a law clerk to the Honorable Gerald B. Tjoflat, Circuit Judge, United States Court of Appeals for the Eleventh Circuit (telephone (904) 232-3416, P.O. Box 960, Jacksonville, Florida 32201). My clerkship ran from August 1981 through August 1982.

(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;

I practiced with the law firm of Bedell, Dittmar, DeVault & Pillans, P.A., 101 East Adams Street, Jacksonville, Florida 32202, telephone (904) 353-0211. I was a law clerk with the firm in 1981, an associate from 1982 to 1986 and became a partner in 1986. I withdrew from the firm in 1996 upon my appointment as a United States Magistrate Judge.

(b) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

Following my Eleventh Circuit clerkship with Judge Tjoflat, I joined the Bedell firm in Jacksonville where I practiced for 14 years before I became a United States Magistrate Judge in 1996. At the Bedell firm, my practice was limited to litigation, both in federal and state courts.

I became a United States Magistrate Judge on November 26, 1996. Because of the heavy caseload in the Middle District of Florida, the Magistrate Judges have substantial responsibilities. Thus, in addition to handling a broad variety of civil and criminal non-dispositive motions (many of which require hearings), I have also conducted numerous evidentiary hearings in criminal cases and issued many reports and recommendations concerning dispositive criminal motions. I have taken hundreds of felony guilty pleas, conducted misdemeanor trials and sentenced misdemeanor defendants. I have also exercised full jurisdiction over federal civil cases (with the consent of the parties) meaning I have engaged in case management, ruled upon dispositive civil motions and conducted civil trials, including a lengthy jury trial. I have had substantial experience in admiralty cases as well as deciding social security disability appeals (which are generally handled by consent jurisdiction in this District).

(2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

When I practiced with the Bedell firm, the majority of my practice was in civil litigation representing both individual and corporate plaintiffs and defendants in areas such as RICO and other statutory claims, contracts, probate, civil rights, employment discrimination, professional negligence, business torts and products liability. I also had more limited experience in federal criminal practice, primarily grand jury and pretrial practice. I also engaged in a substantial appellate practice, including preparing appellate briefs and delivering oral argument in the First, Second and Third District Courts of Appeals in Florida, the Supreme Court of Florida and the United States Court of Appeals for the Eleventh Circuit. I also served as co-counsel in a case in the United States Supreme Court where I had a primary role in the preparation of the briefs.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, giving dates.

As my practice was limited to litigation, I appeared regularly in both state and federal court (and occasionally before administrative bodies). This was true throughout my years as an attorney. As a Magistrate Judge, I am in court virtually every day conducting a variety of hearings and other proceedings.

(2) Indicate the percentage of these appearances in

(A) federal courts;
(B) state courts of record;
(C) other courts.

I estimate that during my years of practice as an attorney, approximately 65% of my court appearances were in federal courts, 34% were in state courts and 1% or less were before administrative bodies.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.

As an attorney, I estimate that 95% or more of my practice was in a wide variety of civil litigation and 5% or less in criminal matters (including appeals).

As a Magistrate Judge, about 60% of my time (including both court and chambers) is spent on civil matters and 40% is spent on criminal 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.

Although I do not know the precise number, I estimate that as an attorney I tried to verdict or judgment at least 20 (and likely more) cases (this does not include appellate matters or matters in the trial court which were resolved by summary judgment or settled during trial). Early in my career, I served as associate counsel in these cases. After I became a partner, I served as co-counsel or lead counsel with one of my

other partners or associates. Because our firm almost always had at least two lawyers trying cases, I only recall serving as sole counsel in a trial on one occasion.

(5) Indicate the percentage of these trials that were decided by a jury.

I estimate that 40% of these cases were tried to a jury.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

In 1987, I served as co-counsel representing one of two criminal defendants in a case which was decided by the United States Supreme Court. Tanner v. United States, 107 S.Ct. 2739 (1987). Two issues were presented to the Supreme Court: whether the District Judge had erred in refusing to conduct a post-verdict hearing on alleged juror intoxication and drug use during the trial and whether the conspiracy count of the indictment failed to charge a conspiracy to defraud the United States. By a 5-4 decision, the Supreme Court held that no evidentiary hearing was required on the juror misconduct issue. However, the Court ruled unanimously that the indictment failed to charge a conspiracy to defraud the United States under 18 U.S.C. §371. On remand, the Eleventh Circuit reversed the defendants' convictions. United States v. Conover, 845 F.2d 266 (11th Cir.1988). While lead counsel, John DeVault, presented oral argument to the Supreme Court, I had a primary role in the preparation of the briefs to both the Supreme Court and the Eleventh Circuit and attended oral argument.

In 1983, I was appointed by the Eleventh Circuit to represent a criminal defendant in a petition for writ of certiorari to the United States Supreme Court. The case involved the question of whether the "plain view" exception to the Fourth Amendment's prohibition against warrantless searches and seizures permits the admission into evidence of items found by law enforcement agents in a warrantless search of the defendant's purse. The Supreme Court denied cert. Hernandez v. United States, 464 U.S. 918 (1983).

As requested, copies of the briefs have been provided.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I was a long-time member of the Jacksonville Bar Association's *pro bono* panel. In 1991, I was recognized by the Jacksonville Bar Association for contributing more than 100 hours of *pro bono* legal assistance. I also served on the Board of Directors of Jacksonville Area Legal Aid and participated in The Florida Bar's Guardian Ad Litem program, representing an eight year old girl who had been sexually abused. Additionally, I was Chair of a Citizen Review Panel which conducted approximately 40 juvenile dependency proceedings and made recommendations to the judge as to the best outcome for the dependent child.

During my practice years, I accepted several *pro bono* appointments by both the Federal District Court and the Eleventh Circuit. The Eleventh Circuit also appointed me to represent a criminal defendant in a petition for writ of certiorari to the United States Supreme Court involving a Fourth Amendment question. Hernandez v. United States, 464 U.S. 918 (1983) (denying cert.)

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

(c) the party or parties whom you represented; and

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

1. **Tanner v. United States, 107 S.Ct. 2739 (1987).**
In 1987, I served as co-counsel representing one of two criminal defendants in a case which was decided by the United States Supreme Court. Two issues were presented to the Supreme Court: whether the District Judge had erred in refusing to conduct a post-verdict hearing on alleged juror intoxication and drug use during the trial and whether the conspiracy count of the indictment failed to charge a conspiracy to defraud the United States. By a 5-4 decision, the Supreme Court held that no evidentiary hearing was required on the juror misconduct issue. However, the Court ruled unanimously that the indictment failed to

charge a conspiracy to defraud the United States under 18 U.S.C. §371. On remand, the Eleventh Circuit reversed the defendants' convictions. United States v. Conover, 845 F.2d 266 (11th Cir. 1988). While lead counsel, John DeVault, presented oral argument to the Supreme Court, I had a primary role in the preparation of the briefs to both the Supreme Court and the Eleventh Circuit and attended oral argument. Mr. DeVault still practices at my former firm, Bedell, Dittmar, DeVault, Pillans & Coxe P.A., 101 East Adams Street, Jacksonville, Florida 32202, telephone (904) 353-0211. Other co-counsel in the case were David R. Best, Best & Anderson, 1201 E. Robinson Street, Orlando, Florida 32801, telephone (407) 425-2985, and Richard A. Lazzara (now a United States District Judge in Tampa), United States Courthouse, 801 North Florida Avenue, Tampa, Florida 33602, telephone (813) 301-5350. Opposing counsel was the Solicitor General's Office (primarily Richard J. Lazarus who is no longer with that Office), Office of the Solicitor General, 950 Pennsylvania Ave., NW, Washington, D.C. 20530, telephone (202) 514-2217.

2. In re Estate of Smith, 685 So.2d 1206 (Fla.1996).
In 1996, I represented the Estate of Charles W. Smith which sought Florida Supreme Court review of an adverse decision in the First District Court of Appeal. The Florida Supreme Court accepted jurisdiction because of a conflict among the districts and issued an opinion favorable to my client. The case concerns whether the Florida statute of limitations for adjudication of paternity barred a paternity claim first asserted in a probate action following the alleged father's death. It raised significant statutory and constitutional issues. I substantially wrote the briefs and delivered the oral argument to the Florida Supreme Court. My co-counsel was Beth E. Luciano, who now practices at 8000 Baymeadows Way #5-3-001, Jacksonville, Florida 32256, telephone (904) 636-2262. Other co-counsel was Bruce D. Johnson (now retired from the practice of law), 2000 Wells Road, Suite B, Orange Park, Florida 32073, telephone (904) 272-4040. My opponent was Barry J. Fuller, 2301 Park Avenue, Suite 404, Orange Park, Florida 32073, telephone (904) 264-0585.

3. Gregg v. U.S. Industries, Inc., 887 F.2d 1462 (11th Cir. 1989).
In Gregg v. U.S. Industries, Inc., Case No. 72-25-Civ-Oc-16C, United States District Court, Middle District of Florida, I was co-counsel for the plaintiff in a two-week federal jury trial of a business fraud action. At the time we tried the case in 1987, the case was 15 years old, having been tried twice and appealed once already. Thus, the case presented tremendous logistical, organizational and evidentiary issues. Lead

counsel, C. Harris Dittmar, who had tried the previous two cases, and I (along with associate Julie H. Tucker) were successful in obtaining a multi-million dollar judgment on behalf of our client, which was affirmed by the Eleventh Circuit on appeal (the District Judge had remitted the punitive damages award). The case raised numerous issues such as the proper measure of damages in a Florida common law fraud claim. I had substantial responsibilities in the case, including handling a number of witnesses at trial, doing much of the pretrial preparation and writing substantial portions of the legal briefs. Mr. Dittmar has now retired from the practice of law, but his address is 4031 Timuquana Road, Jacksonville, Florida 32210, telephone (904) 388-5409. The trial judge was The Honorable John H. Moore II, (now Sr.) United States District Judge, Middle District of Florida. Opponents were William F. Sondericker, now with Carter, Ledyard & Milburn, 2 Wall Street, New York, New York 10005, telephone (212) 732-3200, and James Cobb, Peek, Cobb, Edwards & Ashton, 1301 Riverplace Blvd., Suite 1609, Jacksonville, Florida 32207, telephone (904) 399-1609.

4. Dunn v. The Florida Bar, 726 F.Supp. 1261 (M.D.Fla.1988), aff'd., 889 F.2d 1010 (11th Cir. 1989), cert. denied, 111 S.Ct. 46 (1990).
I was co-counsel representing The Florida Bar in a lengthy evidentiary hearing to determine whether plaintiffs were entitled to collect attorneys' fees from The Florida Bar under the Civil Rights Act following resolution of the underlying case. The District Judge entered an order denying fees and the Eleventh Circuit affirmed that decision. I substantially wrote the district court and appellate briefs and delivered oral argument to the Eleventh Circuit. At the district court level, the Honorable William K. Thomas, Senior United States District Judge for the Northern District of Ohio (now deceased), presided. The Eleventh Circuit panel consisted of Hon. James C. Hill, Senior Circuit Judge, Hon. Phyllis A. Kravitch, Circuit Judge, and Hon. Richard C. Freeman, United States District Judge for the Northern District of Georgia, sitting by designation. In addition to my co-counsel, Mr. Dittmar, the co-defendant Supreme Court of Florida was represented by Eric J. Taylor, Asst. Attorney General, Department of Legal Affairs, P. O. Box 15742, Tallahassee, Florida 32317, telephone (850) 414-3300. Opposing counsel were Alan B. Morrison of the Public Citizens Litigation Group, 1600 20th Street NW, Washington, D.C. 20009, telephone (202) 588-1000, and William J. Sheppard of Sheppard, White & Thomas, 215 N. Washington Street, Jacksonville, Florida 32202, telephone (904) 356-9661.

5. RBC III, et al. v. City of Jacksonville, et al., Case No. 89-19565-CA, Circuit Court, Duval County, Florida (1989). I was co-counsel with my former partner John A. DeVault III representing the City of Jacksonville in a mandamus action which sought to compel the City to approve a site development plan and issue a building permit for a shopping center. I substantially wrote the pleadings and the briefs and was co-counsel with Mr. DeVault in the trial. Following trial, the circuit court issued a final judgment adverse to the City. The trial judge was The Honorable A.C. Soud, Jr., Circuit Judge, Fourth Judicial Circuit. Opposing counsel was John E. Steele, now United States District Judge, Middle District of Florida, United States Courthouse and Federal Building, 2110 First Street, Suite 6-109, Ft. Myers, Florida, 33901, (941) 461-2140.

6. Wiley v. U. S. Mineral Products Co., 660 So.2d 1087 (Fla.1st DCA 1995). I represented on appeal the defendant fireproofing manufacturer which had been granted a directed verdict in an action brought by a welder alleging that exposure to the defendant's fireproofing product had led to silicosis. I was lead counsel in preparing the briefs and presented oral argument to the First District Court of Appeal. The First District, by a 2-1 margin, affirmed the directed verdict in favor of my client. The First District panel consisted of Hon. James E. Joanos, Hon. L. Arthur Lawrence, Jr., and Hon. Robert T. Benton, II (in dissent). My associate counsel was Allan F. Brooke, II, who is now a partner at Bedell, Dittmar, DeVault, Pillans & Coxe P.A., 101 East Adams Street, Jacksonville, Florida 32202, telephone (904) 353-0211. My other co-counsel was Floyd L. Matthews, Jr., Spohrer, Wilner, Maxwell, 701 West Adams Street, Jacksonville, Florida 32204, telephone (904) 354-8310. Opposing counsel was W. Thomas Copeland, 421 3rd St. N., Jacksonville Beach, Florida 32250, telephone (904) 246-9130.

7. In United States Mineral Products Company v. Ann P. Tipping, Case Nos. 92-00385 and 92-00814, Florida Court of Appeals, First District (1992), I was lead counsel on appeal representing defendant/appellant which was appealing an adverse 6.8 million dollar judgment in a products liability action. The case raised numerous issues including the applicability of the Florida statute of repose for products liability, whether the jury's verdict was influenced by improper references to liability insurance and other issues. I substantially wrote the briefs with the assistance of my colleague, Beth E. Luciano. The case settled while on appeal. My recollection is that at the time of the settlement, no judges had yet been assigned to hear the appeal. My opposing counsel were P. Scott Russell IV, 1300 Riverplace Blvd., Suite 601, Jacksonville, Florida, 32207, (904) 346-4480 and W. C. Gentry, One Independent Drive, Suite

1701, Jacksonville, Florida, 32202, (904) 356-4100.

8. American Telephone and Telegraph Co. v. Fraiser, 545 So.2d 405 (Fla 1st DCA 1989).
I was co-counsel representing former owners of property who were sued by AT&T for an alleged nuisance on the property created by a lessee. We were successful in getting the complaint dismissed on limitations and other grounds and the First District Court of Appeal affirmed in the published decision cited above. I substantially drafted the pleadings in the trial court, as well as the appellate briefs (my recollection is that the appellate court did not hold oral argument). The trial judge was The Honorable Lawrence D. Fay, Jr., Circuit Judge, Fourth Judicial Circuit (now deceased). The First District panel consisted of Hon. Anne Booth, Hon. Winifred Wentworth, and Hon. Richard W. Ervin, III. My co-counsel was John A. DeVault, III and opposing counsel was Gary Pajcic, Pajcic & Pajcic, P.A., One Independent Drive, Suite 1900, Jacksonville, Florida 32202, (904) 358-8881.

9. Pugh v. Beaches Public Hospital Special Taxing District, Case No. 84-1380-Civ-J-16, United States District Court, Middle District of Florida (1984). Our firm represented a hospital administrator who had been terminated from his employment. We brought a civil rights and age discrimination action on his behalf. I participated in the conduct of discovery, taking the depositions of some of the hospital board members as well as other fact witnesses. I also substantially wrote the pleadings and briefs in the case. I argued a number of motions and handled several of the witnesses at the jury trial before The Honorable John H. Moore II, now Senior United States District Judge, Middle District of Florida, Jacksonville Division, Room 428, Jacksonville, Florida, 32201, (904) 549-1980. The jury returned a verdict adverse to our client. Lead counsel was John A. DeVault III. Opposing counsel were J. Clark Hamilton, Jr., Fannin, Tyler and Hamilton, 4069 Atlantic Blvd., Jacksonville, Florida, 32207, (904) 398-0806 and William T. Stone, Cole, Stone & Stoudemire, 201 North Hogan Street, Suite 200, Jacksonville, Florida, (904)353-9664.

10. In Re: Estate of James Alexander Howard, Deceased, Joan Wood Howard, Petitioner v. Patricia Howard Doane, Respondent, Case No. 92-00200-CP (1992). I was co-counsel, along with my former partner C. Harris Dittmar, in a probate action involving complex estate tax issues. I participated heavily in the discovery, which was handled on an expedited basis, taking the depositions of numerous fact and expert witnesses. I also prepared the case for trial and substantially wrote

many of the briefs and pleadings. I tried the case with Mr. Dittmar, handling a number of the witnesses. During trial, the case settled. The trial judge was The Honorable Charles Mitchell, Circuit Judge, Fourth Judicial Circuit. Opposing counsel were Lawrence J. Hamilton II and Christopher J. Greene of Holland and Knight, 50 N. Laura Street, Suite 3900, Jacksonville, Florida 32202, (904) 353-2000.

20. Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No

21. Party to Civil or Administrative Proceedings: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

In January 2001, a *pro se* plaintiff brought a lawsuit against me, as well as two other federal judges, members of the U.S. Attorneys Office and others, alleging a conspiracy to deprive the plaintiff of his civil and constitutional rights relating to an underlying lawsuit the plaintiff has pending in the United States District Court, Middle District of Florida. (I was the Magistrate Judge assigned to the underlying case. Plaintiff also sued the District Judge assigned to the case.) Plaintiff also filed a document in this case entitled "Notice to the Court of Plaintiff's Forthcoming Request for Criminal Investigation" in which he requested the Attorney General to conduct a criminal investigation of myself, numerous other federal judges, court personnel and governmental officials. The style of the case is Andrew P. Moore, II v. Harvey E. Schlesinger, et al., Case No. 3:01-cv-108-Orl-31KRS, United States District Court, Middle District of Florida. The case was dismissed and judgment entered in favor of myself and the other defendants on October 10, 2001. On May 14, 2002, the Eleventh Circuit, in a non-published decision, affirmed the dismissal. Moore v. Schlesinger, et al., Case No. 01-13751 (11th Cir. May 14, 2002).

22. Potential Conflict of Interest: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have

been nominated.

As a Magistrate Judge, I have always strived to comply with the conflict rules of the Code of Judicial Conduct and I would continue to do so as a District Judge. Aside from my former firm (see below), I have very few conflicts (most of my assets are in mutual funds). I do own shares of Compass Bancshares and therefore would disqualify myself in any case in which it is a party.

I remain a participant in my former law firm's pension and profit sharing plan, though I no longer contribute to it and have no control over its operation. Because of this participation, I disqualify myself in all cases in which my former firm appears. (On one occasion, after full disclosure, all parties requested that I not disqualify myself. Such remittal is permitted by the Code of Judicial Conduct). If required, I can roll over the funds from this pension plan into my federal thrift savings plan.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

As a Magistrate Judge, I have previously served as an adjunct law professor at the local law school (teaching one course) and might pursue that again (though I have no current plans to do so).

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached financial disclosure report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached net worth statement.

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

(a) If so, did it recommend your nomination?

(b) Describe your experience in the judicial selection process, including the

circumstances leading to your nomination and the interviews in which you participated.

I submitted a lengthy application to the Florida Federal Judicial Nominating Commission. I was then selected for interview and interviewed with the Middle District of Florida members of the Commission and its Chairman (about 21 persons). After that interview, the Commission selected me as one of three finalists. I was invited to Washington where I interviewed with the White House Counsel, associate counsel and a representative of the Department of Justice. I also separately interviewed with Florida's two senators, Senators Graham and Nelson, and their staffs. I was later advised by associate White House Counsel that, pending a FBI background check and other vetting, I was the likely nominee. On May 22, 2002, I was nominated by the President.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No

AO-10 (w)
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. Sec. 101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Corrigan, Timothy J.	U.S.D.C., M.D. Fla.	05/24/2002
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
U. S. District Judge	X Nomination, Date 05/22/2002 __ Initial __ Annual __ Final	01/01/2001 to 04/30/2002
7. Chambers or Office Address	**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.**	
P.O. Box 52029 Jacksonville, FL 32201	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.)

__ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Member, Board of Directors	Guardian of Dreams (current)
2	Counselor	Chester Bedell Inn of Court (current)
3	Member, Board of Directors	Homeowners' Association (resigned 2001)

I. AGREEMENTS (Reporting individual only; see pp.14-16 of Instructions.)

__ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1996	Bedell, Dittmar, DeVault & Pillans Employee Profit Sharing Plan w/former firm (no control)
2		
3		

I. NON-INVESTMENT INCOME (Reporting individual and spouse; see pp. 17-24 of Instructions.)

X NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1		
2		
3		

FINANCIAL DISCLOSURE REPORT — Name of Person Reporting: Corrigan, Timothy J. — Date of Report: 05/24/2002

IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
___ NONE (No such reportable reimbursements.)		
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
___ NONE (No such reportable gifts.)			
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 32-33 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
X NONE (No reportable liabilities.)			
1			
2			
3			
4			
5			
6			

* VAL CODES: J=$15,000 or less K=$15,001-$50,000 L=$50,001 to $100,000 M=$100,001-$250,000 N=$250,001-$500,000
O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT | Name of Person Reporting: Corrigan, Timothy J. | Date of Report: 05/24/2002

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Bank of America	A	Interest	J	T	Exempt				
2 Bedell Profit Sharing Plan		None	N	T	Exempt				
3 Jax Fed. Credit Union (includes IRA)	A	Interest	J	T	Exempt				
4 Jax Fed. Credit Union (includes IRA)	D	Interest	M	T	Exempt				
5 Vanguard MM Acct.	B	Dividend	K	T	Exempt				
6 Compass Bank Stock	B	Dividend	K	T	Exempt				
7 Nat'l Life of Vermont (ins. policy)	D	Dividend	L	T	Exempt				
8 U.S. Savings Bonds		None	J	T	Exempt				
9 U.S. Savings Bonds		None	K	T	Exempt				
10 U.S. Savings Bonds		None	K	T	Exempt				
11 Jax. Navy Fed. Credit Union	A	Interest			Exempt				
12 Vanguard Int'l Growth Fund	A	Dividend	J	T	Exempt				
13 Vanguard MM Acct.	A	Dividend	J	T	Exempt				
14 Vanguard Total Stock Market Fund	A	Dividend	K	T	Exempt				
15 Vanguard MM Acct.	A	Dividend	J	T	Exempt				
16 Vanguard Total Stock Market Fund	A	Dividend	J	T	Exempt				
17 Vanguard Total Stock Market Index Fund	A	Dividend	K	T	Exempt				

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 Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(Col. C2) U=Book Value V=Other W=Estimated

Name of Person Reporting: Corrigan, Timothy J.

Date of Report: 05/24/2002

FINANCIAL DISCLOSURE REPORT

VII. Page 2 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 Montgomery U.S. Emerging Growth Fund IRA	A	Dividend			Exempt				
19 Vanguard MM Acct. (IRA)	A	Dividend	K	T	Exempt				
20 Montgomery MM Fund (IRA)	A	Dividend			Exempt				
21 Montgomery MM Fund (IRA)	A	Dividend			Exempt				
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									

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 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 Corrigan, Timothy J.	Date of Report 05/24/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Corrigan, Timothy J.	05/24/2002

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature _____ Date 5/24/02

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

TIMOTHY J. and NANCY M CORRIGAN (JOINT)

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 3/31/02 unless otherwise noted

ASSETS		LIABILITIES	
Cash on hand and in banks ≈	$118,000	Notes payable to banks-secured	
U.S. Government securities-add schedule (savings bonds) ≈	9,000*	Notes payable to banks-unsecured	
Listed securities-add schedule (attached)	103,905	Notes payable to relatives	
Unlisted securities–add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule ≈ CENLAR mortgage residence	139,000
Real estate owned-add schedule (residence) ≈	245,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property ≈	35,000		
Cash value-life insurance ≈	73,000		
Other assets itemize:			
Pension Plan (former firm)	355,630	(as of 7/31/01)	
Federal Thrift Savings Plan ≈	81,200		
		Total liabilities	139,000
		Net Worth	881,735
Total Assets ≈	1,020,735	Total liabilities and net worth	1,020,735
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	NO	Are any assets pledged? (Add schedule)	No (except mortgage)
On leases or contracts	NO	Are you defendant in any suits or legal actions?	See #21 on Questionnaire
Legal Claims See #21 on Questionnaire		Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax	N/A		
Other special debt	N/A		

* 10,000 face value – maturing 2004

SCHEDULE

Timothy J. and Nancy M. Corrigan (Joint)

Vanguard Funds (3/31/02)	$	57,918.00
Compass Banc Shares (3/31/02)	$	21,290.00
Vanguard (IRA)	$	24,697.00
TOTAL	$	103,905.00

FINANCIAL STATEMENT

NET WORTH

Minor Child # 1 (As of 3/31/02)

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 ≈	$ 1,900	Notes payable to banks-secured	
U.S. Government SAVINGS BONDS securities-add schedule ≈	35,000	Notes payable to banks-unsecured *	
Listed securities-add schedule Vanguard UGMA	18,979	Notes payable to relatives	
Unlisted securities–add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	
Real estate owned-add schedule		Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property			
Cash value-life insurance			
Other assets itemize:			
Prepaid College Plan ≈	8,000	(estimated)	
		Total liabilities	0
		Net Worth ≈	63,879
Total Assets ≈	$ 63,879	Total liabilities and net worth ≈	63,879
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	
On leases or contracts		Are you defendant in any suits or legal actions?	
Legal Claims		Have you ever taken bankruptcy?	
Provision for Federal Income Tax			
Other special debt			

* Estimate - $50,000 face value on Series EE Savings Bonds - maturing between 2003 - 2005

FINANCIAL STATEMENT

NET WORTH (As of 3/31/02)

Minor Child # 2

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 ≈	$ 790	Notes payable to banks-secured	
U.S. Government securities-add schedule (savings bonds) ≈	35,000	* Notes payable to banks-unsecured	
Listed securities-add schedule Vanguard UGMA	16,748	Notes payable to relatives	
Unlisted securities–add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	
Real estate owned-add schedule		Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property			
Cash value-life insurance			
Other assets itemize:			
Prepaid College Plan ≈	8,000 (estimate)		
		Total liabilities	0
		Net Worth ≈	60,538
Total Assets ≈	60,538	Total liabilities and net worth ≈	60,538
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	
On leases or contracts		Are you defendant in any suits or legal actions?	
Legal Claims		Have you ever taken bankruptcy?	
Provision for Federal Income Tax			
Other special debt			

* Estimated - $50,000 face value series EE savings Bonds maturing between 2003 - 2005

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1. Name: Full name (include any former names used).

   Jose Expedicto Martinez
   Jose Expedicto de Jesus Martinez

2. Position: State the position for which you have been nominated.

   Judge for the United States District Court for the Southern District of Florida

3. Address: List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

   Office: 601 Brickell Key Drive, Suite 501, Miami, Florida 33131
   (305) 577-4500

4. Birthplace: State date and place of birth.

   July 28, 1941
   Santo Domingo, Dominican Republic, then known as Ciudad Trujillo, Dominican Republic

5. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Mary Anne (Bielawa) Martinez - homemaker
   We have two children, both grown and independent.

6. Education: List in reverse chronological order, listing most recent first, each college, law school and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   University of Miami School of Law- 1962-1965
   Graduated with an LLB which has since become a JD.

   University of Miami- 1958-1962
   Graduated with a BBA in Marketing.

7. Employment Record: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Date	
July 1, 1991 to date	Attorney Jose E. Martinez, P.A. which was of counsel and is now a partner at Martinez & Gutierrez (a partnership including professional associations) 601 Brickell Key Drive Suite 501 Miami, Florida 33131-2651 previously located at 799 Brickell Plaza Suite 606 Miami, Florida 33131-2808
November 1989 to July 1991	Of counsel to and Partner (Shareholder) Adorno & Zeder, P.A. 2665 S. Bayshore Drive Suite 1600 Coconut Grove, Florida 33133
July 1985 to October 1989	Partner Martinez & Mattox 201 Alhambra Circle Suite 1200 Coral Gables, Florida 33146 and 4665 Ponce de Leon Boulevard Coral Gables, Florida
November 1982 to June 1985	Partner English McCaughan and O'Bryan 201 Alhambra Circle Suite 1200 Coral Gables, Florida 33146

July 1980 to November 1982	Partner (Shareholder) Leib & Martinez, P.A. 201 Alhambra Circle Suite 1200 Coral Gables, Florida
1972 to 1974 (On leave of absence from law firm)	Regional Director Office for Drug Abuse Law Enforcement U.S. Department of Justice Washington, D.C.
January 1970 to July 1980	Associate - Partner Helliwell, Melrose & DeWolf 1401 Brickell Avenue Miami, Florida
November 1968 to January 1970	Asst. U.S. Attorney Southern District of Florida Miami, Florida
November 1965 to November 1968	Legal Officer - U.S. Navy - Judge Advocate General Corps. U.S. Naval Station Key West, Florida
June 1965 to November 1965	Clerk Law Offices of Jonathan E. Ammerman Pan American Bank Building Miami, Florida
June 1964 to June 1965	Clerk McDonald & McDonald 1450 S.W. 1st Street Miami, Florida

Position	Name of Organization	Status
President, Director, Treasurer, Registered Agent	Jose E. Martinez, P.A.	Filed 8/5/82, Active
President, Vice-President, Director, Registered Agent	Spanish Broadcasting Network	Filed 8/19/99, Active
Assistant Secretary, Registered Agent	Dorado Realty	Filed 9/26/88, Active
Assistant Secretary	Land Development of Miami, Corp.	Filed 8/18/88, Inactive eorporation - Voluntarily dissolved - 3/20/97
Director	Martinez, Mattox & Spittler, Chartered	Filed 12/11/86, Inactive corporation - Involuntarily dissolved - 11/16/87
Director	100 Roycroft Rd., Inc.	Filed 7/21/82 - Inactive corporation - Involuntarily dissolved - 11/10/83
Secretary	ISHA International, Inc.	Filed 11/19/81 - Inactive corporation - Involuntarily dissolved - 11/21/84
President, Secretary, Treasurer, Registered Agent	Leib & Martinez, P.A.	Filed 1/9/81 - Inactive corporation - Involuntarily dissolved - 11/14/86
Registered Agent, Assistant Secretary	Revel Investment Company	Filed 8/8/91 - Inactive corporation since 8/7/91, Voluntarily dissolved 7/26/01
Director	Horizon Resources, Inc.	Filed 10/9/87, Inactive Corporation - Involuntarily dissolved - 11/4/88

Director	Racal Export, Inc.	Filed 8/31/78, Inactive Corporation - Voluntary Dissolution - 3/23/79
Director	Vespa Insurance Agency, Inc.	Filed 2/12/64 - Inactive Corporation - Voluntary Dissolution - 3/12/90

8. Military Service: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

Commissioned LTJG, USNR 1 May 1964, Entered active duty on 27 November 1965; released from active duty on 12 November 1968 as a LT, USNR. Service Number 698770 which was converted to 265-64-5116/2505--remained in Reserves and voluntarily retired in September 1993 as a Captain (0-6) continue to serve as Blue and Gold Officer for the Naval Academy interviewing candidates for admission; have also been recalled from the retired list to work in South America on missions teaching human rights and civilian control of the military.

9. Honors and Awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, and honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

While at the University of Miami, I was selected for various honoraries, including Iron Arrow, which is considered the highest honorary on campus. I later had the privilege of serving as Chief (president). I served as president of my social fraternity, Kappa Sigma and as treasurer of the Interfraternity Council. I was the treasurer of the Student Government of the School of Business and was in many other clubs and honoraries including Omega, the Interfraternity honorary. I worked my way through college and law school in various capacities including my work at the Student Activities Office of the University of Miami, where I became the senior student assistant and worked directly for the director of student activities.

10. Bar Associations: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

I am currently The Vice Chairman of the Federal Court Practice Committee of The Florida Bar (1999 to date)
Chairman of the Drug Abuse Committee of the Florida Bar (in 1974)
Southern District of Florida (1968-date)
The American Bar Association (April 5, 1976 to date)

The Federal Bar Association (December 1, 1969 to date)
The Dade County Bar Association (1965-1985)
The National District Attorneys Association (1969-1985)
Dade County Association of Chiefs of Police (1972-1974)
Cuban American Bar Association (1991-1996)
National Association of Criminal Defense Lawyers (1993-1999)
Hispanic National Bar Association (1998-date)

11. Bar and Court Admission: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Eleventh Circuit Court of Appeals-1981
United States Supreme Court-1971
United States Fifth Circuit Court of Appeals-1969
United States Court of Military Appeals-1966
Supreme Court of Florida-1965
United States Tax Court-1965

12. Memberships: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on a basis or race, sex, or religion - either through formal membership requirements or the practical implementations or membership policies. If so, describe any action you have taken to change these policies and practices.

WLRN-TV (Channel 17) Community Advisory Board (Chairman)
Miami City Club
Kappa Sigma Social Fraternity
Delta Theta Phi Legal Fraternity
Honorary Consul for Dominican Republic (1983-1990)
U.S. Naval Academy Information Officer
Consular Corps of Miami (1983-1991)
Dade County Public Schools (Citizens' Oversight Committee)
Naval Reserve Association
Radio Peace (Catholic Archdiocese of Miami Radio Station) Board Member

13. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all

speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

None.

14. Congressional Testimony: List any occasion when you have testified before a committee or subcommittee or the Congress, Including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

15. Health: Describe the present state of your health and provide the date of your last physical examination.

Excellent. October 23, 2001.

16. Citations: If you are or have been a judge, provide:

(a) a short summary and citations for the ten (10) most significant opinions you have written; (b) a short summary of and citations for all rulings or yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and (c) a short summary of any citations for all 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.

17. Public Office, Political Activities and Affiliations:

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

1968 - 1970 Assistant U.S. Attorney,
Southern District of Florida
Appointed by Attorney General Ramsey Clark

1969 Special Assistant U.S. Attorney,
District of Puerto Rico
Appointed by Attorney General John N. Mitchell

1972 - 1974 Regional Director, U.S. Office for Drug Abuse
Law Enforcement, U.S. Dept. of Justice,
Atlanta, Georgia - Appointed by President Nixon

1973 Special Assistant U.S. Attorney,
Northern District of Georgia
Appointed by Attorney General Richard G. Kleindienst

1973 - 1974 Special Assistant U.S. Attorney,
Southern District of Florida
Appointed by Attorney General Elliot L. Richardson

(b) Have you ever held a position or played a role in a political campaign? If so, please indicate the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

18. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Not applicable.

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Date	
July 1, 1991 to date	Attorney Jose E. Martinez, P.A. which was of counsel and is now a partner at Martinez & Gutierrez (a partnership including professional associations) 601 Brickell Key Drive, Suite 501 Miami, Florida 33131-2651 previously located at 799 Brickell Plaza, Suite 606, Miami, Florida 33131-2808
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July 1985 to October 1989	Partner Martinez & Mattox 201 Alhambra Circle, Suite 1200 Coral Gables, Florida 33146 and 4665 Ponce de Leon Boulevard Coral Gables, Florida
November 1982 to June 1985	Partner English McCaughan and O'Bryan 201 Alhambra Circle, Suite 1200 Coral Gables, Florida 33146
July 1980 to November 1982	Partner (Shareholder) Leib & Martinez, P.A. 201 Alhambra Circle, Suite 1200 Coral Gables, Florida
1972 to 1974 (On leave of absence from law firm)	Regional Director Office for Drug Abuse Law Enforcement U.S. Department of Justice Washington, D.C.
January 1970 to July 1980	Associate - Partner Helliwell, Melrose & DeWolf 1401 Brickell Avenue Miami, Florida
November 1968 to January 1970	Asst. U.S. Attorney Southern District of Florida Miami, Florida
November 1965 to November 1968	Legal Officer - U.S. Navy - Judge Advocate General Corps U.S. Naval Station Key West, Florida

June 1965 to November 1965	Clerk Law Offices of Jonathan E. Ammerman Pan American Bank Building Miami, Florida
June 1964 to June 1965	Clerk McDonald & McDonald 1450 S.W. 1st Street Miami, Florida

b. 1. Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

My practice is a general practice with an emphasis on litigation and most recently on product liability defense. I represent various clients in different types of business endeavors. I have tried all types of criminal cases from Tax Evasion to Racketeering to violations of the Taft-Hartley Act to violations of various regulations on both prosecution and defense sides. I have also tried all types of civil litigation ranging from simple foreclosures to Anti-Trust matters and RICO cases.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I have no specialty area of practice other than litigation which is discussed in detail elsewhere in this questionnaire. At the present time, I represent, among others, Ford Motor Company, Phillip Morris and Emerson Electric.

c. 1. Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

My appearances in court have diminished as my practice matured and it became more economically efficient for my clients to have younger lawyers make court appearances, however, I do still keep my hand in it as much as can be justified, considering the best interests of my clients. I also control the litigation for my clients and supervise the trial lawyers handling the matters. I would say that I still appear in Court regularly, particularly the past several years, as I became involved in some high profile cases (2 tobacco

class actions and one tobacco Attorney General case) which required my personal involvement.

2. Indicate the percentage of these appearances in:

(o) federal courts;
30%
(p) state courts of record;
65%
(c) other courts.
5%

3. Indicate the percentage of these appearances in:

(a) civil;
80%
(b) criminal.
20%

80%- if number of cases is the criteria. However, insofar as time commitment is concerned over the course of my career, the nature of the criminal cases which I have handled makes it about 50/50 between civil and criminal. For example, one year I handled only 2 criminal cases but one took about 6 months to try and one took almost 2 months. This makes it very hard to compute this figure. The last few years I was in trial for several months in civil class actions and the percentage of civil litigation will approach 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.

Although I have kept no records, I believe I have tried in excess of 250 cases as lead counsel to verdict or judgment.

5. Indicate the percentage of these trials that were decided by a jury:

(a) jury;
60%
(b) non-jury.
40%

19. Litigation: Describe the ten most significant litigated matters which you personally handled and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;
(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
(c) the party or parties whom you represented; and
(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

a. The United States of America v. Neal R. Harrington. Case No.: 78-185-CR-WMHOEVELER S.D. Fla

I represented Mr. Harrington, a local businessman who was charged, along with about 17 others, with violating the Taft-Hartley Act by (in his case) paying money to Union Officials, (who were co-defendants), for labor peace after they had threatened him, and others, with economic and grievous bodily harm. These violations of the Taft-Hartley Act, which were misdemeanors, were then used as the predicate acts to charge all the participants with violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 USC 1961 et seq. and subject them to a substantial jail term (20 years per count), a heavy fine, and forfeiture of their business. I was the lead counsel for Mr. Harrington and, of necessity, had to take the lead for the other businessmen who were charged along with him, although they were represented by their own lawyers. It was a very difficult case to try because he was being tried with defendants who were accused of beating and murdering persons on the docks. It became imperative to distance Mr. Harrington from the others or an acquittal was not going to be possible. After about 5 months of actual trial, not counting pre-trial matters, the Honorable William M. Hoeveler, granted a severance which resulted in a subsequent plea to misdemeanors and a sentence of probation. The day the indictments were returned, a plea to three misdemeanors was offered by me on behalf of Mr. Harrington, but in what I perceived to be a misguided effort to appear even handed as between management and labor, the offer was rejected by the prosecutor and the lengthy and extremely expensive trial followed. I therefore considered the plea an unqualified victory.

Mr. Harrington's aspect of the case was not reported but I was asked to and did participate in the appeal for Dorothy and Ray Kopituk, two of the other business persons charged and convicted. That case was reported when it was affirmed at 690 F2d 1289. The issues which were briefed and argued on appeal included the misjoinder of counts and of defendants, sufficiency of evidence and, a most novel problem which arose during jury deliberations, where a juror was disqualified well after the deliberations were under way and an alternate juror who had

been discharged and sent home at the time deliberations commenced, was brought in and the jury was charged again and instructed to start deliberating anew. The ramifications of this case were evidenced in new rules concerning jurors and their replacement.

This case was significant because it was an incredibly massive undertaking and virtually every day there was a significant and novel issue presented which required research and argument. The very nature of the prosecution required a totally new approach to trying a case. Although efforts were made to be totally prepared, it was all one could do to stay 1 or 2 days ahead of the presentation. It was a true test of stamina.

The lead attorney for the government was John Evans who is now deceased. Serving as my assistant in the case was John L. O'Donnell Jr. of Orlando who is now deceased. Other defense counsel were:

E. David Rosen
2910 New World Tower
100 Biscayne Blvd
Miami, Florida 33132
(305)377-3737

Michael G. Masin
retired-unknown

Joseph A. Varon
3900 Hollywood Blvd
PTHS 4
Hollywood, Florida 33021
(305)963-7239

Michael H. Tarkoff
100 S.E. 2nd Street
Suite 3500
Miami, Florida 33131
(305)347-4191

Max B. Kogen
Current address unknown

Jim Matthews
retired-unknown

Karl J. Leib Jr.
deceased

Griffin Bell Jr.
Atlanta Ga.

Lacy Mahon Jr.
223 E. Bay Street
Jacksonville, Florida 32202
(904)354-3526

b. United States of America v. Vicente Carrodeguas, et al. - Case No 81-23-CR-JAGONZALEZ So Dist Fla

My client, Vicente Carrodeguas, Chief Financial Officer of WFC Corporation, was charged, along with several other officers, with conspiring to defraud the United States of America by filing and causing others to file, false tax returns and counseling others to delete certain items of income from their returns. Three of the defendants were convicted, including my client. Three others were acquitted. This case was significant in that notwithstanding the loss, it was probably my best litigated case. It is obvious that the Government has a tremendous edge in the presentation of their cases, particularly as they can pick and choose the cases they present. Success for defense counsel is not always judged by ultimate victory. The novel issues, the quality of the representation for the defendants, the quality of the rulings from the court (Jose A. Gonzalez), combined to make this one of the most significant cases I have tried.

In a conversation several years later, Judge Gonzalez repeated what he had said in open court, that this was the best litigated case he had seen in all his years as a State or Federal Judge. For a Judge of his caliber to state that makes one appreciative of the rare set of circumstances which combined to make this such a significant case.

The Government was represented by Sam Strother, a departmental attorney from Washington. The various defense counsel were:

William A. Meadows
Deceased

Robert C. Josefsberg
800 City National Bank Building
25 W. Flagler St.
Miami, Florida 33130
(305)358-2800

Irwin J. Block
Adorno & Zeder
2601 South Bayshore Drive
Miami, Florida 33133

(305)858-5555

Roy Black
201 S Biscayne Blvd
Suite 1300
Miami, Florida 33131
(305)371-6421

E. David Rosen
2910 New World Tower
100 Biscayne Blvd
Miami, Florida 33132
(305)377-3737

Hugh Culverhouse, Jr.
1 Biscayne Tower
Suite 3600
Miami, Florida 33131
(305)371-3600

c. United States of America v. Julius Cecil Olson
83-79-CRJ14-BLACK - Middle District of Florida

A criminal indictment was returned on June 2, 1983 in the Middle District of Florida charging Julius Cecil Olson, and others, with various violations of the federal laws relating to importation and distribution of controlled substances. I participated in the preparation of a defense based on the doctrines of double jeopardy and fragmented prosecution, since Mr. Olson had previously been convicted and sentenced in Alabama for the same acts but with a slightly different set of co-defendants. The crimes charged were different in that in Alabama the agency investigating was the DEA and in Jacksonville, Customs was involved. This case was significant in that the general policy concerning double jeopardy require that if <u>any</u> element required for conviction does not apply to both prosecutions then it is not considered double jeopardy. John R. Bartels Jr. of White Plains, New York served as counsel with me and Lacy Mahon Jr. of Jacksonville was local counsel. The briefs were written by me and an associate of mine and I participated in all planning sessions and attended all oral arguments. I made some of the oral arguments, but I was primarily involved in the matters that transpired after the motion to dismiss, which was filed on August 11, 1983, was granted. The magistrate, the Honorable Harvey Schlesinger, now a District Court Judge in Orlando, recommended the granting of our motion and on November 23, 1983, the Honorable Susan H. Black, now a Judge in the United States Court of Appeals for the Eleventh Circuit, granted our motion and dismissed the charges. The Government appealed the dismissal and at that time we embarked on discussions with the Department of Justice wherein we argued that this prosecution violated the "petit policy" which was an internal policy of the Department of Justice which prohibited trying separately the

different aspects of a case even if it did not rise to the level of Double Jeopardy. Although this policy is not well known, it is most often observed in its breach. A series of discussions with Thomas O'Malley of the Department of Justice, and others, resulted in the voluntary dismissal of the appeal by the government, on March 19, 1984, and the subsequent release of the defendant from custody. This case was significant because it is one of the few cases where the government has acknowledged that a violation of its internal policy had risen to the level where a dismissal was mandated. This case was not reported. Counsel included:

Assistant United States Attorney
Lawrence Gentile III
now living in Orlando
(407)422-6341

John R. Bartels Jr.
925 Westchester Ave
Suite 304
White Plains, New York 10604
(914)681-7175

Lacy Mahon Jr.
1120 Blackstone Building
233 E. Bay Street
Jacksonville, Florida 32202
(904)354-3526

d. Citibank --Cedars of Lebanon bankruptcy matters cases 74-178-BKC-JAGONZALEZ, 74-179-BKC-JAG, 74-180-BKC-JAG

I represented Citibank of New York which had over $500,000.00 worth of chattel on the premises of Cedars of Lebanon Hospital (and other related entities) at the time Cedars filed for bankruptcy with no security agreement having been executed. Through an adversarial proceeding I was able to prove up a security agreement from 18 or 20 apparently unrelated pieces of paper which showed the parties intent and satisfied the requirements of the Uniform Commercial Code. As a result, my client became a secured creditor which permitted them to obtain a substantial recovery. Although the case was not reported in the true sense of the word, the order was widely circulated in the bankruptcy arena and for several years I got phone calls requesting my research and memoranda. The lawyer for Cedars of Lebanon was:

C. Peter Buhler
Deceased

e. United States of America v. Anthony R. Field. Reported at 532 F2d 404, rehearing denied, 535 F2d 630, certiorari denied 429 U.S. 940 (FAY).

This matter involved my representation of a foreign bank officer, Anthony R. Field, who was served on about January 12, 1976 with a subpoena to appear on January 20, before a Federal Grand Jury in Miami which was investigating foreign tax havens. Field was served while he was changing planes at Miami International Airport. Before the return date of the subpoena, we sought information and advice from the Cayman Islands as to the exposure of Field if he answered questions before the Grand Jury. A letter from the Cayman Inspector of Banks and Trust Companies dated January 16, 1976 warned Field about violating Cayman secrecy laws. An affidavit was obtained from a respected Cayman lawyer which declared that if Field testified he would probably be charged on his return to the Caymans. On February 18, 1976, Field was granted immunity and ordered to testify.

A hearing was held on March 18, 1976. At that hearing, evidence was presented concerning the likelihood of his prosecution outside the United States. The court and the government did not question that Field would, by testifying, subject himself to probable criminal prosecution in the Cayman Islands, his place of employment and residence. Notwithstanding this, the court ordered him to answer and when he failed to do so, held him in civil contempt. An appeal was filed pursuant to 28 U.S.C. 1826(b) which required a decision within 30 days from the Court of Appeals. The matter was fully briefed and I participated in the writing of the brief and handled the oral argument. The court of appeals applied the principles of international comity in deciding that the relative interests of the states involved required them to "regret"(fully) require Field to testify.

The case was of tremendous significance to the client, Anthony R. Field and was a case of first impression. It was litigated aggressively. The unique nature of the case extended beyond the courtrooms and the legal papers involved. We had argued that the Caymanian Bank Secrecy Act would place this man in jeopardy even if he were granted immunity by the United States (which he subsequently was) as they could not guarantee he would not be charged when he returned to the Cayman Islands or the Bahamas, which also had a secrecy act, a branch of the same bank, and where the government was also seeking information, for violation of their laws.

A petition for writ of Certiorari was made to the U.S. Supreme Court which was denied. After the various appellate proceedings were terminated and the matter was returned to the trial court with the appellate court holding that the testimony could be compelled, it was discovered that the prosecutors had permitted the grand jury to expire without passing this pending matter to another grand jury. This procedural failure meant that, there being no pending matter before the grand jury, the court could not compel the attendance of the witness and Field did not have to testify.

Assisting me was
John L. O'Donnell Jr. (Now deceased).

Lead Government Counsel
Bernard S. Bailor

Tax Div. Dept of Justice
Washington D.C.
(Number and present location unknown)

f. United States of America vs. Joyce K. Albury, Charles R. Albury and Joel Wertheim - Case No. 88-243-CR-KING, Southern District of Florida

On April 14, 1988 Defendants Charles Raymond Albury, Joel Wertheim and my client, Joyce K. Albury were indicted by a Federal Grand Jury for conspiracy to defraud the United States, specifically a conspiracy to impede and impair the Internal Revenue Service (IRS) (commonly referred to as a "Klein conspiracy"). The Alburys were also indicted for two substantive tax evasion offenses for 1981 and 1982 in violation of 26 USC §7201. The indictment alleged that the Albury's conspired with co-defendant Joel Wertheim, an attorney, to evade the Albury's taxes.

The case commenced jury trial on March 1, 1989 and concluded on March 17, 1989 with guilty verdicts as to all three defendants. The case was significant in that the amount of money involved was substantial and there was little question that Mrs. Albury knew that her husband had access to substantial amounts of money, and that the tax returns did not reflect a substantial amount of income, and that she had signed the returns. The government asserted that in 1981 the Albury's reported $13,647.00 in taxable income yet spent approximately $375,000.00 and in 1982 they reported only $11,380.00 in taxable income yet spent approximately $750,000.00. Notwithstanding the substantial amount of money which was proven to have been spent, the case was vigorously defended in part based upon the defense of the battered woman syndrome. It was our position that notwithstanding the apparent signatures and cooperation of the defendant Joyce Albury in the preparation of and filing of the tax returns, the circumstances in the case supported the position that she had lost her ability to resist her husband's efforts to force her to violate the law. Although the defense of the battered woman syndrome was not unique, it was relatively new in this context. Unfortunately, the Court rejected this defense and the Appellate Court upheld its rejection. This case was noted at 919 F2d. 743 but the opinion was not published.

Counsel included:

AUSA Robert Bondi
Southern District of Florida
(305)536-5457

Defense counsel for the husband:

Kirk W. Munroe
3100 S.E. Financial Center
200 S. Biscayne Boulevard
Miami, Florida 33131

(305)372-8808

g. United States of America vs. Silvio R. Diaz-Muñoz, Alfredo Garcia and Eduardo Garcia - Case No. 79-5689-CR-EATON, U.S. District Court for the Southern District of Florida.

This was a tax evasion case against two brothers based upon a failure to include certain income in their tax returns. My client was Eduardo Garcia, a local businessman who was accused of conspiracy to defraud an insurance company, embezzlement, filing false tax returns, preparing false documentation and mail fraud. Also defending various other charges were his brother Alfredo Garcia and another Defendant by the name of Silvio R. Diaz-Muñoz. After a trial which lasted more than two weeks, involved 3 defendants, 19 counts and 200 exhibits, the jury returned a verdict of guilty as to all counts in less than three hours (including lunch). From the very beginning, one of the major contentions on our part in behalf of the Defendant Eduardo Garcia was that this case was structured in such a way that it was unfair and prejudicial to the Defendant because of a misjoinder of counts and Defendants. The significance of the case was that this was one of the few cases where I have ever been able to fully develop misjoinder as a defense and in addition it was also one of the few cases where a specific Brady request (a request for the disclosure of evidence favorable to the Defendant pursuant to Brady vs. Maryland) resulted in obtaining information from the government but a refusal to disclose it because of the classified nature of the information.

The trial court accepted the representations of the government that matters would be tied together and that it was necessary to try it in the fashion that they had set it up but the U.S. Court of Appeals for the 5th Circuit reversed and remanded the case. The Appellate Court held that the Brady violations constituted error, that the misjoinder of offenses and of Defendants constituted error and that various other Motions made at trial should have been granted. All of the defense counsel felt vindicated by the Appellate Court finding that in making its decision to combine defendants and counts the government must balance the needs of the court against its own needs and those of the defendants. It pointed out that even the prosecutor was confused and inadvertently included in his final argument documents which had not been moved into evidence which proved that it was unclear what was and was not in evidence. There was substantial variance between the particulars and the proof at trial and in general the opinion relied heavily on those matters which we, through tremendous difficulty, managed to preserve during this very complicated trial. At the retrial, a plea was entered to a misdemeanor tax count resulting in no further incarceration for the Defendant (Reported at 632 F2d 1330).

The Co-Counsel:

For Defendant, Diaz-Muñoz
Harvey D. Rogers
1401 N.W. 17 Avenue
Miami, Florida 33125
(305)325-0040

For Defendant Alfredo Garcia
Marsha L. Lyons
P.O. Box 10095
Tallahassee, Florida 32302-2095
(904)222-3533

The government was represented on Appeal by:

Caroline L. Gaines
Attorney Appellate Section
Criminal Division
Dept. of Justice
Washington, D.C.

h. United States of America vs. Elkin A. Echeverri - Case No. 87-5433, District of New Jersey before the Honorable Stanley S. Brotman.

My client, Elkin Echeverri was tried in Camden, New Jersey in a three month trial that involved seven other Defendants. He was convicted of participating in a Continuing Criminal Enterprise and sentenced to a 25 year term without possibility of parole or probation. Various other sentences were made to run concurrent with this sentence. The significance of this case was that evidentiary questions rose each day which were certainly going to become appellate points. It was necessary to be alert all the time for the preserving of the record. The record was adequately preserved because although I did not handle the Appeal (which was reported at 854 F.2nd 638) the Third Circuit found error and reversed some of the convictions but found harmless error in other areas.

AUSA:

Paul J. Fishman
First Assistant U.S. Attorney
970 Broad Street
Newark, New Jersey 07102
(201)645-2700

Co-Defense counsel:

Francis J. Hartman
300 Chester Avenue
Moorestown, New Jersey 08057
(609)235-0220

Thomas M. Barron
711 East Main Street
Moorestown, New Jersey 08057
(609)234-4340

Jack J. Zappacosta
Route 70 East
Cherry Hill, New Jersey 08003
(609)351-0300

Mark Tarentino
37 Grand Street
P.O. Box 387
Mount Holly, New Jersey 08060
(609)267-1100

Steven Friedman
900 Haden Avenue
Collinswood, New Jersey 08108
(609)858-7728

Daniel A. Bernardin
434 Haden Avenue
Collinswood, New Jersey 08108
(609)854-0999

Donald F. Manno
Route 70 and McClellan Boulevard
Pennsauken, New Jersey 08109
(609)665-6464

i. United States of America vs. Anthony De Pasque - Case No. 80-189-Cr-JAGONZALEZ.

This was one of the government's first reverse sting cases where they produced marijuana in an effort to induce persons to buy it. Anthony De Pasque, a native of New Jersey was in the Miami area and through a friend was introduced to an undercover DEA agent. After De Pasque met with the agent and stated that he had brought $150,000.00 with him, he was shown marijuana and refused to buy it because it allegedly was Colombian, not Jamaican. He stated he was going to look for a different type of marijuana and was not interested in dealing with the agent. This single conversation and the seizure of the $150,000.00 at the time of the arrest was the only evidence against Mr. De Pasque in a conspiracy charge. We argued that since the government had no evidence of any prior marijuana deals by Mr. De Pasque, and there were no

prior telephone conversations between Mr. De Pasque and the agents, the **agreement** to buy was critical to a conspiracy charge whereas in the normal defendant sale pattern that agreement is easily inferred. The court obviously took this into consideration because in spite of the large amount (for the time) of money involved and the discussions of a large purchase of marijuana, the court gave Mr. De Pasque a relatively light sentence of six months in prison. The case was significant because while we lost both in the District Court and before the 11th Circuit, we were told the case influenced future sting operations. The case was affirmed by the Appellate Court at 691 F2d. 510 (11th Cir, 1982) but the opinion was not published.

Co-Counsel
John R. Bartels, Jr.
925 Westchester Ave
Suite 304
White Plains, New York 10604
(914)681-7175

Stephen Hartz (Former Assistant U.S. Attorney)
1 S.E. 3rd Avenue
Suite 2800
Miami, Florida 33131
(305)374-5600

j. Significant Tobacco Litigation

i. Norma R. Broin, et al., Plaintiffs, v. Phillip Morris Companies, Inc. et. al., Defendants,- Case No. 91-49737 CA (22), Circuit Court, 11th Judicial Circuit in and for Dade County Florida., filed 1991, tried June 1997, before Judge Kaye.

Reported at:
Philip Morris v. Broin, 699 So.2d 1375 (Fla. 1997)
Philip Morris v. Broin, 678 So.2d 339 (Fla. 1996)
Philip Morris v. Broin, 654 So.2d 919 (Fla. 1995)

This case, involved allegations of injuries caused by environmental tobacco smoke (ETS) or second hand smoke to a class of non-smoking flight attendants. I represented Dosal Tobacco Corporation, a small, family owned cigarette manufacturer from Opa Locka, Florida that sold much of its product to the state of Florida for resale within its prison system. After six years of various legal battles including appeals on the certification of the class, the case started in June of 1997. On the first day of jury selection, my client, Dosal Tobacco Corporation, was dismissed by the plaintiffs. I was subsequently retained by Phillip Morris to assist the chief trial lawyers in the trial. Prior to the dismissal of Dosal, I was the lead counsel and supervised other attorneys in my office in typical trial preparation. After my retention by Phillip Morris I assisted chief trial counsel in jury selection, was assigned certain witnesses to prepare cross examination and be

ready to handle those witnesses if and when they are called as witnesses and was responsible for preparing for, briefing and arguing specific issues which are expected to come up.

The historic nature of this case is obvious. It was the first case in a series of cases which have had obvious significance. As result of my successful representation of Dosal Tobacco Corporation, I was asked to represent them in the companion class action of Engle and the historic case brought by the State of Florida. These cases have fascinating legal issues arise and my involvement has permitted me to argue some of the most novel and ground breaking issues I have ever seen or heard of.

Stanley M. Rosenblatt and
Susan Rosenblatt
Attorneys for Plaintiffs
66 West Flagler Street
12th Floor - Concord Building
Miami, Florida 33130

David L Ross, Esquire
GREENBERG TRAURIG ET AL
Attorneys for Lorillard, Tobacco Institute
1221 Brickell Avenue
Miami, Florida 33131

Barry Davidson, Esquire and
Norman A Coll, Esquire
COLL DAVIDSON CARTER ET AL
Attorneys for Philip Morris
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-2312

Edward A Moss, Esquire
Anderson Moss et al
Attorneys for Brown & Williamson
100 North Biscayne Boulevard
25th Floor
Miami, Florida 33132

Joseph P. Moodhe, Esquire
DEBEVOISE & PLIMPTON
Attorneys for Council for Tobacco Research
875 Third Avenue
New York, NY 10022

Walter L. Cofer, Esquire
David Hardy, Esquire
SHOOK HARDY & BACON
Attorneys for Lorillard and Philip Morris
One Kansas City Place
1200 Main Street
Kansas City MO 64105

Richard M. Kirby, Esquire
JONES DAY REAVIS & POGUE
Attorneys for RJ Reynolds
3500 One Peachtree Center
303 Peachtree Street NE
Atlanta, GA 3038-3242

James A Goold, Esquire
COVINGTON & BURLING
Attorneys for Tobacco Institute
1201 Pennsylvania Avenue NW
Washington, DC 20004

Mike Russ
KING & SPALDING
Attorneys for Brown & Williamson
191 Peachtree Street
Atlanta, GA 30303-1763

Douglas J. Chumbley, Esquire
CARLTON FIELDS WARD ET AL
Attorneys for RJ Reynolds.
4000 International Place
100 SE Second Street
Miami, FL 33131

Hugh R. Whiting, Esquire
JONES DAY REAVIS & POGUE
Attorneys for RJ Reynolds
901 Lakeside Avenue
Cleveland, Ohio 44114

Alan C. Sunberg, Esquire
Fred Townsend Hawkes, Esquire
CARLTON FIELDS WARD ET AL

Attorneys for Philip Morris
500 First Florida Band Building
PO Drawer 190
Tallahassee, Florida 32302

ii. The State of Florida, et al. v. The American Tobacco Company, et al.;
Case No: 95-1466
Circuit Court, Fifteenth Judicial Circuit for Palm Beach County, Florida

The State of Florida sued various tobacco manufacturers to recover medicaid funds spent on health care for Florida residents who allegedly became ill as a result of smoking cigarettes. I was the lead counsel for Dosal Tobacco and supervised other attorneys in my office in typical trial preparation. After two years of pretrial discovery and trial preparation, the case was scheduled to go to trial in July 1997. Florida was the second state in the United States to set a trial for a medicaid reimbursement suit against the tobacco industry. The day before opening statements were scheduled, the case was settled. This case was significant because it was one of the first cases in which a state sued the tobacco industry to recover medicaid reimbursement. The settlement agreement paved the way for the master settlement agreement between the attorney generals of various states and the tobacco industry which was entered into in 1998.

ROBERT M. MONTGOMERY, ESQ.
Montgomery & Larmoyeux, P.A.
1016 Clearwater Place
Post Office Drawer 3086
West Palm Beach, FL 33402-3086

J. ANDERSON BERLY ESQ.
Ness, Motley, Loadholt Richard & Poole
Meeting Street, Suite 600
P.O. Box 1137
Charleston , S.C. 29402

MICHAEL MAHER, ESQ.
Maher, Gibson & Guiley
East Livingston Street, Suite 200
Orlando, FL 32801

WAYNE HOGAN, ESQ.
Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel, P.A.
Blackstone Building, Suite 804
233 East Bay Street
Jacksonville, FL 32202

WILLIAM C. GENTRY, ESQ.
Gentry, Phillips, Smith and Hodak, P.A.
Six East Bay Street, Suite 400
PO Box 837
Jacksonville, FL 32201

MURRAY A. GARNICK, ESQ.
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

STEPHEN J. KRIGBAUM, ESQ.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
Post Office Box 150
West Palm Beach, FL 33402

EDWARD A. MOSS, ESQ.
Anderson, Moss, Parks & Sherouse
New World Tower - 25th Floor
100 North Biscayne Boulevard
Miami, FL 33132

JUSTUS REID, ESQ.
Reid, Metzger & Associates, P.A.
250 Australian Avenue South, Suite 700
West Palm Beach, FL 33401

R. WILLIAM RUTTER, JR.
SPECIAL MASTER
Metzger, Sonneborn & Rutter
1545 Centrepark Drive North
West Palm Beach, Fl. 33401

iii. Engle et al. v. RJ Reynolds tobacco Company, et al.
Case No.: 94-8273 CA (20)
Circuit Court, Eleventh Judicial Circuit for Miami-Dade County, Florida

Reported at:
R.J. Reynolds Tobacco v. Engle, 751 So.2d 51 (Fla. 1999)
R.J. Reynolds Tobacco v. Engle, 682 So.2d 1100 (Fla. 1996)

This case, involved allegations of injuries caused by cigarette smoking to a class of Florida smokers(estimated at 500,000 Floridians). After four years of various legal battles including

appeals on the certification of the class, the trial started in June of 1998 and continued until July 2000. Because of the enormity of the case, the trial was divided into several phases including bifurcation on the issues of liability and damages, Phases I and II. Phase II was further divided into a compensatory damages phase (a) and a punitive damages phase(b). Phase III, individual trials for each class member, has yet to happen. Initially, I represented Dosal Tobacco Corporation, however, at the conclusion of the Plaintiff's case during Phase I, I obtained a directed verdict on behalf of Dosal Tobacco. After the dismissal of Dosal Tobacco, I was retained to represent the Tobacco Institute for the remainder of the case. My involvement during Phase II of the trial continued was of a more limited nature.

This case is historically significant because it was the first smokers class action case that went to trial and it was the single largest punitive damage verdict in history. The verdict is currently being appealed to the Third District Court of Appeals of the State of Florida.

Stanley M. Rosenblatt, Esquire
Susan Rosenblatt, Esquire
STANLEY M. ROSENBLATT, P.A.
12th Floor - Concord Building
66 West Flagler Street
Miami, Florida 33131
(Counsel for Plaintiffs)

James T. Newsom, Esquire
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(Co-counsel for Lorillard, Inc.,
Lorillard Tobacco Company,
Phillip Morris Incorporated)

Melvin Spaeth, Esquire
David Eggert, Esquire
ARNOLD & PORTER
555 12th Street, N.W.
Washington, DC 20004
(Co-counsel for Philip Morris Inc.)

Robert C. Heim, Esquire
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(Co-counsel for Philip Morris Inc.)

Stephen N. Zack, Esquire
ZACK, SPARBER, KOSNITZKY,
SPRATT & BROOKS, P.A.
100 SE Second Street, Suite 2800
Miami, Florida 33131
(Co-Counsel for Philip Morris Inc.)

David L. Ross, Esquire
GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
1221 Brickell Avenue
Miami, Florida 33130
(Co-counsel for Lorillard, Inc., Lorillard
Tobacco Company)

James A. Goold, Esquire
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(Co-counsel for Tobacco Inst.)

Richard M. Kirby, Esquire
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, GA 30308-3242
(Co-counsel for RJ Reynolds
Tobacco Company)

Douglas J. Chumbley, Esquire
R. Benjamine Reid, Esquire
CARLTON FIELDS
100 S.E. 2nd St., Suite 4100
Miami, Florida 33131
(Co-counsel for R.J. Reynolds Tobacco Company)

Aaron Marks, Esquire
KASOWITZ BENSON TORRES
& FRIEDMAN
1633 Broadway - 22nd Floor
New York, NY 10019
(Co-counsel for Liggett Group
Inc., Brooke Group Ltd.)

Kelly Anne Luther, Esquire
CLARKE, SILVERGATE, CAMPBELL WILLIAMS & MONTGOMERY
799 Brickell Plaza, 9th Floor
Miami, Florida 33131
(Co-counsel for Liggett Group
Inc., Brooke Group Ltd.)

Edward A. Moss, Esquire
SHOOK, HARDY & BACON, L.L.P.
201 South Biscayne Blvd., 24th Floor
Miami, Florida 33132
(Co-counsel for Brown & Williamson
Tobacco Corporation)

Richard A. Schneider, Esquire
Michael Russ, Esquire
KING & SPALDING
191 Peachtree Street
Atlanta, GA 30303-1763
(Co-counsel for Brown &
Williamson Tobacco Corp.)

Joseph P. Moodhe, Esquire
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(Co-counsel for Counsel for
Tobacco Research)

Michael Nachwalter, Esquire
David H. Lichter, Esquire
KENNY, NACHWALTER, SEYMOUR
ARNOLD, CRITCHLOW & SPECTOR
1100 Miami Center
201 South Biscayne Boulevard

Miami, Florida 33131
(Co-counsel for Council for Tobacco Research)

Anthony N. Upshaw, Esquire
Adorno & Zeder, P.A.
2601 S. Bayshore Drive
Suite 1600
Miami, Florida 33133
(Co-counsel for Council for Brown & Williamson Tobacco Corp.)

Dan K. Webb, Esquire
Winston & Strawn
3000 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
(Co-counsel for Philip Morris)

Norman A. Coll, Esquire
Barry R. Davidson, Esquire
Coll, Davidson, Smith
Salter & Barket
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131-2312
(Co-counsel for Philip Morris)

David M. Bernick, Esquire
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
(Co-counsel for Philip Morris)

Herbert M. Wachtell, Esquire
Wachtell, Lipton, Rosen & Katz
51 W. 52nd Street
New York, NY 10019
(Co-counsel for Philip Morris)

20. Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other then a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

21. Party to Civil or Administrative Proceedings: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian ad litem, stakeholder, or material witness.

Mary Anne Martinez and Jose E. Martinez, vs. Federated Department Stores, Inc., d/b/a BURDINE'S, Case No. 92-7770-CA-13. This was a suit filed in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida and was given Case No. Case No. 92-7770-CA-13. This was a slip and fall case where my wife fell at a Burdines Department store injuring her mouth and teeth. The case was settled immediately upon filing, for a nominal amount (less than $2,000.00) which covered her medical expenses which were not covered by health insurance. Suit was necessary because the financial condition of Burdines (it was in bankruptcy) did not permit settlement without suit being filed.

Jose E. Martinez v. Ronnie Lee, Case No. 93-11521-CA-01. This was a suit filed in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida I sued Ronnie Lee in my representative capacity as court appointed receiver.

Exa International, Inc. a Nevada Corporation f/k/a Essex International, Inc. v. Exa International , Inc. a Minnesota Corporation, et al. Case No. 99-13039 CA 04 This was a suit filed in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida. I was apparently sued as a director which I may have been for a short time. The case was settled by the principals.

In Re: Guardianship of Dalia J. Martinez, Case Number 00-00262. This is an guardianship case involving my mother filed in Circuit Court, 11th Judicial Circuit, Miami-Dade County, Florida Probate Division. I was appointed along with my sister Elvira D. Martinez to act as co-guardian of my mother Dalia J. Martinez.

Estate of Tomas Balsera, Case Number 01-23314 FC 04. This is an active estate case filed in Circuit Court, 11th Judicial Circuit, Miami-Dade County, Florida Probate Division in which I have been appointed curator until letters of administration are issued.

22. Potential Conflict of Interest: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflict of interest during your initial service in the position to which you have been nominated.

I can think of none at this time. I will disclose prior clients and describe relationships to all parties bearing in mind that public confidence in the judiciary is of paramount importance. My outside activities are not in areas which traditionally are considered to be high risk as far as any potential conflict with judicial duties, but I will remain mindful of them when presented with any real or possible conflict of interest.

23. Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Although at the present time I have no intention of pursuing employment outside court service, after I am sure I can handle the time commitments, I may teach or perform other activities as are permitted after consultation with the chief judge and any other available authority to guide me in judging the propriety of these activities in light of my office.

24. Sources of Income: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See annexed financial disclosure report.

25. Statement of Net Worth: Complete and attach the financial net worth statement in detail. Add schedules as called for.

26. Selection Process: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

1. If so, did it recommend your nomination?

Yes

2. Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

I appeared before the commission of the Southern District of Florida in the Grand Jury room of the Federal Courthouse in Fort Lauderdale, FL. The interview took about 45 minutes and was an exceptionally pleasant

experience. Two days later, I was called by the Chair of the committee who advised me that I was one of three candidates selected and that I would be hearing from someone in Washington DC soon. A few days later I received a call from the Office of the General Counsel in the White House which made arrangements for me to come to Washington to be interviewed by our two US Senators, Bob Graham and Bill Nelson at their offices.

Approximately one week later I went to Washington DC and met in Senator Bill Nelsons office with members of his staff and the staff of Senator Bob Graham. We met for about a half hour before the two Senators, who had been on the floor of the Senate came in. We met for about another half hour or perhaps 45 minutes with both Senators and had a very nice discussion. I then went to the West-Wing of the White House where I met with Judge Alberto Gonzalez, General Counsel to the President. We met for perhaps 30 minutes and I was told that we could expect to hear from them in about 8 weeks.

3. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue or questions? If so, please explain fully.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		5	000	Notes payable to banks-secured - see below			--
U.S. Government securities-add schedule			--	Notes payable to banks-unsecured			--
Listed securities- Schedule A		40	015	Notes payable to relatives			--
Unlisted securities -Schedule B		6	926	Notes payable to others			--
Accounts and notes receivable:			--	Accounts and bills due			--
Due from relatives and friends			--	Unpaid income tax			--
Due from others			--	Other unpaid income and interest			--
Doubtful			--	Real estate mortgages payable - Schedule G		143	490
Real estate owned - Schedule C		950	000	Chattel mortgages and other liens payable			--
Real estate mortgages receivable			--	Other debts-itemize: See Schedule H		56	253
Autos and other personal property - Schedule D		70	000				
Cash value-life insurance - Schedule E		73	100				
Other assets itemize: Schedule F		206	902				
				Total liabilities		199	743
				Net Worth	1	152	200
Total Assets	1	351	943	Total liabilities and net worth	1	351	943

CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor - Cosigner on firm line of credit				Are any assets pledged? (Add schedule) None			
On leases or contracts - No				Are you defendant in any suits or legal actions? No			
Legal Claims - No				Have you ever taken bankruptcy? - No			
Provision for Federal Income Tax - No							
Other special debt - None							

Financial Statement/Net Worth Schedules

Schedule A - Listed Securities Owned by Mary Anne Martinez

American Electric Power	
62.37 shares/Market Value as of December 2001	$2,695.00
Dominion resources	
421.6 shares/Market Value as of December 2001	$24,735.27
Exelon	
38.608 shares/Market Value as of December 2001	$1,763.99
McDonalds Corporation	
44.453 shares/Market Value as of December 2001	$1,194.45
Southern Company	
307.2073 Shares/Market Value as of December 2001	$7,787.70
Western Resources	
107.4011 Shares/Market Value as of December 2001	$1,838.70
Total:	**$40,015.11**

Schedule B- Unlisted Securities

Jose E. Martinez, P.A.	
1 share	$ 500.00
Spanish Broadcasting Network, Inc.	
250 shares	$ 6,426.00
Total:	**$ 6,926.00**

Schedule C - Real Estate Owned

Jose and Mary Anne Martinez

Personal Residence

Total: $950,000.00

Schedule D - Autos and other personal property

Lincoln LS 2000	$35,000.00
Lexus GS300	$35,000.00
Total:	**$70,000.00**

Schedule E - Cash Value - Life Insurance -

Protective Life Insurance	$64,100.40
Navy Mutual Aid	$9,000.00
Total:	**$73,100.40**

Schedule F - Other Assets:

Mellon Private Asset Management MAM - IRA Value as of 12/31/01	$37,164.90
Mellon Private Asset Management IRA #1 Rollover Value as of 12/31/01	$79,573.78
Mellon Private Asset Management MAM - Investment Management Account Value as of 12/31/01	$90,163.42
Total:	**$206,902.10**

Schedule G - Real Estate Mortgage Payable
Home Finance Center
1390 S. Dixie Highway, Suite 1104
Coral Gables, Florida 33146

Total: $143,490.85

Schedule H - Other Debts
Co-signor on a line of credit in the name of Martinez & Gutierrez with
Mellon United National Bank
(Balance as of 1/25/02)

Total: $56,253.33

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Martinez, Jose E.	District Court-S. Dist. of Fl.	01/25/2002
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
US District Judge (Nominee)	X Nomination, Date 01/23/1902 __ Initial __ Annual __ Final	01/01/2001 to 01/01/2002
7. Chambers or Office Address	**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.**	
601 Brickell Key Drive Suite 501 Miami, Florida 33131	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.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Partner	Martinez & Gutierrez
2	President, Director, Treasurer, Registered Agent	Jose E. Martinez, P.A.
3	President, Vice-President, Director, Registered Agent	Spanish Broadcasting Network

II. AGREEMENTS *(Reporting individual only; see pp.14-16 of Instructions.)*

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1/25/02	Upon my departure from my firm, any income that may be attributable to my share of the partnership will be paid to me.
2	1/25/02	I plan to divest myself of my ownership interest in Spanish Broadcasting Network, Inc.
3		

III. NON-INVESTMENT INCOME *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2001	Guardianship of Margaret Sterbutzel (spouse)	
2	2001	Jose E. Martinez, P.A.	$52300.00
3	2001	Martinez & Gutierrez (spouse)	
4			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Martinez, Jose E.	01/25/2002

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	Exempt		
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependent children. See pp 33-35 of Instructions.)

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	Mellon United National Bank	Co-signor on a line of credit in the name of Martinez & Gutierrez	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
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
Martinez, Jose E.	01/25/2002

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				
Place "(X)" after each asset exempt from prior disclosure.	(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 Jose E. Martinez, P.A., (privately held/common st)		None	J	U	Exempt				
2 Spanish Broadcasting Network, Inc.(priv. held common stock)		None	J	U	Exempt				
3 American Electric common stock - owned by spouse	A	Div/Reinvest	J	T	Exempt				
4 Dominion Resources common stock - owned by spouse	B	Div/Reinvest	K	T	Exempt				
5 Southern Co. common stock - owned by spouse	A	Div/Reinvest	J	T	Exempt				
6 Exelon Corp. common stock - owned by spouse	A	Div/Reinvest	J	T	Exempt				
7 Western Resources common stock - owned by spouse	A	Div/Reinvest	J	T	Exempt				
8 McDonald's Corporation Common Stock - owned by spouse	A	Div/Reinvest	J	T	Exempt				
9 IRA #1 Rollover	B	Div & Int	L	T	Exempt				
10 - Cash Reserve Account III - Florida									
11 - Mellon Private Asset Mgt Bond Fund MPAM SHS									
12 - Dreyfus Disciplined Stock Fund									
13 - Dreyfus Emerging Markets Fund									
14 - Dreyfus International Value									
15 - Dreyfus Premier Small Co STK CL R									
16 IRA #2	B	Div & Int	K	T	Exempt				
17 - Cash Reserve Account III-Florida									

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	Date of Report
Martinez, Jose E.	01/25/2002

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 (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure.	(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 - Mellon Private Asset Mgt Bond Fund MPAM SHS									
19 - Dreyfus Disciplined Stock Fund									
20 - Dreyfus Emerging Markets Fund									
21 - Dreyfus International Fund									
22 - Drefus Premier Small Co STK CL R									
23 MAM Investment Mgt Acct	B	Div. & Inter	L	T	Exempt				
24 - Cash Reserve Account - Florida									
25 - Dreyfus Disciplined Stock Fund									
26 - Dreyfus Emerging Markets Fund									
27 - Dreyfus International Value									
28 - Dreyfus Premier Small Co STK CL R									
29 - Dreyfus Prem LTD Muni BD CL R									
30 University Credit Union Account	A	Interest	J	T	Exempt				
31									
32									
33									
34									

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	Date of Report
	Martinez, Jose E.	01/25/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

The IRA #1 Rollover, IRA #2 and MAM Investment Management Account are all Managed by Mellon Private Asset Management.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Martinez, Jose E.	01/25/2002

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	Co-guardian	Guardianship of Dalia J. Martinez
5	Assistant Secretary, Registered Agent	Dorado Realty
6	Registered Agent	Shatila Trading Company
7	Registered Agent	Windsor Enterprises
8	Chairman	WLRN-TV (Channel 17) Advisory Board

Senator FEINSTEIN. Thank you very much, and this hearing is adjourned.

[Whereupon, at 4:56 p.m., the committee was adjourned.]

[Question and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

Senate Judiciary Committee
Hearing on the Nomination of Priscilla Owen
July 23, 2002

Questions Submitted by U.S. Senator Russell D. Feingold

1. During the hearing, I asked you about reports that the Texas Supreme Court had been criticized for allowing clerks, during their clerkships, to accept large bonuses from law firms that they planned to join following their clerkships and that you had characterized the criticism and a criminal investigation into the practice as a "political issue." When I asked why you would dismiss this issue in that manner, you said,

> **[T]his is a long-standing practice that I would say many if not most federal district courts, federal circuits and I think even some judges [*sic*] on the U.S. Supreme Court – law firms around the country typically give so-called 'clerkship bonuses' to their lawyers who take their first year of practice and clerk for a court, not just my court, as I said federal district courts, federal courts of appeals, U.S. Supreme Court . . . .**

In fact, there is a difference between the Texas Supreme Court's pre-2001 practice of allowing clerks to get law firm bonuses while they were still clerking and the ethics rules governing clerks on the federal courts. According to a Judicial Conference advisory opinion, "A [federal] law clerk may not, during his or her service as a law clerk, accept any bonus given in anticipation of services to be provided for the clerk's future employer."[1] This policy reflects the very concerns motivating the local investigation of your court's practice.

> **(a) In light of the rules for federal clerks, why would you characterize the pre-2001 "practice" on your court as the same as that at the federal level?**

Response:

> I may have misunderstood your question during the hearing.[2] I did not think that when you said that the Supreme Court of Texas had been criticized for "allowing

[1]Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion No. 83, Issued January 16, 1990, Revised July 10, 1998.
[2]The question at the hearing to which I believe you have referred in your written question was:

> SEN. FEINGOLD: Justice Owen, the independence of the Texas Supreme Court has recently been attacked for allowing its law clerks to accept large bonuses, as much as $45,000 from law firms that law clerks plan to join after completing their clerkships. And the potential for a conflict of

its law clerks to accept large bonuses," you meant bonuses that were actually paid to a law clerk while he or she was working for the court. I do not know whether any law clerk for the Supreme Court of Texas was actually paid a clerkship bonus while clerking for the court. It is my understanding that a number of law firms offered compensation packages to law students or lawyers who clerked for courts, regardless of whether the court was the Supreme Court of Texas or a federal court, that included a so-called clerkship bonus. It is my understanding that at the time a law student or law clerk was hired by a law firm, the terms of the compensation package, including the amount of any clerkship bonus, was known to the law student or clerk. It was also my understanding that the amount and timing of payment of any clerkship bonuses may have varied from law firm to law firm, but that whatever clerkship bonus was offered by any particular law firm was the same for all law clerks, regardless of whether the law clerk clerked for the Supreme Court of Texas or a federal court.

I have absolutely no reason to believe that the bonuses were offered to influence any law clerk while performing duties for a court. Because of the rules in place at the Supreme Court of Texas, and I assume at all courts, such bonuses could not influence any work of the court because law clerks were required to recuse. To the best of my knowledge and belief, the bonuses to law clerks were given in recognition of the fact that clerking for a court is a valuable professional experience. Law firms recognize that law clerks gain considerable legal experience on the court, which in turn fuels competition among firms to hire them.

To the best of my knowledge, there is now a difference between how law firms compensate law clerks who have clerked or will clerk at the Supreme Court of Texas and law clerks for federal courts. As I understand it, some law firms have ceased paying any clerkship bonus at all to law clerks who clerk at the Supreme Court of Texas, while they continue to pay such bonuses to federal court law clerks. To the extent that any clerkship bonuses would be paid to former Supreme Court of Texas law clerks, the court's rules of conduct for law clerks require that the bonus is to be paid over the course of at least one year after the clerk begins to

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interest here is very real and serious, I think. The clerks review and express opinion on cases brought by or against the firms paying their bonuses. I'm told this issue provoked an investigation by the Travis County attorney into whether the practice violates Texas criminal law. The Texas Ethics Commission ruled last year that the bonuses could be in violation of the state's bribery laws. In response, the supreme court issued new guidelines concerning these so-called clerk perks. I'm told that you, however, defended the clerk perks and dismissed the criticism as a, quote, "political issue that is being dressed up as a good government issue," unquote. Why do you believe that this was simply a political issue and not a genuine issue of ethics, fairness and independence of the judiciary?

work for his or her law firm employer, while former federal clerks could receive the bonus in a lump sum upon completion of the clerkship.

(b) Do you not perceive a difference between clerks' receiving substantial bonuses from law firms during their clerkships and former clerks receiving bonuses when they start at their law firms?

Response:

I recognize that if law clerks for the Supreme Court of Texas had received clerkship bonuses before their clerkships ended, there may have been a basis for someone to conclude that there was at minimum the appearance of impropriety. Again, I do not know whether any law clerks for the Supreme Court of Texas were actually paid a clerkship bonus while clerking for the court. If that occurred, there would have been a difference between when law firms compensated federal court clerks and clerks for the Supreme Court of Texas. However, my court's practice of prohibiting clerks from working on any case in which a clerk's future firm was involved ensured that no breach of ethics would occur. Many law clerks, both for federal courts and the Supreme Court of Texas, had accepted future employment with a law firm before their clerkships with a court began, and most of those who had not already accepted employment with a law firm before the court clerkship began accepted employment with a law firm while clerking. It is my understanding that when employment with a law firm was accepted, all elements of the compensation package were known to the law clerk, including the amount of any clerkship bonus. Accordingly, if a clerkship bonus was part of the compensation package, there was an expectation by clerks for federal courts and the Supreme Court of Texas that the clerkship bonus would be paid, regardless of when the bonus was to be paid.

(c) Given the difference between the pre-2001 practice in your Court and that in the federal courts, would you now concede that critics of the practice raised legitimate concerns?

Response:

I recognize that if law clerks for the Supreme Court of Texas had received clerkship bonuses before their clerkships ended, there may have been a basis for someone to conclude that there was at minimum the appearance of impropriety. I do not know if any law clerks at the Supreme Court of Texas actually received clerkship bonuses while they were clerking. However, because law clerks were flatly prohibited from working on, discussing, or having any contact with other court personnel regarding any matter in which the law clerk's future employer was involved, there was no risk of improper influence affecting the clerk's duties on the court, whether the employer paid a clerkship bonus or not.

Further, it is my recollection that the most vocal critics of clerkship bonuses said that it was illegal for a law firm to pay, and a law clerk for the Supreme Court of Texas to ever accept any clerkship bonus at all, regardless of when it was paid. This same criticism, however, was never leveled at any federal law clerk or any employer of any federal law clerk. These critics wanted the practice of clerkship bonuses to Supreme Court of Texas clerks to cease altogether, even though federal law clerks could continue to receive them. The implication, if not the outright allegation, was that law clerks for the Supreme Court of Texas and their employers had violated the criminal laws of Texas. But I can say with conviction that no law clerk at the Supreme Court of Texas accepted a bribe or otherwise violated any Texas law even if they accepted a clerkship bonus while clerking for the court. Nor, given the wall that separated law clerks from cases involving their future employers, was there an opportunity for a law clerk at the Supreme Court of Texas to have any influence on any case in which his or her future employer was involved. No law clerk or law firm has ever been accused by a law enforcement agency of any wrongdoing, much less prosecuted or convicted for the compensation packages that were offered and received. Please see my responses to questions 3(a) and 3(b) below.

2. (a) Prior to the change in the Court's rules adopted earlier this year, did you require law firms to report clerk bonuses to you?

Response:

The Supreme Court of Texas has not required law firms to report law clerk bonuses, either under the former rules or the current ones.

The Supreme Court of Texas had rules applicable to law clerks when I arrived at the court in January 1995. With regard to so-called "sign-on" bonuses, they provided:

> A briefing attorney will notify his or her Justice as soon as an offer of employment from a law firm has been accepted (or even if an offer of employment and its acceptance appear probable). The Justice is to be notified whether a "sign on" bonus is involved, its amount and when it is expected to be paid. If a briefing attorney accepts an offer of employment before coming to work for the Court, the Justice is to be notified as soon as possible of the fact as well as the details of any "sign on" bonus.[3]

Effective February 1, 2001, the Supreme Court of Texas adopted a policy that superceded the foregoing policy. The February 1, 2001 policy provided, in pertinent part:

[3]A copy of this policy, approved June 20, 1990, is attached as Appendix 1.

V.

While a Briefing Attorney or Staff Attorney is working for the Supreme Court, he or she may not accept a "sign on bonus", reimbursement for bar exam fees, bar exam preparatory courses, moving expenses, or other benefits from the law firm for which he or she will work after leaving the Court. To the extent permitted by law, such benefits may be received before or after the Briefing Attorney's or Staff Attorney's actual employment with the Court.

VI.

While a Supreme Court employee, a Briefing Attorney or Staff Attorney may seek and obtain employment to begin after completing his or her employment at the Court. A Briefing Attorney or Staff Attorney should participate only in such recruiting activity as would not detract from the dignity of the position or lend itself to an appearance of impropriety. He or she should restrict recruiting travel to a law firm's home office or office of potential employment. A law firm may offer hospitality, such as dinner, lodging, or entertainment only to a Briefing Attorney or Staff Attorney who the firm is actively considering for employment. A Briefing Attorney or Staff Attorney may only accept such hospitality from a law firm for which he or she is actively interested in working after employment at the Court.[4]

The Code of Conduct for Law Clerks and Staff Attorneys of the Supreme Court of Texas adopted by the court in January of 2002[5] replaced the February 1, 2001 policy.

(b) Did you keep written records of clerks' bonuses before the policy change earlier this year? Can you produce copies of those records?

Response:

I have no reason to believe that any of my law clerks failed to comply with the court's policies, set forth above in response to question 2(a). I did not keep

[4]A copy of the policy adopted by the Supreme Court of Texas effective February 1, 2001, regarding Past and Future Employment of Briefing Attorneys and Staff Attorneys is attached as Appendix 2.

[5]A copy of the January 2002 Code of Conduct is attached as Appendix 3.

written records of clerks' bonuses, and my court's rules neither required nor encouraged me to do so.

(c) Did other justices, as far as you know? Are those publicly available?

Response:

To the best of my knowledge, other justices did not keep written records of bonuses to clerks.

3. You told the Committee that clerks who had accepted financial bonuses or subsidies from a law firm were recused from cases in which the law firm had an interest.

(a) Could you describe for the Committee the steps that you took to ensure that Texas Supreme Court clerks did not work on cases in which one of the parties was represented by a law firm that gave financial benefits to the clerk?

Response:

When I became a Justice on the Supreme Court of Texas in January 1995, the court's written policy with regard to law clerks working on cases that involved past or future employers was as follows:

> II.
>
> A briefing attorney who has worked for a law firm prior to working for the Court is not to work on any case at the Supreme Court on which he or she may have worked or of which he or she may have gained knowledge while in the law firm's employ. The circumstances will be promptly reported so that the briefing attorney's Justice may make appropriate adjustments in the work of the office.[6]

In addition to the foregoing policy which remained in effect until February 1, 2001, the Supreme Court of Texas had adopted in 1986 the "Code of Conduct for Briefing Attorneys and Staff Attorneys," and both applied to all law clerks. That Code provided in Canon 3(e) that:

> e. Briefing attorneys and staff attorneys should not assist in the drafting of an opinion nor prepare any memorandum in any case involving family members or future employers as parties or attorneys. Nor should they discuss or sit in on any discussion in cases involving family members.[7]

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[6]A copy of that policy, approved June 20, 1990, is attached as Appendix 1.
[7]A copy of the Code adopted in 1986 is attached as Appendix 4.

Effective February 1, 2001, the Supreme Court of Texas amended its policy "Concerning Past and Future Employment of Briefing Attorneys and Staff Attorneys." Rather than quote that policy, which is lengthy, a copy is attached as Appendix 2. The 1986 Code of Conduct, including Canon 3(e), quoted above, remained in effect.

In January 2002, the Supreme Court of Texas adopted its current Code of Conduct for Law Clerks and Staff Attorneys.[8] It superceded both the 1986 Code of Conduct and the February 1, 2001 policy regarding law clerks' future employment.

At all times since I have been a member of the Supreme Court of Texas, I have instructed my law clerks that if they had ever been employed by any law firm as a law clerk, had accepted permanent employment with a law firm, or were interviewing or contemplating interviewing for a job with a law firm, they could not work on, or take part in any discussion whatsoever regarding, any matter in which any of those law firms appeared as counsel or a party. Nor could my law clerks be present during the court's conferences when any matter falling in any of these categories was discussed. If an amicus brief were filed during the course of a case by a law firm falling in any of the above categories, my law clerk ceased to have any further contact with that matter. It was reassigned to another law clerk or my staff attorney. My policies placed more restrictions on my law clerks than the court's written Code of Conduct and other written policies regarding future employers. Please see my response to Question 3(b) below.

(b) What standards did you use to determine whether a conflict existed between clerks and the cases they worked on? Do you have any documentation of the system by which you determined which clerks should be recused from cases? If so, please provide that documentation.

Response:

The standards that I used included the Supreme Court of Texas' Code of Conduct for law clerks and its other written policies, as they have existed over the years that I have been at the court. (These are set forth above or attached as Appendices.) Additionally, I saw no practical difference between clerking for a law firm and accepting permanent employment with a law firm. I have joined or authored decisions regarding attorney and law firm employee conflicts of interest and disqualification issues that I felt should govern my law clerks and their work for the court.[9] Accordingly, as I have said above, law clerks in my chambers were strictly prohibited from working on any matter that involved a law firm for

[8] A copy of the 2002 Code is attached as Appendix 3.

[9] *See In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998); *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995); *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1995).

which they had worked as a clerk and any law firm at which they had accepted permanent employment or were considering seeking or accepting employment.

(c) Have you documented how many clerks were recused from cases argued by their future employers? Can you provide the Committee with that documentation? If not, can you estimate the number of clerks who were recused from such cases?

Response:

Recusal was not and is not limited to cases argued by a law clerk's future employer. Law clerks are recused from all matters filed in the court in which their future employer is counsel or a party, not just the cases in which the court exercised discretionary review and granted a petition for review. I have not documented how many clerks were recused from cases filed in the Supreme Court of Texas, and I do not believe that anyone else has done so either. Court rules neither required nor encouraged us to do so. I estimate that most law clerks had to recuse at one time or another. A substantial majority of law clerks for the Supreme Court of Texas has historically accepted employment with the Texas office of a law firm. Although I have not made any type of study, I am fairly confident that at one time or another, many of the law firms with which law clerks had accepted future employment appeared as counsel in a matter before the Supreme Court of Texas. When that occurred, any law clerk that had accepted future employment with that firm was automatically disqualified from working on the matter. And, even if a law clerk had not been hired by that firm, if the law clerk had any knowledge of the matter from any source, the law clerk was disqualified. As I have explained above, there was the additional rule in my chambers that if any of my law clerks had clerked for a law firm, they were disqualified in all of that law firm's cases that came before the court.

A number of law clerks for the Supreme Court of Texas, including some of my law clerks, accepted employment from law firms located outside of Texas. Those law firms appeared, if at all, with less frequency than Texas-based law firms in cases filed in the Supreme Court of Texas.

4. Section 36.08 (e) of the Texas Penal code states:

> **A public servant who has judicial or administrative authority, who is employed by or in the tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.**

(a) Have you ever advocated for changes to this law, and if so, why did you think it should be changed and what alterations did you want to see made to this statute?

Response:

There is a statutory exception to section 36.08(e) of the Texas Penal Code. Section 36.10(a)(2) provides that section 36.08 does not apply to "a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient."[10]

I have not publicly advocated for a change to either section 36.08 or 36.10. I had at least some concern that any change in the law could be construed, wrongly I believed, to mean that law clerks for the Supreme Court of Texas who in the past received bonuses from their employers, regardless of when paid, had violated section 36.08.

(b) In March 2001, legislation was introduced in the Texas State Senate that would address the issue of Court clerks receiving bonuses from their future employers. Did you support this proposed bill? Why or why not?

Response:

I am not familiar with all the legislation that was proposed regarding compensation to law clerks by their future employers. I did not publicly support any changes in the law. Please see my response to question 4(a) above.

5. (a) If confirmed to the Fifth Circuit, do you believe it would be a conflict of interest to hear a case in which one of the parties or counsel of record contributed to your past campaigns to the Texas Supreme Court?

Response:

Please see my response to Question 5(b) below.

(b) Do you think it would be necessary to recuse yourself to avoid the appearance of impropriety? If so, what standard would you use to determine whether to recuse yourself?

Response:

There are numerous federal judges across the country who were formerly state court judges elected in partisan, contested elections, including judges who now serve on the Fifth Circuit. Unfortunately, as discussed below, I have been unable to find any court decisions addressing whether a federal judge was required to recuse when a former state campaign contributor appeared before him or her. If confirmed, I would seek opinions from the Administrative Office of the United

[10] TEX. PENAL CODE § 36.10(a)(2).

States Courts and the United States Judicial Conference and would abide by those opinions. I would also, of course, evaluate any such issue, as I would any matter of judicial ethics, by consulting the Code of Conduct for United States Judges.

I have spent a considerable amount of time researching the question of whether 28 U.S.C. § 455 would require a federal judge who formerly was a state judge to disqualify in a case in which a lawyer or party had made a campaign contribution when the judge was running for a seat on a state bench. I have found no cases that resolve that question. The only decision that I found that comments in any substantial way on this question is *In re Mason*, 916 F.2d 384 (7th Cir. 1990). In that case, a federal judge had contributed $100 to a mayoral candidate and $100 to a candidate for county clerk. These two individuals were subsequently defendants in the judge's court. The Seventh Circuit held that recusal was not required, but in the course of its discussion said:

> Reasonable, well-informed observers of the federal judiciary understand that judges with political friends or supporters regularly cast partisan interests aside and resolve cases on the facts and law. Judges with tenure need not toady, and don't. Chief Justice Burger wrote an opinion that led to the resignation of the President who gave him that office. *United States v. Nixon,* 418 U.S. 683 (1974). Justice Holmes wrote a dissent in an antitrust case that President Roosevelt had personally decided to pursue, despite being a frequent guest at the Roosevelts' table. *Northern Securities Co. v. United States,* 193 U.S. 197 (1904), discussed in Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 261-73 (1989). Tenure of office, coupled with the resolve that comes naturally to those with independent standing in the community, have led a "political" judiciary in the United States to be more assertive in securing legal rights against the political branches than is the politically neutral, civil service judiciary in continental Europe. A reasonable, informed observer takes account of this history when deciding whether political connections call into question the judge's ability to render an impartial decision.[11]

The Seventh Circuit further said in that case that "sponsorship and other indicia of political support in bygone days do not disqualify a judge."[12] But the Seventh Circuit also said in the same case:

[11] 916 F.2d at 387.
[12] 916 F.2d at 387.

> [W]e might have a much more difficult case if, as occurs in many states, the attorney gave significant financial support to the judge's campaign committee while the judge was on the bench. Such contributions create opportunities to curry favor, and large ones could require disqualification. Contributions have both practical justifications (someone has to pay for the campaign in states that elect judges) and civic ones (attorneys know the most about who would make a good judge, and it would be regrettable to have ethical rules that put them on the sidelines). In the federal system, however, it is possible to maintain airtight financial separation between bench and bar, once the judge takes office.[13]

Accordingly, I have found no case law that squarely indicates how this question would be resolved by a court.[14]

Again, I suspect that this issue has arisen previously since there are a number of current federal judges who were formerly elected state judges whose campaigns received contributions. The Fifth Circuit, for example, includes judges from Texas and Louisiana who were appointed to the federal bench after having been elected as state court judges, and I would certainly consult with them on their recusal policies involving former contributors.

As an elected judge in Texas, I have assiduously followed all applicable rules of ethics, and if I am confirmed to the Fifth Circuit, I will continue to do so. Although it is my tentative view that neither 28 U.S.C. § 455 nor any Canons of ethics would require me to disqualify simply because a lawyer or party had contributed to my 1994 or 2000 election campaigns, given the lack of dispositive precedent regarding that question, if confirmed, I would confer with members of the Fifth Circuit and would also seek opinions from the Administrative Office of the United States Courts and the United States Judicial Conference.

I contacted the Administrative Office of the United States Courts, Office of the General Counsel, and inquired if there had been any opinions issued on whether a

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[13]916 F.2d at 387.

[14]In considering this question, I think it is also instructive to consider court decisions from across the country that have addressed whether a still-sitting elected state court judge should recuse in cases involving campaign contributors. These decisions—involving donors appearing before the very court the judge had campaigned for, not a subsequent lifetime seat on the unelected federal bench—are discussed at length in my response to question 1(a) posed by Chairman Leahy, which is attached as Appendix 5. In short, these decisions have consistently concluded that elected judges do not act unethically in carrying out the responsibilities that they were chosen to discharge by the electorate.

federal judge is required by any of the Canons to disqualify because as a state judge, he or she accepted campaign contributions. I was informed that there have been no opinions on this question. However, I was sent excerpts from the "Compendium of Selected Opinions" that includes the following statements under the heading "§ 7.7 Miscellaneous Rulings":

> (b) A magistrate judge who was an unsuccessful candidate for elected office before becoming a judge may not solicit contributions to pay off lingering campaign debts, and may not accept any such contributions from lawyers or from any person whose interests have or may come before the magistrate judge.
>
> * * *
>
> (e) A judge shall not control a campaign fund accumulated during his or her tenure as an elected official. A judge should not host a party for former political campaign workers.

With regard to (e) above, Texas law requires a former officeholder to remit any unexpended political contributions to certain specified recipients within six years of leaving office or filing a final report, whichever is later.[15] If confirmed, I intend to promptly contribute all unexpended campaign contributions to a recognized, tax-exempt charitable organization for educational or religious purposes, or to a public or private institution for higher learning for the purpose of assisting or creating a scholarship program, as permitted by Texas law.

As indicated above, since there is no direct authority on whether contributions to my past state court campaigns would require recusal if I were confirmed to the federal bench, I would seek opinions from the Administrative Office of the United States Courts and the United States Judicial Conference, and would abide by such opinions, in addition to conferring with judges on the Fifth Circuit, particularly those who were once elected state court judges. In my conversation with a member of the Office of General Counsel of the Administrative Office of the United States Courts, I was told that it was unlikely that I could obtain an opinion unless I was confirmed and presented a concrete factual situation on which an opinion could be issued.

(c) What assurances can you give this Committee that, if confirmed to the Fifth Circuit, you would put aside the interests of those who have contributed to your campaigns in deciding cases before you?

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[15] *See* TEX. ELEC. CODE §§ 254.203, 254.204.

Response:

That is my solemn oath: to dispense equal justice under law. I have faithfully followed that oath as a justice on the Supreme Court of Texas, and I will continue to hold it sacred if confirmed to the federal bench. My decisions have always been and will continue to be based solely on the law, which includes any applicable statutes, any applicable United States Supreme Court decisions, and precedent from the court on which I serve. Campaign contributions have never been and never would be considered. Many federal judges previously served as state court judges who were elected to the bench in a contested election. I, like those judges, would never allow campaign contributions to play any part in any decision.

(d) If confirmed to the Fifth Circuit, what standard and analysis would you undertake if presented with a motion from a party to recuse yourself from cases involving past campaign contributors?

Response:

Please see my response to questions 5(a) and (b) above. In short, however, I would (i) consult the Code of Conduct for United States judges, which cautions to avoid even the appearance of impropriety, (ii) confer with members of the Fifth Circuit (particularly those who once served as elected state court judges), and (iii) request and abide by advisory opinions from the Administrative Office of the United States Courts and the United States Judicial Conference.

Responses to
Follow-Up Questions from Senator Edward M. Kennedy
to Justice Priscilla Owen,
Nominee to the Fifth Circuit Court of Appeals

1. **At your hearing, you were asked about Ford v. Miles. I would like to ask you some specific follow-up questions about the case. As you know, this case involved a fourteen year-old African-American boy, Willie Searcy, who won damages from Ford Motor Company for injuries he suffered from a car crash that left him a quadriplegic, breathing only through the assistance of a respirator. The jury found that the seatbelt the teenager was wearing was defective, because it created slack in the shoulder harness which then caused the seatbelt to catch his head and neck, severing his head from his spinal cord, and awarded $30 million in actual damages and $10 million in punitive damages On appeal, the appellate court substantially affirmed the trial court, but reversed the punitive damages award, remanding it for a new trial on the ground that there was insufficient evidence to support the jury's finding of gross negligence and malice. On appeal, you authored an opinion that reversed the entire case on venue grounds, and ordered a retrial. While the case was awaiting retrial, Willie Searcy died.**

   A. **When the case reached the Texas Supreme Court, the plaintiff filed a motion to expedite the case, attaching the affidavit of a doctor stating that without the funds to pay for a back-up respirator, a generator, and other critical medical and support services, Searcy's condition would worsen, and that he could die. Ford did not oppose that motion. After oral argument you were assigned the task of writing the decision, but it took about a year and a half after oral arguments for a decision to be issued in the case. (The case was argued November 21, 1996; your opinion was issued on March 19, 1998).**

   - **Why did you not grant or rule on the plaintiff's motion to expedite the case?**
   - **Why did you take a year and a half after oral argument to issue your opinion?**

Response:

I understand and respect your desire to know the details about what transpired during my court's consideration of this appeal. I hope that you will understand my obligation to maintain the confidentiality of the deliberations of the Supreme Court of Texas. Canon 3(B)(11) of the Texas Code of Judicial Conduct provides:

> A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial

> capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

However, there is public information about how the Supreme Court of Texas handles matters that come before it in general, and there is public information that may shed light on some of the factors that were involved in this particular case.

With regard to the motion to expedite, the court considered the *Ford v. Miles* case an important one, but we did not give it precedence over many of the other important cases on our docket at the time. We decided it in about the same amount of time that we decided other cases that fiscal year. The average time for disposition of an argued cause for the year ended August 31, 1998 was 538.31 days.[1] The *Ford v. Miles* case was disposed of in 560 days.[2] The court's disposition rates were better in previous and subsequent years.[3] When the court issued the opinions in *Ford v. Miles*, the members of the court unanimously agreed, in hindsight, that the motions to expedite this case should have been granted. That would have meant that this case would have taken precedence over most other matters on our docket, and it *might* have resulted in a faster disposition. It would have required at least five members of the court to vote to grant the motions to expedite, but those motions were not granted.

In response to your inquiry about the time that it took my court to issues opinions in *Ford v. Miles*, I am one of nine members of the Supreme Court of Texas. The court's written opinions and any separate opinions cannot be handed down until at least five members of the court affirmatively vote to publicly issue them. It cannot be assumed that the member of the Court who ultimately writes the majority opinion for the court was initially assigned responsibility for writing that opinion. Also, it cannot be assumed that even if a case is initially assigned to a particular judge, that another member of the court did not attract a majority at one or more points during deliberations but later lost that majority.

I can say that once five members of the Supreme Court of Texas agreed that opinions in this case should issue, the opinions went out within a matter of days. There were three opinions issued in the case: the majority opinion that I authored for the court, which also included my concurring opinion; a dissent by Justice Hankinson; and a concurring opinion by Justice Raul Gonzalez. It is a matter of

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[1] *See* Supreme Court of Texas Official Docket Activity Report, Fiscal Year Beginning September 1, 1997.

[2] The case was filed in the Supreme Court of Texas on September 5, 1996, and opinions issued on March 19, 1998.

[3] The Supreme Court of Texas Official Docket Activity Report, Fiscal Year Beginning September 1, 1997, reflects that the average time between filing of an argued cause and the issuance of an opinion was 538.31 days for the fiscal year ended August 31, 1998. For other years, the average time was: 319.12 days for 1995, 321.84 days for 1996, 395.72 days for 1997, 442.83 days for 1999, 408.06 days for 2000, and 451.1 days for 2001.

public record that the case was argued on November 21, 1996, when Justice John Cornyn was a member of the court. He resigned on October 18, 1997, and Justice Deborah Hankinson succeeded him on October 27, 1997. As already noted, Justice Hankinson authored the dissent in this case.

There were a number of issues raised in Ford Motor Company's petition and the Mileses' petition. In addition to the venue question, an issue of first impression that my court decided was whether a step-parent has a cause of action for loss of consortium when a step-child is catastrophically injured. (967 S.W.2d at 382-84). Eight members of the court agreed on this issue. One member, Justice Spector, expressed no view in any public writing. Other issues were considered by my court in the various written opinions that were issued, but a majority of the court did not resolve those issues. I wrote a concurring opinion, joined by two other judges, that considered whether Ford waived its objection to the jury charge on design defect and whether the charge to the jury on design defect was incorrect and constituted reversible error. Two members of the court, Chief Justice Phillips and Justice Raul Gonzalez did not express a view on this issue in any public writing. I also considered in a concurring opinion joined by another judge the admissibility of two videotapes and sled tests. Three members of the court did not express a view on that question in any public writing. Four members of the court, in a dissent, said that the Court should not reach the jury charge or evidentiary issues because the case was reversed and remanded on the venue issue. (967 S.W.2d at 390-91 (Hankinson, J., dissenting)). I disagreed because I believed that it would be tremendously unfair to the Mileses to retry the case a second time, and then have to go through yet another appeal on the same issues. I also believed that it would waste judicial resources not to answer questions that would almost certainly come up again when the case was retried. I said in my concurring opinion:

> The Court's decision regarding venue is dispositive of the judgment that will be entered in this case. However, other substantial and significant issues have been raised, and some of those questions undoubtedly will persist on remand. To permit those issues to linger, perhaps necessitating a third trial, would be patently unjust to the parties and would result in a waste of judicial resources. Only recently, all nine members of this Court joined in considering an issue "not essential to [the] disposition of this case" in order to "provide the trial court with guidance in the retrial" of the case. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997); *see also Tyler Bank & Trust Co. v. Saunders*, 159 Tex. 158, 317 S.W.2d 37, 43 (1958) (holding that since there must be a retrial, the Court felt it necessary to address the admissibility of certain evidence). Accordingly, a resolution of issues that are likely to recur is in order, and I would proceed to decide them.[4]

[4] 967 S.W.2d at 384.

Yet another issue was considered by Justice Raul Gonzalez's concurring opinion, in which two other judges joined. That issue was whether an appellate court can affirm a judgment for actual damages and remand for a new trial on only punitive damages. (967 S.W.2d at 389-90 (Gonzalez, J., concurring)).

In sum, there were a number of issues other than venue that were considered by the court in three separate writings in this case. The court was divided on those issues, as evidenced by the opinions in the case.

B. You reversed the jury award on venue grounds. This issue had been raised by Ford at the trial court, but rejected. The issue of venue was then submitted to the Texas Supreme Court as a point of error in its Application for Review, but, as I read the record, the Supreme Court granted review on eight points of error, but did not grant the writ on the venue issue.

- **Am I wrong–did the Texas Supreme Court grant review of the venue point of error?**

Response:

It is not the practice of the Supreme Court of Texas, nor was it at the time of the *Ford v. Miles* appeal, to grant review of some points of error but not others. If the court granted an application for writ of error, all issues raised by the parties were before the court. A copy of the order granting Ford's application and the Mileses' conditional application is attached as Appendix 1. It can be seen from that order that my court granted the applications in their entirety. No issues were specified, and all issues raised by both sides were before the court.

- **Was the issue of venue briefed by the plaintiffs? Was it briefed by the defendants? Please describe the extent to which the issue was briefed and provide any supporting materials that elucidate this issue.**

Response:

The issue of venue was briefed by both the plaintiffs and the defendants. A copy of the briefing in the Supreme Court of Texas that includes the venue issue is attached as Appendix 2. It can be seen from that briefing that the venue issue was briefed by Ford in its Application for Writ of Error and its Reply Brief in Further Support of Its Application for Writ of Error, and it was briefed by the Mileses in their Brief of Respondents. The venue issue was raised at all stages of this case. It was raised in the trial court, and it was the first issue decided by the court of

appeals.[5] Because the venue question was properly preserved and raised in the Supreme Court of Texas, my court was required to decide it. A Texas statute mandates that a case must be reversed and a new trial ordered if venue was improper.[6] The only exception would be if there were an issue on which an appellate court could render judgment. There were no rendition issues presented in the *Ford v. Miles* appeal, therefore, the Supreme Court of Texas had to decide the venue question.

- **Was the issue of venue raised by plaintiffs or defendants at oral argument?**

Response:

Venue was not discussed at oral argument, but that was not at all unusual. Another issue, whether a step-parent may recover damages for the catastrophic injury to his or her step-child, was an issue of first impression decided by my court in this case. It was not discussed at oral argument either. The parties are allotted only 20 minutes per side. It is frequently the case that significant issues included in the briefs are not discussed at oral argument. Oral argument before my court is not part of the error preservation process. It is an opportunity for the members of the court to ask questions and for counsel for the parties to offer comments that may further explain arguments made in the briefing. Oral argument does not affect whether the issue is preserved, and my court will resolve all issues necessary to disposition that are included in the briefing.

- **Assuming the Texas Supreme Court had the jurisdictional power to dispose of a case on grounds not taken for review and/or that have not been argued, is it customary for the Court to do so? In your time on the Court, do you know how often the Court has done so?**

Response:

With very few exceptions not relevant here, the Supreme Court of Texas would not consider any issue on appeal that was not raised in the lower courts and that was not presented in the briefing to the Supreme Court of Texas. As indicated above, the venue issue was raised at all stages in this case, and it was briefed in the Supreme Court of Texas.

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[5] *See Miles v. Ford Motor Co.*, 922 S.W.2d 572, 579-80 (Tex. App.—Texarkana 1996, writ granted).

[6] The statute says:

> (b) On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error. In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits.
>
> TEX. CIV. PRAC. & REM. CODE § 15.064(b).

2. **Under Texas law, as in Title VII of the Civil Rights Act of 1964, a plaintiff can establish employment discrimination by showing that an improper factor, such as race, was "a motivating factor" for an employment practice. This language in Title VII comes as the result of the Civil Rights Act of 1991, which I sponsored in part to respond to the Supreme Court's decision in Price Waterhouse v. Hopkins (1989). The Price Waterhouse decision held that even if an employer made a decision for discriminatory reasons, the employer is not liable if it can show that it would have made the same decision anyway, for some other reason. The 1991 change made clear that as long as an employer was motivated by race, gender or other discrimination, the employer is liable (though not required to provide backpay or reinstate the employee), even if there were other reasons for the employment action.**

Texas' Human Rights Statute is modeled on Title VII and plainly allows a plaintiff to show that the impermissible factor was "a motivating factor" for the employment practice. Last year in Quantum Chemical Corporation v. Toennies, 47 S.W.3d 473 (2001) you joined a dissent that would have increased a plaintiff's burden in discrimination cases. Your reasoning in that dissent troubles me because it seems to go against the plain language of the Texas law. Please answer the following

- **Where in the language of the Texas statute did you find support for the notion that a plaintiff must show that discrimination was the determinative factor, as opposed to simply "a motivating factor"?**
- **Where in the legislative history of the Texas statute did you find support for the notion that you must show that discrimination was the determinative factor?**
- **If you did not rely on the language or the legislative history please explain why.**
- **Your opinion relied on the fact that a few circuit courts have found, in the context of Title VII, that the "motivating factor" standard is inapplicable in so-called "pretext" cases. It is not clear to me how these circuit courts arrived at their conclusion given the language and legislative history of the 1991 Civil Rights Act. My question, however, is why follow those federal circuits when the plain language of the Texas statute clearly says that the plaintiff must only show that discrimination is "a motivating factor"?**

Response:

In construing Chapter 21 of the Texas Labor Code, I looked to federal law interpreting the federal Civil Rights Act, as amended in 1991, because the Texas statute expressly said that Chapter 21 was intended to "provide for the execution

of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments," and to "identify and create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. 633."[7] In fact, all members of the Supreme Court of Texas looked to federal law in deciding how to construe the Texas statutes at issue. The majority opinion of the Supreme Court of Texas did say at the outset that it "would ordinarily look to federal precedents for interpretive guidance to meet the legislative mandate that the [Texas Commission on Human Rights Act] is intended to 'provide for the execution of the policies of Title VII of the Civil Rights Act of 1964," but that the majority of the Supreme Court of Texas would not do so in this case "because the federal courts are closely divided on this issue."[8] But the majority opinion subsequently said that it *would* look to federal law in construing the Texas anti-discrimination statutes:

> One of [the Texas Commission on Human Rights Act's] purposes is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." TEX. LABOR CODE § 21.001(1). Therefore, analogous federal statutes and the cases interpreting them guide our reading of the TCHRA. *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex.1999). Even though the statutory language appears to provide that "a motivating factor" is the causation standard in all TCHRA/Title VII cases alleging unlawful employment practices, federal case law makes the issue less simple than it appears.[9]

The majority opinion then looked to the history of the federal Civil Rights Act and federal cases decided under it.[10] The majority opinion of the Supreme Court of Texas ultimately cited[11] *Harris v. Shelby County Bd. Of Education*, a decision from the Eleventh Circuit,[12] and *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, a decision from the Second Circuit,[13] as support for its conclusion about the proper jury charge to be given.

Thus, the principal difference between the majority and the dissenting opinions was which federal court decisions were more persuasive in light of the express language of the federal law, which Texas law substantially tracked, and the history of the 1991 amendments to the federal Civil Rights Act. The dissenting opinion in *Quantum Chemical v. Toennies*, which I joined, found more authoritative a decision from the Third Circuit, *Watson v. Southeastern Pennsylvania Transportation Authority*,[14] and a decision from the Fourth Circuit,

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[7] Tex. Lab. Code § 21.001(1)-(2). For ease of reference, a copy of sections 21.001, 21.051, and 21.125 of the Texas Labor Code are attached as Appendix 3.
[8] *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001).
[9] 47 S.W.3d at 476.
[10] *See* 47 S.W.3d at 476-80.
[11] 47 S.W.3d at 480.
[12] 99 F.3d 1078, 1084-85 (11th Cir. 1996).
[13] 115 F.3d 116, 121 (2d Cir. 1997).
[14] 207 F.3d 207 (3d Cir. 2000).

Fuller v. Phipps,[15] and found at least some guidance in two United States Supreme Court decisions, *Landgraf v. USI Film Products*,[16] and *Reeves v. Sanderson Plumbing Products, Inc.*[17]

The question in *Quantum Chemical v. Toennies* was whether the 1991 amendments to the federal Civil Rights Act, and accordingly the Texas statutes that were modeled after the amended Civil Rights Act, eliminated the distinction between the burden of proof in "pretext" cases and "mixed motive" cases. "Pretext" cases are those in which the plaintiff may prevail by showing that the employer's stated reason for its decision was false or that a discriminatory reason motivated the decision.[18] "Mixed motive" cases are those in which both legitimate and illegitimate considerations played a part in the employment decision.[19]

Under the pre-1991 version of the Civil Rights Act, a majority of the United States Supreme Court agreed that the words "because of" in the Civil Rights Act meant that the plaintiff must prove that consideration of an illegitimate criterion was the "but-for" cause of an adverse employment action. This was expressed in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[20] and the dissent of four other Justices in that case.[21] By contrast, the plurality in *Price Waterhouse* would have held that "but-for" causation is not the appropriate burden of proof under the Civil Rights Act.[22] Instead, the plurality would have held that once a plaintiff shows that an illegitimate criterion, such as gender, "played a motivating part in an employment decision," the burden of proof shifts to the employer who "may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[23] However, Justice O'Connor formulated a different burden-shifting mechanism in her concurring opinion that effectively became the holding of the United States Supreme Court in *Price Waterhouse*, which was a mixed-motive, not a pretext, case. Justice O'Connor posited that if "a disparate treatment plaintiff [showed] by direct evidence that an illegitimate criterion was a substantial factor in the decision," then "the burden rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor."[24] This meant that if the employer in a mixed motive case satisfied the trier of fact that it would have made the same decision even if it had not considered the illegitimate criterion, then there was no liability at all under the Civil Rights Act.

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[15] 67 F.3d 1137 (4th Cir. 1995).
[16] 511 U.S. 244 (1994).
[17] 530 U.S. 133 (2000).
[18] *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n. 12, 260, 287 (1989).
[19] *Price Waterhouse*, 490 U.S. at 247 n. 12, 260.
[20] 490 U.S. 228, 262 (1989) (O'Connor, J., concurring).
[21] 490 U.S. at 281 (Kennedy, J., dissenting).
[22] 490 U.S. at 240 (Brennan, J.).
[23] 490 U.S. at 244-45 (Brennan, J.).
[24] 490 U.S. at 276 (O'Connor, J., concurring).

Thus, the collective opinions in *Price Waterhouse* established at least four things: 1) in a pretext case, the burden of proof remains with the plaintiff, who must establish "but-for" causation, 2) in a mixed-motive case, the plaintiff must only show that an improper consideration was a substantial factor in the employment decision, 3) if the plaintiff in a mixed-motive case makes the substantial factor showing, the burden shifts to the employer to demonstrate that it would have made the same decision without taking into account an illegitimate factor, and 4) there was no liability and thus no remedy at all if an employer established that it would have taken the same action even if it had not considered an illegitimate factor.

Congress enacted section 107 of the Civil Rights Act of 1991 in response to *Price Waterhouse*. Courts have universally agreed that one objective section 107 accomplished was to provide a limited remedy in a mixed-motive case. Under section 107(b), even if an employer establishes that it would have taken the same action without considering an illegitimate factor, a court may at least grant declaratory and injunctive relief and require payment of costs and attorneys fees.[25] However, a court may not award damages or require reinstatement, hiring, promotion or other similar remedies.[26] The question with which my court and others have struggled was which of the other four holdings in *Price Waterhouse* did section 107 override, if any.

The United States Supreme Court has not squarely decided whether section 107 changed the standard of causation in a pretext case, which remained "but-for" causation under *Price Waterhouse*. However, the United States Supreme Court has at least has observed in *Landgraf* that section 107 sets "forth standards applicable in 'mixed motive' cases,"[27] implying that section 107 was not intended to change the burden of proof in "pretext" cases. That was the conclusion later reached by the Fourth Circuit in *Fuller v. Phipps*,[28] and the Third Circuit in *Watson*.[29] The court in *Watson* looked first to the language of section 107. Section 107(a), which has been codified at 42 U.S.C. § 2000e-2(m), says:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

[25] Section 107(b) has been codified at 42 U.S.C. § 2000e-5(g)(2)(B).
[26] 42 U.S.C. § 2000e-5(g)(2)(B).
[27] *Landgraf v. USE Film Products*, 511 U.S. 244, 251 (1994).
[28] 67 F.3d 1137, 1141 (4th Cir. 1995).
[29] *Watson v. Southeastern Penn. Transp. Auth.*, 207 F.3d 207 (3d Cir. 2000).

The court in *Watson* observed that the words "was a motivating factor for any employment practice, even though other factors also motivated the practice," described a mixed-motive case, but not a pretext case.[30]

Significantly, the court in *Watson* also reasoned that if section 107(a) (which is subsection (m) of 2000e-2 quoted above) were meant to change the standard of causation in *all* disparate treatment cases, then Congress would not have limited the applicability of the expanded remedies granted under 107(b) to just the cases in which liability is established under 107(a). The same remedies would be available whenever an unlawful employment practice was established, not just when an unlawful employment practice was established by demonstrating that an illegitimate factor was "a motivating factor . . . even though other factors also motivated the practice."[31] Instead of referencing the Act's definition of an "unlawful employment practice" in subsection (a) of 42 U.S.C. 2000e-2, which says that the action must have been taken "because of" an illegitimate consideration such as gender, section 107(b) references only subsection (m) of 42 U.S.C. 2000e-2. Section 107(b), codified at 42 U.S.C. § 2000e-5(g)(2)(B), says:

> (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

By its very terms, the affirmative defense in section 107(b) cannot apply in a pretext case. In a pretext case, there is only one motive, not mixed motives, or else the case would be a mixed-motive case. When section 107(b) says the affirmative defense to limit remedies applies when the employer "would have taken the same action in the absence of the impermissible motivating factor," that necessarily means that there was more than one motivating factor: an "impermissible" one and a permissible one. This express language, the express language of section 107(a), and the reasoning in *Watson*, was part of what persuaded me that section 107 was not intended to apply to pretext cases.

The legislative history of section 107, set forth in *Watson*, also played a part in persuading me that Congress did not intend for section 107 to override the holding in *Price Waterhouse* that "but-for" causation was still the standard of

[30] 207 F.3d at 217.
[31] Section 107(a), codified as 42 U.S.C. § 2000e-2(m).

causation in pretext cases. As *Watson* sets forth, the House Report said that section 107 was designed to overrule only *one aspect* of *Price Waterhouse*, which was to provide at least a limited remedy when discrimination had occurred but the employer would have made the same decision without the discriminatory motive:

> The House Report's discussion of Section 107 appears in a section entitled, "The Need to Overturn Price Waterhouse." H.R.Rep. No. 102-40(I), *reprinted in* 1991 U.S.C.C.A.N. at 583. The first paragraph of this discussion identifies the portion of the holding in *Price Watherhouse* that the legislation was meant to overrule, namely, the holding that "*the defendant may avoid a finding of liability* . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account," *id.* (emphasis added). Moreover, a footnote takes pains to note that the legislation was not intended to overrule the decision *in toto*. *Id.* n. 39. Later, the Report emphasizes that Section 107 was designed to "overrule[ ] one *aspect* of the Supreme Court's decision in *Price Waterhouse*" and that Section 107 "would clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons, is relevant to determine not the liability for discriminatory employment practices, but only the appropriate *remedy*". *Id.* at 586 (emphasis on "one aspect" added, emphasis on "remedy" in original).[32]

Finally, I found it to be at least of interest that just two years ago, the United States Supreme Court quoted a jury charge in a pretext case that said the standard of causation was whether discrimination was "the real reason" for the discharge.[33] Although the correctness of the charge was not at issue, the Supreme Court did not give any indication that the standard should instead have been whether discrimination was "a motivating factor." Again, while quotation of this jury charge without comment is certainly not dispositive of what section 107 intended with regard to the standard of causation in a pretext case, it is as least something to be considered.

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[32] *Watson*, 207 F.3d at 218-19 (emphasis and parentheticals in original).

[33] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000). Regarding the district court's charge to the jury, the United States Supreme Court said:

> The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; *and* 2, that age discrimination was the real reason for [petitioner's] discharge."

530 U.S. at 153.

The Texas statutes at issue in *Quantum Chemicals v. Toennies* were, as noted above, modeled after the federal Civil Rights Act. The words "because of" appear, as they do in the federal statute,[34] in the definition of an unlawful employment practice: "An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer [discriminates]."[35] And, the Texas counterpart to section 107 of the federal Civil Rights Act of 1991 says:

> **§ 21.125. Clarifying Prohibition Against Impermissible Consideration of Race, Color, Sex, National Origin, Religion, Age, or Disability in Employment Practices**
>
> (a) Except as otherwise provided by this chapter, an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice, unless race, color, sex, national origin, religion, age, or disability is combined with objective job-related factors to attain diversity in the employer's work force.
>
> (b) In a complaint in which a complainant proves a violation under Subsection (a) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court may grant declaratory relief, injunctive relief except as otherwise provided by this subsection, and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a complaint under Subsection (a), but may not award damages or issue an order requiring an admission, reinstatement, hiring, promotion, or back pay.[36]

Quantum Chemical v. Toennies was a pretext case, not a mixed-motive case.[37] The trial court instructed the jury that "an employer commits an unlawful employment practice if, because of age, the employer discharges an individual."[38] I would have upheld this jury charge as substantially correct because it tracked the "because of" language in section 21.051 of the Texas Labor Code.[39] I would not have required the instruction to instead track section 21.125(a) of the Texas Labor Code and ask whether age discrimination was "a motivating factor." Section 21.125(a) begins by saying it applies "[e]xcept as otherwise provided by this

[34] 42 U.S.C. § 2000e-2(a).
[35] Tex. Labor Code § 21.051; *see* Appendix 3.
[36] Tex. Labor Code § 21.125; *see* Appendix 3.
[37] 47 S.W.3d at 479.
[38] 47 S.W.3d at 475.
[39] Tex. Labor Code § 21.051; *see* Appendix 3.

chapter."[40] It is otherwise provided in section 21.051 that generally, the causation standard is "because of." The standard in section 21.125 only applies when there are mixed motives, that is, when one of the enumerated criteria, such as gender, was "a motivating factor for an employment practice, even if other factors also motivated the practice."[41]

For all the reasons considered above regarding section 107 of the 1991 Civil Rights Act, I would have construed section 21.125 the same way that the Third and Fourth Circuits have construed section 107.

3. In Lawrence v. CDB Services, Inc., 44 S.W.3d 544 (2001), you joined a majority opinion holding that it did not violate public policy for employers to enter into agreements with their employees under which employees waived their statutory rights to sue their employer for workplace injuries, in exchange for the payment of certain death and medical benefits. The dissenting justices criticized the majority's ruling, saying that it undermined the fundamental policies underlying the state's workers' compensation law. Two months after the Lawrence decision, the Texas Legislature passed, and the Governor signed, legislation effectively overturning Lawrence decision and making pre-injury waivers illegal.

A. As the dissent in Lawrence pointed out, in enacting the workers' compensation law, the Texas legislature sought to encourage employers to enroll in the workers' compensation insurance system. One of the incentives to participation that the legislature built into the system was to preserve employees' right to sue non-participating employers for money damages for workplace injuries. Please explain how allowing employees to waive these rights is consistent with the law's policy of encouraging participation in the workers' compensation insurance system.

Response:

The decision in *Lawrence v. CDB Services, Inc.*[42] is an example of my court's recognition of the different roles that courts and legislative bodies should play in setting and carrying out public policy. The issue in that case was whether it was against public policy for an employee working for an employer who did not subscribe to workers' compensation coverage to voluntarily agree to waive the right to pursue common-law claims in a court in the event of an on-the-job injury or death and instead agree to accept benefits under an employer's compensation plan.

Texas is the only state, to the best of my knowledge, that permits an employer to choose not to subscribe to workers compensation coverage. It is my understanding that in every other state, participation in the state's workers compensation scheme is mandatory. Nevertheless, the majority opinion in *Lawrence*, which I joined, recognized that the

[40] Tex. Labor Code § 21.125(a); *see* Appendix 3.
[41] Tex. Labor Code § 21.125(a); *see* Appendix 3.
[42] 44 S.W.3d 544 (Tex. 2001).

Texas Legislature designed the Texas workers' compensation scheme to encourage employer participation.[43] But the Supreme Court of Texas also recognized that there were a number of other public policy considerations surrounding the question of whether a non-subscribing employer could offer and an employee could voluntarily agree to accept benefits under an employer's plan to compensate him or her in the event of an on-the-job injury or death. These included a concern about the number of workers who were already receiving benefits under a non-subscribing employer's plan and the effect that voiding these plans would have on them. We said,

> We do not know how many injured employees in Texas are currently receiving benefits provided by their employers under similar plans. Several *amici* suggest that there are a significant number. Were we to invalidate such plans on public policy grounds, these employees might lose their benefits yet no longer be able to assert common-law claims because of limitations problems.[44]

We were also concerned by the contentions of a number of *amici* that allowing plans like the ones at issue in *Lawrence* would increase benefits for injured workers, and that plans like this had been used for many years.[45] The public policy in favor of preserving the freedom of contract was also of concern.[46] In the cases before us, the decision to choose the employer's plan over common law tort claims was an informed one, reached after consulting with counsel, and the decision was not made under duress nor was it based on misrepresentations.[47]

My court concluded that we were "ill-equipped to evaluate the likely real-world consequences of invalidating the agreements before us."[48] We said that whether these types of agreements should be permitted was a question that the Legislature should resolve: "We believe the factually-intensive, competing public policy concerns raised by the parties and by *amici* in these cases are not clearly resolved by the statute and are best resolved by the Legislature, not the judiciary."[49] We essentially concluded that the Legislature should remain free to decide what the public policy of Texas should be with regard to this question, and that the Legislature's hands should not be tied by the courts. The Legislature did in fact resolve the question. After our decision in this case was issued, the Legislature considered the matter and amended the Labor Code to prohibit these types of benefit plans.[50]

B. Do you believe it is lawful for employers to ask employees to waive their rights under Title VII of the Civil Rights Act? Under the Fair Labor Standards Act?

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[43] 44 S.W.3d 544, 553 (Tex. 2001) (observing, "[w]e recognize that the Legislature designed the workers' compensation scheme to encourage participation").
[44] 44 S.W.3d at 553.
[45] 44 S.W.3d at 552.
[46] 44 S.W.3d at 553.
[47] 44 S.W.3d at 546, 547.
[48] 44 S.W.3d at 553.
[49] 44 S.W.3d at 553.
[50] Tex. Labor Code § 406.033.

Under the Family and Medical Leave Act? Is it your view that any statute that does not explicitly prohibit waiver of rights implicitly permits such waivers? If not, how would you distinguish between those statutes that permit waivers and those that do not?

Response:

In construing any statute, I begin with the language used in the statute. I also consider its legislative history, if any. Further, I do not decide questions about how a statute is to be construed in the abstract or in a vacuum. The United States Constitution requires that there be a case or controversy before a court may opine on the meaning of a statute. Texas law has a similar constraint on state courts. I would construe a statute in the context of facts that gave rise to a controversy. I would consider the briefing and arguments of the parties and any *amici* and thoroughly research any question of statutory construction. Without the benefit of an actual case, briefing, and extensive research, I cannot answer whether the federal statutes that you identified would, under any set of circumstances, allow an employee to waive certain rights or benefits. I can say, however, that Title VII of the Civil Rights Act makes a large number of employment practices unlawful.[51] Similarly, the Fair Labor Standards Act and the Family and Medical Leave Act make certain actions unlawful.[52] It is a basic principle of law that parties cannot by contract agree that what is unlawful is lawful. Nor can parties by contract prevent governmental entities from enforcing the laws.

In *Lawrence*, the Workers Compensation Act did not make the type of agreements at issue unlawful. The only question was whether an employee could waive common law causes of action.

4. John Sonnier, an employee of a cannery unit at the State Department of Corrections, lost his hand and a portion of his arm while inspecting a tomato chopping machine that had been manufactured by Chisholm-Ryder Company. Sonnier v. Chisholm-Ryder Co., 909 S.W.2d 475 (1995) involved a certified question concerning the scope of Texas' statute of repose, which requires personal injury lawsuits against those who "construct or repair an improvement to real property" to be brought within 10 years.

The question in Sonnier was whether the statute of repose applies to manufacturers that produce, but do not install, equipment that becomes an improvement to real property. The majority ruled that the statute did not extend to such manufacturers, but you authored a dissent that would have extended the statute of repose to protect manufacturers and even suppliers of raw materials. The majority said its "reading of the statute is the only one consistent with the plain language of the statute, the legislative history, and the statutory purpose," 909 S.W. 2d at 482, and criticized you for advocating a test that "is significantly more broad than any holding in this area so far," id. at 483.

[51] *See, e.g.*, 42 U.S.C. § 2000e-2.
[52] *See, e.g.*, 29 U.S.C. §§ 215, 216; 29 U.S.C. § 2615.

My concern is that, under your test, application of the statute of repose would appear to extend repose protection to any manufacturer or supplier who claims that they intended that their product constitute an improvement to property. What was your basis for arguing for this type of broad protection for companies–one that places such importance on the company's asserted subjective intent?

Response:

In *Sonnier*, the Supreme Court of Texas construed a statute of repose. That statute provides in pertinent part:

> § 16.009. Persons Furnishing Construction or Repair of Improvements
>
> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.[53]

The test that I would have applied in the *Sonnier* case was not based on subjective intent and would not include suppliers of raw materials. I said that in deciding whether a manufacturer "constructs . . . an improvement to real property," the "inquiry should include the intent of the parties at the time the item at issue was constructed, the manner in which it is used in conjunction with the property, and the manner in which it is attached or connected in some way to the real property."[54] I explained that with respect to a manufacturer, it must be the *objective* intent of the parties at the time of construction that the thing being constructed would become part of real property:

> The inquiry should be what the parties objectively intended at the time the item or product in question was constructed. The principle consistently running throughout our case law, prior to today, has been that section 16.009 applies where the object or product was intended to become a part of real property at the time it was made. There is a fundamental distinction between items of this nature, such as an elevator or a furnace, and items of "personalty" such as a tank car or a painting. It is virtually incontrovertible that at the time a manufacturer makes an elevator or a furnace, it is contemplated that these items will become an integral part of a building. The examples of "personalty" relied upon by the Court to validate its rationale, the tank car in the case of *Logan v. Mullis*, 686 S.W.2d 605 (Tex.1985), and a painting bolted to a motel wall in the Court's hypothetical, are not analogous. It cannot be said that at the

[53] Tex. Civ. Prac. & Rem. Code § 16.009(a).
[54] 909 S.W.2d at 487 (Owen, J., dissenting).

> time these items were manufactured, they were intended to become improvements to real property within the meaning of section 16.009.[55]

The tank car discussed in the quote above is an example of how I would have construed the statute. In *Logan v. Mullis*,[56] the owner of an easement built a road on the easement. As part of that project, he built a culvert beneath the road where it crossed a creek. To make the culvert, he cut off the ends of a tank car, placed it in the creek bed, and covered it with gravel. He later got into a dispute with the owners of the subservient estate and removed the culvert. The Supreme Court of Texas correctly held that the tank car had become a fixture to the real property.[57] The owner of the easement did not have the right to remove it. The court was not construing section 16.009 in that case, but as I explained in *Sonnier*, under my construction of section 16.009, the *manufacturer* of the tank car could not have relied on section 16.009 if the tank car, when in use as a culvert, had collapsed. The *manufacturer* of the tank car could not objectively have intended for the tank car to have become part of real property.[58]

With regard to suppliers of raw materials, I specifically said in my dissent that "[t]hose who only supply materials, such as nuts, bolts, nails, concrete, or lumber, are not included. They do not 'construct' an improvement, but merely provide materials."[59] With all due respect to the majority of the Supreme Court of Texas in *Sonnier*, my construction of section 16.009 was not "significantly more broad than any holding in this area so far."

My construction of section 16.009 was consistent with a prior decision of my court,[60] the reasoning, if not the result, in seven prior courts of appeals' decisions in Texas,[61] and two decisions of the United States Court of Appeals for the Fifth Circuit applying Texas law.[62]

In applying my test in *Sonnier*, I would have held that reasonable minds could differ about whether the tomato chopper at issue in that case was an improvement to real property.[63] I would have let the jury's verdict on that question stand.[64]

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[55] 909 S.W.2d at 484-85.
[56] 686 S.W.2d 605 (Tex. 1985).
[57] 686 S.W.2d at 609.
[58] *Sonnier*, 909 S.W.2d at 484-85.
[59] 909 S.W.2d 475.
[60] *Conkle v. Builders Concrete Prods. Mf. Co.*, 749 S.W.2d 489 (Tex. 1988).
[61] *Karisch v. Allied-Signal, Inc.*, 837 S.W.2d 679 (Tex.App.--Corpus Christi 1992, no writ); *Big West Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800 (Tex.App.--Amarillo 1992, no writ); *Ablin v. Morton Southwest Co.*, 802 S.W.2d 788 (Tex.App.--San Antonio 1990, writ denied); *Dubin v. Carrier Corp.*, 798 S.W.2d 1 (Tex.App.--Houston [14th Dist.] 1989, writ dism'd by agr.); *Rodarte v. Carrier Corp.*, 786 S.W.2d 94 (Tex.App.--El Paso 1990, writ dism'd by agr.); *Dubin v. Carrier Corp.*, 731 S.W.2d 651 (Tex.App.--Houston [1st Dist.] 1987, no writ); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex.App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.), *appeal dism'd*, 459 U.S. 802 (1982).
[62] *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 518 n. 13 (5th Cir. 1992); *Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244, 247 (5th Cir. 1992).
[63] 909 S.W.2d at 488.
[64] 909 S.W.2d at 490.

Responses to
Questions from Chairman Patrick Leahy for Justice Priscilla Owen

1. **Justice Owen, you accepted over a million dollars in contributions for your 1994 and 2000 election campaigns from law firms, lawyers and litigants, many of whom regularly appear, or have interests, before you in Court. I understand that, according to the Texas Code of Judicial Conduct, you are not required to disclose such conflicts of interest or recuse yourself in cases involving your campaign contributors. In fact, at your hearing, you testified that you did not disclose to parties before you any campaign contributions that you received related to interests in the particular case because you said that such contributions are a matter of public record. You also said that you did not recuse yourself in any case in which you received campaign contributions from a party, despite the apparent conflict of interest.**

   a. **In your view, did your participation in these cases violate Canon 2(A) of the Texas Code of Judicial Conduct, which states, in part, that, "A judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"?**

Response:

I do not believe that my participation in these cases violated Canon 2(A) of the Texas Code of Judicial Conduct. That is the settled view of case law from Texas and instructive decisions from other states with similar selection systems.

The people of Texas have chosen to include in our state Constitution the requirement that judges at the trial and appellate levels be elected.[1] For many years, I have advocated that we change this system, but change has not occurred. I currently serve, as all Texas judges serve, under a system that elects judges. Texas law requires judicial candidates to regularly, publicly disclose campaign contributions, and those disclosures are as readily available to lawyers and litigants as they are to the public generally. Decisions from courts in Texas as well as decisions in other jurisdictions acknowledge that in states that elect judges, the citizens recognize that campaign contributions will be made by lawyers and parties who may appear before state court judges. These decisions have consistently concluded that elected judges do not act unethically in carrying out the responsibilities that they were chosen to discharge by the electorate.

One federal court, in *Shepherdson v. Nigro*, 5 F. Supp.2d 305, 310-11 (E.D. Pa. 1998), summarized:

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[1] *See* Article 5, section 2(c) (Supreme Court of Texas); Article 5, section 4(a) (Court of Criminal Appeals); Article 5, section 6(b) (Courts of Appeals); Article 5, section 7 (District Judges).

> A number of high courts for states in which judges are elected have held that a judge is not ethically, let alone constitutionally, required to recuse in cases where a party is represented by an attorney who has contributed to or raised money for the judge's election campaign. *See, e.g.*, *Reems v. St. Joseph's Hosp. and Health Center,* 536 N.W.2d 666, 671 (N.D. 1995) (recusal not required where attorney for party was co-chairman of judge's campaign finance committee); *Roe v. Mobile County Appointment Board,* 676 So.2d 1206, 1233 (Ala. 1995) (judge not prohibited from sitting on case in which contributing lawyer represents a party); *In re Disqualification of Ney,* 74 Ohio St. 3d 1271, 657 N.E.2d 1367, 1368 (1995) (recusal not required where party represented by partner of judge's campaign chairman); *Nathanson v. Korvick,* 577 So.2d 943, 944 (Fla. 1991) (recusal not required where party represented by attorney who contributed to judge's election campaign and served on her campaign committee); *Aguilar v. Anderson,* 855 S.W.2d 799, 802 (Tex. App. 1993) (acceptance by judges of campaign contributions from lawyers does not create bias requiring recusal).
>
> * * *
>
> It is unrealistic and unfair to require that judges run for election and then to deride them for accepting the money that is necessary to sustain a campaign from a principal source.
>
> Absent public financing or blind funding of judicial campaigns, that a judge may preside in some cases in which a litigant's attorney contributed to the judge's campaign is an almost inevitable concomitant of the policy decision to elect judges. If a judge must recuse himself whenever a contributing attorney or member of a contributing firm enters an appearance, a candidate who succeeds in attracting contributions from a wide array of lawyers would constantly be recusing himself. *See Roe,* 676 So.2d at 1233 ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of cases filed in their courts").

Similarly, a Texas court has explained in *Williams v. Viswanathan*, 65 S.W.3d 685, 688 (Tex. App.—Amarillo 2001, no writ), that the people who have chosen an elective system for judges are aware of the realities of electing judges:

> We also agree . . . that a reasonable person must be aware of the facts surrounding our judiciary and must know that our judges have to stand for election on a regular basis, that elections cost money, and that money must be raised to conduct an effective campaign. *Aguilar*, 855 S.W.2d at 805. Suffice it to say, within the framework of the system mandated by the people of Texas over a long period of time, in order to require a sitting justice to recuse, something more than the mere fact that he or she prevailed in a contested election and that contributions were received must be shown.

Other Texas courts that have addressed the propriety of a judge sitting in a case in which an attorney or party has contributed to that judge's campaign include *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.—El Paso 1993, writ denied); *J-IV Investments v. David Lynn Machine, Inc.*, 784 S.W.2d 106, 108 (Tex. App.—Dallas 1990, no writ); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842-45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); and *River Road Neighborhood Assoc. v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex. App.—San Antonio 1984, no writ). *See also Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App.—Beaumont 1999), rev'd on other grounds, 41 S.W.3d 118 (Tex. 2001).

Finally, in deciding cases judges should be encouraged not to focus on who their contributors have been. To expect judges to look through lists of contributors and announce in each case whether any participant has contributed to their campaigns would not, in my view, promote public confidence in the judiciary but, on the contrary, would feed public doubts and cynicism.

b. I understand that, according to the Texas Code of Judicial Conduct and interpretive case law, the receipt of political contributions by a judge does not create bias necessitating recusal, or even appearance of impropriety, in a case in which a contributor is a party. However, while there may be no legal authority that requires disqualification in such cases, as a judge entrusted with the responsibility to promote fairness and public confidence in the impartiality of the judicial system, do you think there is ever a time where a judge has a common sense or ethical obligation to disqualify himself or herself? Please explain.

Response:

I certainly agree that a judge has "a common sense or ethical obligation to disqualify himself or herself" in appropriate circumstances, and I have not hesitated to do so when disqualification was warranted. For example, I would disqualify and have disqualified myself from participating in cases in which my former law firm represented a party while I was a member of that firm, and there are other situations in which the Code of Judicial Conduct requires disqualification. With regard to

campaign contributions, as noted above, several on-point decisions from state and federal courts across the country make clear that campaign contributions, standing alone, create neither actual conflicts of interest nor the appearance of such conflicts. However, a judge would have an ethical obligation to disqualify in a case in which a lawyer or party had made a political contribution to the judge's campaign, and it was a material violation of law for the judge to retain the contribution. There also may be an ethical obligation to disqualify in a case in which a lawyer or party had made a contribution to the judge's campaign, and the judge failed to report that contribution in violation of the law.

The purpose of the campaign contribution limits like those that I voluntarily imposed in 1994 and those that are now suggested by Texas law is to reduce the possibility that any supporter of a judicial candidate would contribute so much as to raise an appearance of impropriety.

2. **Justice Owen, in your 1994 campaign cycle, just a few economic interests supplied the vast majority of your campaign cash. You received approximately 21% of your total campaign funds from non-law firm businesses, including from individuals or the political action committees of Enron and Halliburton. You also received a significant share of your campaign money from two leading business tort political action committees, Texans for Lawsuit Reform and the Texas Civil Justice League, that aim to, among other things, limit product liability, reduce punitive damages, and extend employer immunity. The "energy and natural resources" sector accounted for 16% of your campaign contributions, and, you, along with Justice Hecht, also received the smallest percentage of your contributions from plaintiff lawyers. Given that such large corporations have supported you and that many of your decisions have been in their favor, what assurances can you give the Committee that, as a judge, you will be procedurally and substantively fair to plaintiffs who bring claims against corporate interest?**

Response:

Until allegations regarding campaign contributions were made against me by a special interest group, I never had cause to review information about who contributed to my judicial campaigns other than as part of the campaign process itself, and I had never made such a review. The bulk of the campaign contributions occurred in 1993 and 1994, eight and nine years ago, when I first ran for a seat on the Supreme Court of Texas. The balance of the contributions were made in 1999, when I sought re-election. I have now reviewed some of the campaign contributions that have been discussed by a special interest group in connection with my nomination.

I respectfully disagree that "just a few economic interests supplied the vast majority of" the contributions to my campaign. There were more than 3,000 contributors to

my 1994 election campaign. The average of those contributions was approximately $400. In the 2000 election cycle, I closed my campaign after the filing deadline when I did not receive a Republican or Democrat opponent. At that point, contributions to my campaign totaled about $300,000 from about 270 contributors, for an average contribution of approximately $1,111. In the 2000 election campaign, I returned 35% of each contribution, so that the average of the contributions that I retained was approximately $722.

During the 1994 campaign, I voluntarily imposed a goal that at least one half of the total amount of contributions to my campaign would be from non-lawyers, and to the best of my knowledge, I met that goal. I had broad-based support from many segments of our society, which is evidenced by the number of contributors, more than 3,000. I do not know whether 21% of my total campaign contributions came from non-law firm businesses. Nor do I know whether the "'energy and natural resources' sector accounted for 16%" of my campaign contributions. I have not attempted to make those calculations. Further, as you may know, Texas law does not permit corporations to make political contributions. The contributions I received were from individuals, either directly or through action committees, and contributors to committees are often the rank-and-file employees. I have not determined whether I or Justice Hecht "received the smallest percentage of [our] contributions from plaintiff lawyers."

During my 1994 election campaign, the political action committee of Texans for Lawsuit Reform contributed $5,000, less than one half of one percent (less than 0.5%) of my total campaign contributions. During that campaign, the political action committee of the Texas Civil Justice League contributed $4,929.31, less than one half of one percent (less than 0.5%) of my total campaign contributions. During my 2000 election campaign, the political action committee of Texans for Lawsuit Reform contributed $5,000, and I returned $1,750. The $5,000 contribution was about 1.2% of my total campaign contributions in 2000. During the 2000 campaign, the political action committee of the Texas Civil Justice League contributed $1,000 to my campaign, and I returned $350. The $1,000 contribution was about 1/3 of one percent (0.33%) of the total amount of campaign contributions that I received during the 2000 election cycle. I did not recall these amounts, but I have now reviewed campaign records in order to respond to your question.

If I am confirmed you can be assured that I will be procedurally and substantively fair to all who may appear before me as a federal Circuit judge. That is my solemn and sworn oath: to dispense equal justice under the law. I have faithfully followed that oath as a justice on the Supreme Court of Texas, and I will continue to hold it sacred if confirmed to the federal bench. My decisions have always been and will continue to be based solely on the law, which includes any applicable statutes, any applicable United States Supreme Court decisions, and precedent from the court on which I serve.

A few representative decisions that I have authored or joined that resulted in an individual or small business prevailing over a corporation or business entity include:

Continental Airlines v. Kiefer, consolidated with *American Airlines v. Shupe*, 920 S.W.2d 274 (Tex. 1996)

Griffin Industries. v. Honorable Thirteenth Court of Appeals, 934 S.W.2d 349 (Tex. 1996) (holding federal Airline Deregulation Act does not prevent negligence claims brought against airline companies by injured passengers).

Franks v. Sematech, Inc., 936 S.W.2d 959 (Tex. 1997) (ruling that employee injured by manufacturer's gate is not barred by statute of limitations from intervening in subrogation action against manufacturer and employer that was timely filed).

Littlefield v. Schaefer, 955 S.W.2d 272 (Tex. 1997) (holding liability-release clause unenforceable in wrongful death suit brought against motorcycle race promoter).

Owens-Corning Fiberglass Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (Owen, J., concurring) (allowing imposition of punitive damages against manufacturer of asbestos-containing products in products-liability suits).

Clark v. Texas Home Health, 971 S.W.2d 435 (Tex. 1998) (holding that plaintiff nurses had a cause of action under Texas law for retaliatory employment decision taken in response to their expressed intent to report licensed health care practitioner).

In re Ethyl Corp, 975 S.W.2d 606 (Tex. 1998) (denying defendants' request for mandamus relief from trial court's decision to consolidate plaintiffs in asbestos-exposure litigation).

In re Bristol-Myers Squibb Co., 975 S.W.2d 601 (Tex. 1998) (ruling in favor of plaintiff breast-implant litigants and consolidating claims into a single trial).

Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153 (Tex. 1998) (requiring insurance company to pay $50,000 uninsured motorist coverage for a boy's inadvertent act).

NME Hosps., Inc. v. Rennels, 994 S.W.2d 142 (Tex. 1999) (permitting pathologist to sue hospital for unlawful employment practices despite no direct employment relationship).

Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217 (Tex. 1999) (denying mining company's summary judgment because of failure to prove as a matter of law that limitations barred claims or that exposure to radioactive materials at company's facility did not cause leukemia).

Hernandez v. Tokai Corp., 2 S.W.3d 251 (Tex. 1999) (rejecting manufacturer's argument in defective design products liability suit that it had no duty to make the product child resistant if intended only for adult use).

Chilkewitz v. Hyson, 22 S.W.3d 825 (Tex. 1999) (holding that plaintiff's naming surgeon as an individual in medical malpractice suit was sufficient to

commence suit against the professional association doing business under surgeon's name).

Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000) (ruling that neither settlement from earlier suit seeking damages for asbestosis nor statute of limitations barred worker from pursuing claims against suppliers of asbestos products when he developed mesothelioma).

Great Dane Trailers, Inc. v. Estate of Wells, 52 S.W.3d 737 (Tex. 2001) (denying trailer manufacturer's claim of federal law preemption in plaintiff's state common law tort claims).

King v. Dallas Fire Ins. Co., 2002 Tex. Lexis 68 (Tex. May 30, 2002) (holding that insurance company was legally obligated to defend insured who was subject to underlying action; court views injury-triggering event from insured/consumer's standpoint).

American Cyanamid Co. v. Geye, 2002 Tex. Lexis (Tex. June 6, 2002) (holding that farmer's state law claims against herbicide manufacturer for crop damage are not preempted by federal law).

D. Houston v. Love, 2002 Tex. Lexis 102 (Tex. June 27, 2002) (holding that when employer exercises some control over its independent contractor's decision to consume alcoholic beverages to the point of intoxication, such that alcohol consumption is required, employer must take reasonable steps to prevent foreseeable injury to independent contractor caused by drunk driving).

3. If confirmed to the Fifth Circuit, what analysis would you use if presented with a motion to recuse yourself from cases involving litigants, law firms or parties who contributed to your 1994 or 2000 election campaigns?

a. Please explain the specific steps you would take to comply with 28 U.S.C. § 455, which governs disqualification of federal justices, judges and magistrates.

Response:

There are numerous federal judges across the country who were formerly state court judges elected in partisan, contested elections, including judges who now serve on the Fifth Circuit. Unfortunately, as discussed below, I have been unable to find any court decisions addressing whether a federal judge was required to recuse when a former state campaign contributor appeared before him or her. If confirmed, I would seek opinions from the Administrative Office of the United States Courts and the United States Judicial Conference and would abide by such opinions, in addition to conferring with my Fifth Circuit colleagues, particularly those who were once elected state court judges. I would also, of course, evaluate any such issue, as I would any matter of judicial ethics, by consulting the Code of Conduct for U.S. Judges.

I have spent a considerable amount of time researching the question of whether 28 U.S.C. § 455 would require a federal judge who formerly was a state judge to disqualify in a case in which a lawyer or party had made a campaign contribution when the judge was running for a seat on a state bench. I have found no cases that resolve that question. The only decision that I found that comments in any substantial way on this question is *In re Mason*, 916 F.2d 384 (7th Cir. 1990). In that case, a federal judge had contributed $100 to a mayoral candidate and $100 to a candidate for county clerk. These two individuals were subsequently defendants in the judge's court. The Seventh Circuit held that recusal was not required, but in the course of its discussion said:

> Reasonable, well-informed observers of the federal judiciary understand that judges with political friends or supporters regularly cast partisan interests aside and resolve cases on the facts and law. Judges with tenure need not toady, and don't. Chief Justice Burger wrote an opinion that led to the resignation of the President who gave him that office. *United States v. Nixon,* 418 U.S. 683 (1974). Justice Holmes wrote a dissent in an antitrust case that President Roosevelt had personally decided to pursue, despite being a frequent guest at the Roosevelts' table. *Northern Securities Co. v. United States,* 193 U.S. 197 (1904), discussed in Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 261-73 (1989). Tenure of office, coupled with the resolve that comes naturally to those with independent standing in the community, have led a "political" judiciary in the United States to be more assertive in securing legal rights against the political branches than is the politically neutral, civil service judiciary in continental Europe. A reasonable, informed observer takes account of this history when deciding whether political connections call into question the judge's ability to render an impartial decision.[2]

The Seventh Circuit further said in that case that "sponsorship and other indicia of political support in bygone days do not disqualify a judge."[3] But the Seventh Circuit also said in that same case:

> [W]e might have a much more difficult case if, as occurs in many states, the attorney gave significant financial support to the judge's campaign committee while the judge was on the bench. Such contributions create opportunities to curry favor, and large ones could require disqualification.

[2] 916 F.2d at 387.
[3] 916 F.2d at 387.

> Contributions have both practical justifications (someone has to pay for the campaign in states that elect judges) and civic ones (attorneys know the most about who would make a good judge, and it would be regrettable to have ethical rules that put them on the sidelines). In the federal system, however, it is possible to maintain airtight financial separation between bench and bar, once the judge takes office.[4]

Accordingly, I have found no authority that squarely indicates how this question would be resolved by a court.

Again, I suspect that this issue has arisen previously since there are a number of current federal judges who were formerly elected state court judges whose campaigns received contributions. The Fifth Circuit, for example, includes judges from Texas and Louisiana who were appointed to the federal bench after having been elected as state court judges, and I would certainly consult with them on their recusal policies involving former contributors, in addition to the other specific steps discussed above. As an elected judge in Texas, I have assiduously followed all applicable rules of ethics, and if I am confirmed to the Fifth Circuit, I will continue to do so.

b. Please explain the specific steps you would take to comply with Canon 2(A) of the Code of Conduct for United States Judges and any other applicable provisions of the Code and related commentary regarding financial interests and conduct that creates the appearance of impropriety.

Response:

Given the context of your question, I assume that question b. relates specifically to campaign contributions. I contacted the Administrative Office of the United States Courts, Office of the General Counsel, and inquired if there had been any opinions issued on whether a federal judge is required by any of the Canons to disqualify because as a state judge, he or she accepted campaign contributions. I was informed that there have been opinions on this question. I was sent excerpts from the "Compendium of Selected Opinions" that includes the following statements under the heading "§ 7.7 Miscellaneous Rulings":

[4] 916 F.2d at 387.

(b) A magistrate judge who was an unsuccessful candidate for elected office before becoming a judge may not solicit contributions to pay off lingering campaign debts, and may not accept any such contributions from lawyers or from any person whose interests have or may come before the magistrate judge.

* * *

(e) A judge shall not control a campaign fund accumulated during his or her tenure as an elected official. A judge should not host a party for former political campaign workers.

With regard to (e) above, Texas law requires a former officeholder to remit any unexpended political contributions to certain specified recipients within six years of leaving office or filing a final report, whichever is later.[5] If confirmed, I intend to promptly contribute all unexpended campaign contributions to a recognized, tax-exempt charitable organization for educational or religious purposes, or to a public or private institution for higher learning for the purpose of assisting or creating a scholarship program, or both, as permitted by Texas law.

As indicated above, since there is no direct authority on whether contributions to my past state court campaigns would require recusal if I were confirmed to the federal bench, I would seek opinions from the Administrative Office of the United States Courts and the United States Judicial Conference, and would abide by such opinions, in addition to conferring with judges on the Fifth Circuit, particularly those who were once elected state court judges.

c. **What assurances can you give the Committee that you would follow the Code of Conduct and laws and related regulations regarding disclosure and disqualification? For example, if one of your campaign contributors, such as Vinson & Elkins, were to appear before the Fifth Circuit in a particular case, do you think that, as stated in 28 U.S.C. §455, your "impartiality might be reasonably questioned"? Do you think that presiding over such a case would create in reasonable minds a perception that your ability to carry out judicial responsibilities with integrity, impartiality and competence would be impaired? What specific actions would you take in such a case, including any disclosure, and would you identify the grounds for disqualification and disqualify yourself?**

Response:

[5] *See* TEX. ELEC. CODE §§ 254.203, 254.204.

As indicated above, I would if confirmed seek opinions from the Administrative Office of the United States Courts and the United States Judicial Conference, and would abide by such opinions, in addition to conferring with my Fifth Circuit colleagues, particularly those who were once elected state court judges. As an elected judge in Texas, I have assiduously followed all applicable rules of ethics, and if I am confirmed to the Fifth Circuit, I will continue to do so.

4. **Justice Owen, last week a newspaper article described a case which you handled a few years back called Ford v. Miles. This was a civil lawsuit brought against the Ford Motor Company by a young man who became a paraplegic after a car accident, claiming that a problem with the seatbelts in his car were to blame. He won a substantial verdict in the trial court, which was reduced some on appeal. When it reached your court, the paper reports that both parties asked for the decision to be expedited: presumably Ford wanted to try and get a large verdict off of its books, and the young man and his family wanted to have access to the money they needed to pay for the round-the-clock care that he required.**

This case was assigned to you, but despite the request for a quick decision, you did not issue an opinion for about 18 months, as I understand it. You ultimately ruled against the young man on a legal basis argued by neither side, and according to news reports, the Court as a whole issued something of an apology to the young man for having taken so long.

Last year, while the case was still pending on appeal, the young man died - alone and unattended - evidently because his family could not afford the proper nursing care.

Response:

The newspaper account is inaccurate. I understand that Willie Searcy died on July 3, 2001, more than eight years after the head-on collision in which he was so severely injured. His unfortunate death occurred more than three years after my court issued an opinion remanding this case to the trial court for further proceedings.

Counsel for Willie Searcy's mother and step-father (the Mileses) first filed this case one year after the accident occurred. Suit was filed in a county that had no relationship whatsoever to the accident, to the sale of the Ford pick-up, or to the residence of the parties. This choice of venue was challenged in the trial court, the court of appeals, and in the Supreme Court of Texas. In reversing this case based on improper venue, my court did not rule on a legal basis that neither side argued.

The case did not reach my court until September 1996. The opinion, which I authored, which was issued on March 19, 1998, as soon as five justices on the court

voted to issue opinions. The Mileses, as well as Ford Motor Company, filed motions for rehearing, and those motions were overruled by my court on June 23, 1998, again, more than three years before Willie Searcy died.

After the case returned to a trial court, the trial court granted a summary judgment in favor of Ford Motor Company on the Mileses and Searcy's liability and punitive damages claims. That occurred on July 23, 1999. The Mileses appealed that judgment to a court of appeals, and the appeals court issued an opinion reversing the trial court in part and remanding some of the claims to the trial court on June 29, 2001. Accordingly, after my court remanded the case to the trial court, the case was before the trial court for about a year, and after the trial court ruled against the Mileses, the case was pending in the court of appeals for about two years. It was then that Willie Searcy died, while the case was in the court of appeals.

Ford thereafter filed a petition for review in my court on August 13, 2001, after Willie Searcy had passed away. That petition for review was denied by my court without reaching its merits, and the case was remanded to the trial court in accordance with the court of appeals' judgment. I understand that the case remains pending in a trial court, and no determination of whether Ford is liable has been made by the trial court.

a. **You testified at your hearing that you resolved the case on the issue of venue. You implied in your testimony that it was a fairly straightforward legal question, having nothing to do with the complex issues of liability in the case. If this was such a simple and obvious resolution, why did it take you 18 months to issue the opinion?**

Response:

I understand and respect your desire to know the details about what transpired during my court's consideration of this appeal. I hope that you will understand my obligation to maintain the confidentiality of the deliberations of the Supreme Court of Texas. Canon 3(B)(11) of the Texas Code of Judicial Conduct provides:

> A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

However, there is public information as to how the Supreme Court of Texas handles matters that come before it in general, and there is public information that may shed light on some of the factors that were involved in this particular case.

I am one of nine members of the Supreme Court of Texas. The court's written opinions and any separate opinions cannot be handed down until at least five members of the court affirmatively vote to publicly issue them. It cannot be assumed that the member of the Court who ultimately writes the majority opinion for the court was initially assigned responsibility for writing that opinion. Also, it cannot be assumed that even if a case is initially assigned to a particular judge, that another member of the court did not attract a majority at one or more points during deliberations but later lost that majority.

With regard to the *Ford Motor Co. v. Miles* case, I can say that once five members of the Supreme Court of Texas agreed that opinions in this case should issue, the opinions went out within a matter of days. There were three opinions issued in the case: the majority opinion that I authored for the court, which also included my concurring opinion; a dissent by Justice Hankinson; and a concurring opinion by Justice Raul Gonzalez. (A copy of *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998) is attached as Appendix 1.) It is a matter of public record that the case was argued on November 21, 1996, when Justice John Cornyn was a member of the court. He resigned on October 18, 1997, and Justice Deborah Hankinson succeeded him on October 27, 1997. As already noted, Justice Hankinson authored the dissent in this case.

The venue issue was raised at all stages of this case. It was raised in the trial court, and it was the first issue decided by the court of appeals.[6] Ford's briefing in my court (the Supreme Court of Texas) urged that the trial court's judgment must be reversed and remanded because of improper venue.[7] Because the venue question was raised, my court was required to decide it. A Texas statute mandates that a case must be reversed and a new trial ordered if venue was improper.[8]

But venue was not the only issue in the case. An issue of first impression that my court decided was whether a step-parent has a cause of action for loss of consortium when a step-child is catastrophically injured. (967 S.W.2d at 382-84). Eight members of the court agreed on this issue. One member, Justice Spector,

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[6]*See Miles v. Ford Motor Co.*, 922 S.W.2d 572, 579-80 (Tex. App.—Texarkana 1996, writ granted). A copy of the court of appeals' decision is attached as Appendix 2.
[7]A copy of that briefing is attached as Appendix 3.
[8]The statute says:

> (b) On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error. In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits.

TEX. CIV. PRAC. & REM. CODE § 15.064(b).

expressed no view in any public writing. Other issues were considered by my court in the various written opinions that were issued, but a majority of the court did not resolve those issues. I wrote a concurring opinion, joined by two other judges, that considered whether Ford waived its objection to the jury charge on design defect and whether the charge to the jury on design defect was incorrect and constituted reversible error. Two members of the court, Chief Justice Phillips and Justice Raul Gonzalez did not express a view on this issue in any public writing. I also considered in a concurring opinion joined by another judge the admissibility of two videotapes and sled tests. Three members of the court did not express a view on that question in any public writing. Four members of the court, in a dissent, said that the Court should not reach the jury charge or evidentiary issues because the case was reversed and remanded on the venue issue. (967 S.W.2d at 390-91 (Hankinson, J., dissenting)). I disagreed because I believed that it would be tremendously unfair to the Mileses to retry the case a second time, and then have to go through yet another appeal on the same issues. I also believed that it would waste judicial resources not to answer questions that would almost certainly come up again when the case was retried. I said in my concurring opinion:

> The Court's decision regarding venue is dispositive of the judgment that will be entered in this case. However, other substantial and significant issues have been raised, and some of those questions undoubtedly will persist on remand. To permit those issues to linger, perhaps necessitating a third trial, would be patently unjust to the parties and would result in a waste of judicial resources. Only recently, all nine members of this Court joined in considering an issue "not essential to [the] disposition of this case" in order to "provide the trial court with guidance in the retrial" of the case. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997); *see also Tyler Bank & Trust Co. v. Saunders*, 159 Tex. 158, 317 S.W.2d 37, 43 (1958) (holding that since there must be a retrial, the Court felt it necessary to address the admissibility of certain evidence). Accordingly, a resolution of issues that are likely to recur is in order, and I would proceed to decide them.
>
> 967 S.W.2d at 384.

Yet another issue was considered by Justice Raul Gonzalez's concurring opinion, in which two other judges joined. That issue was whether an appellate court can affirm a judgment for actual damages and remand for a new trial on only punitive damages. (967 S.W.2d at 389-90 (Gonzalez, J., concurring))

The court considered the *Ford v. Miles* case an important one, but we did not give it precedence over many of the other important cases on our docket at the time. We decided it in about the same amount of time that we decided other cases that fiscal

year. The average time for disposition of an argued cause for the year ended August 31, 1998 was 538.31 days.[9] The *Ford v. Miles* case was disposed of in 560 days.[10] The court's disposition rates were better in previous and subsequent years.[11] When the court issued the opinions in *Ford v. Miles*, the members of the court unanimously agreed, in hindsight, that the motions to expedite this case should have been granted. That would have meant that this case would have taken precedence over most other matters on our docket, and it *might* have resulted in a faster disposition. It would have required at least five members of the court to vote to grant the motions to expedite, but those motions were not granted.

In sum, there were a number of issues other than venue that were considered by the court in three separate writings in this case. The court was divided on those issues, as evidenced by the opinions in the case.

b. Can you respond to the charge made on the record in the newspaper by a former clerk on your court, that you have a, "reputation for slowness in handling your caseload," and that this case in particular was the source of "gossip and embarrassment" in the courthouse?

Response:

Certain statements in a newspaper story were attributed to Susan Hays, who served as Justice Spector's law clerk from August 1997 to July 1998. With regard to the statement Ms. Hays allegedly made regarding the length of time that it took the court to issue opinions in *Ford v. Miles*, I can only repeat what I have said above. This case had many issues, the members of the court were in disagreement on many of those issues, and the court issued opinions as soon as five members of the court voted to do so. It is also a matter of public record that the year that Ms. Hays clerked for the court was a year in which the court's average time for disposition of an argued cause was longer than other years that I have served on the court.[12] Ms. Hays' one-year view of the court's docket was not representative of other years.

The statement attributed to Ms. Hays about the timeliness of my work is incorrect. I believe that I have a reputation as a very hard-working and productive member of the court. I have authored many opinions for the court, including both signed

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[9] *See* Supreme Court of Texas Official Docket Activity Report, Fiscal Year Beginning September 1, 1997.

[10] The case was filed in the Supreme Court of Texas on September 5, 1996, and opinions issued on March 19, 1998.

[11] *See* n. 12, *infra*.

[12] The Supreme Court of Texas Official Docket Activity Report, Fiscal Year Beginning September 1, 1997, reflects that the average time between filing of an argued cause and the issuance of an opinion was 538.31 days for the fiscal year ended August 31, 1998. For other years, the average time was: 319.12 days for 1995, 321.84 days for 1996, 395.72 days for 1997, 442.83 days for 1999, 408.06 days for 2000, and 451.1 days for 2001.

majority opinions and per curiam opinions.[13] It should be noted that Ms. Hays was a clerk at our court for only one year, from August 1997 to July 1998. Ms. Hays would have no knowledge of the internal workings of the court for any time period other than that one-year period. And, as I have said, I disagree with the statement attributed to Ms. Hays about the timeliness of my work.

Also, I appreciate the various support letters that other former law clerks, both Democrats and Republicans, have written this Committee in support of my nomination.

c. **Is there any mechanism by which the Texas Supreme Court keeps track of the way a justice handles his or her docket? Are there periodic reports of petitions or opinions pending in each justice's chambers that would give us an idea of whether or not this is a chronic problem? If so, is this something you could arrange for the Committee to examine?**

Response:

As explained above, the internal deliberations of the court, including case assignments and information about how particular cases have been handled internally are not matters of public record. The Texas Code of Judicial Conduct, Canon 3(B)(11), requires that members of the court keep information about its internal handling of cases confidential. The Texas Public Information Act specifically excludes the judiciary.[14] Access to judicial records is governed by Rule 12 of the Texas Rules of Judicial Administration, but records related to a court's adjudicative function are excluded from the scope of Rule 12. [15] There are reports that are issued to the public that show overall information and statistics regarding the docket of the Supreme Court of Texas. They do not give information about individual members of the court other than the number of opinions written by each judge.

5. **In a case called Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995), the issue was the constitutionality of a state law requiring minors to file medical malpractice actions before they turn 18. This was an issue that had been decided previously by the Texas Supreme Court, in favor of the injured children. The only difference in this case was a slight change in the age cutoff imposed on the plaintiffs.**

The majority found this to be a fairly simple question of following the Texas Supreme Court precedent, but you managed to discover a legal basis they did

[13]From the time I joined the Supreme Court of Texas on January 1, 1995, through the court's fiscal year ended August 31, 2001, I authored approximately 88 majority opinions for the court, which includes signed opinions and per curiam opinions.
[14]*See* TEX. GOV'T CODE § 552.003(1)(B).
[15]*See* Rule 12.2(d).

not see on which to distinguish this case. What is striking about the majority's opinion, written by Justice John Cornyn, is what can fairly be characterized as a lecture to the dissent, which you authored, on the important of following precedent. Justice Cornyn wrote:

> **Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in [the previous case]. . . . Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process that differs dramatically from that properly employed by the political branches of government. Id. at 12-13. (Citations omitted.)**

a. Why do you think your Republican colleagues found it necessary to include this admonition in a published opinion?

Response:

I did not believe at the time *Weiner v. Wasson* was written, and I do not believe now in re-reading it, that the majority was lecturing the dissenters (which included me as the author of the dissent) about stare decisis. The majority and the dissenters in *Weiner v. Wasson* agreed that previous decisions of the court applied and should not be overruled. They disagreed only as to how those prior decisions applied in this case. I wrote at length on stare decisis in my dissent, as I explain below.

The passage quoted above from the opinion of the court written by then-Justice Cornyn was specifically in response to the argument by Weiner (the physician who was sued) that a prior decision of the court, *Sax v. Voetteler*,[16] should be overruled altogether. The majority notes at page 319 of the opinion that "Weiner urges us to either overrule *Sax*, or limit the holding to its facts. We decline to do so." The next two paragraphs after this passage, from which the language quoted above in your question comes, address Weiner's argument that *Sax* should be overruled. I never advocated that *Sax* be overruled. In fact, I said that "the basic principles of *Sax* are sound." 900 S.W.2d at 332. I argued only that *Sax* should be limited to its facts and that it did not require the court to hold the statute before us unconstitutional under all circumstances. I said, "*Sax* should and must be limited to its facts in *some*

[16] 648 S.W.2d 661 (Tex. 1983).

respects because the Court [in *Sax*] had before it a different statute with a considerably different legislative history and different provisions." 900 S.W.2d at 332 (emphasis in original). It was only in the paragraph *after* the passage quoted in your question that the majority addressed the argument of the dissenters and Weiner that *Sax* should be limited to its facts, as distinguished from Weiner's argument that *Sax* should be overruled, an argument that the dissenters did not advance.

b. Considering the strong legal argument made by the majority based on a bedrock principle of our system, was there some other reason you chose to rule in a way that would, I assume, ultimately benefit the insurers of the doctors found liable for injuries to their patients?

Response:

I, too, am committed to the bedrock principle of stare decisis. I wrote in *Weiner v. Wasson*:

> A fundamental tenet in our jurisprudence is the recognition of the need for consistency and predictability in the decisions of our courts. This Court should be loath to overrule its prior decisions, particularly where an opinion has been cited and relied upon as frequently and as recently as has *Sax*. Our Court should not succumb to a temptation to continually revisit prior decisions as new fact situations arise or the concerns of the public shift. The Court similarly stresses the importance of stare decisis, but misapprehends the application of that doctrine to the case before us. The Court concludes that in order to uphold the constitutionality of section 10.01, it is compelled to "overrule *Sax* or to somehow limit the holding of that case to its facts." 900 S.W.2d 320. *Sax* should and must be limited to its facts in *some* respects because the Court had before it a different statute with a considerably different legislative history and different provisions. But the basic principles of *Sax* are sound, with limited exceptions noted above. Those principles should lead this Court to uphold section 10.01. The application of the rationale of *Sax* to this case leads only to a different *result*, not to a departure from the essence of *Sax* or from the decisions of this Court on which it was based.
>
> 900 S.W.2d at 332-33 (emphasis in original).

The question in *Weiner v. Wasson* was whether a statute passed by the Texas Legislature violated what is called the "open courts" provision in the Texas

Constitution.[17] The statute said that health care liability claims had to be brought within two years from the date of the occurrence, but that "minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim."[18] In 1983, in *Sax v. Votteler*,[19] the Supreme Court of Texas had held that the predecessor to this statute violated the open courts provision. That earlier statute said that minors under the age of 6 years had until their 8th birthday to file suit on a health care claim.

I was of the view in *Weiner v. Wasson* that the subsequent statute that the Texas Legislature passed in response to *Sax v. Votteler* was not unconstitutional *as applied to the facts* in *Weiner v. Wasson*. In *Weiner*, surgery was performed by Bruce Weiner on Emmanuel Wasson when Wasson was 15 years old. During the same year that surgery was performed, his mother filed a medical grievance against Weiner because she believed he had performed the surgery negligently and as a result, her son had to undergo total hip replacement. Within two years after Weiner had performed the allegedly negligent surgery on Wasson, Wasson's mother hired an attorney to represent her son in a claim against Weiner. For some reason unexplained in the record, this lawyer did not file suit until more than four years after Weiner last saw Emmanuel Wasson. I said that on these facts, there was no violation of the open courts provision. I said that the statute of limitations

> is not unconstitutional where the minor is at least twelve years of age, his or her parent knew of the injury and potential claim within the limitations period, and the parent or legal guardian was competent and had no conflict of interest that would preclude him or her from acting in the best interest of the child.
>
> 900 S.W.2d at 322.

My conclusion was based on what the court had said in *Sax* and three decisions of the Supreme Court of Texas on which *Sax* had relied. In *Weiner v. Wasson*, I quoted what the court had said in *Sax*:

> We hold, therefore, that the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature *absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress*. In applying this test, we

[17]Article I, section 13 of the Texas Constitution says: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."
[18]TEX. CIV. STAT. ANN. art. 4590i, § 10.01.
[19]648 S.W.2d 661 (Tex. 1983).

> consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.
>
> 900 S.W.2d at 325 (quoting *Sax*, 648 S.W.2d at 665-66 (emphasis in my dissent in *Weiner v. Wasson*)).

The court in *Sax* had cited and reaffirmed *Lebohm v. City of Galveston*, 275 S.W.2d 951 (Tex. 1955), which I also cited and relied on in *Weiner v. Wasson*. In *Weiner*, I quoted *Lebohm's* explanation of what the open court's provision did and did not prohibit the Legislature from doing:

> Thus it may be seen that legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.
>
> 900 S.W.2d at 324 (quoting *Lebohm*, 275 S.W.2d at 955).

There were at least two differences between the statute before the court in *Sax* and the statute before us in *Weiner* that I thought were important. First, the Legislature was attempting to follow what the court had said in *Sax*. The Legislature articulated why it thought it was "reasonabl[y] exercis[ing] the police power in the interest of the general welfare," as required by *Lebohm*, in passing a statute of limitations that applied to minors who had a health care liability claim. The statute at issue in *Sax* contained no such findings by the Legislature. In *Weiner* I summarized the findings of the Legislature set forth in section 1 of article 4590i, which were lengthy. I pointed out that the Legislature had found, among other things, that there was a medical malpractice crisis in Texas and that it was likely that there would be further *reductions of the availability of health care* in the future. I thought that these findings, coupled with the age limits that I will discuss below, satisfied the requirement in *Sax* and in *Lebohm* that the Legislature reasonably exercise its police power in the interest of the general welfare when it abrogates a common law cause of action. The statute in *Weiner* did not even abrogate a common law cause of action, it simply put time limits on when suit could be brought. I said in *Weiner*:

> The Legislature articulated its findings and the basic purposes of article 4590i in section 1. Those findings are lengthy and will not be quoted here. In sum, the Legislature found that there is a medical malpractice crisis in this state which has had a material adverse effect on the cost and availability of health care. The Legislature found it likely

> that there would be further reductions in the availability of health care in the future. These findings meet the test of an "important" state interest. The remedy, limiting the time over which physicians and health care providers face liability, is directly related to the crisis identified by the Legislature and bears a real relationship to the articulated legislative goal of making health care more affordable, and above all available, for all Texans. The Legislature reasonably concluded that reducing the potential of long-term liability would help to ease the strain on health care services. *See Thompson*, 578 N.E.2d at 291; *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 894 (1980); *Mominee*, 503 N.E.2d at 738 (Wright, J., dissenting). Without section 10.01, a physician could be forced to defend a claim arising out of injuries incurred during childbirth up to twenty years after the occurrence. Page Keeton explained in his memorandum to the Texas Medical Professional Liability Study Commission that a medical malpractice statute of limitations is aimed at "the prevention of the bringing of stale claims or claims that are made so long after the so-called negligent event occurred as to make it virtually impossible to ascertain the facts."
>
> Significantly, the statute at issue in *Sax* contained no such findings. The Court in *Sax* did not consider these public policy concerns or whether the legislative scheme bears a real relationship to the social evils being addressed. Taken in tandem with the Legislature's adoption of a higher threshold age at which limitations begins to run, the legislative findings support the constitutionality of this statute, and there is a valid basis for drawing distinctions between the statute under scrutiny in *Sax* and section 10.01.
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> 900 S.W.2d at 331-32.

The other difference between the statute at issue in *Sax* and the statute at issue in *Weiner* that I thought was important was the age limit. In the old statute, it was 8, in the subsequent statute it was 14. The Texas Legislature chose the age of 14, after *Sax* had struck down the earlier statute, only after considering what experts had to say about when a child could communicate with a parent that there was a health problem. In this regard, I said in *Weiner*:

> This age [14] was not chosen at random by our Legislature. The Legislature considered the opinions of a number of experts as to when a minor could verbalize inner problems and could directly communicate that he or she was

> experiencing a health problem. The Legislature also considered the age by which an impairment to the development of the child could be recognized. *See* Debate on Tex.H.B. 1048 on the Floor of the House, 65th Leg., R.S. 138-41 (March 22, 1977) (transcript available from House Committee Services) (statement of Representative Bock explaining expert opinions considered by the House State Affairs Committee in arriving at the age of fourteen). In enacting section 10.01, the Legislature rejected the lower age of eight set forth in the *Sax* statute. In most cases, by the time a child attains the age of twelve, a competent parent or legal guardian should be able to determine if an injury to the child has occurred as a result of negligent medical treatment.
>
> Requiring suit to be brought on behalf of the minor is a reasonable substitute for removing the right of a fifteen year old to bring suit in his or her own capacity after reaching majority, provided that the minor has a legally competent parent or legal guardian who has no conflict of interest that would preclude him or her from acting in the best interests of the minor. *Compare Greathouse v. Fort Worth & Denver City Ry. Co.* 65 S.W.2d 762, 765 (Tex. Comm'n App. 1933, holding approved). The minor's rights are adequately safeguarded. *See Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235, 239-40 (Ga. 1992); *Thompson v. Franciscan Sisters Health Care Corp.*, 218 Ill. App. 3d 406, 578 N.E.2d 289, 292, 161 Ill. Dec. 162 (Ill. App. Ct. 1991). The Family Code empowers parents to protect the legal interests of their child, recognizing their right "to represent the child in legal action and to make other decisions of substantial legal significance concerning the child." TEX. FAM. CODE § 12.04(7). The Rules of Civil Procedure similarly enable parents as next friends to enter into settlement agreements on behalf of their minor children. TEX. R. CIV. P. 44. In addition to having the right to pursue a claim on behalf of their children, parents usually have a financial incentive to bring an action on behalf of a child who has been injured by medical malpractice. *See Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717, 739 (Ohio 1986) (Wright, J., dissenting).
>
> 900 S.W.2d at 327.

I agreed that under *Sax*, the statute before the court in *Weiner v. Wasson* might be unconstitutional in some circumstances:

> A different result may obtain if a plaintiff demonstrates that he or she had no parent or legal guardian who was competent to bring suit, or that his or her parents or legal guardian had a conflict of interest that prevented them from acting in the minor's best interests. In such circumstances, the statute of limitations may well be unconstitutional as applied to such a plaintiff. But requiring a competent parent or legal guardian to bring suit does not constitute "an impossible condition" prohibited by the open courts provision.
>
> 900 S.W.2d at 330.

I and the two other members of the court who joined my opinion simply disagreed with a majority of the court that the statute was unconstitutional under all circumstances and under the circumstances presented in *Weiner v. Wasson*.

6. **An issue of concern to taxpayers is always the accountability of their government, the transparency of the decision making, and the integrity with which their tax dollars are spent. A dissent you wrote in a case two years ago, City of Garland v. Dallas Morning News, 22 S.W. 3d 351 (Tex. 2000), brings these issues to mind.**

In this case, the Dallas Morning News sued the City of Garland for access to a document which outlined the reasons why the city's finance director was going to be fired. The majority held that this document, prepared by the city manager and submitted by him to the City Council, fell squarely within the definitions in the Texas open records law describing the types of materials that should be publicly available. You wrote the dissent in this case, finding that the document could be shielded from public scrutiny.

I agree with the majority that you would have created such a large loophole that it would have swallowed the rule entirely. Can you explain why, under your interpretation, any document that would otherwise be produced under the statute could not be protected from disclosure simply by having it labeled "draft"?

Can you see why some might question your commitment to following the letter and spirit of the Texas open records law and maybe even suspect that you were trying to come down against public disclosure, no matter what the law required?

Response:

Although a majority of the Court reached a judgment in *City of Garland v. Dallas Morning News*,[20] there was no majority opinion in that case. Justice Baker's opinion was a plurality opinion, not the opinion of the court. However, a majority of the court, including me, agreed that the Texas Public Information Act contains what is known as the deliberative process privilege.[21] The issue was whether the particular document before us fell within the deliberative process privilege.

The City of Garland's city manager prepared a memo addressed to the City's director of finance purporting to terminate him and listing the reasons why. But the memo was never sent. The city manager said that he had drafted the memo to give to city council members to discuss in a closed session so that a decision could be reached about the finance director's future. Instead of sending the memo and terminating the finance director, the City negotiated a settlement with him and he resigned.[22]

I did not take the position that simply by labeling a document a "draft," it could be shielded from the Texas disclosure laws. The plurality opinion never contended that this was my position. Our differences were over whether predecisional *personnel* memoranda fell within the deliberative process privilege. The plurality characterized my position as follows: "[T]he dissent asserts that the privilege protects all predecisional and deliberative agency memoranda involving personnel decisions because such decisions necessarily involve policy."[23]

The primary debate among the members of the court was whether federal case law was persuasive in defining the parameters of the deliberative process privilege. Although I agreed that federal case law was not binding, I and those who joined my opinion found its reasoning persuasive. Other members of the court did not, even though they acknowledged that the Texas Legislature used "the Freedom of Information Act as a model."[24] The language of the Texas and federal statutes regarding the so-called agency memorandum exception is almost identical, which the plurality opinion also acknowledged.[25]

I relied on a number of federal court decisions that had consistently held that documents that reflect the internal debate in making personnel decisions are included within the deliberative process privilege, as distinguished from documents

[20] 22 S.W.3d 351 (Tex. 2000).
[21] 22 S.W.3d at 360 (Baker, J. plurality opinion); 22 S.W.3d at 370 (Owen, J., dissenting).
[22] 22 S.W.2d at 354, 369.
[23] 22 S.W.3d at 364-65.
[24] 22 S.W.3d at 355.
[25] 22 S.W.3d at 360.

reflecting the actual decision and the reasons for that decision. The federal decisions on which I relied were cited in my dissent.[26]

I also relied on United States Supreme Court decisions that had mapped out the parameters of the deliberative process privilege, although those decisions did not specifically involve personnel decisions.[27]

My construction of the Texas Public Information Act and its treatment of personnel decisions was consistent with the Texas Open Meetings Act. The plurality conceded that the same information that was contained in the memorandum at issue could have been discussed in a closed meeting and not disclosed to the public.[28] I had difficulty in seeing how the Texas Legislature intended the two statutes to treat the same information so differently, depending on whether it was orally conveyed or conveyed for discussion purposes in a memo, particularly in light of all the federal decisions that said documents used in making personnel decisions are covered by the deliberative process privilege.[29]

I was not advocating a broad construction of the Texas Public Information Act. I specifically said that a document that would otherwise be public cannot be shielded by discussing it at a closed meeting:

> I agree with the plurality that a document that would otherwise be public information cannot be brought within the deliberative process exemption by discussing it at a closed session. But where, as here, the document was prepared solely for use in a closed meeting and the document does not reflect the decision reached or the reason for that decision, it is exempt.[30]

I was attempting to follow the letter and the spirit of Texas law, which to me clearly indicated that internal, pre-decisional deliberations regarding personnel matters are not subject to public disclosure. I assure you and this Committee that I am committed to open government and will faithfully and impartially interpret laws that seek to maximize public disclosure and transparency of government decisionmaking.

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[26]They include, in the order that I cited them: *May v. Dep't of Air Force*, 777 F.2d 1012 (5th Cir. 1985); *American Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203 (D.C. Cir. 1990); *Kalmin v. Dep't of Navy*, 605 F. Supp. 1492 (D.D.C. 1985); *Schell v. U.S. Dep't Health & Human Servs.*, 843 F.2d 933 (6th Cir. 1988); *Skelton v. U.S. Postal Serv.*, 678 F.2d 35 (5th Cir. 1982).

[27]Those decisions were *Renegotiation Bd. v. Grumman Aircraft Engineering, Corp.*, 421 U.S. 168 (1975); *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); and *EPA v. Mink*, 410 U.S. 73 (1973).

[28]22 S.W.3d at 366.

[29]22 S.W.3d at 370.

[30]22 S.W.3d at 370.

7. Are there any opinions of the Texas Supreme Court, majority or dissent, which you authored, or with which you concurred, that you now regret or believe were wrong?

To the extent I was in the dissent or differed with a majority opinion of my court on its reasoning in particular cases, I recognize that the majority's opinion is controlling law, and I am bound to give effect to that law unless the United States Supreme Court has since spoken and called that law into question. I am committed to stare decisis. Indeed, as my judicial record shows, I have never hesitated to apply a controlling decision, even when I had argued for a contrary interpretation in an earlier case.

Responses to
Follow-up Questions from Senator Schumer
for Fifth Circuit Nominee Priscilla Owen

Question 1:

In your concurrence to In re Jane Doe 1, you state that you would have required a minor to meet a higher standard of "sufficiently well informed" than that adopted by the majority, specifically advocating that a minor must "exhibit an awareness that there are issues, including religious ones, surrounding the abortion decision."

I am interested in your thinking on this point for three reasons. First, you inject your own perceptions of the legislature's intent in establishing the "sufficiently well informed" requirement without providing support from the legislative history at any point. You simply state that *you* would have established a higher standard.

Second, you cite Casey and Matheson in your opinion and in your testimony as if they establish a minimum level of information that state statutes *must* require minors to obtain before receiving an abortion. While the Supreme Court has held that states *may* impose certain requirements on a minor's right to make decisions regarding abortion, nowhere does it *mandate* those requirements; the Court leaves those important decisions to the states' elected representatives. The Texas legislature chose a moderated standard that did not go as far as absolutely possible. You appear to have rejected that decision and seem to have imported a wholly new requirement into the Texas law. If that is the case, it seems to be a disturbing approach to judicial interpretation which shifts power away from the legislature and the people it represents.

Third, I am concerned by your actual reading of Casey and Matheson. Neither of these cases supports your position that the Supreme Court allows states to require a minor to demonstrate that she has considered religious issues in order to receive a judicial bypass. Casey simply allows states "to encourage [a minor] to know that there are *philosophic and social arguments*" involved in the abortion decision. Matheson appears to be even more removed from your position. The majority opinion states only that "a State reasonably may determine that parental consultation . . . is particularly desirable with respect to the abortion decision -- one that for some people raises profound moral and religious concerns . . . ." In no way does the Court suggest that a religious awareness requirement is an appropriate requirement for judicial bypass or that it would be constitutional.

Let there be no confusion, I have absolutely no objection to a woman – minor or otherwise – taking religious considerations into account when weighing the serious question of whether to exercise her constitutional right to choice. My concern is that you appear to have attempted to write into law something that the legislature decided not to put there. That is the very definition of judicial activism.

In light of the fact that you cite no legislative history supporting your interpretation of the legislature's intent and the lack of textual support in either Casey or Matheson, please explain how you arrived at your position that a minor should also exhibit awareness that there are religious arguments surrounding her abortion decision. Other than the text of the statute, the legislative history and prior decisions, where do you find guidance in your decision making? What is your understanding of the role of judges in interpreting law?

Response:

The role of a judge is to interpret a statute as the legislative body has written it, and not to interpose any personal preference or opinion. As in all cases involving statutory interpretation, I endeavored, to the best of my ability, to discern the intent of the Texas Legislature when it enacted the parental notification statutes. I turned to the text of the statutes themselves, and I considered the context in which that text was chosen by the Legislature. I agreed with a majority of my court that the "Texas parental notification statute was enacted against a backdrop of over two decades of decisions from the United States Supreme Court," and that the "Legislature was obviously aware of this jurisprudence when it drafted the statute before us."[1]

The text of the Texas statutes reflects that the Texas Legislature intended that one of the parents of an unemancipated minor who is seeking to have an abortion must be notified, with certain limited exceptions. Section 33.002 of the Texas Family Code says that a "physician may not perform an abortion on an unemancipated minor unless" one of the events enumerated in the statute occurs. These are:

1) 48 hours actual notice has been given in person or by phone to one parent prior to the performance of the procedure; or
2) a judicial bypass is obtained in accordance with section 33.003 or 33.004; or
3) the physician certifies in writing to the Texas Department of Health that there are medical indications that, in the physician's judgment, necessitate an immediate abortion to avoid the minor's death or serious risk of substantial and irreversible impairment of a major bodily function; or
4) if actual notice cannot be given to a parent after a reasonable effort, 48 hours notice is given by certified mail addressed to a parent at the last known address; or
5) a parent signs an affidavit waiving the 48 hour notice requirement.[2]

A physician commits an offense punishable by a fine not to exceed $10,000 if he or she performs an abortion on a minor in violation of section 33.002.[3] The law allows for three circumstances under which a minor may obtain a judicial bypass. A minor can have an

[1] *In re Doe*, 19 S.W.2d 249, 254 (Tex. 2000).
[2] *See* Tex. Fam. Code § 33.002.
[3] *See* Tex. Fam. Code § 33.002(g).

abortion without notice to a parent if (1) she is mature and sufficiently well informed; (2) notification would not be in her best interest; or (3) notification may lead to physical, sexual, or emotional abuse.[4]

The issue in the first *Doe* case concerned the factors that a court should consider in determining whether a "minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents" within the meaning of the Texas parental notification statutes.[5] None of the many opinions in the various *Doe* cases that have come before the Supreme Court of Texas cite the statutes' legislative history in construing the words "mature and sufficiently well informed" because the legislative history did not discuss the particular meaning to be ascribed to those words.[6] Instead, a majority of the court concluded that those words had been derived from opinions of the United States Supreme Court. The Texas Legislature did not provide any definition of those terms, but it was clear to every member on my court that the Texas Legislature intended for a minor to show something other than an understanding of the medical procedure that she wished to undergo and the attendant medical risks. If that were all that the Legislature had intended, it could have referred to the informed consent provisions of article 4590i.[7] Those provisions direct a panel of health care providers to periodically decide what disclosures must be made for each medical procedure to obtain informed consent. The disclosures specified by the panel are presumptively adequate and are published in the Texas Register.[8] But the Texas Legislature did not refer to the informed consent statute. Instead, the Texas Legislature chose the concepts of "mature" and "sufficiently well informed," which the United States Supreme Court had considered in some detail over the course of various decisions that addressed a woman's and a minor's right to choose to have an abortion.

In construing the bypass provision, I looked at why the Legislature had chosen the specific words "mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents."[9] The words "mature" and "well enough informed" were the words chosen by the United States Supreme Court when it set forth the parameters within which States could regulate minors seeking an abortion.[10] By the time that the Texas Legislature chose the words "mature and sufficiently well informed," the United States Supreme Court had given considerable guidance on the extent to which a State could ensure that a minor was "mature" and "well

[4] *See* Tex. Fam. Code § 33.003(i).
[5] Tex. Fam. Code § 33.003(i). Sections 33.002, 33.003, and 33.004 of the Texas Family Code are included in Appendix 1 for ease of reference.
[6] In one decision, the opinion of the court and two of the three dissents discussed the statutes' legislative history, but not in connection with the specific meaning of the words "mature and sufficiently well informed." *In re Doe*, 19 S.W.3d 346 (Tex. 2000).
[7] Tex. Rev. Civ. Stat. Ann. Art. 4590i.
[8] *See* Tex. Rev. Civ. Stat. Ann. Art. 4590i, §§ 6.01-6.07.
[9] Tex. Fam. Code § 33.003(i).
[10] *See Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *see also Akron II*, 497 U.S. at 511 (approving of bypass provision that allowed a minor to show that she was "sufficiently mature and well enough informed to decide intelligently whether to have an abortion); *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (recounting the requirements in *Bellotti II* for a bypass provision).

enough informed" to consent to an abortion without the knowledge of either of her parents. The history of how the United States Supreme Court had approached attempts by various states to regulate the performance of an abortion on a minor was well known to the Legislature when it enacted the Texas Parental Notification statutes.

More than 25 years ago, in *Danforth*, the United States Supreme Court held a parental consent statute unconstitutional because it applied to all unmarried minors, under the age of 18, unless an abortion was necessary to preserve the life of the mother.[11] But the Supreme Court said in *Danforth* that, "[w]e emphasize that our holding that [the statute] is invalid does not suggest that every minor, regardless of age or *maturity*, may give effective consent for termination of her pregnancy."[12]

Subsequently, in a decision widely known as *Bellotti II*,[13] a plurality of the United States Supreme Court provided more insight into what it meant by a "mature" minor when it described an *immature* minor and explained why a State may require parental consultation for *immature* minors. The plurality observed, "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences."[14] More specifically, the plurality opinion in *Bellotti II* said that "as a general proposition," a State may conclude that parental consultation is "particularly desirable" when a minor is considering an abortion, a decision "that for some people raises profound moral and *religious* concerns."[15]

A majority of the United States Supreme Court subsequently quoted the foregoing statements from *Bellotti II* with approval in *H. L. v. Matheson*:

> Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an *immature*, dependent minor. Four Justices in Bellotti II joined in stating:
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> > "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly burdens the right to seek an abortion]. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often

[11] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).
[12] *Danforth*, 428 U.S. at 75 (emphasis added).
[13] *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*).
[14] *Bellotti II*, 443 U.S. at 640.
[15] *Bellotti II*, 443 U.S. at 640.

> is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision–one that for some people raises profound moral and *religious* concerns. . . ."[16]

To me, a logical reading of these statements by the United States Supreme Court meant that a "lack of ability to make fully informed choices that take account of both immediate and long-range consequences" would be indicated if a minor had no appreciation "that for some people [the abortion decision] has profound moral and religious concerns."[17] I was very clear in my concurring opinion in *Doe* that a State could not require a minor to hold any philosophical or religious beliefs.[18] Nor did I say that a minor would have to explain, much less defend, any philosophic or religious beliefs that she may have. I said only that in the context of determining whether a minor is "mature and sufficiently well informed to make the decision to have an abortion without notification of either of her parents,"[19] she should indicate an *awareness* of, and that she has considered, "that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion."[20]

The Texas Legislature's choice of the words "mature and sufficiently well informed to make the decision to have an abortion performed without notification of either of her parents" substantially tracked the language used by a plurality of the United States Supreme Court in *Bellotti II* to describe a constitutionally sufficient bypass provision. With regard to the maturity and well-informed prong of a bypass proceeding, the plurality said that such a proceeding should allow a minor to show that she is "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes."[21]

When the Texas Legislature chose the words "mature" and "sufficiently well informed," a plurality of the United States Supreme Court had also articulated in *Casey* why it is constitutionally permissible, particularly for minors, for a State to impose a 24-hour waiting period in order to insure informed consent to an abortion. A plurality said in *Casey*:

> Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or *religious principles* of

[16] 450 U.S. 398, 409 (1981) (emphasis added).
[17] *Matheson*, 450 U.S. at 398 (quoting *Bellotti II*, 443 U.S. at 640).
[18] *Doe*, 19 S.W.2d at 264 (Owen, J., concurring).
[19] Tex. Fam. Code § 33.003(i).
[20] *Doe*, 19 S.W.2d at 264 (Owen, J., concurring).
[21] *Bellotti II*, 443 U.S. at 643.

> their family. *See Hodgson, supra*, 497 U.S. at 448 (opinion of Stevens, J.).[22]

The plurality in *Casey* cited Justice Stevens' opinion in Part VI of *Hodgson*, in which Justice O'Connor had joined. In *Hodgson*, the Supreme Court upheld a parental notification statute that, like the Texas statute at issue in *Doe*,[23] required a minor to wait 48 hours after notifying one of her parents before proceeding with an abortion. Justice Stevens' opinion had said:

> We think it clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. . . . The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the *religious* or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future.[24]

Here again, members of the United States Supreme Court were indicating that for a minor, reaching an informed decision may include consideration not only of the competency of the physician who is to perform the abortion, but also of her moral or religious beliefs, if any. The plurality in *Casey* also said that a state "may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."[25] To me these passages indicated that when a minor seeks an abortion without the knowledge of either of her parents, a State may ensure that she has considered not only medical information, but her values and morals and religious beliefs, if any, and the impact her decision may have on her future as part of demonstrating that she is in fact mature and sufficiently well informed.

In light of this history and the guidance the United States Supreme Court had given on what "mature" and "well enough informed to make her abortion decision" meant,[26] I saw no basis for choosing some elements of what the United States Supreme Court had said are part of what States may consider in deciding "maturity" and "well enough informed," but not others, in determining what the Texas Legislature intended. Nothing in the words of the Texas Parental Notification statutes or their legislative history so much as hinted at a basis for picking and choosing among elements that the United State Supreme Court has said that States could consider in determining if a minor was "mature" and "well

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[22] *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 899-900 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added).
[23] 19 S.W.2d 249 (Tex. 2000).
[24] *Hodgson*, 497 U.S. at 448 (Stevens, J.).
[25] *Casey*, 505 U.S. at 872 (O'Connor, Stevens, and Souter, JJ.).
[26] *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

informed." I believed when I wrote my concurring opinion in *Doe* that I would be substituting my judgment for that of the Legislature's if I did not give full effect to what the United States Supreme Court has indicated are indicia of a mature and well-informed minor. It seemed to me that either the Texas Legislature had looked to what the United States Supreme Court had said about "maturity" and "well-informed" and chose virtually the same words the United States Supreme Court had used, or the Texas Legislature had its own, totally independent concept of what those terms meant, but had not given any guidance in the statutes as to what those concepts were. I found the latter possibility to be highly implausible. Therefore, I felt compelled to define the words "mature" and "sufficiently well informed" in light of *everything* that the United States Supreme Court had said in this regard, not just *some* of what it had said.

Question 2:

Again, in In re Jane Doe I, you state that you would "require a minor to demonstrate that she sought and obtained meaningful counseling from a qualified source about the emotional and psychological impact she may experience now and later in her life as a result of having an abortion. She should be able to demonstrate to a court that she understands that some women have experienced severe remorse and regret."

What would Jane Doe I have to demonstrate to satisfy you that she understood the "emotional and psychological impact" of concerning [sic] abortion to be "sufficiently well informed" under the Texas statute? Is there anything in the statutory language or the legislative history that requires a woman to demonstrate the understanding that some women have experienced severe remorse and regret? If not, where do you find support for your holding? How do you explain your requirement of this heightened standard?

Response:

The concept that a minor should receive counseling from a qualified source about the emotional and psychological impact she may experience from having an abortion came from United States Supreme Court decisions that considered what constitutes a fully informed decision. In a decision frequently referred to as *Akron I*, the United States Supreme Court struck down certain requirements that a city had imposed on women before they underwent an abortion.[27] The Supreme Court later reversed some of these aspects of *Akron I* in *Casey*.[28] But even under the more restrictive view of a State's authority taken in *Akron I*, the United States Supreme Court recognized that there are psychological and emotional considerations, not just physical ones, surrounding the decision to have an abortion and that a State may seek to ensure that the decision has been made in light of all those circumstances:

> The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman. The

[27] *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).
[28] *Casey*, 505 U.S. at 870-871, 882-883.

> decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment," *Bellotti II*, 443 U.S., at 649 (plurality opinion), and thus the State legitimately may seek to ensure that is has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." *Colautti v. Franklin*, 439 U.S., at 394.[29]

In *Akron I*, the Supreme Court specifically held that "a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion."[30] The Supreme Court also discussed the role of counseling, saying that the "*critical factor*" in ensuring informed consent was whether the pregnant woman "obtains the necessary information and *counseling from a qualified person*,"[31] which did not necessarily mean the physician:

> We are not convinced, however, that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.[32]

In a footnote to the foregoing quote, the Supreme Court expanded upon what would be adequate counseling, concluding that for most people, particularly for minors making the decision without parental input, providing printed information is not "counseling":

> We do not suggest that appropriate counseling consists simply of a recital of pertinent medical facts. On the contrary, it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably. It is not disputed that individual counseling should be available for those persons who desire or need it. Such an opportunity may be especially important for minors alienated or separated from their parents. . . . . Thus, for most patients, mere provision of a printed statement of relevant information is not counseling.[33]

The United States Supreme Court further held in *Akron I* that a "State is [not] powerless to vindicate its interest in making certain the 'important' and 'stressful' decision to abort '[i]s made with full knowledge of its nature and consequences,'" and that a "State may

[29] *Akron I*, 462 U.S. at 443 (citations in original).
[30] *Akron I*, 462 U.S. at 445.
[31] *Akron I*, 462 U.S. at 448 (emphasis added).
[32] *Akron I*, 462 U.S. at 448.
[33] *Akron I*, 462 U.S. at 448 n.38 (citations omitted).

establish reasonable minimum qualifications for those people who perform the primary counseling function."[34]

I concluded in *Doe* that when the Legislature said that a minor is entitled to a judicial bypass upon showing by a preponderance of the evidence that she is mature and sufficiently well informed,[35] the Legislature had the foregoing explications from the United States Supreme Court in mind. Based on these United States Supreme Court opinions, it seemed highly unlikely to me that the Legislature thought that a minor could be sufficiently well informed about the physical, medical, emotional, and psychological aspects of an abortion, which the United States Supreme Court has repeatedly said are extant in the decision, from reading materials or consulting with untrained lay persons.

I did not say in *Doe* that any particular articulation by a minor was necessary to demonstrate that she had obtained meaningful counseling from a qualified source about the emotional and psychological impact she may experience at the time that she had an abortion or later in life. Each minor would no doubt have a unique articulation. I said only that the basic touchstones should be met to ensure that a minor is sufficiently well informed. I did say, however, in line with what the United States Supreme Court had said in *Akron I* and *Akron II*,[36] that a minor "should not be required to obtain counseling or other services from a particular provider."[37] And I said in *Doe*, following precisely what had been said in *Matheson* and *Danforth*,[38] that it was unlikely that a minor would obtain adequate counseling from the attending physician at an abortion clinic.[39] I also said that it was unlikely that a minor would obtain all necessary information from a religious or advocacy group.[40]

With regard to my statement in *Doe* that a minor "should be able to demonstrate to a court that she understands that some women have experienced severe remorse and regret,"[41] I was attempting to paraphrase statements from members of the United States Supreme Court regarding the need for a pregnant woman, in giving informed consent, to understand the potential emotional and psychological consequences to some. I had already quoted those statements from United States Supreme Court opinions in my concurring opinion.[42] The United States Supreme Court had said in *Akron II*, quoting *Matheson*, that: "'The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.'"[43] And the plurality opinion in *Casey* had discussed "devastating

[34] *Akron I*, 462 U.S. at 448-49 (citations omitted).
[35] Tex. Fam. Code § 33.003(i).
[36] *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 518 (1990).
[37] *Doe*, 19 S.W.2d at 265 (Owen, J., concurring).
[38] *Matheson*, 450 U.S. at 410; *Danforth*, 428 U.S. at 91.
[39] *Doe*, 19 S.W.2d at 265 (Owen, J., concurring).
[40] *Doe*, 19 S.W.2d at 265 (Owen, J., concurring).
[41] *Doe*, 19 S.W.2d at 264 (Owen, J., concurring).
[42] *See Doe*, 19 S.W.2d at 264, 265 (Owen, J., concurring).
[43] *Akron II*, 497 U.S. at 519 (quoting *Matheson*, 450 U.S. at 398).

psychological consequences" when a decision to have an abortion was not fully informed.

Again, I believed that the Legislature intended for Texas courts to draw fully on what the United States Supreme Court had said that States may take into account in ensuring a well informed decision when it chose the words "mature and sufficiently well informed" in the parental notification statutes.

Question 3:

Since Griswold, the origins of the right to privacy have been the subject of much debate. Many scholars and members of the judiciary have found Justice Douglas' argument in Griswold that the right arises out of the penumbra of the Bill of Rights to be unconvincing. Some have chosen to follow the assertion in Justice Goldberg's concurrence that the privacy right, like other unenumerated rights, arises from the Ninth Amendment's declaration that whether a right is enumerated in the Constitution should not be construed to deny or disparage other rights retained by the people. Still others have argued that the Constitution embodies no right to privacy beyond the specific protections of the Fourth and Fifth Amendments.

At your hearing, you testified that you could not answer the question of what you would have done had you been sitting on the Supreme Court in 1965 when the Griswold opinion was issued. I ask again that you answer my question, a question that first year law students regularly answer when taking Constitutional Law exams.

I ask that you to answer the same question regarding the following cases: Brown v. Board of Education, Korematsu v. United States, Miranda v. Arizona, and Roe v. Wade.

In pursuing this line of questioning, I am mindful of the importance of not asking you to pre-commit yourself on any issue that might come before you as a federal judge. There is no concern for precommitment with these questions since I am asking you only about already-settled questions of law on already-reviewed particular sets of facts.

As you consider your answers to these questions, I want you to know that I do not have a litmus test with regard to these answers. I have voted for several pro-life, anti-choice judicial nominees in the past year and expect I will vote for many more in the coming years. I fully appreciate that one may personally disagree with the holding in a case or the reasoning employed to reach that holding, while remaining committed to the principles of stare decisis, precedent, and the rule of law. What I am interested in is how you approach the Constitution.

Response:

I approach the United States Constitution with the utmost respect for its importance to our nation and its citizens and to our freedoms and the stability of our government. I

understand that the Constitution must be faithfully construed and applied, and I am committed to doing so. I have taken a solemn oath to uphold the United States Constitution, and I have carried out that oath to the best of my ability.

In construing and applying the United States Constitution, judges do not write on a clean slate. It would be the rare case indeed in which the United States Supreme Court has not provided at least some guidance through its decisions interpreting and applying the Constitution. As a lower court judge, I am bound to follow all decisions of the United States Supreme Court interpreting the Constitution unless and until they are modified or overruled by the United States Supreme Court. Even if the United States Supreme Court has questioned, but not expressly overruled or modified, one of its own decisions, I, as a lower court judge, am bound by that decision unless and until the United States Supreme Court says otherwise.[44]

When presented with a Constitutional question, I endeavor to read every case the United States Supreme Court has decided that pertains to the particular matter before me. My task is not to determine whether I agree with all the United States Supreme Court has had to say on the subject, but instead to discern what the Court has said and to faithfully apply the Court's reasoning and holdings to the matter before me.

With respect to the cases enumerated in your question, the United States Supreme Court had the benefit of the briefing, the oral arguments, and the discussions and debates that took place among the Members of the Court at the time, none of which is available to me. Justice Marshall stated that "by deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances." *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J. dissenting). As such, I honestly cannot tell you how I would have ruled had I been privy to all of the information the Court had before it. I do intend to follow all United States Supreme Court precedent, as I have done on the Supreme Court of Texas, unless and until it has been overruled by the United States Supreme Court itself. I leave it, as I must, to the United States Supreme Court to pass judgment on its own decisions. My duty is to follow the Constitution as interpreted by the United States Supreme Court.

[44] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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E. Thomas Bishop
Bishop & Hummert, P.C.
5910 North Central Expwy, Suite 1600
Dallas, Texas 75206
214/987-8181
214/987-8180 FAX
E-Mail: tbishop@bishophummert.com

June 19, 2001

Senator Patrick Leahy
SENATE JUDICIARY COMMITTEE
224 Dirksen Building
Washington, D.C. 20510

RE: Nomination of Justice Patricia Owen for the United States Fifth Circuit Court of Appeals

Dear Senator Leahy:

I have had the privilege of knowing Justice Patricia Owen of the Texas Supreme Court, both personally and professionally, for many years. I cannot imagine a more qualified, ethical, and knowledgeable person to sit on the United States Fifth Circuit Court of Appeals.

I accept the reality that politics is a part of our culture, but I know that when it comes to appointing federal judges, we must transcend politics and look to character and ability. Patricia Owen has the character and ability to make all of us, Democrat and Republican, proud.

I ask that your Committee act swiftly to confirm her nomination to the United States Fifth Circuit Court of Appeals.

Thank you.

Sincerely,

E. Thomas Bishop

ETB:jet/5374

Republican National Hispanic Assembly
Texas Chapter
15102 Spring Bluff San Antonio Texas 78247
210/ 653-2442 Fax 210/ 653-3556 E-mail: rvcasanova@Aol. com

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Legislative Director
Bexar County

July 15, 2002

The Honorable Patrick J. Leahy, Chairman
Committee on Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

We have passed the one-year anniversary of Texas Supreme Court Justice Priscilla Owen's nomination by President Bush to serve on the 5th Circuit Federal Court of Appeals. The President nominated Owen on May 9, 2001, yet she has not received a hearing from the Senate Judiciary Committee. This situation has gone from regrettable to completely irresponsible.

The American Bar Association has unanimously rated Justice Owen "well qualified," its highest possible rating. Justice Owen interprets the law as it is written and intended by the legislature. Justice Owen received the endorsement of virtually every major Texas newspaper when she ran for re-election in 2000 in recognition of her superb qualifications, temperament and impressive record as a principled and restrained jurist who follows the law.

She deserves a prompt and fair hearing. Further delay is not acceptable.

Sincerely,

Roy V. Casanova, Jr.

Roy V. Casanova, Jr.
Legislative Director
RNHA USA

RVC: bjc

Judicial Appointments
NOMINATION MEMO

Priscilla Owen

Nominated: May 9, 2001
Position: U.S. Court of Appeals for the Fifth Circuit (Texas, Louisiana, Mississippi)
- Court Stats: 17 full-time positions, 4 vacancies, 3 nominees (1 confirmed, 1 defeated in Judiciary Committee)
- Urgency: This vacancy is a ***judicial emergency***, open since January 23, 1997

Current Job: Justice, Texas Supreme Court (elected 1994, re-elected w/out opposition 2000)
Background: Private practice in Houston (1978-94)
ABA Rating: ***Unanimously well-qualified***
Support: Texas Senators Phil Gramm (R) and Kay Bailey Hutchison (R) support Owen

The Judicial Job Description

An effective hiring process starts with an accurate job description. Similarly, the judicial selection process must start with the right judicial job description. Because the contending sides use different job descriptions, the debate is often divisive, confusing, and even misleading. When he nominated Justice Priscilla Owen on May 9, 2001, President Bush provided the right job description:

> ***"Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench."***[1]

A judge's job is important, but limited. She must decide legal disputes by applying the law that the people give her; she does not have the power to make the law she applies in order to achieve certain results. The power to make law, to run the country and define the culture, belongs to the people, not to judges.

Supporting this system is easy as long as it produces what we like. The challenge comes when the people make law we do not like. Should we praise judges who abuse their power by making law, so long as we like the law they make? Should we condemn judges who follow the law but produce unfavorable results?

The political ends do not justify the judicial means. No matter what the results, judges must stick to interpreting, but not making, law. The people can change the law if the results are unacceptable, but they must retain the power to govern themselves, run the country, and define the culture.

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The Judicial Selection Process

The Constitution establishes the hiring process for federal judges, giving to the president the power to nominate and, with the Senate's consent, appoint them.[2] The proper job description must guide that process, from interviewing the right candidates, asking the right questions, and considering the right information to applying the right criteria and finally making the right decision.

President Bush is using the right job description in choosing his nominees. Their judicial philosophy is called ***judicial restraint*** because they are restrained by the law. In a basketball game, the referee must fairly apply the rules. He cannot change the rules mid-game so that his preferred team wins. Similarly, judges must fairly apply the law. They cannot change the law to produce their preferred result.

Unfortunately, it appears that a different view may be operating in the confirmation phase of the process. Many Senators, and certainly most left-wing interest groups, seem to care more about politically correct ends than judicially correct means. To them, winners and losers are more important than how the game is played. Decisions are good or bad based on whether the results favor certain political interests, not on whether judges follow the law. This view is dangerous because ***judicial activism***, or judges making law, takes the power to run the country and define the culture away from the people.

Senate Democrats, led by Sen. Charles Schumer of New York, insist that confirmation of President Bush's nominees should depend on their "ideology," that is, on the results they will deliver in their judicial decisions. Thus Senators actively employ ideological litmus tests, demanding to know how nominees would rule on certain issues in future cases. Since activist judges essentially translate their personal views into judicial decisions, advocates of judicial activism must determine a nominee's personal views to predict what she will do as a judge. This very dangerous approach undermines judicial independence and ultimately destroys the power of the people to govern themselves.

An effective hiring process starts with an accurate job description. This brief overview provides the frame of reference for understanding the current, increasingly divisive, debate over judicial appointments. The desire for a politicized, activist judiciary willing to deliver the liberal agenda drives the overall obstruction of President Bush's judicial nominees, as well as the particularly aggressive assault on individual nominees such as Justice Priscilla Owen.

Justice Priscilla Owen

When Justice Owen ran for re-election to the Texas Supreme Court in 2000, ***every major Texas newspaper endorsed her*** and 84% of Texans voted for her. She was only the second woman elected to the court and its first member elected to a full term without major party opposition.[3]

- The *Houston Chronicle* praised her "proper balance of judicial experience, solid legal scholarship and real-world know-how."[4]
- And the *Dallas Morning News* said she "has brought impressive legal scope to the bench and has provided thoughtful opinions."[5]

Texas Supreme Court Chief Justice Top Phillips has said that Justice Owen "is what [President] Bush said: she tries to follow the legislative will in every case and apply the law, not invent it."[6] Similarly, the analysts at the Free Congress Foundation's Judicial Selection Monitoring Project reviewed Justice Owen's

record and concluded that she is "a judge who interprets the law, rather than one who makes the law."[7] Former White House Counsel C. Boyden Gray found after his analysis that "Justice Owen has stressed that the function of a court in interpreting legal text is to give effect to the intent of the lawgiver."[8] Justice Owen fits the appropriate job description[9] and is the kind of judge America needs.

Justice Owen's Opposition

Justice Owen's opponents are the same political forces that have attacked previous Bush nominees to judicial and executive branch positions. Their tactics are familiar and their purpose is clear: to keep off the bench judges they perceive as unlikely to deliver results favorable to their political interests and to dissuade President Bush from nominating such a judge to the Supreme Court in the future.

Curiously, they now use the language of "judicial activism" and "judicial restraint." When President Clinton was appointing judges, these same forces claimed that "judicial activism" either did not exist or the label meant nothing more than an undesirable judicial decision. The *New York Times* dismissed the label "judicial activism" as nothing but a "hazy slur."[10] Left-wing law professor David Kairys wrote that judicial activism "is in the eye of the beholder."[11] When public debate about judicial activism included congressional hearings in 1997, left-wing groups echoed U.S. Circuit Judge Jon Newman's assertion that critics of judicial activism attach the label to "any decision [they do] not like."[12]

Now, perhaps admitting that judicial activism is indefensible, the far-left is trying to highjack the label, change its meaning, and use it to their advantage. They behave very much like the activist judges they favor, judges who change the meaning of statutes and the Constitution for their own ends.

Abortion is driving the opposition to many of President Bush's judicial nominees. Three-quarters of Americans would ban most or all abortions and large majorities would require such things as informed consent, spousal notification, parental consent, and waiting periods, and would ban partial-birth abortion.[13] The American people have never chosen abortion-on-demand for themselves, and judges who respect the people's decisions about such issues are not likely to force it upon them. Instead, the current national policy of abortion-on-demand was established, and can only be maintained or extended, through activist judges.

Abortion extremists care only whether a particular judge or judicial nominee will, in the end, contribute to the incidence of abortion and the expansion of abortion "rights." As such, they look only at the results of Justice Owen's votes or written opinions in abortion-related cases, do the math, and decide whether those results contribute to their abortion agenda. They acknowledge no balance of any other rights or interests, ignore the facts and issues in these cases, and never ask whether judges rather than the people should decide such matters at all. Abortion is all that matters.

One abortion extremist has said that Justice Owen "exemplifies the most extreme hostility to reproductive rights of any of the nominees that President Bush has named."[14] This claim is baffling since the Texas Supreme Court has not considered a case raising the issue of reproductive "rights" during Justice Owen's tenure. As such, abortion extremists have distorted Justice Owen's record to create an image they hope will be more politically potent.

Top 11 Distortions of Justice Owen's Record

A Texas statute requires minor girls to notify at least one parent before getting an abortion.[15] It does not require parental consent or even notification of both parents. **This statute requires the least parental involvement possible and does not itself prohibit a single abortion.** It then dilutes this minimal parental involvement by creating three exceptions. Young girls can bypass their parents altogether if a judge concludes they are "mature and sufficiently well informed" to make the decision on their own; that "notification would not be in [their] best interest"; or that "notification may lead to…abuse."[16]

The legislature did not define these terms or set standards for applying them. Instead, the Texas Supreme Court had to determine what girls must prove to fit within these exceptions and bypass their parents. The court decided 12 cases, eleven in 2000 and one in 2002. The girl in each case seeking to bypass her parents is identified only as Jane Doe and the cases are sequentially identified as *In re Jane Doe 1*, *In re Jane Doe 2*, and so on. Two of the cases, *Jane Doe 1* and *Jane Doe 4*, returned to the Texas Supreme Court and the second ruling in each case is identified with *(II)*.[17]

Though other abortion extremists parrot similar claims, the National Abortion Federation (NAF) has led the assault on Justice Owen's record in this area. This memo examines and answers their distortions.

Distortion #1

"in thirteen out of fourteen …abortion cases…she has voted against abortion rights"[18]

The issue of "abortion rights" was not raised in a single case before Justice Owen. Neither these parental notification cases, nor the statute they interpreted and applied, addressed any "right" to abortion at all. In fact, it might be said that the statute, at least tacitly, assumed a "right" to abortion and dealt only with the circumstances under which minor girls could exercise that "right."

The legislation's Senate sponsor, however, supports abortion "rights." In a July 15, 2002, letter to U.S. Senate Judiciary Committee Chairman Patrick Leahy, Texas state Sen. Florence Shapiro wrote that the law "***is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified***. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion."[19]

It also may come as a shock to NAF that the U.S. Supreme Court, which invented the so-called "right" to abortion in the first place, held quite clearly that this "right" is neither absolute nor unlimited. In *Roe v. Wade*[20] itself, the Supreme Court responded to the argument that

> "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. ***With this we do not agree.*** Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are ***unpersuasive.***"[21]

So it is with these cases that involve minors, not adults; a requirement of notification, not consent; and notice to just one parent, not two. To insist that requiring a child merely to tell one parent before having an abortion is an assault on "abortion rights" is hyperbole in the extreme. It may make for effective fund-raising letters or help motivate some political activists, but it bears no relationship to the truth.

Justice Owen shows more balance than her opponents in suggesting that the U.S. Supreme Court might not approve certain abortion restrictions they have not yet reviewed. The Court has, for example, required a bypass provision in parental consent,[22] but not parental notification, statutes. Nonetheless, Justice Owen acknowledged that those parental consent decisions "suggest that the United States Supreme Court might hold that bypass procedures are necessary in notification statutes."[23] In addition, though the U.S. Supreme Court has upheld a single-parent notification requirement, Justice Owen acknowledged that "[t]he constitutionality of requiring a minor to notify *both* parents is questionable."[24] The NAF gives her no credit.

Abortion extremists can perhaps be expected to misrepresent Justice Owen's votes and decisions in these cases, but some of the news media also fail to be balanced or accurate. Anthony Lewis reported in the *New York Times*, for example, that "Justice Owen is an opponent of abortion rights for minors without their parents' permission."[25] This statement is patently false in at least three ways. First, the cases to which it refers involved a parental **notification**, not a parental **permission**, statute. Second, as explained above, the issue of "abortion rights" was never before the court. Third, Justice Owen has never indicated her own view of abortion rights, in a court decision or anywhere else.

Distortion #2

Justice Owen "voted against abortion rights" in 11 of 12 parental notification cases[26]

Perhaps NAF believes no one will actually check the record, but this accusation is completely false. For those who tabulate results, the picture looks like this:

- The Texas Supreme Court required notification six times[27] and facilitated bypass six times.[28]
- Justice Owen was in the majority in nine cases[29] and dissented in three cases.[30]
- Justice Owen voted to require notification in nine cases[31] and to facilitate bypass in three cases.[32]
- **Justice Owen dissented from the majority to vote for notification in just three cases.[33]**

It is important to understand how these cases proceed through the Texas judicial system. Texas law does not allow appeal from a decision granting a bypass. Therefore, in every case reaching the Texas Supreme Court, two other courts have already denied a bypass and required notification.[34] Under these procedural conditions, and considering its standard of review,[35] the Texas Supreme Court can be expected to require notification in a substantial percentage of cases.

The NAF makes a particularly offensive suggestion that Justice Owen voted against notification in the most recent case because she had been nominated to the U.S. Court of Appeals.[36] While, as already noted, NAF is simply wrong that this was the only case in which Justice Owen voted to facilitate bypass, her vote in that case proves exactly the opposite of NAF's perverse innuendo. The court's decision in *Jane Doe 10* was based on some language in an earlier decision from which Justice Owen had dissented.[37] In *Jane Doe 10*, however, she acknowledged that the prior precedent applied and, though she had disagreed with it, was willing to be bound by it. This is the mark of a restrained, not an activist, judge.

Abortion extremists insist that, regardless of the law, a judge who does not permit (or takes a position even potentially discouraging) an abortion in a particular case is "hostile to abortion rights." Such a ridiculous statement is made even worse when the issue of "abortion rights" is not before the judge in the first place. This sort of rhetoric distorts the role of judges, misrepresents the facts and issues of individual cases, and misleads the public about judicial selection.

Distortion #3

"Owen Misrepresents Legislative Intent Of Bypass Provision"[38]

Abortion extremists such as the NAF refer to this legislation as a "bypass statute"[39] and actually claim it was intended to "assist" minor girls "in their attempt to obtain abortions."[40] That spin is not only factually false, it is totally absurd. Prior to this legislation, minor girls could get an abortion without telling their parents; its enactment alone clearly shows the legislature wanted to discourage rather than assist young girls getting abortions without parental knowledge.

- The legislation's House sponsor, Rep. Dianne White Delisi, stated that girls would be able to bypass their parents only in "rare cases."
- Rep. Phil King said that notification should happen in the "vast, vast, vast majority of cases."
- The legislation's Senate sponsor, pro-choice Sen. Florence Shapiro, wrote that, under the statute, parental notification would be the rule "except in very limited circumstances."

Distortion #4

"Owen Chastised By Colleagues For 'Unconscionable Judicial Activism'"[41]

In *Jane Doe 1*,[42] the court concluded that the girl had not shown she was mature and sufficiently well informed to make the abortion decision without her parents' knowledge. After establishing new standards for applying this notification exception, the court sent the case back for re-consideration. The trial and lower appellate court again denied the girl's application for a bypass and the case returned to the Texas Supreme Court.[43] This time, the court granted the bypass application. Justices Hecht,[44] Owen,[45] and Abbott[46] wrote individual dissenting opinions.

Justice Alberto Gonzalez, now Counsel to President Bush, wrote a concurring opinion responding to Justice Hecht's dissent in a previous notification case.[47] There, Justice Hecht wrote that the court had granted bypasses based on "the majority's deep-seated ideology."[48] It was the "force of that ideology" and the court's "ideological motivations"[49] he argued, that drove the majority's decision.

Justice Gonzalez was part of the majority that Justice Hecht had criticized. In his *Jane Doe 1(II)* concurrence, after citing Justice Hecht's criticism, Justice Gonzalez wrote: "The dissenting opinions suggest that the exceptions to the general rule of notification should be very rare and require a high standard of proof....Thus, to construe the [statute] so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism."[50] He concluded his concurrence by responding to Justice Hecht's additional criticism in the present case: "Justice Hecht charges that our decision demonstrates the Court's determination to construe the [statute] as the Court believes [it] should be construed and not as the Legislature intended....I respectfully disagree."[51]

Abortion extremists must have jumped for joy when they read those words, quickly claiming Justice Gonzalez had accused Justice Owen of "unconscionable judicial activism."[52] They must have assumed no one would actually read the relevant opinions in these cases. The only colleague Justice Gonzalez named – not once, but twice – was Justice Hecht. He did not name Justice Owen at all. In addition, Justice Gonzalez

attached that label to his characterization of a position, not to one necessarily taken by any of the dissenters. In fact, it can reasonably be argued that none of the dissenters' positions was "to eliminate bypasses."

Some abortion extremists make multiple errors in their rush to attribute this criticism directly to Justice Owen. People for the American Way, for example, claims that Justice Gonzalez "criticized a dissent joined by Owen in one case as 'an unconscionable act of judicial activism.'"[53] Not only did Justice Gonzalez not criticize Justice Owen's dissent at all, Justice Owen did not join the one he did criticize.

Distortion #5

"Owen Misrepresents U.S. Supreme Court Decision"[54]

In *Jane Doe 2*,[55] the Texas Supreme Court set standards for applying the statute's second exception, that girls can bypass their parents if notification "would not be in the best interest of the minor."[56] In this case, Justice Owen agreed with the majority to send the case back for re-consideration and wrote a concurring opinion to explain further what factors the trial court should consider.

The statutory language here was drawn from the U.S. Supreme Court's decision in *Lambert v. Wicklund*,[57] which evaluated an identical Montana parental notification statute. This "best interest" standard is a two-sided coin. Judges must determine whether notification would not be in the minor's best interest but also whether an abortion without notification would be in her best interest.

In *Lambert*, the Court said that "a judicial bypass procedure requiring a minor to show that ***parental notification is not*** in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that ***abortion without notification is*** in her best interest."[58] The Court said plainly that nothing in this "best interest" standard "permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest."[59]

Justice John Paul Stevens' concurrence in *Lambert* is also instructive. He criticized the majority's holding that "a young women must demonstrate both that abortion is in her best interest and that notification is not."[60] That criticism is inexplicable if the Court in *Lambert* had held that a girl need only show that notification is not in her best interest and not that abortion without notification is in her best interest.

In *Jane Doe 2*, Justice Owen urged what the U.S. Supreme Court required in *Lambert*. In fact, the Texas Supreme Court itself later adopted this position. In *Jane Doe 4(II)*, the Court unanimously required notification after evaluating whether "notifying her parents could cause harm to their family structure"[61] (notification is not in her best interest) and whether "her physical needs and the potential dangers may weigh in favor of involving her parents"[62] (abortion without notification is not in her best interest).

Distortion #6

"Owen Redefines 'Maturity' As Not Seeking Judicial Bypass At All"[63]

The NAF claims that Justice Owen made pursuit of a bypass itself evidence that a minor is not mature enough to get one. In another mischaracterization of the statute and Justice Owen's position, the NAF claims that "Justice Owen declared the girl too immature to be allowed an abortion."[64] The statute, and the court's decisions interpreting and applying it, determines not whether a girl can get an abortion, but

whether she can get an abortion **without notifying her parents**. Requiring parental notification does not determine whether an abortion takes place.

The NAF claims Justice Owen presented the view that pursuit of a bypass is evidence of immaturity in *Jane Doe 1(II)*.[65] Again, the NAF must assume no one will actually read the opinions in these cases. This allegation is simply fabricated out of thin air. Justice Owen never, anywhere, even suggested that a girl's attempt to obtain a judicial bypass was evidence, let alone proof, of immaturity.

The trial court in *Jane Doe 1(II)* concluded the girl was not sufficiently well informed, but made no finding about her maturity. Under Texas law, an appellate court presumes that evidence supports both a trial court's express findings and its "omitted findings which are necessary to support the judgment."[66] Justice Owen not only did not make her own determination of the girl's immaturity, she explicitly **denied** that the Texas Supreme Court should independently re-weigh evidence the trial court had examined and make factual determinations on its own. "The question in this case," she wrote, "is not whether this Court would have ruled differently when confronted with all the evidence that the trial court heard. The question is whether legally sufficient evidence supports the trial court's judgment. The answer to this latter question is yes."[67]

Distortion #7

"Owen Equates The Seeking of a Bypass With 'Deceit'"[68]

Whether the NAF likes it or not, the right of parents to direct the upbringing of their children is not only profoundly important, but well-established in Texas law and U.S. Supreme Court precedent. Texas law allows parents to stop financially supporting their children once they turn 18 and graduate from high school.[69]

In *Jane Doe 4*,[70] the girl claimed her parents would stop supporting her if she told them she was pregnant because they had done so when her sister became pregnant. There was no evidence, however, whether the sister was 17 or 18, when her parents could terminate support. There was no evidence whether the parents had done so because of the pregnancy. There was no evidence that the girl was in the same situation, with the same family relationship, as her sister. Significantly, when this case came back to the Texas Supreme Court after re-evaluation, the court unanimously required notification.[71]

The NAF accuses Justice Owen of disregarding the impact of notification on family relationships. In doing so, they simply misquote her words. Compare NAF's quotation with what Justice Owen actually wrote:

NAF Report quotation of Justice Owen	Justice Owen dissent in *Jane Doe 4*
...neither the trial court nor this Court may properly consider whether Jane Doe 4's parents would withdraw their emotional or financial support after she turns eighteen and graduates from high school if they were notified of her intent to have an abortion while she is a minor...*I cannot countenance a rule of law that would permit a minor to deceive her parents in order to avoid their expression of disapproval*....[72]	**Because the Legislature has drawn a clear line as to when parental obligations of support end,** neither the trial court nor this Court may properly consider whether Jane Doe 4's parents would withdraw their emotional or financial support after she turns eighteen and graduates from high school if they were notified of her intent to have an abortion while she is a minor. **Jane Doe 4 has no legal entitlement to her parents' support once she reaches eighteen years of age and receives her high school diploma. Conversely, her parents**

	would be within their legal rights to express their disapproval of her conduct by withdrawing further support once she is considered an adult. I cannot countenance a rule of law that would permit a minor to deceive her parents in order to avoid their expression of disapproval **when those acts of disapproval are wholly within the parents' rights.**[73]

Quite contrary to the NAF's claim, Justice Owen was indicating her intent to follow a legal rule laid down by the Texas legislature, which chose to allow parents to terminate financial support for their adult children. The rule of law Justice Owen could not countenance was the majority's holding that interfered with parents' established legal rights. This false and deceptive claim by NAF amounts to a deliberate attempt to deceive the Senate and the American people about Justice Owen's record. Their inserted ellipses completely changed Justice Owen's position.

Had the NAF done this in a brief in federal court, they might have been subjected to sanctions under the Federal Rules of Civil Procedure. One court, for example, chastised an attorney for "the manipulative use of ellipses and omissions" and said that misrepresentation of a court's opinion "clearly provides the basis for sanctions under Fed.R.Civ.P. 11."[74] Another court said that "[e]llipses in quotes from opposing parties' briefs that completely distort the original are inappropriate" and told the attorney to stop "attempting to gain an advantage in argument by mischaracterizing the positions of opposing parties."[75]

Distortion #8

"Owen Unsympathetic To Health Risks Of Young Women"[76]

By now it should come as no surprise that Justice Owen stated exactly the ***opposite*** of what the NAF charges. Rather than saying that "even health risks should not be taken into account"[77] in parental notification cases, Justice Owen has explicitly said that courts must do so. In *Jane Doe 1*,[78] for example, Justice Owen agreed that "[t]he Court properly requires a minor to consult a health-care provider about the general risks of an abortion."[79] She repeatedly stated that the "medical, emotional, and psychological consequences of an abortion" should be considered.[80]

The NAF accuses Justice Owen of "a lack of compassion."[81] Significantly, the American Bar Association, which has itself been accused of liberal bias, unanimously gave Justice Owen its highest "well qualified" rating. This is significant for three reasons.

First, the ABA's comprehensive investigation examines a nominee's answers to the U.S. Senate Judiciary Committee's questionnaire as well as the nominee's legal writing. Its investigator interviews both the nominee and many people who have information about her qualifications.[82] Second, the ABA has consistently and publicly favored abortion rights for 30 years.[83] In fact, in 1990 the ABA adopted a resolution, by a nearly three-to-one margin, opposing any requirement of parental notification before minor girls can obtain abortions.[84] Third, the ABA's published evaluation criteria include "the nominee's compassion…open-mindedness…freedom from bias and commitment to equal justice under the law."[85]

If the ABA, despite its support of abortion rights, finds Justice Owen well qualified after a thorough investigation of her entire record, the NAF, because of its support of abortion rights, must base its opposition on a cursory review of part of her record.

Distortion #9

"Owen Unsympathetic To Physical And Mental Abuse Of Teenaged Girls"[86]

The NAF's claim that Justice Owen lacks sympathy for abused children has absolutely no evidence to support it. Under the statute's third exception, a girl may bypass her parents if she proves that notification may lead to abuse. The NAF cites *Jane Doe 2*[87] for Justice Owen's lack of sympathy, yet the court in this case considered the statute's "best interest" exception, not the "abuse" exception. And in *Jane Doe 2*, Justice Owen voted to send the case back to the trial court so the girl could have another chance at bypassing her parents.

The NAF similarly misrepresents Justice Owen's position in *Jane Doe 3*.[88] The girl in this case testified that her father had never abused her, that she no idea how her father would react upon learning of her pregnancy, and that he would probably be more upset learning she had an abortion without his knowledge.[89]

When defining "abuse," Justice Owen followed a traditional approach to statutory construction by looking to other provisions of the Texas Family Code using the same word.[90] Section 261 defines abuse as "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning."[91] Justice Owen applied this definition and concluded there was no evidence to meet it. The NAF offers not a shred of evidence to the contrary.

Distortion #10

"Owen's Attempted Imposition of Religious Counseling Requirement"[92]

This claim again exposes the NAF's extremism and dishonesty. In *Jane Doe 1*,[93] Justice Owen concluded that the statute requires girls seeking to bypass their parents to be exposed to the "profound philosophic arguments surrounding abortion."[94] She drew guidance from the U.S. Supreme Court's decision in *Planned Parenthood v. Casey*.[95] The Court, while affirming *Roe v. Wade*, held that "the state may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children."[96]

Justice Owen's position here was exactly the opposite of what NAF claims. She specifically rejected the proposition that courts can encourage girls to adopt a particular viewpoint, including a religious one. She wrote: "A court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to profess any religious beliefs."[97] Knowing this, the NAF again deliberately misrepresents Justice Owen's position. Compare the following:

NAF Report quotation of Justice Owen	Justice Owen's concurrence in *Jane Doe 1*
She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion…[R]equiring a minor to exhibit an	She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion….A

awareness that there are issues, including religious ones, surround [sic] the abortion decision is not prohibited by the Establishment Clause.[98]	**court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to profess any religious beliefs.** But requiring a minor to exhibit an awareness that there are issues, including religious one, surround [sic] the abortion decision is not prohibited by the Establishment clause.[99]

Such deliberate misrepresentation, even of quotations which any researcher could check, casts serious doubt on the NAF's entire analysis.

Distortion #11

"Owen displayed an unwillingness to protect abortion clinics from harassing protesters"[100]

The second category of abortion-related cases involves court injunctions restricting pro-life activity. In *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas*,[101] the court reviewed an injunction and issued an order creating so-called "buffer zones" around abortion clinics and abortionists' homes. The court prohibited pro-life activists from:

- Yelling and shouting
- Demonstrating more than two at a time near an abortion clinic
- Providing counseling more than one at a time to potential patients
- Approaching the same potential patient more than once
- Continuing conversation after a potential patient expresses a desire to stop

But the court went even further, affirming an award of more than $1.2 million in actual and punitive damages against the pro-life activists.

Justice Owen joined, but did not write, the majority opinion. She did not join a separate opinion by Justice Raul Gonzalez arguing that the injunction violated the pro-life activists' First Amendment rights and that abortion itself is immoral.[102]

It's no wonder that Planned Parenthood's vice president called the decision "a complete and total victory"[103] and its attorney called it a "grand slam."[104] Planned Parenthood's own newsletter in the summer of 1998 proclaimed on the front page: "Anti-abortion Protestors Lose in Texas Supreme Court."

Now that a different spin serves their purpose, abortion extremists have changed their tune. What was once hailed as a "grand slam" is now attacked because it "displayed unwillingness to protect abortion clinics from harassing protestors."

The Current Nomination Blockade

This trail of distortion about the record of individual nominees is part of an overall blockade against President Bush's judicial nominees. During the first two-year Congress of the Clinton administration, the Democrat Senate confirmed 128 nominees. During the first two-year Congress of the Bush administration, the Democrat Senate has so far confirmed just 59 nominees. During the last three administrations, the Senate

confirmed in the first two years an average of 92% of the appeals court nominees. To date, the Senate has confirmed just 34% of President Bush's appeals court nominees.

Today, 53 judicial nominees remain stalled in the Senate. The previous three presidents saw their first 11 appeals court nominees confirmed in an average of 81 days. Today, 436 days later, seven of President Bush's first group of 11 appeals court nominees have not had a hearing.

America is at a crossroads. The battle over judicial appointments is a battle over whether the people will retain the power to govern themselves, to run the country, and to define the culture.

NOTES

[1] http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.
[2] U.S. Constitution, Article II, Section 2.
[3] Such widespread support makes baffling the claim by one abortion extremist organization of "widespread criticism in Texas for [Justice Owen's] judicial record." National Women's Law Center, *Justice Owen's Record Shows Hostility to Reproductive Rights*, at 1, available at http://www.nwlc.org/details.cfm?id=1163&section=JCWR.
[4] Editorial, *Houston Chronicle*, September 24, 2000, at 2.
[5] Editorial, *Dallas Morning News*, October 26, 2000, at 18A.
[6] Quoted in *Houston Chronicle*, May 10, 2001.
[7] http://www.judicialselection.org/.
[8] Gray, *Priscilla Owen: A Restrained, Principled Jurist*, at 2.
[9] Some far-left groups claim that Justice Owen's judicial philosophy is the opposite of what President Bush has endorsed. See, e.g., People for the American Way, *The Dissents Of Priscilla Owen: A Judicial Nominee Who Would Make The Law, Not Interpret It*, at 1 (Justice Owen has "a judicial philosophy directly contrary to President Bush's asserted goal of nominating judges who will interpret the law, not make it."). The report is available at http://www.pfaw.org/issues/judiciary/owen/report/. It strains credibility for groups that have fought aggressively against appointment of restrained judges for many years to act as arbiters of what they oppose.
[10] "Topics of the Times: The Senate's Judicial Farce," *New York Times*, February 17, 1998, at A18.
[11] Kairys, "Clinton's Judicial Retreat: When Naming Judges, He Is Quick to Cave," *Washington Post*, September 7, 1997, at C1.
[12] Newman, "Misdiagnosing Courts' Problems," *New York Times*, January 6, 1998, at A19.
[13] Saad, "Public Opinion Abourt Abortion—An In-Depth Review," available at http://www.gallup.com/poll/specialReports/pollSummaries/sr020122ii.asp.
[14] Quoted in Lewis, "More Battles Loom Over Bush's Nominees for Judgeships," *New York Times*, April 7, 2002, at 24.
[15] Texas Family Code, section 33.002(1).
[16] Texas Family Code, section 33.003.
[17] *In re Jane Doe 1*, 19 S.W.3d 249 (Texas 2000); *In re Jane Doe 1(II)*, 19 S.W.3d 346 (Texas 2000); *In re Jane Doe 2*, 19 S.W.3d 278 (Texas 2000); *In re Jane Doe 3*, 19 S.W.3d 300 (Texas 2000); *In re Jane Doe 4*, 19 S.W.3d 322 (Texas 2000); *In re Jane Doe 4(II)*, 19 S.W.3d 337 (Texas 2000); *In re Jane Doe 10*, 45 Tex.Sup.J. 605 (Texas 2002). In the remaining five cases, *In re Jane Doe 5-9*, the court required notification but did not issue a written opinion.
[18] *National Abortion Federation Report on Priscilla Owen* (undated manuscript) (hereinafter *NAF Report*), at 1.
[19] Letter from Florence Shapiro to Patrick Leahy, July 15, 2002 (emphasis added).
[20] 410 U.S. 113 (1973).
[21] *Id.* at 153 (emphasis added).
[22] See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *Bellotti v. Baird*, 443 U.S. 622,643 (1979).
[23] *Jane Doe 1*, 19 S.W.3d at 262 (Owen, J., concurring).
[24] *Jane Doe 2*, 19 S.W.3d at 287 (Owen, J., concurring).
[25] Lewis, "More Battles Loom Over Bush's Nominees for Judgeships," *New York Times*, April 7, 2002, at 24.
[26] *NAF Report* at 2-3.
[27] *Jane Doe 4(II), 5-9.*
[28] *Jane Doe 1, 1(II), 2, 3, 4, 10.*
[29] *Jane Doe 1, 2, 4(II), 5-10.*
[30] *Jane Doe 1(II), 3, 4.*

[31] *Jane Doe 1(II), 3, 4, 4(II), 5-9.*
[32] *Jane Doe 1, 2, 10.*
[33] *Jane Doe 1(II), 3-4.*
[34] Texas Family Code, section 33.004.
[35] "Unlike the court of appeals, our Court may only engage in legal sufficiency review." *Jane Doe 1*, 19 S.W.3d 249,253 (Texas 2000).
[36] *NAF Report* at 3 ("the only case in which Owen did *not* vote to deny a girl her right to have an abortion without parental notification was a 2002 case decided after Owen was nominated to the 5th Circuit."). That case was *Jane Doe 10*. Needless to say, had Justice Owen voted to require notification in that case, NAF would simply have added that to the rest of its indictment.
[37] *Jane Doe 1(II)*, 19 S.W.3d 346 (Texas 2000).
[38] *NAF Report* at 4.
[39] *Id.* at 2.
[40] *Id.* at 4.
[41] *Id.* at 3.
[42] 19 S.W.3d 249 (Texas 2000).
[43] *Jane Doe 1(II)*, 19 S.W.3d 346 (Texas 2000).
[44] *Id.* at 367.
[45] *Id.* at 376.
[46] *Id.* at 383.
[47] *Jane Doe 4*, 19 S.W.3d 322,327 (Texas 2000) (Hecht, J., dissenting).
[48] *Id.* at 328.
[49] *Id.*
[50] *Jane Doe 1(II)*, 19 S.W.3d at 365-66 (Gonzalez, J., concurring).
[51] *Id.* at 366.
[52] See, e.g., *NAF Report* at 2 ("Alberto Gonzalez…described her opinion as 'an unconscionable act of judicial activism.'"); National Abortion Rights Action League, *Priscilla Owen: Nominee for United States Court of Appeals For the Fifth Circuit*, at 1 (what…Alberto Gonzalez called an **'unconscionable act of judicial activism.'**")(emphasis in original)(hereinafter *NARAL Report*), available at http://www.naral.org/mediaresources/fact/pdfs/powen_report.pdf.
[53] *PFAW Report* at 1.
[54] *NAF Report* at 5.
[55] 19 S.W.3d 278 (Texas 2000).
[56] Texas Family Code, section 33.001.
[57] 520 U.S. 292 (1997) (per curiam).
[58] *Id.* at 297 (emphasis added).
[59] *Id.* at 298.
[60] *Id.* at 302 (Stevens, J., concurring in the judgment).
[61] *Jane Doe 4(II)*, 19 S.W.3d at 340.
[62] *Id.*
[63] *NAF Report* at 6.
[64] *Id.*
[65] 19 S.W.3d 346 (Texas 2000).
[66] *Wisdom v. Smith*, 209 S.W.2d 164,166-67 (Texas 1948).
[67] *Doe 1(II)*, 19 S.W.3d 346,383 (Owen, J., dissenting).
[68] *NAF Report* at 7.
[69] Texas Family Code, section 151.003(b).
[70] 19 S.W.3d 322 (Texas 2000).
[71] *Jane Doe 4(II)*, 19 S.W.3d 337 (Texas 2000).
[72] *NAF Report* at 7 (emphasis in *NAF Report*).
[73] *Jane Doe 1*, 19 S.W.3d at 335 (Owen, J., dissenting)(emphasis added).
[74] *Napoli v. Sears, Roebuck & Co.*, 835 F.Supp. 1053,1063 (N.D.Ill. 1993).
[75] *Angelico v. Lehigh Valley Hospital Assoc.*, No.CIV.A 96-2861, 1996 WL 524112, at *4 - *5 (E.D.Penn. Sept. 13, 1996).
[76] *NAF Report* at 8.
[77] *Id.* at 9.
[78] 19 S.W.3d 249 (Texas 2000).

[79] *Id.* at 264 (Owen, J., concurring).
[80] *Id.*
[81] *NAF Report* at 9.
[82] *Id.* at 5-6.
[83] The ABA endorsed the Uniform Abortion Act and the Equal Rights Amendment in 1972, federal and state legislation to finance abortions for poor women in 1978, and the agenda of the United Nations Women's Conference in Beijing in 1996. See Jipping, *Selecting and Confirming Federal Judges: What Has Gone Wrong?* (1997), at 23.
[84] *Id.*
[85] American Bar Association, *The ABA Standing Committee on Federal Judiciary: What It Is and How It Works*, at 4-5, available at http://www.abanet.org/scfedjud/backgrounder.html.
[86] *NAF Report* at 9.
[87] 19 S.W.3d 278 (Texas 2000).
[88] 19 S.W.3d 300 (Texas 2000).
[89] See *Jane Doe 3*, 19 S.W.3d at 312 (Hecht, J., dissenting).
[90] The U.S. Supreme Court has held that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Stenberg v. Carhart*, 530 U.S. 914,944 (2000) (citation omitted).
[91] Texas Family Code, section 261.001(1)(A).
[92] *NAF Report* at 10.
[93] 19 S.W.3d 249 (Texas 2000).
[94] *Id.* at 263 (Owen, J., concurring).
[95] 505 U.S. 833 (1992).
[96] *Id.* at 872-73 (plurality opinion).
[97] *Jane Doe 1*, 19 S.W.3d at 264 (Owen, J., concurring).
[98] *NAF Report* at 10 (emphasis in *NAF Report*). Other abortion extremist groups make the same accusation, using even more severely edited versions of Justice Owen's actual position. See, e.g., *NARAL Report* at 2,5.
[99] *Jane Doe 1*, 19 S.W.3d at 264-65.
[100] *NAF Report* at 2.
[101] 975 S.W.2d 546 (Texas 1998).
[102] *Id.* at 570.
[103] Quoted in *Austin American-Statesman*, July 4, 1998, at B2.
[104] Quoted in *Houston Chronicle*, July 4, 1998, at A1.

HECTOR DE LEON*
ANTHONY ICENOGLE**
THOMAS P. WASHBURN

JOSEPH C. BOGGINS*
OF COUNSEL
WAGGONER CARR
OF COUNSEL
L. DEAN CORR
OF COUNSEL
JOHN M. DAPPER
OF COUNSEL

HEATHER L. McCLURE
LEGAL ASSISTANT

DE LEON, BOGGINS & ICENOGLE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
221 WEST 6TH STREET, SUITE 1050
BANK ONE TOWER
AUSTIN, TEXAS 78701
(512) 476-5308
TELECOPIER (512) 482-8628
E-MAIL: DELEON@DBILAW.COM
WWW.DBILAW.COM

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LEGAL SPECIALIZATION

June 26, 2002

Via Fax 202/224-9516
And Regular Mail

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

RE: Nomination of the Honorable Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

This correspondence is sent to you in support of the nomination by President Bush of Texas Supreme Court Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

As the immediate past President of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

Additionally, Justice Owen played a major role in organizing a group known as Family Law 2000 which seeks to educate parents about the effect the dissolution of a marriage can have on their children. Family Law 2000 seeks to lessen the adversarial nature of legal proceedings surrounding marriage dissolution. The Fifth Circuit would be well served by having someone with a background in family law serving on the bench.

Justice Owen has also found time to involve herself in community service. Currently Justice Owen serves on the Board of Texas Hearing and Service Dogs. Justice Owen also teaches Sunday School at her Church, St. Barnabas Episcopal Mission in Austin, Texas. In addition to teaching Sunday School Justice Owen serves as head of the altar guild.

Justice Owen is recognized as a well rounded legal scholar. She is a member of the American Law Institute, the American Judicature Society, The American Bar Association, and a Fellow of the American and Houston Bar Foundations. Her stature as a member of the Texas Supreme Court was recognized in 2000 when every major newspaper in Texas endorsed Justice Owen in her bid for re-election to the Texas Supreme Court.

It has been my privilege to have been personally acquainted with various members of the U.S. Court of Appeals for the Fifth Circuit. The late Justice Jerry Williams was my administrative law professor in law school and later became a personal friend. Justice Reavley has been a friend over the years. Justice Johnson is also a friend. In my opinion, Justice Owen will bring to the Fifth Circuit the same intellectual ability and integrity that those gentlemen brought to the Court.

I earnestly solicit your favorable vote on the nomination of Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

Thank you for your attention to this correspondence.

Very truly yours,

Hector De Leon

cc:	The Honorable Orrin Hatch United States Senate 152 Dirksen Senate Office Building Washington, D.C. 20510	Via Fax 202/228-1698 and Regular Mail
cc:	The Honorable Alberto R. Gonzales	Via Fax 202-456-6279
cc:	Viet D. Dinh	Via Fax 202-514-2424

THE WHITE HOUSE

WASHINGTON

April 5, 2002

Dear Chairman Leahy:

In our recent conversations, you suggested that the White House should examine whether contributions Justice Owen received for her campaigns for the Texas Supreme Court raise any legitimate issue with respect to her fitness to serve on the Fifth Circuit. We have done as you have suggested, and I see no basis to question Justice Owen's fitness to serve on the Fifth Circuit. The record reflects that she has at all times acted properly and in complete compliance with both the letter and the spirit of the rules relating to judicial campaign finance.

I am certain you will agree that it was entirely proper for Justice Owen's campaign to receive contributions. Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, which are partisan under Texas election law, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds. Like Senators, therefore, candidates for the state judiciary in Texas may receive contributions to finance their campaigns.

To be sure, Justice Owen and many others would prefer a system of appointed rather than elected state judges. In fact, Justice Owen has long advocated appointment of judges (coupled with retention elections). She has written to fellow Texas attorneys on the issue, committed to a new system in League of Women Voters publications, and appeared as a pro-reform witness before the Texas Legislature. She has explained even to partisan groups why judges should be selected on merit. But the people in some states, including Texas, have chosen a system of contested elections for judges. Elected state judges certainly are not barred from future appointment to the federal judiciary; on the contrary, some notable federal appellate judges whom President Clinton nominated and you supported were state judges who had run and been elected in contested elections -- Fortunato Benevides and James Dennis, for example, from the Fifth Circuit.

I am also certain that you would find nothing inappropriate about the sources from which Justice Owen's campaign received contributions. In her 1994 and 2000 elections, Justice Owen's campaign quite properly received contributions from a large number of entities and individuals, with no single contributor predominating. In the 1994 election cycle, her campaign received approximately $1.2 million in contributions from 3,084 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her campaign. And Justice Owen's campaign, of course, received no corporate contributions from Enron or any Enron-affiliated corporation, as such corporate contributions are not permissible under Texas law. Notably, in the 1994 election, not only did Justice Owen comply with all campaign laws, she went beyond what the law required and voluntarily limited contributions when many other judicial candidates did not do so.

In the 2000 election cycle, Justice Owen's campaign received approximately $300,000 in contributions from 273 different contributors. In that cycle, her campaign received no contributions from Enron or its affiliates, from employees of Enron, or from Enron's political action committee. In addition, Justice Owen ultimately had no Democratic or Republican opponent in the 2000 election

cycle, and she closed her campaign office and returned most of her unspent contributions, an act that I believe is unusual in Texas judicial history.

It was entirely proper for Justice Owen's campaign to receive campaign contributions, including the contributions from Enron employees. Indeed, *seven* of the nine current Texas Supreme Court Justices received Enron contributions, and several of them received more than Justice Owen's campaign received. As this record demonstrates, elected judges certainly did not act improperly in the past, before anyone knew about Enron's financial situation, by receiving contributions from employees of Enron – any more than it could be said that Members of Congress acted improperly in the past by receiving contributions from Enron.

If, as is evident from the foregoing discussion, there was nothing amiss with the fact that Justice Owen received donations or with the sources from which she received them, the only other possible area of concern with her conduct relating to campaign contributors would be her decisions from the bench. Texas Code of Judicial Conduct Canon 3(B)(1) provides that a judge "*shall* hear and decide matters assigned to the judges except those in which disqualification is required or recusal is appropriate." And it is well-established that judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 215 (5th Cir. 2001); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999), *rev'd on other grounds*, 41 S.W.3d 118 (Tex. 2001); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App. 1990). Indeed, in any state with elected judges, any other rule would be unworkable. The primary protections against inappropriate influence on judges from campaign contributions are disclosure of contributions and adherence to the tradition by which judges explain the reasons for their decisions. If the people of a state deem those protections insufficient, the people may choose a system of appointed judges rather than elected judges, as Justice Owen has advocated for Texas.

Surmising that the concerns you raised would likely focus on her sitting in cases in which Enron had an interest, we have undertaken a review of her decisions in such cases. We have reviewed Texas Supreme Court docket records and Enron's 1994-2000 SEC Form 10Ks to determine the cases in which Enron or affiliates of Enron were parties to proceedings before the Court since January 1995 (when Justice Owen took her seat). The decisions of the Texas Supreme Court since January 1995 in proceedings involving Enron have been ordinary and raise no questions whatsoever.

A judge's decisions are properly assessed by examining their legal reasoning, not by conducting any kind of numerical or statistical calculations. But even those who would attempt to draw conclusions based on such calculations would find nothing in connection with these Enron cases. To begin with, we are aware of no proceeding involving Enron in which Justice Owen cast the deciding vote. In six proceedings in which we know that Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in two cases and adverse in two cases. With respect to the remaining two, one cannot be characterized either way, and she did not participate in the other case because it had been a matter at her law firm when she was a partner. Eight other matters came before the Court in which we know that Enron or an affiliate was a party, but the Court declined to hear them. In those matters, the Court's actions could be characterized as favorable to Enron in four cases, adverse in three cases, and one was dismissed by agreement of the parties. We will supply the Judiciary Committee copies of the cases on request.

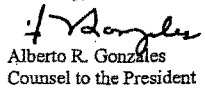
There has been some media attention on one case involving Enron in which Justice Owen wrote the opinion for the Court. *See Enron Corp. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996). The issue in that case concerned the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on one of two different dates. The Court held that the statute did not violate the state constitution -- and the decision was unanimous. I understand that two Democratic Justices who sat on the Court at that time (Justices Raul Gonzalez and Rose Spector) have written to you to explain the case, indicating that Justice Owen's participation in the case was entirely proper. Moreover, the lawyer who represented a party opposing Enron in this case (Robert Mott) recently was quoted as saying that criticism of Justice Owen for her role in this case is "nonsense." *Texas Lawyer* (April 1, 2002). In my judgment, this case raises no legitimate issue with respect to Justice Owen's confirmation.

Finally, I am informed that, if confirmed, Justice Owen will donate all of her unspent campaign contributions to qualifying tax-exempt charitable and educational institutions, as is contemplated under section 254.204(a)(5) of the Texas Election Code.

I trust that the foregoing will resolve all questions concerning the propriety of Justice Owen's activities in relation to financing her campaigns. As you know, I served with Justice Owen, and I am convinced from my work with her that she is a person of exceptional integrity, character, and intellect. Both Senators from Texas strongly support her nomination. The American Bar Association has *unanimously* rated Justice Owen "well qualified," and one factor in that rating process is the nominee's integrity.

Despite her superb qualifications and the "judicial emergency" in the Fifth Circuit declared by the Judicial Conference of the United States, Justice Owen has not received a hearing for nearly 11 months since her May 9, 2001, nomination. We respectfully request that the Committee afford this exceptional nominee a prompt hearing and vote.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

cc: The Honorable Orrin Hatch
The Honorable Phil Gramm
The Honorable Kay Bailey Hutchison

April 1, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Leahy:

We served on the Texas Supreme Court with Justice Priscilla Owen when the case of *Enron Corporation et al. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996) was decided. The issue in this case was the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on two different dates. In a unanimous opinion, all justices, Democrats and Republicans alike, agreed with the opinion authored by Justice Owen that the choice of the valuation date in ad valorem tax statute did not violate a provision of the State Constitution requiring uniformity and equality in ad valorem taxation. We found the decisions of the United States Supreme Court and other states instructive on this issue.

In our ruling, we agreed with the rulings of the Harris County Appraisal District and the trial court.

Cordially,

Raul A. Gonzalez
Justice, Texas Supreme Court
1984-1998

OF COUNSEL
LOCKE LIDDELL & SAPP LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 305-4746
(512) 305-4800-fax

Rose Spector
Justice, Texas Supreme Court
1992-1998

OF COUNSEL
BICKERSTAFF HEATH SMILEY POLLAN
KEVER & MCDANIEL, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 472-8021
(512) 320-5638-fax

BOB GRAHAM
FLORIDA

4

United States Senate
WASHINGTON, DC 20510-0903

Statement of Senator Bob Graham
Senate Judiciary Committee Hearing on the Nominations of Mr. Timothy Corrigan to Serve as a Federal Judge in the Middle District and of Mr. Jose Martinez to Serve as Federal Judge in the Southern District of Florida
July 23, 2002

Mr. Chairman, thank you for scheduling this hearing. I would also like to thank the Committee for recognizing the needs of Florida. It is my pleasure to introduce Judge Timothy Corrigan and Mr. Jose Martinez.

Tim Corrigan, an experienced Judge in Florida's Middle District, has been nominated to serve as a federal judge in the Middle District of Florida. Jose Martinez, a dedicated attorney and partner at Martinez & Gutierrez, has been nominated to serve as a federal judge in the busy Southern District of Florida.

Mr. Chairman, Tim Corrigan's qualifications make him an excellent candidate for service on the federal bench. Prior to his appointment as a Magistrate Judge, Judge Corrigan spent 14 years in private practice with the Jacksonville law firm of Bedell, Dittmar, DeVault, Pillans and Coxe, P.A. As a Magistrate Judge since 1996, he has considerable experience handling a broad variety of civil and criminal matters, including conducting numerous evidentiary hearings and misdemeanor trials.

Judge Corrigan received his law degree, with distinction, in 1981 from Duke University School of Law, where he served as a member of the editorial board of the Duke Law Journal. He received his undergraduate degree, with honors, from the University of Notre Dame in 1978.

Currently, Mr. Corrigan is a member of the Florida Bar, the Jacksonville Bar Association, the Federal Bar Association and the American Bar Association. The Jacksonville Bar Association recognized Judge Corrigan in 1991 for his pro bono services. From 1987 – 1989, Judge Corrigan served on the board of Jacksonville Legal Aid and was honored for his service.

Mr. Corrigan is joined by his wife, Nancy Marie Mead, who is a physical therapist and his sons Brian and Kevin, ages 15 and 13.

Mr. Chairman, Jose Martinez's long and impressive legal career makes him an equally outstanding candidate. Beginning as counsel and now partner at Martinez & Gutierrez, Mr. Martinez has been associated with the firm since 1991. Jose Martinez's has served as Assistant United States Attorney in the Southern District of Florida, and Legal Officer for the United States Navy, Judge Advocate General Corps. He took a two-year leave

from his Associate Partner firm to become the Regional Director for the Office for Drug Abuse Law Enforcement of the United States Department of Justice.

Mr. Martinez received his undergraduate and law degree from the University of Miami. He was the President of the highest honorary on campus, the Iron Arrow. His involvement with Student Government ranged from working in the Student Activities Office to becoming the treasurer of the School of Business.

Currently, Mr. Martinez is the Vice Chairman of the Federal Court Practice Committee of the Florida Bar. He is also a member of the American Bar Association, the Federal Bar Association, the Cuban American Bar Association, and the Hispanic National Bar Association.

Mr. Martinez is married to Mary Anne Bielawa and has two daughters. His daughter Jan Vair is an attorney and a new mother to baby Elizabeth Ann. Mr. Martinez' youngest daughter, Ann-Marie Martinez, works for Walt Disney Productions.

Mr. Chairman, I would like to thank you again for scheduling this hearing. I am confident that you will agree that Judge Timothy Corrigan and Mr. Jose Martinez possess the qualities needed to effectively serve on the Federal Bench.

PRISCILLA OWEN: A RESTRAINED, PRINCIPLED JURIST

BY C. BOYDEN GRAY

Mr. C. Boyden Gray served as Counsel to President George H.W. Bush from 1989-1993. Mr. Gray is a graduate of Harvard University (A.B. 1964, magna cum laude) and the University of North Carolina (J.D. 1968), where he served as Editor-in-Chief of the UNC Law Review. Following graduation from law school, he clerked for Chief Justice Earl Warren of the U.S. Supreme Court.

The Ninth Circuit's recent decision to hold the pledge of allegiance unconstitutional[1] serves as a vivid reminder that the federal bench must be staffed by jurists who are committed to deciding cases according to the law, not their personal policy preferences. Judges are neither legislators nor constitutional drafters, and it is an abuse of power to use the judicial office to impose one's political views in the guise of legal interpretation.

Though startling, and inconsistent with America's constitutional traditions, the Ninth Circuit's ruling has provoked a nationwide civics lesson. The pledge decision presents an opportunity for the American people to reconsider what sort of judges should be confirmed to the federal bench. And at a more general level, it is an occasion to revisit the issues of the judiciary's proper role in a democratic system of government, and what is meant by "judicial activism" and "judicial restraint."

Ultimately, judicial restraint is an appreciation for the judiciary's limited powers, and a reluctance to usurp prerogatives that the Constitution assigns or reserves to the other branches of government. In particular, restrained judges:

- adhere faithfully to binding precedent issued by higher courts, especially the United States Supreme Court;
- defer to the policy choices the legislature enacts into positive law, and refrain from substituting their views for those of the legislature;
- interpret the Constitution and laws enacted by the legislature as intended by those who wrote them;
- respect the traditional authority of trial courts, which are in the best position to assess the credibility and demeanor of witnesses, to make factual findings;
- uphold the right of individuals to take actions which the law permits them to take; and
- approach each case without any preconceived notions, or reflexively siding with any one litigant.

Judged by any of these criteria, Justice Priscilla Owen of the Texas Supreme Court, whom the President has nominated to a vacancy on the U.S. Court of Appeals for the Fifth Circuit, undoubtedly is a restrained and principled jurist. Time and again, in her opinions Justice Owen has stressed that the function of a court in interpreting legal text is to give effect to the intent of the lawgiver. Justice Owen consistently has interpreted Texas statutes in light of the binding precedents of the United States Supreme Court. She has deferred to the enactments of the Texas Legislature, denying that judges legitimately can interpret statutory language to reflect their own political or ideological commitments. And she has declined, as an appellate judge, to meddle with the traditional prerogative of the trial courts to make findings of fact.

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[1] *See* Newdow v. U.S. Congress, No. 00-16423 (9th Cir. June 26, 2002).

The discussion below demonstrates Justice Owen's fidelity to these and other jurisprudential pillars, a fidelity that earned her a unanimous "well-qualified" rating from the American Bar Association, the highest rating a judicial nominee can possibly achieve. We agree that Justice Owen is superlatively well suited to occupy a seat on the Fifth Circuit, and we urge the Senate to approve her nomination as soon as possible.

I. Balancing the Rights of Protesters and Patients: *Operation Rescue v. Planned Parenthood*

Judges often are faced with difficult cases where the rights of individual parties collide. The judge is left with the delicate task of balancing the rights of both parties in accordance with the law. Justice Owen's decision to join the majority in *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*[2] is compelling evidence of her commitment to decide cases according to the governing law. Consistent with the rule of law, the majority neutrally balanced the competing interests of two mutually antagonistic sets of litigants: abortion providers and pro-life activists. According to the Court, "[a]ccommodating interests like property and privacy rights along with free expression often necessitates limitations on all of them."[3]

In *Operation Rescue*, the Court upheld the vast majority of restrictions the trial judge imposed on the pro-life protesters. Although the majority made several modifications to the trial court's order—for example, reducing the size of buffer zones surrounding abortion clinics—it ultimately approved an injunction that (1) established buffer zones around certain abortion clinics and providers' homes, where active protests were taking place; (2) prohibited more than two activists from entering a protest zone at any given time; (3) prohibited protesters from shouting or yelling; (4) prohibited more than a single demonstrator from approaching patients to offer "sidewalk counseling"; (5) prohibited demonstrators from approaching a given patient more than once when she enters the clinic and once when she leaves; and (6) required demonstrators to stop talking to patients when they indicated a desire to be left alone. According to the Court, the modified injunction "protects the demonstrators' right to engage in peaceful speech. At the same time, the provision ensures that the demonstrators will not interfere with the significant government interests protected by the buffer zone."[4] The majority—including Justice Owen—also upheld the trial court's decision to assess over $1 million in punitive damages against the protesters.[5]

At the time it was handed down, the *Operation Rescue* decision was universally regarded as a victory for the abortion providers, even though some groups now claim that the majority's opinion "displayed unwillingness to protect abortion clinics from

[2] 975 S.W.2d 546 (Tex. 1998).
[3] *Id.* at 555.
[4] *Id.* at 567
[5] *See id.* at 569.

harassing protesters."[6] For instance, at the time, a Planned Parenthood officer hailed the decision as "a complete and total victory."[7] Planned Parenthood's attorney in the case said of the ruling: "It wasn't a home run. It was a grand slam."[8] Moreover, Justice Owen declined to join Justice Raul Gonzales's partial dissent, which argued that the injunction offended the protesters' free speech rights.[9] The political expediency of the group's revised interpretation, which distorts the decision beyond all recognition, is apparent.

II. Deference to the United States Supreme Court: *Doe 1(I)* and *Doe 2*

Judicial restraint—and indeed the rule of law—requires that judges on lower courts commit themselves to following the binding precedents of superior tribunals: "As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute."[10] In both *In re Jane Doe* ("*Doe 1(I)*")[11] and *In re Jane Doe 2* ("*Doe 2*"),[12] Justice Owen conscientiously applied U.S. Supreme Court precedents dealing with what underage girls must prove before they can have an abortion without telling their parents. Her opinions recognized that the U.S. Supreme Court had interpreted the precise language used in the Texas Parental Notification Act in other cases before the law was enacted. In such a case, canons of judicial construction require that a judge presume that the legislature was aware of the precedent and intended to incorporate it into the legislation. In a word, Justice Owen was reading the Texas statute in light of the pronouncements of the highest court in the land.

Needless to say, Justice Owen's reading of the statute is not the only reasonable interpretation of what the Legislature intended; other members of the Court could, and certainly did, reach different conclusions about the Legislature's intent. But Justice Owen's stated commitment to implement the Legislature's will belies any claim that she was seeking to substitute her views, whatever they may be, for those of the people's elected representatives.

Like all of the twelve Parental Notification Act cases the Texas Supreme Court has handed down to date, *Doe 1(I)* and *Doe 2* required the Court to interpret a Texas statute that lays down the general rule that at least one parent of an underage girl must

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[6] *See National Abortion Federation Report on Priscilla Owen* at 2 (2002) ("*NAF Report*").
[7] Juan B. Elizondo Jr., *Abortion Clinic Buffers Reined in*, AUSTIN AM.-STATESMAN, July 4, 1998, at B2 (quoting Judy Reiner, senior vice president for Planned Parenthood of Houston and Southeast Texas).
[8] Clay Robinson, *Anti-Abortion Protesters Lose '92 Case Ruling; $1.2 Million in Damages Upheld*, HOUSTON CHRON., July 4, 1998, at A1 (quoting Neal Manne, attorney for Planned Parenthood of Houston and Southeast Texas).
[9] *See Operation Rescue*, 975 S.W.2d at 573-84 (Gonzales, J., concurring in part and dissenting in part).
[10] 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.401, at I-2 (2d ed. 1993).
[11] 19 S.W.3d 249 (Tex. 2000). The Texas Supreme Court uses Arabic and Roman numerals to differentiate the multiple parental notification cases it has heard. In a given case, the Arabic numeral refers to the identity of the girl, and the Roman numeral specifies which appearance the girl is making before the Texas Supreme Court. So, for example, "*Doe 1(I)*" signifies the first Jane Doe plaintiff in her first appearance before the Court.
[12] 19 S.W.3d 278 (Tex. 2000).

be notified before the girl can have an abortion.[13] The statute contains three exceptions to that rule: a parent need not be notified if: (1) the girl is "mature and sufficiently well informed"; (2) "notification would not be in the best interest of the minor"; or (3) "notification may lead to physical, sexual, or emotional abuse of the minor."[14]

None of the parental notification cases involved any dispute over whether the Constitution guarantees the right to an abortion, or even the scope of that right. Instead, the cases dealt with routine legal issues such as the proper method of interpreting a statute, and the degree of deference an appellate court owes to a trial court's factual findings.[15] As the majority in *Doe 1(I)* emphasized, "[w]e are not called upon to decide the constitutionality or wisdom of abortion. Arguments for or against abortion do not advance the issue of statutory construction presented by this case. Instead, our sole function is to interpret and apply the statute enacted by our Legislature."[16] It should go without saying that a decision to deny a girl a judicial bypass, pursuant to standards established by the state Legislature, does not prevent her from having an abortion; it only requires that one of her parents know about it before she does so.

In *Doe 1(I)*, the Court interpreted the first exception to the general rule that parents must receive notice that their minor daughter is seeking an abortion: notice is not necessary when the girl is "mature and sufficiently well informed."[17] Justice Owen—

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[13] *See* TEX. FAM. CODE § 33.002(1) (2000):

> (a) A physician may not perform an abortion on a pregnant unemancipated minor unless:
>
> (1) the physician performing the abortion gives at least 48 hours actual notice, in person or by telephone, of the physician's intent to perform the abortion to:
>
> (A) a parent of the minor, if the minor has no managing conservator or guardian; or
>
> (B) a court-appointed managing conservator or guardian.

[14] *Id.* § 33.003(i). The complete text of the exceptions reads as follows:

> The court shall determine by a preponderance of the evidence whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, whether notification would not be in the best interest of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor. If the court finds that the minor is mature and sufficiently well informed, that notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of the minor, the court shall enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents or a managing conservator or guardian and shall execute the required forms.

[15] In some of these cases, Justice Owen has gone out of her way to express her view that certain statutory restrictions on abortion would violate the Constitution. For instance, the U.S. Supreme Court has held that a parental *consent* statute must contain a judicial bypass provision to be constitutional, *see* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 439-42 (1983) ("*Akron I*"), but it has left unsettled whether parental *notification* statutes, like Texas's, must allow for judicial bypass, *see* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510 (1990) ("*Akron II*"). Nevertheless, Justice Owen reasoned that "there is reasoning in [Supreme Court precedent] that would suggest that the United States Supreme Court might hold that bypass procedures are necessary in notification statutes." *Doe 1(I)*, 19 S.W.3d at 262 (Owen, J., concurring). Justice Owen also has expressed her view that "[t]he constitutionality of requiring a minor to notify *both* parents is questionable." *Doe 2*, 19 S.W.3d at 287 (Owen, J., concurring) (citing Hodgson v. Minnesota, 497 U.S. 417, 450-55 (1990)); *see also In re* Doe 3, 19 S.W.3d 300, 320 (Tex. 2000) (Owen, J., concurring).

[16] *Doe 1(I)*, 19 S.W.3d at 251.

[17] TEX. FAM. CODE § 33.003(i).

while agreeing with the result reached by the Court majority—wrote separately to emphasize that by using the language "mature and sufficiently well informed," the Legislature intended to ensure that girls be exposed to the widest possible range of information when deciding whether to have an abortion without telling their parents. According to Owen, "the Legislature intended to require minors to be informed about the decision to have an abortion to the full extent that the law, as interpreted by the United States Supreme Court, will allow."[18] Justice Owen simply deferred to and applied the precedent of a superior tribunal. Because the language of the parental notification statute itself tracks language from Supreme Court caselaw,[19] Justice Owen reasonably concluded that the Legislature meant to incorporate the full body of Supreme Court parental notification precedent. The majority also recognized that the Legislature intended to incorporate the Supreme Court's jurisprudence.[20]

Specifically, Justice Owen argued that the Legislature meant to require that girls be exposed to the "profound philosophic arguments surrounding abortion."[21] This requirement derives from the Supreme Court's decision in *Planned Parenthood v. Casey*,[22] where, after reaffirming the validity of *Roe v. Wade*,[23] it held that "the state may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children."[24]

Justice Owen never suggested that the Legislature intended for girls to be exposed to any particular viewpoint: they should learn about arguments "surrounding" abortion, not "against" abortion. And Justice Owen expressly denied that courts could coerce girls into following any particular set of views, religious or otherwise: "A court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to profess any religious beliefs."[25] Astonishingly, an interest group's report on Justice Owen excises this crucial sentence from its quotation of her concurrence, replacing it with an ellipsis.[26]

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[18] *Doe 1(I)*, 19 S.W.3d at 262 (Owen, J., concurring).
[19] *Compare* Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (plurality opinion) ("*Bellotti II*") (holding that a minor girl seeking an abortion must be able to show "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes"), *with* TEX. FAM. CODE § 33.003(i) ("The court shall determine by a preponderance of the evidence whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian.").
[20] *Doe 1(I)*, 19 S.W.3d at 254 ("Our Legislature was obviously aware of this jurisprudence when it drafted the statute before us.").
[21] *Id.* at 263 (Owen, J., concurring).
[22] 505 U.S. 833 (1992).
[23] 410 U.S. 113 (1973).
[24] *Casey*, 505 U.S. at 872-73 (plurality opinion); *see also* Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam) ("[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.").
[25] *Doe 1(I)*, 19 S.W.3d at 264 (Owen, J., concurring); *see also id.* at 265 ("I agree with the Court that she should not be required to obtain counseling or other services from a particular provider.").
[26] *See NAF Report* at 10 (quoting *Doe 1(I)*, 19 S.W.3d at 264-65 (Owen, J., concurring)):

Nor did Justice Owen "reject Planned Parenthood as a 'qualified source of information'" about abortion, as an interest group now claims.[27] She simply quoted a decision of the U.S. Supreme Court, which specifically acknowledged that abortion clinics are unlikely to provide girls with all of the information they need to make an informed decision about whether to have an abortion: "[i]t seems unlikely that [a girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."[28]

Justice Owen's conclusion that the Legislature meant for girls to learn about the impact an abortion will have on the fetus[29] likewise derives from the Supreme Court's decision in *Casey*:

> Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.[30]

Justice Owen's concurrence in *Doe 2* is equally compelling evidence of her commitment to following the established precedents of the U.S. Supreme Court. In *Doe 2*, the Texas Supreme Court interpreted a second exception to the general rule that a girl's parents must be notified before she can have an abortion: "whether notification would not be in the best interest of the minor."[31] Again agreeing with the judgment issued by the Court's majority, Justice Owen wrote separately to emphasize that this exception reflects the Legislature's intent that courts should evaluate two factors: (1)

> She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion. . . [R]equiring a minor to exhibit an awareness that there are issues, including religious ones, surround [sic; error in *NAF Report*] the abortion decision is not prohibited by the Establishment Clause.

The group is fortunate that its audience is the public at large, not the federal judiciary; a number of courts have held that attorneys can be sanctioned for using ellipses to mischaracterize the views of their opponents. *See, e.g.*, Napoli v. Sears, Roebuck & Co., 835 F. Supp. 1053, 1063 (N.D. Ill. 1993) (faulting counsel for "the manipulative use of ellipses and omissions," and emphasizing that "[m]isrepresenting a court's opinion is unwise; indeed, it clearly provides the basis for sanctions under Fed. R. Civ. P. 11"); Angelico v. Lehigh Valley Hosp. Ass'n, No. CIV.A 96-2861, 1996 WL 524112, at *4 - *5 (E.D. Pa. Sept. 13, 1996) (stating that "[e]llipses in quotes from opposing parties' briefs that completely distort the original are inappropriate," and admonishing the plaintiff's counsel to refrain from "attempting to gain an advantage in argument by mischaracterizing the positions of opposing parties").

[27] *See NAF Report* at 10.

[28] H.L. v. Matheson, 450 U.S. 398, 410 (1981) (citation omitted).

[29] *Doe 1(I)*, 19 S.W.3d at 265 (Owen, J., concurring).

[30] *Casey*, 505 U.S. at 882 (plurality opinion).

[31] *See* TEX. FAM. CODE § 33.001(i) (2000).

whether notifying the girl's parents is not in her best interest, and (2) whether the abortion itself is in her best interest.[32]

The Legislature's belief that this exception would be available only to girls who can prove *both* that abortion is in their best interest *and* that notifying a parent is not, derives from the U.S. Supreme Court's decision in *Lambert v. Wicklund*.[33] In that case, the Court interpreted a Montana statute that, like Texas's, allowed a girl to have an abortion without notification if "the notification of a parent or guardian is not in the best interests of the [girl]."[34] The *Lambert* Court interpreted this language to require the girl to prove that abortion without notification (not just the failure to provide notification) was in her best interest. According to the Court, "a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification* is in her best interest."[35] The *Lambert* Court further reasoned that nothing in Montana's statute "permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest."[36]

Ironically, in a later *Jane Doe* case, the members of the *Doe 2* majority themselves came to embrace Justice Owen's interpretation of the "best interest" exception. In *In re Jane Doe 4* ("*Doe 4(II)*"),[37] the Court considered *both* whether the abortion itself was in the girl's best interest—specifically, whether her medical condition made abortion prohibitively risky[38]—*and* whether notifying her parents was not in her best interest.[39] The Court's implicit conclusion that the health risks of abortion were relevant to whether the girl was entitled to a "best interest" judicial bypass suggests that Justice Owen's interpretation of that provision has carried the day.

Statements in the legislative history made by members of both parties confirm Justice Owen's conclusion that the exceptions to the parental notification requirement were intended to be just that: exceptions, not the rule. Representative Phil King

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[32] *See In re Doe 2*, 19 S.W.3d 278, 285 (Tex. 2000) (Owen, J., concurring) ("The inquiry under the 'best interest' provision is not simply whether notifying a parent that the minor is pregnant and is seeking an abortion would be in the minor's best interest. The inquiry is whether *proceeding with an abortion* without notification of a parent is in the minor's best interest.").

[33] 520 U.S. 292 (1997) (per curiam).

[34] MON. CODE ANN. § 50-20-212(5) (1995), *quoted in Lambert*, 520 U.S. at 294.

[35] *Lambert*, 520 U.S. at 297.

[36] *Id.* at 298. The fact that the *Lambert* Court construed Montana's statute to require that the girl prove two elements, not just one, is further indicated by Justice Stevens's separate opinion in that case. Concurring in the judgment, Justice Stevens faulted the majority for concluding that "a young woman must demonstrate both that abortion is in her best interest and that notification is not." *Id.* at 302 (Stevens, J., concurring in the judgment). There would have been no need for Justice Stevens to write separately if the majority had held that a girl was entitled to the "best interest" exception simply by showing that notification was not in her best interest, with no analysis of whether the abortion itself was in her best interest.

[37] 19 S.W.3d 337 (Tex. 2000).

[38] *See id.* at 340 (reasoning that "if she does have a current health risk, then her physical needs and the potential dangers may weigh in favor of involving her parents in her decision").

[39] *See id.* (speculating that "notifying her parents could cause harm to their family structure and potentially lead her parents to withdraw support").

predicted that parents would be told that their minor daughter was planning to have an abortion in the "vast, vast, vast majority of cases."[40] Representative Dianne White Delisi, the Parental Notification Act's sponsor, indicated that judges would grant bypasses only "in rare cases."[41] Representative Patricia Gray called the bypass procedures "exceptional,"[42] and Senator David Bernsen likewise referred to them as "small exceptions."[43]

Indeed, the mere fact that the law was passed is evidence that the Texas Legislature intended to make it more difficult for minor girls to have abortions without their parents' knowledge. Before the law was enacted, girls were free to have abortions without telling their parents. If the Legislature meant to "assist minors in their attempt to obtain abortions," as one interest group now claims,[44] rather than to enable parents to play a part in one of the most important decisions their daughters will ever make, it would have had no need to pass the statute. Justice Owen's willingness to give effect to the Legislature's expressed intent in adopting the Parental Notification Act reveals her to be the sort of restrained jurist who deserves a seat on the federal bench.

III. Deference to the Texas Legislature: *Doe 3*

One of the most important aspects of judicial restraint is a judge's commitment to interpreting statutes and the Constitution in light of the text, structure, and context, and the judge's corresponding reluctance to cobble together meanings based on nothing more than judicial fiat. *In re Doe 3* ("*Doe 3*")[45] reveals that, when called upon to construe statutory language, Justice Owen interprets it consistently with similar language appearing in analogous statutes. She rejects the proposition that judges can interpret a statute to bear a meaning that they would have assigned it had they been members of the legislature.

Doe 3 saw the Texas Supreme Court interpret the final of the three exceptions to the parental notification requirement: "whether notification may lead to physical, sexual, or emotional abuse of the minor."[46] The majority could not agree on an appropriate

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[40] Hearings on Senate Bill 30 Before the House State Affairs Comm., 76th Leg., tape 3, side B (Tex. Apr. 19, 1999) (statement of Rep. King). The Texas Legislature made audiotape recordings of the proceedings surrounding the adoption of the Parental Notification Act, but apparently did not produce written transcripts. The Texas Supreme Court transcribed a number of the materials at its own expense. *See In re Doe 1(II)*, 19 S.W.2d 346. 373 (Tex. 2000) (Hecht, J., dissenting) ("*Doe 1(II)*"). The materials are extensively quoted in Justice Abbott's dissent in *Doe 1(II)*. *See id.* at 383-93 (Abbott, J., dissenting).

[41] Hearings on Senate Bill 30 Before the House State Affairs Comm., 76th Leg., tape 1, side A (Tex. Apr. 19, 1999) (statement of Rep. Delisi).

[42] *Id.* tape 3, side B (Apr. 19, 1999) (statement of Rep. Gray).

[43] Hearings on Senate Bill 30 Before the Senate Human Services Comm., 76th Leg., tape 3, at 4 (Mar. 10, 1999) (statement of Sen. Bernsen).

[44] *NAF Report* at 4.

[45] 19 S.W.3d 300 (Tex. 2000).

[46] TEX. FAM. CODE § 33.001(i) (2000).

definition of "abuse."[47] For her part, Justice Owen looked to an analogous definition contained in section 261 of the Texas Family Code, located just a few chapters away from the Parental Notification Act, also a part of the Family Code. Under the Legislature's definition, conduct constitutes "abuse" if it produces "mental or emotional injury to a child that results in an *observable and material impairment* in the child's growth, development, or psychological functioning."[48]

The U.S. Supreme Court has long recognized as a "fundamental canon of statutory construction" that judges should construe the words of a statute "in their context and with a view to their place in the overall statutory scheme."[49] In particular, "[i]dentical words used in different parts of the same act are intended to have the same meaning."[50] Relying on the Legislature's pre-existing statutory definition, Justice Owen argued, was preferable to the Court fabricating an entirely new one: "rather than fashioning its own definition, a Court should apply the Legislature's definition of 'abuse' when interpreting other provisions of the same Code unless there is a good reason for not doing so."[51] As the Legislature already had defined "abuse" in a related section of the Texas Family Code, the objective standard it had laid out would be the most appropriate to use in these circumstances.[52]

A number of statements in the legislative history made by members of both parties attest that Justice Owen correctly surmised that the members of the Texas Legislature intended "abuse" to be read in light of section 261. These statements indicate that the Legislature intended the "abuse" exception to be available only to girls who stood to suffer the severest and most traumatic physical and emotional injuries. During a floor debate, Representative Helen Giddings offered an example of a minor who would qualify as having been "abused":

> I know we have provisions in this bill for abused girls when abuse is suspected or detected to get help, but there are cases where the abuse is not known. . . . [W]e had a case where a mother had a Norplant put into

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[47] One group of judges cited a definition of "abuse" contained in the Texas Human Resources Code, whose relevance to the parental notification context is neither apparent nor explained. *See Doe 3*, 19 S.W.3d at 304 (Gonzales, J., concurring in the judgment) (arguing that "emotional abuse contemplates unreasonable conduct causing serious emotional injury" (citing TEX. HUM. RES. CODE § 48.3002(2) (2000))). Another group of judges declined to identify any sort of statutory tether for their favored definition, and proposed simply that "abuse is abuse." *See id.* at 307 (Enoch, J., concurring and dissenting).

[48] TEX. FAM. CODE § 261.001(1)(A) (2000) (emphasis added); *see also id.* § 261.001(1)(B) (providing that "abuse" includes "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning").

[49] Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).

[50] Stenberg v. Carhart, 530 U.S. 914, 944 (2000) (citing Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995)).

[51] *Doe 3*, 19 S.W.3d at 319 (Owen, J., dissenting); *see also id.* (urging "[d]eference to the Legislature's definition of emotional abuse").

[52] *Id.* at 320.

> the arm of her child so that the father could have sex with that child without fear of pregnancy.[53]

Two days later, another member cited Representative Giddings' example as evidence of the need for a judicial bypass provision: "Look, the parent is abusive, the parent, in Ms. Giddings' case is selling the child, we need a judicial bypass."[54] And Senator Mario Gallegos repeatedly expressed concern about parents who would kill their daughters, or injure them so severely that they required hospitalization, after learning that they were pregnant.[55]

Thus Justice Owen's conclusion that Jane Doe 3 had not established that she could be "abused" hardly reflects "a lack of compassion for victims of abuse."[56] In fact, the girl in that case conceded that she had never been abused either physically or emotionally, and that she had no idea how her father would react to the news of her pregnancy.[57] Justice Owen therefore concluded that the girl's fears about her father's temper simply did not rise to the level of severity the Legislature had in mind when it created an exception for girls who may suffer "observable and material" abuse that would "impair the child's growth, development, or psychological functioning."[58]

IV. Upholding the Prerogatives of Trial Courts: *Doe 1(II)*

Justice Owen's dissent in *In re Jane Doe* ("*Doe 1(II)*")[59] indicates that she not only respects the institutional prerogatives of the legislature and of superior courts. She also refuses to interfere with the unique fact-finding function of trial courts. Unlike courts of appeals, which typically resolve pure questions of law, trial courts have the additional responsibility of determining what took place as a factual matter. Appellate courts are loath to interfere with this fact-finding function, because trial judges are better equipped to observe the girl's maturity and assess the demeanor and credibility of witnesses than are appellate judges, who merely review a paper record.[60] In *Doe 1(II)*, the majority held that Jane Doe 1—whose case had returned to the Court after the initial

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[53] *See* House Debate on Committee Substitute Senate Bill 30, 76th Leg., tape 147, side A (Tex. May 19, 1999) (statement of Rep. Giddings).
[54] *See id.* tape 158, side B (May 21, 1999) (statement of Rep. Clark).
[55] *See, e.g.*, Hearings on Senate Bill 30 Before the Senate Human Services Comm., 76th Leg., tape 1, at 22; tape 2, at 14; tape 2, at 25 (Mar. 10, 1999) (statement of Sen. Gallegos).
[56] *NAF Report* at 9.
[57] Jane Doe 3 testified as follows before the trial court:

> Q Has your dad ever physically abused you?
> A Me, no.
> ***
> Q Don't you think he's going to be even more upset when he finds out that this occurred without his knowledge?
> A I guess. I don't know.

See Doe 3, 19 S.W.3d at 312 (Hecht, J., dissenting).
[58] *See* TEX. FAM. CODE § 261.001(1)(A) (2000).
[59] 19 S.W.3d 346 (Tex. 2000).
[60] *See, e.g.*, Taylor v. Meek, 276 S.W.2d 787, 790 (Tex. 1955).

remand—had established that she was "mature and sufficiently well informed" to have an abortion without telling her parents. Justice Owen dissented, criticizing the majority for itself evaluating the evidence before the trial court, rather than following the customary practice of deferring to that court's factual findings.

According to Justice Owen, the majority "has usurped the role of the trial court, reweighed the evidence, and drawn its own conclusion"—a practice that was contrary to "more than fifty years of precedent regarding appellate review of a trial court's factual findings."[61] According to well-settled Texas law, the Texas Supreme Court may disregard a trial court's factual findings only if there is "no evidence" in the record to support them. In making that determination, the Court is "required to determine whether the proffered evidence as a whole rises to the level that would enable reasonable and fair-minded people to differ in their conclusions."[62] Ultimately, the Court cannot disturb a trial judge's findings unless *no reasonable person* could have reached the same conclusion.[63] Justice Owen's commitment to upholding the powers of the trial courts—and not any hostility to the rights of minors—is what informs her decisions.

Although Justice Owen acknowledged that it was "a close case,"[64] she concluded that the appellate record contained enough evidence to support the trial court's finding that Jane Doe 1 was not well enough informed to have an abortion without involving one of her parents in the decision. For instance, the girl gave little indication that she had considered the alternatives to abortion, such as giving the infant up for adoption or keeping it. Jane Doe 1 did not know that adoptive parents are thoroughly screened before and after a child is placed with them, and had not considered whether her parents would help, financially or otherwise, raise the child.[65] It must be stressed that Justice Owen did not *herself* conclude that the girl was not sufficiently well informed; rather, Justice Owen concluded that *evidence supported the trial court's finding* that the girl was not sufficiently well informed:

> The question in this case is not whether this Court would have ruled differently when confronted with all the evidence that the trial court heard. The question is whether legally sufficient evidence supports the trial court's judgment. The answer to this latter question is yes.[66]

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[61] *Doe 1(II)*, 19 S.W.3d at 376, 377 (Owen, J., dissenting); *see also id.* at 383 ("Longstanding principles of appellate review and our Texas Constitution do not permit this Court to substitute its judgment for that of the trial court and or [sic] to ignore the evidence, as it has done.").

[62] Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24 (Tex. 1994); *see also* Harbin v. Seale, 461 S.W.2d 591, 592 (Tex.1970); Burt v. Lochausen, 249 S.W.2d 194, 199 (1952).

[63] *See, e.g.*, *Moriel*, 879 S.W.2d at 25 ("[T]he court must be persuaded that reasonable minds could not differ on the matter . . . ." (citation omitted)); *id.* ("The rule as generally stated is that if reasonable minds cannot differ from the conclusion that the evidence lacks probative force it will be held to be the legal equivalent of no evidence." (citation omitted)).

[64] *Doe 1(II)*, 19 S.W.3d at 381 (Owen, J., dissenting).

[65] *See id.* at 382-83.

[66] *Id.* at 383.

Justice Owen further faulted the majority for failing to defer to the trial court's implicit factual finding that the girl was not sufficiently "mature" to have an abortion without telling her parents—the other element a girl must prove before she can invoke the "mature and sufficiently well informed" exception. Although the trial court found, as a factual matter, that the girl was not "well informed," it made no explicit finding as to whether she was "mature." The majority therefore held that it could presume that the minor was mature enough to have an abortion without parental involvement.[67]

In fact, under well-settled Texas law, when a trial court issues factual findings, appellate courts are required to presume that there is evidence to support "not only the express findings . . . but also any omitted findings which are necessary to support the judgment."[68] As such, the Supreme Court could not presume that the girl was mature unless, based on the evidence before the trial court, *no reasonable person* could have reached the opposite conclusion.

As was the case with the "well informed" prong, Justice Owen concluded that the record contained enough evidence to support the trial judge's failure to find that the girl was mature. In particular, there was evidence that the girl's reason for not wanting her parents to know about her intent to have an abortion was her fear that they would stop paying for her automobile and her car insurance.[69] Again, Justice Owen did not *herself* make a finding that the girl was not mature, nor did she suggest that the girl's attempt to obtain a judicial bypass was itself evidence of a lack of maturity.[70] She simply deferred to the trial court's implicit finding—for which the record contained some supporting evidence—that the girl was not mature: given the evidence in the record, "[t]he trial court could reasonably find that Doe was not mature enough to make the abortion decision without telling one of her parents."[71]

Justice Owen also criticized the procedurally irregular manner in which the majority decided the case. After the initial remand of February 25, 2000—in which Justice Owen concurred—Jane Doe 1's application for a judicial bypass was denied by the trial and appellate courts. On March 10, 2000, the Supreme Court issued an order, without opinion, approving the girl's request to have an abortion without telling her parents.[72] The Court did not explain its reasons for denying parental notification until June 22, 2000, over three months later. Justice Owen rejected the majority's claim that an expedited ruling would enable the girl to have a "vacuum aspiration" or "suction curettage" abortion, a less intrusive procedure that, according to Planned Parenthood,

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[67] *See id.* at 357-58.
[68] Wisdom v. Smith, 209 S.W.2d 164, 166-67 (Tex. 1948); *see also* Cates v. Clark, 33 S.W.2d 1065, 1066 (Tex. 1931) (invoking the "well-recognized rule of law" that appellate courts must presume that all facts were found in support of a trial court's judgment, when the trial court has issued findings of fact and evidence in the record supports the judgment).
[69] *Doe 1(II)*, 19 S.W.3d at 381 (Owen, J., dissenting).
[70] *NAF Report* at 6.
[71] *Doe 1(II)*, 19 S.W.3d at 381 (Owen, J., dissenting).
[72] *See In re Jane Doe 1*, 19 S.W.3d 300 (Tex. 2000).

can be performed until the end of the thirteenth week of pregnancy.[73] On the date the Court issued its opinionless order, Jane Doe 1 was already into her fifteenth week of pregnancy. The thirteen-week deadline had passed some two weeks prior, and the girl was no longer eligible for a vacuum aspiration or suction curettage abortion.[74]

Nor was there any indication that the girl sought an immediate ruling from the Supreme Court. She never indicated to the Court that a delay would prevent her from undergoing a particular type of abortion procedure, or otherwise would risk damaging her health. In fact, she requested and was granted a seven-day continuance by the court of appeals.[75] The girl's notice of appeal to the Supreme Court did state "ATTENTION CLERK: PLEASE EXPEDITE"—but that language appears on the standard notice of appeal form, promulgated by the Supreme Court itself, used in *all* parental notification cases.[76]

V. Respecting the Legal Rights of Parents: *Doe 4(I)*

Justice Owen's dissent in *In re Jane Doe 4* ("*Doe 4(I)*")[77] demonstrates her respect for parents' right under the law to decide how to best bring up their children. In *Doe 4(I)*, the majority concluded that a seventeen-year-old girl was entitled to another opportunity to attempt to prove that having an abortion without telling her parents was in her "best interest." Some evidence in the record indicated that the girl's parents might stop supporting her financially if they learned that she had become pregnant. As the majority recognized, however, the girl's testimony "largely consisted of monosyllabic responses to leading questions."[78]

In dissent, Justice Owen denied that "this Court has the authority, statutory or otherwise, to decide that parents will not be permitted to exercise their right to withhold support from their children when those children become adults in the eyes of the law."[79] She repeatedly expressed her "fervent hope that no matter what the transgressions of the child have been, no parent would sever all contact with an adult child."[80] But parents have no legal obligation under Texas law to support their children once they

[73] According to the Planned Parenthood pamphlet submitted to the Supreme Court as part of the record, vacuum aspiration or suction curettage is available "through the end of the 13th week of pregnancy." *Quoted in Doe 1(II)*, 19 S.W.3d at 378 (Owen, J., dissenting).
[74] The girl testified that a February 19 sonogram revealed that she had been pregnant for eleven weeks and one day. *See id.* As such, she completed her thirteenth week of pregnancy—and hence her eligibility for vacuum aspiration or suction curettage—on March 3. By March 10, the date of the Court's opinionless decision, the girl had been pregnant for fully fourteen weeks, and had entered her fifteenth week.
[75] *See id.*
[76] *See id.* at 377; *see also id.* at 370 & n.24 (Hecht, J., dissenting) (citing PARENTAL NOTIFICATION R., Forms 3A & 4A (Tex. 2000)).
[77] 19 S.W.3d 322 (Tex. 2000).
[78] *Id.* at 323-24.
[79] *Id.* at 334 (Owen, J., dissenting).
[80] *Id.*; *see also id.* at 335 ("I would hope that parents continue to provide love and support to their children beyond the age of eighteen and to provide funds for an education beyond high school if the parents are able to do so . . . .").

turn 18 and graduate from high school[81]—which the girl would soon do. Justice Owen therefore concluded that the girl would not be entitled to a "best interest" exception if her parents would withhold financial support after she reached the age of majority. (By negative implication, Justice Owen would hold that a girl is entitled to an abortion without notification if her parents would stop supporting her before she turned 18.) According to Justice Owen, "it is not the business of courts to interject their own values into the lives of the citizens of this State."[82] Instead, "[w]hether parents do or do not provide support for their children who are considered adults in the eyes of the law is a parental call, not a call for the courts in determining the best interests of a child."[83]

Nor is it the case, as an interest group now claims, that in a later stage of the same litigation Justice Owen concluded that the girl's medical condition was not relevant to whether she was entitled to have an abortion without notifying her parents. In *In re Jane Doe 4* ("*Doe 4(II)*"),[84] the Court unanimously held that the girl had not proven that she was "mature and sufficiently well informed," principally because she could not explain how her medical condition made abortion a riskier option for her. Because of the girl's lack of understanding, the Court concluded, it was best to involve her parents in the decision.[85] Justice Owen joined an opinion concurring in the judgment, which argued that the girl should be required to tell her parents that she wanted an abortion, not because she did not understand the health risks in particular, but because as a general matter she had shown "no depth of understanding that a minor should be expected to have before making the 'grave and indelible' decision to have an abortion."[86]

This is hardly evidence of "Owen's apparent stance that even health risks should not be taken as seriously by the courts."[87] On the contrary, the majority opinion concluded that the girl was not entitled to a judicial bypass on the ground that she lacked knowledge about how her medical condition would affect her abortion.[88] The concurrence Justice Owen joined quite expressly *denied* that the girl's apparent confusion about her medical condition was the reason she was not entitled to keep the abortion secret from her parents: "the deficit in Doe's testimony is not that she could not explain whether and how her prior treatment for a medical condition would affect her having an abortion."[89]

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[81] *See* TEX. FAM. CODE § 151.003(b) (2000).
[82] *Doe 4(I)*, 19 S.W.3d at 334 (Owen, J., dissenting).
[83] *Id.* at 335.
[84] 19 S.W.3d 337 (Tex. 2000).
[85] *See id.* at 339.
[86] *Id.* at 342 (Hecht, J., concurring) (quoting Bellotti v. Baird, 443 U.S. 622, 642 (1979) ("*Bellotti II*")).
[87] *NAF Report* at 9.
[88] *See Doe 4(II)*, 19 S.W.3d at 340 (reasoning that "if she does have a current health risk, then her physical needs and the potential dangers may way in favor of involving her parents in her decision").
[89] *Id.* at 342 (Hecht, J., concurring).

VI. A Final Note on "Unconscionable Judicial Activism"

The members of the Texas legal community know Justice Owen to be a jurist of the highest integrity, one who is committed to following the law no matter where it leads, and subordinating her personal policy preferences, whatever they may be, to the expressed intent of the legislature. In fact, every major newspaper in Texas endorsed Justice Owen during her reelection campaign in 2000. With respect to her nomination to the Fifth Circuit, the *Dallas Morning News* editorialized that "Justice Owen's lifelong record is one of accomplishment and integrity. She is one of the few judicial nominees to receive a unanimous 'well qualified' rating from the American Bar Association."[90] Likewise, Texas Chief Justice Tom Phillips agreed that Justice Owen "tries to follow the legislative will in every case and apply the law, not invent it."[91] Baylor University President Herbert Reynolds—who formerly served as Chairman of the Texas Commission on Judicial Efficiency—wrote: "Based on my knowledge of Justice Owen for the past 30 years, I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals."[92]

Despite these testimonials to Justice Owen's temperance, interest groups have seized on a single sentence from Justice Gonzales's concurrence in *Doe 1(II)* in an effort to disparage her commitment to practicing judicial restraint. Justice Gonzales's concurrence must be read in the context of Justice Hecht's dissent in that same case (a dissent that Justice Owen did not join). The Hecht dissent expressly accused the members in the majority—including Justice Gonzales, whom the dissent individually names—of reading their policy preferences into the Parental Notification Act.[93] Justice Gonzales wrote separately to deny Justice Hecht's allegation; that is, to dispute the "suggest[ion] that the Court's decisions are motivated by personal ideology. *See* 19 S.W.3d 367 (Hecht, J., dissenting)."[94] Justice Gonzales further explained that he disputed "Justice Hecht['s] charge[ ] that our decision demonstrates the Court's determination to construe the Parental Notification Act as the Court believes the Act should be construed and not as the Legislature intended."[95]

According to Justice Gonzales, the dispute among the Justices reflected no more than disagreement over the proper way to interpret a statute. He explained that "every member of this Court agrees that the duty of a judge is to follow the law as written by

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[90] Editorial, *Stop the Payback; Senate Needs to Move on Judicial Nominees*, DALLAS MORNING NEWS, Feb. 10, 2002, at 2J.

[91] Mary Flood, *Judicial Nominee Takes Issue with Conservative Label*, HOUSTON CHRON., May 10, 2001, at A37.

[92] Letter from Herbert H. Reynolds, Baylor University President and Chancellor Emeritus, to All Members of the Senate Judiciary Committee (March 25, 2002).

[93] *See In re Jane Doe*, 19 S.W.3d 346, 367 (Tex. 2000) (Hecht, J., dissenting) ("*Doe 1(II)*"):

> The Court adamantly refuses to listen to all reason, and the only plausible explanation is that the Justices who comprise the majority—Chief Justice Phillips, Justice Enoch, Justice Baker, Justice Hankinson, Justice O'Neill, and Justice Gonzales—have resolved to impair the Legislature's purposes in passing the Parental Notification Act, which were to reduce teenage abortions and increase parental involvement in their children's decisions.

[94] *Id.* at 365 (Gonzales, J., dissenting).

[95] *Id.* at 366.

the Legislature. This case is no different."[96] Justice Gonzales then explained that it was his duty to follow the law as he interpreted it, regardless of what his policy views may or may not have been, and regardless of how other Justices interpreted the Act:

> [T]o construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism. As a judge, I hold the rights of parents to protect and guide the education, safety, health, and development of their children as one of the most important rights in our society. But I cannot rewrite the statute to make parental rights absolute, or virtually absolute, particularly when, as here, the Legislature has elected not to do so. . . .
>
> While the ramifications of such a law and the results of the Court's decision here may be *personally troubling to me* as a parent, it is *my obligation* as a judge impartially to apply the laws of this state without imposing *my moral view* on the decisions of the Legislature. Justice Hecht charges that our decision demonstrates the Court's determination to construe the Parental Notification Act as the Court believes the Act should be construed and not as the Legislature intended. I respectfully disagree. This decision demonstrates the Court's determination to see to it that we discharge our responsibilities as judges, and that personal ideology is subordinated to the public will that is reflected in the words of the Parental Notification Act, including the provisions allowing a judicial bypass.[97]

The interest groups wrongly interpret the first sentence quoted above to mean that Justice Gonzales was charging other members of the Court with engaging in inappropriate judicial activism. But that reading ignores the subsequent sentences, as well as the broader context of Justice Hecht's accusations against the majority of the Court for engaging in judicial activism. Rightly read, Justice Gonzales's concurrence does not charge any other Justice with being judicial activists; it simply denies Justice Hecht's allegations that the majority was interpreting the Parental Notification Act in light of their political or ideological commitments.

Justice Owen's voting record and opinions in the parental notification cases defy easy categorization. Justice Owen voted to allow abortions without notification more than some of her colleagues, and less than others.[98] The record therefore belies any

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[96] *Id.* at 365.

[97] *Id.* at 366 (emphasis added).

[98] In the twelve rulings the Texas Supreme Court has issued as of July 9, 2002, Justice Owen was with the majority nine times, and recorded a dissent just three times. (By way of contrast, Justice Hecht joined the majority in seven cases, and recorded a dissent in five.) Justice Owen joined the majority in *Doe 1(I)*, *Doe 2*, *Doe 4(II)*, *Doe 5*, *Doe 6*, *Doe 7*, *Doe 8*, *Doe 9*, and *Doe 10*. She dissented in *Doe 1(II)*, *Doe 3*, and *Doe 4(I)*. In three cases, Justice Owen joined or authored an opinion that facilitated a girl's attempt to procure an abortion without telling her parents. In nine cases, she joined or authored an opinion that required (or, in the case of a dissent, would have required) a girl to notify her parents before having an abortion. (The numbers for Justice Hecht, by contrast, are one and eleven,

assertion that she reflexively adopts any one position in parental notification cases. But more fundamentally, a Justice's "batting average" in parental notification cases is a poor indicator of his or her views on the frequency with which judicial bypasses should be granted.[99] Under Texas law, parental notification cases can be appealed to the Texas Supreme Court only when a trial court has denied a girl's request to have an abortion without telling one of her parents, and an appellate court has affirmed that denial. There is no appeal if the lower courts approve the bypass.[100] Thus, the only opportunities the Supreme Court has to consider whether to grant judicial bypass are in cases where two lower courts have already determined that the girl's parents must be notified before she can have an abortion. Put another way, the cases that reach the Texas Supreme Court are disproportionately likely to present a situation where the statute requires a girl to inform her parents that she plans to have an abortion.

VII. Conclusion

As long ago as 1835, Alexis de Tocqueville recognized the close interrelationship between American law and American politics. "Scarcely any political question arises in the United States," he wrote, "that is not resolved, sooner or later, into a judicial question."[101] But the fact that judges decide politically charged issues does not mean that they should decide them politically. Instead, consistent with the rule of law and the limited role of the judiciary in a democratic system of government, judges must refrain from reading their personal beliefs into the law, and instead must give effect to the intent of the lawgiver.

Justice Pricilla Owen's demonstrated commitment to doing just that reveals her to be the sort of jurist the American people have come to expect should occupy the federal bench. She has balanced the competing interests of pro-life activists and abortion providers, refusing to side reflexively with either group of litigants, and rejecting the proposition that the First Amendment is an excuse for unlawful protests. She has interpreted the Texas Parental Notification Act consistently with the U.S. Supreme Court's pronouncements on whether an underage girl is "mature" and "well informed," and whether a girl's plan to have an abortion without telling her parents is in her "best interest." She has interpreted "abuse" in the Parental Notification Act consistently with that term's definition in a similar Texas statute, refusing to manufacture a definition herself. She has deferred to the factual findings of the trial courts, which are in a unique position to assess the demeanor and credibility of witnesses, and has denied that appellate courts can reweigh the evidence themselves.

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respectively.) Justice Owen voted to facilitate abortion without notification in *Doe 1(I)*, *Doe 2*, and *Doe 10*. She voted to require notification in *Doe 1(II)*, *Doe 3*, *Doe 4(I)*, *Doe 4(II)*, *Doe 5*, *Doe 6*, *Doe 7*, *Doe 8*, and *Doe 9*.

[99] It goes without saying that the "batting average" is even worse evidence of members' views about abortion generally, since the parental notification cases involve no question about whether the Constitution guarantees the right to abortion, or the scope of that right.

[100] *See* TEX. FAM. CODE § 33.004 (2000).

[101] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley trans., Alfred A. Knopf 1994) (1835).

Any one of these rulings, standing alone, would be compelling evidence of the author's understanding of the modest powers of the judiciary. And any one of these jurisprudential pillars—dedication to Supreme Court precedent, deference to the legislature, respect for the trial courts' factual findings—would qualify the author for a seat on the federal bench. Fortunately for the people of the Fifth Circuit, Justice Owen is committed to them all. I enthusiastically support Justice Owen's nomination to the Fifth Circuit, and urge the Senate to consider and approve her without additional delay.

Statement of
The Honorable Orrin Hatch
United States Senator
Utah

July 23, 2002

PRINTABLE VERSION

I want to welcome all the nominees today, as well as the Members of Congress who have come to testify on their behalf, and I ask that I be able to put statements for Misters Timothy Corrigan and Jose Martinez into the record. I look forward to your testimony and final vote by the Senate.

I would like especially to welcome Justice Priscilla Owen of Texas, our lone Circuit Court nominee. I intend today to comment on Justice Owen's qualifications, and to address some of the deceptions, distortions and demagoguery orchestrated against her nomination, that we have all read in the national and local papers. I have long looked forward to this hearing, as I expect has she.

I would like first to comment on the two jingos that are being used about her record as if they had substance: namely, that Justice Owen is "conservative" and that she is "out of the mainstream." Of course, this comes from the Washington interest groups, in many cases, who think that mainstream thought is more likely found in Paris, France, than Paris, Texas.

I must admit that it's curious to hear it argued that a nominee twice elected by the people of the most populous state in the Circuit for which she is now nominated is "out of the mainstream." Texans will no doubt be entertained by whoever says that.

Listening to some of my the commentary on judges, I sometimes think that mainstream for them is a northeastern river of thought that travels through New Hampshire early and often, widens in Massachusetts, swells in Vermont, and deposits at New York City. Well, the mainstream that I know, and that most Americans can relate to, runs much broader and further than that.

The other mantra repeated by Justice Owen's detractors is that she is "conservative." I believe that the use of political or ideological labels to distinguish judicial philosophies has become highly misleading and does a disservice to the public's confidence in the independent judiciary, of which this Committee is the steward.

I endorse the words of my friend, and former Chairman, Senator Biden when he said some years ago that: "[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal, it is not about Democrat or Republican. It is about

intellectual and professional competence to serve as a member of the third co-equal branch of the Government."

I believe it is our duty to confirm judges who stand by the Constitution and the law as written, not as they would want to rewrite them. That was George Washington's first criterion for the federal bench, and it is mine. I also want common sense judges who respect American culture. I believe that is what the American people want.

I believe we do a disservice to the independence of the Judiciary by using partisan or ideological terms in referring to judges.

My reason was well stated by Senator Biden when he said that: "it is imperative [not to] compromise the public perception that judges and courts are a forum for the fair, unbiased, and impartial adjudication of disputes."

We compromise that perception, I believe, when we play partisan or ideological tricks with the judiciary. Surely, we can find other ways to raise money for campaigns and otherwise play at politics, without dragging this nation's trust in the judiciary through the mud, as some of the outside groups continue to do.

All you have to do to see my point is read two or three of the fund-raising letters that have become public over the past couple of weeks that spread mistruths and drag the judiciary branch into the mud, as many recent political campaigns increasingly find themselves.

On a lighter note, while on ideology, let me pause to point out that one of the groups deployed against Justice Owen is the Communist Party of America, but then I don't know that they have come out in favor of any of President Bush's nominees. I suspect after the fall of the Berlin Wall, they must have a lot of time on their hands these days.

Today I wish to address just why a nominee with such a stellar record, a respected judicial temperament, and as fine an intellect as Justice Owen has, -- who graduated third in her class from Baylor's law school, a great Baptist institution, when few women attended law school, let alone in the South, -- who obtained the highest score in the Texas Bar examination, -- and who has twice been elected by the people of Texas to serve on their Supreme Court, the last time with 83% of the votes and the support of every major newspaper of every political stripe, - I would like to address just why such a nominee could be here today with as much organized and untruthful opposition from the usual leftist, Washington special interest groups that we see. I will peel through what is at play for those groups. We need to expose and repel what is at play for the benefit and independence of this Committee.

And I would like to address also the reasons why I am confident that she will be confirmed notwithstanding. Not least of which is that this Committee has never voted against a Circuit nominee with the American Bar Association's unanimous rating of Awell qualified." Justice Owen has that highest of ratings.

The first reason for the organized opposition, of course, is plain. Justice Owen is from Texas, and Washington's well-paid reputation destroyers could not help but attempt to attack the widely popular President of the United States, at this particular time in an election year, by attacking the judicial nominee most familiar to him. Justice Owen, welcome to Washington.

But as I prepared more deeply for this Hearing, the second reason became apparent to me. In my [26] years on this Committee I have seen no group of judicial nominees as superb as those that President Bush has sent to us, and he has sent both Democrats and Republicans, men women, Hispanics, African Americans, and Caucasians.

In reading Justice Owen's decisions, one sees a judge working hard to get it right, -- to get at the legislature's intent and to apply binding authority and rules of judicial construction. It is apparent to me that of all the sitting judges the President has nominated, Justice Owen is the most outstanding nominee. She is, in my estimation, the best that every American, every consumer and every parent could hope for.

Her opinions, whether majority, concurrences or dissents, could be used as a law school text book that illustrates exactly how - and not what -- an appellate judge should think, how she should write, and just how she should do the people justice by effecting their will through the laws adopted by their elected legislatures. Justice Owen clearly approaches these tasks with both scholarship and mainstream American common sense. She does not substitute her views for the legislature's, which is precisely the type of judge that the Washington groups who oppose her want.

She is precisely the kind of judge that our first two presidents, George Washington and John Adams, had in mind when they agreed that the justices of the state supreme courts would provide the most learned candidates for the federal bench.

So in studying her record, the second reason for the militant and deceptive opposition to Justice Owen became quite plain to me. In this world turned upside down, simply put, she is that good.

Another reason for the opposition against Justice Owen is the most demagogic - the issue of campaign contributions and campaign finance reform. Some of her critics are even eager to tie her to the current trouble with Enron. Well, she clearly has nothing to do with that. Neither Enron nor any other corporation has donated to her campaigns -- in fact, they are forbidden by Texas law to make campaign contributions in judicial elections. Despite the politics, I am certain that Justice Owen is quite eager to address this issue fully, and being a Texas woman, I trust she will not embarrass the questioner too badly.

Not that there is a need for more questions. The Enron and campaign contributions questions were amply clarified in a letter to Chairman Leahy and the Committee dated April 5th by Alberto Gonzales. I ask, Madam Chairman, to place this and other related letters into the record. And I would place into the

record a retraction from The New York Times saying that they got their facts wrong on this Enron story. Such retractions don't come often, although the misstatement of facts by the destroyer groups do.

I also hope that Justice Owen will get a chance to address her views on election reform and judicial reform, of which she is a leading advocate in Texas. She is also a leader in Gender Bias Reform in the courts and a reformer on divorce and child support proceedings. I hope she will have an opportunity to address these matters and about her acclaimed advocacy to improve legal services and funding for the poor. All of these are aspects of her record her detractors would have us ignore - I don't know about my other colleagues, but I certainly did not read these positive attributes in those fancy documents, or should I say booklets, released over the past several weeks by the People for the American Way and their co-conspirators in the Washington special interest lobby.

I ask, Madam Chairman, to place into the record letters from leaders of the Legal Society and 14 past presidents of the Texas Bar Association, many of whom are Democrats.

The fourth reason for the opposition to Justice Owen is the most disturbing to me. For some months now, a few of my Democrat colleagues have strained to point out when they believe they are voting for judicial nominees that they believe to be pro-life. I have disputed this when they have said it because the record contains no such information of personal views from the judges we have confirmed.

Each time they assert it, my staff has scoured the transcripts of hearings and turned up nothing. What does turn up is that each time my colleagues have asserted this, they have done so only for nominees who are men.

I am afraid that the main reason Justice Owen is being opposed, is not that personal views - namely on the issue of abortion -- are being falsely ascribed to her -- they are -- but rather because she is a woman in public life who is believed to have personal views that some maintain should be unacceptable for a woman in public life to have.

Such penalization is a matter of the greatest concern to me because it represents a new glass ceiling for women jurists. And they have come too far to suffer now having their feet bound up just as they approach the tables of our high courts after long-struggling careers.

I am deeply concerned that such treatment will have a chilling effect on women jurists that will keep them from weighing in on exactly the sorts of cases that most invite their participation and their perspectives as women.

Ironically, the truth is that the cases that her detractors point to as proof of apparently unacceptable personal views are a series of fictions. This is what I mean about exposing the misstatements of the left-wing activist groups in Washington.

I will illustrate just three of these fictions.

The first sample fiction is the now often-cited comment attributed to then Texas Supreme Court Justice Alberto Gonzales, written in a case opinion, that Justice Owen's dissent signified "an unconscionable act of judicial activism." Someone should do a story about how often this little shibboleth has been repeated in the press and in several websites of the professional smear groups. I would venture that some of my colleagues have it on the first page of their briefing memos even now.

The problem with it is that it isn't true. Justice Gonzales was not referring to Justice Owen's dissent, but rather to the dissent of another colleague in the same case.

The second sample fiction is the smear group's misrepresented portrayal of a case involving buffer zones and abortion clinics. In that case, the majority of the Texas Supreme Court ruled for Planned Parenthood and affirmed a lower court's injunction that protected abortion clinics and doctor's homes and imposed 1.2 million dollars in damages against pro-life protestors. In only a few instances, the court tightened the buffer zones against protestors. Justice Owen joined the majority opinion and was excoriated by dissenting colleagues -- who were admittedly pro-life, by the way.

When describing that decision then, abortion rights leaders hailed the result as a victory for abortion rights in Texas. Planned Parenthood's lawyer said the decision "isn't a home run, it's a grand slam."

Of course, that result hasn't changed, but the characterization of it has. This is how Planned Parenthood describes this same case in their fact sheet on Justice Owen: "[Owen] supports eliminating buffer zones around reproductive health care clinics..."

In fact, her decision did exactly the opposite. And I think this Committee deserves and should demand a formal apology and full explanation.

The third and most pervasive sample fiction concerns Justice Owen's rulings in a series of Jane Doe cases which first interpreted Texas' then-new parental involvement law. The law - which I think is important to emphasize was passed by the Texas legislature (NOT Justice Owen) with bi-partisan support -- requires that an abortion clinic give notice to just one parent 48 hours prior to a minor's abortion. Unlike states with more restrictive laws such as Massachusetts, Wisconsin, and North Carolina, consent of the parent is not required in Texas. A minor may be exempted from giving such notice if they get court permission.

Since the law went into effect, over 650 notice bypasses have been requested from the courts. Of these 650 cases, only 10 have had facts so difficult that two lower courts denied a notice bypass, -- only 10 have risen to the Texas Supreme Court.

Justice Owen's detractors would have us believe that in these cases, she would

have applied standards of her own choosing. Ironically, in each and every example they cite, whether concurring with the majority or dissenting, Justice Owen was applying not her own standards but the standards enunciated in the Roe v. Wade line of decisions of the United States Supreme Court, which she followed and recognized as authority.

For example, detractors take pains to tell us that Justice Owen would require that to be sufficiently informed to get an abortion without a parent's knowledge, that the minor show that they are being counseled on religious considerations. They appear to think this is nothing more than opposition to abortion rights. They are so bothered with this religious language that various documents produced by the abortion industry lobby italicize the word religious. But this standard is not Justice Owen's invention, but rather the words of the Supreme Court's pro-choice decision in Casey. Should she not follow one Supreme Court decision, but be required to follow another? Is that we want our judges to do - pick and choose which decisions to follow? That appears to be the type of activist judge these groups want, and this Committee should resist all such attempts.

The truth is that rather than altering the Texas law, Justice Owen was trying to effect the legislator's intent. No better evidence of this is the letter of the pro-choice woman Texas Senator stating her "unequivocal" support of Justice Owen. Senator Shapiro says of Justice Owen: "Her opinions interpreting the Texas [parental involvement law] serve as prime example of her judicial restraint." I understand why the Washington left-wing groups don't like that in a judge, but this Committee should applaud and commend such restraint and temperament.

The truth is that, rather than being an activist foe of Roe, Justice Owen repeatedly cites and follows Roe and its progeny as authority. Compare this to Justice Ruth Bader Ginsburg who wrote in 1985 that the Roe v. Wade decision represented "heavy handed judicial intervention" that was "difficult to justify."

In relation to this, I would like briefly to comment on the mounting offensive of some to change the rules of judicial confirmation by asking nominees to share personal views or to ensure that nominees share the personal views of the Senator on certain cases.

To illustrate my view, I'll tell you that many people have recently called on this Committee to question nominees as to their views on the pledge of allegiance case. My full-throated answer to this is no, -- as much as I think that that case was wrongly decided. I also happen to think that the recent School Voucher case is the most important civil rights decision since Brown but I am not going to ask people what they think about that case either.

Such questions threaten the heart of the independent judiciary and attempt to accomplish by hidden indirection what Senators cannot do openly by constitutional amendment. It is an attempt to make the courts a mere extension of the Congress.

I speak against this practice in the strongest terms, and, in my view, any nominee who answers such questions would not be fit for judicial office and would not

have my vote.

The truth is that there are many who, like Justice Ginsburg, think that cases like Griswold or Roe were wrongly decided as a constitutional matter even if they agree with the policy result, -- just as the great liberal Justice Hugo Black did in his dissent in Griswold. A few weeks ago we heard testimony that Chief Justice Warren thought Brown v. Board of Education was his worst ruling as matter of constitutional law, but not his least necessary.

Again, I welcome Justice Priscilla Owen. Considering the opposition mounted so unfairly against you, I have to tell you that today you may be the bravest woman in America. I hope that there are young women watching you right now - you are an excellent role model for anyone and especially young women.

Now, some of Justice Owen's detractors have made much about the fact that she is not afraid to dissent. Of course, they fail to mention dissents like her opinion in Hyundai Motor v Alvarado, in which Justice Owen's reasoning was later adopted by the United States Supreme Court on the same difficult issue of law.

They also overlooked her dissent in a repressed memory/sexual abuse case where she took the majority to task with these words: "This is reminiscent of the days when the crime of rape went unpunished unless corroborating evidence was available. The Court's opinion reflects the attitudes reflected in that era."

Perhaps, Madam Chairman, they thought that dissent reflected too well the perspective of a woman to point out to Senators like you.

Despite deceptive opposition I think that Justice Owen should be confirmed. First, because I believe that colleagues like you, Madam Chairman will be fair. You often remind us, in your modesty, that you are not a lawyer, but I think that is among the reasons that your common sense often shines through on this Committee.

I also believe my Democrat colleagues will be led by the time-tested standards well-stated by Senator Biden, and look again to qualifications and judicial temperament, not base politics. Whether the Biden standard will survive past our time, will be tested now.

If we fail the test we will breach our responsibility as auditors of the Washington special interest groups and the Judiciary's stewards on behalf of all the people, and not just some.

Thank you, Madam Chairman. I look forward to the testimonies today.

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PRINTER FRIENDLY VERSION

John L. Hill
JP Morgan Chase Tower
600 Travis Street, Suite 3400
Houston, Texas 77002
(713) 226-1230

July 19, 2002

Via Facsimile (202) 224-9516
and First Class Mail

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D. C. 20510

Dear Chairman

President Bush honored impeccable integrity, character, and scholarship when he nominated to the U.S. Court of Appeals for the Fifth Circuit a leading voice for reform in the Texas judiciary: Priscilla Owen.

I came to know Justice Owen several years ago during her service on the Texas Supreme Court, where I had previously served as Chief Justice. Then and now, Justice Owen has distinguished herself as a forceful advocate for reforming Texas's system for selecting judges. Under the state Constitution, for more than 125 years, Texas has selected its judges through contested elections, and the law therefore permits judicial candidates to receive campaign contributions. The system has positive aspects, but one of the downsides is that it invites speculation about whether judges should preside in cases where their contributors appear as attorneys or parties. That's why Justice Owen tirelessly has fought to minimize the influence of campaign contributions in judicial elections.

Reflecting her early commitment to the integrity of the courts, Justice Owen signed a judicial reform pledge during her first campaign in 1994. She has championed several proposed constitutional amendments, including an option for judges to run in non-partisan retention elections. She has written to members of the bench and bar, urging them to back reform. She has argued that the judiciary should be above the influence of partisan politics. And in a unique combination of symbolism and substance, Justice Owen *returned* over a third of her campaign contributions after not drawing a Democrat or Republican opponent during her 2000 re-election campaign.

Justice Owen and I would be the first to admit that the Texas judicial-selection system is in need of reform. But some special interest groups confuse flaws in our system with flaws in our judges. These groups insist on denouncing individual members of the judiciary, when reform of the laws they dislike can only come from amending the Texas Constitution, which Justice Owen strongly supports.

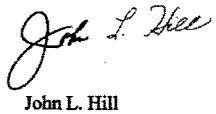
Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups make no effort to assess whether her decisions are legally sound, and instead are content to fall back on the canard of an "appearance of impropriety." Nor have they so much as acknowledged Justice Owen's unswerving leadership in seeking reform—reforms of which they presumably approve. The groups lack credibility when they attack Justice Owen for participating in a system that has been in place longer than a century, is mandated by the Texas Constitution, and is not within her ability to change by herself. I know Texas politics and can clearly say that these assaults on Justice Owen's record are false, misleading, and deliberate distortions.

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. I echo the American Bar Association's *unanimous* conclusion that she is "well qualified" for the federal bench—the highest rating possible. United States Senators from both sides of the aisle have called the ABA's rating the "gold standard" of a nominee's fitness for the federal bench, and I agree with them. I know personally just how impeccable Justice Owen's credentials are.

After graduating in 1977 from Baylor Law School with honors at the top of her class, Justice Owen earned the highest score on the Texas bar exam. Her academic excellence foreshadowed the exceptional career to follow. Elected twice by the people of Texas, Justice Owen has served with distinction on the Texas Supreme Court for more than seven years. In 2000, every major Texas newspaper endorsed Justice Owen during her successful re-election bid.

President Bush and both Senators from Texas strongly support Justice Owen. I join them and many, many others – of all political stripes – in calling on the U.S. Senate to give this intelligent, ethical, and gifted woman a fair hearing and swift Senate confirmation.

Very truly yours,



John L. Hill

JLH:br

cc: ***Via Facsimile (202) 228-1698***
and First Class Mail
The Honorable Orrin Hatch
United States Senate
152 Dirksen, Senate Office Building
Washington, D. C. 20510

United States Senate

WASHINGTON, DC 20510

October 12, 2001

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
SD-224
Washington, DC 20510

Dear Mr. Chairman:

We write to urge you to take swift and positive action on the pending nomination of Justice Priscilla Richman Owen to the U.S. Fifth Circuit Court of Appeals.

Justice Owen is eminently qualified to serve on the Fifth Circuit bench, having served with distinction since 1995 as a member of the Supreme Court of Texas and as an accomplished attorney in private practice for almost 20 years prior to that time. Her academic and scholarly experience is also exceptional. In fact, Justice Owen has the rather rare distinction of having been unanimously rated as "well qualified" by the American Bar Association.

Justice Owen's nomination has been pending since May 9 of this year and she has yet to receive a hearing. We therefore respectfully ask that you lead the Judiciary Committee to favorable action on Justice Owen's nomination in time for full Senate consideration this year.

We look forward to continuing to work with you and the other members of the committee to ensure that outstanding candidates like Justice Owen are carefully and efficiently considered for appointment to the federal bench. Thank you.

Sincerely,

Kay Bailey Hutchison

Phil Gramm

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-4304

March 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am dismayed to see the Wall Street Journal report today that some members of the Senate may "target" the nomination of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. I urge that the Committee on the Judiciary take swift and positive action on her nomination, particularly in light of the fact that Judge Priscilla Owen was among the group of original 11 federal judicial nominees announced by President Bush on May 9, 2001.

Justice Owen's stellar academic achievements and professional experience are remarkable. She earned a cum laude bachelor of arts degree from Baylor University and graduated cum laude from Baylor Law School in 1977. Thereafter, she earned the highest score on the Texas Bar Exam. Prior to her election to the Supreme Court of Texas in 1994, she was a partner in the Texas law firm of Andrews & Kurth LLP where she practiced commercial litigation for seventeen years.

Justice Owen has delivered exemplary service on the Texas Supreme Court, as affirmed by her receiving positive endorsements from every major newspaper in Texas during her successful re-election bid in 2000. Justice Owen enjoys bipartisan support and, in connection with her nomination, the American Bar Association Standing Committee on the Federal Judiciary has *unanimously* voted Justice Owen "Well Qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

I thank you and look forward to continuing to work with you and the other members of the Committee to ensure that Justice Owen is carefully and efficiently considered for appointment to the federal bench.

Sincerely,

Kay

Kay Bailey Hutchison

I hope you will give her a fair hearing soon.

Web=http://hutchison.senate.gov

BAKER
&
HOSTETLER LLP
COUNSELLORS AT LAW
(Writer's Direct Dial 713-646-1338)
1000 LOUISIANA, SUITE 2000 • HOUSTON, TEXAS 77002-5009 • (713) 751-1600 • FAX (713) 751-1717

23 May, 2001

President George W. Bush
The White House
Washington, D.C.

Re: The Nomination of Justice Priscilla Owen of the Texas Supreme Court to the 5th United States Court of Appeals

Dear Mr. President:

I was very pleased to read that you have nominated Justice Owen to fill the vacancy on the 5th Circuit Court of Appeals. In her service on the Texas Supreme Court, Justice Owen has authored many significant decisions, including at least one case that has saved untold litigation expenses by clarifying issues regarding the Texas statutes of limitations. See *HECI v. Neel*, 982 S.W.2d 881 (Tex. 1998).

Justice Owen and I were adversaries for a number of years in an oil and gas case involving a claim for several million dollars. Throughout the extensive discovery and pre-trial process, as well as during the trial, Justice Owen conducted herself in an exemplary fashion. Always knowledgeable of the facts and the law, she also exercised the cooperation and professionalism in her conduct and respect for witnesses, parties, opposing counsel, and the Court that is so often missing from advocates.

In summary, you have made an excellent choice and it is the sincere hope of many of my fellow trial lawyers in Texas that Justice Owen be promptly confirmed so that she can assume her position on the 5th Circuit. The only objection I can voice is the loss Texas will suffer on our Supreme Court of a very knowledgeable, dedicated jurist.

Most Respectfully,

Jon David Ivey
of Baker & Hostetler

cc: Senator Kay Bailey Hutchison
Senator Phil Gramm

HUGHES | LUCE LLP
ATTORNEYS AND COUNSELORS

1717 Main Street, Suite 2800
Dallas, TX 75201
214 939 5500
214 939 6100 fax

hughesluce.com

Darrell E. Jordan
214 939 5856
jordand@hughesluce.com

July 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

As past presidents of the State Bar of Texas, we join in this letter to strongly recommend an affirmative vote by the Judiciary Committee and confirmation by the full Senate for Justice Priscilla Owen, nominee to the United States Court of Appeals for the Fifth Circuit.

Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. Based on her superb integrity, competence and judicial temperament, Justice Owen earned her *Well Qualified* rating unanimously from the American Bar Association Standing Committee on the Federal Judiciary – the highest rating possible. A fair and bipartisan review of Justice Owen's qualifications by the Judiciary Committee certainly would reach the same conclusion.

Justice Owen's stellar academic achievements include graduating *cum laude* from both Baylor University and Baylor Law School, thereafter earning the highest score on the Texas Bar Exam in November 1977. Her career accomplishments are also remarkable. Prior to her election to the Supreme Court of Texas in 1994, for 17 years she practiced law specializing in commercial litigation in both the federal and state courts. Since January 1995, Justice Owen has delivered exemplary service on the Texas Supreme Court, as reflected by her receiving endorsements from every major newspaper in Texas during her successful re-election bid in 2000.

The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of *pro bono* service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor.

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Justice Owen also has been a long-time advocate for an updated and reformed system of judicial selection in Texas. Seeking to remove any perception of a threat to judicial impartiality, Justice Owen has encouraged the reform debate and suggested positive changes that would enhance and improve our state judicial branch of government.

While the Fifth Circuit has one of the highest per judge caseloads of any circuit in the country, there are presently two vacancies on the Fifth Circuit bench. Both vacancies have been declared "judicial emergencies" by the Administrative Office of the U. S. Courts. Justice Owen's service on the Fifth Circuit is critically important to the administration of justice.

Given her extraordinary legal skills and record of service in Texas, Justice Owen deserves prompt and favorable consideration by the Judiciary Committee. We thank you and look forward to Justice Owen's swift approval.

Sincerely,

Darrell E. Jordan

On behalf of former Presidents of the State Bar of Texas

Blake Tartt	Jim D. Bowmer
James B. Sales	Travis D. Shelton
Hon. Tom B. Ramey, Jr.	M. Colleen McHugh
Lonny D. Morrison	Lynne Liberato
Charles R. Dunn	Gibson Gayle, Jr.
Richard Pena	David J. Beck
Charles L. Smith	Cullen Smith

cc: The Honorable Orrin G. Hatch
Office of Legal Policy U. S. Justice Department

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

OPENING STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING FOR PRISCILLA OWEN
NOMINEE TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
July 23, 2002

I begin by thanking Senator Feinstein for chairing today's hearing and all Senators who have agreed to chair nominations hearings since the change in majority last summer. Today we hold a hearing to consider the 79th, 80th and 81st judicial nominees for whom this Committee has held hearings since last July 11. Judge Owen is the 17th Court of Appeals nominee for whom we have held hearings in less than 13 months. The fact is that we have held more hearings for more circuit court nominees than in any of the six and one-half years in which Republicans controlled the Committee before the change in majority last summer.

During our first year in the majority, we held twice as many hearings for President Bush's Courts of Appeals nominees as were held in the first year of the Reagan Administration, when the Senate was controlled by Republicans, and five times as many as in the first year of the Clinton Administration, when the Senate was controlled by Democrats. Those are the facts.

Under Democratic leadership, this Committee has also voted on more judicial nominees, 75, than in any of the six and one-half years of Republican control that preceded the change in majority. We voted on twice as many circuit court nominees, 15, as the Republican majority averaged in the years they were in control. In fact, this last year we voted on more nominees than were voted on in 1999 and 2000 combined and on more circuit court nominees than Republicans voted on in 1996 and 1997 combined.

We have achieved what we said we would by treating President Bush's nominees more fairly and more expeditiously than President Clinton's nominees were treated. By many measures the Committee has achieved almost twice as much this last year as Republicans averaged during their years in control.

In the six and one-half year period of Republican control before the change in majority last summer, vacancies on the Courts of Appeals more than doubled from 16 to 33 and overall vacancies rose from 63 to 110. We have reversed those trends.

Today, the Committee proceeds with a hearing on the nomination of Priscilla Owen to the United Court of Appeals for the Fifth Circuit, Timothy Corrigan for the District Court for the Middle District of Florida, and Jose Martinez for the District Court for the

Southern District of Florida. I welcome the nominees, their families and their friends, and all those interested in these important matters.

Judge Owen has been nominated to fill a seat vacated by William Garwood, a Reagan appointee who served until taking senior status in January, 1997. Not long afterwards, on July 24, 1997, President Clinton nominated Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. Despite his qualifications, and his unanimous rating of Well Qualified by the ABA, Mr. Rangel never received a hearing from the Committee, and his nomination was returned to the President without Senate action at the end of 1998, after a fruitless wait of 15 months. Frustrated with the lack of action on his nomination, Mr. Rangel asked that his name be withdrawn from consideration, and on September 16, 1999, President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, to fill that same vacancy. Mr. Moreno did not receive a hearing on his nomination either during its pendency of more than 17 months. President Bush withdrew the nomination of Enrique Moreno to the Fifth Circuit and later sent Judge Owen's name in its place. It was not until May of this year, at a hearing before Senator Schumer, that this Committee heard from any of President Clinton's three nominees to the 5th Circuit, when Mr. Moreno testified along with a number of other Clinton nominees about their treatment by the Republican majority. Thus, Judge Owen's is the third nomination to this vacancy and the first to be accorded a hearing before this Committee.

In fact, when this Committee held its hearing on the nomination of Judge Edith Clement to the Fifth Circuit last fall, it was the first hearing on a Fifth Circuit nominee in seven years. By contrast, Judge Owen is the third nomination to the Fifth Circuit on which this Committee has held a hearing in less than one year.

When Judge Owen was initially nominated, the President changed the confirmation process from that used by Republican and Democratic Presidents for more than 50 years. That resulted in her ABA peer review not being received until later in the summer. As a result of a Republican objection to the Democratic leadership's request to retain all judicial nominations pending before the Senate through the August recess, the initial nomination of Justice Owen was required by Senate rules to be returned to the President without action. The Committee nonetheless took the unprecedented action of proceeding during the August recess to hold two hearings involving judicial nominations, including a nominee to the Court of Appeals for the Federal Circuit.

In my efforts to accommodate a number of Republican Senators, including the Republican Leader, this Committee's ranking member, and at least four other Republican members of this Committee, I have scheduled hearings for nominees out of the order in which they were received. This has been a longstanding practice of the Committee. I have also indicated that those nominations that are less controversial are easier to consider and would, by and large, be scheduled earlier. Controversial nominations, such as Judge Owen's, can sometimes take longer. In spite of the treatment by the former Republican majority of so many moderate judicial nominees of the previous President, we proceed today, as I said that we would, with a hearing on Judge Owen.

Despite a history of filling vacancies in Florida through a nonpartisan, merit-based process, going back at least a decade under two presidents of different political parties, this White House decided it knew better. Despite a process that filled 29 vacancies on Florida's federal district courts and despite a consensus within the Florida legal community that the process of working with that State's Senators and a judicial nomination commission process had produced distinguished, qualified nominees, this Administration decided to go in a different direction. I commend Senators Graham and Nelson for being able to come to some agreement so that we can move these nominations forward at this time.

The question each Senator on this Committee will be asking himself or herself as we proceed is whether these judicial nominees meet the standards we require for any lifetime appointments to the federal courts. The President has often spoken of judicial activism without acknowledging that ends-oriented decisionmaking can come easily to ideological conservative nominees. Through the course of these hearings we will have an opportunity to seek to determine how nominees are likely to act as federal judges.

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CHARLES W. MATTHEWS
5959 LAS COLINAS BOULEVARD
IRVING, TEXAS 75039-2298

May 1, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Leahy:

I recently attended the Fifth Circuit Judicial Conference. One of the major concerns of the judges was the continuing challenge to handle the work of the court despite the vacancies that remain unfilled. In order to ensure the proper administration of justice, these vacancies need to be filled. The courts and the litigators deserve attention to this ongoing problem.

In this regard, I ask you specifically to consider a prompt hearing for Justice Priscilla Owen of Texas, President Bush's nominee to the United States Fifth Circuit Court of Appeals. A hearing will produce ample evidence of her outstanding qualifications. She has received a "well qualified" recognition by the ABA Standing Committee on the Federal Judiciary. The *Dallas Morning News* editorial commented that "Justice Owen's lifelong record is one of accomplishment and integrity."

Justice Owen has served ably on our Supreme Court. She will serve with distinction on the Federal bench.

Thank you for your consideration.

Sincerely,

CWM:mb

Senator Mitch McConnell's Statement
for Justice Priscilla Owen
Tuesday, July 23, 2002

I would like to welcome Justice Owen to this Committee. I have read much of her file, including several impressive letters of recommendation from Texas lawyers and jurists. These letters are from people who actually know her, and have worked and served with her.

Their authors represent a diversity of background, party affiliation and experience. Yet they are united in their enthusiastic support of her, particularly with respect to her character and integrity. After reviewing these letters, I wasn't sure if we should be confirming or canonizing her.

Given the high ethical conduct Justice Owen has exhibited and her strong support for reform of the Texas system for selecting judges, it is perverse that far left groups have tried to impugn her integrity. It is in response to these attacks that I would like to make a few points.

First Principles

Like Justice Owen, I favor the appointment, rather than the election, of judges. But the people of Texas, as is their right, happen to disagree. The Texas Constitution, in fact, requires the election of all judges. Since Texas has not adopted public funding of elections, Texas law recognizes that judicial candidates must accept donations to fund their campaigns and specifically authorizes them to do so. I know this bothers some people, but by allowing judicial candidates to accept donations or contributions to pay for their campaigns, Texas has simply recognized that you cannot have elections without campaigns, and campaigns cost money.

Furthermore, the Texas Code of Judicial Conduct, canon 4D(1), specifically provides for the solicitation and acceptance of campaign contributions by judicial candidates. And Texas judges and justices routinely accept contributions from lawyers, law firms and businesses who appear before them in court.

Moreover, Texas law recognizes that recusal is neither necessary nor appropriate just because a party before a judge may have contributed to them. The reason is that requiring recusal is unworkable in a system where all judges are elected, and judicial candidates receive contributions from thousands of people. If recusal were required, judges and justices would be recusing themselves all the time.

Finally--and I know this also bothers some people--but campaign contributions are a form of political speech and association that is at the core of the First Amendment. Just a few weeks ago, the Supreme Court handed down a decision, *Republican Party of Minnesota v. White,* that said, in short, when states require their judges to run for election–as Texas and other states do–judicial candidates have First Amendment rights, and you cannot have judicial elections without judicial campaigns. So it is clear that Justice Owen's acceptance of campaign contributions is authorized–is, in fact, essentially required–by Texas constitutional law, and it is protected by federal constitutional law.

Justice Owen's Exemplary Conduct

Now, Justice Owen's specific conduct in this system has been exemplary, and it has manifested itself in at least three ways. First, she has worked to reform the judicial selection system in Texas. For example, she wrote an article for the Denton County Bar Association Newsletter on January 25, 2000, in which she examined the current system in Texas of electing judges. She concluded that Texas "would be better served with a different method of selecting judges than the current one." She recommended an appointment-retention system, where judges are appointed and later stand for retention. She noted that "With regard to the cost of judicial elections, I believe that retention elections would largely eliminate campaign spending." I request that Justice Owen's article be made a part of the record.

In 1995, she appeared in support of and signed a petition in support of legislation that would reform the judicial selection process. And I request that Justice Owen's affirmation in support of that legislation and the legislation itself be part of the record.

In fact, it appears no one has worked harder to reform the Texas judicial selection system than her. The former chair of the Texas State Commission on Judicial Efficiency, Herbert H. Reynolds, wrote to this Committee, stating that "Chief Justice Phillips and Justice Owen were most supportive of the Commission's recommendation that judges in the State of Texas should not be elected and, therefore, subject to the possible conflicts that are perceived to be present."

Darrell E. Jordan, on behalf of himself and fourteen other past Presidents of the Texas State Bar, both Republicans and Democrats, has written to the Chairman, stating that "Justice Owen also has been a long-time advocate for an updated and reformed system of judicial selection

in Texas. Seeking to remove any perception of a threat to judicial impartiality, Justice Owen has encouraged the reform debate and suggested positive changes that would enhance and improve our state judicial branch of government." I request that Mr. Reynolds' and Mr. Jordan's letters be part of the record.

The former Chief Justice on the Texas Supreme Court, a Democrat, John L. Hill, wrote that "Justice Owen has distinguished herself as a forceful advocate for reforming Texas' system of electing judges. . . . [S]ome special interest groups confuse flaws in our system with flaws in our judges. These groups insist on denouncing individual members of the judiciary, when reform of the laws they support can only come from amending the Texas Constitution, which Justice Owens strongly supports. Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings."

Chief Justice Hill goes on to say, "Tellingly, the groups make no effort to assess whether her decisions are legally sound, and instead are content to fall back on the canard of an 'appearance of impropriety.' Nor have they so much acknowledged Justice Owen's unswerving leadership in seeking reform–reforms of which they presumptively approve. The groups lack credibility when they attack Justice Owen for participating in a system that has been in place longer than a century, is mandated by the Texas Constitution, and is not within her power to change by herself. I know Texas politics and can clearly say that these assaults on Justice Owen's record are false, misleading, and deliberate distortions. After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well-reasoned, and that her integrity is beyond reproach." I submit the eloquent remarks of former Chief Justice John Hill for the record.

Second, Justice Owen has gone out of her way to exceed legal and ethical requirements. Initially, I want to note that in 8 years on the state supreme court, no one has ever accused her of wrongdoing or asked her to recuse herself because of campaign contributions.

In 1994, when there were no limits on contributions to state candidates, she went beyond what Texas law required and voluntarily limited contributions when many other candidates did not do so. I request that the campaign pledge she made be part of the record. Justice Owen, in fact, was ahead of her time because the Texas legislature subsequently capped contributions to judicial candidates–a cap she has never exceeded. And in 2000 she returned to her supporters over a third of her campaign contributions.

Third, by setting high standards, Justice Owen has received the respect and admiration of her peers. For example, the ABA considers ethics and integrity in rating judicial nominees. Justice Owen has received the highest rating possible--unanimous "well qualified"--which, as my colleagues on the other have said, is the "gold standard" for judicial nominees.

And as we have seen, people who *know* Justice Owen–I don't mean far left special interest groups with an agenda, but people who have worked and served with her–think highly of her. This includes people she has bested as a litigator or ruled against as a jurist. For example, Attorney Jon David Ivey wrote the Committee, stating "Justice Owen and I were adversaries for a number of years in an oil and gas case involving a claim for several million dollars. Throughout the extensive discovery and pre-trial process, as well as during the trial, Justice Owen conducted herself in an exemplary fashion." I submit Mr. Ivey's letter for the record.

Conclusion

Some people see a "quid pro quo" boogeyman lurking behind every decision that is made. But to see such a boogeyman in Justice Owen would be laughable if I didn't know that she takes her reputation seriously. The baseless accusations leveled against her do far more to cause the appearance of impropriety than any action she has taken. I hope my colleagues will look at her long record of ethical behavior and her efforts to reform the judicial selection process and give short shrift to the unsubstantiated charges of outside groups.

JUDICIAL REFORM CAMPAIGN PLEDGE

For each contested election I pledge to the voters of Texas that I will:

1. Accept no more than $5,000 from a PAC, a political party, any other entity, or an individual together with his or her spouse and dependent family members.

2. Have no more than half my contributors be lawyers and, in a statewide race, accept no more than 60% of my total contributions from lawyers.

3. Allow no PAC or political party to spend more than $5,000, pro rata, to aid my campaign.

4. Accept no more than $25,000 from a law firm and all its employees and members, their spouses and dependent family members.

5. Accept no more than 15% of my total contributions from non-lawyer PACs.

6. Use no funds raised for any non-judicial office.

7. Spend or loan no more than $10,000 of my own money for my campaign.

8. Spend no more than $2 million.

9. Make a good faith effort to report the occupation and employer of each person who contributes more than $50.

I make this pledge only if each of my opponents does by February 14, 1994. Even if each of my opponents does not take this pledge, I will make every effort to conduct my campaign so as to avoid the appearance of impropriety.

Priscilla Owen
Signature of Candidate

February 9, 1994
Date

PERDUE, BRANDON, FIELDER, COLLINS & MOTT, L.L.P.

HOWARD PERDUE*
LARRY BRANDON
C. DAVID FIELDER
JAMES O. COLLINS
ROBERT MOTT
GEORGE DOWLEN
KEVIN BRENNEN
HAROLD LEREW
GREGG M. McLAUGHLIN
G. BRUCE MEDLEY
DONALD B. ROSEMAN
TERRY G. WISEMAN
MICHAEL J. DARLOW
JOSEPH T. LONGORIA
TERRY ANN WHITE
TAB BEALL
*Retired

ATTORNEYS AT LAW
1235 NORTH LOOP WEST, SUITE 600
HOUSTON, TEXAS 77008

TELEPHONE (713) 862-1860
FACSIMILE (713) 869-0030

LYNN STAVINOHA
DAVID A. ELLISON
LAURA J. MONROE
OWEN M. SONIK
CARL O. SANDIN
JASON L. BAILEY
DAVID S. CRAWFORD
JEAN MARIE BAER
ELKE L. DANIEL
R. GREGORY EAST
DAVID HUDSON
KAREN KOCKS
DEBRA S. MERGEL
ELIZABETH BANDA
TRACEY CRITES
JOHN BANKS
SANDRA GRIFFIN

July 1, 2002

Hon. Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

RE: Justice Priscilla Owen

Dear Chairman Leahy:

My name is Robert Mott. I was the legal counsel for the Spring Independent School District in the case of *Enron Corporation et al. v. Spring Independent School District,* 922 S.W.2d 931 (Tex. 1996). We were the losing party in this case.

I have been disturbed by the suggestions that Justice Priscilla Owen's decision in this case was influenced by the campaign contributions she received from Enron employees. I personally believe that such suggestions are nonsense. Justice Owen authored the opinion of a unanimous court consisting of both Democrats and Republicans. While my clients and I disagreed with the decision, we were not surprised. The decision of the Court was to uphold an act of the Legislature regarding property valuation. It was based upon United States Supreme Court precedent, of which we were fully aware when we argued the case.

I firmly believe that there is absolutely no reason to question Justice Owen's integrity based upon the decision in this case.

Sincerely,

Robert Mott

RM/lc

cc: Honorable Orrin Hatch

Nelson 1/5

Mr. Chairman, it is my pleasure to introduce Mr. Jose Martinez, nominee to serve on the District Court for the Southern District of Florida and Mr. Tim Corrigan, nominee to serve on the District Court for the Middle District of Florida.

Senator Graham wanted to be here today to offer his support, but he is currently presiding at the Intelligence Committee. I would ask that Senator Graham's written statement be included in the Record.

First, let me say that I am pleased to endorse Mr. Martinez's nomination.

He is a graduate of the University of Miami Law School and served in the United States Naval Reserve. His naval service includes time spent in South America where he taught human rights

and civilian control of the military. Most recently, he has built a successful private practice in south Florida.

Mr. Martinez distinguished himself as a trial lawyer in south Florida and by all accounts has the integrity and sense of fairness that is essential to serving on the federal bench. He is well recognized as a person of high ethical standards who is devoted to the law and the legal community. I hope the committee will look favorably on his nomination.

I also want to introduce and endorse Mr. Tim Corrigan who has been nominated to serve in Florida's Middle District.

Mr. Corrigan is a graduate of Duke University Law school. Following law school, he served as a clerk on the Eleventh Circuit.

He then went to work as an associate, and later became a partner, at Bedell, Dittmar, DeVault, Pillans and Coxe. Since 1996 he has served as a Magistrate Judge in the Middle District and by all accounts has done an outstanding job.

In interviewing Mr. Corrigan last year and in talking to Florida's legal community, I am confident he will be an excellent jurist. He has the experience, temperament, and commitment to community that is critical to success on the federal bench.

I believe both of these nominees will continue to be a credit to Florida's legal community and will have highly respected careers as federal judges.

4/5

I also want to take a moment to talk about the process Florida uses to select its Federal judges.

For the past 14 years, Florida has used citizen commissions to review and suggest candidates to fill the state's federal judicial vacancies.

This selection system has succeeded through ~~three~~ FOUR administrations by providing a structure and process that is solely designed to find and promote the state's best judges and lawyers.

I strongly believe the state selection process must continue to be honored by all sides - in good faith - for strong candidates like Tim Corrigan and Jose Martinez to rise to the top. I look forward to working with the Administration and Florida's JNC to ensure the system's continued success.

Thank you for this opportunity to appear today, I'm looking forward to working with the Committee to secure Mr. Corrigan and Mr. Martinez's confirmations.

GARDERE

attorneys and counselors ▪ www.gardere.com

Direct: 214-999-4868
Direct Fax: 214-999-3868
sobenhaus@gardere.com

June 7, 2001

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Leahy:

I write in support of the nomination of Justice Priscilla R. Owen to the United States Court of Appeals for the Fifth Circuit.

As a member of the Texas bar who is Board Certified in Civil Appellate Law, I practice frequently before the Supreme Court of Texas, and I keep abreast of its decisions. I have always considered Justice Owens's decisions to be thoughtful, intellectually sound, and respectful of the rights of all Texas citizens.

For your information, I generally support Democratic candidates for national office. In fact, in 1988 I was a delegate to the Texas State Democratic Convention for the Reverend Jesse Jackson. Despite my political preferences, I do not hesitate to recommend Justice Owen for the Fifth Circuit.

Very truly yours,

Stacy R. Obenhaus

SRO:tdh

cc: Presidential Personnel Office
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

DALLAS 1018468v1

GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower, 1601 Elm Street, Dallas, Texas 75201-4761 ▪ 214.999.3000 Phone ▪ 214.999.4667 Fax

Statement of Justice Priscilla Owen
Committee on the Judiciary
United States Senate
July 23, 2002

Madam Chair, Chairman Leahy, Members of the Committee. I first want to thank you for the opportunity to appear before you today. I also want to thank the President for the honor of nominating me to the United States Court of Appeals for the Fifth Circuit. I want to thank Senator Gramm and Congresswoman Kay Granger for introducing me, and for their support of my nomination. I understand that Senator Hutchison will be here later this morning, and I want to thank her for her support and for her friendship. I also want to thank the Counsel to the President and my former colleague, Justice Alberto Gonzales, for his assistance and support during this process.

If you would indulge me, I would like to introduce my sister Nancy Lacy and my pastor Jeff Black who are here with me today. I would be remiss if I did not also recognize and thank former Chief Justice and Texas Attorney General John Hill for all that he has done.

Some of my other friends who are here are . . . .

I also want to thank all of the people in Texas who have expressed their support for my nomination. In particular, I would like to thank:

- Justice Raul Gonzalez and Justice Jack Hightower, also a former Congressman;
- The 15 past Presidents of the State Bar of Texas -- Republicans and Democrats -- who have written a letter of support to the Committee; and
- All who have taken the time to come to Washington to meet with Senators and your staffs.

Madam Chair, Mr. Chairman, and Members of the Committee, I appreciate the opportunity to give an opening statement today. I know that it is unusual to do so, but in this case it is necessary. The picture that some special interest groups have painted of me is wrong. And I want to set the record straight.

I have been very honored to serve as a judge on the Supreme Court of Texas, and I am extremely humbled to be the President's nominee to the Fifth Circuit. But I have never forgotten where I came from. After my father died of polio when I was ten months old, my mother and I lived with her parents and brother on a farm in South Texas. My family worked very hard to make a living then, as they do now. My mother eventually remarried a wonderful man, and we moved to what was to me a big city, Waco. For those of you who don't know where that is, it's near Crawford. But I still spent my summers in South Texas, working on the farm alongside people from a variety of backgrounds. I learned a lot, particularly that all of us have so much in common, no matter where we come from or what we do for a living, and that we must all respect one another.

I was fortunate enough to attend Baylor University and Baylor Law School. I started practicing law twenty-four years ago, when there weren't many women in the profession. The practice of law was very good to me, but an opportunity arose for me to run for the Supreme Court of Texas, and I decided to pursue that opportunity.

I concluded that people like me -- who were experienced, and had the academic qualifications, and didn't have an ax to grind -- should be willing to step out of private practice and serve the public as judges. So I ran for a seat on the Supreme Court of Texas, and the people of Texas elected me in 1994. They re-elected me in 2000.

Although I am a judge, I think it is important to try to serve people in other ways. I have worked to increase legal aid to the poor and to improve their access to the courts. I also helped form a group known as Family Law 2000 that seeks to lessen the adversarial nature of divorces. I have served on the board of Texas Hearing & Service Dogs, which is a charitable organization that trains and provides service dogs to quadriplegics and paraplegics and those whose hearing is impaired. I am a member of St. Barnabas Episcopal Mission, where I teach Sunday School and serve as head of the altar guild.

As a judge, I have worked very hard to carry out the responsibilities that the people of Texas have given me. I believe I have fulfilled those responsibilities.

Four basic principles have guided my work as a judge.

First, I always remember that the cases that come before my court involve real people with real disputes and real problems. And I know that our decisions will affect a lot of other real people because of the precedent they set. So when I decide a case, I must do so based on a fair and consistent application of the law. My decisions cannot be based, and are not based, on whether a party is rich or poor or who their lawyer is. My decisions are based on the law -- whether that is a statute, a decision from the United States Supreme Court, or a prior decision from my Court.

Second, when a statute is before me, I must enforce it as you in Congress or as the state legislature, as the case may be, have written it unless that law is unconstitutional. I believe my decisions demonstrate that I respect the division between the Legislative and Judicial Branches of the government. And if I am confirmed, I will do my utmost to apply statutes as you have written them, not as I or others might have written them.

Third, I must strictly follow precedent of the United States Supreme Court. I have taken a solemn oath to do so. I have upheld that oath in the past, and if confirmed, I will continue to do so as a Fifth Circuit judge.

Fourth, judges must be independent -- both from public opinion and from parties and lawyers who appear before them. Texas has a system of partisan elections for judges. That means that judges necessarily will preside over cases in which people who have contributed to their campaigns may appear as a lawyer or a party. This is the same system that some other States employ, but I do not believe it is the best system. I have long advocated that Texas adopt a system in which judges are appointed and then stand for retention elections. I have also led efforts to improve judicial campaign financing. I voluntarily imposed limits on contributions during my first campaign, when no limits were imposed by any laws. And I returned 35% of my campaign contributions when I ran in 2000 and didn't draw a major-party opponent.

In closing, Madam Chair and Members of the Committee, I recognize the tremendous responsibility that judges have. For more than seven years, I have tried very hard to carry out that responsibility fairly and impartially. Those who know my record best have informed the Committee of their judgment that I have been a fair and impartial judge on the Supreme Court of Texas.

I thank you for allowing me to make this statement and to appear before you today. I welcome the opportunity to answer any questions that you have.

LORI R.E. PLOEGER
6516 EAST HILL DRIVE
AUSTIN, TEXAS 78731
(512) 346-0828

JUNE 27, 2002

VIA FACSIMILE AND U.S. MAIL

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Confirmation of the Honorable Priscilla R. Owen

Dear Mr. Chairman:

I am writing to express my unequivocal support for the nomination of the Honorable Priscilla R. Owen, Associate Justice of the Supreme Court of Texas, as a Judge for the United States Court of Appeals for the Fifth Circuit. It was my privilege to serve as Justice Owen's briefing attorney from January to August 1995.

As Justice Owen's briefing attorney, I had the opportunity to observe Justice Owen carrying out her responsibilities on a daily basis. During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. Justice Owen works indefatigably, reading and analyzing the parties' briefs and the relevant legal authorities, often into the wee hours of the night. In addition to her impeccable work ethic, Justice Owen also brings to the bench a keen legal intellect, which is reflected in well-written opinions that are well-grounded in precedent.

Justice Owen is a role model for me and for other women attorneys in Texas. She attended law school in the mid-1970s, at a time when the ratio of women-to-men was still one in ten at best. She not only attended law school, she excelled, graduating third in her class and serving on the *Baylor Law Review*. Shortly thereafter, she again distinguished herself by obtaining the highest score on the Texas Bar Examination. Her stellar performance continued in her career as a practicing attorney. At age 30, she was made partner of a major Houston law firm when female partners were a rarity. During her 17 years at the firm, she earned the admiration, respect, and friendship of her colleagues. Now in her second term on the Texas Supreme Court, Justice Owen continues to demonstrate the outstanding qualities that have consistently distinguished her as a leader in the legal profession.

I know that she will bring the same intelligence, diligence, and strength of character to her position as a Circuit Judge for the Fifth Circuit. I strongly urge you and the other members of the Senate Judiciary Committee to support her confirmation.

Sincerely,

Lori R.E. Ploeger

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

POA

Policyholders of America 888-648-8823

July 12, 2002

Senator Patrick Leahy,
Senator Edward Kennedy,
Senator Joseph Biden,
Senator Herb Kohl,
Senator Dianne Feinstein,
Senator Russ Feingold,
Senator Charles Schumer,
Senator Richard Durbin,
Senator Maria Cantwell,
Senator Arlen Specter,
Senator Jon Kyl,
Senator Mike DeWine,
Senator Jeff Sessions,
Senator Sam Brownback,
Senator Mitch McConnell
Senator John Edwards
Senator Orrin Hatch,
Senator Strom Thurmond and
Senator Chuck Grassley

By fax to individual offices

Dear Senators:

Policyholders of America ("POA") is a national nonprofit association of policyholders with nearly 20,000 American families in our membership. Every state is well represented by our members. Members range from families on welfare to some of the most affluent in America. Members are all registered voters: 48% voted in Republican primaries, 44% voted in Democratic primaries. Our organization works closely with members from both sides of the aisle on issues impacting the American homeowner, specifically insurance-related issues. We also endorse and oppose various candidates and nominees – both Democrats and Republicans.

As the President of POA, my membership has asked me to write you regarding a nominee to the US Court of Appeals (Fifth circuit), Justice Priscilla Owen.

It may surprise you to learn that a consumer organization like ours *supports* Justice Owen for the US Court of Appeals. A few consumer groups oppose her appointment. Our association of consumers respectfully disagrees: we believe in listening to the voters.

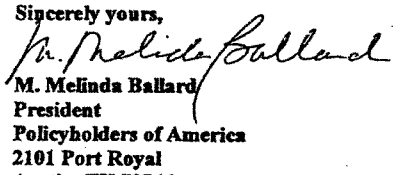
Texans went to the polls and overwhelmingly endorsed Justice Owen. That many Texans could not be wrong. If you believe in the democratic process, Justice Owen deserves to be appointed to the Fifth Circuit.

It should be noted that none of our members have cases before either the Texas Supreme Court of the Fifth Circuit Court of Appeals so we have no "dog in this hunt". The truth is, we know how costly litigation is to pursue, so our organization encourages members to only use the legal system as a last resort.

Justice Owen may be a conservative but she is a fair and impartial Justice. She's a tough Texas gal with heart. She would be a valued asset to the US Court of Appeals for the Fifth Circuit and we urge you to appoint her to the Federal Bench.

Thank you for the opportunity to share our association's views on this important appointment. I welcome any questions or comments you may have and a chance to elaborate on our endorsement of Justice Owen. I also invite you to go to our website and see some of the legislative issues, including Congressman Conyers' HR 5040, that we are endorsing. Our association has also been invited by the House Committee on Financial Services to testify this week about the growing mold problem facing the American homeowner. Hopefully, some time soon, the Senate will address this issue too, so safeguards can be put in place that protect the American homeowner.

Sincerely yours,



M. Melinda Ballard
President
Policyholders of America
2101 Port Royal
Austin, TX 78746
Direct line: 512-347-8779
Toll free: 888-648-8823

Priority: Normal
Topic:
Sent: 3/25/02
From: Emeritus, President
To: dick@durbin.senate.gov; info@kyl.senate.gov; russell_feingold@feingold.s...; sam_brownback@brownback.sen...; senator@biden.senate.gov; senator@feinstein.senate.gov; senator@kennedy.senate.gov; senator@mcconnell.senate.gov; senator@sessions.senate.gov; senator@thurmond.senate.gov; senator_hatch@hatch.senate.gov; senator_kohl@kohl.senate.gov; senator_leahy@leahy.senate.gov
CC:

March 25, 2002

Dear Senators:

I write to support the nomination of the Honorable Priscilla Owen for the 5th U.S. Circuit Court of Appeals.

Justice Owen is well-known to me, both from her undergraduate and Law School days at Baylor University, where I served for 20 years as President and Chancellor, as well as during the two year period from 1995-1997 when I served as Chair, Texas State Commission on Judicial Efficiency.

Justice Owen is a superlative individual in every way. She is extremely bright, she possesses great integrity and is equipped with the character or moral virtues necessary for the high office she holds as well as the high office for which she has been nominated.

During the work of the Commission I had frequent contact with Chief Justice Thomas Phillips and most of the Associate Justices. I found that Chief Justice Phillips and Justice Owen were most supportive of the Commission's recommendation that judges in the State of Texas should not be elected and, therefore, subject to the possible conflicts that are perceived to be present. We recommended to the State Legislature, and Justice Owen concurred, that judges be appointed to their first term and then would have to run for office after the first term in retentive nonpartisan elections. This appoint/elect/retain system would reduce campaign contributions dramatically.

Based on my knowledge of Justice Owen for the past 30 years I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals.

Respectfully yours,

Herbert H. Reynolds
President and Chancellor Emeritus
Baylor University
Waco, Texas 76798

I give my name and position but under University guidelines I speak for myself only.

Copies faxed to: Senator Charles Schumer, Senator Charles Grassley, Senator John Edwards, Senator Arlen Specter, Senator Maria Cantwell and Senator Mike DeWine

LAW OFFICES
SHOOK, HARDY & BACON L.L.P.
HAMILTON SQUARE
600 14TH STREET, NW, SUITE 800
WASHINGTON, D.C. 20005-2004
TELEPHONE (202) 783-8400 ◆ FACSIMILE (202) 783-4211

GENEVA
HOUSTON
KANSAS CITY
LONDON
MIAMI

NEW ORLEANS
OVERLAND PARK
SAN FRANCISCO
TAMPA

Victor E. Schwartz
202-662-4856
vschwartz@shb.com

July 18, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: **Nomination of Texas Supreme Court Justice Priscilla Owen**

Dear Mr. Chairman:

Throughout the past three decades, many members of your Committee have been kind enough to ask my views about tort law. I have taught in law school, and practiced on behalf of plaintiffs in the 1970s. I currently practice in the defense firm of Shook, Hardy & Bacon, L.L.P. and represent the American Tort Reform Association. You have appreciated that when I share my views with you, I try my utmost to be objective. Because almost anyone's views on judges are likely to be seen as having bias, I have refrained from commenting on any judicial nominee.

I am now writing you about Texas Supreme Court Justice Priscilla Owen because she has been attacked as being unfair in the very area of my expertise, tort or liability law. Since 1976, I have been co-author of the most widely used torts textbook in the United States, *Prosser, Wade & Schwartz's Cases and Materials on Torts*. I have also served on the three principal American Law Institute Advisory Committees on the new *Restatement of Torts (Third)*. The study of tort law has been the love of my professional life.

Because of my academic and practice obligations, I have had a very deep interest in opinions of law in the field of torts. Naturally, I am familiar with state supreme court judges or justices who are thought to be "pro-plaintiff" or "pro-defendant." In that regard, when I heard about controversies surrounding Justice Owen, I was somewhat puzzled because I had not placed her in either group.

This past weekend, I reviewed most of her principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as "pro-plaintiff" or

"pro-defendant" is untrue. Those who have attacked her as being "pro-defendant" have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law.

Justice Owen's fundamental approach to tort law is to make it stable. On the one hand, she is not a judge who would be likely to jump to the front of a plaintiffs' lawyers petition to expand the scope of tort law. Furthermore, she would be unlikely to allow claims for brand-new types of damages, such as hedonic damages, or create cutting-edge liability claims (*e.g.*, allowing a lawsuit against a fast food chain, where there was no showing that an individual plaintiff's health was actually harmed by eating at that chain). On the other hand, she would not and has not arbitrarily thwarted the rights of plaintiffs under existing tort law.

Let me give you just a few examples. In *Merrell-Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), a decision for which she was roundly criticized by a group called "Texans for Public Justice," Justice Owen held that the evidence was legally insufficient to establish that a birth defect was caused by exposure to the drug Bendectin.® Bendectin® is the only drug that helps alleviate the severe symptoms of morning sickness. It is still approved by the U.S. Food and Drug Administration and regulatory agencies throughout the world. As Justice Owen recognized, the attempts by plaintiff's counsel to tie the birth defects of the plaintiff's child to Bendectin® in the *Havner* case were insufficient. The Supreme Court of the United States itself recognized, in a case involving that very drug, that judges should act as gatekeepers, and not permit juries to make judgments based on bad science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I am not surprised that the Association of Trial Lawyers of America (ATLA), the organized plaintiffs' bar, and those who have empathy with that group criticized Justice Owen for her decision. They also criticized the United States Supreme Court when it rendered the *Daubert* decision. ATLA and its sympathizers believe that judges should not act as gatekeepers; rather, they believe that juries should be permitted to weigh scientific evidence as they choose.

Here is the rather interesting point. In a case decided almost simultaneously with *Havner*, not mentioned by "Texans for Public Justice" or other groups criticizing Justice Owen, she would have allowed an adult to pursue a sexual abuse claim against an alleged abuser who purportedly did the wrongful acts when the plaintiff was a child. In the case *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996), expert testimony indicated that the plaintiff had "repressed memories" that arose when the plaintiff was an adult. The majority held that expert testimony was insufficient to warrant the application of the "discovery rule," which would have tolled the statute of limitations. It required "objectively verifiable" evidence of abuse to apply the discovery rule and toll the statute. Justice Owen noted, however, that such evidence was often unavailable, and the unavailability of the evidence is frequently due to acts done by the alleged abuser. She would have held that the repressed

memory evidence was sufficient to toll the statute and allow the claim. I recommend that Members of this Committee read this case and note that Justice Owen wrote the sole dissenting opinion in the case.

In a later case, Justice Owen prevented another plaintiff from falling into a statute of limitations trap. A patient brought a malpractice case against a surgeon in his individual capacity. The patient later amended his complaint, and named the surgeon's professional association as a defendant. The association moved to dismiss the case because the statute of limitations had expired by the time the suit was brought against the association. Writing for the Texas Supreme Court, Justice Owen held that the cause of action brought against the surgeon in his individual capacity preserved the potential of the claim against the association. *See Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999).

Justice Owen's views about product liability law strike the same balance. For example, Justice Owen joined in a Supreme Court of Texas opinion that considered a question certified by a federal court as to whether a manufacturer of a product used by adults – a cigarette lighter – might have a duty, in some situations, to childproof the product. Justice Owen joined with the Court in holding that a manufacturer may have such an obligation. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999).

One finds the same sense of "balance" in Justice Owen's opinions in other areas of tort law. In a very interesting opinion, Justice Owen joined with the Texas Supreme Court to strip a defendant business of its defenses based on a plaintiff's fault when that defendant business had decided to opt out of the workers' compensation system. Justice Owen supported the sound public policy that would discourage businesses from opting out of workers' compensation and taking their chance on their vagaries of a tort lawsuit in the workplace. As you and Members of your Committee know, a fundamental reason why workers' compensation was adopted in the first place is so that a worker's fault does not preclude him or her from obtaining compensation for a workplace injury. *See Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

I wish to reiterate that I am not suggesting that Justice Owen is a plaintiffs' lawyer's "dream judge." She is not. For example, when the Texas Supreme Court addressed the issue of whether jurors should be told that if they find a plaintiff more than 50% responsible for his or her own injury, the plaintiff might lose, Justice Owen dissented from the majority. The majority found that such information was allowed to go to the jury. Justice Owen believed such action could cause jurors to look more at the effect of the 50% rule than the facts of the case. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998). While not everyone (including myself) would agree with Justice Owen's decision, it is anchored in logical judicial precedent and has a clear public policy basis. *See* Victor Schwartz, *Comparative Negligence*, §17-5(a) (3d Ed. 1994).

SHOOK, HARDY & BACON L.L.P.

My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests.

I would be pleased to answer any questions or inquiries by Members of your Committee, and I value your taking the time to read this statement.

Sincerely,

Victor E. Schwartz

cc: The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary

:NATOR FLORENCE SHAPIRO
/ISTRICT 8

COMMITTEES:
State Affairs, *Chair*
Education
Intergovernmental Relations
Redistricting

The Senate of The State of Texas

DISTRICT OFFICE:
5005 Addison Circle
Addison, Texas 75001
(972) 385-9876
(972) 385-9677 (Fax)

AUSTIN OFFICE:
P.O. Box 12068
Austin, Texas 78711
(512) 463-0108
(512) 463-7579 (Fax)
TDD 1-800-735-2989

July 15, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy,

I am writing to express, in the strongest possible terms, my unequivocal support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit.

It is difficult to overstate Justice Owen's extraordinary academic and professional qualifications, as the American Bar Association recognized when it honored her with its highest possible rating: "unanimous well-qualified". I have known Justice Owen for several years and have always been impressed with her extraordinary intelligence and integrity. Her legal career has been marked by accomplishment. Not only has she worked to improve access to legal services for the poor and fought to increase the funding of such programs, she has also helped organize a group known as Family Law 2000, which seeks to educate parents about the effects of dissolving a marriage on children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As a Senator in the Texas Legislature, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as it is written, and as the Legislature intended, not based on her subjective idea of what the law should be. I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth.

Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. I was the chief author of the Senate bill, and followed very closely the Texas Supreme Court's opinions regarding the statute. Although some might try to hold up the Texas Parental Notification Act as a litmus test on abortion, they simply cannot make the case. The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion. Therefore, when the Texas Supreme Court heard the Jane Doe cases, it was merely interpreting a newly-enacted procedural statute -- passed with overwhelming bipartisan support -- that recognized the legitimate role of parents in such weighty decisions, not the underlying right to an abortion. I appreciated that Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the

governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do.

I, along with many of my colleagues -- Democrats and Republicans alike -- filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement. We recognized that there should be exceptions under certain conditions, and allowed a girl three opportunities to demonstrate to a court that she fell within those exceptions. It is important to note that the Texas Supreme Court does not even have an opportunity to hear a case under the Act unless both a trial court and an intermediate appellate court have both already considered the evidence and ruled that a girl does not satisfy the exceptions and must notify one parent prior to having an abortion.

Prior to the passage of the Act, a child could go to a doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time, school nurses were not even permitted to give aspirin to a child without parental consent. Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents -- that at least one parent should be involved in a major medical decision impacting their minor daughter. Because this was not an "abortion" bill but a "parental involvement" bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan law that promotes the relationship between parents and their minor daughters and is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench - an experienced jurist who follows the law and uses common sense. I strongly urge the Committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation.

Very truly yours,

Florence Shapiro

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

Jason C.N. Smith
2257 College Avenue
Fort Worth, Texas 76110
(817) 924-5539

April 8, 2002

Senator Patrick Leahy
Chairman,
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Nomination to Fifth Circuit of Priscilla Owen

Dear Senator Leahy:

I am writing you as a Democratic member of the Senate Judiciary Committee to request that you hold a hearing and confirm Priscilla Owen to the Fifth Circuit Court of Appeals. Justice Owen's service on the Texas Supreme Court qualifies her to serve on the Fifth Circuit. Moreover, I, as a Democrat, hope she is not subjected to the same treatment that President Clinton's judicial nominees, such as Judge Mike Schattman here in Texas, were subjected to by the Republicans.

I am a life long, liberal Democrat who has voted in every Democratic primary since 1988. I have been active in Democratic Party politics since I was fifteen, supporting people like Lloyd Doggett and Martin Frost. I practice law in Fort Worth, Texas representing Plaintiffs in civil rights, personal injury and employment discrimination cases, including cases in federal court and in the Fifth Circuit. I served as a briefing attorney for Democratic Texas Supreme Court Justice, Jack Hightower, in 1992-93 and as a Staff Attorney for Justice Hightower in 1995. It is during this last stint with Justice Hightower that I became personally acquainted with Justice Owen.

Justice Owen is an impressive woman whose life is filled with accomplishment. Justice Owen grew up in Waco, Texas (Ann Richard's hometown) in a middle class family. She graduated top of her class from Baylor University School of Law. After graduation, Justice Owen went to

work at the Andrews and Kurth law firm in Houston, where she soon became a partner. At Andrews and Kurth, Justice Owen handled mainly commercial litigation and oil and gas cases.

Justice Owen was not politically active prior to winning election to the Texas Supreme Court in 1994. For that election, she bested Democrat Jimmy Carroll, who served as Chief Justice of the Austin Court of Appeals and who I supported. So, naturally, I was suspicious of Justice Owen at first.

In August of 1995, I accepted Texas Supreme Court Justice Hightower's request to serve as his staff attorney until his retirement on January 1, 1996. It was then I saw Justice Owen at work.

Justice Owen worked long hours and read every brief personally. She actually pulled cases from the library instead of relying on what the lawyers asserted the cases stood for in the briefs. She was an invaluable resource to the Court in oil and gas cases because she actually understood oil and gas law.

When Justice Hightower retired, I had been contacted to serve as a law clerk for Mike Schattman, who was nominated by President Clinton in December 1995 to serve as a United States District Judge in the Northern District of Texas. Upon Justice Hightower's retirement, the Texas Supreme Court graciously allowed me to temporarily serve as an overflow staff attorney for the Court until Judge Schattman was confirmed, supposedly in March 1996. I worked mainly with Justice Owen, who undertook to work at reducing the Court's backload, and saw her work up close.

While Justice Owen has been accused by some of being conservative in personal injury cases, she was the only judge on the Court to argue for allowing tolling of the statute of limitations for sexual abuse victims who have repressed memories, as set forth in her dissent in *S.V. v. V.V.*, 933 S.W.2d 1, 28 (Tex. 1996). As this opinion shows, Justice Owen, rather than being result oriented, tries to figure out what the law is and apply it. Her dissent is compelling and compassionate.

Justice Owen is not a social conservative. Her life is a testament to that. She is a career woman who has been single most of her adult life, who has a diverse group of personal friends, and who is tolerant and even supportive of persons who have lifestyle choices different than hers. She

does not tolerate bigotry of any sort.

While the Texas Supreme Court whittled away at the right to privacy in City of *Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) in an overly broad opinion which followed the anti-gay United States Supreme Court opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Justice Owen, in a concurring opinion, told the Court it was making statements beyond what the facts required and signaled her personal discomfort with the extreme language used by the Court. I believe this is because she did not agree with the Court's veiled attempt to deny homosexuals basic civil rights.

Justice Owen has the highest ethical standards who took steps to make sure she and the Court avoided even the appearance of impropriety. She has consistently supported reform of Texas' system of electing judges which requires them to raise campaign money. Because of the quality of her tenure, Justice Owen was re-elected in 2000 without opposition.

In March 1996, it became clear that Judge Schattman would not be confirmed by the Senate because Bob Dole made Clinton's judicial nominees a campaign issue. Thus, I moved on to the Texas Attorney General's Office where I investigated insurance companies. I was very angry that the Senate Republicans politicized the judicial selection process and prevented me from serving Judge Schattman. But I left my service for the Texas Supreme Court with a great respect for Justice Owen.

As part of my current practice, I represent employees in discrimination and other employment cases. Justice Owen has joined or concurred in several decisions of the Texas Supreme Court that protect employee rights, including *NME Hospitals, Inc. v. Renner,* 994 S.W.2d 142 (Tex. 1999) and *GTE Southwest v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999)(Justice Owen concurring). On the Fifth Circuit, which is notorious for ignoring United States Supreme Court precedent in employment discrimination cases; I think Justice Owen will be a breathe of fresh air.

I commend you on the rejection of Judge Pickering, who was just plain scary in light of his attitudes on racial issues. Justice Owen is no Judge Pickering. She is a smart, hard working, tolerant, independent woman who is qualified to serve on the Fifth Circuit Court of Appeals. She tries to interpret the law, not make it, as a judge. She will not be a right wing activist judge, but rather someone who respects precedent and legislative

intent. And on social issues, I believe she will be moderate and weigh in on the side of tolerance. Upon receiving a lifetime appointment to the Fifth Circuit, I believe her tenure and legacy will be somewhere between Justices Anthony Kennedy and David Souter and will not resemble the tenure of Justices Scalia and Thomas.

The Republicans' tactics angered me when it came to confirming or even holding hearings for President Clinton's judicial nominees, such as Mike Schattman. But two wrongs do not make it right. That is why I hope you, as a Democrat who believes in fair play, will vote to have a hearing about and to confirm the nomination of Justice Priscilla Owen to the Fifth Circuit Court of Appeals.

Thank you and keep up the fight for working people.

Sincerely,

Jason C.N. Smith

SHELTON M. VAUGHAN
6127 BRIAR ROSE DRIVE
HOUSTON, TEXAS 77057-3501

April 19, 2002

Senator Patrick J. Leahy
SR-433
United States Senate
Washington, DC 20510

Dear Senator Leahy:

I am a practicing attorney in Houston, Texas and I am writing to express my concern and alarm at the large numbers of vacancies in the federal judiciary. The efficacy and the very integrity of the American legal system is being compromised as a result of the unnecessary delays in Congress in filling these vacancies.

A year ago there were just over 80 judicial vacancies in the Federal system. Now there are 100. Of those vacancies, the Judicial Conference of the United States classifies 37 of them as "judicial emergencies" due to the lengthy delays and legal compromises that result from the shortage of judges. Clearly the confirmation process is not working properly.

These vacancies are not the result of a lack of judicial nominations. President Bush nominated 66 judges in his first year in office, more than a third again as many as the past three presidents nominated in their first year in office. It is apparent that the delay is occurring in Congress, in the confirmation process. The Senate has an obligation to the citizens of the United States to act promptly upon the President's nominations to the federal bench. Those of us engaged in the daily practice of law are acutely aware of this judicial emergency, which, as Chairman of the Senate Judiciary Committee, you have the power to remedy. It is critical that the Senate Judiciary Committee accelerate the pace of its hearings on these nominees.

In particular, as a Texan practicing within the jurisdiction of the Fifth Circuit Court of Appeals, I urge you to schedule a confirmation hearing for Texas Supreme Court Justice Priscilla Owen, whom President Bush nominated on May 9, 2001 to the Fifth Circuit Court of Appeals. Justice Owen is held in high esteem among lawyers in Texas and has an outstanding record as an attorney and a judge. As you know, the ABA Standing Committee on the Federal Judiciary unanimously voted Justice Owen "well qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

Not only has Justice Owen had a distinguished career that has garnered recognition across the political spectrum. In addition, the vacancy she was nominated to fill is one of the ones I referred to above, which the Judicial Conference has declared a "judicial emergency." Last year, you said that all judicial nominees would receive a hearing before the Senate Judiciary Committee within a year of their respective nominations. In just a matter of days, on May 9,

2002, it will have been a year since Justice Owen's nomination. I urge you not to break your word, but instead to schedule Justice Owen's confirmation hearing immediately.

While I understand there are some thorny partisan issues involved, I ask that Congress look beyond the smaller political bickerings and understand the damage this situation is causing to our American legal system. Moreover, while the leadership of the Judiciary Committee may have reservations about the ideology of the nominees, their duty as Senators is to provide a fair and prompt hearing and then a vote. Whether the nominee is confirmed or not, the process needs to move forward.

I ask not that Congress compromise its duties or values, I ask only that they carry them out in a timely manner. No one benefits from a legal system suffering from absent judges. For the sake of American justice, I urge you to do all you can to address this problem and, in particular, to promptly schedule Justice Owen's confirmation hearing.

Very truly yours,

Shelton M. Vaughan

cc: Senator Orrin G. Hatch
Senator Phil Gramm
Senator Kay Bailey Hutchison