

**NOMINATIONS HEARING OF U.S. CIRCUIT AND
U.S. DISTRICT JUDGES**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

APRIL 16, 2010

Serial No. J-111-117

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NOMINATIONS OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT; KIMBERLY J. MUELLER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA; RICHARD MARK GERGEL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA; J. MICHELLE CHILDS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA; AND CATHERINE C. EAGLES, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FRIDAY, APRIL 16, 2010

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

The Committee met, pursuant to notice, at 10:04 a.m., Room SD-226, Dirksen Senate Office Building, Hon. Dianne Feinstein presiding.

Present: Senators Leahy, Klobuchar, Kaufman, Specter, Sessions, Hatch, Kyl, Cornyn, and Coburn.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Welcome, everyone, to this morning's hearing of the Senate Judiciary Committee.

This morning we will hear from five nominees for the Federal courts, two of whom hail from the State of California.

We've just been joined by the Chairman. Mr. Chairman, do you want to—

Chairman LEAHY. No, no. Please go ahead and chair the hearing.

Senator FEINSTEIN. Okay.

We will hear from five nominees for the Federal courts, two of whom hail from the State of California.

On the first panel, we will hear from Professor Goodwin Liu, who has been nominated for a seat on the U.S. Court of Appeals for the Ninth Circuit. Professor Liu is a nationally recognized expert on constitutional law and education policy and he is the Associate

Dean of the University of California, Berkeley, Bolt Hall School of Law.

Before I give some brief remarks as also the Senator from California about Professor Liu, I would like to just quickly go over the order of this hearing. There will be 5-minute rounds. We will use the early bird rule and we will go from side to side.

Following my statement, the Ranking Member will give his opening statement. Of course, the Chairman of the Committee is here and if he wishes to make a statement he will do so. I will recognize Senator Graham, Senator Clyburn to introduce the nominees from the District Court.

Chairman LEAHY. Representative Clyburn.

Senator FEINSTEIN. I promoted him.

[Laughter.]

Senator SESSIONS. He doesn't think so.

[Laughter.]

Chairman LEAHY. I think Leader Clyburn maybe thought it was a—Mr. Leader, we're glad to have you here.

Senator FEINSTEIN. You don't regard that as a promotion?

[Laughter.]

Senator FEINSTEIN. Then I will introduce a series of letters into the record, and then we will call up Professor Liu.

The four other candidates are: Magistrate Judge Kimberly Mueller, nominated from the Eastern District of California; Richard Gergel, nominated from the District of South Carolina; J. Michelle Childs, nominated for the District of South Carolina; and Catherine Eagles, nominated for the Middle District of North Carolina. So we welcome all of you and your families. I was privileged to have an opportunity to meet some of you briefly.

So let me say a few words about Professor Liu now. He was born in Augusta, Georgia, raised by his parents, who were here, who were Taiwanese doctors that had been recruited to the United States to provide medical care in under-served areas. Professor Liu's parents left Taiwan when the country was still under martial law, and they imbued in him a deep respect and appreciation for the opportunities afforded in the United States.

Professor Liu did not learn to speak English until kindergarten because his parents did not want him to speak with an accent, and from that early age on he has excelled again and again: he was co-valedictorian of his high school; he graduated Phi Beta Kappa from Stanford University, where he was co-president of the student body and received the university's highest award for service as an undergraduate.

I have never before received a letter about a judge which was signed by three different presidents of a university. I want to read some of it to you because I think it's important.

Goodwin Liu attended Stanford while Donald Kennedy was president. He graduated Phi Beta Kappa in 1991. He was the recipient of numerous awards for his academic excellence, leadership, and contributions to the university, including the Lloyd W. Dinkelspiel Award for Outstanding Service to Undergraduate Education, the James W. Lyons Dean's Award for Service, the Booth prize for Excellence in Writing, the Walter Vincenti prize, a David

Starr Jordan Scholar, and the university's President's Award for Academic Excellence.

Dr. Kennedy worked with Goodwin Liu when he was one of the early student volunteers and leaders for the Haas Center for Public Service at Stanford while he was co-president of the student body his senior year. In 1990, Donald Kennedy wrote a personal letter, recommending Mr. Liu for the Rhodes scholarship, which he won and used to obtain a master's degree at Oxford University.

Gerhart Casper, president emeritus of Stanford and former dean of the Law School and provost at the University of Chicago, is now a constitutional law scholar at Stanford. Dr. Casper has come to know Mr. Liu as a Stanford alumnus, and then as a colleague in constitutional law. He considers Mr. Liu as a measured interpreter of the Constitution.

"In expounding the Constitution, Mr. Liu fully appreciates the commitments of the framers, who were decisive in fidelity to the Constitution and its interpretation by the Supreme Court. Mr. Liu will be a distinguished and faithful addition to the appellate branch."

Goodwin Liu is currently a member of the board of trustees of Stanford University, the governing body for the university. John Hennessy has worked closely with him since his appointment as a trustee in 2008. "Mr. Liu is an invaluable member of the board, serving on the Committees on Audit and Compliance, Academic Policy, Planning and Management, and Alumni and External Affairs. In a group of highly accomplished trustees, he is widely regarded as insightful, hardworking, collegial, and of the highest ethical standards.

In summary, Goodwin Liu, as a student, scholar and trustee, has epitomized the goal of Stanford's founders, which was to promote the public welfare by exercising an influence on behalf of humanity and civilization, teaching the blessings of liberty, regulated by law, and inculcating love and reverence for the great principles of government as derived from the inalienable rights of man to life, liberty, and the pursuit of happiness. We highly recommend Goodwin Liu for the honor and responsibility of serving on the U.S. Court of Appeals for the Ninth Circuit."

The letter is signed, "John L. Hennessy, President, Gearhart Casper, President Emeritus, and Donald Kennedy, President Emeritus.

Additionally, Professor Liu began his legal career as a law clerk to two highly accomplished jurists. One jurist on the U.S. Court of Appeals for the D.C. Circuit, and Justice Ruth Bader Ginsburg, on the U.S. Supreme Court. He has also worked as a special assistant in the Department of Education. He has represented business clients in antitrust and insurance cases as a private litigator at the law firm of O'Melveny & Myers.

In 2003, he became professor at Boalt Hall School of Law. His scholarly work has been published in the Nation's top journals. In 2009, he received the university's Distinguished Teaching Award, the highest honor given for teaching at the University of California at Berkeley.

Throughout his career, he has devoted particular care and attention to improving educational opportunities for students in the

United States. He is a supporter of voucher programs and charter schools. He serves as a consultant to the San Francisco unified school district, and he has been awarded the Education Law Association's award for Distinguished Scholarship. He has an exceptional legal mind and a deep devotion to excellence in public service.

So now, before I mention the other individuals, I would like to turn to the Ranking Member for his remarks and any remarks he'd care to make about this nominee, and then we will proceed.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Madam Chairwoman. We appreciate being with you. I'm glad Senator Leahy can join us. I look forward to the nominees today. I see my Congressional colleagues. I know they're ready to say something. They've got things they need to do today.

But I do want to say a few things. I love this Constitution, the great republic that we've been given. It is something that we should cherish and pass on to our children. In the nomination of Professor Liu, we have someone that I know you have recently spent a number of hours with and have a high opinion of. Others who know him speak highly of him.

Professor Liu has written broadly on many of the important issues concerning law today. Many people respect his writings, and many people disagree with his writings. They represent, I think, the very vanguard of what I would call intellectual judicial activism, a theory of interpretation of our Constitution and laws that empowers a judge to expand government and to find rights there that often have never been found before.

So I think this is going to provide an interesting discussion for us today. The President, out of all the fine lawyers and professors in the country and in the Ninth Circuit, has chosen Professor Liu. I think that says something about his approach to the law, his philosophy of the law, and we'll be looking into that today. I'll be asking questions about a number of things.

There are many, many things that the Professor has written, but one in his *Stanford Law Review* article of November, 2008, "Re-thinking Constitutional Welfare Rights" states this: "My thesis is that the legitimacy of judicial recognition of welfare rights depends on socially situated modes of reasoning that appeal not to transcendent moral principles of an ideal society, but to the culturally and historically contingent meanings of social goods in our own society."

He goes on to say, "I argue that the judicial recognition of welfare rights is best conceived as an act of interpreting the shared understanding of particular welfare goods as they are manifested in our institution, laws, and evolving practices", and goes on to state, "so conceived, justiciable welfare rights reflect the contingent character of our society's collective judgments rather than the tidy logic of comprehensive moral theory."

Well, I think that's a matter that we should talk about and to deal with honestly and fairly today, and I hope that we will be able

to do that. I believe Professor Van Alsteen, then at Duke—I think he’s at the Eleventh Circuit Conference, made remarks one time that “if you truly respect the Constitution you will enforce it as written, whether you like it or not.” I think that’s the calling of a judge. They’re not empowered to identify somehow in the atmosphere what they consider to be socially altered opinions of the day and then redefine the meaning of the Constitution.

If you feel, and if a judge feels they have that power, and this is a theory that is afoot in America today, judges who feel they have that power, I think, abuse the Constitution, disrespect the Constitution, and if it’s too deeply held, can actually disqualify them for sitting on the bench.

I would note that Professor Liu understands, I think, the importance of judicial philosophy in the confirmation process when he opposed Justice Roberts’ confirmation. He issued a statement that said, “It’s fair and essential to ask how a nominee”—Judge Roberts—“would interpret the Constitution and its basic values. Americans deserve real answers to this question and it should be a central focus of the confirmation process.”

He concluded that I guess his disagreements with Justice Roberts on that issue was so severe, that he advocated him not being confirmed in the Senate, as well as he testified in this Committee to very aggressively—too aggressively, I think—oppose the confirmation of Justice Alito.

So, Madam Chairman, we’ve got a number of issues we want to talk about. I want to give the nominee a chance to respond fairly to the concerns of his failure to produce certain documents and records and so forth. He’s entitled to that. I do believe that he did not spend nearly enough time in evaluating the questionnaire and properly responding to it to a degree that I’ve not seen, I think, since I’ve been in the Senate.

And I’ll also note that the nominee has not been in court and tried cases. He’s never tried a case, never argued a case on appeal, and therefore lacks the normal experience we look for. He has an academic record, and that’s all we have to judge his judicial philosophy on. We intend to pursue that, and I hope we’ll have a good hearing and a nice discussion about the future of law in America.

Senator FEINSTEIN. Thank you very much, Senator. We will have a good hearing, and appreciate all members having an open mind.

I’d like to ask the Chairman of the Committee if he has any comment to make before we proceed further.

Senator.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I’ll put my full statement in the record. I thank you for doing this hearing. I know this is the third time we’ve had it scheduled, and I’m glad this time the parliamentary—there wasn’t a parliamentary road block up to prevent hearing from him. Professor Liu is a widely respected constitutional law professor. I noticed one of the Fox News commentators said his qualifications for the appellate bench are unassailable.

When I listened to some of the concerns expressed by them, I hate to suggest a double standard here, but I will. I think of when another widely regarded law professor appeared before this Committee as a nominee, the University of Utah professor, Michael McConnell, who was also supported by a senior member of this Committee, Senator Hatch.

Professor McConnell was nominated by President Bush. He had had provocative writings. They included staunch advocacy for reexamining the First Amendment free exercise clause and the establishment clause jurisprudence. He expressed strong opposition to *Roe v. Wade*. He had testified before Congress that he believed the Violence Against Women Act was unconstitutional, an act that both you, Madam Chair, and I had worked on and helped write, and had been passed by a bipartisan majority.

He had a number of other areas where he was strongly critical of the Supreme Court. But he said that he felt that he believed in the doctrine of stare decisis, he'd be bound to follow Supreme Court precedent. I supported, even though I disagreed with just about everything that he had written about. I believed it when he said that he would follow Supreme Court precedent.

I supported his nomination, and unlike now when even people come out of here unanimously and are held up month after month, week after week, he was reported favorably by this Committee and was confirmed to the Tenth Circuit by a voice vote. I'd just note this for Senator Sessions, if I might: he was reported by voice vote in the Senate within a day of his nomination being reported. Within a day. We now have people, even for the lower courts, who get unanimous and we have to file cloture to even get them through.

So I'll put my full statement in the record, Madam Chair, and I thank you.

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

Senator SESSIONS. If I could just respond, since my name was mentioned. I would note that this nominee, Professor Liu, was set for a hearing in 28 days, when the average Court of Appeals nominee for the Obama administration so far was 48 days, and during the time when President Bush was in office the average time wait between nomination and a hearing when Senator Leahy was Chairman was 247 days.

So, I think we're moving rapidly, a little more rapidly than all the members on our side felt we should. Since as late as Tuesday night at 10:30, we're still receiving documents that should have been produced earlier that are just now being produced. So I think that this nomination is moving very fast, and we'll do our best to be prepared, although it's difficult, with a short timeframe, to evaluate the large numbers of documents, 117, that have been produced since the first hearing was set.

Senator FEINSTEIN. Thank you. Thank you.

Chairman LEAHY. I would note on that, having been mentioned—we don't have to go back and forth on this—but within about 3 weeks of the time I became Chairman of this Committee I scheduled and held hearings on one of President Bush's Court of Appeals nominees. I think it was within two or 3 weeks of becoming Chairman. That's not quite 280 days. Thank you.

Senator FEINSTEIN. Yes. I hope we don't get into a discussion of this.

[Laughter.]

Senator FEINSTEIN. But I feel I should point out that this hearing has already been delayed twice. Chairman Leahy originally intended to hold the hearing on March 10. That was 37 days ago. At the Ranking Member's request, he delayed it to March 24, but the minority then used a procedural tactic on the floor to block the hearing.

In the meantime, Professor Liu has been attacked and really never given a chance to speak. That's simply not fair and it's certainly not the American way. I won't go into a lot of judicial confirmation statistics, but I will say that in the first 15 months of the Obama administration, only 18 judicial nominees have been confirmed. By the same time in the Bush administration, 42 nominees had been confirmed.

So now I'd like to recognize Senator Graham and Representative Clyburn to introduce the nominees for the District Court of South Carolina.

Senator SPECTER. Madam Chair.

Senator FEINSTEIN. Senator.

Senator SPECTER. I wonder if I might be recognized for just a minute. I have to catch a train, but I wanted to make a very brief comment.

Senator FEINSTEIN. You certainly may. And I assume—I know Representative Clyburn had said he had a problem with time. Is that agreeable with everybody? Fine. Please go ahead.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. I will be very brief. I wanted to stop by today to urge my colleagues to move with dispatch on the nomination of Goodwin Liu. It is my hope that we will find one day soon an opportunity to break the gridlock which has engulfed the Senate for some time now on the judicial issues. We had the filibuster on the other side in 2005, and we finally worked through it with the so-called Gang of 14, where we solved the problem: no filibusters except under unusual circumstances.

I have reviewed Mr. Liu's record and I see that he's a Yale Law School graduate, was on the *Yale Law Journal*. With some personal experience on those credentials, that's an extraordinary background, plus all the rest of—

Senator FEINSTEIN. You leave out Stanford.

[Laughter.]

Senator FEINSTEIN. Never mind.

Senator SPECTER. Plus all the rest. Well, he's got a good supplemental record to draw distinction.

But we really need the best and the brightest in these positions. The business about the filibusters is being carried to just ridiculous extremes.

Senator Casey and I have Judge Vanaskie, a District Court judge, who is extraordinary. We had to file a petition for cloture,

it takes 30 hours of the Senate's time. So many cloture petitions have been filed and they have then been confirmed unanimously, or virtually unanimously.

So I think there really has to be some break point where we stop the retaliation. If it takes another Gang of 14, or perhaps more happily a Gang of 100, to get it done, I would urge my colleagues to move ahead here.

But I wanted to come by for a few moments. I appreciate you taking me out of order, Madam Chair, and I appreciate the indulgence of my colleagues.

Senator FEINSTEIN. Thank you very much, Senator.

Now if we might proceed for Senator Graham and Representative Clyburn to introduce the South Carolina nominees.

Senator Graham, would you like to proceed?

PRESENTATION OF J. MICHELLE CHILDS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, AND RICHARD MARK GERGEL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA BY HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Madam Chairman. I don't think, Jim, if he had any desire of running for the Senate, it's probably lost.

[Laughter.]

Senator GRAHAM. But thank you all. This is something I hope we all can agree upon. I am honored to be here to make my recommendations to the Committee about these two fine individuals.

We have two Republican Senators with a Democratic President, and I think some of you have been in that situation, maybe in the reverse role. When it comes to judges, Congressman Clyburn, Spratt, and myself, and Senator DeMint, along with the administration, have been able to put together a package of four District Court judges and one Fourth Circuit judge.

I'm very proud of our work and I want to recognize what Congressman Clyburn has done. He's been a great partner in dealing with this issue and the administration has been very flexible. We appreciate their assistance. I want to congratulate the administration for nominating these two fine individuals. I think when I get through talking you'll understand why we're proud of them.

First, Judge Michelle Childs has served as a Circuit Court judge in Columbia, South Carolina since 2006. She's the Chief Administrative Judge for our General Sessions and Business Courts. The ABA unanimously rated her as "Well Qualified." She was the first African-American woman partner for Nexsen & Pruet, one of the biggest firms in South Carolina. As the Deputy Director of the South Carolina Department of Labor, she was also a Worker's Compensation Commissioner.

She's a graduate of the University of South Carolina School of Business, School of Law, and she's married to Dr. Floyd Angus, with one daughter, Julianne.

I would just like to say this, because time is short: every lawyer that I know of who's appeared before her, regardless of their political persuasion or philosophy, has nothing but great things to say

about Judge Childs as being fair, smart, courteous to lawyers, and those who appear before her feel like they're getting not only a fair experience, but it's been a rewarding experience. She will do a great job for the people of South Carolina as a District Court judge and we're just very proud of her.

Richard Gergel is an outstanding member of our Bar. He was Joe Lieberman's campaign manager. That didn't work out too well when Joe ran for President. Joe's my favorite Democrat and he's my favorite Republican.

[Laughter.]

Senator GRAHAM. So I have a warm spot in my heart for him.

But Richard was rated unanimously "Well Qualified" by the ABA. He's represented the State of South Carolina, the city of Columbia, as their attorney. He's a Duke University Law School graduate and he's been married to Belinda Gergel, and they have two sons, Robert and Joseph. From a lawyer's perspective, he is one of the best lawyers we have in South Carolina and he will bring to the bench a very deep practice and background experience which I think will make him a very capable judge.

To the administration, thank you for approving this package. To Congressman Clyburn, thank you for being a good partner on this and other matters. To the Committee, I'd appreciate any support you could give these two fine individuals.

Thank you.

Senator FEINSTEIN. Thank you, Senator Graham.

Representative Clyburn, welcome to the other side.

PRESENTATION OF J. MICHELLE CHILDS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, AND RICHARD MARK GERGEL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA BY HON. JAMES E. CLYBURN, A U.S. REPRESENTATIVE FROM THE STATE OF SOUTH CAROLINA

Representative CLYBURN. Thank you, Madam Chair, Chairman Leahy, Ranking Member Sessions, and members of the Committee. Thank you so much for allowing me to appear here today on behalf of Michelle Childs and Richard Gergel.

I want to begin by thanking my colleague from South Carolina, Senator Graham, and really wish to associate myself with the remarks he just made. Senator Graham and I are from different sides of the aisle, but we agree on the fitness and judicial temperament of these two distinguished nominees. I have known these two outstanding nominees for years and could go on for hours vouching for their character and reputations. However, in the interest of time, I will ask that my full statement be included in the record, along with their resumes.

[The prepared statement of Representative Clyburn appears as a submission for the record.]

Representative CLYBURN. President Obama has chosen two very well-qualified individuals whose nominations are very historic. I use the word "historic" because each of them brings a new level of diversity to the South Carolina Federal courts. Once confirmed, Richard Gergel will be the first Jewish justice, and Michelle Childs will be the second African-American female justice to sit on the

Federal bench in South Carolina. In fact, Judge Childs will also be the third woman and the third African-American justice.

In addition to their diverse backgrounds and experiences as public servants throughout their careers, Michelle Childs and Richard Gergel have displayed exceptional integrity and an unwavering commitment to justice.

Madam Chair, as Senator Graham has indicated, Judge Childs currently sits on the South Carolina Circuit Court, the State's trial court of general jurisdictions. She serves as the Chief Administrative Judge for General Sessions, the State's criminal court, and as Chief Administrative Judge for the State's Business Court.

According to the Chief Justice of South Carolina's Supreme Court, Jean Toal, Judge Childs has demonstrated a dedication to the job and a work ethic unmatched by other judges. Chief Justice Toal tells a story that I think demonstrates the kind of judge Michelle Childs is, and shows the value system and commitment that she has to the law.

Late one Friday afternoon before Christmas, the chief justice had a difficult emergency that needed to be resolved rather quickly, so she called the Richland County Courthouse and found that Michelle Childs was still on the bench and able to solve the issue with intelligence and compassion. A few days later, Judge Childs delivered her first child. In the words of Chief Justice Toal, "commitment is Judge Childs' watchword, and I hate to lose her."

Judge Childs has served as an acting justice for the South Carolina Supreme Court. Prior to taking the bench in 2006, she was a commissioner with the South Carolina Worker's Compensation Commission from 2002 to 2006. She is a former president of South Carolina Bar's Young Lawyers Division, and currently serves on the South Carolina Bar's House of Delegates.

Madam Chairwoman, I also have the pleasure of introducing Richard Gergel. I have known Richard Gergel since he was the first student body president at the newly integrated Keenan High School in Columbia, South Carolina, the high school from which my three daughters graduated.

Richard Gergel has the ability and experience to serve well on the trial bench. He has extensive experience as a trial lawyer and as a principal and senior partner with Gergel, Nichols & Solomon in Columbia, South Carolina, where he has specialized in personal injury litigation, employment discrimination matters, and complex government litigation since 1983.

I have known him in my capacity as State Human Affairs Commissioner for almost 18 years. I found him to be a very good guy to work with on issues, and even a good guy when we are on opposite sides of the issue.

I want to conclude by urging the Committee, and the Senate as a whole, to move expeditiously to confirm these two candidates. Currently, 30 percent of the seats on the Federal bench in South Carolina are vacant and expeditious confirmation of these two outstanding nominees will do the legal profession proud and be a good thing for the State of South Carolina and the United States of America.

I thank the Committee so much for allowing me to be here today.

Senator FEINSTEIN. And we thank you. Representative Clyburn, Senator Graham, I know you have other things to do, so if you wish to be excused or remain, it is really your option. Thank you very much.

We have received letters from both Senators Burr and Hagen. They regret that they cannot be here today, but they have asked that I submit the records in support of Judge Catherine Eagles for the record. So ordered.

[The information appears as a submission for the record.]

Senator SESSIONS. Madam Chairwoman, I would just note that Senator Burr also gave me that statement and did express his regret that he couldn't be here, but expressed his strong support for the nominee as a person that is scrupulously fair and has the intellect and integrity to be a fine judge.

Senator FEINSTEIN. I appreciate that. Thank you very much, Senator.

I would also add that Judge Eagles has presided over at least 500 trials, has heard hundreds of civil and criminal motions, and has been unanimously rated "Well Qualified" by the American Bar Association. So, we look forward to her testimony.

I would also submit at this time Senator Boxer's statement. She regrets she is unable to be here and has asked me to submit her statement for the record in support of California nominees, Professor Goodwin Liu and Magistrate Judge Kimberly Mueller.

I'd also like to recognize members of the House of Representatives here today, Representative Mike Honda, Representative Doris Matsui, and Representative David Wu, who are here today. Also, Representative Gregorio Sablan, we very much welcome you. So, thank you very much.

Now, Mr. Liu, would you please come forward? If you would introduce your parents and your family at this time, then I'll administer the oath.

**STATEMENT OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT
JUDGE FOR THE NINTH CIRCUIT**

Professor LIU. Thank you so much, Madam Chair.

I'm delighted to be able to introduce my family today. With me from California, sitting in green behind me, is my wife, Ann O'Leary. She's a native of Orono, Maine. Her parents, Pam and Charlie, couldn't be here with us, but I'd like to introduce them as well.

In Ann's arms is my 4-week-old son Emmett, who I hope, Madam Chair, you will give special dispensation to sleep through this hearing.

[Laughter.]

Senator FEINSTEIN. Better asleep than the other end of the spectrum.

Professor LIU. I think we'll all be better off for it.

Senator FEINSTEIN. Yes.

Professor LIU. And then sitting next to my wife is the apple of our eye, that's my daughter Violet. She's 3 years old. It turns out that she and Emmett share the same birthday. My wife and I have been trying to explain to her that I've been nominated to be a

judge, and about 3 days after my nomination she said to me, "Daddy, are you a judge yet?"

[Laughter.]

Professor LIU. I said, "Well, that's not the way this works." But she became so interested in the constitutional process of advice and consent that she decided to join us here today.

Senator FEINSTEIN. Right.

[Laughter.]

Professor LIU. Sitting in the row right behind are my parents, Wen-Pen and Yang-Ching Liu. They go by their initials, WP and YC. They came here all the way from Sacramento, California, where they live, to support me.

I have a brother as well, Kingsway Liu, who also lives in the Bay area. He's a doctor and couldn't get a day off today to be here, but I also wanted to introduce him for the record.

And behind me is a large number of my former students and friends, and I would just like to recognize them and the special efforts that they made to be here to support me.

I don't have any further statement, Senator. I'm happy to answer the Committee's questions.

Senator FEINSTEIN. Well, thank you very much.

If you would stand and raise your right hand, please.

[Whereupon, the witness was duly sworn.]

Senator FEINSTEIN. Thank you very much.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Goodwin Hon Liu

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

United States Circuit Judge for the Ninth Circuit

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

UC Berkeley School of Law
Berkeley, California 94720

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

1970; Augusta, Georgia

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1995 – 1998, Yale Law School; J.D., 1998
1991 – 1993, Oxford University; M.A., 2002
1987 – 1991, Stanford University; B.S. with distinction, 1991
1986, Harvard Summer School; no degree

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

2003 – Present
UC Berkeley School of Law
Berkeley, California 94720
Associate Dean and Professor of Law (2008 – Present)
Assistant Professor of Law (2003 – 2008)

2008 – Present
San Francisco Unified School District
555 Franklin Street
San Francisco, California 94102
Legal Consultant

2006 – 2007
University of Washington
Center for Reinventing Public Education
2101 North 34th Street, Suite 195
Seattle, Washington 98103
Consultant

2005
The William and Flora Hewlett Foundation
2121 Sand Hill Road
Menlo Park, California 94025
Consultant

2001 – 2003
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, D.C. 20006
Litigation Associate

2000 – 2001
Supreme Court of the United States
One First Street, NE
Washington, D.C. 20543
Law Clerk to Justice Ruth Bader Ginsburg

2000
Nixon Peabody LLP
401 Ninth Street, NW, Suite 900
Washington, D.C. 20004
Contract Attorney

1999 – 2000
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20003
Special Assistant to the Deputy Secretary of Education

1998 – 1999
United States Court of Appeals for the D.C. Circuit
333 Constitution Avenue, NW
Washington, D.C. 20001
Law Clerk to Judge David S. Tatel

1998
NAACP Legal Defense Fund
1444 Eye Street, NW
Washington, D.C. 20005
Summer Intern

1996 – 1998
Yale Law School
P.O. Box 208215
New Haven, Connecticut 06520
Teaching Assistant to Professor Drew Days (Civil Procedure)
Teaching Assistant to Professor Owen Fiss (Civil Procedure)

1997
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005
Summer Intern

1997
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004
Summer Associate

1996
Howard Rice Nemerovski Canady Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Summer Associate

1995
Providence College
Feinstein Institute for Public Service
Providence, Rhode Island 02918
Senior Fellow

1993 – 1995
Corporation for National Service
1201 New York Avenue, NW
Washington, D.C. 20525
Senior Program Officer for Higher Education

1992
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
Document Analyst

1991
Upward Bound
Haas Center for Public Service
Stanford, California 94305
Chemistry Teacher

Other Affiliations

2009 – Present
Public Welfare Foundation
1200 U Street, NW
Washington, D.C. 20009
Member, Board of Directors

2008 – Present
Stanford University
Stanford, California 94305
Member, Board of Trustees (uncompensated)

2008 – Present
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, D.C. 20036
Member, Board of Directors (uncompensated)

2008 – Present
Alliance for Excellent Education
1201 Connecticut Avenue, NW, Suite 901
Washington, D.C. 20036
Member, Board of Directors (uncompensated)

2004 – Present

American Constitution Society
1333 H Street, NW, 11th Floor
Washington, D.C. 20005
Chair, Board of Directors (2009 – Present) (uncompensated)
Member, Board of Directors (2004 – Present) (uncompensated)

2008

Obama-Biden Transition
Office of the President-Elect
Washington, D.C. 20500
Member, Education Policy Working Group
Member, Education and Labor Agency Review Team

2005 – 2008

ACLU of Northern California
39 Drumm Street
San Francisco, California 94111
Member, Board of Directors (uncompensated)

2004 – 2008

Chinese for Affirmative Action
17 Walter U. Lum Place
San Francisco, California 94108
Member, Board of Trustees (uncompensated)

1997 – 2000

Stanford Alumni Association
Stanford, California 94305
Member, Board of Directors (uncompensated)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have registered for selective service.

8. **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.

Distinguished Teaching Award, UC Berkeley, 2009
Pacific Islander, Asian, and Native American Law Students Association Alumni Award,
Yale Law School, 2009
Elected to American Law Institute, 2008

Selected as one of ten Emerging Scholars by *Diverse Issues in Higher Education*, 2008
 Steven S. Goldberg Award for Distinguished Scholarship in Education Law, Education Law Association, 2007
 Asian American Alumni Award, Stanford University, 2005
 Stanford Associates Governors' Award for exemplary volunteer service, Stanford University, 2005
 Benjamin Scharps Prize (best paper by third-year law student), Yale Law School, 1998
 Clifford Porter Prize (best paper on taxation), Yale Law School, 1998
 Potter Stewart Prize (best team argument in appellate moot court competition), Yale Law School, 1997
 Editor, *Yale Law Journal*, 1996 – 1998
 Doctor of Public Service (honorary degree), Unity College, 1995
 Rhodes Scholarship, 1991
 Lloyd W. Dinkelspiel Award for Outstanding Service to Undergraduate Education, Stanford University, 1991
 Phi Beta Kappa, 1990
 James W. Lyons Dean's Award for Service, Stanford University, 1990
 Boothe Prize for Excellence in Writing, Stanford University, 1988
 Walter Vincenti Prize (best paper on values, technology, science, and society), Stanford University, 1988
 University President's Award for Academic Excellence, Stanford University, 1988
 David Starr Jordan Scholar, Stanford University, 1987

9. **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
 American Law Institute
 National Asian Pacific American Bar Association

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

California, 1999
 District of Columbia, 2002

There have been no lapses in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2006
 United States Court of Appeals for the Third Circuit, 2002
 United States Court of Appeals for the Seventh Circuit, 2001
 United States Court of Appeals for the Ninth Circuit, 2008
 United States Court of Appeals for the D.C. Circuit, 2002

There have been no lapses in membership.

11. Memberships:

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Public Welfare Foundation, Board of Directors (2009 – Present)
 Stanford University Board of Trustees (2008 – Present)
 Chair, Special Committee on Investment Responsibility (2009 – Present)
 American Constitution Society (2001 – Present)
 Board of Directors (2004 – Present); Chair (2009 – Present); Secretary (2004 – 2008); Chair, Board Development Committee (2004 – 2008)
 American Law Institute (2008 – Present)
 National Women’s Law Center, Board of Directors (2008 – Present)
 Alliance for Excellent Education, Board of Directors (2008 – Present)
 Oakland Zoo (2008 – Present)
 California Academy of Sciences (2008 – Present)
 Education Sector, Nonresident Senior Fellow (2007 – Present)
 The Club at the Claremont (2006 – Present)
 United States Tennis Association (2006 – Present)
 KQED Public Radio (2004 – Present)
 Stanford Alumni Association (1991 – Present)
 Board of Directors (1997 – 2000)
 Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, UC Berkeley
 Faculty Co-Director (2004-2009)
 Center on Reinventing Public Education, University of Washington
 National Working Group on Funding Student Learning (2006 – 2008)
 ACLU of Northern California, Board of Directors (2005 – 2008)
 Chinese for Affirmative Action, Board of Trustees (2004 – 2008)
 Haas Center for Public Service, National Advisory Board (1999 – 2007)
 Chair (2005 – 2007); Deputy Chair (2003 – 2005)
 Young Faculty Leaders Forum, Kennedy School of Government (2002 – 2006)
 Alumni Trustee Nominating Committee, Stanford University (2001 – 2005)
 Task Force on Minority Alumni Relations, Stanford University (2001 – 2005, 1995 – 1996)

Vice Chair (2001 – 2005)

- b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of the organizations listed above currently discriminates or has discriminated at any time I have been a member on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies. I am not aware of any discrimination by these organizations prior to my membership.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Scholarly Work

The Bush Administration and Civil Rights: Lessons Learned, 4 Duke J. Const. L. & Pub. Pol'y 77 (2009)

Keeping Faith with the Constitution (Oxford University Press, forthcoming 2010; American Constitution Society, 2009) (with Pamela S. Karlan and Christopher H. Schroeder)

National Citizenship and the Promise of Equal Educational Opportunity, in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009)

Rethinking Constitutional Welfare Rights, 61 Stan. L. Rev. 203 (2008)

The First Justice Harlan, 96 Cal. L. Rev. 1383 (2008)

Improving Title I Funding Equity Across States, Districts, and Schools, 93 Iowa L. Rev. 973 (2008)

"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 Harv. L. & Pol'y Rev. 53 (2008)

Interstate Inequality and the Federal Role in School Finance, in *Holding NCLB Accountable: Achieving Accountability, Equity, and School Reform* 103 (Gail L. Sunderman ed., 2008)

Seattle and Louisville, 95 Cal. L. Rev. 277 (2007)

Education, Equality, and National Citizenship, 116 Yale L.J. 330 (2006)

Interstate Inequality in Educational Opportunity, 81 N.Y.U. L. Rev. 2044 (2006)

Developments in U.S. Education Law and Policy, 2 Daito L. Rev. 17 (2006)

- The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & Inequality 81 (2006)
- School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791 (2005) (with William L. Taylor)
- Race, Class, Diversity, Complexity*, 80 Notre Dame L. Rev. 289 (2004)
- Brown, Bollinger, and Beyond*, 47 How. L.J. 705 (2004)
- Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003) (with Hillary Rodham Clinton)
- The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002)
- Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 Wis. L. Rev. 1
- Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381 (1998)
- Developments in Policy: The FDA's Tobacco Regulations*, 15 Yale L. & Pol'y Rev. 399, 416-29 (1996)
- Knowledge, Foundations, and Discourse: Philosophical Support for Service-Learning*, Mich. J. Community Service Learning, Fall 1995, at 5

Editorials

- "The Next Verdict on Prop. 8," *L.A. Times*, Nov. 10, 2008, at A19
- "Finding Right Mix for School Funding," *Sacramento Bee*, Jan. 13, 2008, at E5 (with Alan Bersin and Michael Kirst)
- "The Meaning of Brown vs. the Board," *L.A. Times*, Dec. 25, 2006, at A31
- "Life and Death and Samuel Alito," *L.A. Times*, Nov. 27, 2005, at M5
- "Roberts Would Swing the Supreme Court to the Right," *Bloomberg.com*, July 22, 2005
- "Truth Is, We Do Underfund Our Schools," *S.F. Chron.*, June 23, 2005, at B9
- "A Misguided Challenge to Affirmative Action," *L.A. Times*, Dec. 20, 2004, at B11; reprinted in "Too Good To Be True," *Cal. Bar Journal*, Feb. 2005, at 8
- "Regent's Stand on UC Admissions Is on Shaky Ground," *Sacramento Bee*, Apr. 1, 2004, at B7 (with Theodore Hsien Wang and William Kidder)
- "A Moment as Big as 'Brown,'" *Wash. Post*, June 29, 2003, at B3
- "Real Options for School Choice," *N.Y. Times*, Dec. 4, 2002, at A35
- "The Myth and Math of Affirmative Action," *Wash. Post*, Apr. 14, 2002, at B1

Other

- "Getting Beyond the Facts: Reforming California School Finance," Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity Issue Brief (2008) (with Alan Bersin and Michael W. Kirst)
- "Justice Alito and the Death Penalty," American Constitution Society Issue Brief (2005) (with Lynsay Skiba)
- "From *Brown* to *Grutter* and Beyond," *Boalt Hall Transcript*, Spring/Summer 2004, at 26

Foreword, in SERVICE-LEARNING: A MOVEMENT'S PIONEERS REFLECT ON ITS ORIGINS, PRACTICE, AND FUTURE at xi (Timothy K. Stanton et al. eds., 1999)
 "Origins, Evolution, and Progress: Reflections on a Movement," Feinstein Institute for Public Service, Providence College (1996); portions reprinted in *Metropolitan Universities: An International Forum*, Summer 1996, at 25
 "Service-Learning: A Paradigm Shift in Higher Education?," *NSEE Quarterly* (National Society for Experiential Education, Mt. Royal, N.J.), Fall 1995, at 8
National Service, The Federal Government and Higher Education: Reflections on the Corporation's Role, in CAMPUS COMPACT, SERVICE COUNTS: LESSONS FROM THE FIELD OF SERVICE AND HIGHER EDUCATION (Melissa Smith ed., 1995)

Some of my published works may have been reprinted in other media.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Funding Student Learning: How to Align Education Resources with Student Learning Goals, School Finance Redesign Project, Center on Reinventing Public Education, University of Washington (2008)

Final Report of the Task Force on Minority Alumni Relations, Stanford University (2004)

Final Report of the Task Force on Minority Alumni Relations, Stanford University (1996)

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Letter to Senator Patrick Leahy and Senator Jeff Sessions in support of the confirmation of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court (2009) (I did not contribute to the preparation of this letter; I joined it as a signatory.)

Testimony Before a Joint Hearing of the California Senate and Assembly Judiciary Committees on Proposition 8 (Oct. 2, 2008)

Brief of Amici Curiae Professors of Constitutional Law in Support of Respondents, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (I did not contribute to the preparation of this brief; I joined it as a signatory.)

Testimony Before the California Assembly Education Committee on AB 586 (Jan. 16, 2008)

Testimony Before the U.S. Senate Judiciary Committee on the Nomination of Judge Samuel A. Alito, Jr. to the U.S. Supreme Court (Jan. 10, 2006)
Lawyers' Statement on Bush Administration's Torture Memos (2004) (I did not contribute to the preparation of this statement; I joined it as a signatory.)

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have repeatedly and thoroughly searched on-line resources (Westlaw, Lexis, Google), my calendar, and my memory to produce the list below. To the best of my knowledge, this list is accurate and complete.

- Aug. 10, 2009: American Sociological Association Annual Meeting, San Francisco, CA. I spoke on a panel titled "Education in Diverse Communities."
June 19, 2009: American Constitution Society National Convention, Washington, D.C. I discussed the ideas in my co-authored book, *Keeping Faith with the Constitution*, on a panel. I also gave brief remarks at lunch.
May 16, 2009: Boalt Hall Commencement, Berkeley, CA. I gave a commencement speech to the Boalt Hall Class of 2009.
May 1, 2009: American Constitution Society, Washington, D.C. I spoke at an event to release my co-authored book *Keeping Faith with the Constitution*.
Apr. 22, 2009: UC Berkeley Distinguished Teaching Award Ceremony, Berkeley, CA. I gave an award acceptance speech.
Apr. 18, 2009: Northern District of California Judicial Conference, Yountville, CA. I compared and contrasted the early Obama administration with the early Lincoln administration on a panel titled "Team of Rivals." I do not have copies of any notes, transcript, or recording.
Apr. 16, 2009: Blum Center for Developing Economies, Berkeley, CA. Justice Stephen Breyer gave a presentation on "International Law," and I served as a moderator and commenter.
Apr. 15, 2009: American Educational Research Association Annual Meeting, San Diego, CA. I presented my paper, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 Iowa L. Rev. 973 (2008), on a panel titled "Funding Public Education for Disadvantaged Students: Economic, Legal and Policy Perspectives."
Apr. 4, 2009: Brennan Center for Justice Conference on "The Next Democracy," White Oak Conservation Center, FL. I gave a brief interview for a conference video.

- Feb. 23, 2009: Washington University St. Louis School of Law, St. Louis, MO. I spoke on civil rights as part of the Public Interest Law and Policy Speaker Series.
- Jan. 30, 2009: Dale Minami Boalt Alumni Fellowship Dinner, San Francisco, CA. I gave dinner remarks urging the student audience to pursue public service.
- Jan. 8, 2009: American Association of Law Schools Annual Meeting, San Diego, CA. I described the mission and activities of the American Constitution Society on a panel titled "Associational Pluralism." I do not have copies of any notes, transcript, or recording.
- Dec. 17, 2008: Public Education Network Annual Conference, San Francisco, CA. I described the activities of the Obama-Biden Transition team on education policy in a session titled "Equity and Access." I do not have copies of any notes, transcript, or recording.
- Nov. 14, 2008: American Constitution Society Conference on "The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union," Philadelphia, PA. I spoke on a panel titled "The Privileges or Immunities Clause."
- Nov. 13, 2008: Columbia Law School, New York, NY. I presented my paper, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008), at a legal theory workshop.
- Oct. 30, 2008: University of Chicago Law School, Chicago, IL. I presented my paper, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008), at a constitutional law workshop.
- Oct. 22, 2008: Duke Law School, Durham, NC. I presented my paper, *The Bush Administration and Civil Rights: Lessons Learned*, 4 Duke J. Const. L & Pub. Pol'y 77 (2009), in the "Lessons Learned Series" of the Program in Public Law.
- Oct. 3, 2008: Stanford Center for Opportunity Policy in Education, Stanford, CA. I gave a talk on civil rights at a conference on the forty-year anniversary of the Kerner Commission report.
- Sept. 16, 2008: Institute for Legal Research, Forum on "Courts, Politics, and the Media," Berkeley, CA. I gave brief remarks on the need for judicial decisions to be better communicated to the public. I do not have copies of any notes, transcript, or recording.
- June 14, 2008: American Constitution Society National Convention, Washington, D.C. I spoke on a panel titled "Our Enduring Constitution: Applications and Interpretations."
- June 9-10, 2008: James B. Hunt Institute for Educational Leadership and Policy, Governors Education Symposium, Cary, NC. I discussed my articles, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 Iowa L. Rev. 973 (2008), and *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006).
- May 16, 2008: UC Santa Barbara Conference on "Realizing *Bakke's* Legacy: Equal Opportunity and Access to Higher Education," Santa Barbara, CA. I gave remarks on diversity and higher education.

- May 6, 2008: Grantmakers in Film and Electronic Media, Washington, D.C. I spoke on a panel discussing the documentary film *Traces of the Trade*.
- Apr. 25, 2008: Asian Pacific Americans in Higher Education Annual Conference, San Francisco, CA. I spoke at a session on university trusteeship and described my service as a member of the Stanford Board of Trustees. I do not have copies of any notes, transcript, or recording.
- Apr. 18, 2008: EdSource Forum, Palo Alto, CA. I presented my co-authored report, "Getting Beyond the Facts: Reforming California School Finance" (2008).
- Apr. 2, 2008: UC Berkeley webcast on "Understanding California's School Funding Crisis," co-sponsored by the California Media Collaborative, Commonwealth Club of California, and Education Writers Association, Berkeley, CA. I discussed ideas from my co-authored report, "Getting Beyond the Facts: Reforming California School Finance" (2008).
- Mar. 17, 2008: National Academy of Sciences, Workshop Series on Common Standards for K-12 Education, Washington, D.C. I was assigned to speak on "Implications of Common Standards for Adequacy Lawsuits."
- Feb. 8, 2008: University of Washington School of Law, American Constitution Society student chapter, Seattle, WA. I discussed my article, "*History Will Be Heard: An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol'y Rev. 53 (2008).
- Feb. 8, 2008: Seattle University School of Law, Seattle, WA. I discussed the ideas in my article, "*History Will Be Heard: An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol'y Rev. 53 (2008), at a conference titled "*Brown Undone? The Future of Integration in Seattle After PICS v. Seattle School District No. 1.*"
- Jan. 11, 2008: Policy Analysis for California Education Seminar, Sacramento, CA. I presented my co-authored report, "Getting Beyond the Facts: Reforming California School Finance" (2008).
- Jan. 4, 2008: American Association of Law Schools Annual Meeting, New York, NY. I discussed the ideas in my article, "*History Will Be Heard: An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol'y Rev. 53 (2008), on a panel titled "The *Seattle/Louisville* Ruling: Constriction or Expansion of Race-Based Policies?"
- Dec. 12, 2007: Union for Reform Judaism Biennial Conference, San Diego, CA. I gave remarks at a session examining recent Supreme Court cases in light of new appointments.
- Dec. 12, 2007: Kaiser Permanente Annual National Diversity Conference, San Francisco, CA. I discussed the current state of affirmative action law and policy on a panel titled "Affirmative Action: Past, Present, and Future."
- Nov. 19, 2007: American Association of State Colleges and Universities Annual Conference, San Francisco, CA. I gave remarks on diversity in higher education.
- Nov. 2, 2007: Center for Comparative Study of Race and Ethnicity Conference on "Embracing Diversity: Making and Unmaking Race, Ethnicity and Difference in the 21st Century," Stanford, CA. I discussed changes in civil

- rights law and policy since *Brown* on a panel titled "Education and Equity in a Post-*Brown* Era." I do not have copies of any notes, transcript, or recording.
- Oct. 9, 2007: U.S. Court of Appeals for the Ninth Circuit annual law clerk orientation, San Francisco, CA. I gave dinner remarks published as *The First Justice Harlan*, 96 Cal. L. Rev. 1383 (2008).
- Oct. 5, 2007: Columbia Law School, American Constitution Society student chapter, New York, NY. I discussed my article, "*History Will Be Heard: An Appraisal of the Seattle/Louisville Decision*," 2 Harv. L. & Pol'y Rev. 53 (2008).
- July 27, 2007: American Constitution Society National Convention, Washington, D.C. I spoke on a panel titled "Race and the Constitution: The State of Equal Protection."
- July 24, 2007: Bar Association of San Francisco "Supreme Court Review," San Francisco, CA. I discussed major cases of October Term 2006. I do not have copies of any notes, transcript, or recording.
- Mar. 31, 2007: *Pepperdine Law Review* Symposium on "Post-*Grutter*: What Does Diversity Mean in Legal Education and Beyond?," Malibu, CA. I discussed the implications of *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003) for university admissions policies in a session titled "Diversity in Admissions." I do not have copies of any notes, transcript, or recording.
- Mar. 23, 2007: San Mateo Legal Aid Society Annual Awards Luncheon, East Palo Alto, CA. I gave remarks on the meaning of *Brown v. Board of Education*.
- Mar. 6, 2007: UC Berkeley Graduate School of Education Colloquium, Berkeley, CA. I spoke on a panel discussing No Child Left Behind and commented on a presentation by Sandy Kress, former education advisor to President George W. Bush.
- July 20, 2006: Bar Association of San Francisco "Supreme Court Review," San Francisco, CA. I discussed major cases of October Term 2005. I do not have copies of any notes, transcript, or recording.
- June 19, 2006: Achievement Gap Initiative Research Conference, Kennedy School of Government, Cambridge, MA. I presented my articles, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006), and *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).
- June 18, 2006: American Constitution Society National Convention, Washington, D.C. I moderated a panel titled "Wealth Inequality."
- May 8, 2006: Mathematical Sciences Research Institute, Berkeley, CA. I presented my articles, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006), and *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006), at a conference titled "Raising the Floor: Progress and Setbacks in the Struggle for Quality Mathematics Education for All."
- Apr. 28, 2006: UC Berkeley School of Law, Berkeley, CA. I presented my articles, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006), and *Education, Equality, and National Citizenship*, 116 Yale L.J.

- 330 (2006), at a conference titled "Rethinking *Rodriguez*: Education as a Fundamental Right."
- Apr. 10, 2006: American Educational Research Association Annual Meeting, San Francisco, CA. I was a commenter on a keynote address by Christopher Edley on educational opportunity and civil rights.
- Mar. 11, 2006: Daito Bunka University Law School, Tokyo, Japan. I presented my article, *Developments in U.S. Education Law and Policy*, 2 Daito L. Rev. 17 (2006), to law students and faculty.
- Mar. 9, 2006: National Taiwan University College of Law, Taipei, Taiwan. I gave a talk on the U.S. Supreme Court and recent appointments to law students and faculty.
- Mar. 4, 2006: National Asian Pacific American Conference on Law and Public Policy, Harvard Law School, Cambridge, MA. I gave a talk on the historical struggle of Asian Americans for equal citizenship and marriage equality.
- Feb. 13, 2006: American Constitution Society Bay Area Lawyers Chapter, San Francisco, CA. I spoke on a panel titled "Domestic Spying: Illegal or Inevitable?"
- Sept. 29, 2005: Charles Hamilton Houston Institute for Race and Justice, Harvard Law School, Cambridge, MA. I presented my articles, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006), and *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).
- July 30, 2005: American Constitution Society National Convention, Washington, D.C. I moderated a panel titled "The Right to Education Revisited." I described the Supreme Court decision in *San Antonio Independent School District v. Rodriguez* (1973) and introduced the panelists. I do not have copies of any notes, transcript, or recording.
- June 28, 2005: Bar Association of San Francisco "Supreme Court Review," San Francisco, CA. I discussed major cases of October Term 2004. I do not have copies of any notes, transcript, or recording.
- May 5, 2005: University of Minnesota Law School Conference on "With All Deliberate Speed: *Brown II* and Desegregation's Children," Minneapolis, MN. I presented my article, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & Inequality 81 (2006).
- July 1, 2004: Supreme Court Review, American Constitution Society, Washington, D.C. I moderated a panel discussion on the major cases of October Term 2003.
- June 15, 2004: American Association of Law Schools Racial Justice Workshop, Portland, OR. I presented my article, *Race, Class, Diversity, Complexity*, 80 Notre Dame L. Rev. 289 (2004).
- Sept. 11, 2003: Boalt Hall Alumni Association Annual Dinner, Berkeley, CA. I presented my article, "From *Brown* to *Grutter* and Beyond," *Boalt Hall Transcript*, Spring/Summer 2004, at 26.
- Aug. 30, 2003: Harvard Civil Rights Project Color Lines Conference, Cambridge, MA. I spoke on a panel titled "Inequality in K-12 Educational Opportunity" and presented my co-authored article, *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791 (2005).

- Aug. 2, 2003: American Constitution Society National Convention, Washington, D.C. I spoke on a panel titled "Segregation, Integration, and Affirmative Action After *Bollinger*." I do not have copies of any notes, transcript, or recording.
- Mar. 31, 2003: Georgetown University Law Center, Washington, D.C. I spoke on a panel titled "One Step Forward, Two Steps Back? *Grutter v. Bollinger* and the Future of Affirmative Action" and analyzed the *Grutter* decision. I do not have copies of any notes, transcript, or recording.
- Sept. 30, 1999: Workshop on "Foundations of Educational and Psychological Assessment," National Academy of Sciences, Washington, D.C. I discussed federal laws and policies concerning student assessment in K-12 public schools. I do not have copies of any notes, transcript, or recording.
- May 20, 1995: Chandler-Gilbert Community College, Chandler, AZ. I gave a commencement speech.
- May 13, 1995: Unity College, Unity, ME. I gave a commencement speech.
- Apr. 10, 1991: Panel discussion on "Safe Speech, Free Speech, and the University," Stanford University, Stanford, California. I discussed recent debates on campus concerning hate speech. I do not have copies of any notes, transcript, or recording.
- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Peter Jamison, "The Torture Memos and Berkeley's Law-School Schedule," *SF Weekly*, Aug. 12, 2009

Jess Bravin, "Decision Reflects Court's Deep Division," *Wall Street Journal*, June 30, 2009, at A4

Ari Shapiro, "Conservatives Have 'Originalism'; Liberals Have ...?," *NPR All Things Considered*, June 23, 2009

Lydia DePillis, "Et Tu, Scalia?," *Slate*, June 22, 2009

Ariel Alexovich, "Suite Talk: ACLU Director Leaves D.C. Office," *Politico.com*, June 3, 2009

Maura Dolan, "Battles Brew As Gay Marriage Ban Is Upheld," *Los Angeles Times*, May 27, 2009, at A1

Petra Pasternak, "Prop 8 Stands, But What About the 18K Marriages?," *LegalPad Blog*, May 26, 2009

Bara Vaida, "ACLU's Fredrickson Departs for Legal Group," *Under the Influence (National Journal blog)*, May 19, 2009

Aaron Wiener, "Supreme Court Nominee Debate Defined by Conservatives," *Washington Independent*, May 18, 2009

Joe Garofoli, "Pros and Cons of President's Potential Choices," *San Francisco Chronicle*, May 13, 2009, at A6

David Lightman et al., "Obama Court Pick Could Sail Through," *Miami Herald*, May 2, 2009, at A5

- Michael Doyle, "Souter Has Defied a Legal Stereotype," *Miami Herald*, May 2, 2009, at A5
- Michael Doyle & Marisa Taylor, "Liberal or Not, Souter's Departure Will Remake Court," *McClatchy-Tribune News Service*, May 1, 2009
- Dan Levine, "A Handful of Hopefuls Eye Ninth Circuit," *Recorder*, Mar. 18, 2009, at 1
- Jess Bravin, "Rethinking Original Intent," *Wall Street Journal*, Mar. 14, 2009, at W3
- Leslie A. Gordon, "Left Turn Permitted," *ABA Journal*, Mar. 2009, at 9
- Noelle Carter, "Slow Revolution," *Los Angeles Times*, Feb. 25, 2009, at F1
- Eric Lichtblau, "Obama Pick to Analyze Broad Powers of President," *New York Times*, Jan. 8, 2009, at A22
- Ari Shapiro, "Balance of Power Swings to Liberal Legal Group," *NPR Weekend Edition*, Jan. 3, 2009
- Lisa Lerer, "Liberal Legal Group Comes to the Fore," *Politico.com*, Dec. 28, 2008
- Maura Dolan, "Brown Asks Justices to Toss Prop. 8," *Los Angeles Times*, Dec. 20, 2008 at A1
- James Parker, "Prop. 8 Suits Win Supreme Court Review," *Daily Californian*, Nov. 20, 2008
- Maura Dolan, "Justices Will Hear Prop. 8 Challenges," *Los Angeles Times*, Nov. 20, 2008 at A1
- John Simerman, "Same-Sex Marriage Headed Back to Court," *Contra Costa Times*, Nov. 6, 2008
- Ben Smith, "Affirmative Action Change Under Obama?," *Politico.com*, Nov. 3, 2008
- David G. Savage, "Roe vs. Wade? Bush vs. Gore? What Are the Worst Supreme Court Decisions?," *Los Angeles Times*, Oct. 23, 2008
- Bob Egelko, "U.S. Supreme Court in Play After Election," *San Francisco Chronicle*, Oct. 20, 2008, at A1
- Tony Mauro, "Can McCain, Obama Turn High Court?," *Legal Times*, Oct. 13, 2008, at 8
- Joseph Bui, "Same-Sex Couples Plan to Marry," *Daily Californian*, June 24, 2008
- Amber Lee, "Anticipation over Supreme Court Ruling on Same-Sex Marriage," *KTVU Evening News*, May 14, 2008, <http://www.ktvu.com/video/16269552/index.html>
- Zusha Elinson, "Valley Attorneys Get Political: Local Lawyers Help Candidates to Form Tech, IP Policies," *Recorder*, May 13, 2008, at 1
- Peter Schrag, "California School Funding: Inadequate By Any Measure," *Sacramento Bee*, Apr. 9, 2008, at B7
- Kendra Hamilton, "Is Right the New Left? An Analysis of Justice Clarence Thomas's Concurring Opinion in the Seattle and Louisville Cases," *Diverse Issues in Higher Education*, Aug. 23, 2007, at 27
- Marcia Coyle, "Prevailing Winds: In the First Full Term with Alito, Court Took Marked Conservative Turn," *National Law Journal*, Aug. 1, 2007, at 1

- Ibram Rogers, "The Weight of One Man's Opinion: While Casting the Deciding Vote in the Recent K-12 Desegregation Case, Justice Anthony Kennedy's Opinion Left Some Room to Maneuver," *Diverse Issues in Higher Education*, July 26, 2007, at 7
- Shirley Dang, "Panel Tries to Explain Desegregation Ruling," *Contra Costa Times*, July 25, 2007, at A10
- Mark Walsh, "Use of Race Uncertain for Schools," *Education Week*, July 18, 2007, at 1
- Josh Gerstein, "Duplicity Pervades Race-Related Measures," *New York Sun*, July 2, 2007
- Bill Mears, "5-4 Votes Nudge Supreme Court to the Right," *CNN.com*, July 2, 2007
- Margaret Warner, "Key Decisions Mark Shift in Supreme Court," *NewsHour with Jim Lehrer*, June 29, 2007
- Ellen Goodman, "The Transformation of Justice Ginsburg," *Boston Globe*, June 29, 2007, at 17A
- Nina Totenberg, "High Court's New Race Ruling Echoes in Schools," *NPR Morning Edition*, June 29, 2007
- Bob Egelko, "5-4 Decision Disrupts Schools' Integration Plans," *San Francisco Chronicle*, June 29, 2007, at A21
- Joan Biskupic, "Roberts Steers Court Right Back to Reagan," *USA Today*, June 29, 2007, at 8A
- Brent Kendall, "State's Ban on Race Use Exceeds Court's; Opinion Won't Affect California Schools' Plans," *Los Angeles Daily Journal*, June 29, 2007
- Joseph Goldstein, "Color-Blind Schools Set by Court," *New York Sun*, June 29, 2007, at 1
- Nina Totenberg, "Supreme Court Rejects School Desegregation Plan," *NPR All Things Considered*, June 28, 2007
- Warren Olney, "The United States Supreme Court and School Integration in L.A.," *Which Way, L.A.?* (KCRW radio), June 28, 2007, http://www.kcrw.com/news/programs/ww/ww070628the_united_states_su
- Linda Greenhouse, "Oral Dissents Give Ginsburg a New Voice," *New York Times*, May 31, 2007, at A1
- Michael Krasny, "School Integration," *KQED Forum*, May 30, 2007, <http://www.kqed.org/epArchive/R705300900>
- Halimah Abdullah, "School Systems Still Losing Numbers Game: Neediest Don't Always Get Their Fair Share of Money," *Memphis Commercial Appeal*, Jan. 29, 2007, at A1
- "More Fairness in Funding Key to Equal Opportunity," *Oakland Tribune*, Jan. 3, 2007
- Linda Seebach, "If School Funding Is Rigged, It's to Benefit Those in Charge," *Rocky Mountain News*, Dec. 30, 2006, at 11C
- "Report Rips Funding for Low-Income Education," *Mobile Press-Register*, Dec. 23, 2006, at B2
- Grace Rauh, "Needy Students Go Without, Report Finds," *Contra Costa Times*, Dec. 22, 2006, at F4

- Amit R. Paley, "Program Widens School Funding Gap, Report Says," *Washington Post*, Dec. 21, 2006, at A4
- Naush Boghossian, "Wealthy Schools Get More, Report: Districts Nationwide Shortchange Poor, Minorities," *Los Angeles Daily News*, Dec. 21, 2006, at N1
- Nancy Zuckerbrod, "Aid Policies Hurting Poor Students?," *Deseret Morning News*, Dec. 21, 2006, at A3
- Todd Silberman, "School Funding Gaps Cited," *Raleigh News & Observer*, Dec. 21, 2006, at B7
- Eleanor Chute, "Report: Education Funds Misdirected," *Pittsburgh Post-Gazette*, Dec. 21, 2006, at B3
- Bob Egelko, "School Integration Back Before Supreme Court," *San Francisco Chronicle*, Dec. 3, 2006, at A1
- Paul Tough, "What It Takes to Make a Student," *New York Times Magazine*, Nov. 26, 2006
- "UC Teachers Propose New Admissions Policy," *Monterey County Herald*, Oct. 28, 2006
- Michelle Locke, "University of California Professors Propose Admissions Changes," *Associated Press*, Oct. 27, 2006
- Elaine Ayala, "Kauffman Still Seeks Equality in Education," *San Antonio Express-News*, Sept. 5, 2006, at 1C
- Charles Lane, "Justices to Hear Cases of Race-Conscious School Placements," *Washington Post*, June 6, 2006, at A3
- Wendy Davis, "Vouchers Tested: School Vouchers Are Facing a Different Set of Legal Challenges in State Courts," *ABA Journal*, June 24, 2006
- Ray Suarez, "The Alito Effect," *NewsHour with Jim Lehrer*, Feb. 21, 2006
- Ed Gordon, "High Court Considers Domino's Discrimination Suit," *NPR News & Notes*, Dec. 8, 2005
- Daniel Eisenberg, "How Alito Looks Under the Lens," *Time Magazine*, Nov. 14, 2005, at 28
- Jonathan Jones, "Alito Record on Religion a Concern," *Argus*, Nov. 2, 2005
- Adam Liptak & Jonathan D. Glater, "The Paper Trail: Lucid Rulings Tackling Many of Biggest Issues," *New York Times*, Nov. 1, 2005, at A25
- Bob Egelko, "The President's Supreme Court Nominee," *San Francisco Chronicle*, July 20, 2005, at A13
- Matt Krupnick, "Campuses Reject Polarizing Guests," *Contra Costa Times*, June 12, 2005, at F4
- Stephen Phillips, "Union Joins Attack on Bush Flagship Reforms," *Times Education Supplement*, Apr. 29, 2005
- Tom Hamburger, "White House Curbs Probe of Commentator's Hiring," *Los Angeles Times*, Apr. 15, 2005, at A13
- Tonia Bui, "Affirmative Action Study Met with Controversy," *Daily Californian*, Feb. 17, 2005
- Matt Krupnick, "New Spotlight on High Court Appointments," *Contra Costa Times*, Oct. 26, 2004, at A1
- Marcia Coyle, "2003-2004 Term: Supreme Court Review, Flexing Muscle and Wisdom," *National Law Journal*, Aug. 2, 2004, at S1

- Charles Lane, "Finality Seems to Elude High Court's Grasp," *Washington Post*, July 4, 2004, at A12
- Michael Doyle, "Election-Year Term is Cautious One for Court," *Sacramento Bee*, July 3, 2004, at A1
- Jonathan D. Glater, "Attention Wal-Mart Plaintiffs: Hurdles Ahead," *New York Times*, June 27, 2004, at 35
- Margarita Bauza, "U-M Readies New Admissions Plan; More Individualized Review of Freshman Applicants Is Expected," *Detroit News*, Aug. 26, 2003, at 1A
- Linda Greenhouse, "Context and the Court," *New York Times*, June 25, 2003, at A1
- Peter Y. Hong, "Justices to Reconsider Race in Admissions," *Los Angeles Times*, Mar. 31, 2003, at A18
- Sean Groom, "Clerking at the Supreme Court," *Washington Lawyer*, Mar. 2003, at 21
- Elliot Zaret, "Will Grutter Trump Bakke?," *Washington Lawyer*, Dec. 2002, at 22
- "From Statistics to Soup Kitchens: Youth as Resources in the 1990s," *National Civic Review*, Mar. 22, 1994, at 120
- Sue Hutchison, "Travails of the 'Stanford Man': For Some, Donald Kennedy's Brash Image Is Symbolic of the School's Arrogance," *San Jose Mercury News*, Apr. 14, 1991, at 1A
- Sue Hutchison, "Stanford Students to Lobby Sacramento for Public Schools," *San Jose Mercury News*, Mar. 27, 1991, at Peninsula Extra 8
- Carolyn Jung, "Stanford Out Front in Focus on Teaching: University Backs New Push with Cash," *San Jose Mercury News*, Mar. 8, 1991, at 1B
- "List of 32 Rhodes Scholars Includes Two Texans," *Houston Chronicle*, Dec. 10, 1990, at A7
- Art Campos, "Capital's Rhodes Scholar," *Sacramento Bee*, Dec. 10, 1990, at A1
- Carl Irving, "N. Californians Named as Rhodes Scholars Are Both from Families of Achievers, with Hopes of Careers with Government in Public Service," *San Francisco Examiner*, Dec. 10, 1990, at A5
- Kathryn Dettman, "Thirty-Two Rhodes Scholars Announced, Including Minister, Five from Harvard," *Associated Press*, Dec. 9, 1990
- Herbert A. Michelson, "Capital Teen Completes Project at UC Lab," *Sacramento Bee*, July 6, 1987, at B2

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held a judicial office.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____
- i. Of these, approximately what percent were:

jury trials? ___%; bench trials ___% [total 100%]

civil proceedings? ___%; criminal proceedings? ___% [total 100%]

- b. Provide citations for all opinions you have written, including concurrences and dissents.
 - c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).
 - d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
 - e. Provide a list of all cases in which certiorari was requested or granted.
 - f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.
 - g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.
 - h. Provide 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, provide copies of the opinions.
 - i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.
14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have not served as a judge.

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

- a. List chronologically any public offices you have held, 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 unsuccessful nominations for appointed office.

I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I am a registered Democrat. I have never held office in or rendered services to a political party. I have never been a member of, held office in, or rendered services to an election committee. I have never held a position or played a role in a political campaign, apart from occasional monetary contributions to political candidates.

16. **Legal Career:** Answer each part separately.

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

1998 – 1999; I served as a law clerk to Judge David S. Tatel, U.S. Court of Appeals for the D.C. Circuit.

2000 – 2001; I served as a law clerk to Justice Ruth Bader Ginsburg, Supreme Court of the United States.

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

2008 – Present; I serve as a legal consultant to the San Francisco Unified School District. My office address is UC Berkeley School of Law, Berkeley, California 94720.

iii. 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.

1998
NAACP Legal Defense Fund
1444 Eye Street NW
Washington, D.C. 20005
Summer Intern

1999 – 2000
United States Department of Education
400 Maryland Avenue SW
Washington, D.C. 20003
Special Assistant to the Deputy Secretary of Education

2000
Nixon Peabody LLP
401 Ninth Street NW, Suite 900
Washington, D.C. 20004
Contract Attorney

2001 – 2003
O'Melveny & Myers LLP
1625 Eye Street NW
Washington, D.C. 20006
Litigation Associate

2003 – Present
UC Berkeley School of Law
Berkeley, California 94720
Associate Dean and Professor of Law (2008 – Present)
Assistant Professor of Law (2003 – 2008)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

As a law clerk to Circuit Judge David S. Tatel (1998-1999) and to Associate Justice Ruth Bader Ginsburg (2000-2001), I assisted with legal research and writing. As a Special Assistant to the Deputy Secretary of Education (1999-2000), I was an attorney staff member to the senior leadership in the Department. Early in my career, I also served short stints as a legal intern to the NAACP Legal Defense Fund (summer 1998) and as a contract attorney to a law firm (summer 2000), where I assisted with legal research and writing.

After clerking at the Supreme Court, I practiced law at O'Melveny & Myers in Washington, D.C. (2001 to 2003). I did general business litigation and was a member of the appellate litigation group. I also did significant pro bono work.

Since 2003, I have been a full-time law professor at the UC Berkeley School of Law.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

At O'Melveny & Myers, my typical clients were large businesses. In addition to appellate work, my areas of practice included antitrust, insurance, and product liability. I also represented some individuals in white collar criminal matters and pro bono matters.

Since my appointment to the UC Berkeley faculty in 2003, my primary work has consisted of teaching and research. I also have performed occasional legal work as a consultant in the area of education law.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice at O'Melveny & Myers was exclusively litigation. I appeared in court occasionally. My other work as an attorney has not involved court appearances.

i. Indicate the percentage of your practice in:

1. federal courts 75%
2. state courts of record 25%
3. other courts
4. administrative agencies

ii. Indicate the percentage of your practice in:

1. civil proceedings 80%
2. criminal proceedings 20%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have not tried any cases in courts of record to verdict, judgment, or final decision.

i. What percentage of these trials were:

1. jury:
2. non-jury:

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

I filed one amicus brief in the Supreme Court of the United States. Brief of 19 Former Chancellors of the University of California as *Amici Curiae* in Support of Respondents, *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, and *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (Oct. 10, 2006).

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. *In re: Rite Aid Corp. Securities Litigation*

I assisted O'Melveny attorneys Bruce Hiler, Jeffrey Kilduff, and William Stuckwisch in handling an appeal in the U.S. Court of Appeals for the Third Circuit on behalf of a former chief financial officer of Rite Aid facing fraud and other charges in a securities class action filed after Rite Aid restated its earnings in the late 1990s. The appeal (No. 01-3563) challenged the district court's entry of a settlement bar order that purported to eliminate potentially valuable contractual indemnification claims that our client might have had against Rite Aid under state law (E.D. Pa., Civil Action No. 99-CV-1349, Judge Dalzell). I briefed the appeal. Our client reached a settlement with Rite Aid in September 2002 before the appeal was argued.

Managing counsel for our client were Bruce Hiler and Jeffrey Kilduff, O'Melveny & Myers LLP, 1625 Eye St., NW, Washington, DC 20006, (202) 383-5300. Counsel for Rite Aid were William A. Slaughter, Ballard, Spahr, Andrews & Ingersoll, 1735 Market Street, 51st Floor, Philadelphia, PA 19103, (215) 665-8500, and Douglas B. Adler, Skadden, Arps, Slate, Meagher & Flom, 300 South Grand Avenue, 34th Floor, Los Angeles, CA 90071, (213) 687-5000. Counsel for Class Plaintiffs were Carole Broderick, Berger & Montague, 1622 Locust Street, Philadelphia, PA 19103, (215) 875-3015; David J. Bershad, Milberg, Weiss, Bershad, Hynes & Lerach.

2. *Hidalgo v. FBI*

This case involved a Freedom of Information Act (FOIA) request by a federal inmate, who in 1999 sought documents from the FBI relating to an informant who had testified at his trial. The FBI invoked various FOIA exemptions and refused to confirm or deny the existence of responsive documents. After an unsuccessful administrative appeal, plaintiff brought this case *pro se* (D.D.C., Civil Action No. 00-0709, Judge Robertson), and the court rejected his claims on March 16, 2001. He then filed a *pro se* appeal in the U.S. Court of Appeals for the D.C. Circuit (No. 01-5161). The appeal was on a list of *pro se* cases that the D.C. Circuit assigns to pro bono counsel. I volunteered for the assignment, and Walter Dellinger served as the supervising partner. I briefed the appeal and argued the case before Chief Judge Ginsburg and Judges Sentelle and Henderson. On October 3, 2003, the court held that my client's administrative appeal was untimely and dismissed the suit without prejudice. 344 F.3d 1256 (D.C. Cir. 2003). The court of appeals did not reach the merits of the FBI's nondisclosure decision, although I had fully briefed those issues. After I left O'Melveny, plaintiff refiled the suit with the firm's continued assistance, and the district court ultimately ordered the FBI to disclose most of the information plaintiff had requested. 541 F. Supp. 2d 250 (D.D.C. 2008). The opinion relied substantially on the merits arguments I had made in the original case.

Supervising co-counsel was Walter Dellinger, O'Melveny & Myers LLP, 1625 Eye St., NW, Washington, DC 20006, (202) 383-5300. Counsel for the government was Diane M. Sullivan, United States Attorney's Office, Judiciary Center, 555 Fourth Street NW, Washington, D.C. 20530, (202) 514-7205.

3. *IVAX Corp. v. Aztec Peroxides LLC*

I assisted O'Melveny attorneys Richard Parker and William Stuckwisch in the representation of a defendant foreign company in this suit alleging unlawful price-fixing among organic peroxide manufacturers. The complaint was filed on March 28, 2002, in the U.S. District Court for the District of Columbia (02-CV-00593), and the case was assigned to Judge Robertson. I helped brief a motion to dismiss for lack of personal jurisdiction or, in the alternative, for failure to state a claim. On January 7, 2003, Judge Robertson dismissed our client from the suit based on plaintiffs' failure to state a claim.

Managing counsel for our client was Richard Parker, O'Melveny & Myers LLP, 1625 Eye St., NW, Washington, DC 20006, (202) 383-5300. Counsel for Plaintiffs was Ann C. Yahner, Cohen Milstein, 1100 New York Avenue NW, Washington, D.C. 20005, (202) 408-4600.

4. *Paper Systems Inc. v. Nippon Paper Industries Co.*

I assisted O'Melveny attorneys Ian Simmons and William Stuckwisch in handling this appeal in the U.S. Court of Appeals for the Seventh Circuit. Our client, a paper manufacturer, had won dismissal in district court of a price-fixing conspiracy suit against it. 2000 WL 362020 (E.D. Wis. Mar. 30, 2002). I was principal author of the briefs. The court of appeals (Chief Judge Flaum and Judges Bauer and Easterbrook) reversed. 281 F.3d 629 (7th Cir. 2002).

Managing counsel for our client was Ian Simmons, O'Melveny & Myers LLP, 1625 Eye St., NW, Washington, DC 20006, (202) 383-5300. Counsel for Plaintiffs was Daniel A. Small, Cohen, Milstein, Hausenfeld & Toll, 1100 New York Avenue NW, Suite 500, Washington, D.C. 20005, (202) 408-4600.

5. *Parents Involved in Community Schools v. Seattle School District No. 1*

The case concerned the constitutionality of race-conscious voluntary desegregation plans in the Louisville and Seattle school districts. I was counsel of record and the primary author of an amicus brief filed on October 10, 2006, in the Supreme Court of the United States on behalf of nineteen former University of California chancellors representing all ten UC campuses in support of the school districts. Boalt Hall dean Christopher Edley collaborated with me on the brief. We did all the work pro bono. The Supreme Court invalidated the school districts' plans. 551 U.S. 701 (2007).

Co-counsel on the amicus brief was Christopher Edley, Dean, UC Berkeley School of Law, Boalt Hall, Berkeley, CA 94720, (510) 642-6483. Counsel for Louisville Petitioner

was Teddy B. Gordon, 807 West Market Street, Louisville, KY 40202, (502) 585-3534. Counsel for Seattle Petitioner was Harry Korrell, Davis Wright Tremaine, 1201 Third Avenue, Suite 2200, Seattle, WA 98101, (206) 622-3150. Counsel for Jefferson County Public Schools was Francis J. Mellen, Wyatt, Tarrant & Combs, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202, (502) 589-5235. Counsel for Seattle School District No. 1 were Michael Madden, Bennett Bigelow & Leedom, 1700 Seventh Avenue, Suite 1900, Seattle, WA 98101, (206) 622-5511, and Maree Sneed, Hogan & Hartson, 555 Thirteenth Street NW, Washington, D.C. 20004, (202) 637-5600.

6. *Gilchrist v. State Farm Mutual Automobile Insurance Co.*

Plaintiffs alleged that defendant insurers violated federal antitrust laws by conspiring to limit coverage for certain auto body repairs. After the district court certified a nationwide class of 70 million policyholders, the insurance companies appealed to the U.S. Court of Appeals for the Eleventh Circuit. I assisted O'Melveny attorney John Beisner in writing an amicus brief in support of the insurance companies on behalf of several insurance trade associations. Among other arguments, we contended that the McCarran-Ferguson Act required this dispute to be resolved by state regulatory authorities and not by federal courts. The Eleventh Circuit agreed that the McCarran-Ferguson Act barred the suit. 390 F.3d 1327 (11th Cir. 2004).

Managing counsel for our clients was John Beisner, now with Skadden, Arps, Slate, Meagher & Flom, 1440 New York Ave., NW, Washington, DC 20005, (202) 371-7000. Counsel for Plaintiffs was R. Stephen Berry, Berry & Leftwich, 1717 Pennsylvania Avenue NW, Suite 450, Washington, D.C. 20006, (202) 296-3020. Counsel for State Farm was Carey P. DeDeyn, Sutherland Asbill & Brennan, 999 Peachtree Street NE, Atlanta, GA 30309, (404) 853-8000

7. *Lloyd v. General Motors Corp.*

I assisted O'Melveny attorneys John Beisner, Neil Gilman, and Jonathan Hacker in representing General Motors in the Maryland Court of Appeals in a suit by several individuals seeking to recover the cost of repairing allegedly unsafe seatbacks where none of the individuals claimed actual personal injury as a result of the alleged defect. General Motors prevailed in the lower courts, and plaintiffs appealed. I helped brief the appeal, heard by Chief Judge Bell and Judges Eldridge, Raker, Wilner, Cathell, Harrell, and Battaglia. The Maryland Court of Appeals reversed. 916 A.2d 257 (Md. 2007).

Managing counsel for our clients was John Beisner, now with Skadden, Arps, Slate, Meagher & Flom, 1440 New York Ave., NW, Washington, DC 20005, (202) 371-7000. Counsel for Plaintiffs were John M. Mason, Marks & Sokolov, 1835 Market Street, 28th Floor, Philadelphia, PA 19103, (215) 569-8901; and William F. Askinazi, Law Offices of William F. Askinazi, OBA Bank Building, Suite 200, 20300 Seneca Meadows Parkway, Germantown, MD 20876, (301) 540-5380.

8. *Martinez v. Bush*

I assisted O'Melveny attorneys Ron Klain and Jeremy Bash in the representation of minority voters raising constitutional and statutory challenges to Florida redistricting plans. The complaint was filed in January 2002 in the U.S. District Court for the Southern District of Florida (Nos. 02-20244-CIV, 02-10028-CIV), and the case was assigned to a three-judge district court comprised of Judges Tjoflat, Hinkle, and Jordan. I helped draft the second amended complaint and plaintiffs' consolidated memorandum in opposition to defendants' motion for judgment on the pleadings. The district court upheld the redistricting plans. 234 F. Supp. 2d (S.D. Fla. 2002).

Managing counsel were Ron Klain and Jeremy Bash, both now with the United States Government. Counsel for the State of Florida was Paul F. Hancock, Deputy Attorney General, 110 SE 6th Street, 10th Floor, Fort Lauderdale, FL 33301, (954) 712-4600.

9. *State of Maryland v. Sanders*

I was pro bono defense counsel to a Maryland inmate facing a criminal charge of second-degree assault for striking a correctional officer during an altercation with another inmate (Montgomery County Circuit Court Docket No. 96047C). I took on this case through a partnership between my law firm and a local public defender's office in which firm attorneys provided pro bono counsel to indigent defendants facing misdemeanor charges. By working with the state's attorney and the victim of the offense, I helped the client secure probation before judgment. To achieve this result, I successfully persuaded the assault victim to appear on the defendant's behalf at an October 2002 hearing before Judge Weinstein in Montgomery County Circuit Court.

My co-counsel was Brett S. Lonker, Assistant Public Defender, 199-P East Montgomery Avenue, Rockville, MD 20850, (240) 773-9600. Counsel for the State of Maryland was John McLane, Montgomery County State's Attorney, 50 Maryland Avenue, 5th Floor, Rockville, MD 20850, (240) 777-7300.

10. *Highland Tank v. ACE/CIGNA*

In October 2000, Plaintiff filed this class action suit against its insurers alleging failure to pay certain dividends owed under a workers' compensation policy. The case was filed in Pennsylvania state court (Lancaster County Court of Common Pleas). The court certified a nationwide class, and I assisted O'Melveny attorney Brian Boyle in the representation of the defendants on appeal. I helped brief the appeal, in which our clients argued that class certification was improper because the policies were governed by state laws that varied from one jurisdiction to another. I do not recall whether the appeal was argued or decided before I left O'Melveny, and I am unable to locate the docket or filings for this case. The parties settled in July 2004.

Managing counsel for our client was Brian Boyle, O'Melveny & Myers LLP, 1625 Eye St., NW, Washington, DC 20006, (202) 383-5300.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Since 2003, I have been a full-time law professor at UC Berkeley. My principal work consists of teaching and research and, since becoming associate dean in 2008, administrative duties. I also served as faculty co-director of the Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity from 2004 to 2009 and in that capacity advised and participated in civil rights research projects.

On a limited basis, I have been a legal consultant on matters of education law and policy. Most significantly, I advise the San Francisco Unified School District on its student assignment plan. I occasionally testify on constitutional law questions before local, state, and federal government entities. I have served on the boards of several nonprofit legal organizations.

I have performed no lobbying activities on behalf of any client or organization.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have been a member of the UC Berkeley School of Law faculty since 2003. In those years, I have taught the following courses:

Constitutional Law: 2004, 2005, 2006, 2008, 2010
 judicial review, federalism, separation of powers, equal protection, due process
 Contemporary Issues in Constitutional law: 2009
 a different topic each week, including gun rights, death penalty, abortion, and voting rights
 Fundamental Rights: 2005, 2006
 positive and negative rights, legislative constitutionalism, substantive due process, theories of constitutional interpretation
 Education Law & Policy: 2003, 2004, 2005
 school desegregation, school finance, school choice, vouchers, standards, and testing

20. **Deferred Income/ Future Benefits:** List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Under my contract with Oxford University Press for publication of *Keeping Faith with the Constitution*, I am entitled to royalties based on book sales. I have no other arrangements for deferred income or future benefits.

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

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court.

22. **Sources of Income:** 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, licensing fees, 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.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My wife and I are both presently employees of the University of California. I serve on the Board of Trustees of Stanford University. I am a consultant to the San Francisco Unified School District. I also serve and recently have served on the boards of several nonprofits, some of which participate in litigation on behalf of clients or on their own behalves. My wife is a senior fellow at the Center for American Progress, and she serves on two non-profit boards, Public Advocates and the East Bay Community Law Center, some of whose work involves litigation. If confirmed, I would carefully apply the recusal statutes, the relevant canons of the Code of Conduct for United States Judges, and the advice of colleagues and/or the Judicial Conference to any case involving one or more of these entities in any capacity. Where necessary to ensure impartiality or to avoid

appearance of partiality, I would disclose ties to litigants and recuse myself where appropriate.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will handle all matters involving actual or potential conflicts of interest through the careful and diligent application of the Code of Conduct for United States Judges as well as other relevant canons and statutory provisions.

25. **Pro Bono Work:** 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 take seriously the professional responsibility of lawyers to serve the disadvantaged, which was a large part of my motivation to go to law school. As a law firm associate, I took on many pro bono matters, which in some months accounted for one-third or more of my billable hours. Those matters included *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003), a Freedom of Information Act case in which I served as court-appointed counsel. They also included cases I handled through a local partnership between my firm and the Montgomery County, Maryland, Office of the Public Defender. For example, I represented a woman facing an assault charge for throwing a kitchen knife at her husband and successfully persuaded the district attorney to drop the charge by uncovering a long history of physical and psychological abuse of the woman by her husband.

Since joining the Berkeley Law faculty, I have continued to devote considerable time to the needs of the disadvantaged, especially low-income or minority children in public schools. In addition to my scholarship and policy work in these areas, I contributed my time and expertise to the creation of a new charter school run by UC Berkeley and Aspire Public Schools in my local community. From 2004 to 2008, I served on a faculty advisory committee that helped launch the California College Preparatory Academy. The school serves a predominantly low-income, African American, and Hispanic student population in grades 7-10 (with plans to expand to grades 7-12). In the first two years of my involvement, I participated in monthly two-hour committee meetings as well as volunteer activities at the school site.

I also have worked with disadvantaged students in more direct ways. During the first two years after law school, while clerking on the D.C. Circuit and then serving in the U.S. Department of Education, I volunteered my services for three hours on Saturday mornings as an SAT tutor for low-income students at Washington-Lee High School, a public school in Arlington, Virginia.

Finally, I devote considerable time to serving on boards of nonprofit organizations that address the needs of disadvantaged individuals and groups through policy, litigation, and

direct services. I typically spend one to three days per month on this board work.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission to recommend candidates for nomination to the United States Court of Appeals for the Ninth Circuit.

On February 6, 2009, I met with White House Counsel Gregory Craig and staff regarding my interest in serving as a judge. I had a second meeting with White House Counsel's Office attorneys on March 12, 2009. Since August 2009, I have been in contact with White House staff and pre-nomination officials in the Office of Legal Policy at the Department of Justice. On September 23, 2009, I interviewed in Washington, D.C., with Associate Attorney General Thomas Perrelli and attorneys from the Department of Justice and the White House Counsel's Office. The President submitted my nomination to the United States Senate on February 24, 2010.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AO 10
Rev. 1/2008

**FINANCIAL DISCLOSURE REPORT
NOMINATION FILING**

*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) Lin, Goodwin H.	2. Court or Organization U.S. Court of Appeals for the Ninth Circuit	3. Date of Report 2/24/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge - Nominee	5a. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 2/24/2010 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final 5b. <input type="checkbox"/> Amended Report	6. Reporting Period 1/1/2009 to 1/31/2010
7. Chambers or Office Address UC Berkeley School of Law Berkeley, CA 94720-7200	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.		

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

NONE (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
1. Member, Board of Trustees	Stanford University
2. Chair, Board of Directors (I served as Secretary before becoming Chair)	American Constitution Society for Law and Policy
3. Member, Board of Directors	Public Welfare Foundation
4. Member, Board of Directors	National Women's Law Center
5. Member, Board of Directors	Alliance for Excellent Education

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

NONE (No reportable agreements.)

DATE	PARTIES AND TERMS
1. _____	_____
2. _____	_____
3. _____	_____

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting Liu, Goodwin H.	Date of Report 2/24/2010
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III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions.)

A. Filer's Non-Investment Income
 NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2010	University of California - salary	\$21,705.50
2. 2010	San Francisco Unified School District - legal consulting	\$4,972.50
3. 2010	Public Welfare Foundation - director's fee	\$1,500.00
4. 2009	University of California - salary	\$241,102.05
5. 2009	San Francisco Unified School District - legal consulting	\$5,703.75
6. 2009	Public Welfare Foundation - director's fee	\$6,000.00
7. 2009	Oxford University Press - book advance	\$500.00
8. 2009	Georgetown University - honorarium	\$500.00
9. 2009	University of Arkansas, Fayetteville - honorarium	\$250.00
10. 2009	University of San Diego - honorarium	\$200.00
11. 2008	University of California - salary	\$202,642.39
12. 2008	San Francisco Unified School District - legal consulting	\$15,697.50
13. 2008	Union for Reform Judaism - honorarium	\$5,000.00
14. 2008	Kaiser Foundation Health Plan - honorarium	\$2,500.00
15. 2008	James B. Hunt Institute for Educational Leadership and Policy - honorarium	\$1,500.00
16. 2008	Stanford University - honorarium	\$1,000.00
17. 2008	Duke University - honorarium	\$1,000.00
18. 2008	University of Chicago - honorarium	\$300.00

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, complete this section.
 (Dollar amount not required except for honoraria.)

 NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE
1. 2010	University of California - salary

FINANCIAL DISCLOSURE REPORT
Page 3 of 9

Name of Person Reporting Liu, Goodwin H.	Date of Report 2/24/2010
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2. 2009	University of California - salary
3. 2009	Center for American Progress - consulting
4. 2009	Princeton University - honorarium (\$15,000)
5. 2009	San Francisco Chronicle - honorarium (\$150)

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

NONE (No reportable reimbursements.)

	<u>SOURCE</u>	<u>DATES</u>	<u>LOCATION</u>	<u>PURPOSE</u>	<u>ITEMS PAID OR PROVIDED</u>
1. EXEMPT					
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT
Page 4 of 9

Name of Person Reporting Liu, Goodwin H.	Date of Report 2/24/2010
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V. GIFTS. *(Includes those to spouse and dependent children; see pp. 22-31 of filing instructions.)*

NONE *(No reportable gifts.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1. EXEMPT			
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

NONE *(No reportable liabilities.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 5 of 9

Name of Person Reporting Liu, Goodwin H.	Date of Report 2/24/2010
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VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
1. - Chesapeake Core Growth	A	Dividend	K	T	Exempt				
2. - Fidelity Large Cap Stock	A	Dividend	K	T					
3. - Harbor Capitol Appreciation	A	Dividend	K	T					
4. - Vanguard PrimeCap Core	A	Dividend	K	T					
5. - Fidelity Puritan	A	Dividend	K	T					
6. - Oakmark	A	Dividend	K	T					
7. - Vanguard Value Trust Index	A	Dividend	J	T					
8. - SPDR Midcap	A	Dividend	K	T					
9. - Fidelity Low Priced Stock	A	Dividend	K	T					
10. - Royce Value Plus Service	A	Dividend	J	T					
11. - Artio International Equity A	C	Dividend	K	T					
12. - Dodge and Cox International	A	Dividend	J	T					
13. - Fidelity Money Market	A	Dividend	M	T					
14. - Fidelity Ginnie Mae	A	Dividend	K	T					
15. - Fidelity VIP Contrafund	A	Dividend	J	T					
16. - Fidelity VIP Equity-Income	A	Dividend	J	T					
17. - Fidelity VIP Mid Cap	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and 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 = more than \$5,000,000	E = \$15,001 - \$50,000
2. Value Codes (See Columns C1 and D3)	J = \$15,000 or less N = \$250,001 - \$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 \$5,000,000	M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000	
3. Value Method Codes (See Column C2)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	

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Name of Person Reporting Liu, Goodwin H.	Date of Report 2/24/2010
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VII. INVESTMENTS and TRUSTS - income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

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	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)	
	18. - Fidelity Intermediate Bond	A	Dividend	J	T					
19. - Vanguard PrimeCap Core	A	Dividend	K	T						
20. - Dodge and Cox Income	A	Dividend	J	T						
21. - Selected American Shares	A	Dividend	J	T						
22. - Fidelity Midcap Stock	A	Dividend	K	T						
23. - Fidelity Small Cap	A	Dividend	J	T						
24. - Fidelity Diversified International	A	Dividend	J	T						
25. - Vanguard Emerging Market Index	A	Dividend	K	T						
26. - Fidelity Capital Appreciation	A	Dividend	J	T						
27. - Harbor Bond International	B	Dividend	K	T						
28. - TCW Dividend Focused N	A	Dividend	K	T						
29. - Third Avenue International Value	A	Dividend	K	T						
30. - Fidelity Inflation-Protected Bond	A	Dividend	K	T						
31. - Fidelity Capital Appreciation	A	Dividend	K	T						
32. - Fidelity Growth and Income	A	Dividend	J	T						
33. - Fidelity International Small Cap	A	Dividend	J	T						
34. - Fidelity Real Estate Investment	A	Dividend	J	T						

1. Income Gain Codes (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000 J = \$15,000 or less N = \$250,001 - \$500,000 P3 = \$25,000,001 - \$50,000,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000 R = Cost (Real Estate Only) V = Other	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000 L = \$50,001 - \$100,000 P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000	D = \$5,001 - \$15,000 I2 = More than \$5,000,000 M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000	E = \$15,001 - \$50,000
2. Value Codes (See Columns C1 and 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	P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	

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Name of Person Reporting	Date of Report
Liu, Goodwin H.	2/24/2010

VII. INVESTMENTS and TRUSTS – Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

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	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or inst.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
	35. - UC Pathway 2040	A	Dividend	K	T				
36. - UC Balanced Growth	A	Dividend	L	T					
37. - Fidelity Balanced	A	Dividend	K	T					
38.									
39.									

1. Income Gain Codes: (See Columns B1 and D4)	A=\$1,000 or less F=\$50,001 - \$100,000	B=\$1,001 - \$2,500 G=\$100,001 - \$1,000,000	C=\$2,501 - \$5,000 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 Columns C1 and 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 Column C2)	Q=Appraisal U=Book Value	R=Cost (Real Estate Only) V=Other	S=Assessment W=Estimated	T=Cash Market	

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Name of Person Reporting	Date of Report
Liu, Goodwin H.	2/24/2010

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

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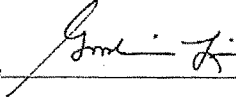
Name of Person Reporting	Date of Report
Liu, Goodwin H.	2/24/2010

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 _____



NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT
NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks		115	816	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		350	967	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		536	594
Real estate owned-add schedule		975	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		66	409				
Cash value-life insurance							
Other assets itemize:							
See attached schedule		537	746				
				Total liabilities		536	594
				Net Worth	1	509	344
Total Assets	2	045	938	Total liabilities and net worth	2	045	938
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you a defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT
NET WORTH SCHEDULES

Listed Securities

Chesapeake Core Growth	\$34,708
Fidelity Large Cap Stock	15,936
Harbor Capital Appreciation	29,999
Vanguard PrimeCap Core	15,620
Fidelity Puritan	30,494
Oakmark	34,891
Vanguard Value Trust Index	14,426
SPDR Midcap	38,250
Fidelity Low Priced Stock	46,287
Royce Value Plus Service	13,513
Artio International Equity A	33,949
Dodge and Cox International	13,715
Fidelity Ginnie Mae	29,179
Total Listed Securities	\$350,967

Real Estate Owned

Personal residence (estimate)	\$975,000
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Real Estate Mortgages Payable

Personal residence	\$536,594
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Other assets: Retirement accounts

University of California (UC) 403(b)	
Fidelity Inflation-Protected Bond	\$31,322
Fidelity Capital Appreciation	17,930
Fidelity Growth and Income	13,720
Fidelity Small Cap Stock	10,466
Fidelity International Small Cap	9,582
Fidelity Real Estate Investment	8,304
Subtotal UC 403(b)	91,324

UC 457(b) UC Balanced Growth	73,920
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UC Defined Contribution Plan (DCP) Fidelity Balanced	42,532
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Fidelity Annuity

Fidelity VIP Contrafund	13,433
Fidelity VIP Equity-Income	10,536
Fidelity VIP Mid Cap	16,523
Subtotal Fidelity Annuity	40,492

Pershing IRA	
Fidelity Intermediate Bond	14,874
Vanguard PrimeCap Core	15,240
Fidelity Low Priced Stock	6,221
Cash/Money Market	446
Subtotal Pershing IRA	<u>36,781</u>
Pershing Roth IRA	
Dodge and Cox Income	11,833
Vanguard PrimeCap Core	20,885
Selected American Shares	9,577
Fidelity Midcap Stock	25,467
Fidelity Small Cap	13,207
Fidelity Diversified International	13,200
Vanguard Emerging Market Index	24,992
Cash/Money Market	156
Subtotal Pershing Roth IRA	<u>119,317</u>
UC 403(b) UC Pathway 2040	22,137
UC 457(b) UC Pathway 2040	22,137
UC Defined Contribution Plan UC Pathway 2040	4,510
Fidelity Roth IRA	
Fidelity Capital Appreciation	1,846
Fidelity Cash Reserves	8
Subtotal Fidelity Roth IRA	<u>1,854</u>
Pershing Roth IRA	
Harbor Bond International	36,747
TCW Dividend Focused N	28,452
Third Avenue International Value	17,468
Cash/Money Market	75
Subtotal Pershing Roth IRA	<u>82,742</u>
Total Other Assets	<u>\$537,746</u>

AFFIDAVIT

I, GOODWIN LIU, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2/23/10
(DATE) [Signature]
(NAME)

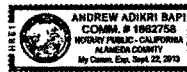
State of California
County of ALAMEDA

On FEBRUARY 23RD 2010 before me, ANDREW ADIKRI BAPI (NOTARY PUBLIC)
(insert name and title of the officer)

personally appeared GOODWIN HON LIU
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Signature] (Seal)

Chairman LEAHY. Madam Chair, if I could just interject.

Senator FEINSTEIN. Mr. Chairman.

Chairman LEAHY. Seeing the children there, Professor Liu, you should know, the folks on this Committee are constantly inundated and having to see pictures of my grandchildren, so I'm delighted to see your children, one of whom is roughly the age of one of our grandchildren. They're beautiful children.

Professor LIU. Thank you very much, Senator.

Senator FEINSTEIN. Professor Liu, if you would please proceed and make a brief statement to the Committee, and then we will open the dias for questions.

Professor LIU. Madam Chair, I have no opening statement. I would be happy to proceed with answering the Committee's questions.

Senator FEINSTEIN. My goodness. That's very unusual. All right.

Well, let me begin then. In a letter yesterday, Ranking Member Sessions wrote the following about your supplemental responses to your questionnaire: "There is now a serious question as to whether Professor Liu has approached this process with the degree of candor and respect required of nominees who come before the Committee. We can no longer extend him the benefit of the doubt that these substantial omissions, in which several of his more extreme statements appear, were a mere oversight."

I would like you to tell the Committee, if you will, what process did you use to provide materials to the Committee, and how were these supplemental materials overlooked, and were they provided?

Professor LIU. Thank you, Madam Chair, for the question. I'm happy to have an opportunity to address that issue.

First, let me acknowledge the frustration of members of the Committee with the way that I've handled the questionnaire. I want to make absolutely clear my assurance to this Committee today, in the most sincere and unambiguous way possible, that I take very seriously my obligations to the Committee and I want to try to be as forthcoming and complete in the information that I provide to you. I think it's fair to say at this point, Madam Chair, that if I had had an opportunity to do things differently, I would certainly have done things differently.

When I prepared my original submission to the Committee, I made a good-faith effort to find responsive materials to the questions. It became evident to me quickly that the submission was incomplete, so I redoubled my efforts to search for anything that could possibly be responsive to the questionnaire. The result was the supplemental submission that the Committee has, I believe dated April 5th.

Some of the items in the supplement are things I should have found the first time. Other items in the supplement were things that I did disclose in the original submission, and where I was able to find a web page or a web link that described or announced that event, I included that as well.

Still other items were things like brown bag lunches and faculty seminars and alumni events that I hadn't thought to look for the first time because they were of the sort of thing that I do day-to-day as a professor and not things that I prepare remarks for, or even keep careful track of.

I submitted all of these items to the Committee in the interest of providing the fullest possible information for your consideration and I'm sorry that the list is long, and I'm sorry that I missed things the first time.

For better or for worse, Madam Chair, I have lived most of my professional life in public. My record is an open book. I absolutely have no intention—and frankly, Madam Chair, I have no ability—to conceal things that I have said, written, or done. So I want to express to you today and to all the members of the Committee my fullest commitment to providing all the information that you need and want in considering my nomination, and I would like to do anything I can to earn the trust of the members of the Committee in my obligation to be forthcoming, both in my testimony today and with respect to the written materials.

Senator FEINSTEIN. Well, thank you very much. I mean, you're not the only nominee that hasn't been able to provide all documents at a given time.

In testimony before this Committee, you criticized some of the judicial opinions of then-Judge Alito, and particularly four of his opinions on the death penalty. Now, I'm one that has supported the death penalty, so I have two questions. The first is this: what was your objection to then-Judge Alito's decisions in this area? The second is: will you have any problem upholding the death penalty as a Circuit Court judge?

Professor LIU. I'm happy to address this, Senator. If I may, I'll just take them in reverse order. The answer to the second question is absolutely not. I would have no difficulty or objection of any sort, personal or legal, to enforcing the law as written with respect to the death penalty. My writings have never questioned the morality or constitutionality of the death penalty, and I would enforce the law as written.

With respect to then-Judge Alito, I believe I submitted for this Committee's consideration my analysis in a few of the death penalty cases on which he sat as a Third Circuit judge, and those were cases in which there were divided panels, and thus the most contentious cases.

I think in all four of those cases there were dissenting views offered by Judge Alito's Third Circuit colleagues, including in each case Republican-appointed colleagues on the bench. And I believe my testimony, as well as written materials, highlighted what I thought were some concerns that were legitimately expressed in those cases. I believe in three of the four of those cases, his view did not prevail and in one of those cases his view did prevail.

Senator FEINSTEIN. Thank you.

Senator SESSIONS.

Senator SESSIONS. Thank you.

Professor Liu, I appreciate your statement about the omissions. I think you are correct that some of the items may not have been easy to discover or remember. Some of them, as you noted, should have been disclosed. The questionnaire calls for all interviews you've given to newspapers, magazines, radio, television stations, provide the dates of those, and so forth, and you failed to do that. It sort of comes on the heels of the Attorney General having forgot-

ten that he filed a brief with Janet Reno and two other former government leaders in the *Padilla* case prior to his confirmation.

So it just raises a point to me that this is a serious question. I'm going to continue to look at this, but I feel like you did not spend enough time on this. Perhaps some of it was because the hearing was moved so rapidly. But those supplementals that you filed were as a result of complaints and questions from the staff, things that bloggers had found and others had found that was produced after the date of the first setting of your hearing, was it not?

Professor LIU. Yes, it was, Senator.

Senator SESSIONS. We want to be sure that we have a complete and fair hearing. I think it's fair to ask what standards we should use in evaluation of a nominee. You, in 2005, were highly critical of Chief Justice Roberts' nomination. I consider him to be one of the finest nominees ever received by the court. You wrote, "There is no doubt Roberts had a brilliant legal mind, but a Supreme Court nominee must be evaluated on more than legal intellect." I think that's correct and I agree with you on that.

Then you criticized Chief Justice Roberts' work for a group called The National Legal Center for the Public Interest, stating that "its mission is to promote, among other things, free enterprise, private ownership of property, and limited government. These are code words for an ideological agenda hostile to the environmental, workplace, and consumer protections."

By the time Chief Justice Roberts was nominated to the District Court in 2001, in addition to his clerkships, he had served as a top lawyer at the Department of Justice. For the same office you have, he was nominated.

In the White House Counsel's Office, he was Principal Deputy Solicitor General. He led the appellate practice at a prominent law firm, had argued 39 cases before the Supreme Court, more than I think anybody in the country at that time, and certainly of his generation, as well as cases before every Federal Court of Appeals in the country.

I understand that you were criticizing his nomination to the Supreme Court, but how do you compare your experience to move to the court that is one step below the U.S. Supreme Court? How do you compare your experience to that of now-Chief Justice John Roberts?

Professor LIU. Well, Senator, I'd be the first to acknowledge that the Chief Justice has an extraordinarily distinguished record, both as a lawyer and as a judge. I believe most any nominee would be fearful of comparing their records to that of the Chief Justice.

I suppose, Senator, that I would leave the comparison to others. I haven't had some of the experiences that Chief Justice John Roberts had when he was nominated to the bench, but I'd like to think that, Senator, I've had other experiences that might be valuable as contributions to the bench.

Senator SESSIONS. Well, likewise, you were highly critical of Justice Alito's nomination and testified against his confirmation. You testified that, "Intellect is a necessary, but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care

about nominees' judicial philosophy." So do I. I agree with you on that.

Likewise, I think you would acknowledge that Justice Alito had an extraordinary record. He served for 3 years as Assistant U.S. Attorney in the Appellate Division, Assistant Solicitor General at Department of Justice, the Office of Legal Counsel in Department of Justice, U.S. Attorney for New Jersey, had argued 12 cases before the Supreme Court, at least two dozen cases before the Federal Courts of Appeals. So have you argued any cases before the Supreme Court or any cases before the Federal Courts of Appeals?

Professor LIU. Senator, I have not argued any cases before the U.S. Supreme Court. I have argued one case before the U.S. Court of Appeals for the DC Circuit.

Senator SESSIONS. Now, I want to be fair about this. I know Senator Feinstein believes, and I do, that we shouldn't personally attack nominees. But in your testimony, in the Alito nomination, I had not recalled the intensity of your remarks.

You said at that time, "Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where Federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent, say, multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit, this is not the America we know, nor is it the America we aspire to be."

Do you think that's a fair analysis of his record? Do you think it meets the standards of civility that we would normally seek to achieve in this Senate confirmation process?

Professor LIU. Well, Senator, if I may explain, I think that the passage you read is perhaps unnecessarily colorful language that I used to describe a set of holdings or opinions that then-Judge Alito had expressed that are analyzed in the testimony that I gave to the Committee.

Let me, if I may, back up and simply say that, as with Chief Justice Roberts, I have the highest regard for Justice Alito's intellect and his career as a lawyer, and I think in many ways my regard for Justice Alito goes even further because he and I share an immigrant family background.

He, too, I think, came from humble origins and attended public school and made the most of all of his opportunities to accomplish all that he has accomplished today, so I have the highest regard for those accomplishments and his trajectory. My criticisms and the concerns that I expressed were limited to one area, and that was the area in which individual rights come up against assertions of government power.

In that area, I had some specific concerns about then-Judge Alito's opinions on the Third Circuit and it did not—my testimony about him did not extend further into other areas of his jurisprudence on which he has written as a justice and as a judge.

Senator SESSIONS. Well, thank you. Time is up. I would just say, I do think that's unfair to him. I think he's a mainstream justice and it raises questions to me about where your philosophy of judging is.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator Leahy.

Chairman LEAHY. Thank you.

Professor Liu, I am extremely impressed with your background. I note where Richard Painter, who was the Chief White House ethics lawyer under President George Bush and worked during the Roberts and Alito nominations, he had worked with a number of President Bush's nominees on their questionnaires. He has no problem with your responses to the questionnaire. He said that a lot of the items left off the original disclosure were relatively unimportant or redundant of what had already been disclosed. He went on to say that he doubted if we'd learn anything new from it. I agree with the former official in the Bush administration.

I also recall, on these questions of what might be said when President Bush nominated University of Utah Professor Michael McConnell. I noted earlier his provocative writings. He wanted us to reexamine the First Amendment free exercise clause, the establishment clause, opposition to *Roe v. Wade*, opposition to the Violence Against Women Act which had passed here nearly unanimously.

But—but—when we asked him, he said, "I agree with the doctrine of *stare decisis*." Now, I supported his nomination. He went out of here and was confirmed the next day. I'd love to see that same standard applied to you. The standards of Republican and Democrats applied. Professor, I'd like to see the same standard applied to you.

So let me ask you these questions: would you recuse yourself from litigation on issues that you've been involved with?

Professor LIU. Mr. Chairman, I would, in all models that would come before me, if I were lucky enough to be confirmed as a judge, apply the principles of recusal that are contained in the U.S. Code, as well as the Canon of Judicial Conduct. I think those standards require judges to avoid the appearance or reality of any conflict of interest or any appearance of bias, and I would apply those with great fidelity and in consultation with my colleagues on the bench who have had experience with those standards.

Chairman LEAHY. I know anytime that I argued cases before the Circuit Court of Appeals I was mindful of the fact that the Circuit—the judges would normally follow their own precedent, but absolutely would follow Supreme Court precedent. If you go on the Ninth Circuit, as I hope you do, will you follow the precedents of the Ninth Circuit, but especially the precedents of the Supreme Court?

Professor LIU. Absolutely, I would.

Chairman LEAHY. Would you feel bound by the precedents of the Supreme Court as a member of a Court of Appeals?

Professor LIU. Absolutely, I would.

Chairman LEAHY. And would you keep an open mind in cases coming before you?

Professor LIU. I would approach every case with an open mind, Mr. Chairman.

Chairman LEAHY. Now, many of your academic writings have set forth your view of how to remain faithful to the values enshrined in the Constitution. There have been questions raised here that you have criticized some in the past in the Supreme Court. I am reminded what Chief Justice Roberts said recently. He thinks people should feel free to criticize what we do. I think all of us feel that way, the same as they are free to criticize those of us here.

Michael McConnell. Outspoken, but a brilliant law professor that President Bush nominated to the Tenth Circuit. He harshly criticized the Supreme Court's decision in *Bob Jones*. That was an 8:1 decision, an 8:1 decision, saying the IRS could revoke the university's tax exemption because it violated anti-discrimination laws. Now, he was enormously critical of that. He was confirmed by a voice vote.

Now, do you believe, just because, like Michael McConnell, who was supported by every single Republican, who had been extraordinarily critical of the Supreme Court—do you believe that any criticism you might have made would make it more difficult for you to follow precedent?

Professor LIU. No, Mr. Chairman. I think that there's a clear difference between what things people write as scholars and how one would approach the role of a judge, and those two are very different things. As scholars, we are paid, in a sense, to question the boundaries of the law, to raise new theories, to be provocative in ways that is simply not the role of a judge to be. The role of the judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That's simply not the role of a judge.

Chairman LEAHY. Thank you.

I would note a letter written to us by Kenneth Starr and Akhil Amar from Yale Law School, written to Senator Sessions and myself. I'll give the last paragraph of it: "In sum, you have before you a judicial nominee with strong intellect, demonstrating an independent and outstanding character," referring to you. Of course, as you know, the nonpartisan ABA gave you the highest possible rating they could give a nominee.

He said, "We recognize that commentators on all sides will be drawn to debate the views that Goodwin has expressed in his writings and speeches. In the end, however, a judge takes an oath to uphold and defend the Constitution. Thus, in our views, the traits that should weigh most heavily in the evaluation of an extraordinarily qualified nominee such as Goodwin Liu are professional integrity, the ability to discharge faithfully any abiding duty to uphold the law. Because he possesses those qualities to the highest degree, we are confident that he will serve in the Court of Appeals fairly and confidently and with great distinction." Then Kenneth Starr and Professor Amar go on to say, "We support and urge a speedy confirmation." I'll put that in the record.

[The letter appears as a submission for the record.]

Chairman LEAHY. And we have letters from 27 former prosecutors and judges, commending your commitment to the Constitution.

These are judges and prosecutors who have supported the death penalty, for example. Madam Chair, I'll put those in the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. I strongly support this nominee.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Senator Hatch, you are next.

Senator HATCH. Professor Liu, welcome to the Committee. We're happy to have you here. I think your wife and family are beautiful. There's no question that I believe you're a very good intellect with a lot of ability.

As I evaluate judicial nominees, I try to get a concrete picture of the kind of judge they would be. I look for clues about how much power they think judges should have over the law that judges use to decide cases. The law that Federal judges use is written law, such as written statutes and a written Constitution. We could all read what the law says. The real issue for judges is determining what the law means. The more leeway judges have, the more places they can look for the meaning of the law, the more powerful judges become, and are.

The more power judges have over what the law means, the less power the people and their elected representatives have. Now, this issue is very important to me as I look at a judicial nominee's record, including yours. So I want to note some of the things you have written that appear to relate to this question. In your book, *Keeping Faith With the Constitution*, you wrote that the Supreme Court looks to "social practices, evolving norms, and practical consequences" to give meaning to the Constitution.

In an interview about that book you said that "the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation."

In a *Stanford Law Review* article you wrote that courts must determine "whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine."

Now, it seems to me that this type of an approach gives all the power to the judges. It lets judges decide what they want the Constitution to mean, not necessarily what it says. After all, judges pick which social practices to consider. Judges decide whether and how this or that norm is evolving. Judges pick which social challenges or conditions are relevant, which values are collective, how they have converged, crystallized, or been absorbed, if your philosophy is correct.

Well, you wrote in your book that this approach is what you mean by fidelity to the Constitution. To me, it sounds more like fidelity to judging and to judges rather than the Constitution. Now, this approach just gets covered in whatever judges want to do with the law.

Let me ask you this: do you stand by these approaches that you have written and spoken about, and do you really think that judges should have this much power over the law? What is left that can be identified as the Constitution after judges have finished adapting it generation after generation to changing conditions and chal-

allenges? What will be left of the Constitution if that is the approach?

These are things that bother me and these are things that say to me that—well, put question marks in my mind as to whether or not you would properly act as a judge. It's one thing to be a law professor and to make a lot of hypotheticals and other things. I make a lot of allowances for law professors, and we're very grateful to good law professors like you. But what about that? Do you still stand by these approaches as though you can just about make of the law anything you want to? I know you can't mean that, but tell me what you think.

Professor LIU. Senator, first of all, thank you for extending the welcome to me and to my family. It means a lot to them and it's an honor for them to be here. Thank you.

Senator HATCH. You're welcome.

Professor LIU. Second, Senator, I think that whatever I may have written in the books and in the articles would have no bearing on my role as a judge. My role as a judge is, I think, clearly to follow the path laid for—

Senator HATCH. But how can you say that? Isn't that your core philosophy, what you've written?

Professor LIU. That is my core understanding of the duties of an appellate judge. And if I may, Senator, go further—

Senator HATCH. Sure.

Professor LIU [continuing]. Then to address specifically the concerns you raised about the book. And let me say at the outset that I can certainly understand how it is that the phrases you've read lead to the concerns that you have. I appreciate the opportunity to explain a little bit more.

In the book, I think one of the things we tried to articulate is that our Constitution is very special because it is a written Constitution, it's a text. And as a text, it is a permanent embodiment of the core principles and the structure of government that we have chosen as a Nation. So that text is very special and the principles that are embodied in that text endure over the ages. Those things do not change. The text of the Constitution does not change, except through the prescribed procedures under Article 5 of the Constitution.

What we argue in the book is that in order to preserve the meaning of that text, in order to preserve the power of that text, it's necessary for judges, in some areas of the law, to give those phrases and those words meaning in the light of the current conditions of the society. Not all phrases, mind you. I mean, there are many parts of the Constitution that are clear-cut. You need two witnesses to convict someone of treason, not one. I think that's a clear rule, so there's no room for interpretation there.

But where the Constitution says, for example, "unreasonable searches and seizures," which are prohibited under the Fourth Amendment. Well, the Supreme Court has instructed that in applying that phrase, what we are to look to are the legitimate expectations of privacy that people have in the society.

I'll just recount, to close my answer, one example that we offer in the book. In 1961, the court decided a case called *Katz v. United States*, which considered the issue of whether the requirement of

physical trespass was necessary to make out an unreasonable search or seizure under the Fourth Amendment. That was a case about telephone wire taps.

The court said, you know, in this day and age the answer to that is no, a physical trespass is not necessary to make it out because people have come to have a legitimate expectation of privacy in their telephone calls. That's not simply a situation of new technology and old principles. Rather, I think it requires the court to have discerned, what is the societal expectation we have around phone calls as opposed to other challenges we have today, for example, like e-mail, Internet, and those are all issues that are still being litigated today where perhaps the privacy principles are not as clear-cut. But with respect to phones in 1961, the court said the Fourth Amendment applies to telephone wire taps. That's the kind of approach, Senator, that those passages you read are meant to illustrate.

Senator HATCH. Thank you.

Madam Chairman, my time is up. I think I'll probably have to wait till the second round.

Senator FEINSTEIN. Thank you very much, Senator Hatch. Appreciate it.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Madam Chairman.

Welcome, Professor Liu. I was going to follow up on Senator Hatch's questions. You explained what this Constitution fidelity means to you. My question is, do you believe there's only one legitimate way for a judge or a scholar to interpret the Constitution?

Professor LIU. Senator Klobuchar, no, I don't think there's any one specific way. In fact, the court, in a variety of cases, has said that there's not any formula, there's not a mechanical process. The art of judging involves more than just a formula.

Senator KLOBUCHAR. So are defenders of, say, originalism, like Justice Scalia, do you believe they are less legitimate judges than another judge that might have a different philosophy?

Professor LIU. I would never say that Justice Scalia is a less legitimate judge than any other judge. Senator, I think the term is one of these terms that is used by lots of people to mean lots of different things, so I'd like to be careful in my answer to that question.

If originalism is taken to mean that the original understanding of the constitutional provision is the sole touchstone and decisive sole touchstone for interpreting the Constitution, I would simply observe that the Supreme Court, throughout its history, has never adhered to that methodology.

If originalism is taken to mean instead that the original meaning, and of course the text of the Constitution, are very important considerations that any judge, in interpreting a provision of the Constitution, must look to, absolutely. I believe that is absolutely true. In many cases, that could be determinative. But it is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.

Senator KLOBUCHAR. So you would agree that judges could come at this with different constitutional interpretations when they look at a specific case? What I'm getting at here, is I was listening to

your answers to Senator Leahy about the difference between a scholar and a judge and I was thinking back to my law school days at University of Chicago, where Professor Easterbrook was my professor, who's now on the Seventh Circuit, and also now-Judge Posner was at the University of Chicago when I was there.

They clearly had a philosophy on economics and the law, a view of the law that not everyone would agree with. But do you believe that you can separate those out? And by the way, I think Judge Easterbrook was 36 years old, even younger than you, when he came before this Committee and he was confirmed through the process, despite having a view that might not be reflected in all of the past court decisions and interpretations. So my question of you is, do you believe that judges can separate out not only their goal as a scholar, but also as an advocate from what they become as a judge?

Professor LIU. Indeed, Senator, I believe they can, and I believe they must.

Senator KLOBUCHAR. Very good.

I wanted to get at something else. We've been focusing a lot on some of your past advocacy or scholarship, as we would with any nominee, but just your life story, as I see your parents sitting back there, having emigrated from Taiwan. My understanding is, you didn't even learn English until you were in kindergarten. Is that right?

Professor LIU. That is true, Senator.

Senator KLOBUCHAR. And that your parents believed in the value of education. The little boy who didn't learn English till he was 5 years old went on to be valedictorian of his public high school class, and then went on to attend Stanford, Oxford, and Yale.

Could you talk about how your parents' story and your life growing up, which is half your life, while we focus so much on individual things at the end, how that will influence you as a judge?

Professor LIU. Certainly, Senator. I guess the way I would put it, is that I feel in many ways, Senator, I've lived a very ordinary life, but I've had very extraordinary opportunities along the way. The first of those extraordinary opportunities was to have parents who really cared about education. They came from a society that did not at the time know many of the freedoms that we take for granted in America, and that has always sat with me as a very important consideration in my coming to the law.

I've also had tremendous educational opportunities at the fine institutions that you mentioned, and I've also had tremendous mentors along the way. I'm very glad that Congresswoman Matsui is here today because her husband Bob, who died an untimely death, was one of my early mentors in politics and the law.

So the combination of all of these, I think, has made me the person who I am, and I believe in all the intangible ways, that would influence my perspective, hopefully for the better, as a judge.

Senator KLOBUCHAR. Thank you very much.

Senator FEINSTEIN. Thank you, Senator Klobuchar.

Senator Kyl is actually next on the list, but he has very generously permitted Senator Coburn to go ahead. So, thank you, Senator Kyl.

Senator Coburn, I'll call on you.

Senator COBURN. Thank you, Senator Feinstein. And thanks, Senator Kyl. We have a hearing going on the financial breakdown in the Permanent Subcommittee on Investigations, and so I appreciate the opportunity.

Professor Liu, welcome. I'm sorry I was not here for your opening statement, but I've read it.

I want to go through a series of questions for you. I must tell you, based on what I've read, I'm highly concerned. I think you and I have a completely different philosophy when we look at the U.S. Constitution, and I want to try to understand where you are to give you a fair opportunity to convince me of how wrong I am.

You co-wrote an article on "Congress, the Courts and the Constitution: Separation Anxiety." You criticized the Supreme Court for overturning the Gun-Free Schools Act, legislation that restricted gun rights, stating, "Even more astounding than the court's willingness to override common-sense legislation with such broad support—the House passed it with only one dissenting vote and the Senate passed it by unanimous consent—is its eagerness to do so in terms which are deliberately designed to exclude Congress, and by extension the American people, from playing a part in defining what the Constitution requires and what it permits."

You continued in that article, "The recent cases do not pretend to be opening arguments in the longer debate. Instead, they are self-conscious pronouncements asserting the court's authority to be the sole and final arbiter of constitutional meaning. More and more, it seems Congress, and the American people by extension, are regarded by the court as mere targets of judicial discipline, unable to live and govern themselves within judicially enforceable limits. The court may have the final say on constitutional interpretation, but I do not see any reason why it should have the only say."

Then in a press interview concerning a legal challenge to California's Proposition 8 which overturned California's Supreme Court ruling in favor of gay marriage, you said the question before the court was: "Should the democratic process be allowed to enact this discrimination by a simple show of hands or is a more deliberative legislative process required?"

Given the brief that you filed in that case, I assume your answer to the question is no. You further stated in an *L.A. Times* article, "Proposition 8 targets a historically vulnerable group and eliminates a very important right. Changing the constitution, the State's paramount law, in such a momentous way arguably calls for deliberative, rather than direct, democracy. Indeed, as early as the Nation's founders, our constitutional tradition has favored representative democracy over simple majority rule when it comes to deciding minority rights."

Now, I'm a physician. I'm not a lawyer, along with Senator Feinstein right now on this Committee. We're the only two that aren't. I understand that in one instance you're discussing the Commerce Clause, and in another you're commenting on the Fourteenth Amendment. But it seems to me that you think in one case the American people should have a say in the interpretation of the Constitution through the democratic process, and in another you say they should not.

This distinction, to me, based on these two episodes, would appear that it's purely based on what you personally—what you personally—think of which right is important or is at issue. Can you please explain why a court should consider the will of the majority as expressed through the legislative process when restricting gun rights, but not when upholding the law protecting traditional marriage?

Professor LIU. Senator, thank you for the question. I'm pleased to address it.

Actually, Senator, if I could clarify the passages you read about Proposition 8. I actually testified before the California Assembly and Senate Judiciary Committees in October of 2008 about the legal implications of Proposition 8, in particular, the anticipated State constitutional challenge to the process by which that amendment to the State constitution was adopted.

The testimony I gave was very clear Senator, that I believe that Proposition 8 should be upheld by the California Supreme Court—not struck down, but upheld by the California Supreme Court—under existing precedents. I was asked to testify in my role as a neutral legal expert. And despite whatever other views I might have had about Proposition 8 on the merits, my personal views, whatever, and even my legal views of the past, I testified before that Committee that the California Supreme Court should uphold that Proposition in deference to the democratic process.

Senator COBURN. If I could correct your testimony, what you said in that is that you thought that they would, not that they should. I believe that was your testimony, according to the copies of your testimony that I have here. You said that they would.

So my question remains the same. The question is, how on one hand can you say the court should—in other words, how are you going to pick that? If you're an appellate judge, how are you going to pick which time you say you get the choice or we get the choice?

The fact is, that is a whole new intervention in judicial philosophy for me, for an old guy from the sticks in Oklahoma, when I see this book—and I kind of like it and I kind of like what it says, even though sometimes it goes against me—and we're going to be picking which way we're going to do it. To me, I think it's a marked inconsistency.

Let me go on, if I may. In a recent Supreme Court decision, *Roper v. Simmons*, Justice Scalia stated in his dissent that the “basic premise of the court's argument that American law should conform to the laws of the rest of the world ought to be rejected out of hand.” Scalia continues that, in the case before the court, what these foreign sources affirm, rather than repudiate, is the Justice's own notion of how the world ought to be and their dictates, that it should be so henceforth in America.

I happen to have pretty strong agreement with that philosophy, and I'm sure you knew that before coming in here. For that reason, some of your statements about the use of foreign law deeply concern me.

In an article you published, I guess it's Daito University Law School in Japan, you said, “The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. The resistance to this practice is difficult

for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.”

The only problem with that is, when you’re sworn in you will swear an absolute oath and allegiance to this document. It’s not about having a monopoly on being accurate, it’s a monopoly on the rulebook that we have.

So would you give me your philosophy on how you will utilize foreign law to interpret our constitutional laws and treaties?

Professor LIU. Certainly, Senator. I do not believe foreign law should control in any way the interpretation of United States law, whether it’s the U.S. Constitution or a statute. I believe that the use of foreign law contains within it many potential pitfalls. In other words, I think that what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument. It is not a canvassing of the world’s practices or in any way a full account of the various practices throughout the world with respect to their laws.

And one of the things I think that makes this country unique and worth cherishing is that we are in many ways—in many, many ways—a much freer nation than many of the other countries around the world. So I think there are many hazards involved in looking at foreign law as guidance for how we interpret our own principles.

I think the statement in the *Law Review*, if I could clarify, because I think there was only just a brief paragraph, alludes only to the idea that I think foreign precedent can be cited in the same way that a Law Review article might be cited, which is simply to say, judges can collect ideas from anyplace that they find it persuasive. But there’s a very important difference, Senator, and one that I take very seriously, between looking for guidance or ideas versus looking for authority. Authority is the basis on which cases are decided, not ideas or other forms of guidance.

Senator COBURN. All right. Thank you very much. I went way over. I apologize.

Senator FEINSTEIN. Thank you, Senator.

Senator KYL, you are next.

Senator KYL. Thank you very much.

Welcome, Professor Liu. Just on that last point, you distinguished between authority and ideas. The role of a judge is to decide the case, applying the authorities to the facts of that case. What’s the role of ideas that would warrant a citation to foreign authorities?

Professor LIU. Well, Senator, I think that judges—

Senator KYL. Excuse me. If I can just add your exact quotation here: “The resistance to the practice,” you say, “is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems.”

Professor LIU. I think, Senator, the allusion is simply to the idea that judges, in their ordinary practice, do cite a variety of sources to bolster their reasoning on a particular point. But I go back to the point I was trying to make to Senator Coburn, which is simply that the role of a judge, to me at least, is only to decide—to make determinative—to make determinative the applicable precedents

and the written law—namely our law—on a particular case or controversy.

Senator KYL. So then why do you write that the resistance to this practice—and you say “the use of foreign authority.” That’s what you’re talking about, not just citing *Law Review* articles. You say, “The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.” It seems to me, there are two problems with this. The first, is finding “wise solutions” as opposed to interpreting the law; second, the reference to “foreign authorities” as ever being appropriate to interpret a U.S. law, except of course in treaty situations and the like.

Professor LIU. Well, Senator, to the first point about the term “solutions”, I didn’t mean it in any way to implicate the notion of policy solutions. I meant the way in which judges have to, when they decide cases, articulate a legal rule. That’s the only meaning that I intended there.

With respect to the use of foreign precedents, I would simply say that the use of those precedents can in no way be determinative. I think a review of Supreme Court cases that have actually implemented this practice shows, I think quite clearly, that the mention of foreign citations in those cases, to my reading at least, is not doing any legal work in the analysis and—

Senator KYL. Well, if I could just respectfully disagree with you, it is used, at least in one decision that I can recall, to bolster the argument that was made by the Justice writing the opinion. So we’ll talk more about this, this idea of authorities versus ideas, but I’m a bit confused.

I also would like unanimous consent, Madam Chairman, to put into the record a bench memo, *National Review Online*, Wednesday, March 24th piece, that responds to the Amar-Starr letter that I think Senator Leahy put in the record, but in any event, someone did.

Senator FEINSTEIN. So ordered. That will go in the record.

[The memo appears as a submission for the record.]

Senator KYL. Thank you. Thank you.

And Professor Liu, let me also follow up on something one of my colleagues talked to you about. Senator Sessions, I believe, quoted the comments that you made relative to Justice Alito’s vision of America. Now, to me, this was reminiscent of Senator Kennedy’s quite unfair characterization of Judge Bork’s vision of America in the very famous speech that he made.

Do you really believe that the words you spoke, what you said, is Justice Alito’s vision of America?

Professor LIU. Senator, I think that that phrase is perhaps unnecessarily flowery language to make the simple point, that I was trying to give a series of examples of opinions that he rendered.

Senator KYL. So you don’t really believe that it represents his vision of America?

Professor LIU. Well, I don’t think that it represents his vision of America that he would implement as policy the practices described in that—in that paragraph. It was only meant to say that as a

judge, he believed that those practices were permissible in America—

Senator KYL. Well, why did you say it that way then? I mean, this calls into question your judicial temperament. That's a key consideration for members of this Committee. That is not tempered language. I mean, you would acknowledge that, I gather. I hope.

Professor LIU. Well, Senator, that—that statement—

Senator KYL. Would you acknowledge that that is not temperate language?

Professor LIU. Perhaps not, considered in isolation, Senator. But that paragraph comes after 14 pages of quite detailed legal analysis of Judge Alito's opinions, and that was the concluding—I believe, penultimate paragraph in that 14-page analysis.

Senator KYL. Well, I see it as very vicious and emotionally and racially charged, very intemperate, and to me it calls into question your ability to approach and characterize people's positions in a fair and judicious way.

Senator FEINSTEIN. Thank you very much, Senator Kyl.

Senator Cornyn, you are next.

Senator CORNYN. Thank you.

Senator FEINSTEIN. Before you go, Senator Cornyn, I'd like to acknowledge the presence of Representative Bobby Scott, again from the other House. He also serves on the Judiciary Committee. Welcome, Representative Scott.

Please proceed.

Senator CORNYN. Good morning, Professor Liu. Welcome. I don't think there's any doubt in my mind, certainly, that you are an American success story, as a son of immigrants and someone who's taken advantage of the opportunities that fortunately we all have here in America, to get to the very top of the legal profession, in your case.

I guess the question I have is, is this the right job for you? It's not just a question of brilliance, it's not just a matter of your academic skill. It really is, is this the right job for you?

I know that you and Senator Hatch talked about the role of a law professor relative to that of a judge, but let me tell you specifically what some of my concerns go to. They may seem relatively mundane, but I think they really are very important.

I note that you say in your questionnaire you've not tried any cases in courts of record to verdict, judgment, or final decision. Is that correct?

Professor LIU. That is correct, Senator.

Senator CORNYN. Having been a State court judge myself for 13 years, I am really very troubled by the fact that, as Senator Sessions documented in his questions, that the lack of attention and diligence, and frankly, sloppiness, in your response to this Committee's questionnaire. There were four occasions when you supplemented your responses, not because you discovered they were incomplete, but because Committee members and staff went on Google and found speeches, documents, press releases, and things that you hadn't previously disclosed.

From my experience as a former trial judge, I will tell you that if a lawyer came into my courtroom and failed to respond completely and accurately to a request from the other side for informa-

tion and had to be called to task four different times before they finally got the honest, complete, and truthful answer, that that lawyer would find themselves held in contempt of court, or worse.

So I don't know whether it's because of your lack of experience in a courtroom or what it is, but can you offer me any comfort at all that this is not really just an act of contempt, but is just some other explanation?

Professor LIU. Certainly, Senator. I have the—I want to express again the fullest commitment that I possibly can to providing this Committee with any information that it wants or needs in evaluating my candidacy for the bench.

Senator CORNYN. Have you actually apologized?

Professor LIU. I have, Senator.

Senator CORNYN. You have?

Professor LIU. In my transmittal letter of the April 5th submission, I did express an apology, and I'm happy to reiterate it here, which is that I'm very sorry for the omissions that existed in the initial questionnaire. I would simply say, though, that the lion's share of items that I submitted in the supplements were not items that were brought to my attention by others, they were items that, upon more diligent searching, I was able to provide to the Committee, including all the various instances in which I moderated a panel, or accepted an award, or emceed an event, or introduced a speaker, or spoke at a brown bag. I tried my best to comb through all the Internet sites and all the other places that one could look for such things. I understand the Committee's frustration with my handling of the questionnaire, and I would have done things differently if I had had the opportunity.

Senator CORNYN. Can you assure us that you've made a complete and accurate response to the Committee's questionnaire at this point, or are there other items that we are going to discover or find out about that have not been revealed?

Professor LIU. Well, Senator, in the—in the revised submission of April 5th, I detail in the beginning of the answer all the searches that I conducted. And if the Committee or any member would desire that I do any more searching, I would be happy to do that with dispatch and turn over any other material that I'm able to find.

Senator CORNYN. Let me turn to part of your response earlier. I think it was in response to Senator Kyl's questions. You characterized some of your criticism of Justice Alito as "not striking the proper balance between individual rights and governmental power."

I'd just like to ask you, in a straightforward way, what do you think the Tenth Amendment of the Constitution means, and how should it be applied? It reads: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

Do you recognize any limit on Federal power to do whatever Congress decides it wants to do or do you think that that's—in other words, do you think the Tenth Amendment is a dead letter?

Professor LIU. Absolutely not, Senator. The Supreme Court has made amply clear that the Tenth Amendment stands for the fundamental principle of federalism that imbues our structure of govern-

ment, and I respect those precedents and would apply them faithfully.

Senator CORNYN. Yet, you criticized Chief Justice Rehnquist's decision or opinion in the *Lopez* case, which was the application of that very same doctrine of federalism. Is that correct?

Professor LIU. I—I expressed concerns about that decision, yes.

Senator CORNYN. And I would tell you that the American people—I hear it from my constituents in Texas, and I hear it from people all across the country, are very concerned about the aggressive growth of the Federal Government and the intrusion of the Federal Government in their lives, which is one reason why at least 16 Attorney Generals—maybe there are more by now—have filed suit, challenging, for example, the individual mandate in the health care reform bill as an unprecedented expansion of Federal power into their lives.

I'm not going to ask you for a legal opinion about that, since that may come before you, if you are confirmed. But do you recognize that our government is not a national government, but a Federal Government, and that individuals and States reserve significant power to make decisions affecting their lives that the Federal Government cannot, and should not, touch?

Professor LIU. Absolutely, Senator. I think that from the founding of our country, we have always had a Constitution that defines the powers of the Federal Government as a set of enumerated powers only. In other words, the Congress of the United States, together with the President, the political branches are not—it's not a legislature of general powers, as the States are. The States are legislatures of general powers, but the Federal Government is not. So, the whole notion of enumeration presupposes the idea that it is a government of limited powers.

Senator CORNYN. Madam Chairman, I know my time is up. I would just like to note that I know Professor Liu has been rated unanimously "Well Qualified" by the American Bar Association's Standing Committee on the Federal Judiciary, even though, as he's acknowledged, he hasn't tried any cases in courts of record to verdict, judgment, or final decision.

I would note, just a few years ago when Judge Frank Easterbrook was nominated to the Seventh Circuit, that it appears that a different standard was applied by the American Bar Association when they gave him a majority "Qualified", minority "Not Qualified" because they said he lacked experience as a practitioner. Maybe the ABA, when they come—and I assume they will at some point—to testify can explain that. But it appears to be a double standard.

Senator FEINSTEIN. Thank you very much, Senator Cornyn.

Senator Kaufman.

Senator KAUFMAN. Yes. Welcome to the Judiciary Committee and the Supreme Court nomination process.

[Laughter.]

Senator KAUFMAN. As you can see, there are some basic differences about the Constitution on this Committee. Senator Cornyn, who I hold in very high regard, I think may have—and Senator Sessions, and Senator Kyl—a different opinion about the role of the Federal Government, which we battle on every single Judici-

ary Committee meeting, but in a very collegial way, in a very good way. I think we've all kind of agreed to disagree on some of these issues.

Anyway, can you talk a little bit about, you clerked both in the District of Columbia Court of Appeals and the Supreme Court. Can you tell me what you kind of learned about the role and function of appellate judges during your experience?

Professor LIU. Certainly. Thank you, Senator Kaufman.

I had the enormous privilege to clerk for two outstanding judges. And one of the things I learned as a law clerk on the U.S. Court of Appeals for the DC Circuit, I think, is applicable to the point that Senator Cornyn raised. It is true, I have not tried cases to verdict and I wouldn't claim expertise in that—in that way.

But one of the things that the judge for whom I clerked routinely did, was he instilled in his law clerks an appreciation for the role of the District judge, and the role of the District judge in understanding how litigants bring cases and how cases get framed. Thus, in virtually all the cases I can remember, he always sent us down to the first floor of the courthouse to go read the record, read the record of what happened in the court below, and those determinations and that record was due an amount of deference because a judge had already passed over this issue once.

And I think that that perspective has always stayed with me, that although we have a system of hierarchy in our courts, all of the members of the courts serve as Article 3 appointees, in some sense as co-equals in the judicial system, and they serve different functions at different points.

And so I would pay, I think, as an appellate judge, very careful attention to the standards of review that apply to the case at hand, because many of those standards of review caution against appellate judges making, in essence, new determinations or as if they were writing on a blank slate when in fact the issue has always been passed through once.

Senator KAUFMAN. And so many of the questions you're asked here, your personal beliefs really don't matter that much, do they, as long as you're a Circuit Court of Appeals judge?

Professor LIU. Not at all, Senator. In fact, the other thing I learned on the DC Circuit was how many issues—virtually everything that comes through the door—has around it a set of applicable precedents, and so there really is no room, in the cases that come up, for judges to invent new theories or to create new doctrine. They are applying the law as it has been interpreted by the Supreme Court and as it has been written by Congress in the cases of statutes.

Senator KAUFMAN. So you don't have real flexibility in terms of your personal beliefs on issues?

Professor LIU. Personal beliefs, I believe, Senator Kaufman, never have a role in the act of judging.

Senator KAUFMAN. Your experience at Department of Education. What do you think came out of that that would help you serve on the Circuit Court?

Professor LIU. Well, I had the great distinction of being able to work for some extremely talented leaders in that department. I think what it gave me was some perspective on how agencies make

decisions, and to the extent that the Courts of Appeals do hear cases that concern administrative law, it does help, I think, to have some appreciation for the ways in which regulatory decision-making, as well as other forms of guidance, get made through the Federal agencies.

Senator KAUFMAN. And how about your experience in private practice? How would that, do you feel, help you if you get on the Circuit Court?

Professor LIU. I feel enormously grateful that I had the time that I had at the O'Melveny & Myers law firm, a collection of outstanding and extremely talented and smart lawyers who showed me in many ways how businesses approach problems, that the role of the lawyer is absolute loyalty to his or her client, and the vigorous and zealous advocacy for the client's interests. I learned, I think, a respect for the process of litigation and the virtues of our adversarial system of litigation.

I also learned what it was like to bill a lot of hours from time to time, but I think that that is part of the zealous advocacy that is expected of any lawyer who takes on a client.

Senator KAUFMAN. I want to thank you for your public service. This is difficult, but the fact that you're willing to do it and the fact that others are willing to do it really makes this country function. I think everyone here applauds the fact that you are willing to make the sacrifices you have, and even more important, your wife is willing to make the sacrifice she's going to have to make for you to go through this, and then to serve on the Circuit Court. So, I want to thank you for your service to your country.

Professor LIU. Thank you, Senator Kaufman.

Senator KAUFMAN. Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Kaufman.

Because of the importance of this nominee, we will certainly have a second round. I'd like to just indicate, my intent would be to go to 12:30, take a half-hour break, and reconvene at 1. We have four additional nominees to hear, and so I know that this is a long wait for you, but I hope you understand. I think it's very important that members have an opportunity to ask Professor Liu all the questions that they want to ask and take the time that's required to do it. So I must apologize to you, but it is the way of the Senate. So if there's no objection, we'll proceed with a half-hour break in about 45 minutes, and then begin again.

Senator SESSIONS. Thank you for that. I think the nominee raises a lot of important philosophical questions about law and the Constitution and we do have a number of questions, so I thank you for the courtesy of allowing sufficient time.

Senator FEINSTEIN. Thank you very much.

To begin the second round, I'd like to say a couple of things. I really think that there is a double standard being applied here, so I'd like to take a look at just a few of President Bush's nominees.

Let me begin with the Chief Justice. Chief Justice Roberts failed to provide documentation for over 75 percent of the speeches and remarks listed in his questionnaire. Not a single Republican objected when the Committee received 15,000 supplemental documents just 4 days before his confirmation hearings were scheduled to begin. In fact, both Chief Justice Roberts and Justice Alito sup-

plemented their questionnaires several times after returning them, including, 75,000 and 36,000 pages of documents, respectively.

Judge Michael McConnell has been covered: appointed to the Tenth Circuit, a prolific constitutional law professor from 1985 to 2001. He did not list a single speech or talk on constitutional law or legal policy. He was confirmed.

Judge Jeffrey Sutton, appointed by the President to the Sixth Circuit, submitted a questionnaire that simply stated “I have given numerous speeches to local Bar Associations, Ohio judges through the Ohio Judicial College, the Federalist Society, and continuing legal education seminars regarding the United States Supreme Court and the Ohio Supreme Court. I either spoke from informal notes or extemporaneously.” He was confirmed.

Judge Brett Kavanaugh, as has been stated, appointed by President Bush to the DC Circuit, submitted a questionnaire that listed 22 speaking events, prefaced by this statement: “I’ve given remarks on occasions, etc.” He was confirmed.

Judge Catharina Haynes, appointed by President Bush to the Fifth Circuit, submitted a questionnaire that said, “As a local judicial candidate I’ve been to dozens, maybe hundreds, of events where each candidate is asked to introduce himself or herself. I have no recordings or notes of these matters, no way to track accurately the dates and locations.” She was confirmed.

Judge Diana Skyes, appointed by President Bush to the Seventh Circuit, submitted a questionnaire along the same lines. The same thing for Judge Kent Jordan to the Third Circuit.

So I think this, and I must say, is remarkably unfair. We have heard the nominee clearly state that he overlooked some things, clearly state that he’s prepared to do anything he can to see that the Committee is fully informed of his writings. I don’t know what more a nominee can do, you know. To rise this to the level that he should be denied confirmation, and this being one of the major reasons, seems very unfair to me.

I would like to ask one question on the commerce clause, however. In recent years—the commerce clause, as we all know, is a very important clause of the Constitution which essentially allows the Congress to legislate in a number of different areas as long as they relate to interstate commerce.

In recent years, the Supreme Court has used a much more constraining view of the commerce clause to strike laws such as the Gun-Free Schools Act of 1995, and the Violence Against Women Act of 1994. So what is your understanding of the scope of Congressional power under Article 1 of the Constitution, particularly the commerce clause?

Professor LIU. Well, Senator, in those two cases, as well as other cases that have followed on—in particular, I’m thinking of the medicinal marijuana case, the *Gonzales v. Raich* case, the court has articulated a doctrine in which there are essentially three categories of ways in which Congress can exercise commerce power, the most substantial of which is a third category in which the court says that the Congress can legislate on matters having a substantial effect upon commerce. A lot of the constitutional doctrine has turned on, what is a substantial effect?

In the *Gun-Free School Zones* case, as well as the *Violence Against Women* case, which I know both of them are very important to you, Senator, the court articulated a doctrine that said that the activity being regulated has to be economic in nature, but it stops short of saying that that is an absolute requirement before the substantial effects analysis can get going because in the medicinal marijuana case just a few years afterwards the court said, but we have to look at the activity as a class of activities, not just the individual instance of an individual possessing a gun, or in the case of the marijuana case, the individual who is desiring the medicinal marijuana, but rather we have to look at it as a class.

And I think that's where the state of the law is right now, is that the court has said that—has put a focus on the economic nature of the activity, but has instructed the lower courts to look at that issue, not simply as the individual instance but as a class. That is the doctrine, as I understand it, and I would faithfully apply that doctrine in any case that came before me as a judge.

Senator FEINSTEIN. Thank you very much. My time is up.

Senator SESSIONS.

Senator SESSIONS. Professor Liu, your article I quoted earlier, "Rethinking Constitutional Welfare Rights", is a troubling document to me. You say there that your thesis is that the legitimacy of judicial recognition of welfare rights depends on "socially situated modes of reasoning that appeal not to transcendent moral principles of an ideal society, but to the culturally and historically contingent meanings of social goods in our own society."

Well, I presume that's a standard you think judges should apply. Do you think a standard, once you reject "transcendent moral principles for an ideal society and move to culturally and historically contingent meanings of particular social goods in our own society", what kind of legal standard is that? Doesn't that allow a judge to do anything they want to do?

Professor LIU. Senator SESSIONS, the Supreme Court has, I think, pretty clearly said that judges cannot create welfare rights in the Constitution.

Senator SESSIONS. No, no, no. What you wrote.

Professor LIU. And I—

Senator SESSIONS. Let me just say—

Chairman LEAHY. Let him answer the question.

Senator SESSIONS. I'm going to allow him to answer, but I just want to say, we do have a time problem. I'm asking a specific question, so if you can do the best you can to be succinct, I'd appreciate it.

Professor LIU. Certainly, Senator. I simply mentioned what the Supreme Court said because in that article I express agreement with what the Supreme Court had said on this score, which is that—elsewhere in the article I say very clearly that judges have no role in inventing welfare rights out of whole cloth and doing it on their own.

Instead, I think the passages that you're reading there are perhaps overly academic language for a simple point, which is that if there are going to be welfare rights in society they must come from the legislature, they must come from Congress, and I used the term "legislative supremacy" to capture that idea. And so—

Senator SESSIONS. Well, could I say, you say “so conceived justiciable welfare rights reflect the contingent character of our society’s judgments.” So you’re talking about a judge’s welfare rights.

Professor LIU. Senator, yes. The role for judges that the article lays out is only that role that the Supreme Court’s own precedents have supported in the past, which is when the legislature has created a program of benefits or some sort, there are various challenges that are occasionally brought to eligibility requirements or termination processes, and the court has seen those as justiciable issues.

Senator SESSIONS. Does it raise a question of whether a State or a Federal Government could reduce welfare rights once they’ve been established? Is that a justiciable—

Professor LIU. Senator, elsewhere in the article I make very clear that the courts have—I believe I used the term “no role for courts at all” in disturbing legislative judgments of that sort, and I use the example of Congress’ 1996 welfare reform law which ended cash assistance to poor families as an entitlement, and I said that the courts have no role at all in questioning that judgment by Congress.

Senator SESSIONS. Well, you do say that you deal with that danger. You note there’s a danger of court take-over of the legislative process, but you say that can be avoided “when courts employ constitutional doctrine in a dialogic process with the legislature to ensure that the scope of welfare provision democratically reflects our social understanding.”

That seems to mean that you’re saying a judge has a right to use the power of the court—lifetime appointment—“to ensure that welfare provisions democratically reflects our social understandings.” So to me, that’s an unintelligible standard and you’re giving a virtually unlimited power of courts to review welfare or health care type legislation.

Professor LIU. Senator, I think that, once again, if I could, you know, try to in some sense cut through the academic jargon there, the only—

Senator SESSIONS. I’ll agree.

Professor LIU. Thank you. On that point we can agree. I guess I’d simply say that the point was trying to capture the way in which the Supreme Court has in past cases approached questions, constitutional questions, that have arisen about legislated programs of benefits. One thing to note about that, Senator, is just that that area of doctrine has not in some sense spiraled out of control. It’s not that judges are, even in an everyday kind of way, making decisions about what kind of welfare rights people should get. In fact, it’s a very limited role, and that’s the only role that I envisioned in the paper.

Senator SESSIONS. Well, in your statements that were not originally produced, but later produced, commenting on your book, *Keeping Faith With the Constitution*, you defined what fidelity to the Constitution is. I expressed what I think I believe, and what Professor Van Alsteen believes, which is, faithfulness is following it as written even if you don’t like it.

But you say, “what we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its text

to the challenges and conditions of our society in every single generation.” So it seems to me you’re saying that a judge can ignore the proper way to amend the Constitution and adapt not only its principles, but its text, to meet whatever challenge they divine at a given time. Correct me if I’m wrong.

Professor LIU. Well, Senator, that is not what I believe. If I may, I think that the interpretation of the Constitution always has to be on the basis of legal principle and not on the basis of what a majority of the society thinks or what the judge in question thinks. Across any—in any generation, the interpretation of the Constitution has to be guided by not what makes people happy, rather, it has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accrued up to that time.

Senator SESSIONS. Well, I’m going to try to fairly evaluate that answer, but I don’t think your writings reflect it. So, it’s up to my judgment. I mean, I have to make a decision: is what you’re saying today consistent with what you said then? I would note that—thank you.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator Leahy.

Chairman LEAHY. Thank you. I would note that it’s one thing to write academic papers and another thing to testify under oath. I think that Professor Liu has testified very well here today. I would note that the article we’ve been talking about explicitly rejects the idea that the courts have the power to create benefits and respects the role of the legislature in the creation of those. I mean, the article speaks for itself. I would hope we would keep on the facts on his legal abilities. I’ve heard comments made suggesting your views are racist, and I just find that outrageous.

Let’s talk about your legal reasoning. We throw around these ancillary charges so easily these days. I don’t know why, what has happened in this country. I remember when I said, as many others did, that I opposed Justice Alito’s nomination and I was attacked as being—in a full-page ad as being anti-Italian.

Now, when my grandparents emigrated to the United States to Vermont from Italy, when my Italian-American mother and her siblings were growing up, knowing how much I respect my uncles and aunts and cousins in Italy and visit them often, I remember sitting on my Italian grandparents’ knees and speaking Italian with them, I think it’s kind of a stretch.

It’s sort of the same stretch that you heard when I opposed Judge Pryor’s nomination and Senator Kennedy and Senator Biden and Senator Durbin and I were called anti-Catholic. I remember talking to my pastor leaving mass the next day. He said, “Where does this sort of thing come from?” And so I would hope we can talk about the law and not things that have belonged to another—maybe another time, an unhappy time in our country.

We’ve heard you criticized that you hadn’t had a lot of courtroom experience. You know, I don’t recall a single Republican saying anything when Judge Kimberly Ann Moore was nominated by George W. Bush, President Bush, for the Federal Circuit. She had had 2 years as a clerk, 1 year of private practice, and 7 years in academia. Nobody felt this disqualified her.

Or when Judge J. Harvey Wilkinson was nominated at the age of 39 by President Reagan to the Fourth Circuit, he had had 1 year as a clerk, 5 years as a newspaper editor, 2 years in the government, 5 years in academia. He was confirmed.

Or Judge Frank Easterbrook, nominated by President Reagan at the age of 36. He spent 1 year as a clerk, 5 years in the government, 7 years in academia. Let's talk about realities. Let's leave these straw men kind of complaints out of it.

We have so many people sitting on our Courts of Appeals nominated by Republican Presidents, supported by both Republican and Democrats who do not begin to have the kind of background that you do, or begin to have the kind of support, bipartisan support, that you have. I think we shouldn't forget that.

The American Bar Association's Standing Committee on the Federal Judiciary found you unanimously "Well Qualified." That's the highest possible rating. They did it in a nonpartisan hearing. Strong support of both your home State Senators. Even a conservative Fox News commentator recently conceded your qualifications for the appellate bench are unassailable.

Now, tell us again the difference between the role of the legal advocates or academic commentators, as you have been playing, as opposed to the role you'd have to play as a judge. Tell us the difference, and tell us whether you think you'd have any difficulty adjusting to a new role as a judge.

Professor LIU. Certainly, Mr. Chairman. I think the role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case.

Academics, when they write, are not bound in the same way. The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, be creative—in other words, many of the qualities that are not the qualities that one expects the judicial process to possess.

One thing that I would like to highlight, though, between these two types of roles, which I hope comes through upon a review of my record, is that there are some similarities between, hopefully, the legal scholarship and the process of judging, which is that I would hope that my record shows an open mindedness, an ability to consider all points of view, a rigor, a respect for the law as an enterprise that has to have integrity, and all of those forms of discipline that make for habits of mind of good listening that I think in other ways makes—could make a person a good judge.

Chairman LEAHY. Thank you. As my sainted mother would have said, *molto grazie*, but as I'll say, thank you very much.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Leahy.

Senator KYL.

Senator KYL. Thank you, Madam Chairman.

Professor Liu, just expanding on this point that we've been discussing earlier, you're distinguishing between the situation in which Congress has legislated in an area, and then the court can in effect breathe life into extensions or deal with issues of eligi-

bility for those rights. That was the way you described the substance of what you wrote in this one article.

Let me ask if you personally believe—personally believe—that “the duty of government cannot be reduced to simply providing the basic necessities of life. The main pillars of the agenda would include expanded health insurance, child care, transportation subsidies, job training, and a robust Earned Income Tax Credit.” In fairness, that is exactly what you wrote. That’s a direct quotation. Also, “that we should be thoughtful, but not bashful, in forging political solidarity necessary for redistributive mutual aid.” Do you personally believe those statements?

Professor LIU. Senator, I’m not familiar with which—is that from my article? Or which text is that that you’re reading from?

Senator KYL. Yes. I’m sorry. We were quoting from that article. It is the “Education, Equality and National Citizenship”, in 116, *Yale Law Journal*, 2006.

Professor LIU. OK. As in—as in all things, Senator, I think I—I stand by my writings. I—I—whatever views I’ve expressed about those matters, however, I would set aside absolutely in my role as a judge, because quite frankly I don’t see the role of a judge as being involved in those kinds of issues.

Senator KYL. And I appreciate the fact that you’ve said that. The problem is, colleagues here on the Committee have talked about the need to get judicial nominees—now, I grant, this was in the context of a Supreme Court nominee—who would have certain agenda that they would bring to the office, agendas that conform with my Democratic colleagues’ agendas, which I don’t necessarily share. One of the concerns that I have expressed about an activist judge is whether or not you approach deciding cases with those agendas in mind or you lay them aside.

Now, you’ve expressed—and I did quote accurately, I think, from that article what you wrote. I perceive these to be your personal opinions. Then I also perceive your view of the law to be that we should find ways to accommodate those opinions, albeit you do say once the legislature has acted. I’ll just quote directly how you state that. This is on “How Welfare Rights May be Recognized Through Constitutional Adjudication in a Democratic Society.”

“Once a legislative body creates a welfare program it’s the proper role of the courts to grasp the community meaning and purpose for that welfare benefit. When necessary, courts should expand the wealth redistributing effects of the program to satisfy needs of equality and national citizenship.” Then you note that you can do that, for example, by “invalidating statutory eligibility requirements or strengthening procedural protections against withdrawal of benefits”, and that is what you said earlier.

Professor LIU. That’s true.

Senator KYL. That seems to me to be an agenda. You bring an agenda to the court, and you’ve written about how that agenda can be accomplished through the judicial process, not the legislative process. You say in another place in this article, “the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights.” You talk about how it was “neutered by previous court decisions, the affirmative as opposed to negative interpretation of the Constitution.”

So I view this as, you have these views. They are very liberal views. You believe that once the legislature has opened the door, that courts can be used to expand those rights in what you would consider to be an appropriate way.

Professor LIU. Well, Senator, I guess I would say that the—those are my views and they're accurately reflected in the passages you—you wrote—you—you spoke. I guess I would characterize them though not as an agenda, but rather as my endorsement of precedents of the court that have done precisely those things. And as a lower court judge, I would follow certainly those precedents, but any precedents that—

Senator KYL. I recognize what you're saying is that when the legislature has acted, courts—there's some precedential ability of courts then to—either through restricting qualifications, for example, of expanding those rights. But it is very clear from what you've said not that these are just examples that you picked out of thin air as, gee, this is what the court might do, but rather, this is your personal view of something the court should try to do. Am I wrong?

Professor LIU. Senator, I'm not sure that I would say that they are things that the court should try to do. I think that a court—certainly if I were confirmed as a judge—would have to simply follow what the Supreme Court has instructed the courts to do on particular issues. But if I could put the passages you read in further context, I would say that most of my writing in this area and the area that Senator Sessions has asked me about—and I understand this is an interest of great importance to you, Senator—most of my writings on education, on welfare, and on, you can call it, broadly, social policy, if you wish, have been directed actually at policymakers and at legislators, not at judges.

So if you look across the broad range of my scholarship on a sort of, I guess, page-for-page basis, most of what I've written is directed at legislators because I come at this from a perspective of judicial restraint in this area. I think that those articles, I hope, convey my understanding of how difficult it is for courts to get involved in this area. We have some historical lessons learned about those—about these kinds of areas. And so that's why I think most of my work, my scholarly work, has actually been directed at policymakers, not really at urging courts to do more.

Senator KYL. If I could just—one final question. Can you see why the passages from this particular article raise the doubt that I have expressed to you?

Professor LIU. I certainly do.

Senator KYL. Thank you.

Professor LIU. I understand.

Senator FEINSTEIN. That completes our second round. Now, Senator Kyl—excuse me. Senator Cornyn has indicated that he is on his way back and will arrive within 5 minutes and does wish a second round. I'll tell you what we will do, if that's all right. We'll begin a third round, and then I'll give Senator Cornyn some additional time when he comes in. We're just going to go for another 15 minutes and then recess.

Are you bearing up all right?

Professor LIU. I'm doing just fine. Thank you, Madam Chair.

Senator FEINSTEIN. You've got amazing cool. Congratulations. I wish I had.

In describing your approach to constitutional fidelity, you have said that the practical consequences of legal rules matter. I happen to agree with this. For example, in the *Lilly Ledbetter* case, the court interpreted Title 7 to require a woman to pay a pay discrimination case—excuse me, to file a pay discrimination case within 180 days of when her employer first paid her less than her male counterparts, even if she had no way of knowing at that time that she was being paid less. Congress has had to pass a new law to overrule that decision and communicate to the court that Title 7 was not intended to have this result. Senator Mikulski led this battle, and I think it was the first bill signed by President Obama.

So here's the question: when do you believe it's appropriate for a judge to consider the practical consequences of legal rules?

Professor LIU. Well, Senator, I think that that's one of the aspects of decisionmaking that I think properly inform the consideration of most cases that come before the courts. Law affects people's lives and it's not a bunch of words on paper, it's not a bunch of cases in the books. These are real things that affect people's lives. Decisions made by a judge should not be based on favoritism toward affecting a person's life one way or the other, it should be based, though, on an appreciation of what's at stake in a particular case. I don't think that one can really grasp the magnitude of the particular case or controversy without understanding how that plays out in people's lives.

Senator FEINSTEIN. Well, thank you.

Just so people know, there is no way that Lilly Ledbetter could have known. She didn't find out until years later what had happened. So the question was, did she have redress? The court ruled no, and we changed that to change the law.

The Supreme Court stated conclusively in the case of *Grutter v. Bollinger* that State universities have a compelling interest in obtaining the educational benefits that flow from a diverse student body. That case and others also made clear that efforts to attain diversity must be carefully tailored to the true educational benefits and not a racial quota.

Now, in log entries, you have been accused of favoring racial quotas, so I want to ask you plainly: do you favor racial quotas, and do you believe they are constitutionally permissible?

Professor LIU. Senator Feinstein, I absolutely do not support racial quotas. In my writings, I think I've made very clear that I believe they are unconstitutional.

Senator FEINSTEIN. So will you follow Supreme Court law, as articulated in *Grutter v. Bollinger* and *Gratz v. Bollinger*, that laid out the court's guidelines for when and how it is permissible for a university to seek to attain a diverse student body?

Professor LIU. Absolutely, I would, Senator. I think my writings have written approvingly of the standards set forth in those cases.

Senator FEINSTEIN. The question that Senator Kyl asked you on social welfare rights—let me ask this question in another way. In a highly theoretical article in the 2008 *Stanford Law Review*, you critiqued two other scholars' notion of constitutional welfare rights and put forth a theory of your own in which courts engage in “a

dialectical process of engagement with the political branches and the public they represent.”

Now, I'd really like to hear you explain this in plain English. I mean, you're obviously very smart. You've been gifted with a great mind. How much is genetic and how much is learned, I don't know, but you have an unusual mind. You're also very young. Sometimes one can get so fancy in their writing that the plainspoken person attributes a lot of things to it that may well not be there. So could you take a crack at what the “dialectical process of engagement with the political branches and the public they represent” actually means?

Professor LIU. Certainly, Senator Feinstein. Let me preface my answer by promising that if I were ever confirmed as a judge, I would not write opinions that sound like that.

[Laughter.]

Professor LIU. All I mean to say, I think, in that article, is it is a characterization of the process through which the precedents of the court have in a sense gone back and forth with the exercise of the legislative power to define the scope of welfare rights. In that back-and-forth process, courts occasionally—occasionally—weigh in with principles under the due process clause or the equal protection clause.

But the legislature, I argue in that—in that piece, retains the final word with respect to the creation of those rights and the elaboration of when those rights are going to kick in and not kick in. The final word belongs to the legislature.

And so I hope that what comes through in the article is a posture really of judicial deference, because what I'm arguing against in the first half of the article is a strain of thinking that was popular in the 1960s and 1970s, that judges should just wholesale invent these things and come up with their own moral theories of what the Constitution requires. I wholesale reject that point of view. That is what the first half of the article is devoted to, is a rejection of that point of view.

Senator FEINSTEIN. Thank you very much.

Senator SESSIONS. Excuse me. Could I defer to Senator Cornyn, and then come to you, for his second round?

Senator KYL. Madam Chairman, if we're going to do that, and we're going to break at 12:30 but we're going to come back at 1, if I could just excuse myself right now then and be back.

Senator FEINSTEIN. Yes, certainly.

Senator KYL. Thank you very much.

Senator FEINSTEIN. So why don't you, in an effort to extend all of the exigencies of membership which aren't usually extended, let me give you your second round now so you wouldn't have missed it.

Senator CORNYN. Thank you, Madam Chairman.

Professor, I assume you're familiar with the work of Judge Stephen Reinhardt on the Ninth Circuit?

Professor LIU. I wouldn't say I'm familiar with his work, but I know a little bit about him and his reputation, yes.

Senator CORNYN. Do you recall having disagreed with a decision by Judge Reinhardt?

Professor LIU. Senator, actually, I can't even think of an opinion by him off the top of my head.

Senator CORNYN. Okay. Fair enough. Fair enough.

Let me then ask you, is your theory of constitutional fidelity substantively different from the living Constitution view endorsed by other liberal scholars?

Professor LIU. Well, Senator, I think the term "living Constitution" has been used by lots of people to mean lots of things. I don't like the term and I—in the book, we reject the term because it suggests that the Constitution is a malleable document that can be read to have words in it that really are not in it.

And I think we take the position that the Constitution is a written text for a special reason, and that is because the text was meant to be the enduring thing that judges would have to apply in the course of deciding cases and not, you know, something that's extra—you know, outside of the text and not something that they would invent on the fly.

Senator CORNYN. On the issue of foreign law, Professor Koh—I guess now he is, of course, at the State Department—has described the debate between transnationalists and nationalists when it comes to the application of foreign law, or what its use might be by judges interpreting, for example, the United States Constitution, United States law.

I believe he thinks that transnationalists believe that domestic courts have a critical role to play in incorporating international law into domestic law, while nationalists claim only that the political branches are authorized to domesticate international legal norms.

Do you agree, first of all, with this distinction by Professor Koh, and if you do, which are you, a transnationalist or a nationalist?

Professor LIU. Well, Senator, frankly, I'm actually not familiar with this debate in the law. I would say perhaps something similar to what I said to Senator Coburn on this issue, which is just that I think that in the decision about what the meaning of American statutes are and what the meaning of the American Constitution is, American precedents and American law are the things that control.

Senator CORNYN. Changing subjects again, in your article, "Rethinking Constitutional Welfare Rights"—I think this has come up in a different context since I had to leave—you write that legislation may give rise to a cognizable constitutional welfare right if it has "sufficient ambition and durability, reflecting the outcome of vigorous public contestation and the considered judgment of a highly engaged citizenry."

I don't know if that would pass Senator Feinstein's standard for plain speaking. But I would just ask you reflecting on the recent debate on health care reform, which passed after vigorous public contestation. I think we could all vouch for that. Does that give rise to—does passing a law like that give rise to new constitutional rights?

Professor LIU. Well, I think it's an excellent question, Senator Cornyn. I want to say, I have not—I don't have a view on that because, like many Americans, I actually haven't read the health care legislation. And beyond that, I think it's—within just the confines of the quote that you read, the durability of it is something I guess

that's remained to be seen, because I understand that it's being challenged in the courts and that even Members of Congress may wish to revisit elements of it in the future. So I think my initial take on your question, although I haven't thought about it very much, is just that it's too early to tell.

Senator CORNYN. Well, so you would at least hold out the possibility that an act of Congress could confer welfare rights or benefits that would somehow become constitutional in nature, which then could not be repealed by a subsequent Congress. Is that right?

Professor LIU. It could always be repealed, Senator. My theory doesn't suggest that it could never be repealed. It could always be repealed. And the only way—I mean, the term “constitutional”, as I've used it, is perhaps misleading. It only means to say that, according to the court's precedents, the court has recognized, in the application of, say, equal protection principles or due process principles, a recognition of the rights that are created by Congress, and in making decisions under those other clauses of the Constitution, have given them due weight in the consideration of, say, eligibility restrictions or termination processes. Those are the cases in which I—those are the cases I've endorsed in that article as conferring a judicially cognizable right. So, that's—that's the only sense in which I mean those terms.

Senator CORNYN. My last question is, in that same article you cite the Supreme Court's decision in *USDA v. Murray* of 1973 as an example of how the court may invalidate an act of Congress and recognize a welfare right. You note that Murray directly engaged the court in substantive policy judgment, an approach that you call “plausibly appropriate in exceptional cases.”

Can you list some examples of exceptional cases in which it would be appropriate for the court to engage in substantive policy judgments, and as a judge, if confirmed, would you feel authorized to engage in such substantive policy judgments?

Professor LIU. Senator, I don't think I would feel authorized to engage in substantive policy judgments because I think that's a prerogative that belongs to the democratic process. I think, actually, in the article, Senator, if I recall correctly, I was critical of the Murray decision because it went further in that regard than my theory would—would—would permit.

Senator CORNYN. Well, thank you very much, Professor.

Professor LIU. Thank you.

Senator CORNYN. Thank you, Senator Feinstein.

Senator FEINSTEIN. Thank you, Senator.

The hour of 12:30 has arrived. I would like to place some letters in support in the record. So ordered.

[The letters appear as a submission for the record.]

Senator FEINSTEIN. We will take a one-half hour break. When we come back, Senator Sessions will lead off. So, please, get some food and some drink and come well prepared.

Professor LIU. Thank you. Thank you.

Senator FEINSTEIN. Thank you.

The Committee will be in recess until 1 p.m.

[Whereupon, at 12:30 p.m., the Committee was recessed.]

AFTER RECESS [1:08 p.m.]

Senator FEINSTEIN. The hearing will resume.

As I indicated, we will begin with the Ranking Member, Senator Sessions.

Senator? Oh. If I might say something while you're getting ready. The procedure is really to do just two rounds for an appellate judge. I want everybody to have an opportunity to ask questions, and so I suggested to the nominee that we will do just whatever it takes to have the questions asked and answered. I would really beg the forbearance of the other four nominees, although I suspect you don't mind not being on the hot-seat.

[Laughter.]

Senator FEINSTEIN. Senator Sessions.

Senator SESSIONS. Thank you so much.

Well, words have meaning. We are in a serious location, dealing with serious issues involving the appellate courts of the United States and a lifetime appointment. I remain uneasy about some of the—not so much the answers you give, but how they square with what you've written before and what impact that has on my understanding of the clarity of your thought and how you approach judging. There's quite a bit of difference between a theoretical law professor and the practicality, the day-after-day duty of enforcing contracts and disputes and ruling on rules of evidence, so I have to say that.

With regard to the death penalty, you've written some about that. Let me just ask you, first, do you personally favor it? I would say absolutely that this would not impact my view of how you would conduct your office. I think good judges can differ on whether they believe in a death penalty or not, and the critical thing is, I guess, will you follow the law.

So I guess my first question is, do you favor the death penalty or not?

Professor LIU. Senator Sessions, I have no opposition to the death penalty. I've never written anything questioning its morality or constitutionality. I would have no problem enforcing the law as written in this area.

Senator SESSIONS. Well, in talking about—in a report of a panel you moderated called “Civil Rights Litigation in the Roberts Court Era” as part of the Reclaiming and Reframing the Dialogue on Race and Racism, you made some comments about it. You talked about changes in State courts and said, “and part of that movement are changes in some of the State legislation and Supreme Courts is the result of State court decisions that have gotten rid of some bad practices—some State legislation that's gotten rid of some bad practices—and then the absorption of that cultural shift into Federal law through the Eighth Amendment.”

It seems to me what you're saying there is that legislation in various States somehow can change how we should interpret the Eighth Amendment. Do you mean that, and whether or not it applies to the death penalty?

Professor LIU. Senator, I think I was perhaps reporting the way in which the Supreme Court has instructed that the Eighth Amendment be interpreted, and the Supreme Court, in its opinions, looks to the practices of the States in informing the meaning of the Eighth Amendment.

Senator SESSIONS. Well, I'm not sure about that. It seems to me that—well, I could see that that would be a theory. Is that the theory that Marshall and Brennan used when they consistently dissented in every death penalty case, asserting that the death penalty violates the Eighth Amendment prohibition on cruel and unusual punishment?

Professor LIU. Senator, I'm actually not sure what theory they used to arrive at that conclusion. I think the comment that you read tracks more closely to the view that the justices have used since the time, actually, of Brennan and Marshall to articulate the standard by which they determine whether something is or is not constitutional under the Eighth Amendment.

Well, is it relevant to you too that there are six—I think maybe eight—references in the Constitution to the death penalty and it would be a stretch, would it not, to say that the Constitution prohibits the death penalty, and that any phrase in it, general phrase like “cruel and unusual punishment” should be construed to eliminate what is positively referred to at six or eight different places?

Professor LIU. Senator, I think that is very strong and important textual evidence that the Constitution contemplates the death penalty. The Fifth and Fourteenth Amendments to the Constitution specifically refer to deprivation of life, but it's followed, of course, with the guarantee of due process of law. But I think that is pretty strong textual evidence that the Constitution contemplates—

Senator SESSIONS. But do you think that the actions by States can change that? That's what you said, it “could shift the absorption of that cultural shift.” That's your words. “Some cultural shift can transfer into Federal law through the Eighth Amendment.” The implication of your remarks is that it could somehow have the cruel and unusual clause constrict the death penalty.

Professor LIU. Well, Senator, I think my understanding of that is that the court has always said consistently throughout its cases that the imposition of the death penalty is a constitutional punishment within the confines of the other guarantees of the Constitution. I haven't understood those decisions to attempt to outlaw the death penalty. Rather, they have dealt with specific—much more specific issues related to how the death penalty is administered and to whom.

Senator SESSIONS. Well, Professor Liu, two justices on the Supreme Court dissented in every single death case, Justice Brennan and Justice Marshall, on the clear view that it was cruel and unusual punishment.

Professor LIU. I'm not endorsing their view, Senator.

Senator SESSIONS. Well, you seem to in this quote. You can say that today. Your quote here seems to suggest you think that if the States change some of their rules of death penalty, that somehow will allow the Eighth Amendment now and Federal judges to alter what I think is plainly a constitutional punishment.

On the—gosh, time flies.

Senator FEINSTEIN. Yes. Questions are long.

[Laughter.]

Senator SESSIONS. You've written, arguing that the citizenship clause of the Fourteenth Amendment creates a positive right, I would summarize, to whatever benefits are at least necessary to

fulfill full participation as a citizen. You go on to note in your “Interstate, Inequality, and Educational Opportunity” piece that the Fourteenth Amendment “guarantee of national citizenship was a generative source of substantial rights.”

I’m uneasy a bit to suggest that the plain words of the Fourteenth Amendment are generating rights. But besides that—and you wrote that citizens have “positive rights to government assistance”, as I understand it.

That is rights derived from the Constitution, as I understand it, and that “these rights can be a guarantee not only against State abridgment”, you wrote, “but also as a matter of positive right.” You concluded that such an agenda, a constitutional agenda, would “include expanded access to health insurance, child care, transportation subsidies, job training, and a robust Earned Income Tax Credit.” So do you believe that, yes or no?

Professor LIU. I do believe that, Senator. But those arguments are addressed to policymakers, not to the courts.

Senator SESSIONS. Well, that’s important—a very important distinction, and I’ll review that. It does seem to be consistent with your view of expansive governmental powers.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator SESSIONS. One thing, and I’ll conclude this remark. That is that as you noted, both with Alito and Roberts, judicial philosophy is important. Your writings are the only thing we have to evidence that. I don’t think it’s sufficient just to say that I’ll follow authority somewhere in the system, because many, many times a case of first impression will be before you and your philosophy will indeed impact how the law is shaped.

Senator FEINSTEIN. Thank you very much. You cannot say you have not had adequate time.

Senator SESSIONS. Thank you.

Senator FEINSTEIN. Senator Kyl.

Senator SESSIONS. I believe it was on fast.

Senator FEINSTEIN. Oh, do you?

[Laughter.]

Senator KYL. Thank you, Madam Chairman, and for your patience.

I want to get back to this question of agenda that I was talking about before we had our little break. You, in a broadcast earlier this year, January 3rd, on NPR, were discussing how the Obama administration represented a new opportunity for the American Constitution Society. You said that Obama administration, “that ACS had the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and policy into practice.” What did you mean by “our ideas” and your “progressive vision” of the Constitution and law and policy?

Professor LIU. Senator, I think that was a reference to the ideas that underpin the American Constitution Society. I think, as the mission statement of that organization reads, it’s a dedication to certain basic principles of our Constitution: genuine equality, liberty, access to the courts, and a broad commitment to the rule of law.

Senator KYL. Is it fairly described as a progressive vision or progressive mission?

Professor LIU. I think many people have described it that way. I think that's fair, yes.

Senator KYL. Now, the——

Professor LIU. The—the organization, I mean.

Senator KYL. Yes.

Professor LIU. Not necessarily—I think the values are those of the Constitution. I don't think they're—I wouldn't say they're progressive or conservative, or whatever. I think those are the values in the Constitution.

Senator KYL. Well, the way you described it was “the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and of policy into practice”, so I assume you subscribe to these views when you talked about “our ideas.”

Professor LIU. I have—I think, as I think the record shows, Senator, I have been deeply involved in the American Constitution Society.

Senator KYL. Yes.

Professor LIU. I have served on the board, I have chaired the board.

Senator KYL. There's nothing wrong with having views that are wrong.

[Laughter.]

Senator KYL. No. OK. But I mean, so that's what you meant by “the opportunity to actually get our ideas and progressive vision of the Constitution and law and policy into practice.” But I guess the follow-up question is, obviously I guess you would say you were speaking in a policy way, not through the judicial process. Is that the way——

Professor LIU. I think—well, Senator, the short answer is yes. In addition, I think that—look, I mean, I think every President has his or her own views of what vision they would like to enforce as a President. I think—I don't think I was meaning anything more than just that basic prerogative of the President.

Senator KYL. Policy through the appropriate ways of implementing policy.

Professor LIU. Absolutely. Yes.

Senator KYL. And what you're suggesting is that it isn't appropriate for a judge to have a policy agenda which he brings to the court and to try to get that agenda adopted into law.

Professor LIU. Absolutely. I think it would not be appropriate for any President to appoint a nominee for a judgeship because of that nominee's agenda.

Senator KYL. OK. I mentioned to you before, two of my colleagues, one of whom is the Chairman of the Committee—and I'll just quote from an April 13th article in *Politico*. He was talking about things like the *Ledbetter* case and the *Citizens United* case: “I think what people are going to do is say, do you share our concern about the fact that the court always seems to side with the big corporate interests against the average American.” That's the end of Chairman Leahy's quote. Do you think, first of all, that that's an accurate characterization of what the Supreme Court does?

Professor LIU. I think the Supreme Court tries as best as it can to apply the law fairly and equally to all interests of the society, whether they are ordinary people or corporate interests.

Senator KYL. Do you think that if you were on the Ninth Circuit Court of Appeals that you would have a biased or a preconceived notion or an agenda to try to right a balance and rule more against big corporate interests?

Professor LIU. Absolutely not, Senator.

Senator KYL. How about in cases where the question of executive power versus legislative power or judicial power is concerned? Do you think that executive power has gotten too big and that the courts should try to reign it in and rebalance so that the executive power is more limited vis-à-vis the other branches?

Professor LIU. Senator, I couldn't say that I have any sort of theory of that sort. I think courts can only decide the cases that are presented to them based on the applicable law. The——

Senator KYL. So would——

Professor LIU. Sorry.

Senator KYL. No. Excuse me for interrupting. So your view would be that if this Committee tried to promote a nominee because of our belief that that nominee would rule against big corporate interests or would rule against executive powers, that that would be an inappropriate basis for us to base support for a nominee on? That's bad grammar, but forgive me.

Professor LIU. I think—I think that—obviously, Senator, I won't pretend to suggest what standards this Committee should use in evaluating a judicial nominee. That's clearly your prerogative and not mine. I would simply say that for all judicial nominees, I think the—I—I would hope that the important test is whether the nominee would be faithful to the law that has been given, and especially for a lower court nominee like myself. In virtually all of these areas, the Supreme Court has said things and handed down precedents, and those would have to be faithfully followed regardless of whatever theory the nominee had about the issue and whatever the nominee may have written previously.

Senator KYL. Thank you.

Senator FEINSTEIN. Thank you very much, Senator.

The hour is now 1:30. I would really like to recess or adjourn this part of the hearing and move on to the four other judges. I know, Senator Kyl, you're going to meet with Professor Liu separately.

Senator KYL. Well, I would like to do that. I'm just wondering, and of course, whatever you would like to do, obviously we can do. I can probably, in about—in no more than 10 minutes, and maybe less than that, conclude the questions that I had, if that would better fit into the schedule. I mean, I'm just going to try to truncate all of this and forget some stuff.

Senator FEINSTEIN. Well, in hopes that you might then vote for him, 10 minutes.

[Laughter.]

Senator KYL. Now, how about that for a test?

[Laughter.]

Senator KYL. Obviously we don't want to approach cases with a preconceived notion, do we? I mean, whatever you want to do. But I think I could fairly quickly get through this.

Senator FEINSTEIN. All right. Fairly quickly.

Senator KYL. OK.

Senator FEINSTEIN. No more than 10 minutes, and then we move on.

Senator KYL. That's acceptable.

Let me ask a question that I asked a previous nominee. The President had talked about—he used two different analogies about judging, talking about the kind of nominee he would nominate. One, was the first 25 miles of a 26-mile marathon, and the other was, he said, “In 95 percent of the cases the law will give you the answer, the last 5 percent, legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart”, he said.

Do you agree with him that the law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what's in the judge's heart?

Professor LIU. Senator, I guess that's a colorful analogy, but I'm not sure that's necessarily the one that I would subscribe to. I think that judges should apply the law all the way through, and I'm not a person who believes that what's in the judge's heart should have a bearing on what the outcome of a case would be.

Senator KYL. OK. Relative to the *Ledbetter* case, because Senator Feinstein asked you if in some cases it's important to determine—let's see. I'll try to get the exact quotation: “to consider the effects of a decision on persons' lives”, and that was a case where, at least presenting it from the Supreme Court's point of view, they interpreted the law as they saw it.

Many people believed that the result was a—led to an unfortunate—that that interpretation led to an unfortunate result on Mrs. Ledbetter's life. So I guess the question is, should that court have considered the effect on her life in making the decision that it did?

Professor LIU. Senator, not to my knowledge. I mean, it would depend on what the applicable law told you to take into consideration. But I don't believe—

Senator KYL. You remember the statute of limitations issue.

Professor LIU. Yes, I'm aware. Yeah. And I don't believe that the effect on Ms. Ledbetter's life is the relevant determinant there.

Senator KYL. So presumably you would have just tried to read the statute, and if she lost, then that was something to be corrected by the legislature, if the legislature decided to correct it?

Professor LIU. I would look to the way the statute of limitations had been applied in the precedents. I would look to the statutory—the relevant statute that governed that issue, and I would try to apply it faithfully, yes.

Senator FEINSTEIN. Senator Kyl.

Senator KYL. Sure.

Senator FEINSTEIN. Just for a moment.

Senator KYL. Sure.

Senator FEINSTEIN. My question was a little different. It wasn't how it affected her life, it was the practical consequences of legal law. In other words, the consequence of the law was so convoluted because she could not possibly have known that she should have been paid on a different pay scale.

Senator KYL. Of course, I stand corrected since I was citing Senator Feinstein.

Would that change your answer?

Professor LIU. I think, you know, just to perhaps bring the two things closer together, I think it is important to consider the kinds of practical consequences Senator Feinstein speaks of in the sense of saying, if the statute of limitations doctrine has within it—and I'm not saying it does. Actually, I don't know what—you know, I don't know off the top of my head what the doctrine says. But if it has within it some notion of a notice, that a person has to know when their rights are being violated in order for the statute to start running, then one would have to inquire, how does the law play out in someone's life.

Senator KYL. Yes. That's the question.

Professor LIU. Right.

Senator KYL. I mean, as you know, statute of limitations law is "knew or should have known."

Professor LIU. Exactly.

Senator KYL. And that's as part of the "should have known." If the person should have known and still loses out on benefits, then the court says that's just the way it is. Is that correct?

Professor LIU. That is correct.

Senator KYL. Now, one of the things that you said in this "Keeping Faith With The Constitution" was that the Constitution requires adaptation of its broad principles to conditions we face today, and so on. You said the question is not how the Constitution would have been applied at the founding, but rather how it should be applied today. I want to focus on that word "should." Then you went on—there's an ellipsis here—"in light of changing needs, conditions, and understandings of our society." I mean, "should" is not—I mean, that's a normative term. The question—I mean, it really begs the question, what is the legal test for how you decide "should", right?

Professor LIU. Yeah. Well, Senator, if I could address that. The ellipsis, the missing words, I believe say how it should be applied to preserve the power and meaning of the text and the principles. The "should" is not—I'm sorry.

Senator KYL. No. If—if—I didn't have those words in here, and that does make it somewhat different.

Professor LIU. Yes. I only mean to say that the "should" is not should as in however a judge feels it should apply, it's, rather, how it should apply in order to preserve what the text says and what the principles behind the text mean.

Senator KYL. One of the areas that we've gotten into in this context is the question of the role of religion or faith in our society. I just note today there's a story out of Madison, Wisconsin. A Federal judge has ruled that the National Day of Prayer is unconstitutional. Obviously, neither you nor I have read this decision, but can you think of any determinative constitutional argument that would support that ruling?

Professor LIU. Senator, I'm going to confess that I have spent hardly any time in my career studying the religion clauses of the Constitution, so I am not familiar with the relevant precedents in that area.

Senator KYL. All right. Let me just conclude with this. You've been pretty outspoken in your criticism of the current Supreme Court. In fact, you've suggested that it lacks both principle and legitimacy. In one article you—and I'm specifically referring to the *Bush v. Gore* decision. You said it was "utterly lacking in any legal principle." That's a pretty tough criticism for a Supreme Court decision.

And in another you claimed that, again, "if you look across the entire run of cases, you see a fairly consistent pattern where respect for precedent goes by the wayside when it gets in the way of result." Now, you obviously have a problem with the Supreme Court decisions here, the precedents that you would be asked to apply. You haven't been bashful about expressing that serious opposition to it, but you're telling us that, notwithstanding that, it's "utterly lacking in legal principle." You would apply the legal principle that you discern that they—or that was the basis of a decision, right?

Professor LIU. Well, Senator, the reason that I perhaps said those words was that the opinion itself stated that it was only to apply in that case. So I'm not sure I would apply that case because the court instructed, in its terms—

Senator KYL. Well, but—yeah. But that's a distinction there with a difference. "Utterly lacking in legal principle" is different than "wouldn't apply to a future case." I mean, are you saying the court had no legal principle basis for the decision that it made in *Bush v. Gore*?

Professor LIU. Well, Senator, I guess the only import of the phrase that I chose there was that it was my thinking that a legal principle should be something that applies in more than one case because it's a principle.

Senator KYL. So you don't think they used a principle, but simply used some kind of pragmatic decisionmaking in the case?

Professor LIU. Well, Senator, I won't—I guess I won't try to characterize it further here, but I've written what I've written and said what I've said.

Senator KYL. You said that Justice Alito "approaches law in a formalistic, mechanical way, abstracted from human experience." You're very critical of that. Now, would you like to invent a fourth element of a tort besides duty, breach of duty, and damage, or elements of a contract, or whatever? I mean, that's a purely mechanical, formalistic way of deciding how a particular case gets decided, isn't it?

Professor LIU. I think this perhaps goes back to your earlier question, Senator Kyl. It's just that I think that in the application of, say, the elements of tort or the elements of contract there is a human aspect to judging. That's why we don't put legal problems through a machine, or through a formula, or through a computer.

Senator KYL. Well, what is the human aspect? I mean, I can understand that in sentencing, for example, but I'm not sure I can understand it in the question of who should win the case, A versus B, defendant versus plaintiff.

Professor LIU. I think a judge must fairly apply the law as it's given and follow the written law to its logical consequence, no matter what the—what the result is. I think in the application of legal

principles, judges are called on to exercise judgment with respect to how they apply in a particular case. I think judges are human beings, and there is often reasonable disagreement about the application of law to facts. But the task, I think, for all judges remains the same, which is applying the law faithfully to the facts of a specific case.

Senator KYL. Yes. And that's a fair statement of the way it should be. We all come to our positions with our preconceived notions, our political ideologies, our notions, and personal experiences can certainly shape how we view certain issues. The job of the judge is to try to remove as much of that from his decisionmaking or her decisionmaking process as possible, would you not agree?

Professor LIU. I would absolutely agree with that, Senator Kyl.

Senator KYL. And finally, would you also agree that when someone has written as extensively as you have in very, as you put it in one sense, colorful language—I mean, you've not been bashful about expressing very specific and strong—obviously strongly held views about certain things, that it can give way to some questioning as to whether or not, the views having been held that strongly, with as much writing about them as you've done and as much very explicit criticism of people who have held a contrary point of view, whether it's possible for you to lay aside those ideas or ideologies and approach cases from a purely objective, unbiased point of view.

Professor LIU. Well, Senator, if I could just offer one thought on that, I hope that my writings demonstrate that I'm someone who's—obviously I have my views, but I hope that I'm someone who's also able to take into account the opposing views of others.

Frankly, I appreciated this opportunity to have this dialog with you, and Senator Sessions, and others about very important and—important and controversial issues of law, about which there is, I think, very reasonable disagreement in America. In fact, one of the great things, I think, about this country and the legal tradition we have is that there is room for that disagreement.

As much as I like my own views, I confess to you that I would actually be a little afraid if I was the only voice speaking and that everything went my way. That's not—that is not the kind of certainty that I have about my own views, and I hope my writings reflect—at least the more thoughtful parts of my writing reflect—that type of discipline and restraint.

Senator KYL. Madam Chairman, thank you. If there is an opportunity for us to visit personally, I would welcome that.

Professor LIU. I would also.

Senator FEINSTEIN. I appreciate that.

Senator KYL. I suspect there may be questions for the record, following up on some of these things, and so on.

Senator FEINSTEIN. Thank you.

Senator KYL. Of course, it goes without saying, you can add to your—or further elucidate on your answers if you want to do that.

Senator FEINSTEIN. Thank you. Thank you.

I'd like to close this off with a few words.

Senator SESSIONS. Madam Chairman.

Senator FEINSTEIN. Yes, go ahead.

Senator SESSIONS. I had a question.

Senator FEINSTEIN. Questions?

Senator SESSIONS. Yes. He got—

Senator FEINSTEIN. If they're softballs, yes. Hardballs, no.
[Laughter.]

Senator SESSIONS. I would note that Jeffrey Sutton's hearing—and he was a mainstream, I think, skilled attorney, had a restrained review of the role of a judge—went on for 12 hours. Senator Schumer had at least one 20-minute round in that time. So we've had some long hearings. This certainly does not exceed the norm.

With regard to your comments about the theory of constitutional fidelity, that it may be valid when the object, fidelity, "may be valid when the object of the interpretation is one of the Constitution's concrete and specific commands." You said you should show fidelity to that.

For example, I think you've noted that revenue bills must arise in the House. That's unequivocal. What about the Second Amendment, which states that "the right to keep and bear arms shall not be infringed"? Is that a precise command that cannot be abridged by unelected judges?

Professor LIU. Senator, the Supreme Court, I think, has clearly said that that is a clear command that protects an individual's right to bear arms.

Senator SESSIONS. Well, there's some uncertainty about it all, whether or not it will apply to States, cities. So what's your view of the Second Amendment?

Senator FEINSTEIN. Oh, here we go.

Senator SESSIONS. Is it clear on that subject? You don't hesitate to say a revenue bill must rise in the House. Do you hesitate to say that the right to keep and bear arms shall not be infringed? Is that ambiguous?

Professor LIU. Senator, I confess, I have not thought about, written about the Second Amendment in any great detail. The book, I think, discusses the Second Amendment as an example of where judges have applied a basic approach to constitutional interpretation that takes into account a variety of factors, including the original meaning, including the text, but also including the practical consequences of a decision and precedent. I think that's the extent of any view that I have about the Second Amendment and I couldn't really go further.

Senator SESSIONS. You've been clear that you felt that quotas are unconstitutional.

Professor LIU. Yes.

Senator SESSIONS. Is that your personal analysis of that or just based on Supreme Court?

Professor LIU. That is my view, Senator.

Senator SESSIONS. But I'm troubled. That's an easy word to say, but I'm troubled that you have written that *Adarand* should be consigned to the dustbin of history. *Adarand* dealt with racial set-asides, giving preference to one person or another as a result of the color of their skin or their ancestry. So I ask you, is that inconsistent? How do you dismiss so firmly the *Adarand* decision when it seems to be based on similar theories as quotas?

Professor LIU. Well, *Adarand* is a precedent of the court, and of course I would follow it as a judge. I think my disagreement with *Adarand* doesn't have anything to do with, I think, it's central holding, which was that all racial classifications by government are subject to the highest level of constitutional suspicion by the courts. I have agreed with that principle in my writings and I have not urged the court to revisit that in any way.

I think the only disagreement I had with *Adarand* was its extension of the principles of the *Crowson* case, which dealt with the obligations of States rather than the Federal Government, with respect to the latitude given to implement Affirmative Action programs. I took a perhaps broader view than the court took of that particular issue, and that's the only point of disagreement that I have with the *Adarand* case.

Senator SESSIONS. One final thing. I'm curious about the American Constitution Society. So many members of the Obama administration talk about a progressive agenda and progressivism. As I understand it, the progressive movement started in the early 1900s, and one of their doctrines was that elite people knew best and that the Constitution was an impediment to them being able to do what was best for those uneducated folk out there in the country.

Is that in any way the American Constitutional Society's view? Why do you use that phrase if it's not?

Professor LIU. Well, Senator, I—this—I think your question rightly, I think, exposes the hazards of using labels of that sort. I guess I'll just put it in plain terms, which is that I think that the American people have always, I think, demonstrated great reverence for our Constitution because they think of it as a set of principles and a document that they can embrace as their own.

I don't think it's a question at all of whether policymakers or judges are in some sense wiser than the people. There is no greater wisdom than that that resides in the American people itself, and that's what has sustained this country, I think, throughout its many, many years as a nation dedicated to the rule of law under our own Constitution.

Senator SESSIONS. Thank you.

Senator FEINSTEIN. Thank you very much, Senator.

I'd like to conclude this now, but I'd like to say, you know, I've been very, very impressed with you personally. You came to my home in San Francisco, we spent a couple of hours. You joined with my family and me for dinner, and my daughter happens to be a judge, so we had a good conversation. I cannot, in my time on this Committee, remember anybody quite so young that has done so much and I have great respect for that.

I think the thing that all of us have to remember is that this is a very diverse country and the law is equal for everybody, but within that law there are certain tensions and there's dialog, and there's discussion, and there are cases on point and not on point. It really takes a mature mind and someone I think that is willing to weigh the sales equally on both sides and make that transition from an advocate to a judge.

Judge Chen, for example, who was an advocate, he's pending for a District Court, has been 8 years as a magistrate judge and has

been able to demonstrate that for 8 years. Here, you are being appointed to the Circuit Court. You haven't had an opportunity to demonstrate that for a period of time. I've asked you about this before. You did not make an opening statement. I would ask you to make a very brief concluding statement just on that point.

Professor LIU. Certainly, Senator. And I think it's a very fair point. Many nominees come before this Committee with backgrounds different from mine. I guess I would say, as you look across my entire record, there are many things I think relevant to the kind of judge that I would be. In my scholarship, I hope that the record shows that I am a rigorous and disciplined person who makes arguments carefully, in a nuanced way, taking into account all the other possible ways of looking at an issue, and where I've decided to lay down my view, I have respectfully treated the views of others.

I think if you look at my teaching, and many of my former students are here today, I hope that what you would find is that I'm a good listener, that I don't seek to impose my views on other people. Rather, what I try to do is elicit all the different points of view that could illuminate an issue.

And I hope that it counts for something that I've won, at least among some, the respect of colleagues who see in me the temperament, the integrity, and the qualities of collegiality and balanced judgment that have enabled me to perform certain leadership positions and to be involved in various organizations that require that skill set. So although, Senator Feinstein, I can't hold up for you a judicial resume that demonstrates in the most direct way the qualities of a judge, I hope at least you'll find analogous evidence in some of the other things that I've done.

Senator FEINSTEIN. Well, thank you very much. I'm going to excuse you now.

I'd like to correct the record of something Senator Coburn said. There are four of us that are non-lawyers on this Committee, and we believe we see the forest rather than just the trees. So, thank you very much for being here today.

Professor LIU. Thank you very much.

Senator SESSIONS. While you're changing, could I offer for the record some letters, Madam Chairman.

Senator FEINSTEIN. Yes, you certainly may.

Senator SESSIONS. I have 10 letters here from the Judicial Action Group, Criminal Justice Legal Foundation, Judicial Watch, Liberty Council, 42 California District Attorneys who say, "For many years our ability to enforce the law and protect the citizens of our jurisdiction has been hampered by erroneous decisions of U.S. Court of Appeals for the Ninth Circuit. This court has been far out of the judicial mainstream." They say, "Under no circumstances should any nominee be confirmed to the Ninth Circuit who would take that court further in the wrong direction. Regrettably, the President has sent to the Senate just such a nominee."

Also, the Concerned Women of America, the Crime Victims United of California, the American Conservative Union, Republican National Lawyers Association.

Senator FEINSTEIN. Well, thank you very much. Those letters will go on the record.

[The letters appear as a submission for the record.]

Senator FEINSTEIN. And I would like to submit to the record a list of 24 court nominees confirmed under the Bush administration who had no prior experience as a judge. So, those documents will go into the record.

[The information appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Professor Liu.

Professor LIU. Thank you.

Senator FEINSTEIN. To your family and those wonderfully well-behaved children, thank you for being here. Bye, Violet. [Laughter.] Thank you so much.

And if our four other nominees would please come forward and take your place, we will begin that.

Since I'm giving you the oath, I'll give you one, too. If you would affirm the oath when I complete its reading.

[Whereupon, the witnesses were duly sworn.]

Senator FEINSTEIN. Thank you.

We now have Hon. Kimberly J. Mueller, Richard Mark Gergel, Michelle Childs, and Catherine Eagles before us, all distinguished people. And I would like to open the floor to Judge Mueller. Is it Muller or Mueller?

Judge MUELLER. It's Mueller, Senator.

Senator FEINSTEIN. Mueller.

Judge MUELLER. Thank you for asking.

Senator FEINSTEIN. All right. And she, as I understand it, is from the Eastern District of California. This is a district with a very high caseload. She is nominated for Judge Damrell's seat, who has taken senior status. She has presided over more than 50 trials and seen approximately 230 cases to verdict or judgment, so she is an experienced jurist.

And I think what we will do is go right down the line and ask each of you to make a few opening comments and introduce your family, if you will.

So why don't we begin with you, Judge?

Senator KYL. May I please interrupt? Excuse me for that, Madam Chairman.

Senator FEINSTEIN. Sure.

Senator KYL. I've just gotten notice now that I do have to run, but could I just welcome each of you and apologize for what seems to be a very unfair process here, where you probably will not get the same attention that the nominee just before you did. [Laughter.]

And I want to assure all of the people who have so patiently waited and have come here to see you perform on this stage, that the fact that you may not get quite the same attention is a testament to the fact that, having looked at all of this stuff in advance—I shouldn't say stuff. All of the material that you provided in advance—you don't seem to have created anything of sufficient controversy, shall we say, to cause us to have to spend that much time with you. So with your leave, I would like to express my congratulations to all of you. I look forward to reading anything that you might say that's controversial. That might be a hint.

And thank you, Senator Feinstein, for your courtesies at the hearing this morning.

Senator FEINSTEIN. Oh, you're very welcome.

Senator KYL. Thank you.

Senator FEINSTEIN. Thank you.

That means you have Senator Kyl's—[Laughter.]

In any event, thank you for being here. I know I speak for the Ranking Member—he can speak for himself—but we both very much regret this, but it is the way of trying to move a number of judges at one time.

So let me begin with you, Judge.

STATEMENT OF HON. KIMBERLY J. MUELLER, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA

Judge MUELLER. Madam Chairman, thank you very much for the opportunity to be here today, Senator Sessions. I would like to first, of course, thank President Obama for the great honor of placing my name in nomination. I would like to thank each of you, and the Committee as a whole, for taking me under consideration, considering whether or not to confirm.

I would also like to acknowledge family members and friends who are here with me today, if I may. May I ask them to stand briefly as I introduce them?

Senator FEINSTEIN. Yes. Please do.

Judge MUELLER. All right. My parents have joined me here from North Newton, Kansas, Ted and Burneal Mueller; my husband, Robert Johnston Slobe.

Senator FEINSTEIN. Please stand so that we might be able to see you. Thank you.

Judge MUELLER. Ted and Burneal Mueller; Robert Johnston Slobe, my husband, from Sacramento. I'm also joined by my sister, LuGene Mueller Isleman from West Des Moines, Iowa.

Additionally, I'm joined by friends, very good friends, from Boston, Massachusetts: Brad and Mary Power, and their daughters, my special friends, Mary and Hana. Additionally, Dave Jones—Dave Smith, a friend from New York City; Andy Stroud, a former colleague at Orrick, Herrington & Sutcliffe from Sacramento; Ann Blackwood, a friend from Sacramento who is working in Washington, DC today.

Senator FEINSTEIN. You're filling up the room.

Judge MUELLER. All right. [Laughter.]

Senator FEINSTEIN. Yes.

Judge MUELLER. And I risk having left someone out. There are some people watching, and with your patience I would just acknowledge them as well.

Senator FEINSTEIN. Please.

Judge MUELLER. And my family and friends could now be seated if they are still standing.

My sister, Mailan and her husband Simon Foster are not able to be here. They are in London, England. My mother-in-law, Carolyn Slobe of Sacramento, is not able to be here; my brother-in-law, Gary Slobe of San Diego; my sister-in-law, Wendy Blackmoor of Boulder, Colorado, and her children, Katie, a teacher in Denver, her son Patrick, a first-year student at Cornell Law School; and finally, our cousin, Stephen James in Sacramento.

Thank you for the opportunity to acknowledge them here today.

Senator FEINSTEIN. Thank you very much. Appreciate it.
Judge Gergel.
[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).
Kimberly Jo Mueller (Kim Mueller, Kim J. Mueller, Kimberly J. Mueller)
2. **Position:** State the position for which you have been nominated.
United States District Judge for the Eastern District of California
3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.
United States District Court
Robert T. Matsui United States Courthouse
501 I Street, Suite 8-230
Sacramento, California 95814
4. **Birthplace:** State year and place of birth.
1957; Newton, Kansas
5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.
1992-1995, Stanford Law School; J.D., 1995
1976-1981 (employment leave 1979-1980), Pomona College; B.A., 1981
6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.
2003-Present
United States District Court for the Eastern District of California
501 I Street, Suite 8-230
Sacramento, California 95814
United States Magistrate Judge

2009 & 2000-2001
University of the Pacific
McGeorge School of Law
3200 Fifth Avenue
Sacramento, California 95817
Adjunct Professor (uncompensated in 2009)

2000-2003
Law Offices of Kim J. Mueller
451 Arden Way
Sacramento, California 95815
Sole Practitioner

1999
UC Davis School of Law
King Hall
400 Mrak Hall Drive
Davis, California 95616
Adjunct Professor (Spring Term)

1995-1999 & Summer 1994
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, California 95814
Associate (1995-1999)
Summer Associate (partial summer 1994)

1995
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305
Research Assistant to Professor Barbara Babcock (spring semester)

Summer 1994
Nossaman, Guthner, Knox & Elliott
915 L Street
Sacramento, California 95814
Summer Associate (partial summer)

Summer 1993
Diepenbrock, Wulff, Plant & Hannegan (since dissolved)
300 Capitol Mall
Sacramento, California 95814
Summer Associate

1983-1993

California Firefighter Foundation (and predecessor entities)
1780 Creekside Oaks Drive
Sacramento, California 95833
Health and Safety Consultant (1992-1993) (part-time)
Health and Safety Director (1984-1992) (part-time after 1987)
Assistant Health and Safety Director (1983-1984)

1987-1992

City of Sacramento
915 I Street
Sacramento, California 95814
City Councilmember (part-time)

1983

Office of Assemblymember Lloyd Connelly
California State Assembly, State Capitol
Sacramento, California 95814
Special Toxics Assistant (unpaid internship)

1981-1983

Williamson Act Program, California Department of Conservation
1416 Ninth Street
Sacramento, California 95814
Graduate Student Assistant

Fall 1981

Contract Employment
Davis, California 95616
Temporary Agricultural Fieldworker (picked melons and tomatoes)

Summer 1981

Kellogg Foundation – Food, Land & Power Program
California Agrarian Action Project
(now Community Alliance with Family Farmers)
Glide Ranch
36355 Russell Blvd
Davis, California 95616
Summer Intern

Other Affiliations (uncompensated)

2007-Present

Sacramento Trust for Historic Preservation
c/o 1931 E Street
Sacramento, California 95811
Vice President (2008-Present)
Director (2007-Present)

2003-Present

United States District Court for the Eastern District of California Historical Society
8001 Folsom Boulevard
Sacramento, California 95826
Director

2000-2003 (approx.)

Sacramento Tree Foundation
191 Lathrop Way, Suite D
Sacramento, California 95815
President (2003; approx.)
Director (2000-2003; approx.)

2001-2002

Uptown Community Development Corporation
492 Arden Way
Sacramento, California 95815
Director

1998-2001

Education First for Grant
c/o Olson, Hagel & Fishburn LLP
555 Capitol Mall, Suite 1425
Sacramento, California 95814
Treasurer

1999

Sacramento Public Library Foundation
828 I Street, Third Floor
Sacramento, California 95814
Director

1992-1997

Uptown Arts, Inc.
492 Arden Way
Sacramento, California 95815
Director

1990-1992
 Cleaner Air Partnership
 2320 Broadway
 Sacramento, California 95818
 Steering Committee

1984-1986
 Sacramento Area Council on Occupational Safety & Health
 c/o Sacramento Area Fire Fighters
 3101 Stockton Boulevard
 Sacramento, California 95820
 Officer

1984-1985 (approx.)
 Sacramento Natural Foods Coop
 1900 Alhambra Boulevard
 Sacramento, California 95816
 Director

1985-1986
 Sacramento Women's Campaign Fund
 1700 L Street
 Sacramento, California 95814
 Chair

1984-1986
 Toxics Coordinating Project
 c/o California Agrarian Action Project
 (now Community Alliance with Family Farmers)
 Glide Ranch
 36355 Russell Blvd
 Davis, California 95616
 Steering Committee

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for selective service.

8. **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.

Sacramento Business Journal, "Women Who Mean Business" (June 2009)
 Sacramento Public Library Foundation, Achievement Award (1999)
Sacramento News & Review, "Best Councilmember" (1992, 1991, 1990)
 Environmental Council of Sacramento, Environmentalist of the Year (1989)
 Glen Elder Improvement Association, Community Service Award (1989)
Sacramento Magazine, "Best and Brightest" (Nov. 1998)
 American Council for Young Political Leaders, U.S.A-U.S.S.R. Exchange (1988)
 Pomona College, Phi Beta Kappa (1980)

9. **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
 Intellectual Property Section (1995-2003)
 American Intellectual Property Law Association
 Anthony M. Kennedy Inn of Court
 California Lawyers for the Arts
 Director (approx. 1997-2000)
 Federal Bar Association, Sacramento Chapter
 Programs Co-Chair, Sacramento Chapter (2001-2002)
 Treasurer, Sacramento Chapter (2002)
 National Convention Chair (1999)
 Milton L. Schwartz Inn of Court
 Sacramento County Bar
 ADR Section (1996-2003)
 Intellectual Property Law Section (1995-2003)
 President (1997)
 State Bar of California
 Access to Justice Commission, Federal Courts Subcommittee (2008-Present)
 Intellectual Property Law Section Executive Committee (2001-2003)
 United States District Court for the Eastern District of California
 Committee on Ninth Circuit Resource Committee Report (2008-Present)
 Ad Hoc Committee on Local Rules re Protective Orders and Sealing (2006-2009)
 Ad Hoc Committee on Local Rules re Patent Litigation (2006-2007)
 Committee on Voluntary Dispute Resolution Program (approx. 2003-2005)
 Judicial Advisory Committee (2001-2003)
 Annual Conference Co-Chair, Monterey, California (2001)
 Voluntary Dispute Resolution Panel (2000-2003)

United States Court of Appeals for the Ninth Circuit
Committee on Alternative Dispute Resolution (2002-2008)
Lawyer Representative (E.D. Cal.) to Circuit Conference (1999-2003)
Women Lawyers of Sacramento

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

California, 1995

In California, a person serving as a judge is not considered a member of the State Bar. There has been no other lapse in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Ninth Circuit, 1995
United States District Court for the Eastern District of California, 1995
United States District Court for the Northern District of California, 1996
United States District Court for the District of Delaware, 1998
United States District Court for the District of Colorado, 1998
Supreme Court of California, 1995

In California, a person serving as a judge is not considered a member of the State Bar. I am not aware of any other lapse in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

American Leadership Forum, Mountain Valley Chapter Class XIII (2009-2010)
Education First for Grant (1998-2001)
Treasurer (1998-2001)
Families for Better Education (2000-2002)
Treasurer & Community Petition Chair (2000-2002)
Friends of the Library, North Sacramento-Hagginwood Branch (2006)
Leaders for Effective Government (2000-2002)

Ninth Judicial Circuit Historical Society (2001-2002, 2003-2004, 2008-2009)
 Operation Protect & Defend (2002-Present)
 Steering Committee & Volunteer (2003-Present)
 River City Rowing Club (2008-Present)
 Rotary Club of Sacramento (2004-Present)
 Director-Elect (two-year term starting July 2010)
 Youth Incentive Program mentor (2007-Present)
 World Community Services Committee Co-Chair (2009-2010)
 Programs Committee (2007-2008), Co-Chair (2008-2009)
 Literacy Committee (2006-2007)
 World Peace Fellows Liaison (2006-2008)
 Sacramento Natural Foods Coop (approx. 1982-Present)
 Director (approx. 1984-1985)
 Sacramento Public Library Foundation (1999)
 Director (1999)
 Sacramento Tree Foundation (approx. 1989-Present)
 President (2003)
 Director (2000-2003)
 Events Chair (2000-2001)
 Fund Development Chair (2001-2002)
 Co-founder, Trees for Tomorrow Campaign (1990)
 Sacramento Trust for Historic Preservation (2007-Present)
 Vice President (2008-Present)
 Director (2007-Present)
 United States District Court for the Eastern District of California Historical Society
 Director (2003-Present)
 Uptown Arts (1992-1997)
 Director (1992-1997)
 Uptown Community Development Corporation
 Director (2001-2002)
 Woodlake Garden Club (approx. 2004-Present)
 Woodlake Neighborhood Association (1995-Present)
 Woodlake Swim Club (approx. 2006-Present)

In addition to the organizations listed above, I have been termed a "member" by cultural organizations that use the term to reflect payment of admission fees and by non-profit organizations that use the term based on the fact of a charitable contribution alone. The organizations in this category that I recall are the California State Railroad Museum, Crocker Art Museum, Capital Public Radio, KVIE Public Television, the Museum of Modern Art, and the Metropolitan Museum of Art.

- b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of the organizations listed has discriminated on the basis of race, sex, religion, or national origin during the time I have been a member. The Rotary Club did not accept women as members until the 1980s. The Woodlake Garden Club did not accept men as members until some time prior to my joining. I am not aware of any other instance of former discrimination.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

"So You Want To Be A Judge? Consider the Role of a Federal Magistrate Judge!" *CWL News* (Fall 2006) (report on remarks made at June 24, 2006 workshop)

"Inmates' Civil Rights Cases and Appointment of Counsel," *Sacramento Lawyer* (May/June 2006)

"Don't be defined by the fences," This I Believe Series, *Sacramento News & Review* (January 19, 2006)

Federal Bench and Bar Media Handbook, Project of Eastern District Lawyer Representatives (drafted and edited First Edition, issued in approx. July 2003)

"Intellectual Property and Internet Law Update: Selected Cases and Legislation" (2001-02), *Intellectual Property & Business Law Sections, California State Bar*, March 2002 (co-written with Mark Leonard)

"The IP Portal" (occasional columns on intellectual property and e-commerce issues targeted to Sacramento legal community; appeared in the *Daily Recorder* in 2000):

"Now UCITA, Now You Don't"

"Think ICANN: ADR for Trademark Plaintiffs Seeking to Recover Domain Names"

"Caveat emptor: Pitfalls Ex Arte"

"An Ounce of Prevention . . . A Few Of The Simple But Important Rules Of Copyright And Trademark Protection"

- “Orrick Represents DigArts in Win Against Corel,” *Intellectual Property Update*, Orrick, Herrington & Sutcliffe LLP (March 2000)
- “Recent Trade Secret Decisions by U.S. and State Courts: January 1995 to May 24, 1996,” *1996 ABA Meeting* (1996) (co-written with Gary E. Weiss) (no copy retained)
- “Inmates’ Civil Rights Cases and the Federal Courts: Insights Derived From A Field Research Project In The Eastern District of California,” 28 *Creighton L. Rev.* 1255 (1995)
- Symposium Co-editor, *Stanford Law & Policy Review*, Stanford Law School, Volume 5, Issue 1 (Industrial Policy Symposium, Fall 1993) (assisted with editing of article entitled “On the Folly and Illegitimacy of Industrial Policy,” by Roger Pilon)
- Letter to the Editor, “Steinberg for City Council,” *Sacramento Bee*, May 25, 1992
- Letter to the Editor, *Sacramento News & Review*, Mar. 3, 1992 (responding to editorial regarding proposed Civilian Review Board)
- “California’s personal exposure reporting system,” *Fire Engineering*, Volume 144 (Sept. 1991) (co-written with James J. Beaumont and Richard Kennedy) (no copy retained; citation available at 1991 WLNR 202281)
- “The additions, subtractions of the city budget,” *Sacramento Bee* (July 11, 1991) (opinion editorial explaining recently adopted city budget)
- “Fixing a future for McClellan, the Army Depot,” *Sacramento Bee* (March 13, 1991) (explanation of proposal made to Base Realignment Commission)
- “Transit opportunities in a post-interstate world,” *Sacramento Bee* (July 6, 1989) (opinion editorial regarding 1991 reauthorization of Highway Trust Fund)
- Firefighters and AIDS*, California Firefighter Foundation and American Red Cross (Sacramento Chapter) (First Edition, approx. 1986) (handbook regarding best practices, taking into account state-of-the art public health information on communicable diseases, for first responders called to provide emergency medical care) (out of print; no copy retained)
- The Firefighter Personal Exposure Record*, California Firefighter Foundation, (approx. 1985) (title based on best recollection; handbook regarding worker-based epidemiology project for tracking firefighter exposures; prepared with input from advisory committees of firefighters and medical professionals) (out of print; no copy retained)
- Preserving agricultural lands : an international annotated bibliography*, California Institute of Public Affairs (1984) (one of three assistants to editor Thaddeus C. Trzyna)
- The Nuclear Power Issue: A Guide to Who’s Doing What In The U.S. and Abroad*, California Institute of Public Affairs (1981) (editor)
- California Museum Directory: a guide to museums, zoos, botanic gardens, and similar institutions in the Golden State*, California Institute of Public Affairs (1st ed., 1980) (edited with the assistance of Karen L. Hertzberg)
- California Environmental Directory*, California Institute of Public Affairs (4th ed., 1979) (assisted primary editor Ted Trzyna in preparation)

I do not recall, and after searching my files and available research databases have not identified, any other published materials I have written.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Revised Proposed Local Rule on Sealing and Redaction (E.D. Cal. Aug. 2009)
Response to Ninth Circuit Resource Committee Recommendations (E.D. Cal. June 2008) (internal court document transmitted only to Ninth Circuit Committee)

Proposed Local Rule on Sealing and Redaction (E.D. Cal. Feb. 2007)
Resolution supporting work of Ninth Circuit ADR Committee (Ninth Circuit Conference, Resolution No. 1, 2001)

White Paper on Faculty Lecture Rights (2000) (paper reviewing state statutory and common law with respect to protection of intangible lecture material; prepared for Davis Faculty Association, 1270 Farragut Circle, Davis, California 95616) (no copy retained)

In addition, I served as a Councilmember of the City of Sacramento from 1987-1992. I contributed daily to the Council's work and to all of its work product during that period by virtue of my position.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I served as a Councilmember of the City of Sacramento from 1987-1992, during which time I participated in all City Council proceedings. During this period, I occasionally provided testimony in my official capacity to other bodies, such as the Defense Base Realignment and Closure Commission. I have not retained copies of such testimony. In my efforts to be a conscientious representative, I regularly corresponded by mail with constituents. I did not retain copies.

Earlier in my career prior to serving as an elected representative and prior to becoming an attorney, I occasionally appeared before public bodies and made official statements. I recall two such instances. In the mid-1980s, I testified before the Sacramento City Council in support of a local ordinance, ultimately adopted, that created a registry identifying the locations of toxic materials stored and used in the City. On a second occasion, also in the mid-1980s, I appeared before the Cal/OSHA Standards Board in my capacity as Health and Safety Director for the California Firefighter Foundation in support of an updated OSHA

standard for firefighter protective gear. I have not retained copies of this testimony.

As a law student at Stanford, I joined a group consisting of approximately half the law school faculty members and one third of students in opposing California Proposition 209 in 1995. A quote attributed to me was included in a press release issued by the University describing faculty and student stances on the Proposition.

From approximately 1998 to 2002, I was active in a neighborhood movement to improve public school administration and unify our local school districts (so as to create a single district for K-12 education, replacing separate district structures for elementary and for high school education). My role was primarily organizational, but my name may have appeared on official statements or communications on this issue.

I do not recall, and after searching my files and available research databases have not identified, any other testimony, official statements, or communications that I have written on matters of public policy or legal interpretation.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

Guest, Civil Rights Class, University of the Pacific McGeorge School of Law, Sacramento, California, October 28, 2009 (question and answer session with Professor/Judge William B. Shubb; no notes)

Presenter, "The First Monday in October," A Celebration of the 219th Term of the United States Supreme Court, hosted by the American Constitution Society, University of the Pacific McGeorge School of Law, Sacramento, California, October 5, 2009

"Women Who Mean Business Awards Luncheon," Sacramento Business Journal, Sacramento, California, June 19, 2009

Annual Meeting, Association of State Correctional Officers, Colorado Springs, Colorado, June 9, 2009 (brief presentation and question and answer session with Ninth Circuit's Prison Litigation Coordinator regarding prisoner litigation and ADR; no notes)

Keynote Speaker, Charles P. Nash Prize Award Dinner, University of California, Davis, California, April 24, 2009

Panelist, Job Forum, Grant Union High School, Sacramento, California, April 17, 2009 (question and answer session before student assembly; no notes)

Update on Pro Bono Panel for Prisoners' Civil Rights Cases, Sacramento County Bar Association, Civil Rights and Constitutional Law Section Luncheon, March 19, 2009

Presenter, "The Law of Habeas Corpus," Orientation Seminar for U.S. Magistrate Judges, Federal Judicial Center, Washington, D.C., October 23, 2008

Co-panelist, "Litigation Strategy: Views from the Bench," 37th Annual Institute on Employment Law, Practising Law Institute, San Francisco, September 2008 (question and answer session focusing on discovery disputes and general federal litigation issues; no notes)

Guest Speaker, Alternate Dispute Resolution Class, Pacific McGeorge School of Law, Sacramento, California, August 28, 2008

Introduction of Speaker Frank Porter, Rotary Club of Sacramento, Sacramento, California, August 11, 2008

Status of Prisoners' Civil Rights Litigation in the Eastern District, Sacramento County Bar Association, Civil Rights and Constitutional Law Section Luncheon, Sacramento, California, July 17, 2008

"Federal Nuts and Bolts," Sacramento Barristers' Club, Sacramento, California, June 25, 2008

Speaker, Women of Stanford Law, Stanford Law School, Stanford, California, March 4, 2008 (question and answer session with law students; no notes)

Speaker, Sacramento Legal Secretaries Association Annual Dinner, Sacramento, California, February 21, 2008

Swearing-in Ceremony for New Lawyers, Pacific McGeorge School of Law, Sacramento, California, December 3, 2007

Presentation of New Sacramento Rotary Fellow Senior District Judge William B. Shubb, Rotary Club of Sacramento, Sacramento, California, November 26, 2007

Host, "Brown Bag" Tour of U.S. District Courthouse for Members of Rotary Club of Sacramento, Sacramento, California, October 22, 2007 (general remarks regarding federal courts, followed by tour of courtrooms, chambers, Marshals facility; no notes)

Panelist, Professions Day, Rotary Club of Sacramento, Sacramento, California, August 27, 2007

Presenter, Discussion of U.S. Courts and Legal System, University of California at Davis Orientation Program for International Students, Davis, California, July 25, 2007

Introduction of Speaker Nancy Saracino, Rotary Club of Sacramento, Sacramento, California, July 23, 2007

Panelist, "How to Avoid Jail While Complying With Electronic Discovery Requests," Fourth Annual E-Commerce Best Practices, Stanford Law School, June 2007

Workshop on Prisoner Section 1983 Cases, Sacramento Chapter of the Federal Bar Association, Sacramento, California, April 25, 2007

Host, "Brown Bag" Tour of U.S. District Courthouse for Members of Rotary Club of Sacramento, Sacramento, California, March 8, 2007 (general remarks regarding federal courts, followed by tour of library, public art, ceremonial courtroom, chambers, Marshals facility, U.S. Attorney's office)

"Bridging the Gap" Seminar for New Lawyers, Barristers Club of Sacramento, Sacramento, California, January 20, 2007

Presiding Judge, New Attorney Admissions Ceremony, U.S. District Court, Sacramento, California, December 4, 2006

Thought for the Day on "Kids' Day," Rotary Club of Sacramento, Sacramento, California, November 2, 2006

Discussion Leader on Ex Parte Contact Rules, Anthony M. Kennedy Inn of Court, Sacramento, California, October 17, 2006

"So You Want To Be A Judge? Consider the Role of a Federal Magistrate Judge!" California Women Lawyers Workshop, Sacramento, California, June 24, 2006

Speaker, Kops 'n Kids Summer Day Camp, Sacramento, California, June 23, 2006

Presentation on the Job of Magistrate Judge, California Third District Court of Appeal, Sacramento, California, May 8, 2006

Workshop on Magistrate Judge Selection Process, Women Lawyers of Sacramento, Sacramento, California, April 20, 2006

Emcee, Retirement Celebration for Magistrate Judge Peter A. Nowinski, March 24, 2006

Moderator and Discussion Leader, "The Declaration of Judicial Independence," Anthony M. Kennedy Inn of Court, Sacramento, California, February 21, 2006

Host, Courthouse Tour, Rotary Youth Exchange, Rotary Club of Sacramento, January 26, 2006 (general remarks regarding federal courts, followed by tour of courtrooms, chambers, Marshals facility; no notes)

"Inmate Cases and Appointed Counsel," Sacramento County Bar Association, Civil Rights and Constitutional Law Section, November 22, 2005

"Nuts and Bolts" Seminar, Sacramento Barristers Club, Sacramento, California, June 23, 2005

"Top Ten Fantasies of a U.S. Magistrate Judge (when it comes to Civil Cases)," Intellectual Property Section, Sacramento County Bar Association, June 16, 2005

Moderator and Discussion Leader, "Sympathy for the Adjuster: When Non-Lawyers Call the Shots," Anthony M. Kennedy Inn of Court, September 21, 2004

Team Member, "Cirque de Pro Se," Anthony M. Kennedy Inn of Court, Sacramento, California, May 18, 2004

Discussion Leader, Intellectual Property Interactive Discussion, Milton L. Schwartz Inn of Court, Davis, California, May 12, 2004

"IP Practice & Discovery in the Eastern District; Practical Insights From the Bench," Sacramento County Bar Association, Intellectual Property Section, September 10, 2003

“Federal Nuts and Bolts,” Sacramento Barristers’ Club, Sacramento, California,
June 19, 2003

In addition, since becoming a U.S. Magistrate Judge:

On the following dates I presided over Naturalization Ceremonies and either offered congratulatory remarks or introduced guest speakers who offered congratulatory remarks: September 17, 2003; January 7, April 14 and August 18, 2004; March 16, June 15 and October 12, 2005; April 19, May 29, June 21, September 22, October 20 and November 22, 2006; April 27, July 27, September 19 and November 27, 2007; January 30 and October 22, 2008; and January 27 and May 19, 2009.

On the following dates I served as a discussion leader, without notes, with the Operation Protect & Defend Project in Sacramento, California: April 22, 2003 (Luther Burbank High School Government Class); February 22, 2008 & March 5, 2009 (McClatchy High School Senior Classroom); March 3, 2009 (Grant Union High School Criminal Justice Academy Class).

On the following dates I have hosted the Sacramento Metro Chamber’s Leadership Class on its Law & Order Day at the U.S. Courthouse in Sacramento, California, making general remarks and answering questions regarding federal court practice: November 8, 2007 and November 12, 2009.

On the following dates I have co-hosted general discussion meetings with practitioners litigating prisoner cases brought under 42 U.S.C. § 1983: June 17, 2004, August 9, 2005, November 16, 2006, April 18, 2008 and August 19, 2009.

On the following dates I have co-hosted general discussion meetings with practitioners litigating prisoner habeas petitions cases filed under 28 U.S.C. § 2254: August 3, 2005, November 13, 2006, May 15, 2007 and April 18, 2008 and September 16, 2009.

I only have complete files on speeches and talks going back to March 2003, when I was appointed a U.S. Magistrate Judge. I have reconstructed the following list of talks given prior to that date from my best recollection and based on the limited copies of talking point notes or outlines I have retained.

Panelist, “Mixed IP Track,” California State Bar 27th Annual Intellectual Property Institute, Santa Barbara, California, November 8-9, 2002 (no notes)
Moderator, “The Use (and Potential Abuse) of Protective Orders in Federal Court,” Sacramento Chapter, Federal Bar Association, Sacramento, California, September 18, 2002 (no notes)

Artist's Moral Rights, Workshop sponsored by California Lawyers for the Arts, Sacramento, California, May 13, 2002

Panelist, Understanding Basic Copyright Law in California, Lorman Education Services Seminar, Sacramento, California, February 1, 2002 (Copyright History and Basics, Protections for Visual Artists)

Copyright for the Visual Artist, Workshop sponsored by California Lawyers for the Arts, Sacramento, California, January 23, 2002

Introduction of Keynote Speaker David Boies, Annual Conference of the United States District Court, Eastern District of California, Monterey, California, Fall 2001

Moderator, "The Weakest Legal Link," Annual Conference of the United States District Court, Eastern District of California, Monterey, California, Fall 2001

Participant, Davis Faculty Association (DFA) Forum on Faculty Copyrights, Davis, California, January 16, 2001

"Mp3.com, Napster and Lawyerly Responses: Protectors of Perpetual Values or Twenty-First Century Dinosaurs?," Intellectual Property Section, Sacramento County Bar Association, September 29, 2000

Co-presenter, Business Success Stories, A Woman's Day Conference & Exposition, 1999, Sacramento, California

Co-presenter, *California Journal v. The Wall Street Journal*, U.C. Davis School of Law, Intellectual Property Club, Davis, California, April 19, 1999

"Copyright: Ownership, Enforcement And The Internet," Workshop Presented by Orrick, Herrington & Sutcliffe LLP, Sacramento, California, April 28, 1998

Co-presenter, When David Met Goliath: Common Law Trademark Rights in the Case of *California Journal v. The Wall Street Journal*, Intellectual Property Section, Sacramento County Bar Association, Sacramento, California, Spring 1997

The foregoing list includes all of the speeches or talks I am able to identify for the time period since I became an attorney in 1995. Prior to that time, and particularly between 1986 and 1992 when I ran for and then served on the Sacramento City Council, I gave speeches and talks weekly, if not daily at times. I have not retained records of what I said on those occasions.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

M. Anderson, "Kim Mueller: U.S. District Court," Women Who Mean Business 2009, *Sacramento Business Journal*, June 19, 2009

John Roemer, "Prison Justice," *San Francisco Daily Journal*, Feb. 26, 2007

Cheryl Miller, "Mueller left behind politics, IP law for federal bench," *The Recorder*, Aug. 29, 2006

- Cynthia Hubert, "Bench mark: Kim Mueller, the only female U.S. magistrate judge in Sacramento, has a lifelong commitment to public service," *Sacramento Bee*, Oct. 2, 2003
- Profile in Special Issue on Sacramento Women, *Sacramento Magazine*, Oct. 2003
- James Houpt, "New Magistrate Judge Took Unconventional Path to Federal Bench," *Sacramento Lawyer* (Sacramento County Bar Association), May/June 2003
- Profile, "On the Rise: 13 Women to Watch," *Sacramento Magazine*, July 1999

When I ran for and then served on the Sacramento City Council, between 1986 and 1992, I gave interviews periodically to local newspapers, radio stations and television stations in the Sacramento area. When I left the City Council in Fall 1992, I discarded virtually all of my campaign materials and discarded or left with the City virtually all of the records related to my Council tenure. I have searched for available news accounts of interviews; there are literally hundreds of news accounts that at least mention my name or include a single quote from me for this time period. Having comprehensively reviewed what material I have been able to locate, I have identified the following reports on interviews I provided in which I am featured as the primary subject:

- A Metro Cable Profile: Elected Officials Leaving Office in '92, *Metro Cable*, Sacramento, California, Fall 1992 (video)
- Deb Kollars, "Mueller Won't Run Again, Will Pursue Law Degree," *Sacramento Bee*, Mar. 7, 1992
- Ken Chavez, "Planning Agency Criticized; Councilwoman May Seek Outside Audit," *Sacramento Bee*, Dec. 11, 1990
- Ilana Debare, "Mueller hopes to raise profile in District 6," *Sacramento Bee*, Jan. 8, 1989
- "Best & Brightest: Twenty People to Watch," *Sacramento Magazine*, Nov. 1988
- Ross Farrow, "Sound walls, sororities keep Mueller busy," *Neighbors Section (Rancho Cordova Edition)*, *Sacramento Bee*, July 28, 1988
- Tim Holt, "Council's New Face," *Suttersown News*, Mar. 31 – Apr. 7, 1988
- Jim Sanders, "Mueller Captures Close Council Race; Runoff in District 2," *Sacramento Bee*, Sept. 23, 1987
- Jim Sanders, "District 6 Race: 7,000 Doorbells Later, Challenger Keeps Trying," *Sacramento Bee*, Sept. 19, 1987

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 2003, I was appointed by the United States District Court for the Eastern District of California to serve an eight-year term as a United States Magistrate Judge. I preside over civil cases on a limited basis on reference from district judges and in full where the parties consent; I also preside over a criminal arraignment calendar and misdemeanor and petty offense docket.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over 52 trials and a total of approximately 230 cases to verdict or judgment.

- i. Of these, approximately what percent were:

jury trials:	10%
bench trials:	90%
civil proceedings:	14 %
criminal proceedings:	86 %

- b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached lists of opinions.

- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *United States v. Cardoso*, Case No. CR S-07-0023, 2009 WL 57631 (E.D. Cal. Jan. 9, 2009). In this felony criminal case, I was the presiding criminal duty judge at the time of defendant's initial appearance and when he brought a later motion for bail review. Defendant was charged with possession of one or more matters containing depictions of minors engaged in sexually explicit conduct. To assist in reaching my decision on the bail review motion, I ordered a psychiatric examination of defendant. I denied defendant's motion for release.

Government counsel was Heiko Coppola, Assistant U.S. Attorney, 501 I Street, Sacramento, CA 95814; 916-554-2700. Defendant's counsel was Dwight Samuel, 117 J Street, Suite 202, Sacramento, CA 95814-2212; 916-447-1193.

2. *Bridgewater v. Roe*, Case No. CIV-S-02-00971, 2007 WL 2794952 (E.D. Cal. Sept. 24, 2007), *adopted by* 2007 WL 3226669 (E.D. Cal. Oct. 30, 2007). In this case, referred to me for all pre-dispositive purposes, I ordered and presided over an evidentiary hearing concerning whether the habeas corpus petitioner's mental illness provided a valid basis for equitable tolling of the applicable limitations period. I found circumstances giving rise to equitable tolling under the law and my recommendation was adopted in full by the District Judge.

Petitioner's counsel was Assistant Federal Defender Allison Claire, 801 I Street, Third Floor, Sacramento, CA 95814; 916-498-6666. Counsel for respondent was Deputy Attorney General Harry Colombo, California Attorney General's Office, 1300 I Street, Sacramento, CA, 95814; 916-324-5170.

3. *McCaskill v. County of Shasta*, Case No. CIV-S-04-704 (E.D. Cal. May 22, 2007). By consent of the parties, I presided over the jury trial held in this case. Plaintiff brought an excessive force claim against a Deputy Sheriff based on the sheriff's use of a dog during plaintiff's arrest, which had resulted in injuries to plaintiff. After four days of trial and a partial day of deliberations, the jury returned a verdict in favor of the defendant.

Plaintiff's counsel was Larry Baumbach, Law Offices of Larry L. Baumbach, 686 Rio Lindo Ave., Chico, CA 95926; 530-891-6222. Defendant's counsel was Laurence L. Angelo, Angelo, Kilday & Kilduff, 601 University Ave., Suite 150, Sacramento, CA 95825, 916-564-6100, x201.

4. *Vega v. Branich*, Case No. CIV-S-02-1977 (E.D. Cal. Mar. 13, 2007). By consent of the parties, I presided over the jury trial held in this case, which concerned an inmate's excessive force claim against a prison guard. Prior to trial, I had denied defendant's motion to dismiss. The jury returned a verdict in favor of the defendant.

Plaintiff's counsel was Mary Beth Moylan, McGeorge School of Law, 3200 Fifth Ave., Sacramento, CA 95817; 916-739-7223. Defendant's counsel was Van Kamberian, Office of the Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244; 916-324-3892.

5. *Isaac v. Morgan Stanley*, Case No. CIV-S-04-1707 (E.D. Cal. Oct. 18, 2005). I presided over this securities litigation for all purposes by consent of the parties. Following briefing and oral argument, I entered an order granting plaintiff's motion to compel arbitration, applying the Federal Arbitration Act in the course of a complex choice of law analysis.

Counsel for plaintiff was William Philip Torngren, Law Offices of William P. Torngren, 117 J Street, Suite 300, Sacramento, CA 95814; 916-554-6447. Counsel for defendant was Kenneth C. Mennemeier, Jr., Mennemeier Glassman and Stroud, 980 Ninth Street, Suite 1700, Sacramento, CA 95814; 916-553-4000.

6. *McIver v. CalExpo*, Case No. CIV-S-01-1967 and *ISC, Inc. v. CalExpo*, Case No. CIV-S-04-1790 (E.D. Cal. December 16, 2005). These related actions were brought under the Americans with Disabilities Act against the public entity operating the California State Fairgrounds and an amusement ride operator. I presided over extensive, serial settlement conferences leading to a comprehensive global settlement of all claims, and entered a consent decree memorializing the parties' agreements. The parties to this case consented to my presiding for all purposes.

Counsel for plaintiff was Timothy S. Thimesch, Thimesch Law Offices, 158 Hilltop Crescent, Walnut Creek, CA 94597-3452; 925-588-0401. Counsel for defendant was Stephen E. Horan, Porter Scott, P.O. Box 255428, 350 University Ave., Suite 200, Sacramento, CA 95865; 916-929-1481.

7. *Comm. Ctr., Inc. v. Hewitt*, Case No. CIV-S-03-1968 (E.D. Cal. Apr. 5, 2005). In this trade secrets and unfair competition action, I presided over a complex discovery dispute based on plaintiff's claim that defendant deliberately destroyed computer evidence, using software called "Evidence Eliminator," in violation of a discovery order. Following hearing, briefing and argument, I entered an Order and Findings and Recommendations recommending default and an award of fees and costs to plaintiff. The District Judge adopted my Findings and Recommendations in part, as to fees and costs.

Counsel for plaintiff was Michael Daponte, Pillsbury Winthrop LLP, 400 Capitol Mall, Suite 1700, Sacramento, CA 95814; 916-329-4768. Counsel for defendant were Robin Perkins and Christopher Wohl, Palmer Kazanjian Wohl Perkins LLP, 520 Capitol Mall, Suite 600, Sacramento, CA 95814; 916-442-3552.

8. *United States v. Knox*, Violation Nos. D2530, 2531 (E.D. Cal. Dec. 13, 2004). These consolidated cases charged assimilated petty offenses based on the California Vehicle Code. I decided as an issue of first impression in our Court that the Federal Assimilative Crimes Act, which provides for "like punishment" for the assimilated crime, does not include California's penalty assessments and restitution fines in addition to the base fine.

Plaintiff's counsel was Samantha Spangler, Assistant United States Attorney, Office of the U.S. Attorney, 501 I Street, 10th Floor, Sacramento, CA 95814; 916-554-2700. Defendant's counsel was Kresta Daly, Rothschild, Wishek & Sands, 901 "F" Street, Suite 200, Sacramento, CA 95814; 916-444-9845.

9. *McKesson Info. Solutions, Inc. v. Bridge Med., Inc.*, Case No. CIV-S-02-2669 (E.D. Cal. Nov. 9, 2004 & Apr. 15, 2005). In this patent infringement action involving a medical device patent, I presided over a *Markman* hearing, referred to me by the District Judge. Following extended presentation of expert testimony at hearing, briefing and oral argument, I entered Findings and Recommendations construing the patent's claim elements. My recommendations, as supplemented, were adopted in full by the District Judge.

Counsel for plaintiff was Mark K. Dickson, 205 De Anza Blvd., Suite 212, San Mateo, CA 94402; 650-346-6675, and James Pistorino, Howrey Simon Arnold & White, 1950 University, 4th Floor, East Palo Alto, CA 94303; 650-798-3580. Counsel for defendant was Jose L. Patiño, Jones Day, 12265 El Camino Real, Suite 200, San Diego, CA 92130; 858-314-1156.

10. *Anzo v. Union Pac. R.R. Co.*, Case No. CIV-S-99-2292 (E.D. Cal. Feb. 4, 2004). By consent of the parties, I presided over a twelve-day jury trial of an injured employee's claim brought under the Federal Employers Liability Act (FELA). After five days of deliberation, I declared a mistrial and reset the case for trial. The case settled before the new trial date.

Counsel for plaintiff was Larry Lockhshin, 555 University Avenue, Suite 200, Sacramento, CA 95864; 916-649-3779. Counsel for defendants was Michael L. Johnson, Union Pacific Law Department, 10031 Foothills Boulevard, Suite 200, Roseville, CA 95747; 916-789-6227.

- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Jones v. Blanas*, Case No. CIV-S-00-2811, 2008 WL 5411967 (E.D. Cal. Dec. 30, 2008), *adopted by* 2008 WL 5411967 (E.D. Cal. Feb. 12, 2009). Plaintiff's lead counsel was Scott Fink, Gibson, Dunn & Crutcher LLP, 555 Mission, Suite 3000, San Francisco, CA 94105-2933; 415-397-5554. Defendants' lead counsel was David Melton, Porter Scott, 350 University Ave., #200, Sacramento, CA 95825; 916-929-1481.

2. *Osband v. Ayers*, Case No. CIV-S-97-0152 (E.D. Cal. June 13, 2008), *adopted by* 2009 WL 230636 (E.D. Cal. Jan. 30, 2009). Counsel for petitioner was Tivon Schardl, Assistant Federal Defender, Office of the Federal Defender, 801 I Street, Third Floor, Sacramento, CA 95814; 916-498-6666; and Tim Brosnan, Attorney at Law, 1116 Guerrero Street, San Francisco, CA 94110; (415) 285-5417. Counsel for respondent was Ward Campbell, Supervising Deputy Attorney General, Office of the California Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244; 916-324-5251.

3. *United States v. Real Property*, 590 F. Supp. 2d 1295 (E.D. Cal. 2008). Counsel for plaintiff was Courtney Jack Linn, Former Assistant U.S. Attorney, now with Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, CA 95814; 916-329-4700. No appearance was made on behalf of the real property defendant.
4. *Sylvester v. Rawers*, Case No. CIV-03-1301, 2008 WL 360459 (E.D. Cal. Feb. 8, 2008), *adopted by* 2008 WL 782481 (E.D. Cal. Mar. 20, 2008). Petitioner's counsel was Ann McClintock, Office of the Federal Defender, 801 I Street, 3rd Floor, Sacramento, CA 95814; 916-598-5700. Respondent's counsel was Deputy Attorney General Brian Means, Office of the Attorney General, P.O. Box 944255, Sacramento, CA 94244; 916-324-2960.
5. *United States v. Garcia-Guizar*, Case No. CR-S-95-411, 2007 WL 1098553 (E.D. Cal. Apr. 12, 2007), *adopted by* 2007 WL 1747046 (June 18, 2007). Movant's counsel was Krista Hart, Law Offices of Krista Hart, 1710 Broadway, #88, Sacramento, CA 95818; 916-498-8398. Respondent's counsel was William Sze Wong, Assistant United States, 501 I Street Suite 10-100, Sacramento, CA 95814; (916) 554-2790.
6. *Wilson v. Cal. Dep't of Corr.*, Case No. CIV-S-02-2169, 2006 WL 707434 (E.D. Cal. Mar. 21, 2006), *adopted by* 2006 WL 1552561 (E.D. Cal. June 1, 2006). Plaintiff's counsel was Carter White, King Hall Civil Rights Clinic, UCD Clinical Programs, One Shields Ave., Building TB30, Davis, CA 95616; 530-752-5440. Defendants' counsel was Oliver R. Lewis, Office of the Attorney General, 1300 I Street, Sacramento, CA 95814; 916-324-5495.
7. *Fredericks v. Knowles*, Case No. CIV-S-05-0334, 2007 WL 4526514 (Dec. 19, 2007), *adopted by* 2008 WL 275693 (Jan. 30, 2008). Petitioner was *pro se*. Counsel for respondent was Steve Acquisto, Office of the Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244; 916-324-1456.
8. *Nunes v. Ramirez-Palmer*, Case No. CIV-S-98-1333, 2005 WL 2135199 (E.D. Cal. Sept. 2, 2005), *adopted by* Case No. CIV-S-98-1333 (E.D. Cal. Feb. 10, 2006), *aff'd*, 485 F.3d 432 (9th Cir. 2007), *cert. denied*, 552 U.S. 962 (2007). Petitioner's counsel was Suzanne Luban, 3758 Grand Ave., Suite 4, Oakland, CA, 94610; 510-832-3555. Respondent's counsel was Deputy Attorney General Frances Dogan, California Attorney General's Office, 455 Golden Gate Ave., #1100, San Francisco, CA, 94102; 415-703-1234.
9. *Turner v. Hickman*, 342 F. Supp. 2d 887 (E.D. Cal. 2004). Plaintiff's counsel was Harry Olivar, Quinn Emanuel Urquhart and Hedges, 865 S. Figueroa St., 10th Floor, Los Angeles, CA 90017; 213-624-7707. Defendants' counsel was Michael G. Lee, Agricultural Labor Relations Board, 915 Capitol Mall, Third Floor, Sacramento, CA 95814; 916-651-7605.

10. *United States v. Camacho*, Case No. CR-S-03-0280 (E.D. Cal. Sept. 4, 2003), *aff'd*, Case No. CR-S-03-0280 (Feb. 9, 2004), *aff'd*, 413 F.3d 985 (9th Cir. 2005). Defendant's counsel was Timothy Zindel, Assistant Federal Defender, 801 I Street, 3rd Floor, Sacramento, CA 95813; (916) 498-5700. Plaintiff's counsel was Matthew Stegman, Assistant United States Attorney, 501 I Street, Suite 10-100, Sacramento, CA 95814; (916) 554-2800.

- e. Provide a list of all cases in which certiorari was requested or granted.

Nunes v. Ramirez-Palmer, Case No. CIV-S-98-1333, 2005 WL 2135199 (E.D. Cal. Sept. 2, 2005), *adopted by* Case No. CIV-S-98-1333 (E.D. Cal. Feb. 10, 2006), *aff'd*, 485 F.3d 432 (9th Cir. 2007), *cert. denied*, 552 U.S. 962 (2007).

I am not aware of any other cases over which I presided in which certiorari has been requested or granted.

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

i) My decisions as the consent judge pursuant to 28 U.S.C. § 636(c), or the referral magistrate judge, were reversed in the following six cases:

Larson v. McDonald, Case No. CIV-S-06-2094 (E.D. Cal. Feb. 22, 2008), *rev'd*, Case No. 08-15624 (slip op.) (9th Cir. Apr. 18, 2008). The Court of Appeals found that an element of an order I had issued required adoption by a District Judge.

Carter v. Astrue, Case No. CIV-S-05-2358 (E.D. Cal. Mar. 29, 2007), *rev'd*, 308 Fed. Appx. 75 (9th Cir. 2009). The Court of Appeals held that I erred in this Social Security appeal by failing to discuss findings of the treating physician.

Hayes v. Comm'r, Case No. CIV-S-04-1621 (E.D. Cal. Sept. 22, 2006), *rev'd*, 281 Fed. Appx. 653 (9th Cir. 2008). The Court of Appeals held that I erred in this Social Security case evaluating a residual functional capacity determination.

Hayes v. Astrue, Case No. CIV-S-04-2652 (E.D. Cal. Mar. 29, 2006), *rev'd*, 270 Fed. Appx. 502 (9th Cir. 2008). The Court of Appeals held that I erred in this Social Security case by finding sufficient evidence for the ALJ's conclusion.

Taniguchi v. Prudential Ins. Co., Case No. CIV-S-03-2306 (E.D. Cal. Oct. 28, 2005), *vacated*, 250 Fed. Appx. 227 (9th Cir. 2007). The Court of Appeals vacated my entry of summary judgment in this denial of coverage action.

Sorn v. Barnhart, Case No. CIV-S-02-1388 (E. D. Cal. Mar. 31, 2004), *rev'd*, 178 Fed.Appx. 680 (9th Cir. 2006). The Court of Appeals held that I erred in this Social Security case by finding sufficient evidence for the ALJ's conclusion.

ii) In the following seven cases, my Findings and Recommendations were adopted in full by the District Judge, and then the District Judge's final order was reversed:

Avina v. Medellin, Case No. CIV-S-02-2661 (E.D. Cal. Mar. 2, 2007 & Mar. 30, 2007), *aff'd in part, vacated in part and remanded*, 339 Fed. Appx. 739 (9th Cir. 2009). The Court of Appeals affirmed in part but found that the plaintiff had exhausted administrative remedies and was entitled to proceed on one claim.

Grayson v. Carey, Case No. CIV-S-03-1694 (E.D. Cal. Aug. 10, 2006 & Sept. 11, 2006), *rev'd and remanded*, 291 Fed. Appx. 17 (9th Cir. 2008). The Court of Appeals reversed in light of *Whorton v. Bockting*, 549 U.S. 506 (2007), decided after my initial opinion, and on my analysis of a procedural bar.

Chappell v. Bess, Case No. CIV-S-01-1979 (E.D. Cal. Mar. 8, 2006 & Apr. 2006), *rev'd*, 275 Fed. Appx. 711 (9th Cir. 2008). The Court of Appeals reversed summary judgment based on stipulation of the parties in this Section 1983 prisoner civil rights case.

Davis v. Silva, No. CIV-S-04-0236, 2005 WL 1540201 (E.D. Cal. June 28, 2005), *adopted*, 2005 WL 2001002 (E.D. Cal. Aug. 19, 2005), *rev'd*, 511 F.3d 1005 (9th Cir. 2008). The Court of Appeals reversed a determination that the habeas petitioner had failed to exhaust state court remedies and found he had satisfied the "fair presentation" requirement even though he did not "present a clear narrative."

O'Neal v. Price, Case No. CIV-S-02-1824 (E.D. Cal. Feb. 17, 2004 & Mar. 3, 2004), *rev'd*, 130 Fed. Appx. 916 (9th Cir. 2005). The Court of Appeals remanded for reconsideration in light of a new decision issued while this case was pending on appeal.

Orner v. Farmon, CIV-S-00-0017 (E.D. Cal. Aug. 15, 2003 & Sept. 30, 2003), *rev'd*, 116 Fed. Appx. 844 (9th Cir. 2004). The Court of Appeals found in this habeas petition that trial counsel had been ineffective for failing to investigate evidence that was impeachable and agreeing to exclude favorable evidence.

Chappell v. McCargar, CIV-S-02-2299 (E.D. Cal. May 12, 2003 & July 2, 2003), *rev'd*, 152 Fed. Appx. 171 (9th Cir. 2005). The Court of Appeals held that this prisoner's civil rights case alleging denial of access to courts and retaliation stated a First Amendment claim, reversing the dismissal I recommended.

iii) My Findings and Recommendations were not adopted, or not adopted in full, by the District Judge in the following nine matters:

Avila v. Olivera Egg Ranch, Case No. 08-2488 (E.D. Cal. Sept. 11, 2009), *request for recon. granted*, Case No. 08-2488 (Feb. 18, 2010). The District Judge granted plaintiff's request for reconsideration of a discovery ruling, and remanded for determination of expenses to be awarded to the prevailing party.

Integon Preferred Ins. Co. v. Isztojka, Case No. 07-526 (E.D. Cal. Oct. 6, 2008), *rejected by* Case No. 07-256 (E.D. Cal. Dec. 9, 2008), *rev'd*, Case No. 09-15702 (9th Cir. Feb. 26, 2010). The District Judge rejected my recommendation that summary judgment be denied. The Ninth Circuit reversed the District Judge.

Smith v. Yates, Case No. CIV-S-06-2072, 2008 WL 707376 (E.D. Cal. Mar. 14, 2008), *rejected by* 2008 WL 3992730 (E.D. Cal. Aug. 25, 2008). The District Judge found an error in my calculation of statutory tolling time.

Somers v. Schwartz, Case No. CIV-S-04-698 (E.D. Cal. July 27, 2007), *rejected by* Case No. CIV-S-04-698 (E.D. Cal. Dec. 18, 2007). The District Judge declined to adopt my recommended grant in a parole habeas case.

Mehl v. Blanas, Case No. CIV-S-03-2682 (E.D. Cal. Dec. 1, 2006), *vacated in part*, 241 F.R.D. 653 (E.D. Cal. Mar. 27 2007). The District Judge issued a broader protective order on discovery than I had in this Section 1983 suit.

Bogan v. Runnels, Case No. CIV-S-02-1408, 2005 WL 2089811 (E.D. Cal. Aug. 30, 2005), *adopted in part by* Case No. CIV-S-02-1408, 2005 WL 2671405 (E.D. Cal. Oct. 19, 2005). The District Judge granted summary judgment in full, whereas I had recommended a partial grant.

Comm. Ctr., Inc. v. Hewitt, Case No. CIV-S-03-1968 (E.D. Cal. Apr. 5, 2005). The District Judge declined to adopt my recommendation for entry of default based on evidence spoliation.

Sass v. Cal. Bd. of Prison Terms, Case No. CIV-S-01-0835 (E.D. Cal. Mar. 16, 2005), *declined to adopt*, 376 F. Supp. 2d 975 (E.D. Cal. 2005), *aff'd in part*, 461 F.3d 1123 (9th Cir. 2006). The District Judge declined to adopt my finding of a liberty interest in state parole protected by the Fourteenth Amendment; the Court of Appeals agreed with me. The District Judge rejected my analysis of whether due process had been afforded and the Court of Appeals found that it had.

Riel v. Warden, Case No. CIV-S-01-0507 (E.D. Cal. July 15, 2003 & Apr. 11, 2008). *See also* 2008 WL 1734786 (E.D. Cal. Apr. 14, 2008) and 2009 WL 805332 (E.D. Cal. Mar. 27, 2009). The District Judge reversed two discovery orders I issued in this capital habeas case. My first order denied petitioner's motion to conduct discovery on the breadth of murders eligible for the death penalty in California. My second order denied a hearing on the guilt phase aspects of petitioner's ineffective assistance of counsel claim.

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I do not designate decisions published or unpublished; I file all my decisions with our Court Clerk. Many of my written opinions are available through Westlaw and Lexis and almost all are accessible through our Court's Case Management / Electronic Case Filing system. In the rare petty offense case in which I issue a written decision, the decision is publicly available through the Clerk's Office.

- h. Provide 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, provide copies of the opinions.

Reynoso-Rodriguez v. Napolitano, 2009 WL 3157477 (E.D. Cal. Sept. 28, 2009).

Osband v. Warden, Case No. CIV-S-97-0152 (E.D. Cal. June 13, 2008), *mot. for recon. denied*, Case No. CIV-S-97-0152 (E.D. Cal. Jan. 30, 2009).

United States v. Garcia-Guizar, 2007 WL 1098553 (E.D. Cal. Apr. 12, 2007), *adopted as modified by* 2007 WL 1747046 (E.D. Cal. June 18, 2007).

Smith v. Curry, 2007 WL 841747 (E.D. Cal. Mar. 20, 2007), *adopted by* 2007 WL 2253520 (E.D. Cal. Aug. 3, 2007), *aff'd*, 580 F.3d 1071 (9th Cir. 2009).

Sass v. Cal. Bd. of Prison Terms, Case No. CIV-S-01-0835 (E.D. Cal. Mar. 16, 2005), *declined to adopt*, 376 F. Supp. 2d 975 (E.D. Cal. 2005), *aff'd in part*, 461 F.3d 1123 (9th Cir. 2006).

Turner v. Hickman, 342 F. Supp.2d 887 (E.D. Cal. 2004).

United States v. Johnson, Case No. CR-S-03-310 (E.D. Cal. Nov. 13, 2003).

United States v. Camacho, Case No. CR-S-03-0280 (E.D. Cal. Sept. 4, 2003), *aff'd*, Case No. CR-S-03-0280 (Feb. 9, 2004), *aff'd*, 413 F.3d 985 (9th Cir. 2005).

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself *sua sponte*. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself *sua sponte*;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I participate in our Court's automatic recusal system by which I regularly provide the Clerk with a list of potential conflicts and screen cases during case assignment that could present conflicts based on this list. I also carefully evaluate each case—both at the time of initial reference and again if it is to be assigned to me for all purposes on consent of the parties. Whenever called for by the Code of Conduct for United States Judges, the recusal statutes, or a general interest in maintaining impartiality and the appearance of impartiality of the Court, I disclose relationships and/or recuse myself.

I have recused *sua sponte* in approximately .003 percent of all cases that have been assigned to me since I began service as a United States Magistrate Judge.

In the following cases, I recused because counsel for a party is affiliated with a law firm that provides legal services to my husband's business:

Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund, CIV-S-09-0090
Swarbrick v. Umpqua Bank, CIV-S-08-0532
Azucena Negrete v. Oldcastle APG West, Inc., CIV-S-08-0477
Golden Gate Beverage Co. v. DMH Ingredients, CIV-S-07-2247
Jonelle Lewis v. Starbucks Corp., CIV-S-07-490

In the following cases, I recused because I or a member of my chambers staff had a family relationship, friendship, or prior professional relationship with an attorney:

Fourscore Res. Capital, LLC v. Nat'l Credit Acceptance, Inc., CIV-S-09-0032
Reclamation Dist. No. 2116 v. Arcady Oil Co., CIV-S-96-1473
Sharon Martin v. Jennell Parks, CIV-S-07-2796
Johnson v. Roche, CIV-S-06-1676
Miller v. Butte County Sheriff's Dep't, CIV-S-06-489
Wilson v. Rebound Action Sport, CIV-S-00-1264

In the following cases, I recused because I, a member of my chambers staff, or a colleague on the bench had a family relationship, friendship, or prior professional relationship or imputed professional relationship with a litigant:

Cofield v. United States, CIV-S-06-1798
Hinton v. Pliler, CIV-S-01-1174
Acuna v. Hedgepeth, CIV-S-09-1538
Fields v. Tefeeries, CIV-S-05-2292
Tholmer v. Pliler, CIV-S-04-1368
Ware v. Sacramento County, CIV-S-06-913

In the following case, I recused because I either still had some law school loans with Sallie Mae, or had only recently paid off such loans:

Virgen v. Sallie Mae, CIV-S-06-341

In the following cases, I recused in order to avoid any appearance of a conflict, in light of my close involvement, until shortly before becoming a United States Magistrate Judge, with efforts to pass a bond measure, and to promote school district unification, both of which affected the school district parties in the cases:

Sparks v. North Sacramento School Dist., CIV-S-05-2496
Slade v. Grant Joint Union High School Dist., CIV-S-05-1483

In the following cases, I recused for reasons I am not able to determine at this time:

Hall v. Pliler, CIV-S-05-1556
Wong et al. v. Heinrich Props. Gen. Props. CIV-S-03-0050

The cases in which a party has requested my recusal, and in which I recused, are as follows:

Johnson v. Couturier, Jr., CIV-S-05-2046. I recused myself from presiding over a non-dispositive motion reference when a party requested my recusal based on one attorney having been my colleague when I was a law firm associate.

Pratt v. Cal. State Bd. of Pharmacy, CIV-S-05-345. I recused myself when a party requested by recusal based on an attorney having been my former neighbor.

The cases in which a party has requested my recusal, and in which I declined to recuse because I found no grounds for recusal after careful consideration of the factors prescribed by 28 U.S.C. § 455, are as follows:

Bowman v. Schwarzenegger, CIV-S-07-2164 (pro se prisoner's civil rights action)

Kirkland v. Levi, CIV-S-06-2596 (pro se prisoner's civil rights action)

Cohea v. Salter, CIV-S-06-2260 (pro se prisoner's civil rights action)

Penilton v. County of Sacramento, CIV-S-03-1966 (pro se prisoner's civil rights action)

Kenneth Driessen v. Tehama County, CIV-S-03-0069 (civil pro se plaintiff)

United States v. Sukup, 97-CR-0461 (federal habeas petition)

15. Public Office, Political Activities and Affiliations:

- a. List chronologically any public offices you have held, 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 unsuccessful nominations for appointed office.

I served from 2001-2003 as a public member of the Cal/OSHA Standards Board by appointment of Governor Gray Davis.

I served from 1987-1992 as a Councilmember for District 6 of the City of Sacramento. I was elected in a nonpartisan election in September 1987 and did not run for reelection. While a Councilmember, I served as Vice-Mayor in 1989, and was an appointee from the Council to the following other decision-making bodies: Metro Transportation Commission, Regional Transit Board, Sacramento Metropolitan Flood Protection Task Force (alternate), Sacramento Theatre Company Board of Directors, Sacramento Transportation Authority (Vice-Chair) and Sacramento/Yolo Port District/Board of Electors.

I served from approximately 1985 to 1987 as a member of the Sacramento City Toxics Commission by appointment of the Sacramento City Council.

I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

From 1998 to 2001, I was Treasurer for Education First for Grant, a general purpose county committee formed to support candidates for the Grant Joint Union High School District. From 2000 to 2002, I was Treasurer and Community Petition Chair for Families for Better Education from 2000 to 2002, an organization that worked to place a measure on the local ballot, through signature-gathering, to unify local elementary and high school districts. Also from 2000-2002, I was a Board Member of Leaders for Effective Government, a committee formed to support candidates for the California State Senate.

I was the candidate in my own campaign for Sacramento City Council in 1987. Prior to becoming a judge, I was an uncompensated volunteer without title in a number of campaigns. Typically, I walked precincts or stuffed envelopes, or lent my name in support. The specific campaigns in which I recall participating are:

Ray Tretheway for City Council (2001)
 Bill Farrell for City Council (2000)
 Rob Kerth for Mayor (2000)
 School Bond Measure, North Sacramento School District (approx. 2000)
 Lauren Hammond for City Council (1997)
 Deborah Ortiz for Sacramento City Council (1993)
 Rob Kerth for City Council (1992)
 Bill Clinton for President (1992)
 Jerry Brown for President (1992 (national convention delegate))
 Kate Karpilow for Sacramento City Council (1989)
 Grantland Johnson for County Supervisor (1986, 1990)
 Peter Keat for SMUD Board (1988)
 Leroy Greene for Senate (1986)
 Ed Smeloff for SMUD Board (1986)
 Joe Serna for Mayor (1982, 1986)
 Lloyd Connelly for Assembly (1982)
 Ann Evans for Davis City Council (1982)
 Peter McNamee for Yolo County Clerk-Recorder (1982)
 Tom Tomasi for Davis City Council (1982)
 John Anderson for President (1980)
 George McGovern for President (1972)

16. **Legal Career:** Answer each part separately.

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

In addition to my current position as United States Magistrate Judge in the Eastern District of California, the following information describes my law practice and legal experience since graduation from law school.

- i. 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 clerk to a judge. During the spring semester 1994, I was a full-time judicial extern to then-United States District Judge David F. Levi of the Eastern District of California. I received academic credit and was not compensated.

- ii. whether you practiced alone, and if so, the addresses and dates;

2000-2003
Law Offices of Kim J. Mueller
451 Arden Way
Sacramento, California 95815
During 2000 located at 520 Calvados Avenue
Sacramento, California 95815

- iii. 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.

1995-1999
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, California 95814
Associate

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have served as a settlement judge in numerous cases during my time as a U.S. Magistrate Judge. The 10 most significant matters are as follows:

1. Mediated a complex ERISA action involving more than a dozen parties, resulting in a proposed consent decree providing for \$8.8 million in cash payments and transfer of a multi-million dollar real estate asset.
2. Mediated to full settlement a case against a joint powers agency based on alleged wrongful termination based on race.
3. Mediated to full settlement a civil rights case brought by a prisoner under 42 U.S.C. § 1983, alleging correctional officers' Eighth Amendment violations for failure to provide constitutionally adequate medical treatment.
4. Through mediation efforts, laid foundation for ultimate full settlement of civil rights case against a county, alleging violations of due process and Fourth Amendment rights arising from the county's seizure of horses.
5. Mediated to full settlement a case brought by a railway worker against his employer railroad, seeking compensation for alleged work-related injury under the Federal Employers Liability Act.
6. Mediated to full settlement a case for assault and battery brought against state employees and the California Youth Authority, removed to federal court from state court.
7. Mediated to full settlement a civil rights case brought under 42 U.S.C. § 1981 against a private employer, alleging employment discrimination based on race.
8. Mediated, over eight months, a comprehensive global settlement of all claims in two related, complex Americans with Disabilities Act actions against the public entity operating the California State Fairgrounds and a private amusement ride operator, culminating in my entry, as the consent judge, of a consent decree resolving fully injunctive relief.
9. Mediated to full settlement a diversity case alleging, *inter alia*, violations of the Uniform Commercial Code in connection with allegedly unauthorized transfers of \$340,000 in funds from plaintiff's bank account to an account in Africa not controlled by plaintiff.

10. Mediated to full settlement, over the course of 13 months and subject to approval of minor's settlements, two related complex civil rights cases brought against a local municipality and the owner of publicly-subsidized apartments by Hmong residents of the apartment complex, alleging Fair Housing Act violations in the form of harassment amounting to housing discrimination by another apartment resident.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

As a sole practitioner from 2000-2003, my practice consisted primarily of intellectual property matters (copyright, trademark, trade secret) with approximately 30 percent litigation, 30 percent licensing and related contractual work, 30 percent proactive protection (registration and auditing) and 10 percent pro bono matters. My prior practice at Orrick, Herrington & Sutcliffe LLP from 1995-1999 also emphasized intellectual property work, although the percentage of litigation at Orrick was higher, in the range of 90 percent.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

When I managed my own practice, my client base consisted of small and medium-sized local and regional businesses, individuals, and other small to medium-sized law firms that did not have intellectual property capabilities in house. In my prior practice at Orrick, Herrington & Sutcliffe LLP, the client base consisted of larger, national and international corporate entities, with the exception of a few pro bono or sliding scale individual clients.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

When I was practicing, I appeared in court approximately 3 to 4 times per month.

- i. Indicate the percentage of your practice in:
 - 1. federal courts: 60%
 - 2. state courts of record: 30%
 - 3. other courts: 10% (T.T.A.B.)
 - 4. administrative agencies:

- ii. Indicate the percentage of your practice in:
1. civil proceedings: 100%
 2. criminal proceedings: 0%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As a lawyer, I was on trial teams for three cases tried to a final judgment (two as associate counsel, and one as co-counsel).

- i. What percentage of these trials were:
1. jury: 33.3%
 2. non-jury: 66.6%

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

I did not practice before the Supreme Court of the United States.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. *Fed. Trade Comm'n v. Scott*, Case No. CIV-S-02-2120 (E.D. Cal.; filed Sept. 27, 2002; stipulated order of judgment entered Oct. 3, 2002). District Judge Lawrence K. Karlton. The Federal Trade Commission alleged defendant's violation of the Federal Trade Commission Act through sale of a marketing program involving the provision of bulk e-mail lists. I served as lead counsel representing the defendant, and negotiated a pre-filing settlement that resolved the case promptly upon filing.

Lead government counsel was Craig Tregillus, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Room H-238, Washington, D.C. 20580; 202-332-0291.

2. *Eros Int'l v. Digital Entm't*, Case No. CIV-S-02-757 (E.D. Cal.; filed April 11, 2002; stipulated order of attachment entered July 5, 2002; consent judgment entered after my withdrawal in Mar. 2003 in anticipation of assuming my current position). District Judge William B. Shubb. I served as local counsel for plaintiff in this action to enforce a foreign judgment of copyright infringement. I assisted in securing a stipulated order for attachment of defendant's assets, and helped lay the groundwork for entry of a consent judgment to achieve plaintiff's litigation objectives.

Co-counsel included Steven H. Bazerman (now deceased) and Jason Drangel, Epstein, Drangel, Bazerman & James LLP, 60 E. 42nd Street, Suite 820, New York, N.Y. 10165; 212-292-5390; and Mark Leonard, Davis & Leonard LLP, 8880 Cal Center Drive, Suite 180, Sacramento, CA 95826; 916-362-9000. Opposing counsel was Gregory J. Roberts, Barrus & Roberts PC, 7111 N. Fresno St., Suite 210, Fresno, CA 93720; 559-431-6800.

3. *Millennium Integrated Servs., Inc. v. NutraStar, Inc.*, Case No. 02AS02006 (Sacramento County Superior Court; filed Apr. 2, 2002; case settled after my withdrawal in Mar. 2003 in anticipation of assuming current position). Judge Joe Gray (ret.) and Judge Judy Holzer Hersher. In this breach of contract action, which also included related claims, I served as lead counsel representing plaintiff in all aspects of case. With one associate whom I supervised, we obtained multiple writs of attachment and successfully levied on them shortly after filing suit, laying the groundwork for settlement of the case.

Co-counsel was Mark Leonard, Davis & Leonard, 8880 Cal Center Drive, Suite 180, Sacramento, CA 95826; 916-362-9000. Opposing counsel was Dale C. Campbell, Weintraub Genshlea Chediak, 400 Capitol Mall, Suite 1100, Sacramento, CA 95814; 916-558-6014.

4. *Gemstone Educ. Mgmt. v. Computerized Home Vision Therapy Sys.*, Case No. CIV-S-02-0460 (E.D. Cal.; filed Mar. 1, 2002; action dismissed Sept. 25, 2002). District Judge William B. Shubb. In this declaratory relief action filed after plaintiff's receipt of a cease and desist demand, I served as sole counsel representing plaintiff. I was able to settle the case favorably prior to the initiation of discovery.

Opposing counsel was Ronald H. Schechtman, Pryor Cashman, 410 Park Ave., New York, New York 10022; 212-326-0102.

5. *Nintendo v. Pooler*, Case No. CIV-S-00-1674 (W.D. Wash.; filed Oct. 3, 2000; dismissed Mar. 29, 2001). District Judge Thomas S. Zilly. In this trademark infringement action based on internet domain name registrations, I served as sole counsel representing an individual defendant. I succeeded in having the case dismissed for lack of jurisdiction, laying the groundwork for defendant to sustain his position for a sufficiently long period of time to obtain an acceptable business resolution. Plaintiff refiled the case in the Eastern District of California on Apr. 10, 2001 as Case No. CIV-S-01-704 (E.D. Cal.); it was dismissed following settlement on Dec. 3, 2001.

Co-counsel was Scott T. Wilsdon, Yarmuth Wilsdon Calfo PLLC, 925 Fourth Ave., Suite 2500, Seattle, WA 98104; 206-516-3871. Opposing counsel were Nicholas Peter Gellert and William Rava, Perkins Coie LLP, 1201 Third Ave., Suite 4800, Seattle, WA 98101-3099, 206-359-8680 & 206-359-6338.

6. *Kings Country Ownership Co. v. Micros Systems*, Case No. CIV-S-99-0384 (E.D. Cal.; filed Feb. 26, 1999; interlocutory appeal dismissed by 9th Cir. Feb. 1, 2000; case dismissed Mar. 8, 2000). District Judge David F. Levi. In this diversity action for breach of contract, I had day-to-day management of the case. I represented my client, one of the corporate plaintiffs, in motion practice. We prevailed in opposing a motion to compel arbitration. I also played an active role in settlement discussions convened by the district and appellate courts.

Co-counsel were Norman C. Hile and James E. Houpt, Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, CA 95814; 916-329-7900 and 916-329-7949, respectively. Opposing counsel was H. Ann Liroff, Kelly, Hockel & Klein, PC, 44 Montgomery Street, Suite 2500, San Francisco, CA 94101, 415-951-0535, James J. Long, Briggs & Morgan, 2400 IDS Center, 80 South Eighth St., Suite 2200, Minneapolis, MN 55402; 612-977-8582, and Honorable Raymond M. Cadei, Sacramento County Superior Court, Dept. 84, Carol Miller Justice Center, 320 Bicentennial Circle, Sacramento, CA 95826-2700; 916-875-7521.

7. *Cal. State R.R. Museum Found. v. Carlson, et al.*, Case No. 99AS03478 (Sacramento County Super. Ct.; filed June 22, 1999). In this trademark enforcement action alleging infringement of "Railfair" trademarks, I served as lead counsel representing plaintiff. I settled the case to the plaintiff's satisfaction following preliminary injunctive relief motion practice, avoiding extended, costly litigation.

The billing partner was Norm C. Hile, Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, CA 95814; 916-329-7900. Opposing counsel was Jeffrey L. Aran, P.O. Box 22833, Sacramento, CA 95822; 916-395-6000.

8. *Seminis Vegetable Seeds, Inc. v. Atlas Seeds, Inc.*, Case No. CIV-S-98-1499 DFL JFM (E.D. Cal.; filed Aug. 7, 1998; case dismissed Mar. 26, 1999). District Judge David F. Levi. In this unfair competition action involving hybridized seed, I served as local counsel for plaintiff, and assisted in early settlement of the case.

Lead co-counsel was Effie F. Anastassiou, Anastassiou and Associates, 242 Capitol St., P.O. Box 2210, Salinas, CA 93902, 831-754-2501. Opposing counsel was Pamela Jackson, 409 Boyd St., Vacaville, CA 95688; 707-446-2333.

9. *Berkla v. Corel*, Case No. CIV-S-98-1159 (E.D. Cal.; filed June 19, 1998; judgment entered Nov. 16, 1999). Magistrate Judge Gregory G. Hollows. In this Copyright Act action with pendent trade secret and unfair competition claims, I served as co-counsel representing plaintiff, who was the creator of a digital tool for use in creating graphic images. After substantial portions of plaintiff's case survived summary judgment, I served as co-counsel at a jury trial held from Oct. 25 to Nov. 8, 1999. Plaintiff succeeded in obtaining a liability verdict on all claims and a finding of willful conduct by defendant, and also obtained damages and punitive damages awards.

Co-counsel was Daniel P. Maguire, California Governor's Office, Legal Affairs, State Capitol, Sacramento, CA 95814, 916-445-0873. Opposing counsel were Brad Lewis, Barclays Global Investors, 400 Howard Street, Second Floor, San Francisco, CA 94105, 415-597-2311, and Patrick Premo, Fenwick & West LLP, 801 California Street, Mountain View, CA 94041, 650-335-7963.

10. *Info. for Public Affairs, Inc. v. Dow Jones & Co.*, Case No. 96AS05368 (Sacramento Superior Court; filed September 27, 1996; settled 1997). See also Case No. C024924 (Third District Court of Appeal; affirming Superior Court on July 24, 1997; unpublished decision). Superior Court Judge Earl Warren, Jr. (ret.); Appellate Justices Consuelo M. Callahan, Rodney Davis and Coleman Blease. My client, the plaintiff publisher of the *California Journal*, brought this trademark infringement and unfair competition action against the publisher of the *Wall Street Journal*, which had sought to create a new section using the *California Journal* name. I was lead associate and managed the litigation on a day-to-day basis. We succeeded in obtaining preliminary injunctive relief for our client, and in preserving the injunction on appeal.

Co-counsel were Norman C. Hile, Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, CA 95814; 916-329-7900, and Andrew W. Stroud, Mennemeier, Glassman & Stroud, 980 9th Street, Suite 1700, Sacramento, CA 95814; 916-551-2590. Lead opposing counsel was Rex Heinke, Akin Gump Strauss Hauer & Feld LLP, 2029 Century Park East, Suite 2400, Los Angeles, CA 90067; 310-229-1030.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

While in private practice, my most significant legal activity comprised complex civil litigation with a primary emphasis on intellectual property including copyright, trademark, trade secret and unfair competition and patent litigation matters.

As a sole practitioner, my legal activity continued to include civil litigation emphasizing intellectual property matters. At the same time I engaged in business counseling and assisted clients with intellectual property protection. Where possible, I strove to assist clients in resolving disputes without litigation or early on in litigation, in order to avoid the attendant time and costs. An example of a matter I was able to resolve prior to any litigation involved a Bay Area artist whose marble installation in the foyer of a downtown high rise was slated for removal; through negotiations with the building owner and the local Arts Commission, I assisted the artist client in preserving the artwork for future re-installation. In another example of a dispute I was able to resolve early on, in the cases of *Blue Ribbon Maint. v. Mercado and Hudson*, I represented the defendants in related trade secret misappropriation actions in which I succeeded in negotiating a stipulated dismissal prior to costly discovery. See Case Nos. 01AS06409, 01AS06410 (Sacramento County Superior Court; filed Oct. 19, 2001; case dismissed Aug. 2002).

I have never been a registered lobbyist and I did not perform lobbying activities for any clients or organizations. I recall meeting on a few occasions in the 1980s with state and local legislators regarding proposed legislation, as a community volunteer. Also, I recall appearing once each before the Sacramento City Council in support of a local ordinance and the Cal/OSHA Standards Board in my capacity as Health and Safety Director for the California Firefighter Foundation in support of a proposed health and safety standard.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Pacific McGeorge School of Law
 Federal Courts (Fall 2009), co-taught with Courtney J. Linn
 Copyright Law (Spring 2001)
 Computer and Internet Law (Spring 2000, Fall 2000)

University of California, Davis, King Hall School of Law
 Cyberlaw 101 (Spring 1999), survey course on emerging Internet legal issues

20. **Deferred Income/ Future Benefits:** List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I do not expect to derive any deferred income or future benefit from prior business relationships.

21. **Outside Commitments During Court Service:** 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.

Pacific McGeorge School of Law has asked me to team-teach Federal Courts again in Fall 2010, and I have accepted. I have no other plans, commitments, or agreements to pursue outside employment. In addition to the Federal Courts class, I hope to continue to teach, provided that I can do so consistent with my obligations to the Court.

22. **Sources of Income:** 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, licensing fees, 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.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I have a small number of direct and family ownership interests that may present occasional conflicts. My husband is President of the North Sacramento Land Company, which owns and manages a handful of local properties, and my husband and I own a commercial studio building in Sacramento. If these entities or properties were involved in a case I would recuse myself. It has been my practice to recuse myself in cases where attorneys have performed work for my

husband's company and I anticipate that, if confirmed, I would continue to do so whenever there might be a reasonable appearance of conflict.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed to serve as a District Judge, I will continue my present practice with respect to identifying conflicts and determining whether recusal is appropriate. I will carefully review disclosure statements and direct provision of additional information where necessary to identify and treat any conflict or circumstance that could give rise to the appearance of conflict. As a case moves forward, during the review of any pleadings or in presiding over a status conference or hearing, I will remain vigilant for any new information that might require a disclosure or recusal. At any time I identify a possible conflict, or at any time it is suggested by a litigant, I will carefully consider my obligations under 28 U.S.C. § 455 and under the Code of Conduct for United States Judges and disclose or recuse myself as required.

25. **Pro Bono Work:** 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 operated my own law practice, I regularly provided pro bono and sliding scale services to individuals and nonprofit organizations, particularly in litigation and contract negotiation matters. I offered my services pro bono to "walk in" clients when appropriate, as well as through the California Lawyers for the Arts' legal referral panel. In some cases, I continued to represent paying clients after their ability to pay ran out. Previously, when I practiced at Orrick, Herrington & Sutcliffe, I obtained approval for work on pro bono matters referred by California Lawyers for the Arts.

As a United States Magistrate Judge, I have expanded resources and recruitment for our court's pro bono panel of attorneys available for appointment to cases in which the court determines that the claims of a pro se incarcerated civil rights plaintiff warrant counsel. I also serve on the Federal Courts Subcommittee of the California State Bar's Access to Justice Commission.

As a judge, I also have remained active in community activities consistent with the judicial canons, such as by participating in a mentorship program sponsored by the Rotary Club.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In response to Senator Boxer's call for applications for the current vacancy in the Eastern District of California, I completed and submitted an application to her Selection Committee for the District in February 2009. I interviewed with the Committee on April 27, 2009. On May 26, 2009, I met briefly with Congresswoman Doris Matsui at her invitation to discuss generally the fact that I had applied for the district judgeship position. Beginning in October 2009, I have been in contact with pre-nomination officials at the Department of Justice. On December 18, 2009, I interviewed in Washington with attorneys from the Department of Justice and the Office of White House Counsel. The President submitted my nomination to the Senate on March 10, 2010.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AO 10
Rev. 1/2008

**FINANCIAL DISCLOSURE REPORT
NOMINATION FILING**

*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) Mueller, Kimberly J.	2. Court or Organization United States District Court Eastern District of California	3. Date of Report 03/10/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) US District Judge - Nominee	5a. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 3/10/2010 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final 5b. <input type="checkbox"/> Amended Report	6. Reporting Period 01/01/2009 to 02/28/2010
7. Chambers or Office Address 8-230 United States Courthouse 501 I Street Sacramento, CA 95814-2322	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.		

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

NONE (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
1. Member, Executive Committee	Eastern Dist Historical Society
2. Board Member, Vice Chair	Sacramento Trust for Historic Preservation
3. Member; Program Committee Co-Chair (Jan-Jun 2009)	Rotary Club of Sacramento
4. World Community Services Co-Chair (Jun 2009-Feb 2010)	Rotary Club of Sacramento
5.	

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

NONE (No reportable agreements.)

DATE	PARTIES AND TERMS
1.	
2.	
3.	

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting Mueller, Kimberly J.	Date of Report 03/10/2010
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III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of filing instructions.)*

A. Filer's Non-Investment Income

NONE *(No reportable non-investment income.)*

	<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>INCOME</u> <i>(yours, not spouse's)</i>
1.			
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

NONE *(No reportable non-investment income.)*

	<u>DATE</u>	<u>SOURCE AND TYPE</u>
1.	2009-2010	North Sacramento Land Company, employee (salary)
2.	2009-2010	North Sacramento Land Company, director (director's fee)
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

NONE *(No reportable reimbursements.)*

	<u>SOURCE</u>	<u>DATES</u>	<u>LOCATION</u>	<u>PURPOSE</u>	<u>ITEMS PAID OR PROVIDED</u>
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT
Page 3 of 6

Name of Person Reporting Mueller, Kimberly J.	Date of Report 03/10/2010
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V. GIFTS. (Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)

NONE (No reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1. Exempt			
2.			
3.			
4.			
5.			

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)

NONE (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.	Glen Fait, Successor Trustee	Real estate mortgage	N
2.	Golden One Credit Union	Personal loan	J
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 6

Name of Person Reporting Mueller, Kimberly J.	Date of Report 03/10/2010
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VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
1. Common Stock, North Sacramento Land Company		None	N	V	Exempt				
2. Partner in Spring Valley Ranch	C	Distribution	M	W					
3. Real estate, North Sacramento, CA	C	Rent	N	W					
4. Bank accounts, Golden One	A	Interest	J	T					
5. (905) Calvert Social Investment Balance - A	A	Interest	J	T					
6. Manulife 401(k) (no control)	C	Interest	M	T					
7. River City Bank accounts	A	Interest	J	T					
8. Real estate, Folsom, CA	F	Rent	P1	R					
9. Real estate, Broomfield, CO	F	Rent	P1	R					
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000 J = \$15,000 or less N = \$250,001 - \$500,000 P3 = \$25,000,001 - \$50,000,000	B = \$1,001 - \$7,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000 Q = Appraisal U = Book Value	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000 L = \$15,001 - \$50,000 P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000 R = Cost (Real Estate Only) V = Other	D = \$5,001 - \$15,000 I1 = \$1,000,001 - \$5,000,000 M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000 S = Assessment T = Cash Market W = Estimated	E = \$15,001 - \$50,000 I2 = More than \$5,000,000
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FINANCIAL DISCLOSURE REPORT
Page 5 of 6

Name of Person Reporting	Date of Report
Mueller, Kimberly J.	03/10/2010

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

Part III-A. Non-Investment Income. Non-reportable non-investment income was earned during the reporting period (salary from the U S Government for services as a United States Magistrate Judge).

Part VII, Investments and Trusts. Re: Common Stock, North Sacramento Land Company. The valuation was based on the per share value resulting from the federal estate tax examination of a related shareholder who died in 1998, which is the most recent valuation available.

Part VII, Investments and Trusts. Re: Investment in real estate, Folsom, CA. The property was acquired for \$1,979,856 on 11/1/05.

Part VII, Investments and Trusts. Re: Investment in real estate, Broomfield, CO. The property was acquired for \$1,153,761 on 2/21/06.

FINANCIAL DISCLOSURE REPORT
Page 6 of 6

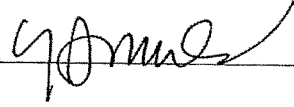
Name of Person Reporting	Date of Report
Mueller, Kimberly J.	03/10/2010

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



NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT
NET WORTH

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		
U.S. Government securities-add schedule			Notes payable to banks-unsecured		
Listed securities-add schedule			Notes payable to relatives		
Unlisted securities--add schedule		954,325	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		1,514,087
Real estate owned-add schedule		4,391,000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property		330,575			
Cash value-life insurance					
Other assets itemize:					
Retirement accounts		263,120			
			Total liabilities		1,514,087
			Net Worth		4,429,933
Total Assets		5,944,020	Total liabilities and net worth		5,944,020
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor			Are any assets pledged? (Add schedule)	No	
On leases or contracts			Are you a defendant in any suits or legal actions?	No	
Legal Claims			Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax					
Other special debt					

Financial Statement**Net Worth Schedules**Assets

Unlisted securities	
Common stock in North Sacramento Land Company	719,950
Partnership interest in Spring Valley Ranch	<u>234,375</u>
Total unlisted securities	954,325
Real estate owned	
Personal residence	615,000
Commercial property #1	650,000
Commercial property #2	1,974,000
Commercial property #3	<u>1,152,000</u>
Total real estate owned	4,391,000

Liabilities

Real estate mortgages payable	
Home equity line of credit	90,000
1st mortgage on home	499,000
1st mortgage on commercial property #1	322,754
1st mortgage on commercial property #2	<u>602,333</u>
Total real estate mortgages payable	1,514,087

AFFIDAVIT

I, **KIMBERLY JO MUELLER**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/9/10
(DATE)

Kimberly Jo Mueller
(NAME)



Jo Ann M Lemmon
(NOTARY)

**STATEMENT OF RICHARD MARK GERGEL, TO BE U.S.
DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA**

Mr. GERGEL. Thank you, Senator and Ranking Member, for the privilege of being here today. I, of course, would like to thank President Obama for the high honor of the nomination. I would like to thank Senator Graham and Senator DeMint for their support for my nomination, and I was quite humbled by the warm comments of Senator Graham and Majority Whip Clyburn today at the beginning of the proceeding.

I would like, if they could stand, my dear wife of 30 years, Dr. Belinda Gergel; my son, Richie, who has come from New York, where he works for NBC News; my son Joseph, a graduate student in Paris, is watching by streaming video, as is my 88-year-old mother, who was very humbled by her youngest son being here today; and my dear friend, Doug Jennings, has come from Bennettsville, South Carolina.

Thank you.

Senator FEINSTEIN. Thank you very much.

Judge Childs.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Richard Mark Gergel

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

United States District Judge for the District of South Carolina

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

1519 Richland Street
Columbia, South Carolina 29201

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

1954, Columbia, South Carolina

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1975-77, 78-79; Duke University School of Law; J.D., 1979

Summer, 1974; New College, Oxford University; No Degree

1972-75, Duke University; B.A., *summa cum laude*, 1975

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

1983 – Present
Gergel, Nickles and Solomon, P.A
1519 Richland Street
Columbia, South Carolina 29201
President/Sr. Partner

The firm has been known by a variety of different names as some attorneys have come and gone:

Gergel and Burnette
Gergel, Burnette and Nickles
Gergel, Burnette, Nickles, Grant and Ouzts
Gergel, Burnette, Nickles, Grant and LeClair
Gergel and Nickles

1981 – 1982
Medlock and Gergel
1320 Richland Street
Columbia, South Carolina 29201
Partner

1981
Medlock, Davis and Gergel
1518 Richland Street
Columbia, South Carolina 29201
Partner

1979 – 1980
Medlock and Davis
1320 Richland Street
Columbia, South Carolina
Associate
Law Clerk (April- August 1978)

August 1977 – March 1978
McNeil Smith For U.S. Senate
Greensboro, North Carolina
Campaign Aide

Summer 1977
Brown, Wood, Ivey, Mitchell & Petty
1 Liberty Plaza
New York, N.Y.
Law Clerk

Summer 1976
 State Circuit Judge John Grimball (deceased)
 Richland County Courthouse
 Columbia, South Carolina 29201
 Law Clerk

May – August 1975
 Senator McNeill Smith
 Box G
 Greensboro, North Carolina
 Legislative Aide

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I did not serve in the armed forces. I did register with the selective service upon my 18th birthday but this was after the adoption of the all volunteer army. I did not receive any type of draft status designation.

8. **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.

Rated "AV", Martindale Hubbell
 Listed in "Best Lawyers in America" (Personal Injury Litigation)
 Listed in "South Carolina Super Lawyers"
 Permanent Member, Fourth Circuit Judicial Conference
 Member, International Society of Barristers
 Jonathan Jasper Wright Award, University of South Carolina Black Law Students Association (2001)
 Phi Beta Kappa (Duke University 1974)
 Staff Member and Member of the Editorial Board, Duke Law Journal

9. **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 served as founding president of the South Carolina Supreme Court Historical Society (1999-2000) and have worked closely with South Carolina Chief Justice Jean H. Toal in organizing day long conferences for the Society, three of which resulted in books being published of the papers delivered at the conferences by the University of South Carolina Press. I served on the Bar's Ethics Advisory Committee in 1980-81.

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

I was admitted to the South Carolina Bar on November 8, 1979.
There has been no lapse in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

South Carolina Courts; November 8, 1979
United States District Court for the District of South Carolina; January 17, 1980
United States Court of Appeals for the Fourth Circuit; April 4, 1980.
I have had no lapses in memberships.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Tree of Life Congregation; Lifelong Member
President (1987, 2007), Board Member, Sunday School Teacher

Columbia Hebrew Benevolent Society; 1992- present
President (1997- present), Vice President (1996-1997)

Jewish Historical Society of South Carolina; 1997- present
President (2002-2003), Board Member

South Carolina Trial Lawyers Association/ South Carolina Association for Justice; 1982-present; Member, Advisory Board for Association's Legislative Committee (2003-2005)

Spring Valley Country Club; Mid 1990's- 2001; Member

Capital City Club; Mid 1990's- present; Member

- b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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 Spring Valley Country Club had a history of racial and religious exclusion from its founding in the 1960's. When my family moved into the Spring Valley neighborhood in 1990, the religious exclusion policies had been eliminated but the racial exclusion was clearly in place. This was particularly unfortunate because the Spring Valley neighborhood was becoming increasingly diverse and the club was in the position to play an important role in promoting a tolerant inclusive atmosphere in the neighborhood. I declined suggestions to join the neighborhood club because of this racial exclusion policy. I was informed that a board member of the club and former president, Mr. Frank Murphey, was actively seeking a change in club bylaws to remove the ability of a single member to blackball a candidate for admission, which was the key method by which the racial exclusionary policy was maintained. I called Mr. Murphey to encourage his efforts and to inform him that my wife and I would not join the club as long as it remained segregated. Mr. Murphey asked my advice at that time regarding the proposed language for the desired bylaw change and asked my permission to use my name as someone who would join the club only if it became desegregated. I told him he was free to repeat to anyone my intention to join Spring Valley only if it eliminated its racial exclusion practices. In late 1990, Mr. Murphey obtained the desired bylaw change and promptly sponsored as members Mr. Ronald and Dr. Juanita Burton. They were formally admitted in December 1990, which represented one of the first instances in Columbia where an African American family was been admitted to one of the city's preeminent country clubs. Mr. Murphey thereafter asked to sponsor my wife and me as members of Spring Valley, which we were now willing to do as result of the desegregation of the club. We became members in February 1991. To my knowledge, the club has been continuously desegregated since that time. My wife and I resigned from the club in 2002 after we moved out of the Spring Valley neighborhood.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

In Pursuit of the Tree of Life: A History of the Early Jews of Columbia, South Carolina, coauthored with Dr. Belinda Gergel (Tree of Life Press 1996);

“To Vindicate the Cause of the Downtrodden: Associate Justice Jonathan Jasper Wright and Reconstruction in South Carolina”, coauthored with Dr. Belinda Gergel, published in At Freedom’s Door: African American Founding Fathers and Lawyers in Reconstruction South Carolina (USC Press 2000);

“Matthew J. Perry’s Contribution to the Development of Constitutional Law”, coauthored with Professor Leon Friedman of Hofstra University School of Law, published in Matthew J. Perry: The Man, His Times and His Legacy, Lewis Burke and Belinda Gergel, Editors (USC Press 2004);

Entries on United States District Judge Matthew J. Perry and South Carolina Associate Justice Jonathan Jasper Wright in South Carolina Encyclopedia, Walter Edgar, Editor (USC Press 2007);

“A Bright Day Now Dawns Upon Us: Jewish Economic Opportunities, Religious Freedom and Political Rights in Colonial and Antebellum South Carolina”, coauthored with Dr. Belinda Gergel, published in The Dawn of Religious Freedom in South Carolina, James Underwood and Lewis Burke, Editors (USC Press 2006);

“Palmetto Jews: Celebrating 300 Years in this ‘Happy Land’”, coauthored with Dr. Belinda Gergel, Sandlapper Magazine (Fall 2002);

“Wade Hampton and the Rise of One Party Racial Orthodoxy in South Carolina”, Proceedings of the South Carolina Historical Association (1976);

“School Desegregation: A Student View”, New South Magazine (Winter 1971);

“Jane Doe v. EMS”: Viewing EMS Under the Legal Microscope”, Journal of Emergency Medical Services, Walt Stoy and Richard Gergel (Oct. 2004);

“The Gergels of Aleksandrovka: Reunited After 100 Years”, The Jewish Historical Society of South Carolina Newsletter (Fall 2008);

“A Snare to the Unwary: Private Appearing Entities May Be Persons Covered by the Tort Claims Act”, South Carolina Trial Lawyers Bulletin, Richard M. Gergel and John Kassel (Spring 2008);

“Colonial South Carolina Was a Haven for Religious Dissenters”, Richard and Belinda Gergel, Op-ed, State Newspaper, May 28, 1997.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

“Recovery of Non-Economic Damages and Use of Expert Witnesses Under the New Medical Malpractice Act”, 2005 South Carolina Tort Law Update, South Carolina Bar CLE, October 28, 2005.

“Maximizing Recoveries Under the New Medical Malpractice Statute”, delivered jointly with O. Fayrell Furr, Newly Adopted Medical Malpractice and General Tort Statutes Seminar, South Carolina Trial Lawyers Association, October 14, 2005.

“Jonathan Jasper Wright”: I have delivered a number of talks on South Carolina’s and America’s first African American appellate judge, Jonathan Jasper Wright. These have included talks in February 1997 in a special ceremony before the South Carolina Supreme Court in Columbia, South Carolina, at the dedication of gravestone at his previously unmarked grave in Charleston, South Carolina, at the 2005 Conference of Chief Justices held in Charleston, South Carolina on July 30, 2005. The general substance of my talks can be found in my speech delivered to the Conference of Chief Justices and in the chapter on Justice Wright referenced above that was published in 2000 by the USC Press.

“The Jews of South Carolina”/ “Early Jews of Columbia, South Carolina”: I, generally with my wife, Dr. Belinda Gergel, have delivered dozens of talks on South Carolina Jewish history over the last 15 years. These talks have been delivered to meetings of the Jewish Historical Society of South Carolina and programs sponsored by Jewish religious organizations, churches, teacher training programs and general civic groups. The substance of our talks are derived from our 1996 book on the Jews of Columbia, the 2002 article in Sandlapper Magazine and the 2006 chapter on colonial and antebellum Jews published by USC Press. An example is the speech on the Jewish-Catholic experience in South Carolina that I delivered at the Columbia Jewish Community Center on October 19, 2006 as part of a Jewish-Catholic dialogue.

Abolition of Video Poker: I was co-lead counsel in the federal court action which ultimately led to the demise of video poker in South Carolina. In the course of that several year long battle, I gave many speeches on this issue, most particularly in 1999, when there was a scheduled public referendum on the question of whether South Carolinians wished to continue to authorize video gambling. I have no records to indicate the date or locations of those talks. I spoke to many civic and religious groups across the state about the severe social consequences of uncontrolled and unregulated video gambling and urged the abolition of video gambling. The General Assembly ultimately banned video gambling, effective July 1, 2000, and that ban was upheld by the South Carolina Supreme Court and the federal courts.

“Applying Principles of Medical Malpractice Litigation to General Civil Litigation”, delivered in a CLE sponsored by the South Carolina Bar CLE Division, October 25, 1995.

“Inappropriate Use of 15 Passenger Vans to Transport School Children”: I have spoken to many local and national meetings about federal prohibition of the sale of vans not meeting school bus safety standards to schools to transport school children to and from school or school related activities. My involvement in this issue arose out of my representation of the Strebler Family in the tragic loss of their six year old son, Jacob, in a 15 passenger van not meeting school bus safety standards. After successfully prosecuting the Strebler case, the family devoted portions of their recovery to promoting a model state statute prohibiting the use of 15 passenger vans by schools and not just the sale of those vehicles by car dealers. South Carolina was the first state to adopt “Jacob’s Law” and the Stebler’s highly visible campaign lead to more effective enforcement by federal officials of the federal statute and regulations. I, along with Mrs. Strebler, delivered a talk to the School Transportation News Western States Conference in Los Vegas, Nevada on August 11, 1998, later delivered a similar talk to a group of Northeastern transportation officials meeting in Rhode Island and spoke to school transportation officials in South Carolina at one of their annual meetings.

“Employment Law Overview”, delivered to 1988 program of Law for Non-Lawyers sponsored by the South Carolina Bar.

“Winning the Medical Negligence Case”, delivered at a CLE sponsored by the South Carolina Bar titled “Selected Issues in Tort Litigation”, held on September 14, 1988.

“Preventing Medical Errors”, delivered to the Lexington Hospital Medical Staff, October 25, 2004. I delivered a similar talk to a meeting of hospital quality assurance officers from across South Carolina in 2008.

“Teacher Rights and Remedies”: Early in my legal career, primarily in the 1980's and early 1990's, I spoke to many educator groups in my capacity as an outside counsel to the South Carolina Education Association. These included statewide meetings as well as local meetings of the Association. My general talk concerned the rights of teachers under state and federal law and the legal parameters associated with the then developing evaluation instruments. I have records indicating talks to the Union County Education Association on May 9, 1991 and to the South Carolina Administrators Association on November 5, 1986. I also recall speaking almost annually before the Spartanburg County Education Association in the 1980's and early 1990's. These are but a few examples of dozens of such speeches I made during the early part of my legal career.

Speech to the Keenan High School Honors Banquet: This was a speech given in 1996 to the honor students at my alma mater, Keenan High School. I was the first student body president of Keenan High School, which was created to facilitate desegregation of Richland School District No. 1 in Columbia, South Carolina. Keenan was approximately one-half black and one half white when I graduated in 1972 and the school became essentially all African American in the 1990's forward. I have maintained an interest in Keenan High School and have given a number of speeches to the students over the years but have no notes other than from this 1996 talk. I recently spoke in 2008 with Congressman Jim Clyburn at the dedication of the new Keenan High School campus.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have been involved in high profile issues for most of my career and have been interviewed by members of the media frequently. I have made no effort to document or track those interviews and cannot reliably provides dates and times for all media interviews. I have used various search engines to locate articles where I have been interviewed and listed them below. While these references

may not identify every media interview, they represent the substantial majority and the general substance of my media interviews. I have listed below general areas for most of my media interviews and finished with a catch-all "miscellaneous" category for subjects in which there are not multiple articles:

1. Jonathan Jasper Wright: My wife and I did significant research on a long neglected early African American lawyer and the country's first black appellate court justice, Jonathan Jasper Wright. I initially made a presentation on Justice Wright in a special ceremony during Black History Month in 1997 and then headed a committee to raise funds for an oil portrait of Justice Wright which now displayed in the lobby of our State Supreme Court. We organized the inaugural meeting of the South Carolina Supreme Court Historical Society in 1998 with a focus on Justice Wright and other early African American lawyers in South Carolina and thereafter arranged for a placement of a headstone on Wright's previously unmarked grave, which was located by my wife and me. All of these activities generated news articles, which included the following:

A. "A Justice Has Won His Case: Court's First Black Jurist Takes Place in History", State Newspaper, February 20, 1997;

B. "Here's Some Heritage for All South Carolinians", State Newspaper, Editorial, February 23, 1997;

C. "Artist Lifts First Black Justice from the Shadows of History", State Newspaper, February 26, 1998;

D. "Marker Brings First Black Justice to Life: Headstone to be Dedicated at Charleston Cemetery Where Reconstruction Official is Thought to be Buried", State Newspaper, February 17, 2000.

2. South Carolina Retirement System Litigation: I was retained by the State of South Carolina in 2000 to represent the State Retirement System after it had lost a benefits dispute before the South Carolina Supreme Court which would cost the System approximately \$1 billion dollars. I petitioned the Court for rehearing and persuaded the Court to reverse itself. News coverage of the litigation included interviews with me after the Court had ruled in the favor of the Retirement System. These included the following articles:

A. "S.C. Court Strikes Down Retiree Benefit Increases", State Newspaper, May 23, 2001;

B. "Lawyer's Clear Thinking Leads to Court's Reversal", State Newspaper, May 27, 2001.

3. Video Poker: This involved a protracted legal battle in State and Federal Court, the South Carolina General Assembly and in the public arena. My interviews on this subject included the following:

- A. "Filibuster on Gaming Successful", Augusta Chronicle, April 9, 1998;
- B. "They Call it Crack Cocaine", Time Magazine, June 1, 1998;
- C. "Fired Up, Poker King Fights Back", State Newspaper, October 9, 1999;
- D. "Video Poker Has Potent Foe: Columbia Lawyer Skilled, Persistent", State Newspaper, January 10, 1999;
- E. "People Like Richard Gergel Make Lawyer Jokes Fall Flat", State Newspaper, Editorial, November 9, 1999
- F. "Playing the Machines", Canadian Broadcast Network, July 7, 2009.

4. School Bus Safety/ 15 Passenger Vans: My representation of families who have lost children in collisions involving school vans not meeting federal school bus safety standards have resulted in the following media interviews:

- A. "Child's Death Spurs Quest for Van Safety: Empty Room, Obscure Law Propel Mother's Crusade", State Newspaper, June 26, 1997;
- B. "Fatal Crash Likely to Start Debate Over Safety of Vans", State Newspaper, February 19, 1999;
- C. "Mom Pushes Bill After Son's Death", State Newspaper, March 14, 2005;
- D. "Child Care Centers Must Use Buses, Not Vans", State Newspaper, July 1, 2006.

5. James Michael Shortt/ Dubious Alternative Medicine Practices: I represented the estates of two former patients of Dr. James Michael Shortt whose deaths were hastened by Dr. Shortt's highly unconventional medical treatments, including the provision of intravenous hydrogen peroxide. Dr. Shortt ultimately lost his medical license and went to federal prison as a result of information which came to light in the course of discovery in our litigation. The striking facts related to Dr. Shortt's medical practices and the slowness of the South Carolina Medical Board to revoke his license was the source of great media interest. My media interviews included the following:

- A. "Death Puts Spotlight on Doctor and Regulators", New York Times, October 6, 2004;
- B. "A Prescription for Death?", 60 Minutes, January 12, 2005;
- C. "Tougher Standards Urged for Doctors", State Newspaper, March 20, 2005;
- D. "Dr. Failed to Report Felony", State Newspaper, September 24, 2004;
- E. "Steroids Prescribed to NFL Players", 60 Minutes, March 30, 2005;
- F. "Disciplining Medical Practioners: Study Says S.C. Board Too Lax", State Newspaper, May 30, 2005.

6. Miscellaneous:

- A. "State to Get Disputed \$700 Million", State Newspaper, June 5, 2009;
- B. "Courts' 'Sunshine' Might Spread", State Newspaper, April 4, 2008;
- C. "Court Rejects Suit on Budget Board", State Newspaper, November 20, 2007;
- D. "S.C. Hospitals Launching Patient Safety Initiatives", State Newspaper, January 28, 2007;
- E. "Debate on Tort Reform Upsets Victims", State Newspaper, January 19, 2005;
- F. "How a Hospital Failed a Boy Who Did Not Have to Die", State Newspaper, June 16, 2002;
- G. "Strom Thurmond Jr. Fits the Job Profile-By S.C. Standards", State Newspaper, January 17, 2001;
- H. "Columbia Jews Celebrated", State Newspaper, January 14, 1996;
- I. "Thrift Case Led Lawyer to Troubling Questions", State Newspaper, February 6, 1992;
- J. "Columbian Realizes Father's Dream of Law Career, Attorney's Rapid Rise To Partnership Shows Ability, Determination", State Newspaper, March 7, 1988;

K. "Columbia Widow Gets \$700,000 in Ladder Death", State Newspaper, August 7, 2005.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
- a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____
 - i. Of these, approximately what percent were:

jury trials? ___%; bench trials ___% [total 100%]

civil proceedings? ___%; criminal proceedings? ___% [total 100%]
 - b. Provide citations for all opinions you have written, including concurrences and dissents.
 - c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).
 - d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
 - e. Provide a list of all cases in which certiorari was requested or granted.
 - f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.
 - g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.
 - h. Provide 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, provide copies of the opinions.

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not previously held judicial office.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have not served as a judge.

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

- a. List chronologically any public offices you have held, 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 unsuccessful nominations for appointed office.

I have never held public elected or appointed office. I was an unsuccessful candidate in 1972 (at age 18) for the Richland School District Number 1 Board of Trustees. I ran with no intention or expectation of winning but sought as a prior student body president to speak out in support of public school desegregation in a campaign in which reactionary forces were inaccurately portraying the schools following several years of court ordered desegregation.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have been a financial supporter of the Democratic Party on a local, state and national level but have never held any party position. Prior to attending college, I worked in the joint campaign of the Richland County Democratic Party from August-November 1972 as a campaign aide. I worked as a driver and campaign aide to North Carolina State Senator McNeill Smith in his campaign in the Democratic Primary for the United States Senate from August 1977-March 1978. I had worked with Senator Smith in the North Carolina Legislature as an undergraduate and took a year off law school after my second year to work in his United States Senate campaign. After returning to South Carolina and beginning my law practice, I supported numerous candidates for public office, primarily as a donor. My law partner, Travis Medlock, ran successfully for Attorney General of South Carolina in 1982, and I actively assisted his campaign as a volunteer and contributor. I held no official title in Mr. Medlock's campaign. I was also active in the organizing effort for Senator Joe Lieberman's campaign for President in 2004 in the South Carolina Presidential Primary. My most direct hands on involvement with a campaign in South Carolina has been my wife's 2008 campaign for Columbia City Council. I assisted her in fundraising, attended campaign meetings, walked her city council district with her and stood at the polls on election-day.

16. Legal Career: Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:
- i. 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.
 - ii. whether you practiced alone, and if so, the addresses and dates;
I have not practiced alone.
 - iii. 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.

1979 – 1980
Medlock and Davis
1320 Richland Street
Columbia, South Carolina
Associate

1981
Medlock, Davis and Gergel
1518 Richland Street
Columbia, South Carolina 29201
Partner

1981 – 1982
Medlock and Gergel
1320 Richland Street
Columbia, South Carolina 29201
Partner

1983 – Present
Gergel, Nickles and Solomon, P.A.
1519 Richland Street
Columbia, South Carolina 29201
President/Sr. Partner

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

In regard to service as a mediator, I have not undergone training as mediator and have not actively sought to serve as a mediator. I was asked by United States District Judge Cameron Currie in 2006 to serve as a mediator in Thorn vs. Jefferson Pilot Life Insurance Company (C.A. No. 3:00-2782-22), which involved allegedly race based insurance premiums. After an intensive day of mediation, we were able to resolve those longstanding disputes. J.P. "Pete" Strom of Columbia, South Carolina was lead counsel in that mediation for Plaintiffs and Brent Clinkscale of Greenville, South Carolina, was lead counsel for Defendants.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

When I began my practice in 1979 after graduation from law school, I was an associate with Medlock and Davis and within a year became a partner. In 1983, I became the senior partner of the firm and have held that position or its equivalent continuously in every successor law firm to this day. I joined Medlock and Davis as an associate and was made a partner in 1980. The firm was then known as Medlock, Davis and Gergel. Craig Davis left that practice soon thereafter to start his own firm. The remaining firm became known as Medlock and Gergel, and we practiced under that name until my senior partner, Travis Medlock, was elected Attorney General of South Carolina in 1982. I formed a new law firm with M. Malissa Burnette in January 1983 (known as Gergel and Burnette) and W. Allen Nickles joined us in 1984 (firm became known as Gergel, Burnette and Nickles). Two additional attorneys became named partners in 1988, Helen Nelson Grant and Cynthia Ouzts (practicing under the name Gergel, Burnette, Nickles, Grant and Ouzts). Over the ensuing several years, Ms. Grant moved to Charlotte, North Carolina and Ms. Ouzts left for another position, and the firm again became known as Gergel, Burnette and Nickles. Thereafter, Tom LeClair joined the firm, which became known as Gergel, Burnette, Nickles and LeClair. Ms. Burnette and Mr. LeClair left the firm in 1998 to open their own practice, and the firm became known as Gergel and Nickles. Shortly thereafter, Carl Solomon joined the firm. We have practice for approximately the last decade under the name Gergel, Nickles and Solomon, P.A.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

When I began my law practice with Medlock and Davis, the firm specialized in employment law, with the largest client being the South Carolina Education Association (SCEA). The firm represented members of the SCEA in various employment related disputes, including discharges, suspensions, and promotion related disputes. These matters were tried before school boards, state and federal administrative agencies, and the state and federal courts. The firm also provided labor defense counsel to various state agencies, which involved representation before state administrative agencies and some federal and state court litigation. The firm also represented individual public employees with labor related disputes, most notably university level academic employees in tenure and promotion disputes. As a beginning associate in an extremely busy

practice, I had the opportunity to participate in trial type administrative and court proceedings and gained remarkable trial experience in my early years of practice. I recall that I was lead counsel at a jury trial the first week or two after being sworn into the Bar and probably handled as lead counsel two dozen trial type administrative hearings in my first year of practice. I also participated in those early years in interesting federal court litigation involving Title VII/ Section 1983 race and sex discrimination issues and well as First Amendment freedom of speech and association issues.

After Mr. Medlock's election as Attorney General, I sought to expand the firm's practice into personal injury litigation, particularly in the area of medical malpractice. This was an emerging area of practice that was of particular interest to me, and I took every opportunity to pursue claims in this area. I tried to verdict a medical malpractice claim in 1984 in which the jury returned a \$2.1 million verdict, then one of the largest personal injury verdicts in the state's history. The news of this verdict spread rapidly among the Bar, and I soon began to receive more and more referrals and direct client contacts in medical malpractice claims. While employment law remained an important aspect of my law practice in the 1980's, an increasing percentage of my practice involved medical malpractice and other complex personal injury claims. In the early 1990's, I employed a registered nurse full time as my paralegal, something I have maintained to this day. By the mid 1990's, a majority of my practice was devoted to complex personal injury litigation, which included medical malpractice, products liability, serious vehicular collisions (particularly involving 18 wheeler collisions) and other catastrophic torts. I continue today to have the great majority of my practice devoted to complex personal injury litigation.

I have been involved throughout my career in complex governmental law litigation, having represented the State of South Carolina and (until recently) the City of Columbia in a broad range of matters. My representation of the State has included a \$1 billion Retirement System dispute, federal litigation by Indian tribes over gambling related issues, a challenge to the constitutionality of the State Budget and Control Board brought in the original jurisdiction of the State Supreme Court, an independent investigation of alleged corruption in the Department of Transportation's road paving program; a federal claim brought by a suspended lawyer against the South Carolina Supreme Court and the individual justices, and federal litigation over the judicial independence of State Worker Compensation Commissioners in the face of certain Executive Orders of the Governor presuming to establish legal standards for their judicial decisions. My representation of the City of Columbia

involved primarily employment related matters, including the discharge of the City Manager and defense in state and federal court litigation. When my wife filed as a candidate for Columbia City Council in 2007, I advised Council that I would no longer be able to represent the City.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice is almost 100% litigation related and that generally has been the case for my nearly 30 years of practice. I appear in the state and federal courts frequently.

- i. Indicate the percentage of your practice in:

- 1. federal courts: 35%
- 2. state courts of record; 55%
- 3. other courts;
- 4. administrative agencies 10%

- ii. Indicate the percentage of your practice in:

- 1. civil proceedings: 100%
- 2. criminal proceedings.

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

In my early years of practice, I tried between 100 and 200 trial type administrative hearings to verdict, mostly involving dismissals of teachers and other public employees

Over the last 15 years, I have tried approximately 30 matters in state and federal court.

With the exception of a limited number of cases in my first year of practice, I have served as lead counsel or lead co-counsel in almost all cases I have been involved in a trial type proceeding.

- i. What percentage of these trials were:

- 1. jury: 30%;
- 2. non-jury. 70%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. Johnson vs. Collins Entertainment Co. Inc. et. al (United States District Court for the District of South Carolina, Civil Action Nos. 98-2225, 99-1601, 99-1709):

These cases, commonly known as the "Video Poker Litigation", represented some of the most intense and significant litigation in the District Court of South Carolina in the last decade. These cases were assigned to United States District Judge Joseph Anderson and challenged the lawfulness of South Carolina's \$3 billion video gambling industry. Judge Anderson would eventually issue over 100 orders in the case and twice certified questions to the South Carolina Supreme Court. The case also was reviewed by the Fourth Circuit Court of Appeals. See, 199 F. 3d 710 (4th Cir. 1999); 349 S.C. 613, 564 S.E. 2d 653 (S.C. 2002); 333 S.C. 96, 508 S.E. 2d 575 (S.C. 1998). The critical rulings of Judge Anderson finding that the video gambling industry was routinely violating state statutory law were eventually confirmed by the South Carolina Supreme Court and contributed to the ultimate banning of the industry by legislation effective July 1, 2000. Chief Justice Jean H. Toal of the South Carolina Supreme Court also has extensive knowledge regarding this litigation and my role as counsel for Plaintiffs. Chief Justice Toal's contact information is Supreme Court Building, 1231 Gervais Street, P.O. Box 12456, Columbia, South Carolina 29211, 803-734-1584. Our clients were hundreds of addicted gamblers who we asserted were victimized by the Defendants unlawful gambling activities.

I, along with Lawrence Richter, served as co-lead counsel for the Plaintiffs, and worked

closely with a team of highly capable lawyers. Mr. Richter's contact information is: Richter Law Firm, 622 Johnnie Dodds Blvd., Mt. Pleasant, South Carolina 29465, 843-849-6000. My law partner, Carl Solomon, was also a critical member of the Plaintiffs' legal team. He can be reached at 1519 Richland Street, Columbia, South Carolina 29201, 803-779-8080. Principal Counsel for the Defendants included Richard Harpootlian, 1410 Laurel Street, P.O. Box 1090, Columbia, South Carolina 29202, 803-252-4848; A. Camden Lewis, Lewis and Babcock, 1513 Hampton Street, Columbia, South Carolina 29201, 803-771-8000; and Dwight Drake, Nelson Mullins Riley and Scarborough, 1320 Main Street, P.O. Box 11070, Columbia, South Carolina 29211, 803-799-2000. All of the claims were eventually settled after the legislative abolition of video gambling in 2000.

2. David Bibeau, as Personal Representative of the Estate of Katherine Ann Kurtz-Bibeau vs. James Michael Short, M.D., et. al.: (United States District Court for the District of South Carolina, C. A. No. 3:04-22306-MJP):

This wrongful death diversity action challenged the unconventional medical practices of an "alternative medicine" physician, Dr. James Michael Shortt, that included the intravenous administration of hydrogen peroxide. The pharmacy and pharmacist that compounded the hydrogen peroxide at Dr. Shortt's request were also parties to the action. Revelations from the civil discovery eventually led to Dr. Shortt's federal indictment, guilty plea and the revocation of his medical license. We represented the Plaintiff. All parties ultimately settled after Senior United States District Judge Perry granted summary judgment to the Plaintiff.

I served as lead counsel for the Plaintiff and my co-counsel was Warren V. Bigelow, 1000 Superior Blvd., Suite 300, Wayzata, Minnesota 55391, 952-475-4000. Principal defense counsel included William L. Howard, Young, Clement Rivers LLP, 28 Broad Street, P.O. Box 993, Charleston, South Carolina 29402, 843-577-4000, and M. Dawes Cooke, Jr., Barnwell, Whaley, Patterson and Helms, LLC, P.O. Drawer H, Charleston, South Carolina 29402, 843-577-7700.

3. Kennedy vs. South Carolina Retirement System, 349 S.C. 339, 549 S.E. 2d 243 (S.C. 2001) and Whele vs. South Carolina Retirement System, 363 S.C. 394, 611 S.E. 2d 240 (2005):

I was asked to assume responsibility for the defense of the South Carolina Retirement System in the Kennedy matter after the South Carolina Supreme Court had ruled 4-1 against the Retirement System, finding the System liable for past retirement benefits totaling nearly \$1 billion. I moved to have the South Carolina Supreme Court reconsider its ruling, asserting that the alleged benefit increase was never intended and was based upon a tortured reading of a poorly drafted statute. The Court agreed to rehear the case, allowed us to reargue and reversed itself 4-1, with Chief Justice Jean H. Toal writing for the majority. Plaintiffs then sought to bring a second action, Whele, which the Supreme

Court assigned to then South Carolina Court of Appeals Judge John Kittredge as a special master. We tried the case on the merits before Judge Kittredge, who ruled for the Retirement System. Judge Kittredge's report was then unanimously affirmed by the South Carolina Supreme Court.

I served as lead counsel. My principal co-counsel were W. Allen Nickles, Gergel, Nickles and Solomon, P.A., 1519 Richland Street, Columbia, South Carolina, 803-779-8080, and Ed Evans, General Counsel to the South Carolina Budget and Control Board, Box 11608, Columbia, South Carolina 29211, 803-734-1261. Principal opposing counsel were Michael Spears, 172 E. Main Street, Suite 200, Spartanburg, South Carolina 864-583-3535, and A. Camden Lewis, Lewis and Babcock, 1513 Hampton Street, Columbia, South Carolina 29201, 803-771-8000.

4. Michael and Lisa Strebler, as Personal Representatives of the Estate of Jacob Strebler vs. Milner Super Gas et. al (Richland County Court of Common Pleas, C.A. No. 94-CP-40-4582):

This wrongful death action was brought against a car dealer which sold a vehicle not meeting federal school bus safety standards to a school to transport school children in violation of 15 U.S.C. Sections 1391-1397, 49 U.S.C. 30112 and 49 C.F.R. 571, a private school which utilized the van with knowledge that it had been sold the vehicle unlawfully and a trucking company which employed a truck driver who had collided with the van after running a red light. We represented the Plaintiffs. In the course of our litigation, which was based on negligence *per se* theory of tort liability, we discovered that the United States Department of Transportation had done little to enforce the federal statutory prohibitions. After extensive pretrial motions and discovery and on the eve of trial, the case settled for the largest amount ever paid at that time for the death of a child in South Carolina. The Strebler family then undertook a nationwide campaign to alert parents to the dangers of these widely used but unlawful school vans. They purchased full page ads in Time and Newsweek and were featured in a Dateline NBC segment. Mrs. Strebler traveled the country giving speeches on the need for effective federal enforcement, and I accompanied her at my own expense on several of these occasions. I also assisted her in drafting model legislation prohibiting schools and day care centers from utilizing the vans (federal law applied only to the car dealers) and provided strategic advice as she lobbied the South Carolina General Assembly to adopt what became known as "Jacob's Law." The statute, South Carolina Code Section 15-5-195, was adopted by the South Carolina General Assembly in 2000 and has essentially eliminated the use of 15 passenger vans by schools in South Carolina. Mrs. Strebler's vocal criticism of federal enforcement efforts was also very effective, and the numerous federal administrative enforcement actions across the country that followed her public campaign led to a dramatic decline in the sale of 15 passenger vans to schools to transport school children across the entire country.

I served as lead counsel. My co-counsel was the late Senator Isadore Lourie. Principal

opposing counsel included William Sweeny, Sweeny, Wingate and Barrow, 1515 Lady Street, Box 12129, Columbia, South Carolina 29211, 803-256-2233; E. Crosby Lewis, 2519 Devine Street, Columbia, South Carolina, 803-256-6099; and Monteith Todd, Sowell, Gray, Stepp and Lafitte, 1310 Gadsden Street, Box 11449 Columbia, South Carolina 29211, 803-929-1400. State Circuit Judge L. Casey Manning heard critical motions in the case and played a central role in facilitating a mediated settlement of the litigation. Judge Manning's contact information is Richland County Judicial Center, 1701 Main Street, Box 192, Columbia, South Carolina 29202, 803-576-1773.

5. Mark A. Reed vs. Charles Robert Coxe, M.D. et. al (Richland County Court of Common Pleas, 2000-CP-40-3842):

This medical malpractice action arose out of negligent emergency room care at a major hospital in Columbia, South Carolina in which a patient suffering from incredible pain on presentation was given powerful pain medications, fell asleep and was essentially lost to follow up for an entire shift. When he awoke and was "rediscovered" by the emergency room staff he had become a paraplegic. We represented the Plaintiff. The transcript of my deposition of the defendant physician, in which he ultimately admitted liability and described the events of that day as the worst of his career, has been widely distributed in the Bar as a model cross examination. The defendants ultimately paid Mr. Reed \$7 million in a 2003 settlement, which remains today one of the largest payments ever made in a medical malpractice settlement in South Carolina.

I served as lead counsel. My co-counsel was Luther Battiste, Johnson, Toal and Battiste, 1615 Barnwell Street, P.O. Box 1431, Columbia, South Carolina 29202, 803-252-9700. My opposing counsel was William H. Davidson, Davidson, Morrison and Lindermann, 1611 Devonshire, 2nd Floor, Box 8568, Columbia, South Carolina 29202, 803-806-8222.

6. Lynne and Curt Stines vs. Teri and Dean Edgar vs. Garden City Wings LLC et. al (Horry County Court of Common Pleas, 08-CP-26-1550 and 1551):

These wrongful death dram shop actions involve the death of two young women at the hands of a drunk driver who had consumed large amounts of alcohol at a Wild Wings Cafe in Garden City Beach, South Carolina. We asserted claims on behalf of Plaintiffs against the franchise and owner of the Garden City location, the franchiser (on grounds of negligent supervision because of actual knowledge that the location was in managerial free fall) and the drunk driver. Evidence obtained included security video from the bar showing the customer/drunken driver stumbling around, dancing with his buddies and bumping into customers and then being served additional alcohol. We also provided technical assistance to the Solicitor prosecuting the drunk driver, who was ultimately sentenced to 21 years in prison. The parties settled on the eve of trial in June 2009, with an ultimate recovery for the families in excess of \$4.4 million. This is thought to be the largest payment ever made in South Carolina in a dram shop action.

I served as lead counsel. My co-counsel was Douglas Jennings, 151 Broad Street, P.O. Drawer 995, Bennettsville, South Carolina 29512, 843-479-2865. Principal opposing counsel included Mark Barrow, Sweeny, Wingate and Barrow, 1515 Lady Street, Box 12129, Columbia, South Carolina 29211, 803-256-2233; Thomas G. Salane, Turner, Padgett, Graham and Laney, 1901 Main Street, 17th Floor, Box 1473, Columbia, South Carolina 29202, 803-254-2200, Robert McKenzie, McDonald, McKenzie, Rubin, Miller and Lybrand, 1704 Main Street, 2nd Floor, Box 58, Columbia, South Carolina 29202, 803-252-0500; and Anthony Livoti, Murphy and Grantland, 4406-B Forest Drive, Box 6648, Columbia, South Carolina 29260, 803-782-1400.

7. Wanda Jackson, as Personal Representative of the Estate of Mary Alice Jones vs. Midlands Emergency Physicians, P.A., David Paul Brown, M.D. et. al (Sumter County Court of Common Pleas, C.A. No. 2006-CP-43-230):

This wrongful death medical malpractice action arose out of astoundingly bad emergency room care rendered to a women presenting with the classic symptoms of a dissecting aortic aneurysm at Toumey Hospital in Sumter, South Carolina. Treatment for this condition is surgical and time is critical. Toumey Hospital was not competent to perform the life saving surgery and the patient needed a prompt transfer to a major cardiac hospital. Instead, Mrs. Jones received extremely slow work up for her troubling symptoms and was not transferred until she had markedly deteriorated. One of the emergency room physicians treating Mrs. Jones, who had a long history of brief employment in numerous emergency rooms across the country, could not be located by the parties. We retained a private investigator who finally located the defendant in a suburban hospital in Arizona. In depth investigation into his troubled past produced a dramatic deposition in which he finally confessed, "ok, you got me." The case settled in 2008 for \$2 million.

I served as lead counsel. My co-counsel was I.S. Leevy Johnson, Johnson, Toal and Battiste, 1615 Barnwell Street, Box 1431, Columbia, South Carolina 29202, 803-252-9700. Principal opposing counsel were G. Murrell Smith, Lee, Erter, James, Holler and Smith, 126 N. Main Street, Box 580, Sumter, South Carolina 29150, 803-778-2471; Julius W. McKay, II, McKay, Cauthen, Settana and Stublely, P.A., 1301 Gervais Street, Box 7217, Columbia, South Carolina 29202, 803-256-4645; Mark S. Barrow, Sweeny, Wingate and Barrow, 1515 Lady Street, Box 12129, Columbia, South Carolina 29211, 803-256-2233; Charles E. Hill, Turner, Padgett Graham and Laney, 1901 Main Street, Box 4706, Columbia, South Carolina 29202, 803-771-4400.

8. Margaret S. Hall vs. Marion School District No. 2, 860 F. Supp. 278 (D.S.C. 1993), aff'd 31 F. 3d 183 (4th Cir. 1994):

This employment dismissal case of a classroom teacher arose out of various public statements made by the teacher critical of her superintendent and school board. Evidence developed in the course of discovery revealed a scheme by the superintendent to

terminate Mrs. Hall in retaliation for her clearly protected first amendment activities. The case was tried before then United States District Judge William Traxler, now Chief Judge of the Fourth Circuit United States Court of Appeals. The trial and Judge Traxler's 15 page order were classics.

I was lead counsel and was assisted by my law partner, W. Allen Nickles. The National Education Association's General Counsel handled the Fourth Circuit appeal. My opposing counsel was Kenneth Childs, Childs and Halligan, 1301 Gervais Street, Suite 900, Box 11367, Columbia, South Carolina 29211, 803-254-4035.

9. Leila and Morgan Grimboll, as Guardian Ad Litem for Elizabeth Grimboll vs. University of South Carolina School of Medicine et. al: (Richland County Court of Common Pleas, 98-CP-40-3360):

This tragic medical malpractice claim involved a 10 year old child who complained of severe back pain several years after surviving childhood cancer. Rather than conduct a standard MRI of the spine to rule out spread of the child's cancer, multiple physicians evaluated the child and concluded she was faking. This diagnosis persisted as the child's symptoms progressively worsened and she ultimately was unable to walk. When the MRI was finally conducted, the child had a massive spinal tumor that could have been treated with earlier diagnosis. Instead, the child was left permanently paralyzed. I was lead counsel in the case, which settled after exhaustive discovery that took the parties across the country. The confidential settlement was at the time one of the largest payouts in a medical malpractice claim.

Opposing counsel included Weldon Johnson, Barnes, Alford, Stork and Johnson, Box 8448, Columbia, South Carolina 29202, 803-799-1111, and Robert Hood Sr., Hood Law Firm, 172 Meeting Street, Box 1508, Charleston, South Carolina 29402, 843-577-4435.

10. Nelson vs. The South Carolina Supreme Court, et. al (United States District Court for the District of South Carolina, C.A. No. 4:99-2015-24):

This federal action arose out of the suspension of an attorney who was dissatisfied with the South Carolina Supreme Court's refusal to reinstate his license. He sued the Supreme Court and each of the five justices individually in federal court, as well as a variety of other parties. This case raised classic judicial immunity defenses as well as preemption and other significant issues to challenge federal jurisdiction of this core state function, the licensing and disciplining of attorneys. We prepared a comprehensive and well researched brief in support of our motion to dismiss. John Hamilton Smith and I represented the defendants, equally sharing the brief preparation and oral argument. We argued our motion to dismiss before then United States Magistrate (now United States District Judge) Terry Wooten, who recommended dismissal of the action. The recommendation was followed by United States District Judge Margaret Seymour, who dismissed the case in May 2001.

The plaintiff represented himself *pro se*. Mr. Smith's contact information is Young Clement Rivers LLP, 28 Broad Street, Box 993, Charleston, South Carolina 29402, 843-577-4000.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Some of my significant activities as a lawyer have been efforts to advance the cause of public safety regarding matters which we have discovered in the course of litigation. These have included research, drafting and strategic support to the Strebler family in their efforts to promote the use of buses meeting federal school bus safety standards in the transportation of children to and from school. I have traveled across the country at my own expense and prepared detailed literature on federal and state mandates for school transportation officials, parents and others vitally interested in the safe transportation of children. I assisted Mrs. Strebler in drafting what is now known as "Jacob's Law" and gave her strategic advice on persuading the South Carolina General Assembly to adopt this important legislation. I provided similar assistance to another client, Helen Haskell, whose 15 year old son, Lewis Blackman, died at the Medical University of South Carolina after experiencing complications from a recent surgery. When Ms. Haskell asked for a "real" doctor (rather than a resident) to evaluate her son, she was told by a resident he was a "real" doctor. At Ms. Haskell's urging the South Carolina General Assembly adopted the "Lewis Blackman Act" which requires residents to wear badges clearly identifying them as in training. I represented the Blackman/Haskell family in the wrongful death claim against the Medical University of South Carolina and then assisted Ms. Haskell behind the scenes in the pursuit of her legislative remedy. In the Video Poker battle, I assisted legislators in reviewing drafts of highly technical legislation, much which were produced by the army of video poker lobbyists to scuttle any efforts to ban the games. I also assisted at their request then Speaker of the House David Wilkins and the late Rep. Terry Haskins in drafting the final legislation that led to the banning of video gambling in South Carolina. I have never served as a registered lobbyist.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I taught an undergraduate course at Columbia College in Columbia, South Carolina one semester in the early 1980's titled "An Introduction to the Legal Process". The course was primarily for students considering a career in the law. We read a number of major

United States Supreme Court cases and discussed such concepts as equal protection, due process, the supremacy clause, freedom of speech and freedom of the press. I do not now have the course syllabus or any materials from the course.

20. **Deferred Income/ Future Benefits:** List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have made at this point no formal arrangements with my law partners regarding compensation for legal matters which are in progress and may not be completed at the time I leave the private practice of law. I anticipate some equitable arrangement will be made on such unfinished work that is fair both to me and to my partners who must complete the work. Since such matters cannot be known at this time and all involve contingency fees, it is not possible to provide an amount of such future sources of income. I anticipate essentially all such matters should be completed within 24 months of my departure from the firm. I am at this point attempting to bring to trial all outstanding litigation matters on which I am working and hope that there will be few unfinished matters at the time I leave the firm. I also own a 40% interest in 1519 Richland Street LLP, which owns our law firm's office building. I would like to sell that interest to my partners at some point but do not wish to unduly burden them as I am departing the firm. I also may receive some modest compensation for my share of the physical assets of the firm but this has not yet been discussed with my partners. I do not intend to seek compensation from my partners or the firm for good will or for cases in progress in which I have not been working or did not produce.

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

I have no such plans.

22. **Sources of Income:** 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, licensing fees, 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

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Two potential sources of conflict of interest that come to mind involve my wife's service as a member of the Columbia City Council and any matters involving my present law partners. I would certainly recuse myself from any matter in which the City of Columbia was a party as long as my wife is a member of Columbia City Council. I would also recuse myself from any action in which my then former law partners were involved to the extent there remained any financial relationship between myself and my former partners. This would include any continuing involvement in my former cases or ownership of the firm's office building.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I intend to undertake any issue of potential recusal with the principles of the Code of Conduct for United States Judges firmly in mind, which mandate the upholding and promoting of the impartiality of the judiciary and the avoidance of any appearance of bias or impropriety.

25. **Pro Bono Work:** 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 attempted over the years to use my talents as an attorney and historian to promote a safer and more tolerate world. In the early 1990's, I brought a suit in the original jurisdiction of the South Carolina Supreme Court challenging the continued flying of the Confederate Battle Flag over the State House because such action was based on a legislative resolution that had expired decades earlier. My clients included the Mayor of Columbia, the state's largest city, and the CEO's of some of the state's largest banks and corporations. The Supreme Court granted our petition for original jurisdiction and appeared poised to grant our request. Unfortunately, the General Assembly responded by adopting a statute authorizing the continued flying of the Confederate Flag, thereby mooting our lawsuit. The state of South Carolina would then endure another decade of racially divisive debate before finally bringing down the Battle Flag from the State House Dome. I handled the entire case, including all litigation costs, out of my pocket, although many of my clients volunteered to contribute to the cause. I spent hundreds of attorney hours in this matter.

I have frequently donated my time and skills to promote the cause of my clients outside the legal arena. As mentioned in response to earlier questions, I provided assistance and support to the Strebler family in their efforts to promote safer transportation for school children. I have traveled to speeches around the country at my personal expense and prepared materials and draft legislation to further the cause. I provided similar services without charge to the Haskell/Blackman family in support of their efforts to require residents to be clearly identified as in training to their patients and families. I also provided without compensation many hours of legal time to legislators seeking a careful review of proposed legislation to ban or restrain video gambling in South Carolina. I have produced in the news articles in response to Question 12(e) a column by State Newspaper editorial writer Cindy Ross Scoppe dated November 9, 1999 that describes in detail my pro bono activities in support of the efforts to ban video gambling in South Carolina.

I have also devoted thousands of hours over the last 20 years to scholarly research and writing that promote tolerance and inclusiveness. This has included original research of our state's first African American lawyer and judge, Jonathan Jasper Wright, and programs which highlight the extraordinary contributions of Sr. United States District Judge Matthew Perry as a civil rights lawyer and jurist. I have written extensively on South Carolina's notable history of religious civility and tolerance and argued that we should apply should practices in our dealings with other minority citizens. I have sought to promote more knowledge of our state's African American history and tradition of religious tolerance by organizing and moderating day long meetings of the South Carolina Supreme Court Historical Society. The Society has brought into the state national scholars and utilized South Carolina's home grown talent to produce first class programs, three of which culminated in published books by the University of South Carolina Press. Our conferences have included such topics as the early African American Bar in South Carolina, South Carolina's history of religious tolerance, women and the law and a program to honor Judge Matthew Perry on the occasion of the dedication of the federal courthouse in his name. I hope to continue my work researching and writing about the history of South Carolina.

26. Selection Process:

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I had several discussions with Congressmen John Spratt and James Clyburn in which they advised me that they intended to recommend me to the President as a United States District Judge. At Congressman Spratt's suggestion, I met with Senator Lindsey Graham, who also indicated to me that he supported my appointment as a United States District Judge. I was contacted on July 23, 2009 by staff from the United States Department of Justice, regarding pre-nomination paperwork which needed to be completed. I was interviewed by telephone on September 10, 2009 by Mr. Jonathan Meyer, Deputy Assistant Attorney General of the United States, and Susan Davies, Associate Counsel to the President. I have had subsequent telephone conversations with Department of Justice staff regarding the nomination paperwork and process. I participated in an interview at the United States Department of Justice in Washington, D.C. on September 24, 2009. Those in attendance included Associate Attorney General Thomas J. Perrelli and staff from the Department of Justice and the White House Counsel's Office. My nomination was submitted to the United States Senate on December 22, 2009.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.



**FINANCIAL DISCLOSURE REPORT
NOMINATION FILING**

*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) Gergel, Richard M.	2. Court or Organization District of South Carolinas	3. Date of Report 12/21/2009
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) District Court--Nominee	5a. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 12/22/2009 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final 5b. <input type="checkbox"/> Amended Report	6. Reporting Period 01/01/2008 to 11/30/2009
7. Chambers or Office Address 1915 Pendleton Street Columbia, South Carolina 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 _____	
<p>IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.</p>		

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

NONE (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
1. _____	_____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____

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

NONE (No reportable agreements.)

DATE	PARTIES AND TERMS
1. _____	_____
2. _____	_____
3. _____	_____

FINANCIAL DISCLOSURE REPORT
Page 2 of 7

Name of Person Reporting Gergel, Richard M.	Date of Report 12/21/2009
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III. NON-INVESTMENT INCOME. (Reporting individual and spouses; see pp. 17-24 of filing instructions.)

A. Filer's Non-Investment Income

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>INCOME</u> (yours, not spouse's)
1. 2007	Gergel, Nickles and Solomon, P.A.	\$690,947.00
2. 2008	Gergel, Nickles and Solomon, P.A.	\$923,648.00
3. 2009	Gergel, Nickles and Solomon, P.A.	\$1,796,655.00
4.		

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, complete this section.

(Dollar amount not required except for honoraria.)

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>
1. 2008	Columbia City Council/ Salary
2. 2009	Columbia City Council/ Salary
3.	
4.	

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

(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

NONE (No reportable reimbursements.)

	<u>SOURCE</u>	<u>DATES</u>	<u>LOCATION</u>	<u>PURPOSE</u>	<u>ITEMS PAID OR PROVIDED</u>
1. Exempt					
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT
Page 3 of 7

Name of Person Reporting Gergel, Richard M.	Date of Report 12/21/2009
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V. GIFTS. (Includes those to spouse and dependent children; see pp. 29-31 of filing instructions.)

NONE (No reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1. Exempt			
2.			
3.			
4.			
5.			

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)

NONE (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.	Bank of America	Mortgage on Investment Property, Edisto Beach, South Carolina	N
2.	Bank of America	Mortgage on Investment Property, Charleston, South Carolina	N
3.	Bank of America	Short Term Note/ Credit Line	K
4.	Prudential Life Insurance	Loan on Life Insurance	K
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 7

Name of Person Reporting Gergel, Richard M.	Date of Report 12/21/2009
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VII. INVESTMENTS and TRUSTS - Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
1. Investment Property, Edisto Beach, S.C.		None	P1	W	Exempt				
2. Investment Property, Charleston, S.C.		None	N	W	Exempt				
3. 1519 Richland LLP, Columbia, S.C.	D	Rent	M	W	Exempt				
4. Prudential Life Insurance		None	K	T	Exempt				
5. Columbia Cash Reserves	B	Int./Div.	J	T	Exempt				
6. Alliance Balance Wealth Strategies/ Class A	A	Int./Div.	K	T	Exempt				
7. Am. U.S. Government Securities/ Class B	A	Int./Div.	K	T	Exempt				
8. Am. Balanced/ Class A	D	Int./Div.	M	T	Exempt				
9. Am. Balanced/ Class B	A	Int./Div.	J	T	Exempt				
10. Am. High Income Trust/ Class A	B	Int./Div.	K	T	Exempt				
11. Columbia Marsico Focused Eq/ Class A	A	Int./Div.	K	T	Exempt				
12. Am. Europacific Growth/ Class A	A	Int./Div.	J	T	Exempt				
13. Goldman Sachs Strategic Fund		None	J	T	Exempt				
14. Hartford Advisors/ Class A	A	Int./Div.	J	T	Exempt				
15. Putnam International Equity/ Class A		None	J	T	Exempt				
16. Am. Washington Mutual Inv./ Class B	A	Int./Div.	J	T	Exempt				
17. Ship Financial International Com USD	A	Int./Div.	J	T	Exempt				

1. Income Gain Codes: (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000 J = \$15,000 or less	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000 L = \$50,001 - \$100,000	D = \$5,001 - \$15,000 I2 = More than \$5,000,000 M = \$100,001 - \$250,000	E = \$15,001 - \$30,000 N = \$250,001 - \$500,000 O = \$500,001 - \$1,000,000
2. Value Codes: (See Columns C1 and D3)	P = \$250,001 - \$500,000 Q = Appraisal	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	

FINANCIAL DISCLOSURE REPORT
Page 5 of 7

Name of Person Reporting Gergel, Richard M.	Date of Report 12/21/2009
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VII. INVESTMENTS and TRUSTS - Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset except from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
18. AllianceBer Large Cap Growth/ Class A	A	Int./Div.	J	T	Exempt				
19. Morgan Stanley Dividend Growth/ Class B	A	Interest	J	T	Exempt				
20. Morgan Stanley European Equity/ Class B	A	Int./Div.	J	T	Exempt				
21. Morgan Stanley Liquid Asset Fund	A	Int./Div.	J	T	Exempt				
22. Morgan Stanley Strategist Fund A	A	Int./Div.	J	T	Exempt				
23. Bank Meridian NA		None	K	W	Exempt				
24. First National Bankshares Inc.		None	J	W	Exempt				
25. Tideland Bancshares Inc.		None	J	W	Exempt				
26. VistaBank South Carolina		None	K	W	Exempt				
27. Bank of America	A	Int./Div.	K	T	Exempt				
28. TIAA-CREF	D	Int./Div.	M	T	Exempt				
29. Exxon Mobil		None	J	T	Exempt				
30. Columbia Tax Exempt Reserves	A	Int./Div.	J	T	Exempt				
31. Wachovia Certificates of Deposit	A	Int./Div.	J	T	Exempt				
32. Morgan Stanley Global Div. Growth/ Sect ion A	A	Int./Div.	J	T	Exempt				
33. Am. Short Term Bond/ Class A	A	Int./Div.	K	T	Exempt				

1. Income Code: (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000 J = \$15,000 or less N = \$250,001 - \$500,000 P3 = \$25,000,001 - \$50,000,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000	C = \$2,501 - \$5,000 H1 = \$1,000,001 - \$5,000,000 L = \$30,001 - \$100,000 P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000	D = \$5,001 - \$15,000 I2 = More than \$5,000,000 M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000	E = \$15,001 - \$50,000
2. Value Codes (See Columns C1 and D3)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	
3. Value Method Codes (See Column C2)					

FINANCIAL DISCLOSURE REPORT
Page 6 of 7

Name of Person Reporting	Date of Report
Gergel, Richard M.	12/21/2009

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

FINANCIAL DISCLOSURE REPORT
Page 7 of 7

Name of Person Reporting	Date of Report
Gergel, Richard M.	12/21/2009

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 _____



NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

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		21	300	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		374	629	Notes payable to relatives			
Unlisted securities--add schedule		61	305	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		49	100
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		720	695
Real estate owned-add schedule	3	200	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		95	000	Auto lease		15	207
Cash value-life insurance		49	408	Loan on Life Insurance		39	973
Other assets itemize:							
TIAA-CREF		103	916				
Interest in 1519 Richland LLP		175	000				
				Total liabilities		824	975
				Net Worth	3	255	583
Total Assets	4	080	558	Total liabilities and net worth	4	080	558
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you a defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT
NET WORTH SCHEDULES

Listed Securities

Columbia Cash Reserves	\$ 2,089
Alliance Balance Wealth Strategies/Class A	15,421
Am. Balanced Class A	139,442
Am. Balanced Class B	2,538
Am. U.S. Gov't Securities Class B	36,078
Am. High Income Trust Class A	33,000
Columbia Marsico Focused Eq. Class A	15,727
Am. Europacific Growth Class A	10,276
Goldman Sachs Strategic Growth A	10,264
Hartford Advisors Class A	768
Putnam International Equity Class A	13,198
Am. Washington Mutual Inv. Class B	13,028
Ship Finance International Com USD1	3,495
AllianceBer Large Cap Growth Class A	8,757
Morgan Stanley Dividend Growth Class B	4,642
Morgan Stanley European Equity Class.B	8,976
Morgan Stanley Liquid Asset Fund	8,383
Morgan Stanley Strategist Fund A	5,339
Columbia Tax Exempt Reserve Daily	489
Wachovia Certificates of Deposit	6,218
Exxon Mobil	3,536
Morgan Stanley Global Div. Growth/Section A	3,336
Am. Short Term Bond/ Class A	29,629
Total Listed Securities	<u>\$ 374,629</u>

Unlisted Securities

Bank Meridian NA	\$ 25,000
First National Bancshares Inc.	2,055
Tidelands Bancshares Inc.	9,250
VistaBank South Carolina	25,000
Total Unlisted Securities	<u>\$ 61,305</u>

Real Estate Owned

Primary residence	\$ 1,200,000
Alternate personal residence 1	1,500,000
Alternate personal residence 2	500,000
Total Real Estate Owned	<u>\$ 3,200,000</u>

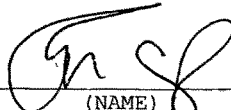
Real Estate Mortgages Payable

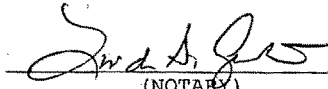
Alternate personal residence 1	\$ 416,305
Alternate personal residence 2	304,390
Total Real Estate Mortgages Payable	<u>\$ 720,695</u>

AFFIDAVIT

I, Richard Mark Gengel, do swear
that the information provided in this statement is, to the best
of my knowledge, true and accurate.

12/2/09
(DATE)


(NAME)


(NOTARY)

**STATEMENT OF HON. J. MICHELLE CHILDS, TO BE U.S.
DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA**

Judge CHILDS. Yes. Madam Chair Feinstein and Ranking Member Sessions, and also other members of the Judiciary Committee who have not had the opportunity to be here before us, thank you. I'm greatly humbled by this opportunity to appear before you. I'd like to express sincere appreciation and gratitude to President Obama for this high honor and privilege of being nominated, and of course to our Senators who have been here in support, particularly Senator Graham, who also made some very warm comments for us today. Then also, Majority Whip Clyburn. We also express appreciation to Senator DeMint, who's also in support of our nomination.

I'd like to acknowledge my family as well. I'll begin, first, with my husband, Dr. Floyd Angus. He's a gastroenterologist in Sumter, South Carolina. He also has next to him my mother, Shandra Childs. My mother is second of 12 children, and I wish to acknowledge my grandmother.

Senator FEINSTEIN. She looks like your sister!

Judge CHILDS. Thank you.

[Laughter.]

Senator FEINSTEIN. That's amazing.

Judge CHILDS. Bertha Mary Green, who is in Detroit, Michigan, who is the matriarch of the family, not able to be here. My mother's other sibling, my uncle Derek and Vivian Green, they came here from Atlanta, Georgia. And when you have a family of 12, there's always an older sibling who watches a younger sibling, and that's the pair relationship between those two.

My brother-in-law, Dr. Sherwin Angus, who is an anesthesiologist here in Hampton, Virginia, and my sister, who's watching by web, who's watching my 16-month-old daughter, my heart, Juliana, and her family and her husband and children. I'd like to acknowledge them. Then also here with us as well is my cousin, Victoria Trice, who actually lived in Louisville, Kentucky, and I'd like to say hello to all my Weathers family. There's an original 13 on that side, so I do have a large family contingency.

Senator FEINSTEIN. You're lucky.

Judge CHILDS. Thank you.

And then also a dear family friend who's part of our extended family, Ms. Deborah Lum. I believe I caught everyone. Yes. Thank you all.

Senator FEINSTEIN. Thank you. I should have said Madam Chief Justice. In any event, welcome. Welcome to your family.

Judge CHILDS. Thank you.

Senator FEINSTEIN. Judge Eagles.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Julianna Michelle Childs

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

United States District Judge for the District of South Carolina

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

Richland County Judicial Center
1701 Main Street, Room 215
P.O. Box 192
Columbia, SC 29202

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

1966; Detroit, MI

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

September 1988-December 1991, University of South Carolina School of Law
J.D., 1991

September 1989-May 1991, University of South Carolina School of Business
M. A., Personnel and Employment Relations, 1991

September 1984-May 1988, University of South Florida
B.S., Management, 1988

Cambridge University, FitzWilliam College (Study Abroad Law Program), Summer
1990; no degree

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

2006-present
South Carolina Judicial Department
1015 Sumter Street
Columbia, SC 29201
Circuit Court Judge

2006-present
Angus Properties, LLC
101 Devant Street, Suite 902
Fayetteville, GA 30244
President & Co-owner

2002-2006
South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201
Commissioner

2000-2002
South Carolina Department of Labor, Licensing and Regulation
110 Centerview Drive
Columbia, SC 29210
Deputy Director, Division of Labor

1997-2002
Paradise Travel, Inc.
1718 St. Julian Place
Columbia, SC 29204
President & Owner

1991-2000
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Summer Associate, 1991; Associate Attorney, 1992-1999; Partner, 2000

1989-1991
Nelson Mullins Riley & Scarborough, LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201
Law Clerk

Non-employment (non-profit) affiliations:

ETV Endowment of South Carolina, Inc.
401 East Kennedy Street, Suite B-1
Spartanburg, SC 29302
Trustee, 2008-present (unpaid)

St. Martin de Porres Catholic School
2229 Hampton Street
Columbia, SC 29204
Advisory Board, 2002-present; Chair, Deacon Roland L. Thomas Memorial Scholarship
Committee, 2009; Chair, Education Endowment Committee, 1996-1997 (unpaid)

South Carolina Bar Foundation
P.O. Box 608
Columbia, SC 29202
Board of Directors, 2002-2007 (unpaid)

Midlands Authority for Conventions, Sports & Tourism
1101 Lincoln Street
Columbia, SC 29201
Board of Directors, 1999-2006; Secretary, 2003-2006 (unpaid)

Columbia Urban League, Inc.
1400 Barnwell Street
Columbia, SC 29201
Board of Directors, 2000-2004; Nominating Committee, 2003-2004; Equal Opportunity
Dinner Committee, 2001 (unpaid)

South Carolina Industry Liaison Group
c/o Wallace T. Bonaparte, President
Director, EEO/AA Compliance
Medical University of South Carolina
20 Ehrhardt Street, Unit #2
P.O. Box 250205
Charleston, SC 29425
www.scilg.com
(Because the organization does not have a physical location, the address is that of the
current president.)
Board of Directors, 1997-2002; President, 2000-2001; Second Vice-President, 1998-1999
(unpaid)

Belmont Green Homeowners Association
3937 West Buchanan Drive
Columbia, SC 29209
Past President, 1996 (unpaid)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have never served in the military or registered for selective service.

8. **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.

South Carolina Liberty Fellowship Program, 2008-present

I'm Every Woman TrailBlazers Award, 2008

University of South Carolina Black Law Students Association Award, 2008

The State Newspaper's "Top 20 Under 40" Award, 2005

University of South Carolina School of Business Outstanding Young Alumni Award, 2000

Benjamin E. Mays Leadership Academy John F. McFadden Award, 2005

American Bar Association Young Lawyers Division Affiliate Leader Award, 2002

National Bar Association Junius W. Williams Young Lawyers Division Award, 2002

Columbia Urban League SHEROES Award, 2002

University of South Carolina Outstanding Alumni Award, 2000

American Bar Association Young Lawyers Division Star of the Quarter Award, 1999

Richland County Bar Association Civic Star Award, 1999

University of South Carolina School of Law: Compleat Lawyer Award, Silver Medallion, 1997

American Bar Association Young Lawyers Division, First Place Winner, Awards of Achievement, 1996-1997

University of South Carolina School of Law: Order of the Barristers; Associate Justice, Moot Court Team; Frederick Douglas Moot Court Team; Student Attorney General, Undergraduate Program, 1988-1991

University of South Florida Most Outstanding Graduate Award, 1988

I was also awarded various educational fellowships and scholarships to the University of South Florida, and the University of South Carolina Schools of Business and Law.

9. **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

Presidential Appointment to Standing Committee on Constitution and By-laws, 2009-present
 Presidential Appointment to Legal Opportunity Scholarship Fund Selection Committee, 2009-present
 House of Delegates, 2006-present; Drafting Committee on Policies and Procedures, 2008-present
 National Conference of State Trial Judges, 2007-present
 Judicial Division, 2006-present
 Fellow, 2001-present
 Nominating Committee, 2008
 Direct Women Project, 2008
 Government and Public Sector Division, 2004-present
 Presidential Appointment as Commissioner, Commission on Mental and Physical Disabilities, 2003-2006
 Young Lawyers Division Liaison, Commission on Racial and Ethnic Diversity, 2002-2003
 Fellow, Labor and Employment Law Section, Equal Employment Opportunity Committee, 2001-2003
 Chair, Minorities in the Profession Committee, Young Lawyers Division, 2001-2002
 Diversity Team, Young Lawyers Division, 2001-2002
 Vice-Chair, Minorities in the Profession Committee, Young Lawyers Division, 2000-2001
 Chair, Awards of Achievement Committee, Young Lawyers Division, 1999-2000
 Beyond the Boundaries Team, Young Lawyers Division, 1998-1999
 Planning Board, Minorities in the Profession Committee, Young Lawyers Division, 1997-1999
 Young Lawyers Division National Conferences Team, 1997-1998

American College of Business Court Judges, 2008-present

Columbia Lawyers Association

President, 1994; Secretary, 1992-1993; Member, 1992-present

John Belton O'Neill Inn of Court

Chair, 2002-2003; Vice-Chair, 2001-2002; Program Chair, 1999-2001;
Member, 1996-present

Merit Selection Panel for United States Magistrate, United States District Court for the
District of South Carolina, 2000

National Association of Women Judges, 2009-present

National Bar Association, 2002-present

Richland County Bar Association, 1992-present
Board of Directors, Public Defender's Office, 1997-1999
Long Range Planning Committee, 1997-1999
Chair, Law Week Committee, 1995-1997
Advisory Committee, 1995-1997

South Carolina Bar, 1992-present
House of Delegates, 1996-2000, 2002-present
Faculty, Bridge the Gap Program, 2009-present
Enhancement Task Force for Young Lawyers Division, 2007-2008
Board of Governors, 2002-2004
Employment and Labor Law Section
President, 2000-2001; President-Elect, 1999-2000; Vice-Chair, 1998-
1999; Secretary-Treasurer, 1997-1998; Continuing Legal Education
program coordinator, 1996-1997; Newsletter Editor, 1995-1996
Diversity and Inclusiveness Committee, 1996
Judicial Qualifications Committee, 1996
Young Lawyers Division, Member, 1992-2002
President, 2001-2002; President-Elect, 2000-2001; Secretary-Treasurer,
1999-2000; Long Range Planning Committee, 1995-2001; Co-Chair, Time
Out for Seniors Project, 1998-1999; Youth Empowerment Summit
Committee, 1997-1998; Chair, Diversity in the Profession Committee,
1997-1998; Co-Chair, Diversity Task Force, 1996-1997

South Carolina Bar Foundation
Board of Directors, 2002-2007

South Carolina Black Lawyers Association, 1992-present
Secretary, 1995-1997

South Carolina Circuit Court Judges Association, 2006-present
Co-Chair, Spring Judicial Conference, 2009-2010
Regional Vice-Chair, 2007-2008
Planning Board, Spring Judicial Conference, 2007-2008

South Carolina Supreme Court

Associate Member, Board of Law Examiners, 2003-2006

South Carolina Women Lawyers Association, 1993-present
Board of Directors, 1999-2001
Co-Chair, Nominating Committee, 1999-2000
Planning Board for Annual Continuing Legal Education program, 1997-1998

University of South Carolina School of Law
Alumni Association Board
President, 2005-2006; Vice President, 2004-2005; Secretary, 2003-2004;
Member, 2000-2007
Nelson Mullins Riley & Scarborough, LLP Center for Professionalism
Advisory Committee, 2001-2006
Planning Board for Annual Fund Drive, 1995-1997

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

South Carolina Bar, May 7, 1992

There has been no lapse in membership.

Certified by the South Carolina Supreme Court as a Specialist in Labor and Employment Law, January 11, 2000. My certification ended in 2002, because I no longer practiced law and thus could not qualify for continued certification.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the District of South Carolina, 1992

United States Court of Appeals for the Fourth Circuit, 1994

Supreme Court of the United States, 1999

There have been no lapses in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school.

Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Benjamin E. Mays Academy for Leadership Development,
Program Coordinator, 1991-2006

Capital City Club, 2002-present

Columbia Urban League, Inc.
Board of Directors, 2000-2004; Nominating Committee, 2003-2004; Equal
Opportunity Dinner Committee, 2001

ETV Endowment of South Carolina, Inc.
Trustee, 2008-present

Midlands Authority for Conventions, Sports & Tourism
Board of Directors, 1999-2006; Secretary, 2003-2006

South Carolina Chamber of Commerce
Former Member, Minority Business Council

South Carolina Industry Liaison Group
President, 2000-2001; Vice-President, 1998-1999;
Board of Directors, 1997-2002

South Carolina Governor's Executive Institute
Student, 2001-2002

South Carolina Workers' Compensation Educational Association
Board of Directors, 2002-2006

Southern Association of Workers' Compensation Administrators
Executive Committee, 2002-2006

St. Martin de Porres Catholic School
Advisory Board, 2002-present; Chair, Deacon Roland L. Thomas Memorial
Scholarship Committee, 2009; Chair, Education Endowment Committee,
1996-1997

- b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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 do not hold nor have I ever held membership in any organization that currently practices or formerly engaged in invidious discrimination.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Articles

Passion for Fairness, Passion for Justice, printed in the South Carolina Bar Young Lawyers Division's The Bar Tab (copies of draft provided)

Lawyering into the 21st Century, printed in the American Bar Association's The Young Lawyer (copies of draft provided)

The Family and Medical Leave Act, printed in Attitudes magazine (copies of draft provided)

Chapter in Dear Sisters, Dear Daughters, printed in a publication by the American Bar Association's Commission on Women in the Profession, (2009) (copies of draft provided)

Childs Joins LLR as Deputy Director of Labor, printed in the LLR Times (June 2000) (copies provided)

YLD: Making Dreams a Reality, printed in the South Carolina Bar Young Lawyers Division's The Bar Tab (Spring 2002) (copies provided)

From the President, printed in the South Carolina Bar Young Lawyers Division's The Bar Tab (Summer 2002) (copies provided)

Revised and edited various chapters printed in the following publications: (1) "The South Carolina Employer's Legal Reference Manual" (copies provided); and (2) "The South Carolina Public Employer's Legal Reference Guide" (Center for Governance-Institute of Public Affairs)

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the

name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Copies of the relevant documents that I submitted to the South Carolina Judicial Merit Selection Commission for my appointment as a Commissioner for the South Carolina Workers' Compensation Commission in 2002 and my election and re-election to the South Carolina Circuit Court in 2006 and 2009, respectively, have been provided.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

During my employment with Nexsen Pruet, LLC (1991-2000) and the South Carolina Department of Labor, Licensing and Regulation (2000-2002), I regularly spoke to personnel management and human resource organizations as well as lectured at several Continuing Legal Education programs and seminars on a variety of employment and labor law issues. Additionally, during my tenure both as a Workers' Compensation Commissioner (2002-2006) and Circuit Court Judge (2006-present), I have participated on various panels, lectured at several Continuing Legal Education programs, and given informal talks on topics including workers' compensation, civil and criminal trial procedural and evidentiary issues, professional responsibility and ethical obligations within the legal profession, and other current topics in the Circuit Court.

The topics on which I have spoken and materials that I have been able to locate include the following:

Civil Rights Act of 1991 Update

The Family and Medical Leave Act of 1993

Basic Employment Law

At-Will Employment and Employee Contracts

The Latest Developments in Employment Discrimination and Equal Employment Opportunity Compliance

The Big Three: Workers' Compensation, Americans with Disabilities Act, Family Medical Leave Act

Sexual Harassment

Discharge and Documentation Seminar

Documentation and Discharge: The Importance of Performance Evaluations in Defending a Wrongful Termination Claim

Employment Discrimination (Federal and State Remedies)

Affirmative Action Plans

Preventing Sexual Harassment Claims

Federal Update on Employment Law

Employee Handbooks: Including Disclaimers and Acknowledgments

South Carolina Employers' Manual-Chapter on the Family and Medical Leave Act

Employment and Labor Law Update: Americans with Disabilities Act

South Carolina Employers' Legal Reference Manual-Chapters on Employment Discrimination, Employee Rights to Leave, and Regulation of Wages and Hours

Americans with Disabilities Act: "Talkin' Out of Both Sides of Your Mouth"

The First Amendment and the Public Sector Employer

The After-Acquired Evidence Doctrine

Disciplining Students with Disabilities and Due Process Hearings and Other Procedures

Legal Aspects of Personnel Management, The Disciplining of Employees, and Terminations

Racial Profiling Seminar Moderator

Investigating Sexual Harassment Claims: Role of Attorneys and Other Investigators

Federal Protection of Employment (no copy available)

Workplace Violence: Legal Considerations

Practical Suggestions for Employers Under the Civil Rights Act of 1991 (no copy available)

Speech for Legal Administrators

Slips and Falls in Workers' Compensation Cases

The Top Ten Career Tips

During the course of my legal and judicial careers, I have also spoken on the following topics:

"The Art of Billing", August 26, 2009
Boykin & Davis Law Firm
220 Stoneridge Drive, Suite 220
Columbia, SC 29210

"Practice Before the South Carolina Circuit Court", Bridge the Gap Program,
August 5, 2009 and March 11, 2009

"Judging the Jury-Voir Dire in South Carolina: A View from the Bench", July 17,
2009

Issues in Workers' Compensation (Panel Discussion), July 16, 2004; May 30,
2003

Workers' Compensation Commission Update (Panel Discussion), August 26,
2005

Medicare Issues in Workers' Compensation (Panel Discussion), April 5, 2002
South Carolina Bar
950 Taylor Street
Columbia, SC 29201

"Cosmetology-From Good to Great: The Cosmetologist's Dream", June 14, 2009
South Carolina State Cosmetology Association
1509 Fontaine Road
Columbia, SC 29223

"Celebrating Black History Month", February 19, 2009
SRC AN Aetna Company
P.O. Box 23759
Columbia, SC 29224-3759

Gender Issues in Practicing Law (Panel Discussion), November 16, 2008
"South Carolina's Business Courts", July 2008
"Ask the Commissioners" (Panel Discussion), July 29, 2006; July 28, 2005; July
24, 2004; July 25, 2003
South Carolina Defense Trial Attorneys Association
1 Windsor Cove, Suite 305
Columbia, SC 29223

"The Judicial Qualifications Process" (Panel Discussion), October 2006
"Trial Strategies", October 31, 2008
South Carolina Black Lawyers Association
736-D St. Andrews Road, #146
Columbia, SC 29210

"Criminal Law Update", September 29, 2008
"Update on Criminal Cases", September 25, 2006
South Carolina Solicitors Association
P.O. Box 11251
Columbia, SC 29211

"Ask the Commissioners," August 2008; August 3-4, 2007; August 4, 2006;
August 5-6, 2005; August 6-7, 2004
South Carolina Trial Lawyers Association
1901 Gadsden Street
Columbia, SC 29211

Commencement Address, May 29, 2009
Richland One Evening School
Heyward Career Center
3560 Lynhaven Drive
Columbia, SC 29204

YWCA's Tribute to Women in Industry Award Speaker, April 9, 2008
YWCA, Sumter Chapter
246 Church Street
Sumter, SC 29150

"Careers in the Law", January 20, 2008
South Carolina Student Trial Lawyers Association
University of South Carolina School of Law

514 Main Street
Columbia, SC 29208

“Crime Victims and Justice Day” (Panel Discussion), December 11, 2007
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Remarks at Student Luncheon, November 9, 2007
University of South Carolina Moore School of Business
1705 College Street
Columbia, SC 29208

South Carolina’s Criminal Court System, October 29, 2007
University of South Carolina College of Arts and Sciences
Department of Criminology and Criminal Justice
Currell College
1305 Greene Street
Columbia, SC 29209

Commencement Address,
South Carolina Executive Institute, March 21, 2007
(Institute ceased operations in 2008)

Remarks at Swearing-In Ceremony for Election to the South Carolina Circuit
Court, August 17, 2006
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201

“Ask the Commissioners” (Panel Discussion), November 2005; May 6, 2005;
November 6, 2004; October 20, 2003; May 3, 2002
Association of South Carolina Claimant Attorneys for Workers’ Compensation
(No physical address)

“Ask the Commissioners” (Panel Discussion), October 23, 2005; February 26,
2005; October 27, 2004
South Carolina Workers’ Compensation Educational Association
(No physical address)

Nominating Speech for Burnadette Norris-Weeks for American Bar Association
Young Lawyers Division’s Representative on the American Bar Association’s
Nominating Committee, Spring 2002
American Bar Association Young Lawyers Division
321 North Clark Street
Chicago, IL 60654

Workplace Safety in South Carolina, September 2001
Workplace Violence, May 2001
South Carolina Department of Labor Licensing and Regulation
Synergy Business Park
Kingstree Building
110Centerview Drive
Columbia, SC 29210

Civil Rights Act of 1991: Practical Suggestions for Employers
August 6, 1992

Remarks at the Joint Spring Conference of the South Carolina and North Carolina
Industry Liaison Groups, 2001

Other general topics on which I have spoken include the following: Practical
Trial Tips; Professional Development for Young Lawyers; Closing Arguments;
Marketing Tips; Becoming Involved with Bar Organizations; Mentoring; and
Making Partner in a Large Firm

Other public transcripts or recordings include:

The Judicial Observation Program
Self-represented Litigants
SC Bar Continuing Legal Education Division
P.O. Box 608
Columbia, SC 29202
(videos available)

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

The Carolina Panorama: I was interviewed by this newspaper, located in Columbia, SC, in the 1990s regarding my career as a lawyer with Nexsen Pruet, LLC, and as one of the few African-American lawyers employed by a major law firm.

- 13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 2002, I was appointed by Governor James H. Hodges to serve as a Commissioner on the South Carolina Workers' Compensation Commission. The Commission adjudicates issues related to compensability, medical treatment, temporary disability benefits, and

partial or permanent disability awards for employees who sustain workplace injuries. I served on the Commission until 2006.

In 2006, I was elected to serve as a Circuit Court Judge by the South Carolina General Assembly and fulfilled the unexpired term of my predecessor. The General Assembly re-elected me to the Circuit Court in 2009. The South Carolina Circuit Court is the state's trial court of general jurisdiction.

The Chief Justice of the South Carolina Supreme Court appointed me to serve as the Chief Administrative Judge for General Sessions (criminal court) from January 2008 to January 2010.

The Chief Justice appointed me to serve as the Chief Administrative Judge for the Business Court Pilot Program, Richland County, from October 2007 through the duration of the program. The Business Court Pilot Program was established for the purpose of designating one judge in the participating counties to hear all matters arising from complex business cases assigned to the Business Court.

I have also served as an Acting Justice for the South Carolina Supreme Court on several occasions during my tenure as a Circuit Court Judge when requested to do so by the Chief Justice. While sitting with the Supreme Court, I have heard and decided both civil and criminal matters.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? Fifty (50).
 - i. Of these, approximately what percent were:
 - jury trials? 85 %; bench trials? 15% [total 100%]
 - civil proceedings? 35%; criminal proceedings? 65 % [total 100%]
- b. Provide citations for all opinions you have written, including concurrences and dissents.

In my capacity as a Circuit Court Judge, I have authored a substantial number of opinions. However, Circuit Court opinions are not assigned citations.

In my capacity as an Acting Justice for the South Carolina Supreme Court, I have concurred in the following opinions: *Lakephia McCrea v. Jafer Gheraibeh*, 380 S.C. 183, 669 S.E.2d 333 (2008); *State v. Henry Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008); *State v. Meckler*, 379 S.C. 12, 664 S.E.2d 477 (2008); *Brenco v. South Carolina Dept. of Transp.*, 377 S.C. 124, 659 S.E.2d 167 (2008); *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008); *State v. Roach*, 377 S.C. 2, 659 S.E.2d 107 (2008); *State v. Miller*, 373 S.C. 599, 647 S.E.2d 175 (2007); *Englert, Inc. v. Leafguard USA*, 377 S.C. 129, 659 S.E.2d 496 (2008)

- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

As a Circuit Court Judge in a Court of General Jurisdiction and in my capacities as Chief Administrative Judge of General Sessions (criminal court), a designated judge for the Richland County Business Court Pilot Program, and an Acting Justice for the South Carolina Supreme Court, I have presided over numerous criminal and civil matters involving diverse issues arising throughout various stages of the legal process. The volume of cases and matters that I preside over daily rarely requires formal written opinions; therefore, I am unable to determine the most significant cases. However, I have provided a list of cases that may offer insight into the various issues I have encountered.

1. *State of South Carolina v. Blakeney, Whitaker, Frierson, McPhail, Lyde, Blakeney, Sadler Richland County, South Carolina (Indictment Nos. 2007-GS-40-4365, 4366, 4367, 4368; 2007-GS-40-435; 2007-GS-40-4429, 4362, 4363, 4364; 2007-GS-40-4358, 4359, 4360, 4361; 2007-GS-40-4429, 4362; 2008-GS-40-1180, 1181, 1182, 1187; 2007-GS-40-4369, 4370, 4371, 4372)*

Summary and Disposition

Defendants were charged with committing one of the largest armored car heists in the history of the United States. Employees of Express Teller Services were refueling the armored car when certain Defendants, armed with a gun, assaulted and kidnapped the employees, drove to a remote location to meet other Defendants, and unloaded over nine million dollars from the armored car. The scheme was successful, in part, because of the roles of inside co-defendant employees. Defendants were charged with criminal conspiracy, assault and battery of a high and aggravated nature, kidnapping, and armed robbery. All Defendants pled guilty and received substantial prison sentences. This case attracted national media attention.

For the State

Daniel Goldberg
5th Circuit Solicitor's Office
1701 Main Street, Suite 302
Columbia, SC 29201
Phone: (803) 576-1800

For Defendants

Charles E. Johnson
Johnson & Associates, PA

1332 Main Street, Suite 65
Columbia, SC 29201
Phone: (803) 256-1964

Tynika Claxton
The Claxton Law Firm
1200 Main Street, Suite 910
Columbia, SC 29201
Phone: (803) 400-1195

Hemphill P. Pride, II
Law Office of Hemphill P. Pride, II
P.O. Box 4529
Columbia, SC 29201
Phone: (803) 256-8015

Deon O'Neil
Richland County Public Defender's Office
1701 Main Street
Main Street Lobby, Suite 103
Columbia, SC 29201
Phone: (803) 765-2592

Joseph M. McCullough, Jr.
Law Offices of Joseph M. McCullough, Jr.
P.O. Box 11623
Columbia, SC 29211
Phone: (803) 779-0005

Joshua Kendrick
Law Offices of Joshua Kendrick
P.O. Box 886
Columbia, SC 29202
Phone: (803) 667-3186

August G. Swarat, II
Whetstone Meyers Perkins & Young, LLC
Columbia, SC 29202
Phone: (803) 799-9400

2. *Lakephia McCrea v. Jafer Gheraibeh*, 380 S.C. 183, 669 S.E.2d 333 (2008)
(Acting Justice for the South Carolina Supreme Court)

Summary and Disposition

At trial, Petitioner moved for a hearing pursuant to *Batson v. Kentucky*,

476 U.S. 79 (1986), contending that Respondent impermissibly struck African-American jurors based on racial motivation. The Circuit Court denied the motion, and the jury returned a verdict in favor of Petitioner. The case was ultimately appealed to the South Carolina Supreme Court which reversed the Circuit Court. The Supreme Court held that Respondent's counsel's explanation that he struck a particular juror based simply on "uneasiness" over the juror's dreadlocks did not constitute a race-neutral reason for exercising a peremptory strike as is necessary to survive a *Batson* challenge.

For Petitioner

Edward L. Graham
Graham Law Firm, PA
P.O. Box 550
Florence, SC 29503
Phone: (843) 662-3281

For Respondent

C. Anthony Harris, Jr.
P.O. Drawer 1449
Cheraw, SC 29520
Phone: (843) 537-5204

3. *Henry D. McMaster, et al. v. Capital Consortium Group, L.L.C. et al.*
(Civil Action No.: 2007-CP-40-3116)

Summary and Disposition

The South Carolina Attorney General sought an injunction to enjoin Defendants, known as the "3 Hebrew Boys," from withdrawing, liquidating, transferring, or otherwise having access to certain funds located at Defendants' bank because Defendants' allegedly sold illegal securities and had an illegal investment scheme. The Attorney General also sought an injunction prohibiting Defendants' bank from closing these accounts. I granted a temporary injunction and froze almost eighteen million dollars in Defendants' bank accounts from Defendants' collection of money for the investment scheme. I also prohibited Defendants' counsel, a non-lawyer, from participating in the proceedings because he was engaged in the unauthorized practice of law. Defendants' counsel was later criminally convicted for the offense of unauthorized practice of law.

For Plaintiffs

Tracy Myers
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Phone: (803) 734-4403

For Defendants

Sakima Bey (not an attorney)
4039 Monticello Road
Columbia, SC 29203

4. *State v. Eric Hemmingway (Indictment No(s):2005-GS-03-00139; 2005-GS-03-00142; 2005-GS-03-00143)*

Summary and Disposition

Defendant was convicted in a jury trial of murder, criminal sexual conduct first degree, and burglary first degree. At trial, which occurred over two years later, the coroner testified that she was unable to determine the decedent's cause of death. Nonetheless, the State proved that the death was the result of asphyxiation by strangulation. This case presented significant legal issues. The case was highly publicized.

For the State

Tameaka A. Legette
14th Circuit Solicitor's Office
P.O. Box 546
Hampton, SC 29924
Phone: (803) 914-2175

Sean P. Thornton
14th Circuit Solicitor's Office
P.O. Box 1725
Walterboro, SC 29488
Phone: (843) 549-2192

For Defendant

Stephen T. Plexico
P.O. Box 1114
Varnville, SC 29944
Phone: (803) 943-7525

5. *State v. Henry Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008)(Acting Justice for the South Carolina Supreme Court)*

Summary and Disposition

Defendant was convicted in the Circuit Court of homicide by child abuse. Defendant ultimately appealed his conviction to the South Carolina Supreme Court. Defendant asserted that the trial court erred by admitting the testimony of a witness regarding Defendant's prior bad acts because such testimony was inadmissible under Rule 404(b) of the South Carolina Rules of Evidence. The South Carolina Supreme Court reversed the

conviction by holding that the State did not present clear and convincing evidence that Defendant committed the alleged prior bad acts, and thus, evidence of those prior bad acts was inadmissible. The Supreme Court further held that the trial court erred in the admitting evidence of the prior bad acts and that the error was not harmless because the testimony was prejudicial and was offered only to demonstrate Defendant's bad character.

For Petitioner

Susan Barber Hackett
P.O. Box 12159
Columbia, SC 29211
Phone: (803) 734-1954

For Respondent

John W. McIntosh
Norman Mark Rapoport
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Phone: (803) 734-5089

6. *Cohen v. South Carolina Department of Transportation (Civil Action No. 2005-CP-27-188)*

Summary and Disposition

Plaintiff sued the South Carolina Department of Transportation and received a 3.5 million dollar verdict. Plaintiff alleged that Defendant failed to properly train and equip its employees to respond adequately to traffic hazards, to promptly remove fallen trees from its public roads, and to warn travelers of fallen trees in dimly lit areas on a particular road. Plaintiff further alleged that Defendant's negligence caused the driver of a motor vehicle to collide with the trees and strike Plaintiff who was standing near the roadway. Plaintiff suffered severe injuries causing her to become mentally and physically disabled. The jury verdict was reduced pursuant to the South Carolina Tort Claims Act.

For Plaintiff

Daniel E. Henderson
Peters Murdaugh Law Firm
P.O. Box 2500
Ridgeland, SC 29936
Phone: (843) 726-6131

For Defendant

C. Scott Graber

Graber Law Firm
605 Carteret Street
Beaufort, SC 29902
Phone: (843) 524-8204

7. *State v. Darrell Williams (Indictment No.:2008-GS-40-13175)*

Summary and Disposition

Defendant, appearing *pro se*, was convicted of burglary first degree. Defendant received a mandatory sentence of life imprisonment without parole because the conviction resulted in a second strike under the State's two strike law for "most serious" crimes. Given the nature of the charges and because Defendant appeared *pro se*, I was confronted with various constitutional and evidentiary issues as well as issues related to professionalism and judicial temperament that often arise when dealing with a *pro se* litigant.

For the State

Heather Weiss, Assistant Solicitor
Dolly Justice Garfield, Assistant Solicitor
5th Circuit Solicitor's Office
1701 Main Street, Room 302
P.O. Box 192
Columbia, SC 29202
Phone: (803) 576-1800

For Defendant

Darrell Williams, *Pro Se*
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Joshua Kendrick (Shadow Counsel)
Law Offices of Joshua Kendrick
P.O. Box 886
Columbia, SC 29202-0866
Phone: (803) 667-3186

8. *State v. Gerald Williamson (Civil Action No.: 2006-CP-40-2803)*

Summary and Disposition

The State of South Carolina re-indicted a case which had been pending for over ten years. The victim requested that the case be re-opened so criminal charges could be pursued against her stepfather who she claimed molested her. After extensive testimony in a non-jury proceeding, I found

that the substantial pre-indictment delay caused undue prejudice to Defendant, and therefore, I dismissed the case.

For the State

Suzanne Mayes
South Carolina Commission on Prosecution Coordination
1401 Main Street, Suite 825
Columbia, SC 29201
Phone: (803) 343-0765

For Defendant

Jack Swerling
Law Offices of Jack Swerling
1720 Main Street, #301
Columbia, SC 29201
Phone: (803) 765-2628

9. *Professional Financial Services Corp. v. Jimmy Chavis and S.C. Dept. of Public Safety, Division of Motor Vehicles (Civil Action No.: 2005-CP-40-5976)*

Summary and Disposition

Plaintiff brought claims against Defendants for breach of contract and negligence. The parties proceeded to a non-jury trial and I found in favor of Plaintiff on all claims. This case involved various issues regarding installment contracts, the South Carolina Tort Claims Act, and the public duty doctrine.

For Plaintiff

J. Gregory Studemeyer
1804 Bull Street
Columbia, SC 29211-2201
Phone: (803) 779-3363

For Defendants

Stephanie McDonald
Senn, McDonald & Leinbach, LLC
Three Wesley Drive
Charleston, SC 29407
Phone: (843) 556-4045

10. *State v. NV Sumatra Tobacco Trading Co., 379 S.C. 81, 666 S.E.2d 218 (2008) (Acting Justice for the South Carolina Supreme Court)*

Summary and Disposition

The State of South Carolina brought an action against Appellant ("Sumatra"), a tobacco product manufacturer, under the Tobacco Escrow Fund Act alleging that the manufacturer had failed to make an escrow deposit and provide certification as required by the Act for cigarettes being sold in South Carolina. The Circuit Court granted summary judgment in favor of the State and Sumatra appealed. In affirming the Circuit Court's decision, the South Carolina Supreme Court held that Sumatra had sufficient minimum contact with South Carolina such that the Circuit Court properly exercised personal jurisdiction over Sumatra. Therefore, the Circuit Court's reasonable exercise of jurisdiction over Sumatra did not offend Sumatra's due process rights. The Supreme Court also held that the trial court properly granted the State's motion for summary judgment and ordered Sumatra to make payments pursuant to the Escrow Fund Act because the undisputed facts cited by the trial court established Sumatra's intent to sell cigarettes in South Carolina.

For Appellant

Joel Collins, Jr.
 Gray T. Culbreath
 Christian Stegmaier
 Collins & Lacy, PC
 P.O. Box 12487
 Columbia, SC 29211
 Phone: (803) 255-0423

For Respondent

J. Emory Smith, Jr.
 South Carolina Attorney General's Office
 P.O. Box 11549
 Columbia, SC 29211
 Phone: (803) 734-3680

- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
1. *State of South Carolina v. Antonio Mobley (State Grand Jury of South Carolina - Indictment # 2008-GS-47-01) (Order Granting Motion to Quash Indictment) (copies provided)*

For the State

Tommie DeWayne Pearson
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Phone: (803) 734-7135

For Defendant

Jack Swerling
Law Offices of Jack Swerling
1720 Main Street, #301
Columbia, SC 29201
Phone: (803) 765-2628

Melvin L. Roberts
Melvin L. Roberts & Associates
P.O. Box 460
York, SC 29745
Phone: (803) 684-4807

2. *Venture Investment Properties Group, Inc., v. Whaley's Mill, L.P., et. al.*
(Civil Action No.: 2007-CP-40-7742) (Business Court Order on Defendants' Joint Motion to Compel and For Sanctions) (copies provided)

For Plaintiff

William R. Padget
Howard Sheftman
Finkel and Altman, LLC
P.O. Box 1799
Columbia, SC 29202
Phone: (803) 765-2935

For Defendants

Jeremy Hodges
Cory Manning
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211
Phone: (803) 255-9766

Demetri K. Koutrakos
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202-1390
Phone: (803) 256-2371

3. *Carolyn D. Covan, et al. v. Blue Cross and Blue Shield of South Carolina, et al. (Civil Action No.: 2008-CP-40-5294)* (Business Court Order on Defendant's Motion to Dismiss) (*copies provided*)

For Plaintiffs

J. Preston Strom, Jr.
Mario Pacello
Strom Law Firm
2110 Beltline Boulevard
Columbia, SC 29204
Phone: (803) 252-4800

John P. Freeman
2329 Wilmot Avenue
Columbia, SC 29205
Phone: (803) 254-4667

For Defendants

Howard Boyd
Gallivan White & Boyd, PA
P.O. Box 10589
Greenville, SC 29603
Phone: (803) 271-9580

4. *Robin R. Jones, By and Through her Guardian ad Litem, Douglas Raymond Jones v. Enterprise Leasing Company-Southeast and Enterprise Rent-A-Car Company* (Civil Action No.: 2006-CP-40-03605R) (Order on Defendant Enterprise Rent-A-Car Company's Motion for Summary Judgment) (*copies provided*); affirmed by the South Carolina Court of Appeals, 383 S.C. 259, 678 S.E.2d 819 (Ct. APP. 2009)

For Plaintiff

Justin S. Kahn
Kahn Law Firm
P.O. Box 31397
Charleston, SC 29417-1397
Phone: (843) 577-2128

For Defendants

Samuel W. Outten
Womble Carlyle Sandridge & Rice, LLC
P.O. Box 10208
Greenville, SC 29603-0208
Phone: (864) 255-5421

5. *Robbie Mouzon v. State of South Carolina (Civil Action No.: 2000-CP-40-2336) (Order Granting Post-Conviction Relief) (copies provided)*

For Applicant

Tara Dawn Shurling
Law Offices of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite D
Columbia, SC 29204
Phone: (803) 738-8622

For Respondent

Brian Petrano
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Phone: (803) 734-3970

6. *State of South Carolina, ex. rel. Henry D. McMaster v. Casale Media et al. (Civil Action No.: 2008-CP-40-729) (Business Court Order on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Protective Order) (copies provided)*

For Plaintiff

Warren Ganjehsani
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202-3200
Phone: (803) 771-7900

For Defendants

Cory Manning
Jeremy Hodges
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211
Phone: (803) 799-2000

7. *State of South Carolina v. Archie Dalmes Porcher (Indictment No.: 2006-GS-10-0759) (Order on Defendant's Motion for Continuance, Motion to Quash, and Motion to Suppress) (copies provided)*

For the State

Nathan Williams
United States Attorney's Office
1441 Main Street, Suite 500
Columbia, SC 29201
Phone: (803) 343-3162

For Defendant

A. Peter Shahid
Shahid Law Office, LLC
89 Broad Street
Charleston, SC 29401
Phone: (843) 853-4500

8. *Jane Doe, a High School Student in Richland County School District Two, and Her Parent, Mary Doe v. Richland County School District Two (Civil Action No.: 2006-CP-40-6525) affirmed by the South Carolina Court of Appeals, 382 S.C. 656, 677 S.E.2d 610 (Ct. App. 2009) (copies provided)*

For Plaintiffs

Kimaka Nichols-Graham
South Carolina Legal Services
701 South Main Street
Greenville, SC 29601
Phone: (864) 679-3259

Thomas L. Bruce
South Carolina Legal Services
701 South Main Street
Greenville, SC 29601
Phone: (864) 679-3259

For Defendants

Kenneth L. Childs
Vernie L. Williams
Jasmine S. Rogers
Childs & Halligan, PA
P.O. Box 11367
Columbia, SC 29211
Phone: (803) 254-4035

9. *Kelley Neely, on behalf of herself and as Personal Representative of the Estate of Shane Haller Neely v. Werner Enterprises, Inc., et al. (Civil Action No.: 2008-CP-40-0044R) (Order on Defendants' Motion to Compel) (copies provided)*

For Plaintiffs

Richard A. Harpootlian, PA
P.O. Box 1090
Columbia, SC 29202
Phone: (803) 252-4848

For Defendants

Mark Barrow
Sweeny Wingate & Barrow, PA
P.O. Box 12129
Columbia, SC 29211
Phone: (803) 256-2233

10. *BL Development Corp. d/b/a Grand Casino Tunica v. Timothy C. Walker*
(Civil Action No.: 2006-CP-40-6619) (Order on Defendant's Notice of
Defenses and Motion to Vacate Foreign Judgment) (copies provided)

For Plaintiff

Mark Pearson
Brock & Scott, PLLC
5821 Fairview Road, Suite 105
Charlotte, NC 28209
Phone: (704) 643-0290

Andrew Thompson
Thompson Law Office, LLC
521 Calhoun Street, Apartment 1
Johnston, SC 29832
Phone: (803) 275-3330

For Defendant

D. Nathan Hughey
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29401
Phone: (843) 577-4435

- e. Provide a list of all cases in which certiorari was requested or granted.

The following is a list of cases in which I was the trial judge where petitions for writ of certiorari were filed. "COA" refers to petitions for writ of certiorari that were filed in the South Carolina Supreme Court from cases decided by the South Carolina Court of Appeals. "PCR" refers to post conviction relief cases from the trial court that are automatically filed as petitions for writ of certiorari directly to the South Carolina Supreme Court. Those cases where certiorari has not been decided are, to my knowledge, currently pending.

Case No.	Case Title	Case Type	Cert. Granted	Cert. Denied
2009134147	Jones, Robin v. Enterprise Leasing	Petition For Certiorari - COA		
200885767	Hendricks, Larry Edward v. SCDC (5)	Petition For Certiorari - COA		
200885806	Hendricks, Larry Edward v. SCDC (6)	Petition For Certiorari - COA		
200885826	Hendricks, Larry Edward v. SCDC (4)	Petition For Certiorari - COA		
2008104426	McCoy, Michael v. The State	Petition For Certiorari - PCR		
2009123986	Boyce, William T. v. The State	Petition For Certiorari - PCR		
2009126988	Byrd, LeShawn v. The State	Petition For Certiorari - PCR		
2009129592	Dickerson, Joseph v. The State	Petition For Certiorari - PCR		
200888186	Sirawat, Chairut v. The State	Petition For Certiorari - PCR		
200776028	Al-Amin, Raquib Abdul v. The State	Petition For Certiorari - PCR		
200892411	Wilds, Israel v. The State	Petition For Certiorari - PCR		
200898913	Mouzon, Robbie v. The STATE	Petition For Certiorari - PCR		
200885049	Roach, Andre Q. v. The State	Petition For Certiorari - PCR		
2008108728	Vaughn, Brett R. v. The State	Petition For Certiorari - PCR		
200888087	Outen, Venson v. The State	Petition For Certiorari - PCR		5/14/2009
200892408	Ward, Sylvester v. The State	Petition For Certiorari - PCR		
2008105528	McElveen, Roy Vance v. The State	Petition For Certiorari - PCR		7/9/2009
200762361	Glymph, Phillip v. The State	Petition For Certiorari - PCR		6/2/2009
200764321	Shiver, William G. v. The State	Petition For Certiorari - PCR		11/19/2008
200765408	Moody, Robert v. The State	Petition For Certiorari - PCR		10/23/2008
200765427	Mosely, Avery v. The State	Petition For Certiorari - PCR		12/4/2008
200765562	Hammond, Darryl v. The State	Petition For Certiorari - PCR		12/17/2008
200765903	Myers, Jerome v. The State	Petition For Certiorari - PCR		5/29/2009
2008105366	Taylor, Prince v. The State	Petition For Certiorari - PCR		
2008109647	Patterson, Frank R. v. The State	Petition For Certiorari - PCR		

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

1. *South Carolina Dept. of Revenue v. Anonymous Co. A*, 678 S.E.2d 255 (S.C. 2009) (a South Carolina Reporter citation has not yet been assigned)

Summary and Disposition

Two companies (the dealer and finance company) sought a refund of sales taxes for installment contracts which became uncollectible. The South Carolina Department of Revenue determined that the companies were not eligible for the requested relief under the applicable statute. The case was appealed to the Administrative Law Court which held that the two

companies constituted one "person" as defined by the statute and thus qualified for the sales tax relief. The South Carolina Department of Revenue appealed the decision to the Circuit Court. After hearing and reviewing the case, I affirmed the decision of the Administrative Law Court. The South Carolina Department of Revenue ultimately appealed the case to the South Carolina Supreme Court, which reversed my ruling and held that the two companies did not constitute one "person" within the meaning of the statute providing for refunds of sales taxes.

For Plaintiff

Milton Kimpson
South Carolina Department of Revenue
P.O. Box 125
Columbia, SC 29214
Phone: (803) 898-5130

For Defendant

John D. Hawkins
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
Phone: (864) 574-8801

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I have not issued any unpublished opinions.

- h. Provide 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, provide copies of the opinions.

The Circuit Courts of South Carolina are courts of general jurisdiction. As a Circuit Court Judge, I have presided over numerous civil and criminal matters involving various constitutional issues. In my capacity as Chief Administrative Judge for General Sessions (criminal court) for the Fifth Judicial Circuit, I handle trials, guilty pleas, bond settings, pre-trial motions, and other matters in which I am confronted with constitutional issues on a daily basis, mostly involving the Fourth, Fifth, Sixth and Eighth Amendments of the United States Constitution. However, I often only make findings of fact and conclusions of law with respect to these issues orally on the record or by way of short order, and thus, have very few formal opinions with citations. In civil trials or motions hearings, I also review constitutional issues unique to civil proceedings.

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have never sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The State of South Carolina does not employ an automatic recusal system. Recusal is determined on a case-by-case basis. Judges are guided by the Judicial Canons and the South Carolina Rules of Professional Conduct.

I believe it is appropriate to recuse myself in any matter in which I have personal knowledge of the facts of the case, a personal or close relationship with the litigants, attorneys, or the parties or I believe there may be an appearance of impropriety or lack of impartiality. I make my determination on the factual situation before me at the time. Prior to or at the call of a case, I inform the parties of any potential conflicts or circumstances of which I believe the parties should be aware so that they may make the appropriate motions and decisions regarding my involvement in the case. For example, in *Nationwide Insurance Company v. Marie Assa'ad-Faltas, M.D., M.P.H. and Randall Gregory Drye, M.D.* (Civil Action No.: 2007-CP-40-5748), I informed the parties that several years ago, I represented the University of South Carolina in an action filed against it by Defendant Faltas. Despite this information, the parties stated their desire that I not recuse myself.

I do not recall any situations in which a litigant requested that I recuse myself because of an asserted conflict of interest where I failed to grant such a request.

However, I have found one occasion to recuse myself *sua sponte* from a case to avoid the appearance of impropriety. After ruling against Defendants on a motion for a temporary injunction in the case of *Henry McMaster, et al. v. Capital Consortium Group, L.L.C. et al.* (Civil Action No.: 2007-CP-40-3116), the individual named Defendants hired new legal counsel. Despite having legal representation, the individual Defendants acting *pro se* filed a motion for reconsideration of the order granting the temporary injunction and additionally filed an action listing myself and other government officials as defendants. As a result of Defendants' actions, I found it necessary to recuse myself, *sua sponte*, in the interest of justice to all parties and to avoid the appearance of impropriety or lack of impartiality.

15. Public Office, Political Activities and Affiliations:

- a. List chronologically any public offices you have held, 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 unsuccessful nominations for appointed office.

In 1999, Mayor Robert Coble (Columbia, South Carolina) appointed me to the Board of Directors of the Midlands Authority for Conventions, Sports & Tourism. I served on the Board until 2006, and served as Secretary of the Board from 2003 to 2006.

In 2000, South Carolina Governor James H. Hodges appointed me Deputy Director, Division of Labor of the South Carolina Department of Labor, Licensing and Regulation. I served until 2002.

In 2002, Governor Hodges appointed me to the South Carolina Workers' Compensation Commission, where I served as a Commissioner until 2006.

I have not had any unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never had membership in or held an office in a political party or election committee.

16. Legal Career: Answer each part separately.

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

- i. 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 judicial clerk.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law as a solo practitioner.

- iii. 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.

South Carolina Judicial Department
1015 Sumter Street
Columbia, SC 29201
Circuit Court Judge, 2006-present

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201
Commissioner, 2002-2006

South Carolina Department of Labor, Licensing and Regulation
110 Centerview Drive
Columbia, SC 29210
Deputy Director, Division of Labor, 2000-2002

Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Summer Associate, 1991; Associate Attorney, 1992-1999; Partner, 2000

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

During my practice at Nexsen Pruet, LLC, my primary practice areas included general litigation, employment and labor law, and domestic relations.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

At Nexsen Pruet, LLC, my typical clients included individuals, governmental agencies, and corporations. During my later years in the law firm, I specialized in employment and labor law.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

I practiced primarily in litigation. I appeared in court more often than occasionally, but less than frequently.

- i. Indicate the percentage of your practice in:

1. federal courts:	50%
2. state courts of record:	25%
3. other courts:	5%
4. administrative agencies:	20%

- ii. Indicate the percentage of your practice in:

1. civil proceedings:	100%
2. criminal proceedings:	0%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During my years as an associate attorney with Nexsen Pruet, LLC, I handled most of my cases with partners in the firm. I did, however, handle several matters as sole or chief counsel. I estimate that I participated in approximately twenty-five trials.

- i. What percentage of these trials were:

1. jury;	85%
2. non-jury;	15%

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

I have never practiced before the Supreme Court of the United States.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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) *Barbara Jean Stanley, as Personal Representative for the Estate of James W. Blume v. Bamberg County (Civil Action No.: 1997-CP-05-19) (2nd Judicial Circuit, Bamberg County); 1997; The Honorable William P. Keesley, Circuit Court Judge*

Summary and Disposition

This case arose out of the suicide of James W. Blume, a convicted felon, while he was incarcerated at the Bamberg County Detention Center. Plaintiff alleged causes of action for negligence, wrongful death, and conscious pain and suffering. Decedent was placed on suicide watch as a precautionary measure because, at the time of his booking, he was intoxicated, attempted to escape, complained that he could not breathe, requested nasal spray, and later slumped to the floor. Although Decedent was checked on a regular, frequent basis, he committed suicide in his cell using his underwear as a noose.

My co-counsel and I represented Defendant. During the course of the litigation, I assisted in all aspects of the trial of the case. I assumed responsibility for the direct examination of the most crucial witness, the jail officer who last checked Decedent before his death while he was being monitored on suicide watch. The Circuit Court granted Defendant a mistrial on the basis of a hung jury (10-2), and the case eventually settled.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Wayne Floyd, opposing counsel
1611 Augusta Road
West Columbia, SC 29169
(803) 739-1824

- 2) *Woods v. Woods (Civil Action No.: 1993-CC-40-0003) (Family Court, 5th Judicial Circuit, Richland County)*; 1993; The Honorable William Byars (retired)

Summary and Disposition

My client, Ms. Woods, left her husband, Mr. Woods, while living in North Carolina and took their two children to California. Mr. Woods filed an affidavit with a North Carolina court in which he misrepresented to the court that he and the children resided in North Carolina, despite having knowledge that Ms. Woods and their children in common were living in California. Based on the fraudulent affidavit, Mr. Woods obtained an *ex parte* order granting him custody of the children. He then presented this order to police in California who gave him custody of the children, and he returned to South Carolina. Ms. Woods sought to regain custody of her children from her ex-husband and obtained an *ex parte* order from California granting her temporary custody of the children.

As attorney of record in this court-appointed case, I had primary responsibility over the case, requiring me to research and draft briefs on significant legal issues. I argued the case before the Family Court requesting that the Court give full faith and credit to Ms. Wood's California order granting her temporary custody. As a result, Ms. Woods regained custody of her children, and the Court transferred the case to the California court system pursuant to the Uniform Child Custody Jurisdiction Act. Ms. Woods was eventually awarded permanent custody of the children by the California court.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Robert C. Fitzsimmons, opposing counsel
1001 Beltline Boulevard
Columbia, SC 29205
(803) 738-0200

- 3) *White v. Chambliss, et. al* (Civil Action No. 1:93-3058-6) (United States District Court for the District of South Carolina, Aiken Division); 1993; The Honorable Charles E. Simon, Jr., United States District Court for the District of South Carolina, Aiken Division (deceased)

Summary and Disposition

Plaintiff filed an action against the South Carolina Department of Social Services ("DSS") and certain DSS social workers for the alleged wrongful death of her minor child while the child was in foster care. The minor child was admitted to the hospital with a broken arm. Hospital staff reported suspected child abuse. As a result, the minor child was placed in DSS custody and ultimately foster care. Approximately one month after being placed in foster care, the child died from blows to the head.

My co-counsel and I represented the DSS social worker who was involved in the placement of the minor child into foster care. I filed a motion for summary judgment asserting that the DSS case worker should be shielded from liability based on a qualified immunity defense. The District Court denied the motion for summary judgment. I assisted another lawyer in the firm with the appellate brief to the Court of Appeals for the Fourth Circuit, which reversed the District Court and granted summary judgment on the basis of the qualified immunity defense.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Sally Walker, opposing counsel
Sally Walker Law Office
110 Mallard Cove Road
Prosperity, SC 29127
(803) 364-3339

- 4) *Dooley v. UPS* (Civil Action No. 3:94-1848-OBC) (United States District Court for the District of South Carolina, Columbia Division); 1994; The Honorable Matthew J. Perry, United States District Court for the District of South Carolina, Columbia Division

Summary and Disposition

Plaintiff brought suit against UPS alleging a violation of the Americans with Disabilities Act ("ADA") based on Defendant's failure to reasonably accommodate Plaintiff because of his disability (back injury). My co-counsel and I represented UPS. I researched and authored the briefs in support of summary judgment. The District Court granted summary judgment in favor of UPS upon finding that Plaintiff had previously filed a claim with the South Carolina

Workers' Compensation Commission alleging that he could not work as a result of his back injury and was awarded permanent and total disability. Based on these findings, the Court further held that Plaintiff was judicially estopped from taking a contrary position in his ADA claim by contending that he could work and perform the essential functions of his job with UPS.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Leon Harmon, co-counsel
Nexsen Pruet, LLC
201 West McBee Avenue
Greenville, SC 29601
(864) 282-1183

Howard Hammer, opposing counsel
1634 Main Street
Columbia, SC 29201
(803) 799-8600

- 5) *Gibbs v. SCE&G, et al. (Civil Action No. 3:93-07700-0) (United States District Court for the District of South Carolina, Columbia, Division); 1993; The Honorable Matthew J. Perry, United States District Court for the District of South Carolina, Columbia Division*

Summary and Disposition

Plaintiff's riding privileges were suspended on SCE&G's Dial-A-Ride Transit system for persons with disabilities as a result of various complaints by drivers and passengers regarding his disruptive and offensive behavior. Plaintiff alleged causes of action for discrimination, retaliation and coercion under the Americans with Disabilities Act, a violation of 42 U.S.C. § 1983, state law claims for intentional and negligent infliction of emotional distress, negligent hiring and supervision, libel *per se*, and civil conspiracy.

My co-counsel and I represented Defendant. After extensive discovery and litigation of the case, I drafted and argued the briefs in support of summary judgment. The Court granted summary judgment in favor of Defendant on five of the nine causes of action. Subsequently, the case settled. This case presented several novel issues of law.

Susan P. McWilliams, co-counsel
 Nexsen Pruet, LLC
 1230 Main Street, Suite 700
 Columbia, SC 29201

Joe Underwood, opposing counsel
 Moses Koon & Brackett, PC
 1333 Main Street, Suite 650
 Columbia, SC 29201
 (803) 461-2300

Heyward McDonald (deceased), counsel for another Defendant

- 6) *Sea Pines Ass'n for the Protection of Wildlife, Inc., et. al. v. South Carolina Department of Natural Resources and Community Services Associates, Inc.*, affirmed by the South Carolina Supreme Court, 345 S.C. 594, 550 S.E.2d 287 (2001); 1998; The Honorable James M. Williams, Circuit Court (retired); The South Carolina Supreme Court – The Honorable Jean Hoefer Toal, The Honorable John Waller (retired), The Honorable James Moore (retired), The Honorable E.C. Burnett (retired), The Honorable Costa M. Pleicones

Summary and Disposition

Sea Pines Plantation had been legally designated as a wildlife sanctuary in Hilton Head, South Carolina. My co-counsel and I represented local and national animal rights groups and individual residents and homeowners of Sea Pines who ultimately sought a permanent injunction to restrain the South Carolina Department of Natural Resources ("SCDNR") from issuing permits for the lethal elimination of deer within Sea Pines and a declaratory judgment that SCDNR was not complying with the requisite statutes, rules and regulations relative to the issuance of permits in a wildlife sanctuary. I researched and authored the briefs and obtained an *ex parte* temporary restraining order enjoining SCDNR and the neighborhood association from obtaining permits for the killing of deer in Sea Pines. The request for temporary injunction was later denied, but I filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals and was granted an injunction enjoining SCDNR from issuing any further permits for killing deer in Sea Pines until the trial of the case. At the non-jury trial of the case, the judge denied the request for a permanent injunction. Shortly thereafter, SCDNR issued another permit. I filed another Petition for Writ of Supersedeas requesting an injunction with the Court of Appeals, which was granted. The case was heard eventually by the South Carolina Supreme Court, which affirmed the Circuit Court and denied the request for a permanent injunction.

Harold W. Jacobs, co-counsel (retired)
 Nexsen Pruet, LLC
 205 King Street
 Charleston, SC 29401
 (843) 720-1763

Ester Haymond, opposing counsel for SCDNR
 South Carolina Administrative Law Court
 1205 Pendleton Street, Suite 325
 Columbia, SC 29201
 (803) 734-3210

James A. Quinn, opposing counsel for SCDNR
 South Carolina Department of Natural Resources
 Rembert C. Dennis Building
 1000 Assembly Street
 Columbia, SC 29201
 (803) 734-4006

Roberts Vaux, opposing counsel for Community Services Associates, Inc.
 Gray B. Taylor
 Vaux & Marscher, P.A.
 16 William Pope Drive, #202
 Bluffton, SC 29910
 (843) 705-2888

- 7) *White, et. al. v. SC State Budget and Control Board, et. al., Op. No. 24711, filed November 10, 1997, South Carolina Supreme Court; 1992; The Honorable L. Henry McKellar, Circuit Court (retired); The South Carolina Supreme Court - The Honorable John Waller (retired), The Honorable Ernest A. Finney, Jr. (retired), The Honorable Jean Hoefer Toal, The Honorable James Moore (retired), The Honorable E.C. Burnett (retired)*

Summary and Disposition

Plaintiffs were attorneys who asserted causes of actions against Defendants for civil conspiracy and defamation *per se*. Plaintiffs alleged that Defendants, a mayor and city manager, conspired against them and defamed them by publicly accusing them of charging excessive fees in the settlement of a case during a radio broadcast interview. My co-counsel and I represented the mayor and city manager. I researched and authored the briefs in support of summary judgment, which was granted by the Circuit Court. I also researched and authored the briefs and argued the appeal in front of the South Carolina Supreme Court, which affirmed in part, reversed in part and remanded the case to the trial Court.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Lex A. Rogerson, Jr., opposing counsel
P.O. Box 365
Lexington, SC 29071
(803) 359-5520

William L. Pope, opposing counsel for Columbia Bible College Broadcasting Co.
Pope & Rogers
930 Hampton Hill Road
Columbia, SC 29209
(803) 254-0700

- 8) *Harris and Prasky v. L&L Wings, Inc.*, affirmed by the Court of Appeals for the Fourth Circuit, 132 F.3d 978 (4th Cir. 1997); 1996; The Honorable Cameron M. Currie, United States District Court, District of South Carolina, Florence Division; Court of Appeals – The Honorable J. Harvie Wilkinson, III, Circuit Judge

Summary and Disposition

Plaintiffs alleged causes of action for sexual harassment, under both *quid pro quo* and hostile environment theories, retaliatory discharge, and pay discrimination pursuant to Title VII of the Civil Rights Act and the Equal Pay Act. My co-counsel and I represented Defendants. I researched and authored the briefs in support of summary judgment. The District Court granted summary judgment as to the Title VII sex discrimination disparate pay claim. I prepared for and participated in all aspects of the trial. I argued the motions for directed verdict, and the District Court ordered a directed verdict as to the equal pay cause of action and one Plaintiff's retaliation claim. The jury returned a verdict in favor of Plaintiffs on the other retaliation claim and the sexual harassment claims. We appealed, and I assisted in writing the briefs for the Fourth Circuit Court of Appeals, which affirmed the jury verdict.

Victoria Eslinger, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Henrietta Golding, opposing counsel
 McNair Law Firm, PA
 Myrtle Beach, SC 29578
 Phone: 843-444-1107

- 9) *Berry, Dunbar, O'Connor & Jordan v. James O. Bakker and Tammy Faye Bakker Messner, et al. (3:98-CV-01202)*; 1998; The Honorable Dennis Shedd, United States District Court, District of Columbia

Summary and Disposition

Plaintiffs sought a declaratory judgment under 28 U.S.C. § 2201 as to the ownership interests in an escrow fund maintained by Plaintiff and an order in the nature of interpleader, under 28 U.S.C. §§ 2361 and 2410, to identify and order the disbursement of the interest owned or claimed by the United States in the escrow fund. Defendants Bakker and Messner entered into an agreement with the United States relative to the settlement of income tax obligations. The agreement addressed the intellectual property rights of Defendant Bakker, payment of funds into an escrow fund managed by Plaintiff, and disbursement of a certain percentage of the funds to the Internal Revenue Service, Defendants Bakker and Messner or their assignees, and their attorneys for representation in a criminal trial.

I served as local counsel for James O. Bakker and Tammy Faye Bakker Messner in a declaratory judgment action seeking to declare the rights of Plaintiff to any proceeds from any literary or other intellectual property. I reviewed and assisted with the preparation of all documents filed with the court. The case eventually settled.

V. Lamar Gudger, III, co-counsel
 P.O. Box 336
 Asheville, NC 28801
 Phone: (828) 252-2227

William Witherspoon, opposing counsel
 United States Attorney's Office
 1441 Main Street, Suite 500
 Columbia, SC 29201
 Phone: (803) 929-3026

- 10) *Hatton v. South Carolina State University*; 1997; The case was never set before a judge because it settled.

Summary and Disposition

My co-counsel and I represented Defendant South Carolina State University and South Carolina State University Board of Trustees against a former president of the University. The president sued the University claiming that she was

wrongfully terminated in breach of her contract. I attended several meetings and provided legal advice to the Board and assisted with the preparation of many documents involved in the case. Given the nature of the proceedings, this case attracted significant media attention. The case was eventually settled.

Susan P. McWilliams, co-counsel
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900

Herbert Louthian, Jr., opposing counsel
Louthian Law Firm, PA
P.O. Box 1299
Columbia, SC 29202
(803) 256-4274

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I do not recall any significant legal activities in which I have been involved that did not result in litigation or did not progress to trial.

I have not performed any lobbying activities on behalf of any client or organization.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught courses at an institution.

20. **Deferred Income/ Future Benefits:** List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Other than my retirement and personal brokerage accounts, I have not engaged in any deferred income arrangements.

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

I do not have any plans or commitments to pursue outside employment.

22. **Sources of Income:** 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, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

None.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would refer to the Judicial Canons and Code of Professional Responsibility to resolve any potential conflict of interest. I would further inquire of the parties before me about any potential issues or areas of concern. I would also recuse myself *sua sponte* in any matters that present the appearance of impropriety or lack of impartiality.

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

I have volunteered countless hours of my time and talent over the years to serve the disadvantaged in several capacities, including pro bono representation, free legal clinics,

servicing on boards with a mission to serve the underprivileged and socially or economically disadvantaged, assisting with or preparing legal documents for persons, speaking at seminars in poor and rural communities on helpful legal topics, mentoring, encouraging diversity initiatives, preparing written materials to make the legal system more understandable, and volunteering at charity functions.

Some of the specific projects in which I have participated include: 1) assisted in the production of a Video Documentary, entitled *Equal Justice: The Law, Lawyers and Civil Rights*, featuring lawyers and judges who helped lead the South Carolina civil rights movement. These videos were distributed throughout elementary and secondary schools and aired on South Carolina Educational TV; 2) organized a "Hoop it Up: Pack it In" basketball benefit to raise monies and donations for backpacks and school supplies for underprivileged children in the poorest school districts in South Carolina.; 3) volunteered with The Children's Garden, a daycare center for the children of homeless and economically disadvantaged parents in transition; 4) organized a "Tender Hearts" wine tasting and auction to support children's charities; and 5) organized a "Does A Difference Make A Difference?" Diversity Continuing Legal Education seminar and ethnic-centered reception. I am currently in the process of assisting the South Carolina Supreme Court's Access to Justice Commission with publications and the production of videos to assist self-represented litigants with assessing and understanding the court system.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

After the election of President Barak Obama, I became aware of potential judicial openings in the United States District Court for the District of South Carolina. Various persons inquired about my desire to seek a position as a United States District Court Judge so I began to research the process for attaining this position. Eventually, I spoke with staff members in Representative James E. Clyburn's office about my interest in the position; however, I never had a formal interview nor participated in any selection commission process. On or about June 12, 2009, I received a joint letter from Congressman Clyburn and Congressman John Spratt informing me that they had nominated me for the position of United States District Court Judge. I contacted their offices to thank them for their confidence in me and to discuss the process. On July 24, 2009, I was informed by staff from the Department of Justice that I was selected to participate in a pre-nomination

process and was requested to begin the paperwork. I have had subsequent conversations with staff from the Department of Justice regarding that paperwork and the nomination process. On September 23, 2009, I interviewed with various legal counsel of the White House and the Department of Justice.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AO 10
Rev. 1/2007

**FINANCIAL DISCLOSURE REPORT
NOMINATION FILING**

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) Childs, Julianna M	2. Court or Organization U.S. District Court, SC	3. Date of Report 12/21/2009
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Active	5a. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 12/22/2009 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final 5b. <input type="checkbox"/> Amended Report	6. Reporting Period 01/01/2008 to 11/30/2009
7. Chambers or Office Address Richland County Judicial Ctr. 1701 Main Street Columbia, SC 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 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.	President	Angus Properties, LLC
2.		
3.		
4.		
5.		

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

NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT
Page 2 of 8

Name of Person Reporting Childs, Julianna M	Date of Report 12/21/2009
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III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of instructions.)

A. Filer's Non-Investment Income

NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2009	South Carolina Judicial Department - salary	\$ 130,312
2. 2008	South Carolina Judicial Department - salary	\$ 129,022
3. 2007	South Carolina Judicial Department - salary	\$ 125,265
4.		
5.		

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, complete this section.
(Dollar amount not required except for honoraria.)

NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE
1. 2009	Tuomey Regional Medical Center and Sumter Medical Consultants - salary
2. 2008	Tuomey Regional Medical Center and Sumter Medical Consultants - salary
3. 2007	Tuomey Regional Medical Center and Sumter Medical Consultants - salary
4.	
5.	

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

NONE (No reportable reimbursements.)

SOURCE	DESCRIPTION
1. Exempt	
2.	
3.	
4.	
5.	

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

NONE *(No reportable gifts.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1.	Exempt		
2.			
3.			
4.			
5.			

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

NONE *(No reportable liabilities.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.	First Palmetto Savings Bank	Mortgage on Rental Property #1	K
2.	Wachovia Bank	Mortgage on Rental Property #2	M
3.	Bank of America	Credit Card	J
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 8

Name of Person Reporting Childs, Julianna M	Date of Report 12/21/2009
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VII. INVESTMENTS and TRUSTS - Income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-69 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "XX" after each asset except from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (I-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, redemption)	(2) Date Month - Day	(3) Value Code 2 (I-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. Rental Property #1, Columbia, SC (2003, \$105,000)	D	Rent	M	Q	Exempt				
2. Rental Property #2, Fayetteville, GA (Angus Properties, LLC)	E	Rent	M	Q					
3. -(2006, \$180,000)									
4. Mass Mutual - Universal Life and Permanent Whole Life	A	Dividend	O	T					
5. -(Risk-based, No control)									
6. Raintree Vacations Time Share (1995, \$9,000)		None	J	R					
7. Wachovia Bank Accounts	A	Interest	J	T					
8. Palmetto Health Alliance (Risk-based, No Control) 401(k)	A	Dividend	J	T					
9. Palmetto Health Alliance	A	Dividend	J	T					
10. -Valic Fixed Fund									
11. -American Funds Great Fund									
12. JP Morgan - Equity Fund									
13. Carolinas Telco Federal Credit Union Accounts	A	Interest	K	T					
14. John Hancock Retirement (Risk-based, No Control)	E	Int./Div.	M	T					
15. U.S. Savings Bonds	A	Interest	J	T					
16. Georgia Higher Education Savings Plan	A	Int./Div.	J	T					
17. SC 401(K) Profit Sharing Plan (Risk-based,	C	Int./Div.	L	T					

1. Income Code:	A - \$1,000 or less	B - \$1,001 - \$2,500	C - \$2,501 - \$5,000	D - \$5,001 - \$15,000	E - \$15,001 - \$50,000
(See Columns B1 and D4)	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 Code:	J - \$15,000 or less	K - \$15,001 - \$50,000	L - \$50,001 - \$100,000	M - \$100,001 - \$250,000	
(See Columns C1 and D3)	N - \$250,001 - \$500,000	O - \$500,001 - \$1,000,000	P1 - \$1,000,001 - \$5,000,000	P2 - \$5,000,001 - \$25,000,000	
3. Value Method Code:	P3 - \$25,000,001 - \$50,000,000	Q - Appraisal	R - Cost (Real Estate Only)	S - Assessment	T - Cash Market
(See Column C2)	U - Book Value	V - Other	W - Fairmarket		

FINANCIAL DISCLOSURE REPORT
Page 5 of 8

Name of Person Reporting Childs, Julianna M	Date of Report 12/21/2009
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VII. INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period																						
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (F-F)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, redemption)	(2) Date Month - Day	(3) Value Code 2 (F-F)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)																		
No Control)																											
18. SC 457 Deferred Compensation Plan (Risk-based, No Control)	E	Dividend	L	T																							
19. SC Retirement Systems (Risk-based, No Control)	D	Interest	L	T																							
20. Brokerage Account #1																											
21. A - 529 College Savings Plan (Risk-based, No Control)	A	Dividend	J	T																							
22. B - IRA	B	Dividend	K	T																							
23. -Thornburg Intl Value																											
24. -Keely Small Cap Value																											
25. -Gabelli EQ INC AAA																											
26. -Pimco Real Return A																											
27. -Pimco Real Return Fund A																											
28. -Pimco Low Duration																											
29. -Columbia Marisco Growth A																											
30. -TCW Dividend Focus																											
31. -Virtus Multi-Sector																											
32. RS Value A																											
33. C - Investments		Dividend	M	T																							
<table border="0"> <tr> <td>1. Income Gain Codes (See Columns B1 and D4)</td> <td>A = \$1,000 or less F = \$50,001 - \$100,000</td> <td>B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000</td> <td>C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000</td> <td>D = \$5,001 - \$15,000 I = More than \$5,000,000</td> <td>E = \$15,001 - \$50,000 J = More than \$50,000</td> </tr> <tr> <td>2. Value Codes (See Columns C1 and D3)</td> <td>J = \$15,000 or less N = \$250,001 - \$500,000</td> <td>K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000</td> <td>L = \$50,001 - \$100,000 P = \$1,000,001 - \$5,000,000</td> <td>M = \$100,001 - \$250,000 R = More than \$50,000,000</td> <td>Q = Supplement T = Cash Market</td> </tr> <tr> <td>3. Value Method Codes (See Column C2)</td> <td>R = Cost (Real Estate Only) U = Book Value</td> <td>S = Assessment V = Other</td> <td>W = Estimated</td> <td></td> <td></td> </tr> </table>										1. Income Gain Codes (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000	D = \$5,001 - \$15,000 I = More than \$5,000,000	E = \$15,001 - \$50,000 J = More than \$50,000	2. Value Codes (See Columns C1 and D3)	J = \$15,000 or less N = \$250,001 - \$500,000	K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000	L = \$50,001 - \$100,000 P = \$1,000,001 - \$5,000,000	M = \$100,001 - \$250,000 R = More than \$50,000,000	Q = Supplement T = Cash Market	3. Value Method Codes (See Column C2)	R = Cost (Real Estate Only) U = Book Value	S = Assessment V = Other	W = Estimated		
1. Income Gain Codes (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000	D = \$5,001 - \$15,000 I = More than \$5,000,000	E = \$15,001 - \$50,000 J = More than \$50,000																						
2. Value Codes (See Columns C1 and D3)	J = \$15,000 or less N = \$250,001 - \$500,000	K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000	L = \$50,001 - \$100,000 P = \$1,000,001 - \$5,000,000	M = \$100,001 - \$250,000 R = More than \$50,000,000	Q = Supplement T = Cash Market																						
3. Value Method Codes (See Column C2)	R = Cost (Real Estate Only) U = Book Value	S = Assessment V = Other	W = Estimated																								

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting Childs, Julianna M	Date of Report 12/21/2009
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VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "XX" after each asset except from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, 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)
34. -American Europacific GRWF									
35. -American GR FD of America F									
36. -JP Morgan Mid Cap Value A									
37. -Wells Fargo SHT TM Muni BD									
38. -Delaware TX - FR USA Intermed A									
39. -DWS Drenan Small Cap Val A									
40. -Allianz NFJ Dividend Value A									
41. RS Value A									
42. -TCW Dividend Focus									
43. -Virtus Multi-Sector									
44. DWS RREEF Real SEC A									

1. Income Code: (See Column B) and D-G	A = \$1,000 or less F = \$50,001 - \$100,000 I = \$15,000 or less	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000 L = \$50,001 - \$100,000	D = \$5,001 - \$15,000 J = More than \$5,000,000 M = \$100,001 - \$250,000	E = \$15,001 - \$50,000 N = \$25,001 - \$50,000 O = \$500,001 - \$1,000,000	P = \$1,000,001 - \$5,000,000 R = Cost (Real Estate Only) S = Assessment W = Estimated
2. Value Code: (See Column C) and D-G	N = \$25,001 - \$50,000 P = \$25,000,001 - \$50,000,000 Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000	P2 = \$5,000,001 - \$25,000,000 T = Cash Market		

FINANCIAL DISCLOSURE REPORT

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Name of Person Reporting	Date of Report
Childs, Julianna M	12/21/2009

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)***FINANCIAL DISCLOSURE REPORT**

Page 8 of 8

Name of Person Reporting	Date of Report
Childs, Julianna M	12/21/2009

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

J. Michelle Childs Date *12-21-09*

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
 Administrative Office of the United States Courts
 Suite 2-301
 One Columbus Circle, N.E.
 Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

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

ASSETS			LIABILITIES		
Cash on hand and in banks		40 000	Notes payable to banks-secured		
U.S. Government securities-add schedule		7 500	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	2	000
Due from relatives and friends		48 500	Unpaid income tax		
Due from others			Other unpaid income and interest		
Doubtful			Real estate mortgages payable-add schedule	325	500
Real estate owned-add schedule		699 000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property		75 000			
Cash value-life insurance		26 200			
Other assets itemize:					
See attached		526 700			
			Total liabilities	327	500
			Net Worth	1 095	400
Total Assets	1	422 900	Total liabilities and net worth	1 422	900
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor			Are any assets pledged? (Add schedule)	NO	
On leases or contracts			Are you a defendant in any suits or legal actions?	NO	
Legal Claims			Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax					
Other special debt					

FINANCIAL STATEMENT
NET WORTH SCHEDULES

<u>U.S. Government Securities</u>	
Series EE Bonds	\$ 7,500

<u>Listed Securities</u>	
	\$ 0

	\$ 0
Total Listed Securities	

<u>Real Estate Owned</u>	
Personal residence	\$ 325,000
Rental Condominium	150,000
Vacation time share	9,000
Commercial Property 1	215,000
Total Real Estate Owned	\$ 699,000

<u>Real Estate Mortgages Payable</u>	
Personal residence	\$ 138,000
Rental Condominium	28,500
Commercial Property 1	159,000
Total Real Estate Mortgages Payable	\$ 325,500

<u>Other Assets</u>	
Georgia Higher Education Savings Plan	\$ 1,900
John Hancock Retirement Account	108,700
Morgan Stanley - 529 College Savings Plan	7,300
Morgan Stanley - IRA Standard/Rollover	50,700
Morgan Stanley - Investment Account	123,600
SC 401(k) Profit Sharing Plan	75,000
457 Deferred Compensation	60,700
SC State Retirement Systems	92,100
Palmetto Health Retirement Plan - 401(K)	2,900
Palmetto Health Retirement Plain - 403(b)	3,800
Total Other Assets	\$ 526,700

AFFIDAVIT

I, Julianna Michelle Childs, do swear
that the information provided in this statement is, to the best
of my knowledge, true and accurate.

December 21, 2009
(DATE)

J. Michelle Childs
(NAME)

Jo Anne M. Nichols
(NOTARY)

STATEMENT OF HON. CATHERINE C. EAGLES, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Judge EAGLES. Yes. Thank you, Madam Chair and Senator Sessions. I also would like to thank the President for the honor.

I am privileged to introduce my family that I have here with me. My husband—and I'd ask them to stand. My husband Bill is here, my sons, John Ivey and Thad are here; my mother, Dorothy Caldwell is here. I'm also joined by some friends who live in the DC area, college friends who are here, Mary Kingsley and Alice Smith and some friends from the time I spent in DC when I was in law school, Susan Kaplan and Paul Colarulli. They are all here with me. My brothers and sisters are scattered around the country, and my nieces and nephews, and they are here in spirit.

Thank you.

Senator FEINSTEIN. Thank you very much.

Since three of you are already judges, I'd like to ask one question and go right down the line and have you answer it.

How can you assure us that in any case that comes before you you will, or that you have been, able to disregard your own personal views and allegiances and decide the case only on the law and the facts? Judge Mueller.

Judge MUELLER. Madam Chairman, thank you for that question. I believe that's the first principle of judging. In fact, I think putting on the black robe symbolizes that exercise of putting aside personal views and coming to the bench, coming to the case with the intent of applying only the law as it is given in the Constitution by the Supreme Court—by the Circuit Court in my case—applying controlling precedent, and doing a judge's best to reach the correct decision under the law.

Senator FEINSTEIN. Thank you.

Judge—excuse me. Mr. Gergel.

Mr. GERGEL. I don't mind that reference. [Laughter.]

Madam Chairman, the paramount issue in the adjudicative process is the rule of law. There is nothing more fundamental. I pledge to you, if I'm fortunate enough to be confirmed, that that will always be my first and central concern, the paramount nature of the rule of law.

Senator FEINSTEIN. Thank you.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Catherine Caldwell Eagles (formerly Catherine Diane Caldwell)

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

United States District Judge for the Middle District of North Carolina

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

Superior Court Judges Chambers
201 South Eugene Street, 4th Floor
Greensboro, North Carolina 27402

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

1958; Memphis, Tennessee

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1979-1982, National Law Center at George Washington University; J.D., 1982
1975-1979, Rhodes College (f/k/a Southwestern at Memphis); B.A., 1979

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

1993 – Present
Superior Court of North Carolina
201 South Eugene Street
Greensboro, North Carolina 27402
Senior Resident Superior Court Judge (2006 – Present)
Resident Superior Court Judge (1993 – 2005)

1984 – 1993

Smith Helms Mullis & Moore (now known as Smith Moore Leatherwood)
300 North Greene Street
Greensboro, North Carolina 27401
Partner (1990 – 1993)
Associate (1984 – 1989)

1982 – 1984

United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton United States Courthouse (current address)
111 South 10th Street
St. Louis, Missouri 63102
Law Clerk to Hon. J. Smith Henley (Harrison, Arkansas) (1983 – 1984)
Staff Law Clerk to Court of Appeals (St. Louis, Missouri) (1982 – 1983)

1981 – 1982

Leva Hawes Symington Martin & Oppenheimer (since dissolved)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Law Clerk (part-time)

1981

Morgan Associates (since dissolved)
1899 L Street, N.W.
Washington, D.C. 20036
Summer Law Clerk

1980

Consumer Product Safety Commission
1111 18th Street, N.W.
Washington, D.C. 20036
FOIA Law Clerk (full-time in summer, part-time during academic year)

1979

Courier-Index and Twin City Tribune
P.O. Box 569
Marianna, Arkansas 72360
Summer Reporter

Other Affiliations

2009 – Present

The Club at Green Valley
1909 Lendew Street
Greensboro, North Carolina 27408
Substitute Health & Fitness Instructor (part-time)

2004 – Present

University of North Carolina School of Government Foundation
 Knapp-Sanders Building
 Campus Box 3330
 Chapel Hill, North Carolina 27599
 Vice Chair, Board of Directors (2006 – Present) (uncompensated)
 Director (2004 – Present) (uncompensated)

2007 – 2009

North Carolina Conference of Superior Court Judges
 c/o Hon. Allen Cobb, President
 316 Princess Street, Room 346
 Wilmington, North Carolina 28401
 Director (uncompensated)

2000 – 2006

New Garden Friends School
 1128 New Garden Road
 Greensboro, North Carolina 27410
 Trustee (uncompensated)

2004 – 2005

Our Children's Place
 P.O. Box 1086
 Chapel Hill, North Carolina 27514
 Director (uncompensated)

1997 – 2004

Summit House
 1589 Skeet Club Road
 High Point, North Carolina 27265
 Vice Chair, Board of Governors (2000 – 2004) (uncompensated)
 Governor (1997 – 2004) (uncompensated)

1995 – 1998

North Carolina Yearly Meeting (Religious Society of Friends)
 4811 Hilltop Road
 Greensboro, North Carolina 27407
 Trustee (uncompensated)

1990 – 1991 (approximate)

Women's Professional Forum
 P.O. Box 38594
 Greensboro, North Carolina 27358
 Director (uncompensated)

1988 – 1992
Greensboro YWCA
One YWCA Place
Greensboro, North Carolina 27401
Director (uncompensated)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for Selective Service as I was not eligible to do so.

8. **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.

North Carolina Association of Trial Lawyers, Trial Judge of the Year (2004)
North Carolina Association of Women Attorneys, Gwyneth P. Davis Public Service Award (2000)
George Washington Law Review (1980 – 1982)
Order of the Coif (1982)
Phi Beta Kappa (1979)
Who's Who in Colleges and Universities (1979)

9. **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
Tort and Insurance Practice Section
Associate Editor, Tort and Insurance Journal (1992 – 1994)
American Judicature Society
American Judges Association
Defense Research Institute
Greensboro Bar Association
Chair, Dispute Resolution Committee & Member, Executive Committee (1992 – 1993)
Guilford Inn of Court
Joseph Branch Inn of Court
North Carolina Association of Defense Attorneys
National Association of Women Judges
North Carolina Association of Women Attorneys
Chair of Judicial Division (2000 – 2001)
North Carolina Bar Association
Board of Governors and Vice-President (2001 – 2002)

- Task Force on Women in the Profession (1999 – 2001)
- Nominating Committee (1998 – 1999)
- Litigation Section Council (1994 – 1997)
- Litigation Section Nominating Committee (1998)
- Dispute Resolution Section Council (1993 – 1995)
- Dispute Resolution Committee (1991 – 1993)
- North Carolina Conference of Superior Court Judges
 - Chair, Education Committee (2005 – Present)
 - Education Committee (2000 – Present)
 - Executive Committee and Board of Directors (2007-2009)
 - Chair, Public Relations Committee (2000 – 2005)
- North Carolina Dispute Resolution Commission
 - Vice-Chair and Chair of Rules Committee (1997 – 2001)
- North Carolina Judicial College Advisory Board (2005 – Present)
- North Carolina Judicial Council
 - Dispute Resolution Committee (2000 – 2005)
- North Carolina Legislative Criminal Procedure Study Commission (1997)
- Supreme Court of North Carolina
 - Chief Justice’s Commission on Professionalism (2000 – 2003)
 - Chief Justice’s Task Force on Dispute Resolution (2000)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Arkansas, 1983
 Missouri, 1982
 North Carolina, 1984

There have been no lapses in my Arkansas and North Carolina memberships. I allowed my membership in the Missouri bar to lapse in 2002 because I was not practicing law in Missouri and had no other connections to the state.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Fourth Circuit, 1985
 United States Court of Appeals for the Eighth Circuit, 1982
 United States District Court for the Eastern District of North Carolina, 1985
 United States District Court for the Middle District of North Carolina, 1984
 United States District Court for the Western District of North Carolina, 1986

There have been no lapses in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

American Association of University Women (1997 – Present)

By-Laws Chair, Greensboro Branch (1997 – Present)

Greensboro YWCA (approximately 1984 – 1996)

Board of Directors (1988 – 1992)

Volunteer (1985 – 1993)

League of Women Voters of the Piedmont Triad (1994 – Present)

New Garden Friends School

Board of Directors (2000 – 2006)

Our Children's Place

Board of Directors (2004 – 2005)

Summit House

Vice Chair (2000 – 2004)

Board of Governors (1997-2004)

University of North Carolina School of Government Foundation

Vice Chair (2006 – Present)

Board of Directors (2004 – Present)

Women's Professional Forum (1985 – 1993)

Education Committee Chair & Membership Chair

Yoga Alliance (2009 – Present)

- b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of the organizations listed now discriminates or has discriminated during the time I have been a member. To my knowledge, the Women's Professional Forum and my local branch of the American Association of University Women have only women members, but both permit membership by men. At least one of the organizations listed, the Greensboro YWCA, historically discriminated on the basis of race, but ceased to discriminate several decades before I first joined. In addition, I was a member of the Delta Delta Delta Sorority while in college, which limits its membership to college women. Although I occasionally receive

mailings from the organization, I have not considered myself a member since graduating from college.

12. **Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

NORTH CAROLINA EVIDENTIARY FOUNDATIONS (2d. ed. 2006) (Co-Author)

A Symposium on the 1993 Amendments to the Federal Rules of Civil Procedure, 29 Tort & Ins. L.J. 467 (1994) (I wrote a short introduction and edited the volume.)

North Carolina, in PRODUCTS LIABILITY DEFENSES: A STATE-BY-STATE COMPENDIUM NCI-NC15 (Davidson Ream, ed., 1992)

Case Note, *Administrative Law - Federal Trade Commission v. Standard Oil Co.*, 50 Geo. W. L. Rev. 349 (1982)

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

The Chief Justice's Task Force on Dispute Resolution prepared a report in 2000 suggesting a method of selecting members for the Dispute Resolution Commission. I do not have a copy of the report. The Task Force is no longer in existence and has no address.

In June 2005, I drafted and presented to the Superior Court Judges Conference a Resolution concerning proposed legislation on handling of exhibits in the courtroom.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I occasionally have been asked by North Carolina legislative committees to informally discuss proposed legislation, especially since I became Senior Resident Superior Court Judge in 2006. These comments have largely related to court

administration. I occasionally have written or e-mailed individual state legislators and county commissioners on my own initiative concerning various proposed legislation of interest to the court system, but I have not found copies in my files. I do not recall any communications about matters of legal interpretation.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

Remarks at Ceremony to Administer the Oath of Office to Judge Patrice Hinnant, Superior Court for Guilford County, Greensboro, NC (Nov. 6, 2009)

"Practical Tips for Trying Medical Negligence Cases," Superior Court Judges Conference, Chapel Hill, NC (Oct. 2009)

"Selected Evidence Issues in Medical Negligence Cases," Superior Court Judges Conference, Chapel Hill, NC (Oct. 2009)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Superior Court for Guilford County, Greensboro, NC (Oct. 2, 2009)

"Ex Parte Contacts," Guilford Inn of Court, Greensboro, NC (March 2009)

"Helpful Hints for the Occasional Visitor to Civil Superior Court," Greensboro Bar Association Seminar (Feb. 19, 2009)

Remarks at Ceremony to Administer the Oath of Office to New District Court Judges, Superior Court for Guilford County, Greensboro, NC (January 5, 2009)

"Making the Transition to the Superior Court Bench," New Judges School at the North Carolina Judicial College, Chapel Hill, NC (Jan. 2009 and earlier dates)

"Jury Management," New Judges School at the North Carolina Judicial College, Chapel Hill, NC (Jan. 2009)

"Resolving Scheduling Conflicts," School for New Senior Residents and Chief District Court Judges, North Carolina Judicial College, Chapel Hill, NC (2009 and earlier dates)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Greensboro, NC (Oct. 3, 2008)

"Evidence Update," Superior Court Judges Conference, Carolina Beach, NC (June 2008)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Greensboro, NC (Oct. 12, 2007)

"Preliminary Questions of Evidence: Rule 104," Superior Court Judges Conference, Asheville, NC (June 2007)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Greensboro, NC (Sept. 15, 2006)

Remarks Made at Dinner Honoring Hon. W. Douglas Albright upon his retirement, Greensboro, NC (Spring 2006)

"Perspective from the Bench," Greensboro Bar Association and CJCP Seminar on Professionalism, Greensboro, NC (no notes) (Apr. 20, 2006)

"Effective Strategies in the Courtroom," North Carolina Association of Defense Attorneys Seminar, Elon Law School, Greensboro, NC (2006 or 2007)

"Co-Defendants, Accomplices, and Co-Conspirators" Superior Court Judges Conference, Chapel Hill, NC (Fall 2005)

"Impeachment, Corroboration, Rehabilitation, and Opening the Door," Superior Court Judges Conference, Chapel Hill, NC (Nov. 2004)

"Professional Standards Viewed from the Bench," Speech recorded by Chief Justice's Commission on Professionalism for Video on Professionalism, Greensboro, NC (July 1, 2004)

"Collected Materials on Character Evidence: The Interplay between Rules of Evidence 404(a), 405, 607, 608, 609, and 611," Superior Court Judges Conference, Fayetteville, NC (Oct. 2003)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Greensboro, NC (Sept. 12, 2003)

"Mechanics of Running a Courtroom," NC Industrial Commission Professionalism Program organized by the Chief Justice's Commission on Professionalism, Raleigh, NC (no notes) (Aug. 14, 2003)

Speech to Women's Professional Forum, Greensboro, NC (Spring 2003)

"View From the Bench" (2003)

Remarks at Ceremony to Administer the Oath Admitting New Attorneys to Practice, Greensboro, NC (Sept. 12, 2002)

"Civility and Demeanor in Jury Selection and Jury Argument," presented with Margaret Burnham (no notes) (Feb. 8, 2002)

Challenges with Judicial Discipline of Lawyers, presentation to Chief Justice's Commission on Professionalism, NC (June 21, 2000)

"Responsibilities of the Trial Judge," North Carolina Bar Association Seminar, Panel discussion on with Judge Osteen, Greensboro, North Carolina (no notes) (June 18, 2001)

"Selected Cases on Discovery Issues" Superior Court Judges Conference, Asheville, NC (June 2001)

"Dealing With Difficult Lawyers," District Court Judges Conference, Atlantic Beach, NC (June 2001)

"Judicial Discipline of Attorneys," Superior Court Judges Conference, Winston-Salem, NC (Nov. 2000)

"Disciplining Lawyers," Superior Court Judges Conference, Pinehurst, NC (June 23, 2000)

"Trial Evidence," North Carolina Bar Association Seminar, Greensboro, NC (no notes) (Dec. 8, 2000)

- “Life After Impasse” and “How Ethics and Professionalism Play a Role in the Mediation Process,” North Carolina Bar Association Seminar, Cary, NC (no notes) (Sept. 22, 2000)
- “Leading Medical Evidentiary Issues,” Panel Discussion at North Carolina Bar Association Seminar, Greensboro, NC (no notes) (Mar. 26, 1999)
- “Products Liability Law in North Carolina: Overview and Synopsis of Issues Relevant to Construction and Insurance Disputes,” and Panel Discussion on “Other Types of Insurance,” North Carolina Bar Association Construction Law Section Seminar, Pinehurst, NC (Sept. 18, 1992)
- “Educating a Superior Court Judge on the Law and the Facts,” North Carolina Association of Trial Lawyers Products Liability Seminar, Raleigh, NC (no notes) (Jan. 12, 1996)
- “ADR and the Judicial System,” Leadership Greensboro, Greensboro, NC (no notes) (Mar. 14, 1995)
- “Serving the Legal Needs in Rural Areas,” (panel discussion) North Carolina Bar Association Pro Bono Conference, Raleigh, NC (no notes) (Nov. 17, 1994)
- Remarks on Sexual Harassment to the Greensboro Branch of the American Association of University Women, Greensboro, NC (no notes) (Oct. 1994)
- “ADR and ‘Informed Consent,’” Greensboro Bar Association Seminar, Greensboro, NC (no notes) (Feb. 7, 1994)
- Remarks to New Lawyers at “Bridge the Gap” program presented by the Greensboro Bar Association Young Lawyers, Greensboro, NC (no notes) (Nov. 12, 1993)
- Panel Discussion on “What Should North Carolina’s Rules of Professional Conduct Say?” North Carolina Bar Association Seminar, Durham, North Carolina (no notes) (Nov. 5, 1993)
- Speech for Fifth Grade Graduation, Claxton, Elementary School, Greensboro, North Carolina (Date not remembered)

I assembled this list from review of my paper and electronic files. In addition to the specific speeches I identified, I speak regularly to school groups and to civic organizations about topics such as our court system, sentencing and criminal law, and being a woman judge (this last topic primarily in the 1990s). I may have participated in other continuing legal education or bench-bar forums of similar types to the speeches I list above.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Doug Clark, “Earls May Be Perfect Judge for Obama,” NEWS & RECORD (Greensboro, NC), July 22, 2009, at A11.

“What I’m Reading,” NEWS & RECORD (Greensboro, NC), Oct. 4, 2009, at H5

“Judges Shouldn’t Need Guns,” NEWS & RECORD (Greensboro, NC), Mar. 19, 2007, at A8
 “Eagles to Replace Albright on Court,” NEWS & RECORD (Greensboro, NC), Dec. 24, 2005, at A1.
 Libby Lewis, “Mediation Background an Asset: Greensboro Lawyer Named to Judgeship,” NEWS & RECORD (Greensboro, NC), Apr. 2, 1993, at B1.

In addition, I recall a television interview about a decade ago concerning a shortage of jurors showing up in Guilford County; I do not remember the date or the interviewer. I have listed all interviews with the News & Record that I have been able to identify, but I have spoken with that publication’s reporters on other dates that I do not specifically recall about topics related to the courts.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed to a vacancy on the Superior Court bench by Governor James B. Hunt, Jr., in 1993. I was thereafter elected in 1994 and re-elected in 1996 and 2004. I became Senior Resident Superior Court Judge in 2006; this happens by seniority pursuant to statute. I preside over criminal and civil court including jury trials, sentence convicted offenders, and decide motions in the state’s highest court of general jurisdiction. As Senior Resident Judge, I am responsible for organization of court schedules and the civil Superior Court docket, appointment of magistrates, and numerous other statutory and traditional duties, in addition to court duties.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I estimate I have presided over at least 500 civil and criminal trials to verdict over the last sixteen years. I have taken thousands of guilty pleas and sentenced thousands of persons. I have heard hundreds of civil motions and scores of criminal motions.

- i. Of these, approximately what percent were:

jury trials:	98%
bench trials:	2%
civil proceedings:	40%
criminal proceedings:	60%

- b. Provide citations for all opinions you have written, including concurrences and dissents.

Under the general practices of our court, judges typically issue in writing only short orders that dispose of motions and cases. Occasionally, in complex cases assigned to me by the Chief Justice and in other civil and criminal cases where circumstances required, I have issued longer orders that set forth a reasoned legal basis for my decision. These orders are not reported, however, and I have not maintained a list of them. There is no mechanism in our court's information systems to generate such a list.

- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *State v. Sanders*, 94 CrS 13383 (Cabarrus County). The defendant was charged with first degree murder of his wife. This was the first capital murder trial over which I presided; the case was tried in the fall of 1995. The defendant was acquitted.

Prosecution: then District Attorney Mark Speas. I have been unable to locate current contact information. Defense: Larry E. Harris, 92 Union St. S., Concord, NC 28025, (704) 788-9001, and Rick Locklear, P.O. Box 56, Landis, NC 28088, (704) 857-6181. I do not have a copy of any orders I signed in this case.

2. *State v. Moses*, 96 CrS 19456-57 (Forsyth County), *aff'd*, 350 N.C. 741 (1999). The defendant was charged with two counts of first degree murder and tried capitally; I presided. At his trial in November 1997, the jury found him guilty and recommended two death sentences. Under North Carolina law, that recommendation is binding on the trial court, and I imposed the sentences.

On appeal, the defendant challenged my decisions to join the two murders for trial, to grant the state's motion to challenge a particular juror for cause, to admit evidence under N.C.R.Evid. 404(b), and in allowing the jury to consider each murder to support an aggravating factor for the imposition of the death penalty for the other murder. The Supreme Court of North Carolina affirmed in an opinion that since has been cited numerous times, primarily on the joinder issue.

Prosecution: Assistant District Attorneys Vince Rabil, 301 N. Main St. Suite 1100, Winston-Salem, NC 27101, (336) 725-1304, and David Spence, 300 Courthouse Square, Beaufort, NC 28516, (252) 838-8142. Defense: Clark Fischer, Randolph & Fischer, 200 Brook Town Ave. Suite 304, Winston-Salem, NC 27101, (336) 724-3513, and Pete Clary, 8 W. 3rd St. Suite 400, Winston-Salem, NC 27101, (336) 761-2510.

3. *State v. Rivera*, 96 CrS 19465-66 (Forsyth County), *rev'd* 350 N.C. 285 (1999). The defendant was charged with two counts of first degree murder and

tried capitally; I presided. At his first trial in October 1997, the jury found defendant guilty and recommended two death sentences. Under North Carolina law, that recommendation is binding on the trial court, and I imposed the sentences. The Supreme Court of North Carolina ruled I improperly excluded defense evidence concerning out-of-court statements by a non-testifying co-defendant and remanded for a new trial. I presided over the retrials in November 1999, at which the jury acquitted the defendant.

Prosecution (first trial): Assistant District Attorneys Rob Lang, now Assistant U.S. Attorney, P.O. Box 1858, Greensboro, NC 27402, (336) 333-5351, and Pansy Glanton, P.O. Box 20083, Winston-Salem, NC 27120, (336) 761-2214. Prosecution (retrial): Assistant District Attorneys David Spence, 300 Courthouse Square, Beaufort, NC 28516, 252/838-8142, and Randall Galyon, now Assistant U.S. Attorney, P.O. Box 1858, Greensboro, NC 27402, (336) 333-5351. Defense (both trials): Dick Ramsey, 250 Executive Park Blvd. Suite 250, Winston-Salem, NC 27103, (336) 765-1600, and Doug Meis, 8 W. 3rd St. Suite 210, Winston-Salem, NC 27101, (336) 725-9090.

4. *State v. Boczkowski*, 94 CrS 20209 (Guilford County), *aff'd*, 130 N.C.App. 702 (1998). The defendant was charged with first degree murder of his wife. At the trial in the fall of 1996, he was found Guilty of First Degree Murder. The jury recommended a sentence of Life in Prison Without Parole, which I imposed. The conviction and sentence were upheld by the North Carolina Court of Appeals.

Prosecution: Assistant District Attorney Randy Carroll, 1801 Westchester Dr., Suite 1801, P.O. Box 2756, High Point, NC 27261, (336) 885-9533. Defense: Fred Lind, Greensboro Public Defender's Office, 201 S Eugene St., Greensboro, NC 27401 (336) 412-7777, and Doug Harris, 1698 Natchez Trace, Greensboro, NC 27455 (336) 288-0284. I do not have a copy of the judgments I signed.

5. *Richardson v. NationsCredit Fin. Servs. Corp.*, 02 CvS 2398 (Durham County); 643 S.E.2d 410 (N.C. Ct. App. 2007), *disc. rev. improvidently allowed*, 362 N.C. 227 (2008). I was assigned to preside over this case and a companion case by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice, as complex civil cases. The plaintiffs sought class certification on claims that the defendant bank sold them illegal insurance as part of refinancing home loans and engaged in other predatory lending practices. I certified a class and granted summary judgment on all liability issues, some in favor of the defendants and some in favor of the plaintiffs. I further decided the way damages would be calculated. These decisions and others were certified for immediate appeal and were reviewed and affirmed by the North Carolina Court of Appeals; after granting a petition for discretionary review and hearing oral argument, the North Carolina Supreme Court found discretionary review had been improvidently granted and left the ruling of the Court of Appeals in place. On remand, the case was settled with Court approval.

Counsel for Plaintiffs and Class were John Alan Jones and Christopher Olson, Jones Martin Parris & Tessener Law Offices, P.L.L.C., 410 Glenwood Avenue, Suite 200, Raleigh, NC 27603, (919) 821-0005. Counsel for the defendants initially was David Dreifus, Poyner & Spruill, P.O. Box 1801, Raleigh, NC 27602-1801, (919) 716-9000, and later was John H. Culver III and Amy P. Williams, K&L/Gates, 214 North Tryon Street, 47th Floor, Charlotte, NC 28202 (704) 331-7453.

6. *Finesse Couch v. Private Diagnostic Center*, 94 CvS 454 (Durham County), *aff'd in part, rev'd in part*, 146 N.C.App. 658 (2001), *petition for disc. review denied*, 355 N.C. 348 (2002). I was assigned to preside over this case by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice, after remand from the Supreme Court of North Carolina, for the specific purpose of determining sanctions against a lawyer who had made an improper closing argument during trial before another judge. My sanctions decision was affirmed by the North Carolina Court of Appeals on every issue except one, on which the Court of Appeals remanded for more detailed findings of fact on the amount of attorney's fees awarded.

Counsel for the Plaintiff was Keith A. Bishop, Suite 105 Madison Centre, 1802 Martin Luther King Parkway, Durham, NC, 27707, (919) 490-1855. Counsel for the defendant was James B. Maxwell, Maxwell Freeman & Bowman, 2741 University Drive, Durham, NC 27717, (919) 493-6464. Initial counsel for the attorney was Vance Barron, 310 S. Greene Street, Greensboro, NC, 27401, (336) 274-4782. On appeal and on remand for the recalculation of attorney's fees, the attorney was represented by Stephen T. Smith, McMillan Smith & Plyler, PO Box 150 Raleigh, NC 27602, (919) 821-5124. The State Bar was represented by Carolin Bakewell, then with the North Carolina State Bar, and Assistant Attorney General Staci Tolliver Meyer. Ms. Bakewell may now be contacted at the Board of Dental Examiners, 507 Airport Blvd, Suite 105, Morrisville, NC, 27560, (919) 678-8223. Ms. Meyer may now be contacted at the N.C. Industrial Commission, 4336 Mail Service Center, Raleigh, NC 27699-4336, (800) 688-8349.

7. *Whiteheart v. Waller*, 08 CVS 818, Forsyth County, *aff'd*, 681 S.E.2d 419 (N.C. Ct. App. 2009). Plaintiff sued Defendant and her law firm for legal malpractice arising out of actions leading up to a lawsuit against Plaintiff which resulted in a verdict against Plaintiff on claims of, *inter alia*, malicious prosecution and libel. Plaintiff claimed that Defendant advised the Plaintiff to take the actions which later resulted in liability, and sought to recover the damages he had to pay. In a case of first impression in North Carolina, I found that the *in pari delicto* doctrine was a valid defense to a legal negligence claim and that the previous verdicts against Plaintiff established Plaintiff's intentional wrongdoing as a matter of law. The North Carolina Court of Appeals affirmed.

Counsel for Plaintiff was Randolph James, 116 N. Spruce Street, Winston-Salem, NC 27101, (336) 724-7707. Counsel for the defendant was E. Fitzgerald Parnell, Poyner Spruill, 301 College Street, Suite 2300, Charlotte, NC 28202, 704/342-5252.

8. *State v. Anderson*, 06 CRS 57340, 58002, Forsyth County, *aff'd*, 2009 WL 3320311 (N.C. Ct. App., Oct. 6, 2009). In this representative felony child abuse trial, I admitted demonstrative evidence about "shaken baby syndrome." The jury found the defendant guilty. The Court of Appeals affirmed.

Counsel in the *Anderson* case were: Prosecution: Jennifer Martin, Forsyth County District Attorney's Office, P.O. Box 20083, Winston-Salem, NC 27120, (336) 761-2214; Defense: Marilyn Massey, Forsyth County Public Defender's Office, Suite 400, 8 W 3rd St, Winston Salem, NC 27101(336) 761-2510.

9. *Dep't of Transp. v. Blue*, 99 CVS 911 (Moore County), *aff'd*, 147 N.C.App. 596 (2001), *disc. review den.*, 356 N.C. 434 (2002). This case and several companion cases began as condemnations actions by the Department of Transportation (DOT) to take and compensate Defendants for land. Defendants filed numerous defenses and counterclaims, raising several questions of first impression concerning the overlap of condemnation law and federal environmental statutes. I handled preliminary motions to dismiss in this case: I denied DOT's motion to strike the Second Defense and allowed DOT's motion to dismiss the counterclaims. These preliminary motion rulings were immediately appealed and the Court of Appeals affirmed.

Counsel for the Plaintiff was Assistant Attorney Generals Fred Lamar and Lisa C. Glover 9001 Mail Service Center Raleigh, NC 27699, (919) 716-6400. Counsel for the defendants was Marsh Smith, 255 West New York Ave., P.O. Box 1075, Southern Pines, NC 28387, 910/695-0800, and Stephen S. Schmidly, Moser, Schmidly, Mason & Roose, LLP, 115 S Fayetteville St, Suite 400, Asheboro, NC 27203. (336) 626-8000.

10. *Webster Enters. Inc. v. Selective Ins. Co.*, 91 CvS 10127 (Guilford County), *aff'd*, 125 N.C.App. 36 (1997). Plaintiff sued the defendant insurance company for damages arising out of a fire, asserting coverage under an insurance policy issued by defendant to the plaintiff. The case was mistried, and I presided at the retrial. My rulings on whether a statement was a judicial admission, directed verdict motions on several insurance coverage issues, and joinder questions were affirmed by the North Carolina Court of Appeals.

Counsel for the Plaintiff was A. Wayland Cooke, Harrison, North, Cooke & Landreth, 100 S. Elm Street, Suite 300, Greensboro, NC 27401, (336) 275-9867, and William L. Osteen, Jr., then with Adams & Osteen, now a United States District Court Judge, United States Courthouse, 324 West Market Street, Greensboro, NC 27401, (336) 332-6090. Counsel for the defendant was

Randolph James, 116 N. Spruce Street, Winston-Salem, NC 27101, (336) 724-7707.

- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

Decisions by Resident Superior Court Judges in North Carolina are not published and are usually not in the form of opinions.

1. *Whiteheart v. Waller*, 08 CVS 818, slip op. (N.C. Super. Ct. Forsyth County Aug. 7, 2008). Counsel for the plaintiff was Randolph James, 116 N. Spruce Street, Winston-Salem, NC 27101, (336) 724-7707. Counsel for the defendant was E. Fitzgerald Parnell, Poyner Spruill, 301 College Street, Suite 2300, Charlotte, NC 28202, (704) 342-5252.

2. *Richardson v. NationsCredit Fin. Servs. Corp.*, 02 CvS 2398, slip op. (N.C. Super. Ct. Durham County Mar. 3, 2005) (hereinafter *Richardson*). I ruled on several preliminary aspects of pending summary judgment motions, including issues related to pre-emption, the Fixed Rate Doctrine, and unjust enrichment, denying summary judgment as to some claims and granting it as to others. The individual plaintiffs and the class were represented by John Alan Jones and Christopher Olson, Jones Martin Parris & Tessener Law Offices, P.L.L.C., 410 Glenwood Avenue, Suite 200, Raleigh, North Carolina 27603, (919) 821-0005. The defendants were represented by John H. Culver III and Amy P. Williams, K&L/Gates, 214 North Tryon Street, 47th Floor, Charlotte, North Carolina 28202, (704) 331-7453.

3. *Richardson*, slip op. (N.C. Super. Ct. Durham County Apr. 14, 2005). I denied Defendant's Motion for Partial Summary Judgment on the plaintiffs' claim for breach of the duty of good faith and fair dealing.

4. *Richardson*, slip op. (N.C. Super. Ct. Durham County June 16, 2005). I granted partial summary judgment for the plaintiffs, ruling that as a matter of law it was an unfair trade practice to sell insurance prohibited by law and that it was a violation of the duty of good faith and fair dealing to sell insurance prohibited by law.

5. *Richardson*, slip op. (N.C. Super. Ct. Durham County Oct. 10, 2005). I granted partial summary judgment for the defendants on plaintiffs' claims against Bank of America, seeking to hold it responsible for the acts of a subsidiary and denied partial summary judgment for the defendants on plaintiffs' punitive damages claim, ruling the evidence established material questions of fact sufficient to require a jury trial.

6. *Richardson*, slip op. (N.C. Super. Ct. Durham County Oct. 10, 2005). I determined the method by which damages would be calculated for the plaintiffs' claims for unfair and deceptive trade practices and breach of the duty of good faith and fair dealing.

7. *Finesse Couch v. Private Diagnostic Ctr.*, 94 CvS 454, slip op. (N.C. Super Ct. Durham County May 30, 2000). Counsel for the plaintiff was Keith A. Bishop, Suite 105 Madison Centre, 1802 Martin Luther King, Jr. Parkway, Durham, NC, 27707, (919) 490-1855. Counsel for the defendants was James B. Maxwell, Maxwell Freeman & Bowman, 2741 University Drive, Durham, NC 27717, (919) 493-6464. Initial counsel for the attorney was Vance Barron, 310 S. Greene Street, Greensboro, NC, 27401, (336) 274-4782. On appeal and on remand for the recalculation of attorney's fees, the attorney was represented by Stephen T. Smith, McMillan Smith & Plyler, PO Box 150 Raleigh, NC 27602, (919) 821-5124. The State was represented by Carolin Bakewell, then with the North Carolina State Bar, and Assistant Attorney General Staci Tolliver Meyer. Ms. Bakewell may now be contacted at the Board of Dental Examiners, 507 Airport Blvd, Suite 105, Morrisville, NC, 27560, (919) 678-8223. Ms. Meyer may now be contacted at the N.C. Industrial Commission, 4336 Mail Service Center, Raleigh, NC 27699-4336, 1-800-688-8349.

8. *North Carolina v. Simpson*, 84 CrS 9828, slip op. (N.C. Super Ct. Rockingham County May 26, 1999). The defendant was represented by Polly Sizemore, who can now be reached at the District Court Judges Chambers, Greensboro Courthouse, 201 South Eugene Street, Greensboro, NC, 27401, (336) 412-7814. The State was represented by Barry S. McNeill of the Attorney General's Office, 9001 Mail Service Center Raleigh, NC 27699-9001, (919) 716-6400.

9. *North Carolina v. Page*, 95 CrS 100004, slip op. (N.C. Super Ct. Forsyth County Feb. 2, 1999). The defendant was represented by Bill Causey and Alec Carpenter, 1840 Eastchester Drive, Suite 202, High Point, NC, 27265, (336) 885-2600. The State was represented by Valerie Spalding of the Attorney General's Office, 9001 Mail Service Center Raleigh, NC 27699-9001, (919) 716-6400.

10. *Cooper v Donohoe Constr. Co.*, 93 CvS 7155, slip op. (N.C. Super Ct. Forsyth County Sept. 20, 1995). Plaintiff Cooper was represented by Tom Comerford & Jerry Smith, 250 W. 1st St. Suite 200, Winston-Salem, NC 27101, (336) 631-8510. Defendant Donohoe Construction Company was represented by Richard Bennett, Bennett and Guthrie, 1560 Westbrook Plaza Dr., Winston-Salem, NC 27103, (336) 765-3121. Defendants Master Steel Erectors and M&J Materials, Inc. were represented by Gregory York, York, Williams, Barringer, Lewis & Briggs, 1915 Rexford Rd. Suite 200, P.O. Box 36858, Charlotte, NC 28236, 704/375-4480, and Jack Bayliss, Jr., Carruthers & Roth, P.O. Box 540, Greensboro, NC 27402, (336) 379-8651.

- e. Provide a list of all cases in which certiorari was requested or granted.

The two cases of which I am aware are *State v. McDonald*, 165 N.C. App. 237 (2004), *disc. rev. denied*, 359 N.C. 195 (2004), *cert. denied*, 544 U.S. 988 (2005), and *State v. Ballenger*, 94 CRS 63378, 94 CRS 63379, Guilford County, *rev'd*, 123 N.C.App. 179 (1996), *aff'd*, 345 N.C. 626 (1997), *cert denied*, 522 U.S. 817 (1997). I am not aware of others.

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

APAC-Atlantic, Inc. v. 7 Star Constr. Co., Inc., 07 CVS 5312, Mecklenburg County, *rev'd*, unreported per Rule 30(e), COA08-913. North Carolina Court of Appeals reversed grant of partial summary judgment.

Billingsley v. Keystone Foods, 02 CVS 2194, Rockingham County, *rev'd*, unreported per Rule 30(e), COA 03-745. The North Carolina Court of Appeals reversed the dismissal of Plaintiff's claims under the North Carolina Retaliatory Employment Discrimination Act.

Brevorka v. Wolfe Constr., Inc., 01 CVS 3911, Guilford County, *rev'd*, 155 N.C.App. 353 (2002), *rev'd*, 357 NC 566 (2003). The North Carolina Supreme Court affirmed my ruling denying a motion to stay pending arbitration, after the North Carolina Court of Appeals had reversed.

Carl v. State, 06 CVS 13617, Wake County, *aff'd in part, rev'd in part*, 665 S.E.2d 787 (NC 2008). I denied the State's motions to dismiss Plaintiff's three claims against the state and Co-defendant's cross-claims; the North Carolina Court of Appeals reversed as to one of Plaintiff's claims and both of the cross-claims, and affirmed as to the other two claims by plaintiff.

Caudill v. Bd. of Adjustments for City of Greensboro, 03 CVS 5259, Guilford County, *vacated*, unreported per Rule 30(e), COA03-1352. The North Carolina Court of Appeals reversed my decision that Petitioner had standing to appeal a zoning decision.

Couch v. Private Diagnostic Clinic, et al., 94 CvS 454 (Durham County), *aff' in part, rev'd in part*, 146 N.C.App. 658 (2001), *petition for disc. rev. denied*, 355 N.C. 348 (2002). I was assigned to this case after remand from the North Carolina Supreme Court for the specific purpose of determining sanctions against a lawyer for an improper closing argument. My decision imposing sanctions was affirmed in large part by the North Carolina Court of Appeals, but remanded for additional findings on the amount of the attorney's fees.

Dep't of Transportation v. Byerly, 98 CVS 3991, Guilford County, *rev'd*, 154 N.C.App. 454 (2002). The Court of Appeals vacated my decision that the defendants had failed to prove adverse possession, remanding for additional findings of fact.

FCR Greensboro, Inc. v. C&M Investments of High Point, Inc., 93 CVS 10899, Guilford County, *aff'd in part, rev'd in part*, 119 N.C.App. 575 (1995). I denied Defendant's motion to vacate an arbitration award and granted Plaintiff's motion for judgment on the arbitration award. The North Carolina Court of Appeals reversed in part, finding some the arbitrator exceeded his authority as to some of the relief awarded.

Estate of Fennell ex rel. Fennell v. Stephenson, 98 CVS 7949, Guilford County, *aff'd in part, rev'd in part*, 137 N.C.App. 430 (2000), *rev'd*, 354 N.C. 327 (2001). I granted the individual Defendants' motion to dismiss Plaintiff's claims, finding all claims were barred by the statute of limitations and that two claims failed to state a claim upon which relief could be granted. I dismissed Plaintiff's claim against the North Carolina State Highway Patrol, finding that the claim was barred by the doctrine of sovereign immunity. The North Carolina Court of Appeals reversed only as to the claim against the North Carolina State Highway Patrol, affirming all other decisions. The Supreme Court of North Carolina reversed the Court of Appeals, thus affirming my ruling.

Hancock v. McGee, 93-CVS-8175, Guilford County, *aff'd in part, rev'd in part*, unreported per Rule 30(e), COA94-888. At trial of this motor vehicle negligence case, Defendant admitted negligence and the jury awarded nominal damages of \$1. The North Carolina Court of Appeals affirmed my rulings on issues to submit, jury instructions, and costs, but reversed entry of judgment for \$1, finding uncontroverted evidence of \$503.60 in medical expenses caused by the accident, and remanded for entry of judgment in that amount.

Hodgson Constr., Inc. v. Howard, 05 CVS 363, Wilkes County, *rev'd*, 654 S.E.2d 7 (NC 2007). The North Carolina Court of Appeals reversed my ruling granting judgment notwithstanding the verdict in favor of the defendant and remanded for reinstatement of the jury verdict for the plaintiff.

Howard v. Oakwood Homes, 98 CVS 5609, Guilford County, *rev'd*, 134 N.C.App. 116 (1999). The North Carolina Court of Appeals reversed my ruling that no agreement to arbitrate existed.

In re Krantz, 98 CVS 1089, Guilford County, *rev'd*, 135 N.C.App. 354 (1999). The North Carolina Court of Appeals reversed my decision granting summary judgment in a case concerning a nuncupative will.

Mabry v. Huneycutt, 00 CVS 1488, Stanly County, *rev'd*, 149 N.C.App. 630 (2002). The North Carolina Court of Appeals reversed my decision dismissing Plaintiff's action for personal injuries based on the statute of limitations.

Middleton v. The Russell Group, 93 CvS 10048, Guilford County, *aff'd in part, rev'd in part*, 126 N.C.App. 1 (1997), *subsequent appeal*, 132 N.C.App. 792 (1999). After a jury trial resulting in a plaintiff's verdict on an ERISA/COBRA claim, I awarded attorney's fees to Plaintiffs, and enhanced Plaintiffs' attorney fees by a factor of 1.5. I denied Defendant's motion for summary judgment on its cross-claim against other Defendants. The North Carolina Court of Appeals upheld numerous pre-trial and trial rulings but reversed my decision to enhance attorney's fees. The Court also reversed my decision as to one of Defendant's cross-claims. Both issues were remanded for further proceedings, and my rulings were upheld on subsequent appeal.

Mutual Community Savings Bank v. Boyd, 94 CVS 5415, Guilford County, *aff'd in part, rev'd in part*, 125 N.C.App. 118 (1997). The North Carolina Court of Appeals reversed my decision granting partial summary judgment in a case concerning whether rights of survivorship were created in a certificate of deposit.

Oakes v. Wooten, 02 CVS 112, Guilford County, *aff'd in part, rev'd in part*, 173 N.C.App. 506 (2005). I entered judgment consistent with a jury verdict finding Defendants negligent and awarded costs and attorney's fees to Plaintiffs. The North Carolina Court of Appeals found no error at trial, but reversed as to attorney's fees and to a portion of the costs that were awarded.

Peach v. City of High Point, 06 CVS 1653, Guilford County, *rev'd*, ____ N.C.App. ____ (September 1, 2009), COA08-1174. The North Carolina Court of Appeals reversed my ruling granting summary judgment in favor of the City of High Point in an inverse condemnation claim based on the statute of limitations.

Precision Fabrics Group, Inc. v. Transformer Sales & Service, Inc., 92 CVS 7199, Guilford County, *aff'd*, 120 N.C.App. 866 (1995), *rev'd*, 344 N.C. 713 (1996). The North Carolina Supreme Court reversed my decision excluding an affidavit from consideration at summary judgment.

Printing Svcs v. Am. Cap. Group, 04 CvS 11876, Guilford County, *aff'd in part, rev'd in part*, 637 S.E.2d 230 (NC 2006), *aff'd*, 361 N.C.347 (2007). The North Carolina Court of Appeals affirmed various substantive rulings in a case under the Loan Broker Act but remanded for additional findings of fact concerning the reasonableness of the attorneys' fee awarded.

Pugh v. Koury Corp., 97 CVS 2380, Guilford County, *rev'd*, unreported per Rule 30(e), COA98-1599. The North Carolina Court of Appeals reversed my decision granting Defendant's motion for summary judgment in a negligence case.

Slaughter v. Swicegood, 01 CVS 12394, Guilford County, *aff'd in part, rev'd in part*, 162 N.C.App. 457 (2004). The North Carolina Court of Appeals affirmed my decision on an arbitration issue, but reversed my decision to allow the individual Plaintiffs to proceed.

State v. Allen, 94 CRS 2883, Forsyth County, *rev'd*, 127 N.C.App. 182 (1997). The North Carolina Court of Appeals reversed my decision on a hearsay issue in Defendant's trial for second degree murder.

State v. Ballenger, 94 CRS 63378, 94 CRS 63379, Guilford County, *rev'd*, 123 N.C.App. 179 (1996), *aff'd*, 345 N.C. 626 (1997), *cert denied*, 522 U.S. 817 (1997). The Supreme Court of North Carolina reversed my dismissal of criminal charges against Defendant for violation of the North Carolina Controlled Substances Act based on a finding that the charges violated the Double Jeopardy Clause.

State v. Barnes, 94 CRS 55069, 94 CRS 20614, Guilford County, *rev'd*, 121 N.C.App. 503 (1996), *aff'd*, 345 N.C. 146 (1996). The Supreme Court of North Carolina vacated the felony larceny judgment and remanded the matter for entry as a conviction of misdemeanor larceny

State v. Brown, 03 CRS 96328, 03 CRS 96332-33, Guilford County, *aff'd in part, rev'd in part*, 182 N.C.App. 277 (2007). The North Carolina Court of Appeals vacated defendant's conviction for possession of a stolen firearm and upheld his conviction on a drug charge.

State v. Canty, 04 CRS 024100-04, 024300, 024303, 068556, Guilford County, *rev'd*, unreported per Rule 30(e), COA06-42. The North Carolina Court of Appeals vacated judgments I had entered on Defendant's guilty plea to six counts of embezzlement.

State v. Cole, 03 CRS 24682, 03 CRS 99364, Guilford County, *rev'd*, unreported per Rule 30(e), COA06-1595. The North Carolina Court of Appeals upheld the defendant's conviction on a drug charge but remanded for a new sentencing hearing.

State v. Corpening, 03 CRS 50040, 03 CRS 51027, Surry County, *aff'd in part, rev'd in part*, 634 S.E.2d 273 (N.C.App. 2006). The North Carolina Court of Appeals vacated defendant's conviction for resisting a public officer but upheld the conviction on a cocaine charge. I had presided at his jury trial.

State v. Dilworth, 98 CRS 23683-4, 98 CRS 65055-8, 98 CRS 65210, 98 CRS 102191-92, 99 CRS 23257, Guilford County, *rev'd*, unpublished per Rule 30(e), COA02-112. The North Carolina Court of Appeals upheld the defendant's convictions but remanded for a new sentencing hearing.

State v. Dumas, 95 CRS 0750, 95 CRS 20017, Guilford County, *rev'd*, 127 N.C.App. 556 (1997). The North Carolina Court of Appeals reversed Defendant's conviction on murder and armed robbery, finding error in an evidence ruling and a failure to instruct the jury on a lesser included offense.

State v. Dye, 97 CRS 52921, Guilford County, *rev'd*, 139 N.C.App. 148 (2000). The North Carolina Court of Appeals reversed my ruling that the Double Jeopardy Clause did not bar Defendant's prosecution for domestic criminal trespass, when she had previously been convicted of criminal contempt.

State v. Falana, 93 CRS 46360, 93 CRS 46361, Guilford County, *rev'd*, 129 N.C.App. 813 (1998). I denied Defendant's motion to suppress evidence seized during a search of his vehicle. The North Carolina Court of Appeals reversed, in light of an intervening decision by the Supreme Court of North Carolina.

State v. Hargett, 00-CRS-052546, 00-CRS-3607, Forsyth County, *rev'd*, unpublished per Rule 30(e), COA01-835. The North Carolina Court of Appeals reversed Defendant's convictions of indecent liberties with a minor and statutory rape based on error in allowing a Forensic Nurse Examiner to testify about the victim's out-of-court statement under the medical diagnosis hearsay exception.

State v. Ledbetter, 95 CRS 20001, Guilford County, *rev'd*, 132 N.C.App. 135 (1999). The North Carolina Court of Appeals reversed my decision on Defendant's claim of ineffective assistance of counsel, finding counsel was ineffective for failing to request a jury instruction on a lesser included offense.

State v. Mack, 93 CRS 40684, 93 CRS 40685, 93 CRS 20556, Guilford County, *aff'd in part, rev'd in part*, 119 N.C. App. 443 (1995). I denied Defendant's motion to dismiss charges of felony possession of cocaine, intentionally maintaining a dwelling for the keeping of a controlled substance, and habitual felon. The North Carolina Court of Appeals reversed my decision only as to the charge of maintaining a dwelling for keeping controlled substances, finding insufficient evidence.

State v. Mathurin, 03 CRS 59477, Forsyth County, *rev'd*, unreported per Rule 30(e), COA05-350. The North Carolina Court of Appeals reversed my findings of aggravating factors at sentencing in light of an intervening decision by the North Carolina Supreme Court.

State v. Middleton, 97 CRS 3661, Rockingham County, *rev'd*, 134 N.C.App. 187 (1999). The North Carolina Court of Appeals reversed my ruling on a Double Jeopardy issue raised in connection with Defendant's drug charges, based on an intervening appellate decision.

State v. Miller, 05 CRS 042576, 05 CRS 064796, Forsyth County, *rev'd*, 191 N.C.App. 124 (2008), *rev'd*, 363 N.C. 96 (2009). At the close of the state's

evidence, I denied Defendant's motion to dismiss a charge of possession of cocaine and Defendant was found guilty. The North Carolina Court of Appeals reversed. The North Carolina Supreme Court then reversed the Court of Appeals, affirming my ruling that there was sufficient evidence to support the jury verdict.

State v. Moses, 05 CRS 57750, Forsyth County, *arrested*, unreported per Rule 30(e), COA07-853. I sentenced Defendant to a range of 114 to 146 months of imprisonment for robbery with a dangerous weapon. The North Carolina Court of Appeals arrested this judgment because the indictment did not name or identify the dangerous weapon that was used.

State v. Oglesby, 02 CRS 60325, 60329, Forsyth County, *aff'd in part, rev'd in part*, 174 N.C.App. 658 (2005), *aff'd in part and vacated in part* 361 N.C. 550 (2007), *decision after remand*, unreported per Rule 30(e), COA 04-1534-2. Defendant was found guilty by the jury of felony murder, first-degree kidnapping, and robbery charges. I found aggravating factors for the two counts of robbery. The North Carolina Court of Appeals affirmed my ruling admitting into evidence a confession by the juvenile defendant, but remanded for resentencing based on an intervening appellate decision. The Supreme Court of North Carolina agreed the confession had been properly admitted, but found that the robbery sentences should not be vacated; rather remand for a decision on harmless error was more appropriate. The convictions and sentences were otherwise affirmed. On remand, the Court of Appeals found harmless error.

State v. Rivera, judgment entered on October 24, 1997, Forsyth County, *rev'd*, 350 N.C. 285 (1999). At Defendant's capital murder trial, I excluded testimony offered by a defense witness as inadmissible hearsay. The Supreme Court of North Carolina reversed and remanded for a new trial.

State v. Scurlock, 99 CRS 11172, Randolph County, *rev'd*, unreported per Rule 30(e), COA00-1365. In reliance on two waivers of counsel signed by the defendant and other judges, I denied Defendant's request for appointment of counsel made when the case was called for trial. Defendant was convicted of first degree kidnapping. The North Carolina Court of Appeals ordered a new trial, finding that because the judges who accepted his waivers had failed to advise the defendant of the maximum punishment, his waiver of counsel was not valid.

State v. Torres, 01 CRS 082537-39, 01 CRS 082546-47, Guilford County, *aff'd in part, vacated in part*, unreported per Rule 30(e), COA02-946. The North Carolina Court of Appeals affirmed my decisions on numerous decisions made at trial, but vacated the defendant's conspiracy conviction due to an acquittal by a co-defendant.

State v. Walker, 98 CRS 7302, 98 CRS 23043, 98 CRS 23065, Guilford County, *aff'd in part, rev'd in part*, 139 N.C.App. 512 (2000). The North Carolina Court

of Appeals vacated Defendant's conviction of attempted first-degree rape for insufficiency of the evidence and affirmed the assault conviction.

State v. White, 93 CRS 20505-06, 93 CRS 33228, Guilford County, *aff'd in part, rev'd in part*, 127 N.C.App. 565 (1997). Defendant was convicted by a jury of robbery, two counts of first degree rape, two counts of first degree sexual offense, and three counts of first degree kidnapping. The North Carolina Court of Appeals found the evidence insufficient to support first degree kidnapping, otherwise found no error, and remanded for resentencing.

Tart v. Martin, 98 CVS 9674, Guilford County, *aff'd in part, rev'd in part*, 137 N.C. App. 371 (2000), *rev'd*, 353 N.C. 252 (2000). I granted summary judgment for Defendants on Plaintiff's two negligence claims. The North Carolina Court of Appeals reversed only as to one claim. The Supreme Court of North Carolina reversed the Court of Appeals, thus affirming my ruling.

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

All decisions by Resident Superior Court Judges in North Carolina are unpublished. I sign hundreds of Orders and Judgments each year. They can be found in official court files maintained by the Clerk of Court in the county where the case was heard. Since my appointment in April 1993, I remember holding court in the following counties in North Carolina: Alamance, Ashe, Allegheny, Alexander, Anson, Buncombe, Cabarrus, Chatham, Cleveland, Davie, Davidson, Durham, Forsyth, Gaston, Guilford, Harnett, Iredell, Johnston, Mecklenburg, Montgomery, Moore, Onslow, Orange, Randolph, Rockingham, Rutherford, Stanly, Stokes, Surry, Union, Wake, Watauga, Wilkes, and Yadkin. There is no comprehensive database which can easily be searched by the name of the presiding judge.

- h. Provide 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, provide copies of the opinions.

State v. Marcus Dwayne Hunter, 04 CrS 75420, Guilford County. Decisions entered March 27, 2009, and April 17, 2009.

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system

by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have followed the North Carolina Code of Judicial Conduct, particularly Canon 3C, in evaluating the necessity or propriety of recusal. I do not hear any cases involving the law firm in which my husband practices. In the first two years or so I was a judge, I did not hear cases involving my former law firm. During election campaigns, I did not hear cases involving the firms with which my treasurer and campaign chairs practiced, absent consent of other parties, and I did not hear cases in which my opponent in the election represented a party. I handle other conflicts of interest as they arise. I recall issuing written recusal orders in the following cases:

In *Brooks v. S. Nat'l Corp.*, et al, 95 CvS 1394, Rockingham County, I recused myself on my own motion after my husband inherited stock in one of the corporate parties.

In *L&S Water Power, Inc., v. Piedmont Triad Reg'l Water Auth.*, 08 CvS 7106, Guilford County, I identified a potential conflict of interest while reviewing the file in connection with a pending motion. I recused myself and later entered a written recusal Order.

In addition, I have entered written recusal orders on a few occasions in connection with administrative matters I would ordinarily handle as Senior Resident Superior Court Judge; these have usually involved cases in which my husband's law firm was appearing. I do not have a list or any way to search for these Orders.

I recall one written motion to recuse on motion of a party in a case. *Blue Rhino Corp. v. PriceWaterhouseCoopers*, 99 CvS 9706, Forsyth County. The litigant suggested that because I had ruled against it on a number of issues and because the attorney for the other party had been counsel to Governor Hunt during the time I was appointed to the bench, I should recuse myself. I referred the motion to another judge for decision. At the hearing, the litigant did not proceed or present any evidence on the allegations concerning my relationship with opposing counsel. The recusal motion was denied by Judge Seay.

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

- a. List chronologically any public offices you have held, 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 unsuccessful nominations for appointed office.

I have not held public office other than judicial office. I have not had any unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I ran my own campaigns for judicial office 1994, 1996, and 2004. I have been a member of the Guilford County Democratic Women since 1993. I recall stuffing envelopes for mailings on a volunteer basis on behalf of Mary Seymour when she ran for the North Carolina State Senate sometime in the mid-1980s.

16. **Legal Career:** Answer each part separately.

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

- i. 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;

In 1982-1983, I worked as a staff law clerk for the United States Court of Appeals for the Eighth Circuit, assigned primarily to Judge J. Smith Henley and Judge Theodore McMillian. In 1983-1984, I worked as a chambers law clerk to Judge Henley.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

- iii. 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.

1984 – 1993
 Smith Helms Mullis & Moore (now known as Smith Moore Leatherwood)
 300 North Greene Street
 Greensboro, North Carolina 27401
 Partner (1990 – 1993)
 Associate (1984 – 1989)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I was certified as a mediator by the North Carolina Dispute Resolution Commission in 1992 and mediated a number of Superior Court cases. I gave up my certification sometime after my appointment to the bench in 1993. I have no records available to identify or describe the proceedings I mediated. They were typical Superior Court civil cases involving personal injury claims and business disputes.

I was an approved arbitrator in the United States District Court for the Middle District of North Carolina. I recall arbitrating only one case, a civil dispute over a claim that well water was contaminated. I do not recall the name of the case and have no records available to identify or describe these proceedings further.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

During my clerkship with the Eighth Circuit from 1982-1984, I worked on a variety of criminal and civil appeals covering a wide range of issues. I prepared bench memoranda about cases being argued and assisted the judges in work needed to prepare of opinions.

In private practice from 1984-1993, I had a general civil litigation practice with a focus on products liability cases, personal injury cases, and cases involving covenants not to compete and trade secrets. I began in 1984 working with partners on cases and, by the time I left practice in 1993, I became the responsible attorney on most cases in which I was involved. After 1985, I spent most of my time on large products liability cases.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Most product liability clients were large corporations. Most clients in covenants not to compete and trade secret disputes were small businesses

or individuals. I represented some companies and individuals upon being retained by insurance companies on their behalves. I worked on at least one plaintiff's personal injury case in which my client was an individual. I am not and never have been a North Carolina Bar board-certified specialist.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

- i. Indicate the percentage of your practice in:

1. federal courts:	75%
2. state courts of record:	23%
3. other courts:	1%
4. administrative agencies:	1%

- ii. Indicate the percentage of your practice in:

1. civil proceedings:	100%
2. criminal proceedings:	0%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried at least nine cases to verdict. I assisted other lawyers in trying at least three jury trials, I tried at least two jury cases as sole counsel, and I was chief counsel in at least two jury trials. I had at least two jury trials where my role was to supervise and be available to assist an associate trying a first case. I also had at least two trials on Social Security cases before an Administrative Law Judge. I believe I participated in the trial of other cases, but I do not recall the details.

- i. What percentage of these trials were:

1. jury:	90%
2. non-jury:	10%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. 1991-93: I defended Showa-Denko as local counsel in a number of North Carolina lawsuits filed in connection with claims that L-tryptophan manufactured by my client caused personal injuries. I was the partner primarily responsible for these cases in North Carolina, though others in the firm worked on them as need arose. There were at least fifteen of these cases, with many lawyers involved for the various plaintiffs and a number of co-defendants. Many of these cases were managed by the Court through MultiDistrict Litigation orders. I handled discovery matters for the client and several mediations. A number of the cases settled but some were still pending when I left private practice.

Co-counsel: Larry Sitton, Smith Moore Leatherwood, 300 N. Greene St., Greensboro, NC, 27401, (336) 378-5200 & Mitchell Herr & Juliet Drake, Cleary Gottlieb, One Liberty Plaza, New York, NY 10006, (212)225-2748. Opposing Counsel in *Earnheart v. Goldline Laboratories*, 3:92CV00253 (WDNC before Judge Potter); S. Luke Largess, Tin Fulton Walker & Owen, 301 East Park Ave., Charlotte, NC 28203, (704) 338-1220. Opposing counsel in *West v. Showa Denko*, 3:92CV00365 (WDNC before Judge Mullen), *Garrison v. Showa Denko*, 4:91CV00518 (MDNC assigned to Judge Erwin), and *Dawson v. Showa Denko*, 4:91CV00519 (MDNC assigned to Judge Erwin); Bill Horsley, 500-D State Street, Greensboro, NC 27405, (336) 691-0077. Opposing counsel in *Middleton v. Henry Schein, Inc.*, 5:91CV00305 (WDNC before Judge Fox), *Vaughn v. P. Leiner*, 2:91CV00392 (MDNC assigned to Judge Erwin), and several other cases was Greg Martin, Martin and Jones, 410 Glenwood Avenue, Suite 200, Raleigh, NC 27603, (919) 821-0005.

2. 1990-1992: *Carroll's Foods, Inc. v. Solvay Animal Health*, et al., 7:90-cv-00128 (EDNC assigned to Judge Britt). Along with co-counsel, I defended Solvay Animal Health in a lawsuit filed by a large poultry producer in Eastern North Carolina. The case concerned claims that an antigen manufactured by Solvay did not accurately disclose a contagious disease, which plaintiffs asserted spread throughout their turkey houses and caused damages. After significant discovery and depositions, the case was settled. In consultation with a senior partner, I managed all discovery in the case, supervised the associates on the case, and took and defended several depositions.

Co-counsel: Bynum Hunter, Smith Moore Leatherwood, 300 N. Greene Street, Greensboro, NC 27401, (336) 378-5200 & Andrew Chamberlin, Ellis & Winters, 333 N.

Greene St., Suite 200, Greensboro, NC 27401, (336) 217-4195. Opposing counsel: Kenneth Wooten & Charles Ellis, Ward & Smith, P.O. Box 867, New Bern, NC 28563, (252) 672-5400.

3. 1992: The last jury trial I handled before moving to the bench was in Alamance County Superior Court. I represented Schneider Trucking in a personal injury case. The Plaintiff was seeking to recover damages for injuries sustained when he was hit at a loading dock by a truck driven by a Schneider driver. I tried the case to verdict with the assistance of an associate before Hon. E. Lynn Johnson. The jury awarded the Plaintiff money in the amount we had offered to settle before trial. There was no appeal and no reported decision. Due to the passage of time, I do not recall the Plaintiff's name and have been unable to locate the case number.

Co-counsel: Debbie Hayes, 5 Glenagle Court, Greensboro, NC 27408, (336) 282-7262. Opposing counsel: Bob Clay, Young Moore and Henderson, P.O. Box 31627, Raleigh, NC 27622, (919) 782-6860.

4. 1987 – 1991: *McHenry v. Shiley*, 2:87CV00349 (MDNC assigned to Judge Erwin). Along with co-counsel, I defended Pfizer and its subsidiary Shiley in this lawsuit concerning a heart valve manufactured by the Pfizer subsidiary. I worked under the direction of two partners and drafted pleadings, worked on discovery, and researched motions. After the case settled, I continued to represent Pfizer and its subsidiaries in other North Carolina litigation and did substantial work in general support of national coordinating counsel for the heart valve litigation nationwide.

Co-counsel: Larry Sitton, Smith Moore Leatherwood, 300 N. Greene St., Greensboro, NC, 27401, (336) 378-5200 & Bill Young, 129 Valley View Rd., Blowing Rock, NC 28605, (828) 295-6585. Opposing counsel: John Haworth, 1801 Westchester Drive, High Point, NC 27262, (336) 883-6177.

5. 1985 – 1991: *Deadwyler v. Volkswagen*, [ST-C-85-38] United States District Court for the Western District of North Carolina. This was a nationwide class action brought pursuant to the Magnuson-Moss Act claiming excessive oil use in Volkswagen Rabbits. Judge James McMillan presided over the case through trial. Judge Woodrow Jones presided after remand. The case was tried to verdict for the defense in the summer of 1987. It continued for several years thereafter with an appeal and subsequent questions concerning attorney's fees. This was a large case which occupied much of my time for several years, and was my first involvement in a products liability case. During discovery, I handled document production, took depositions, wrote many briefs in coordination with co-counsel, and argued several motions. At trial, I organized presentation of many defense witnesses, examined several witnesses, and was primarily responsible for arguing evidentiary objections. After trial, I continued to work with New York counsel on the appellate briefs and subsequent briefs required on remand.

Some of the decisions in this case, rendered by the United States Court of Appeals for the Fourth Circuit, the Honorable James McMillan, and the Honorable Woodrow Jones, are

reported at: 1986 US Dist Lexis 284 (1986); 884 F.2d 779 (1989) *cert. denied*, 493 US 1078 (1990); 1990 US Dist. Lexis 14423 (1990); 748 F.Supp. 1146 (1990); 134 F.R.D. 128 (1991), *affirmed without opinion*, 1992 US App Lexis 14891 (1992).

Co-counsel: Bynum Hunter, Smith Moore Leatherwood, 300 N. Greene Street, Greensboro, NC 27401, (336) 378-5200 & Daniel Gsovski, Herzfeld & Rubin, P.C., 40 Wall Street, New York, NY 10005, (212) 471-8500. Opposing Counsel: Beverly C. Moore, Jr. (since deceased) & B. Ervin Brown, 1014 West Fifth St., Winston-Salem, NC 27101, (336) 723-7966.

6. (Around 1990) *Keeling v. Plomaritis*, Rockingham County Superior Court. Along with a partner in my firm, I represented the defendant doctor in a lawsuit filed by his former employer to enforce a covenant not to compete. I handled the expedited discovery and assisted my partner at the hearing on the motion for preliminary injunction. The case was settled after the hearing. I do not remember details because of the passage of time and because the case did not last long, but it was typical of the kinds of cases I handled for the firm in connection with covenants not to compete. I have not been able to locate the case file number and I do not remember opposing counsel.

Co-counsel: Alan Duncan, Smith Moore Leatherwood, 300 N. Greene St., Greensboro, NC 27401, (336) 378-5200.

7. 1986 - 1988: In the spring of 1986, in Chatham County Superior Court in Pittsboro, North Carolina, I tried my first jury trial. I defended a man in a civil assault case brought by a former employee at the plant where both worked. The plaintiff was pro se. I do not recall my client's name. Judge Gordon Battle presided. After a jury verdict in my client's favor, the plaintiff brought several more identical lawsuits in various other counties, all of which were dismissed as a result of motions I filed and prosecuted. I have not been able to find the file numbers.

8. (1986-87). *Contract Steel Sales, Inc. v. Freedom Constr. Co.*, 84 N.C.App., 460 (1987) and 321 N.C. 215 (1987). I worked with a partner to prepare the briefs on appeal to the North Carolina Court of Appeals and then the Supreme Court of North Carolina. This case concerned whether a subcontractor was entitled to a materialmen's lien under North Carolina law. We represented the defendants, who prevailed at the trial court but were unsuccessful on appeal.

Co-counsel: Robert A. Wicker, 10 Foxglove Lane, Greensboro, NC 27455, (336) 282-0629. Opposing Counsel: Allen Holt Gwyn, Conner Gwyn & Schenck, 306 E. Market St., Greensboro, NC 27401, (336) 691-9222.

9. (1984-1987). *Star Auto. Co. v. Saab-Scania of America, Inc.*, 84 N.C. App. 531 (1987). I worked with two partners to prepare the briefs on appeal to the North Carolina Court of Appeals. The case concerned whether the petitioner, a Saab automobile dealer, had timely filed a request for a hearing before the Commissioner of Motor Vehicles to review the respondent's decision to add another Saab franchise to the area. In the first

appeal, which is not reported, the Court found that the record was insufficient to determine on what date the petition had been filed; in the second appeal, the Court of Appeals affirmed the trial court's ruling that the petition had been timely filed. We represented the respondent, Saab, which was unsuccessful in arguing that the petition was untimely.

Co-counsel: David M. Moore & Stephen W. Earp, Smith Moore Leatherwood, 300 N. Greene St., Greensboro, NC 27401, (336) 378-5200. Opposing counsel: John W. Kirkman, Jr., 100 S. Elm St., Greensboro, NC 27401, (336) 274-7898.

10. (1984-85) *Candid Camera Video World, Inc. v. Mathews*, 76 N.C. App. 634 (1985). I worked with a partner to prepare the briefs on appeal to the North Carolina Court of Appeals. This case concerned whether an indemnification clause in a lease protected the agent of the landlord from liability on tenant's claims arising out of a theft from its store. We represented the defendants, who prevailed at the trial court but were unsuccessful on appeal.

Co-counsel: Robert A. Wicker, 10 Foxglove Lane, Greensboro, NC 27455, (336) 282-0629. Opposing counsel: Joseph F. Brotherton, 127 N. Greene St., Greensboro, NC 27401, (336) 346-1116 & J. Reed Johnston, Jr., 101 N. Greene St., Greensboro, NC 27401.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

While in private practice, I was involved in a number of large product liability cases on the defense side. These included working as statewide counsel for businesses which were involved in lawsuits on a national scale, and working more directly to assist national counsel on work not specifically related to a particular case. I participated in one federal court trial of a nationwide class action. I wrote the trial brief and examined several witnesses, and was primarily responsible for evidentiary objections and the charge conference. Other products liability matters resolved prior to trial. My role ranged from associate acting with substantial oversight from a partner, to associate with substantial independence, to partner with primary responsibility.

I also developed substantial expertise in cases involving covenants not to compete and trade secrets. For the last several years I was in private practice, I was typically the lawyer in the Greensboro office who handled these matters. These cases often involved fast-paced hearings on motions for temporary restraining orders and preliminary injunctions, as well as expedited discovery. Most were settled after the preliminary injunction issue was decided by a court.

While in private practice, I was involved in litigation practice management within the firm and led in-house education efforts for the firm's products liability group. For a time, I hired and supervised legal assistants. I mentored younger lawyers, assisting several with first trials. I was in the second group of certified mediators in the state and was active in several efforts to promote alternative dispute resolution in the state courts.

While on the bench, I have remained active in local and state bar activities. I have served as a Vice-President of the North Carolina Bar Association and regularly participate in continuing education programs. I have taught at New Judges School for new Superior Court Judges for a number of years and regularly teach at our educational programs. I have been on the Education Committee of the Judges Conference for years and have been the chair for the last four years, working closely with faculty at the School of Government, University of North Carolina at Chapel Hill, to plan the programs, recruit faculty, and insure good quality of the programs.

I have not done any lobbying on behalf of any client or organization.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught any courses at a college or university.

20. **Deferred Income/ Future Benefits:** List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I expect to receive retirement benefits from the State of North Carolina Consolidated Judicial Retirement System and through a 401(k) upon my retirement. I have no deferred income arrangements from stock, options, uncompleted contracts or other future benefits which I expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. I am a co-author of the book "North Carolina Evidentiary Foundations" and receive periodic royalties for book sales. I have no other business interests outside my employment.

21. **Outside Commitments During Court Service:** 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.

If my judicial workload permits and if allowed by the applicable ethics rules, I plan to continue to work with the co-authors to update and revise the book "North Carolina

Evidentiary Foundations” until a new co-author is in place. I have no other plans, commitments, or agreements to pursue outside employment.

22. **Sources of Income:** 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, licensing fees, 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.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My husband is a practicing lawyer and, if confirmed, I would recuse myself from any cases in which he or his firm, Higgins Benjamin Eagles & Adams, appear. My husband and I own shares in a number of publicly-held companies which might require recusal under federal rules. I have sentenced hundreds of defendants in criminal court, who may have post-conviction proceedings come before the federal court. In all cases, I would look carefully for any conflicts and follow the applicable rules, codes of conduct, and ethical guidance on treating conflicts.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would resolve any potential conflicts consistent with federal law and the requirements of the Code of Conduct for United States Judges.

25. **Pro Bono Work:** 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.

Soon after I moved to Greensboro, I began volunteering at the YWCA as a mentor to a pregnant teenager. I soon joined the Board of Directors of the YWCA. I handled several matters for pro bono clients.

As a judge, I am prohibited from providing legal representation to anyone, pro bono or otherwise. However, I have been active in a number of civic and charitable organizations over the years which benefit the disadvantaged, including work on the Boards of Our Children's Place, a non-profit working to establish a prison unit where incarcerated women could live with their young children, and Summit House, an alternative to incarceration for offenders with young children. I regularly respond to requests to speak to school and youth groups, both at the courthouse and in the schools.

I participated in a Mini-Internship Program in June 1996 offered by the Greater Greensboro Society of Medicine at Urban Ministry's Health Serve Clinic, and I participated in the Greensboro Mosaic Partnership Program from 2004-2005, organized by the Mayor of Greensboro.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I expressed my interest in the district court to Senator Kay Hagan in a telephone call shortly after she was elected in 2008. I wrote letters to Senator Hagan and Senator Burr in January 2009 expressing my interest more formally. I met personally with Senator Burr's General Counsel at his request on February 17, 2009.

Senator Hagan established a Committee to review and recommend candidates for federal court vacancies, chaired by former North Carolina Chief Justice Burley Mitchell. I had some logistical conversations with Senator Hagan's staff about this Committee's work and was interviewed by this Committee on May 20, 2009. In July 2009, I was informed by Senator Hagan's staff that I would be on the list of three persons she recommended for appointment to the Middle District vacancy.

In the late spring or early summer of 2009, I was contacted by the North Carolina Association of Women Attorneys concerning this vacancy. I was endorsed by the NCAWA for this appointment in July 2009.

Since November 2009, I have been in communication with pre-nomination staff in the Department of Justice. On January 8, 2010, I interviewed in Washington, D.C., with attorneys from the Department of Justice and the Office of White House Counsel. On March 10, 2010, the President submitted my nomination to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AO 10
Rev. 1/2008

**FINANCIAL DISCLOSURE REPORT
NOMINATION FILING**

*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) Eagles, Catherine C.	2. Court or Organization Middle District of North Carolina	3. Date of Report 3/11/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge - Nominee	5a. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 3/10/2010 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final 5b. <input type="checkbox"/> Amended Report	6. Reporting Period 01/01/2009 to 2/28/2010
7. Chambers or Office Address 201 S. Eugene Street, Fourth Floor Greensboro, NC 27402	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.		

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

NONE (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
1. Member, Board of Directors	School of Government Foundation, Chapel Hill, NC
2. Member, Board of Directors	North Carolina Conference of Superior Court Judges
3.	
4.	
5.	

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

NONE (No reportable agreements.)

DATE	PARTIES AND TERMS
1. 1998	401(k) NC Supplemental Retirement Plan, managed by The Prudential Company of America; Manager chooses available funds; I control fund allocation
2. 1986-2009	401(k); Smith Moore Leatherwood LLP Profit Sharing & Savings Plan; managed by Charles Schwab; Manger chose available funds; I controlled fund allocation
3.	

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Name of Person Reporting Eagles, Catherine C.	Date of Report 3/11/2010
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III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions.)

A. Filer's Non-Investment Income

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>INCOME</u> (yours, not spouse's)
1. 2008	Salary, State of North Carolina	\$123488.00
2. 2008	Matthew Bender & Co - Book Royalties	\$865.16
3. 2009	Salary, State of North Carolina	\$122,757.07
4. 2009	Wages, Pyramids Wellness Centers, LLC	\$840.00
5. 2009	Matthew Bender & Co - Book Royalties	\$227.13
6. 2010	Salary, State of North Carolina	\$24,396.00

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, complete this section.
(Dollar amount not required except for honoraria.)

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>
1. 2009	Higgins, Benjam, Eagles & Adams, PLLC - share of PLLC income
2. 2009	Efon University Law School - earnings for teaching a class
3. 2010	Higgins Benjamin Eagles & Adams, PLLC - share of PLLC income
4. 2010	Efon University Law School -earnings for teaching a class

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

NONE (No reportable reimbursements.)

	<u>SOURCE</u>	<u>DATES</u>	<u>LOCATION</u>	<u>PURPOSE</u>	<u>ITEMS PAID OR PROVIDED</u>
1. exempt					
2.					
3.					
4.					
5.					

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Name of Person Reporting Eagles, Catherine C.	Date of Report 3/11/2010
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V. GIFTS. (Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)

NONE (No reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1. exempt			
2.			
3.			
4.			
5.			

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)

NONE (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting Eagles, Catherine C.	Date of Report 3/11/2010
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VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)

1. Brokerage Account #1					Exempt				
2. - BB&T stock	C	Dividend	L	T					
3. -BNC Bancorp Stock	A	Dividend	J	T					
4. -Citicorp stock	A	Dividend	J	T					
5. -Dominion Res Inc VA New Stock	B	Dividend	L	T					
6. -Duke Energy Corp stock	C	Dividend	L	T					
7. -GlaxoSmithKline stock	A	Dividend							
8. -Lincoln National Corp Ind stock	B	Dividend							
9. -Piedmont Natural Gas Co stock	B	Dividend	K	T					
10. -Progress Energy Inc stock	A	Dividend	J	T					
11. -Public Svc Enterprise Group stock	A	Dividend	J	T					
12. - Southern Bankshares NC Inc stock	A	Dividend	L	T					
13. -Spectra Energy Corp stock	B	Dividend	K	T					
14. -The Southern Company stock		None	J	T					
15. -Sprint stock		None	J	T					
16. Brokerage Account #1									
17. -AIM Equity Funds In Charter FD-A Mutual Fund	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000	D = \$5,001 - \$15,000 I = More than \$5,000,000	E = \$15,001 - \$50,000
2. Value Codes (See Columns C1 and D3)	J = \$15,000 or less N = \$250,001 - \$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 \$5,000,000	M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000	
3. Value Method Codes (See Column C2)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	

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Name of Person Reporting Eagles, Catherine C.	Date of Report 3/11/2010
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VII. INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
18. -Growth Fund America CL A Mutual Fund	A	Dividend	L	T					
19. -Inv. Co Am CL A AIVSX mutual fund	D	Dividend	N	T					
20. -Wash Mutl Invs Fd Inc Mutual Fund	A	Dividend	K	T					
21. Inv. Co of Am Class A	A	Dividend	J	T					
22. IRA #1									
23. -Amer Balanced FD CL A Mutual Fund	B	Distribution	L	T					
24. -Inv. Co. of America CL A	C	Distribution	M	T					
25. IRA #2									
26. -Evergreen Equity Income FD CL A	A	Distribution	L	T					
27. IRA #3				T					
28. -Growth Fund Am. CL A	A	Distribution	J	T					
29. IRA #4									
30. -Cash	A	Int./Div.	M	T					
31. -Inv. Co Am CL A AIVSX	B	Distribution	M	T					
32. IRA #5									
33. -Growth Fund Am CL A AGTHX	A	Distribution	J	T					
34. 401k #1									

1. Income Gain Codes (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001 - \$100,000 J = \$15,000 or less N = \$250,001 - \$500,000 P3 = \$25,000,001 - \$50,000,000	B = \$1,001 - \$2,500 G = \$100,001 - \$1,000,000 K = \$15,001 - \$50,000 O = \$500,001 - \$1,000,000	C = \$2,501 - \$5,000 H = \$1,000,001 - \$5,000,000 L = \$50,001 - \$100,000 P1 = \$1,000,001 - \$5,000,000 P4 = More than \$50,000,000	D = \$5,001 - \$15,000 I2 = More than \$5,000,000 M = \$100,001 - \$250,000 P2 = \$5,000,001 - \$25,000,000	E = \$15,001 - \$50,000
2. Value Codes (See Columns C1 and D3)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash Market	

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Name of Person Reporting Eagles, Catherine C.	Date of Report 3/11/2010
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VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, 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)
35. -NC Large Cap Index Fund Mutual Fund		None	L	T					
36. -NC Large Cap Value Fund Mutual Fund		None	K	T					
37. -NC Large Cap Growth Fund Mutual Fund		None	K	T					
38. 401k #2									
39. - Growth Fund -America R2 Mutual Fund		None	K	T					
40. -Capital Income Builder -R2 mutual fund		None	K	T					
41. Lincoln National Life Insurance Co policies Surrender Value		None	L	T					
42. Wells Fargo Advisors Money Market Account	A	Interest	M	T					
43. Wachovia Bank account	A	Interest	J	T					
44. Eagles Farms LLC	G	Distribution	M	W					
45. Bank of America account	A	Int./Div.	K	T					

1. Income Gain Codes: (See Columns B) and D4)	A=\$1,000 or less F=\$50,001 - \$100,000 J=\$15,000 or less N=\$250,001 - \$500,000 P1=\$25,000,001 - \$50,000,000	B=\$1,001 - \$2,500 G=\$100,001 - \$1,000,000 K=\$15,001 - \$50,000 O=\$500,001 - \$1,000,000	C=\$2,501 - \$5,000 H1=\$1,000,001 - \$5,000,000 L=\$50,001 - \$100,000 P1=\$1,000,001 - \$5,000,000 P4=More than \$50,000,000	D=\$5,001 - \$15,000 H2=More than \$5,000,000 M=\$100,001 - \$250,000 P2=\$5,000,001 - \$25,000,000	E=\$15,001 - \$50,000
2. Value Codes (See Columns C1 and D3)					
3. Value Method Codes (See Column C2)	Q=Appraisal U=Bank Value	R=Cost (Real Estate Only) V=Other	S=Assessment W=Estimated	T=Cash Market	

FINANCIAL DISCLOSURE REPORT
Page 7 of 8

Name of Person Reporting	Date of Report
Eagles, Catherine C.	3/11/2010

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

Part VII.

Glaxo Smith Kline stock sold before end of reporting period.
Lincoln National stock sold before end of reporting period.

Eagles Farms LLC valued based on tax value of real estate owned by LLC and annual income -

FINANCIAL DISCLOSURE REPORT
Page 8 of 8

Name of Person Reporting	Date of Report
Eagles, Catherine C.	3/11/2010

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 

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

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		202	899	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	1	277	186	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		183	320
Real estate owned-add schedule		397	800	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		34	570				
Cash value-life insurance		72	302				
Other assets itemize:							
Cash in IRA accounts		244	448				
Eagles Farms, LLC		150	000				
Higgins Benjamin Eagles & Adams PLLC		15	000	Total liabilities		183	320
				Net Worth	2	210	885
Total Assets	2	394	205	Total liabilities and net worth	2	394	205
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts		3	000	Are you a defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT
NET WORTH SCHEDULES

Listed Securities

BB&T Corp.	\$ 66,446
BNC Bancorp	2,125
Citigroup Inc	1,326
Dominions Res Inc VA New	53,186
Duke Energy Corp	62,588
Piedmont Natural Gas Co	20,251
Progress Energy Inc	6,701
Public Svce Enterprise Group	9,332
Southern Bankshares NC Inc	84,000
Spectra Energy Corp	41,856
Sprint	1,345
The Southern Company	6,354

Aim Equity Funds Inc Charter FD-A	5,194
Growth Fund America CL A	82,304
Investment Co America Clas A	262,159
Wash Mutl Invs Fd Inc	19,601
Investment Co America Clas A/Acct 2	10,569

NC Large Capindex Fund	44,302
NC Large Cap Value Fund	55,303
NC Large Cap Growth Fund	15,916
Growth Fund America – R2	36,744
Capital Income Builder – R2	37,892
Amer Balanced FD CL A	53,462
Investment Co America Clas A	114,406
Evergreen Equity Income FD CL A	62,164
Growth Fund America CL A	3,251
Investment Co America Clas A	112,680
Growth Fund America CL A	5,729
Total Listed Securities	\$ 1,277,186

Real Estate Owned

Personal residence	\$ 397,800
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Real Estate Mortgages Payable

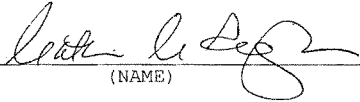
Personal residence	\$ 183,230
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Contingent liabilities – guarantor on lease.

AFFIDAVIT

I, Catherine C. Eagles, do swear
that the information provided in this statement is, to the best
of my knowledge, true and accurate.

3/1/2010
(DATE)


(NAME)

Sharon Allford - 2/20/2011
(NOTARY)

Madam Chief Justice.

Judge CHILDS. Well, actually, that is not my correct title. I'm a Circuit Court judge. The reference earlier to Chief Justice was to Chief Justice Toal, who has allowed me, in her gratitude, to serve as an acting justice on our South Carolina Supreme Court from time to time.

Senator FEINSTEIN. I see.

Judge CHILDS. But thank you.

In reference to your question, I have a high regard and sincere appreciation for our legal system, which is the form of order in our court, in our democracy. I believe that my record supports that I allow litigants to access the courts and have their disputes adjudicated in a fair and impartial manner under a fair and independent legal system. I approach all cases allowing litigants to have equal justice under the law and to act in accordance with the rule of law.

Senator FEINSTEIN. Thank you very much.

Judge Eagles.

Judge EAGLES. Yes. I would join my colleagues here at the table in expressing respect for the rule of law. Part of the role of the judge is to ensure a predictable process to ensure that the law, as it has been expressed by the higher courts—I've been a State court judge for almost 17 years. In my case, it would have been the North Carolina Court of Appeals and North Carolina Supreme Court—is followed in my courtroom every day as fairly and consistently as I am able to do so.

Senator FEINSTEIN. One other question. What is your understanding of the scope of Congressional power under Article 1 of the Constitution, in particular the commerce clause and under Section 5 of the Fourteenth Amendment? Who would like to go first? Judge Mueller.

Judge MUELLER. Madam Chairman, I'll do my best to answer your question. I have not had the opportunity to make such a decision. I can tell you, if the question is asking about whether or not I would ever rule a statute unconstitutional, I can tell you that I would presume a statute to be constitutional and only overturn after very serious consideration and not readily.

But generally, my approach to any case would be to look at the question presented, look at the record of the case before me, marshal the applicable law, and apply that law to the specific question presented. I have not made a decision, I believe, that addresses that question to date.

Senator FEINSTEIN. Mr. Gergel.

Mr. GERGEL. Yes, ma'am. Obviously the commerce clause provides broad powers to Congress; the precedents of the Supreme Court demonstrate that. But that power is not unlimited. The Tenth Amendment is an important feature in balancing the respective powers of the Federal and State government. Likewise, Section 5 of the Fourteenth Amendment provides important remedial powers to Congress to remedy violations of equal protection and due process, but again, that power is not unlimited.

Senator FEINSTEIN. Thank you.

Judge Childs.

Judge CHILDS. I, too, have not had the opportunity to address this particular situation in State court. However, as a limited role in Federal court, I would approach only cases and controversies before me. With respect to any laws respecting your Congressional powers, I would presume that anything that you all are doing is constitutional and would approach it with that mindset, knowing that you would only enact laws that you have had due deliberance over and consider deliberation over, so I wouldn't make that presumption in the first place.

There may be a course of action in which we might have to consider something to be unconstitutional, but I would hope that we'd be in a position where the record—you may not have to reach that decision. But of course, only those particular facts and circumstances that are before the court would I make decisions about.

Senator FEINSTEIN. Thank you.

Judge Eagles.

Judge EAGLES. Yes. As a State court judge, I have not faced many commerce clause issues. I do know there are some recent cases in that area from the U.S. Supreme Court. It would be my intention to read those cases carefully, to read Fourth Circuit cases if there are any that are on point and helpful to the factual situation that would be in front of me, and if there are not, to perhaps look beyond the Fourth Circuit to other circuits if I were fortunate enough to be confirmed, and to apply the law as it is put forward by those appellate courts to the facts specifically in front of me, to only reach constitutional questions when necessary and to rule narrowly when possible.

Senator FEINSTEIN. Thank you.

Senator Sessions.

Senator SESSIONS. Well, thank you. It's good to have all of you here. The process is more rigorous, as you know, than just the hearing we have today. Each of you had to be interviewed by the Department of Justice, and perhaps the President and the White House. You've been asked to submit your materials. FBI has done backgrounds, ABA has done evaluations.

You've submitted documents, according to our questionnaire, to the Senate and our staffs have done their best to pore over them to make sure that things are in order. I have to say at this point, there is nothing happening that is bad, I guess you would say. It looks good on your record. Each of you have had a good deal of experience, it seems to me, to have the kind of skills and gifts and graces and background that would put you in a position to do a good job as a U.S. District Judge.

But it's not a little bitty matter that we go through. This is a lifetime appointment. It's the only opportunity the public has to have any kind of role in it. So I want to say, even though we're not going to be grilling you this morning, or this afternoon, that a lot of work has gone into assuring the public that your nominations are worthy of going forward, that you have the skills, the integrity to do a good job.

Mr. Gergel, you mentioned the rule of law. You've practiced for some time. I just was reading an article in *Fortune Magazine* by the CEO of a major company or investment group, and they were investing all over the world. He was talking positively about it. The

interviewer said, well, what about the United States? Do you still believe in investment in the United States? On three different occasions in that protracted interview he said yes, and the first reason he gave was the rule of law, that you can invest in the United States, you can feel like you'll have a fair day in court if something comes up, and you're at much greater risk in other countries, many other countries, because they don't have that great tradition.

In your experience, how do you evaluate the importance of the rule of law?

Mr. GERGEL. Well, Senator, I think that's an excellent question. I have a friend who was telling me the story about a colleague who had invested in Russia and had a dispute come up that was an ordinary business dispute, and the disputant sent over thugs to threaten the American businessman and he packed up and left Moscow and he's never returned. It shows you you cannot have a free enterprise system, you cannot have a free market if you don't have the rule of law. It is essential to the rule of law.

Senator SESSIONS. I'd just agree. That's one of the reasons I feel so deeply, is the rule of law is—you interpret the statutes and Constitution as written and we give—you get awfully inconsistent verdicts if each judge allows their empathy, or their feelings, or their philosophy to impact it.

Judge Mueller, you've had experience with the sentencing guidelines. You have expressed some concern about the tough sentences on occasion you've been called upon to impose, I understand, in one commencement speech, I understand. You're not the only judge that's expressed that.

And we just passed, in a bipartisan way, unanimously out of the Senate a modification of the crack and powder sentencing guidelines, which are, I think, the primary source, would you not agree, of some of the heavier sentences in the system. So I guess my question to you is, you're about to have this lifetime appointment. How do you feel about the guidelines? What deference do you feel they should be given, and to what extent will you follow them?

Judge MUELLER. Senator, thank you for that question and the opportunity to clarify. I'm not certain I'm remembering the comments you're referencing. It might have come from my very first days as a judge. When I first became a magistrate judge I had had no criminal experience.

Senator SESSIONS. I think the quote was, "Why am I faced with placing children in jail longer than they've been alive?" Sometimes that is true. Then you said, "Of course there is never a reasonable justification, but I'm still searching for explanations."

Judge MUELLER. I may be completely forgetting. That doesn't sound like anything I've ever said.

Senator SESSIONS. You look puzzled. I think you're correct.

Judge MUELLER. Ah.

Senator SESSIONS. I don't think that was you.

Judge MUELLER. OK.

[Laughter.]

Senator SESSIONS. Somebody else will have to answer for that. Judge Childs.

Judge MUELLER. I have forgotten many things I've said, but I am glad to know I wasn't—

Judge CHILDS. I must say, when you were stating that the words sounded quite familiar.

[Laughter.]

Senator SESSIONS. Well, it's a tough thing. How do you feel about it, the duty that you have to impose sometimes very tough sentences, and will you do it?

Judge MUELLER. Absolutely, Senator. And let me just say, even though I do not currently see felony cases, I see felony defendants only on initial appearance's detention hearings. But I regularly consult the guidelines in resolving the Class A misdemeanor cases that are before me. Even though I understand, following Booker and Fan-Fan, that the guidelines are advisory, I regularly consult them in every case.

I consider them an essential tool, both to ensure that I make a well-informed decision in imposing judgment and sentence, but moreover, in ensuring that I am complying with the statutory factors under 18 U.S. Code, Section 3553, and in particular, the factor that focuses on uniformity, ensuring to the best possible that courts are imposing uniform sentences throughout the country. So, I consider the guidelines a very valuable tool.

Senator SESSIONS. I appreciate that. I think that's a good answer for you new Federal judges-to-be. I think that's good advice. A lot of time and effort went into identifying what an appropriate sentence is, what are the aggravating/mitigating circumstances. It's a bit mechanical and some judges don't like it for that reason, but when the dust settles, I think we've definitely achieved more uniformity, more consistency, and actually allow you to feel more comfortable that the sentence you've imposed is one that is not out of the mainstream of thinking.

Mr. Gergel, would you share your thoughts about how you would approach the guidelines?

Mr. GERGEL. You know, we in South Carolina have a special relationship with the guidelines because the chair of the original Sentencing Commission was Billy Wilkins, the Chief Judge of the Fourth Circuit, and I've had the privilege of having two lengthy discussions with Judge Wilkins, since the President was kind enough to nominate me, about both the underlying philosophy and the practical application of the guidelines. And I've also had—spent a good bit of time studying them. They show a lot of collected wisdom and experience. They are a very valuable tool. They should be the benchmark and the beginning point of every sentencing process.

I have found, looking at this, that's often where you end up because it is so reasonable. There are obviously circumstances where they don't fit. Often, all parties—the U.S. Attorney's Office and the defendant counsel—will recognize when they don't fit. They're usually—that's not a matter of dispute. But generally speaking, they're a very valuable tool and I pledge to seriously consider them in any sentencing that I do.

Senator SESSIONS. I would say that Judge Wilkins' leadership in establishing the sentencing guidelines was probably the greatest change in the entire criminal justice system since the founding of the Republic—maybe the eliminating of parole, and you get you get definite sentences. But both of those happened about the same

time. It was a bipartisan act by this Senate before I got here. I think it has been helpful.

Judge CHILDS.

Judge CHILDS. Yes. In State court, we obviously are not bound by any sentencing guidelines, as well as we don't really have sentencing guidelines as advisory. So in that regard, I do believe that the Federal court guidelines—and I appreciate the collaborative and bipartisan efforts that have gone into those guidelines—they assure more consistency, uniformity, and reasonableness of the sentences.

As State court judges, we have a broad range and that will differ from judge to judge as to what a particular sentence might be to an individual defendant. So I'm certainly ready, if lucky enough to be confirmed as well, to approach those guidelines as advisory, but also have some well-reasoned explanations for departing from such guidelines.

Senator SESSIONS. It might make you sleep a little better if you're following the recommendations of people who objectively figured out what they thought would be a reasonable sentence.

Judge CHILDS. Absolutely.

Senator SESSIONS. Judge Eagles.

Judge EAGLES. Yes. When I became a judge in 1993, we did not have any sentencing guidelines or anything like that in North Carolina. Very big disparities in sentencing across the State from judge to judge. But we did have structured sentencing enacted in North Carolina in 1994. It's not exactly the same as the Federal system, I understand, but it does have presumptive sentences with aggravating factors and mitigating factors.

I have been working with those since, I think if I can remember, October 1st of 1994, crimes committed after that date. So I'm used to working with guidelines. It gives a framework for sentencing that is extremely helpful and useful, and I agree with my colleagues that I would definitely consult those in the first instance.

Senator FEINSTEIN. Thank you very much, Senator Sessions.

I'm not going to ask any more questions, but I am going to say this: you are all going to the Federal trial court and it's where the rubber hits the road, and it's where people come in and petition. It's where you will be depended upon to settle cases because some of you will have very large caseloads, and so your ability to work a case to settlement rather than take it to trial is also all-important.

We consider the Federal court the best, the smartest, the premier court in the United States, and so there is a level of trust that you take. The fact that this is a lifetime position, that you can only be impeached, you don't have to run for office, is an enormous, I think, responsibility. The faith and trust and obligation toward the law and the Constitution of your country, of our country, is all-important.

So I just want to say that I have no doubt but that you're going to be confirmed, and I want to wish you well. I want you to carry that standard high.

So with that, this hearing is adjourned.

[Whereupon, at 2:16 p.m., the Committee was adjourned.]

[Questions and answers and submissions follow.]

QUESTIONS AND ANSWERS

Responses of J. Michelle Childs
 Nominee to the U.S. District Court for the District of South Carolina
 to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No.

2. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court affirmed that the *Lopez* and *Morrison* decisions are consistent with its prior decisions on the Commerce Clause.

3. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: My views on the analysis of decisions of the Supreme Court or other appellate courts would have no impact on my work as a federal district judge. It is not the role of a federal district judge to question binding legal precedent, but instead to follow it.

- a. **How would you determine what the evolving standards of decency are?**

Response: If confirmed, I would apply the analysis set forth in the applicable decisions of the Supreme Court and the federal appellate courts in determining the concept of “evolving standards of decency.”

- b. **Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No, unless the Supreme Court overrules its existing precedent.

c. What factors do you believe would be relevant to the judge's analysis?

Response: The factors identified in controlling precedent of the Supreme Court and the appellate decisions within the particular jurisdiction would be relevant to the federal district judge's analysis of this issue.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Not applicable.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No. If confirmed as a federal district judge, I would apply the law set forth by the Supreme Court and the Fourth Circuit.

**Responses of J. Michelle Childs
Nominee to the U.S. District Court for the District of South Carolina
to the Written Questions of Senator Jeff Sessions**

1. **In a commencement speech, you said that judges should be “ambassadors for the protection of our system of jurisprudence” and that they “are uniquely positioned to ensure the fair administration of justice.”**

- a. **What is your definition of the “fair administration of justice”?**

Response: The “fair administration of justice” requires that judges act as fair and impartial arbiters, treat all litigants courteously, assess the particular facts and evidence presented in individual cases, make deliberate and well-reasoned decisions based on established legal precedent, and abide by the judicial canons and ethical standards of conduct.

- b. **As a judge, how have you ensured the fair administration of justice?**

Response: It is my consistent practice to approach each case in the manner described above.

2. **In *Mouzon v. State*, you considered an application for post-conviction relief for an individual whose probation had been revoked. The applicant claimed the revocation was based on insufficient records, and that he had insufficient counsel. You not only vacated a probation revocation which, I believe, was proper, but you also removed 3 years and 10 months from the applicant’s current probation, based in part on an ineffective assistance of counsel claim. According to your opinion, you based this remedy on a court’s equitable powers, citing a South Carolina Court of Appeals case which stated, “Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.”**

- a. **How did you come up with the specific remedy of removing 3 years and 10 months from the applicant’s probation?**

Response: The Mouzon case contained a factual question as to whether the presiding judge at the probation revocation hearing had revoked the applicant’s probation and subsequently sentenced the applicant to “consecutive” sentences. The applicant asserted that the probation officer, who avoided being served with the subpoena for the post-conviction relief hearing, had handwritten that term on the sentencing sheet after the probation revocation hearing. Faced with the dilemma that the probation officer refused to cooperate and the judge was deceased, I resolved the factual question in favor of the applicant. I arrived at this specific remedy to remove the impact of the disputed handwritten term on the sentencing sheet.

b. Why did you believe this was reasonably necessary to “insure a just result”?

Response: I determined that the applicant timely filed his application for post-conviction relief, but his hearing was delayed for years based on circumstances beyond his control which left him without an adequate remedy at law. In essence, the applicant had already served the prison sentence that he attempted to challenge and still had to serve the remainder of his probation sentence. Therefore, I considered the applicant’s request for equitable relief and found it to be reasonable and appropriate under the particular facts and circumstances of this case.

3. You presided over a highly publicized case where an employee tied his boss to a chair, strapped a fake bomb onto him, and demanded \$500,000 or he would blow up the boss and his family. You originally sentenced the man to 38 years in prison. Three years later, you reduced his sentence to 25 years, after a medical evaluation indicated that there was a low risk that the defendant would commit another crime if he remained sober.

a. Can you explain in a little greater detail why you decided to reduce the individual’s sentence from 38 to 25 years?

Response: I initially sentenced the defendant to a term of 38 years for various criminal offenses he committed against the victim. I required that the defendant serve some of the sentences concurrently and some of the sentences consecutively. The defendant timely filed a motion for reconsideration of the sentence. At the hearing on the motion for reconsideration, the defendant’s counsel articulated several arguments that he believed that I had not properly considered, including the defendant’s advanced age (50); his lack of a prior criminal record; that certain sentences for various offenses were to run consecutively instead of concurrently; and a medical evaluation showing defendant’s diagnosis of substance abuse and clinical depression, alternatives for treating these conditions, the defendant’s rehabilitative efforts, and a risk assessment of the defendant. I considered all of these factors and, consistent with the law, reduced the defendant’s sentence to 25 years which reflected a concurrent sentence on all charges.

b. If confirmed, under what circumstances would you depart downward from the sentencing guidelines?

Response: I understand the essential role of the Sentencing Guidelines in insuring uniformity, reasonableness, consistency, and predictability in the sentencing of criminal defendants. I would not depart downward from the Sentencing Guidelines, except when the criteria set forth therein or controlling legal precedent of the Supreme Court or the Fourth Circuit provide an appropriate basis on which to depart from the Sentencing Guidelines.

4. **During the 2008 presidential campaign, President Obama described the types of judges that he will nominate to the federal bench as follows:**

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: Yes. Because President Obama nominated me, I presume I fit his criteria for federal judges.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes.

- c. **What role do you believe empathy should play in a judge’s consideration of a case?**

Response: Empathy should play no role in a judge’s application of the law to the facts of a case.

- d. **Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. **If so, under what circumstances?**

Response: Not applicable.

- ii. **Please identify any cases in which you have done so.**

Response: None.

- iii. **If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: I have had cases involving plaintiffs with significant injuries who have failed to timely file a complaint within the applicable statute of

limitations period. When the law required me to dismiss the case, I followed the law faithfully.

- e. **As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: I believe judges should base their decisions solely on the law and facts presented in the case.

5. **Please describe with particularity the process by which these questions were answered.**

Response: I received the questions from the Department of Justice (DOJ) on April 23, 2010. I reviewed the questions, considered the issues, referenced documents related to the specific matters herein, and undertook legal research. I drafted my answers to the questions and discussed them with the DOJ. Thereafter, I finalized my answers and forwarded them to the DOJ for submission to the Senate Judiciary Committee.

6. **Do these answers reflect your true and personal views?**

Response: Yes.

Responses of Catherine Caldwell Eagles
Nominee to the U.S. District Court for the Middle District of North Carolina
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: I do not believe the Constitution is constantly evolving as society interprets it.

2. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court stated that its decisions in *Lopez* and *Morrison* are consistent with earlier Commerce Clause decisions.

3. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: If confirmed, my views will not be part of the decision-making process and I would follow applicable Supreme Court and Fourth Circuit Court of Appeals precedent. The *Roper* decision is precedent that, if confirmed as a District Judge, I would be required to follow and would follow.

- a. **How would you determine what the evolving standards of decency are?**

Response: I would follow precedents of the Supreme Court and Fourth Circuit Court of Appeals.

- b. **Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: I do not think that a District Judge could make such a finding.

c. What factors do you believe would be relevant to the judge's analysis?

Response: The analysis would be controlled by precedent from the Supreme Court and the Fourth Circuit Court of Appeals.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: I know of no circumstances under which it would be appropriate for a District Judge to rely on foreign or international law in determining the meaning of the Constitution.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Not applicable.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No.

**Responses of Catherine Caldwell Eagles
Nominee to the U.S. District Court for the Middle District of North Carolina
to the Written Questions of Senator Jeff Sessions**

1. **Do you think it is ever proper for judges to indulge their own political views or policy preferences in determining what the law means?**

Response: No.

- a. **If so, under what circumstances?**

Response: None.

- b. **Please provide an example of a case in which you have done so.**

Response: None.

- c. **Please provide an example of a case in which you had to set aside your own values and rule solely based on the law.**

Response: While I do not recall specific details, in making sentencing decisions I have occasionally thought a sentence required by law was too lenient for the circumstances, and I have occasionally thought a sentence required by law was too harsh for the circumstances. I have always followed the law despite any personal wish that the law might allow for a different result.

2. **During the 2008 presidential campaign, President Obama described the types of judges that he will nominate to the federal bench as follows:**

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: By his nomination of me, I believe that I fit his criteria for selection of federal District Judges.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: I agree that feelings do not drive factual decisions and that judges apply the law to facts.

c. What role do you believe empathy should play in a judge's consideration of a case?

Response: Empathy does not determine legal decisions. Empathy can be a valuable asset in helping a judge be a good listener, particularly when considering testimony from litigants, witnesses, and crime victims whose experience might be outside the judge's personal experience. Empathy can also help a judge listen respectfully and with an open mind.

d. Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?

Response: No.

i. If so, under what circumstances?

Response: None.

ii. Please identify any cases in which you have done so.

Response: None.

iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.

Response: While I do not recall the particulars of any specific case, I have seen many people in court over the years whose personal circumstances were compelling but for whom the law did not allow relief. I have been asked by victims of violent crime to order restitution for items not allowed by state law but which seemed related to the crime. I have had cases where an injured person was hurt badly but was unable to establish negligence or whose claim was barred by a statute of limitations. More recently I have seen families with homes in foreclosure and businesspeople whose savings have been decimated by business losses. I have always ruled based on the law and not on empathy for a litigant.

- e. **As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: Decisions must be based solely on the law and facts presented and not on a desired outcome.

2. **Please describe with particularity the process by which these questions were answered.**

Response: I received a copy of these questions from Department of Justice staff on April 23, 2010. I prepared a draft of my answers. I discussed the draft with Department of Justice staff on April 25, 2010. I then provided a final version of my answers to Department of Justice staff for transmission to the Committee.

3. **Do these answers reflect your true and personal views?**

Response: Yes.

Responses of Richard Gergel
Nominee to the U.S. District Court for the District of South Carolina
to the Written Questions of Senator Tom Coburn, M.D.

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No. The Constitution is based upon a set of fixed, enduring principles.

- 2. Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: The United States Supreme Court, in a long line of precedents, has held that congressional power under the Commerce Clause is broad but not absolute. The reasoning and holding of both *Lopez* and *Morrison* are consistent with that approach, as explained in the more recent decision of *Gonzales v. Raich*, 545 U.S. 1 (2005).

- 3. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: My duty as a United States District Judge would be to respect and apply the holdings and analyses of the United States Supreme Court.

- a. How would you determine what the evolving standards of decency are?**

Response: I would look to the relevant precedents of the United States Supreme Court and the Fourth Circuit Court of Appeals and faithfully apply the standards adopted by those appellate courts.

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No. The United States Supreme Court has consistently held that the death penalty is a constitutional form of punishment under the Eighth Amendment.

c. What factors do you believe would be relevant to the judge's analysis?

Response: A District Judge in the District of South Carolina should apply the controlling precedents, holdings and standards of the United States Supreme Court and the Fourth Circuit Court of Appeals.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Not applicable.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: I do not believe foreign law should be utilized to determine the meaning of the United States Constitution.

Responses of Richard Gergel
Nominee to the U.S. District Court for the District of South Carolina
to the Written Questions of Senator Jeff Sessions

- 1. You have had significant litigation and trial experience, but your experience is limited primarily to representing plaintiffs in medical malpractice litigation. If confirmed, will you be able to put aside your experience of representing solely one-side and be a neutral umpire?**

Response: I am confident that I can be fair and impartial to all parties. In regard to my experience as a litigator, I have had the privilege of representing very diverse clients. I have represented plaintiffs and defendants in a broad range of civil litigation, including extensive work as defense counsel representing the State of South Carolina and the City of Columbia. My 30 years of experience as a litigator have taught me that what all parties and counsel desire is a judge who provides a fair and level playing field in which to address claims and defenses. If fortunate enough to be confirmed, I pledge to provide all parties a fair and impartial forum.

- 2. In your questionnaire, you indicated that you have no experience litigating criminal cases. Criminal cases account for a substantial portion of the federal docket. If confirmed, how do you plan to educate yourself with respect to federal criminal law and procedure?**

Response: Since being nominated by the President, I have engaged in study and review of federal criminal law and procedures, including a careful analysis of the Federal Sentencing Guidelines. This has included reading various books provided by the Federal Judicial Center and observing numerous federal criminal trials, guilty pleas and sentencing proceedings. If confirmed, I will continue my study of federal criminal law and procedures, participate fully in programs offered by the Federal Judicial Center and consult regularly with my very experienced colleagues on the Federal District Court bench in South Carolina.

- 3. According to a press report, an associate described you as “a dyed-in-the-wool Democrat, [who] selects cases even if they put him at odds with party leaders.”**

- a. If confirmed, will you allow your political beliefs to influence your decisionmaking?**

Response: No.

- b. Do you think it is ever proper for a judge to indulge in his or her own policy preferences in determining what the law means? If so, under what circumstances?**

Response: No.

4. **During the 2008 presidential campaign, President Obama described the types of judges that he will nominate to the federal bench as follows:**

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: I presume by my nomination that I met the standards of the President to be a United States District Judge.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes.

- c. **What role do you believe empathy should play in a judge’s consideration of a case?**

Response: None.

- d. **Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means? If so, under what circumstances?**

Response: No.

- e. **As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: A judge should base his or her decisions solely on the law and facts presented.

5. **Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on Friday, April 23, 2010, reviewed each question with considerable care and prepared my responses. Those responses were discussed with Department of Justice staff and then submitted to the Judiciary Committee.

6. **Do these answers reflect your true and personal views?**

Response: Yes.

Responses of Goodwin Liu
 Nominee to be U.S. Circuit Judge for the Ninth Circuit
 to the Written Questions of Senator Tom Coburn, M.D.

1. In response my question about using foreign law in interpreting the Constitution, you noted that “what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument.”

a. Do you believe that the Court “[chose] the law that is favorable to [their] argument] in *Lawrence v. Texas*, which cited to foreign law when undercutting the reasoning in *Bowers v. Hardwick*?

Response: Yes. The Supreme Court in *Lawrence v. Texas* cited an act of the British Parliament and decisions of the European Court of Human Rights in support of its assertion that the “references [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.” 539 U.S. 558, 572-73, 576-77 (2003).

b. Do you believe that is what the Court did in *Roper v. Simmons*, which cited the death penalty laws of foreign nations in an effort to show that sentencing a person under 18 years old to death, regardless of the severity of the crime, constituted cruel and unusual punishment under the Eighth Amendment?

Response: Yes. The Supreme Court in *Roper v. Simmons* cited the laws of several nations as well as the United Nations Convention on the Rights of the Child in support of its assertion that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” 543 U.S. 551, 575-78 (2003).

c. At your hearing, you indicated that it was appropriate for courts to cite foreign law for “ideas and other forms of guidance.” To your credit, you said that “[a]uthority is the basis on which cases are decided, not ideas or other forms of guidance.” However, in a constitutional law case, the relevant authority is the Constitution. The only possible relevance I can see for citing foreign law as a source of “ideas [and] other forms of guidance” in such a case is to influence how a judge interprets the Constitution, the relevant authority; therefore, while your answer may have shown your understanding that foreign law may not *control* the meaning of the Constitution, I am still unsure of how you think it is permissible for foreign law to *influence* the interpretation of our Constitution. Do you think there is another relevant purpose for citing to foreign law, other than influencing how a judge interprets authority and legal standards?

Response: Legal standards may occasionally require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts. Apart from circumstances where American law requires a judge to rely on foreign law, however, I do not believe a judge should rely on foreign law as legal authority in interpreting U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have

no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

- d. In your view, is it ever proper for judges to look to contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution? If so, under what circumstances?**

Response: Because foreign law has no legal authority in our legal system, judges should not rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution, unless American law so requires. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

- e. If so, how would you choose which foreign law to consider as you interpret the Constitution?**

Response: Please see response to subpart (d) above.

- f. How do contemporary foreign and international legal materials have any genuine relevance to the issue of American law being decided?**

Response: In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have no relevance as legal authority in the interpretation of American law, foreign law likewise has no relevance as legal authority in the interpretation of American law, except where American law so provides.

- g. There is a surprising dearth of Supreme Court case law on the Second Amendment. Given the paucity of case law on the subject and the clearly unsettled areas of Second Amendment law, would it be appropriate for the Supreme Court to look to “wise solutions” in foreign law when deciding whether the right to bear arms in America is a fundamental right and should be incorporated on to the states?**

Response: Whether the right to bear arms is a fundamental right that should be incorporated on to the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- h. Would foreign law be relevant to any aspect of your efforts to interpret the Second Amendment?**

Response: If confirmed, I would faithfully follow the Supreme Court’s precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment.

i. **Why is foreign law relevant when interpreting the Eighth Amendment and not the Second Amendment?**

Response: If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment and the Eighth Amendment, including any instructions in those precedents on how to interpret these amendments.

2. **You have written a number of articles arguing that the Citizenship Clause of the 14th Amendment creates a positive right to whatever welfare benefits are necessary to facilitate full participation as a citizen.**

In "Interstate Inequality in Educational Opportunity," you argued that "the Fourteenth Amendment guarantee of national citizenship [was] a generative source of substantive rights."¹ You also argued that "contrary to the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties,' the social citizenship tradition assigns equal status to negative rights . . . and positive rights to government assistance."²

In a companion article entitled "Education, Equality, and National Citizenship," you stated: "by virtue of its affirmative character, the substantive protections of the Citizenship Clause are guaranteed not only against state abridgment, but also as a matter of positive right."³ You ultimately concluded that the "the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit."⁴

Throughout our history, most lawyers and judges have not viewed the Constitution in this way. The predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."⁵

a. **Why do you think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative-right guarantee, rather than a set of restrictions on government power?**

Response: In general, I do not think Congress or the Court has interpreted the Constitution to recognize affirmative rights. My writings make clear my awareness that "[t]he concept of positive rights [is] disfavored in Supreme Court doctrine." *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). If confirmed as a judge, I would faithfully follow the Supreme Court's precedents, not the views I have expressed as a scholar.

¹ Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044-2047-48 (2006).

² Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 336 (2006).

³ *Id.* at 358.

⁴ *Id.* at 407.

⁵ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

3. **You have argued that the Constitution creates, in all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. Although you claim these rights arise from the Citizenship Clause of the Fourteenth Amendment, you have also stated that: “we must be careful to ensure that the ideal of national citizenship does not infuse public education with nativism, cultural conformity, or chauvinistic nationalism and we should not use the concept of citizenship to deny education to noncitizen children, not least because the Equal Protection Clause extends to ‘persons,’ not only to citizens.”**

- a. **Do you personally believe that people whose presence in this country violates our immigration laws nonetheless have a constitutional right to public education?**

Response: The Supreme Court has held under the Equal Protection Clause that a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See Plyler v. Doe*, 457 U.S. 202 (1982). *Plyler* dealt only with “innocent” children who “can affect neither their parents’ conduct nor their own status.” *Id.* at 220, 230 (internal quotation marks and citation omitted). The Court also said that a state’s prerogative to deny public education to children who are here illegally might be different if such denial were supported by congressional policy. *See id.* at 224-26. I would faithfully follow the Court’s precedent if I were confirmed. I have written that “we should not use the concept of citizenship to deny education to noncitizen children,” citing *Plyler* to support the proposition that “the Equal Protection Clause extends to ‘persons,’ not only to citizens.” *National Citizenship and the Promise of Equal Educational Opportunity* 130 & n.22, in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009). I have not previously expressed any view on whether people who are here illegally have a constitutional right to public education, and I believe it would not be appropriate for me to do so now.

- b. **Do you personally believe the U.S. Constitution guarantees any “persons” living in the United States a right to healthcare and other welfare benefits?**

Response: The Supreme Court has generally held that the Constitution does not guarantee a right to health care or welfare, and where Congress has restricted the eligibility of noncitizens for such benefits provided by statute, the Court has upheld it. *See Mathews v. Diaz*, 426 U.S. 67 (1976). I would faithfully follow the Court’s precedent if I were confirmed. My writings have not claimed that there is a constitutional right to health care or welfare for any citizen or person. My writings have indicated that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, or define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 244-45, 264-66 & n.324 (2008).

4. **You were one of several law professors who filed an amicus brief with the California Supreme Court in a suit seeking to have California’s definition of marriage as between a man and a woman declared unconstitutional. Your brief argued that California’s definition of marriage violated the equal protection guarantees of the U.S. Constitution, and, therefore, also violated the equal protection guarantees of the California constitution. You also have repeatedly used the language of the majority opinions in *Plessy v. Ferguson* and *Brown v. Board of Education* to describe most states’ definition of marriage as a union between a man**

and a woman. In discussing the recognition of only civil unions among same-sex couples, you have repeatedly made statements to the effect that “[e]ven if marriage provides no greater rights than domestic partnership, a separate-but-equal regime unavoidably signals that same-sex relationships are of lesser worth.”⁶

- a. **Do you stand by your repeated statements that even if marriage provides no greater rights than domestic partnership, such an arrangement is a “separate but equal regime” similar to the majority opinion in *Plessy*?**

Response: I stand by my use of the term “separate but equal” and will leave any comparison to *Plessy* to others. The amicus brief I joined did not argue that California’s definition of marriage violated the U.S. Constitution. The brief urged the court to “rely solely on California, rather than federal, constitutional law” and noted that “California’s Constitution has often been construed to provide broader protection than its federal counterpart.” Brief of Amicus Curiae Professors of Constitutional Law at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The brief discussed federal cases “to illustrate” an “analytic methodology for interpreting the California Constitution.” *Id.* The brief expressed no view and made no attempt to resolve whether California’s definition of marriage violated the U.S. Constitution.

- b. **Do you personally believe that the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states?**

Response: My writings have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

- c. **In an *LA Times* article on Prop. 8, you stated: “Each of the 18,000 same-sex couples and their families in California represents a potential catalyst for broader acceptance of gay marriage. The more familiar we become with gay spouses and their children -- as our friends, neighbors and co-workers -- the more gay marriage will become an unremarkable thread of our social fabric. Proposition 8 may then come to be viewed, in the long run, not as an enduring constitutional principle but as the will of a narrow and ultimately temporary majority.” The idea of marriage as between a man and a woman is one that has endured for thousands of years, since the dawn of man. Do you still believe that traditional marriage, which Proposition 8 protects, “is not as an enduring constitutional principle but... the will of a narrow and ultimately temporary majority?”**

Response: Marriage between a man and a woman is an institution that has endured for thousands of years, and my statement in the *Los Angeles Times* editorial did not say that traditional marriage is the will of a narrow and ultimately temporary majority. My statement was a speculative prediction of how a particular state ballot measure, Proposition 8, “may ... come to be viewed, in the long run.”

- d. **Is the right to marry an example of the constitutional interpretation that you believe properly considers “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?”**

⁶Goodwin Liu, *The Next Verdict on Prop. 8*, LOS ANGELES TIMES, Nov. 10, 2008, at A-19.

Response: I have written that “the history of litigation over the right to marry” is an example of how “changes in social understandings often, and rightly, change how constitutional principles are applied.” Keeping Faith with the Constitution 111 (2009) (discussing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated laws against interracial marriage).

5. **You have been extremely critical of Justice Alito saying that “[h]e approaches law in a formalistic, mechanical way abstracted from human experience.”⁷ This statement seems to reflect the sentiments of Justice Sotomayor who believed that human experiences should influence a judge’s decisions. She stated: “Personal experiences affect the facts that judges choose to see,” and “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Do you agree with Justice Sotomayor’s statement?**

a. **Why or why not?**

Response: I do not believe that a judge may “choose to see” particular facts in a case based on personal experiences or for any other reason. A judge has a duty to consider fully and fairly all the facts in the record of a given case or controversy. I also do not believe that the life experiences that arise from being a member of a particular race or gender would lead a judge “more often than not [to] reach a better conclusion” than the life experiences that arise from being a member of another race or gender.

6. **Please describe the criteria and methodology the Supreme Court employs to determine whether a right is a “fundamental right?”**

Response: The Supreme Court has used the term “fundamental” to describe various rights expressly stated in the Constitution. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (“the arms provision of the Bill of Rights [was] one of the fundamental rights of Englishmen”); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise of religion guaranteed by the First Amendment is a “fundamental concept of liberty”). In those cases, the Court has looked to the history and traditions of Anglo-American jurisprudence to determine whether a right is fundamental. *See, e.g.*, *Benton*, 395 U.S. at 795-96. The Court has also used the term “fundamental right” in interpreting the substantive liberty protected by the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests”). In that context, the Court has similarly looked to “[o]ur Nation’s history, legal traditions, and practices” as “the crucial guideposts” for determining whether a right is “implicit in the concept of ordered liberty” and therefore fundamental. *Id.* at 721 (internal quotation marks and citations omitted).

The Court has occasionally used the term “fundamental” to describe other rights not expressly stated in the Constitution. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210 (2008) (“fundamental right to vote”); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (“fundamental right of access to the courts”); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972)

⁷ Daniel Eisenberg, *How Alito Looks Under the Lens*, TIME, Nov. 14, 2005, at 20.

(describing “the right to travel” as a “fundamental personal right”). In those cases, it does not appear that the Court has used specific criteria or a specific methodology in describing a right as “fundamental.”

7. **In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ____ (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you believe the right to bear arms is a fundamental right?**

Response: Whether the right to bear arms is a fundamental right such that it should be incorporated against the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: The Supreme Court has understood several explicitly guaranteed rights in the Bill of Rights to be fundamental rights based on their roots in Anglo-American jurisprudence. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Sixth Amendment right to trial by impartial jury); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (First Amendment right to free exercise of religion); *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 235-36 (1897) (Fifth Amendment right against takings without just compensation). However, the Supreme Court has not recognized all of the rights explicitly guaranteed in the Bill of Rights to be “fundamental.” *See, e.g.*, *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment requirement of indictment by grand jury).

- b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. My understanding of Supreme Court precedent is that the Court decides whether a provision of the Bill of Rights should apply to the States by examining whether the provision is properly understood as fundamental within the history and traditions of Anglo-American jurisprudence. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-36 (1897). Whether the Second Amendment embodies a fundamental right that applies to the States is a question currently pending in the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521).

- c. ***Heller* further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: The Supreme Court has said that the Second Amendment codified a pre-existing right, and I would faithfully follow the Court's precedent if confirmed as a judge.

- d. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The Supreme Court has determined that the best reading of the text of the Second Amendment is that it protects an individual right to bear arms and that the Second Amendment codified a pre-existing right. I would faithfully follow the Court's precedent if confirmed as a judge.

- e. You testified that "the interpretation of the Constitution ... has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accurred up to that time." What underlying principles would you apply when interpreting the Second Amendment?**

Response: The Supreme Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), and I would faithfully follow the Court's precedent if I were confirmed.

- f. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ____ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: The Supreme Court in *Citizens United* applied the doctrine of stare decisis in overruling prior cases contrary to the Court's holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." 130 S. Ct. 876, 911-13 (2010). *Citizens United* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- 8. You stated during your hearing that "the role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories." Do you believe there was no invention or creation of new legal theories in Justice Blackmun's decision in *Roe v. Wade* when he found a right to abortion in the penumbras of the Constitution? Please explain.**

Response: My writings have "locate[d] *Roe* [*v. Wade*] within the broader constellation of cases extending constitutional protections to individual decision-making on intimate questions of family life, sexuality, and reproduction." *Keeping Faith with the Constitution* 97 (2009). I have written that "nothing about the Court's interpretive method distinguishes the core right in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, as in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner*, *Griswold* and *Eisenstadt*, the Court reasoned from constitutional text, principles, and precedent to the conclusion that that the 'right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... is broad enough to

encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.* at 104 (quoting *Roe*).

- a. Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's March 11, 2010 dissent in *Newdow v. Rio Linda Union School District* (05-17257) when he ruled that including "Under God" in the pledge was unconstitutional? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- b. You also testified that "a court .. judge would have to simply follow what the Supreme Court has instructed the courts to do on particular issues." Do you believe Judge Reinhardt did this in the *Newdow* case? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- c. Do you believe Judge Diane Wood simply followed what the Supreme Court has instructed the courts to do in *NOW v. Scheidler*? Please explain.**

Response: In *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006), the Supreme Court held that threatening or committing physical violence unrelated to robbery or extortion which obstructs, delays, or affects commerce falls outside the scope of the Hobbs Act. I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Wood's opinion in *NOW v. Scheidler*, and I believe it would not be appropriate for me to do so now.

- d. Do you believe there was no invention or creation of new legal theories in Judge Reinhart's decision in *Silveira v. Lockyer*, 312 F.3d 1052, which held that the right to bear arms is a collective right? Please explain.**

Response: The Supreme Court has held that the right to bear arms is an individual right, and I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Reinhardt's opinion in *Silveira v. Lockyer*, and I believe it would not be appropriate for me to do so now.

- e. Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's decision in *Gonzales v. Carhart*, 550 U.S. 124, striking down the Partial Birth Abortion Ban? Please explain.**

Response: The Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and I would faithfully follow the Court's precedent if I were confirmed.

GOODWIN LIU
Associate Dean and
Professor of Law
(510) 642-7509
gliu@law.berkeley.edu

BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Boalt Hall

May 12, 2010

The Honorable Tom Coburn, M.D.
United States Senator
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Coburn:

Thank you for your letter of May 11 and for the opportunity to provide additional information in response to your written questions. In answering your letter, I begin with a brief explanation of how I approached some of the questions on which you have requested more information.

Some of your questions ask for my views on specific cases or doctrines of the Supreme Court or other courts, beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of various cases and doctrines in an effort to advance understanding and betterment of the law and to promote the education of future lawyers. Where I have expressed views about a particular case or doctrine in my scholarly work, I have identified those views and cited the relevant book, article, or speech, while noting that if confirmed I would faithfully follow the law, regardless of my academic views. Where I am able to supply additional information of this sort, I have done so below.

The role of a scholar, however, is distinct from the role of an inferior court judge. As I said at my confirmation hearing and in my responses to written questions, the role of a circuit judge—unlike that of a scholar—is not to evaluate or opine on the correctness of Supreme Court cases or doctrines. It is to apply the law faithfully and impartially to the facts of each case. Accordingly, like prior nominees who have been nominated to serve as an inferior court judge, I do not believe it is appropriate for me now to critique or speculate on the correctness of Supreme Court precedents or doctrines that I will be duty-bound to apply faithfully and impartially if I am confirmed. Moreover, given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by my potential colleagues on the Ninth Circuit. My responses to some of your questions reflect these concerns.

Question 1(g)

If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment. My writings have analyzed the Court's method of constitutional interpretation in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, *see* Keeping Faith with the Constitution 30-33 (2009), and my writings have identified nothing in *Heller* indicating that the Court should look to foreign law (apart from English antecedents to the Second Amendment) in deciding whether the right to bear arms is a fundamental right that should be incorporated on to the states.

Questions 1(h) and (i)

(h) If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, and there is no indication in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, that foreign law (apart from English antecedents to the Second Amendment) is relevant to judicial interpretation of the Second Amendment.

(i) The Supreme Court has not looked to foreign law in interpreting the Second Amendment, and although the Court has looked to foreign law in interpreting the Eighth Amendment, it has made clear that foreign law is not "controlling." *Roper v. Simmons*, 543 U.S. 551, 575 (2005). If confirmed, I would faithfully follow the Court's precedents on the Second and Eighth Amendments, paying careful attention to the guidance in those precedents as to what factors are controlling in the legal analysis. My role as a circuit judge would not be to critique or theorize about any differences between the Court's Second and Eighth Amendment jurisprudence, but to apply the law faithfully and impartially to the facts of each case.

Question 2(a)

I do not think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative right guarantee, rather than a set of restrictions on government power. I agree with you that the predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (noting "the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties' (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.)). My scholarly writings have sought to challenge the conventional view in the area of education based on historical inquiry into how leading

Members of Congress between 1870 and 1890 understood the Fourteenth Amendment guarantee of national citizenship. *See id.* at 367-99. But my writings acknowledge that my academic view is at odds with current law. *See id.* at 336 (“[t]he concept of positive rights [is] disfavored in Supreme Court doctrine” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), among other cases)).

Question 3(a)

In stating that “we should not use the concept of citizenship to deny education to noncitizen children,” my writings did not specifically address the constitutional rights of children who are present in this country illegally. Children who are lawful resident aliens are “noncitizen children,” and their eligibility for U.S. citizenship distinguishes them from children who are illegal immigrants under current law. Further, my writings have not addressed whether adults who are illegal immigrants have any constitutional right to public education, and this question has been the subject of litigation in recent years.

The Supreme Court has held that, absent a congressional policy providing otherwise, a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See Plyler v. Doe*, 457 U.S. 202 (1982). If confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. Accordingly, I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to speculate on whether children who are here illegally have a constitutional right to public education because *Plyler* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed. In addition, because the question whether adult illegal immigrants have a constitutional right to public education is unsettled and may become before me as a judge if I am confirmed, I believe it is not appropriate for me to speculate on that question.

Questions 4(b)

Whether the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states is a question on which I have not previously expressed a view, and it is the subject of active litigation that may come before me as a judge if I am confirmed. Accordingly, I do not believe it is appropriate for me to speculate on this question.

Question 7

Although my writings have analyzed the method of constitutional interpretation employed by the majority and dissenting opinions in *District of Columbia v. Heller*, my analysis “d[id] not weigh the merits of the contrasting opinions in *Heller*.” *Keeping Faith with the Constitution* 30 (2009). If

confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. The Court's decision in *Heller*, in which Justice Scalia determined that the right to bear arms is a fundamental right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 7(d) and (e)

(d) If confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. The Court's decision in *Heller*, which held that the text of the Second Amendment is best read as codifying a pre-existing right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

(e) When interpreting the Second Amendment as a judge if I am confirmed, I would apply the underlying principle that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008). I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to speculate on whether some other underlying principle should guide interpretation of the Second Amendment because *Heller* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 7(f)

The Court in *Citizens United* applied the doctrine of *stare decisis* to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003), and thereby "return to the principle established in [*Buckley v. Valeo*, 424 U.S. 1 (1976),] and [*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978),] that the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). If confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. The Court's decision in *Citizens United*, which said it was restoring pre-1990 law, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 8(a), (b), (d), and (e)

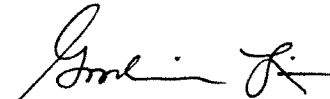
Given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now,

outside the ordinary judicial decision-making process, to critique opinions written by a potential Ninth Circuit colleague.

Question 8(c)

Given considerations of respect, comity, and collegiality toward fellow Article III judges that I intend to observe if I am confirmed, I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by a potential Article III colleague on a sister circuit.

Sincerely,

A handwritten signature in black ink, appearing to read "Goodwin Liu". The signature is fluid and cursive, with a large initial "G" and a distinct "Liu" at the end.

Goodwin Liu

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Cornyn**

- 1. In criticizing President Bush's nomination of Chief Justice Roberts, you wrote: "There is no doubt Roberts has a brilliant legal mind, but a Supreme Court nominee must be evaluated on more than legal intellect." At your confirmation hearing, you stated that whatever you "may have written in [your] books and in [your] articles would have no bearing on [your] role as a judge."**

- a. If your writings have no bearing on your role as a judge, then on what basis should we evaluate you beyond your "legal intellect"?**

Response: In stating that my writings would have no bearing on my role as a judge, I sought to convey that, if I were confirmed, I would set aside my own views and fully commit myself to the obligation of deciding cases impartially and objectively, with faithful adherence to the applicable law, including Supreme Court and circuit precedent. I recognize that the role of a judge is not to bend the law in service of any academic theory or to pontificate on what the law should be. The role of a judge is to apply the law *as it is* to the facts and arguments raised in specific cases or controversies.

That said, I believe my academic record sheds light on my qualifications to serve as a judge in at least three respects. First, my record shows that I would bring to the bench a broad knowledge of the law. Second, my academic writings clearly and candidly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

In addition, if I were confirmed, I would bring to the bench my experiences in law practice and government, as well as the skills I have developed as a successful teacher and in various leadership positions, including service as Associate Dean of my law school. These aspects of my background are discussed below in my response to subpart (b).

- b. What other than your academic work qualifies you to serve as a federal appellate judge?**

Response: In addition to my academic work, I have practiced as a litigation attorney at O'Melveny & Myers, where I worked on a wide range of business matters, including antitrust, insurance, white collar defense, and class action defense, with appellate litigation comprising roughly half of my practice. As a law professor, I have continued law practice as an outside counsel to the San Francisco Unified School District, I have written and filed an amicus brief in the U.S. Supreme Court, and I am regularly called to advise lawyers and policymakers on issues within my expertise. I have also served as a law clerk at the U.S. Supreme Court and at the U.S. Court of Appeals for the D.C. Circuit. These experiences have enhanced my understanding of the nature of appellate litigation and the concerns of practicing lawyers, and they have strengthened my skills in faithfully applying the law to the facts of a specific case or controversy.

In addition, I have had experience in government. Between clerkships, I served as a special assistant to the Deputy Secretary at the U.S. Department of Education. In that capacity, I advised the Secretary and Deputy Secretary on various legal and policy issues concerning K-12 education. Before law school, I served as senior program officer for higher education at the Corporation for National Service. In that capacity, I led the agency's effort to build community service programs at colleges and universities nationwide. Those experiences gave me valuable exposure to agency decision-making and administrative law.

Other aspects of my background have prepared me well for service as an appellate judge. As a successful teacher, I have developed strong skills in presenting and eliciting all sides of a legal argument and in listening well to opposing viewpoints. In addition, I have demonstrated the important qualities of fairness, collegiality, and sound judgment in various leadership positions, including service as Associate Dean of my law school.

2. **At his confirmation hearing, Chief Justice Roberts stated: "Judges are like umpires. Umpires don't make the rules; they apply them. . . . [i]t is a limited role. . . . Judges have to have the humility to recognize that they operate within a system of precedent" He pledged to "decide every case based on the record, according to the rule of law" and to "remember that it is my job to call balls and strikes and not to pitch or bat."**

In *Keeping Faith with the Constitution*, you criticize Chief Justice Roberts's remarks, writing:

Although these attempts to simplify constitution interpretation may have a surface appeal, they do not withstand scrutiny Ironically, the significance of Chief Justice Roberts's baseball analogy is actually the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary

understandings of the game, so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context.

Goodwin Liu, et al., *Keeping Faith with the Constitution* 28 (2009).

However, at your confirmation hearing you offered the following statement that closely tracked Chief Justice Roberts's words: "I think the role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that process works is through absolute fidelity to the applicable precedents and the language of the law, statutes, and regulations that are at issue in the case."

- a. What is the substantive difference between your hearing statement and Chief Justice Roberts's remarks?**
- b. Do you still stand behind your criticism of the Chief Justice's statement?**

Response: Chief Justice Roberts's umpire analogy makes the point that judges must be impartial and objective arbiters of the specific cases and controversies that come before them. I fully agree with that important point. At the same time, my book explains that the umpire analogy, to the extent it compares constitutional adjudication to calling balls and strikes, does not provide a complete account of how judges interpret the Constitution and tends to oversimplify the process. See *Keeping Faith with the Constitution* 28 (2009).

My hearing testimony urged "fidelity" to applicable precedents and the language of laws, statutes, and regulations at issue in a given case. My book does not address interpretation of statutes or regulations. The book defines "fidelity" to the Constitution to require that judges "interpret its words and ... apply its principles in ways that sustain their vitality over time." *Keeping Faith* 25. Using various Supreme Court cases as examples, including *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the book shows that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." *Keeping Faith* 28.

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as

reasonable.” *Bond v. United States*, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices requires the judge to be objective and impartial.

If confirmed, I would faithfully follow Supreme Court and circuit precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

3. **You once criticized Chief Justice Roberts’s work for the National Legal Center for the Public Interest. You said: “its mission is to promote, among other things, free enterprise, private ownership of property, and limited government. These are code words for an ideological agenda hostile to the environment, workplace, and consumer protections.”**

- a. **How did you reach this conclusion?**
- b. **Do you still believe that “free enterprise, private ownership of property, and limited government” are “code words for an ideological agenda hostile to the environment, workplace, and consumer protections”?**
- c. **Isn’t our Constitution based in large part on ideas of free enterprise, private ownership of property, and limited government?**

Response: From the time of America’s founding, our nation and our Constitution have reflected an unwavering commitment to free enterprise, private ownership of property, and limited government. I strongly believe in these important values, and I am personally committed to them. The quotation above was from an op-ed in which I was objecting to one organization’s use of those values in opposition to government efforts to ensure that our free market system is a fair, sustainable, and level playing field. In retrospect, I can see how the language I used may be read to suggest disparagement of the values of free enterprise, private property, and limited government, even though that was not my intention. For that reason, it was a poor choice of words. Free enterprise, private property, and limited government are cornerstones of America’s prosperity and success as a free society, and I regret that the language I used may have suggested otherwise.

4. **Three days after President Bush announced his nomination of John Roberts to the Supreme Court, you wrote an op-ed opposing his nomination. Goodwin Liu, *Roberts Would Swing the Supreme Court to the Right*, Bloomberg (July 22, 2005). The lead items in your attack on Chief Justice Roberts were two of his D.C. Circuit opinions: (1) his unanimous opinion in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), affirming a ruling by District Judge Emmet Sullivan that the arrest of a 12-year-old girl for eating in a Metro station did**

not violate her constitutional rights; and (2) his brief dissent from denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), a case involving an Endangered Species Act regulation.

I believe that your presentation of Chief Justice Roberts's opinions was wildly distorted. In discussing the *Hedgepeth* case, for example, you left the impression that Judge Roberts personally supported the arrest, and you omitted all passages in the opinion that showed he took the exact same position as Judge Sullivan. Likewise, you claimed that Judge Roberts's *Rancho Viejo* dissent took the position that the Endangered Species Act regulation challenged in the case "exceeded Congress's power to regulate interstate commerce." You further alleged that he expressed a "theory of limited federal power" in the dissent that "would potentially undermine bedrock civil rights laws, including the Civil Rights Act of 1964" and "was all but rejected by the Supreme Court in a recent decision upholding federal power to ban medicinal uses of home-grown marijuana." These assertions were misleading at best. What Judge Roberts did in his *Rancho Viejo* dissent was point out that the *particular approach* the panel majority took "seems inconsistent" with Supreme Court holdings and conflicts with a Fifth Circuit ruling, thus making en banc consideration appropriate. He specifically stated that en banc review "would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

- a. Did you read Judge Roberts's actual opinions before writing your op-ed?

Response: Yes.

- b. Is it your considered judgment that the arrest in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), violated the defendant's constitutional rights?

Response: My concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification ("it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears," 386 F.3d at 1157) and thus might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation—an argument that the court's opinion did not address. My op-ed did not express an ultimate view on whether the arrest in *Hedgepeth* violated the defendant's constitutional rights.

- c. After initially advancing a similar line of attack on Chief Justice Robert's *Rancho Viejo* en banc petition dissent, the *New York Times* acknowledged that its account was wrong: "[Roberts] did not say the federal government lacked the power to block a California real estate development because it endangered the toad. . . . He did not question the constitutionality of the Endangered Species Act." David Kirkpatrick, *Correction, Democrats Prepare Ground To Challenge Judge Roberts*, *New York Times* (Aug. 11,

2005). Have you joined the *New York Times* in publicly acknowledging that you misinterpreted Chief Justice Roberts's dissent? If not, do you now admit that your reading of his dissent was incorrect?

Response: My op-ed did not claim that then-Judge Roberts took the position that the Endangered Species Act regulation "exceeded Congress's power to regulate interstate commerce." It stated that "he wrote an opinion urging his court to *consider* overruling its own precedent to hold that an Endangered Species Act regulation exceeded Congress's power to regulate interstate commerce" (emphasis added). While my op-ed expressed concern about "Roberts's theory of limited federal power" (see subpart (d) below), it expressed no view on whether he would have concluded, on *en banc* review, that the regulation exceeded Congress's commerce power.

d. Do you still believe that the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), "all but rejected" the point that Roberts actually made in his *Rancho Viejo* en banc petition dissent?

Response: In *Rancho Viejo*, then-Judge Roberts defined "the activity being regulated" as "the taking of a hapless toad that, for reasons of its own, lives its entire life in California," and he expressed doubt that "the incidental taking of arroyo toads can be said to be interstate commerce." 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*). In *Gonzales v. Raich*, the Supreme Court said: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. 1, 17 (2005). The Court cited with approval *Perez v. United States*, 402 U.S. 146, 154-55 (1971), which held that Congress's power to punish extortionate credit transactions extends to local loan sharks because they are part of interstate organized crime. As the panel decision in *Rancho Viejo* observed, the taking of the toad, though a purely local activity, was part of an economic class of activities—"commercial land development"—having substantial effects on interstate commerce. 323 F.3d 1062, 1069 (D.C. Cir. 2003). *Raich* thus suggests that the proper characterization of the regulated activity in *Rancho Viejo* for purposes of Commerce Clause analysis was not the taking of the toad.

5. In testifying against Justice Alito, you stated: "Intellect is a necessary, but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care about nominees' judicial philosophy."

a. What are the "subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice"?

Response: I believe those qualities include objectivity, impartiality, humility, faithful adherence to equal justice under law, and a genuine understanding of how the law affects the parties to a given case or controversy.

b. Does impartial and dispassionate application of the law not suffice to give the law legitimacy and a semblance of justice?

Response: I believe it does, as long as “dispassion” does not mean a lack of understanding of how the law affects the parties to a given case or controversy.

c. What are the “subtle qualities of judging” that underpin your judicial philosophy?

Response: Those qualities include objectivity, impartiality, humility, faithful adherence to equal justice under law, and a genuine understanding of how the law affects the parties to a given case or controversy.

- 6. You concluded your testimony against Justice Alito by declaring: “Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. . . . [T]his is not the America we know, nor is it the America we aspire to be.”**

At your confirmation hearing, you noted that this passage used “perhaps unnecessary colorful language” or “perhaps unnecessarily flowery language,” but you never answered whether you thought the passage was a fair analysis of Justice Alito’s record. Was it fair? What, if anything, would you change about this passage?

Response: The passage above described a series of opinions that Justice Alito had written as a government lawyer and as a Third Circuit judge regarding what he believed to be permissible under the Constitution. Those writings were analyzed in my 2006 testimony, and the passage above was not intended to suggest that he supported, condoned, or endorsed those practices as a policy matter. However, upon rereading and reflecting on this passage in response to this question, I believe the passage is unduly harsh and provocative and does not add to the fifteen pages of legal analysis that preceded it. What troubles me most is that the passage has an *ad hominem* quality that is unfair and hurtful to the nominee—a reality that, in all candor, I did not appreciate then nearly as much as I appreciate now. The passage does not reflect and indeed obscures the respect I have for Justice Alito as a person who rose from humble origins to serve our country honorably as a prosecutor, judge, and now Supreme Court Justice. For these

reasons, I regret having written this passage, and I would omit it if I had the opportunity to rewrite my testimony.

7. **At your confirmation hearing, you testified that you were “not familiar with th[e] debate in the law” outlined by Harold Koh, the Legal Advisor of the Department of State and former dean of the Yale Law School, between nationalists and transnationalists. Here, in detail, is how Professor Koh explains the difference between nationalists and transnationalists, which, he says, “hold sharply divergent attitudes toward transnational law”:**

Generally speaking, the transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy. The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law. The transnationalists view domestic courts as having a critical role to play in domesticating international law into U.S. law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that U.S. courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that U.S. courts should limit their attention to the development of a national system. Finally, the transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity, while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs. . . .

Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l L. Rev. 745, 749-50 (2006); see also Harold Hongju Koh, *International Law is Part of Our Law*, 98 Am. J. Int'l L. 43 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

- a. **As described by Professor Koh, are you a transnationalist or a nationalist? Have you ever previously expressed your position on this question? What did you say?**

Response: This subject lies outside of my expertise, and I have not previously expressed a view on this question.

- b. **Do you believe that domestic courts have “a critical role to play in domesticating international law into U.S. law” and “should use their interpretive powers to promote the development of a global legal system”?**

Response: I have not previously expressed a view on this question, and if confirmed, I would faithfully follow the commands of the Supreme Court with respect to the proper role of U.S. courts.

c. Have you ever taken a course taught by Professor Koh? If so, which course[s]?

Response: Yes. I took International Business Transactions from Professor Koh.

8. Professor Koh has said that there can be no “law free” zones, no “extra-legal” spaces, no realm within which judges should not have the final word, no matter to which branch the Constitution allocates the decisionmaking responsibility. According to Professor Koh, the question “[h]ow far do our human rights and constitutional obligations extend?” has been “brought into sharp relief by Abu Ghraib and the debates over extraterritorial torture, the mistreatment of detainees at Guantanamo, and the denial of habeas corpus and full trial rights to suspected enemy combatants.” Professor Koh has stated that there is “no reason why constitutional due process should be limited at our ‘physical borders.’”

a. Do you believe the activities of the President, exercising his constitutional powers as Commander in Chief of the United States Military, should have his handling of foreign terrorists captured on the battlefield scrutinized by civilian judges in Article III courts? Have you ever expressed an opinion on this matter? If so, please provide details.

Response: I have not previously expressed a view on this question, and if confirmed, I would faithfully follow the Supreme Court’s precedents on this issue.

b. Justice Lewis Powell, Jr., in *INS v. Chadha*, noted that “the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.” What is your view of the Separation of Powers and how it functions in the context of the War on Terror?

Response: My writings have said that “ours is a system of checks and balances” and that neither historical practices nor judicial decisions have authorized the President to disregard statutes duly enacted by Congress in times of war. Keeping Faith with the Constitution 73-82 (2009). If confirmed, I would faithfully follow the Supreme Court’s precedents on how the principle of separation of powers applies in the context of the war on terror.

9. Professor David Cole of the Georgetown Law Center has said that the appeal of international human rights law extends to such matters as

“the death penalty, criminal justice, gay rights, and economic and social rights, where international human rights standards often reflect more robust visions than does current United States constitutional law. . . . We will be best served by a strategy . . . that seeks to employ the rhetoric and tactics of the international human rights movement to help frame our constitutional vision. We should steer clear of appeals to citizenship in favor of the more universal claim of human dignity, which rests ultimately on personhood.”

Do you agree with Professor Cole that courts should “employ the rhetoric and tactics of the international human rights movement to help frame our constitutional vision”?

Response: I have not previously expressed a view on this issue, and if confirmed, I would faithfully follow the Supreme Court’s precedents in applying the Constitution to specific cases and controversies.

10. You have written: “The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. . . . The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.” Goodwin Liu, *Developments in U.S. Education Law and Policy*, 2 *Daito L. Rev.* 18, 27 (2006).

a. In your view, what are some examples of “common legal problems faced by constitutional democracies around the world”?

Response: Examples include the role of judicial review and the application of constitutional liberty and equality guarantees.

b. How should judges determine which foreign rulings are “wise solutions” to “common problems”?

Response: Apart from circumstances where American law requires a judge to rely on foreign law, I do not believe a judge should rely on foreign law as legal authority in resolving legal problems that arise under U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. However, just as law review articles have no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

- c. **Should the rulings of some constitutional democracies matter more than others? Why or why not?**

Response: Please see response to subpart (b).

- d. **Are foreign laws or international norms relevant to determining the rights secured to U.S. citizens by the Citizenship Clause and/or Privileges and Immunities Clause of the Fourteenth Amendment?**

Response: I do not believe foreign laws or international norms have any legal authority in determining the rights secured to U.S. citizens under the Citizenship Clause or the Privileges or Immunities Clause of the Fourteenth Amendment unless U.S. law so provides. I have not previously expressed any view on whether foreign laws or international norms may be a source of ideas on this question, and any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

11. **In you hearing testimony, you stated: “I do not believe foreign law should control in any way the interpretation of United States law, whether it’s the U.S. Constitution or a statute.” You also distinguished between the citation of foreign law “like a law review article,” which you suggested a court could do when interpreting U.S. law, and the citation of foreign law as “authority,” which you suggested would be inappropriate. But in your article *Developments in U.S. Education Law and Policy*, 2 *Daito L. Rev.* 18, 27 (2006), you write that the “resistance” to the “use of foreign authority in American constitutional law . . . is difficult for me to grasp.”**

- a. **Please explain in detail what you mean when you say that foreign law should not “control in any way the interpretation of United States law.” In doing so, please elaborate on how you define “control.”**

Response: What I mean is that foreign law has no legal authority in the interpretation of U.S. law unless U.S. law so provides. Accordingly, foreign law cannot comprise any part of the legal basis for an interpretation of U.S. law unless U.S. law so provides. There are exceptions where legal standards require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts.

- b. **In your *Daito Law Review* article, did you mean to say that the resistance to the use of “foreign authority in American constitutional law” was difficult for you grasp? What did you mean by “authority”?**

Response: The article’s reference to “foreign authority” was a reference to law that is authoritative within a foreign legal system. It was not meant to suggest that foreign law has authority within the American legal system. To be clear, my view

is that foreign law has no legal authority in the interpretation of U.S. law, including the U.S. Constitution unless U.S. law so provides.

12. During your hearing testimony, you said: “I believe that the use of foreign law contains within it many potential pitfalls. In other words, I think that what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument. It is not a canvassing of the world’s practices or in any way a full account of the various practices throughout the world with respect to their laws.”

a. Please provide citations for the cases in which you observe the Justices “choos[ing] the law that is favorable to the argument.”

Response: *Roper v. Simmons*, 543 U.S. 551, 575-78 (2003); *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003).

b. Would it be acceptable for a court to cite foreign law an authority if the court did “canvass[] the world’s practices” or take “a full account of the various practices throughout the world with respect to their laws”? Why or why not?

Response: No, because foreign law has no legal authority in the interpretation of U.S. law, including the U.S. Constitution, unless U.S. law so provides.

13. In your article, *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 254 (2008), you write: “The problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.”

a. Do you think that courts should look to international laws, practices, and social norms when determining whether a “social consensus” has been reached on a given issue? Why or why not?

Response: No. In using the term “social consensus,” my article is referring to the understandings of “a particular society,” “our own society,” the United States of America. *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 210, 233, 234 (2008).

b. Do you think that courts should consider foreign law and practices when assessing the “trajectory of social norms” or applying their “predictive judgment as to how a judicial decision may help forge or frustrate a social consensus”? Why or why not?

Response: Response: No. In using the terms “social norms” and “social consensus,” my article is referring to the norms and understandings of “a particular society,” “our own society,” the United States of America. *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 210, 233, 234 (2008).

14. In *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 266-68 (2008), you conclude that Title I of the Elementary and Secondary Education Act of 1965 has a method of allocating federal funds that you believe is unconstitutional. You also write that California’s system of school finance is “ripe for reexamination.”

a. If the constitutionality of these laws were challenged, would you, as a judge, feel compelled to recuse yourself based on your expressed views?

Response: If confirmed as a judge, I would take seriously my obligation to avoid the reality or appearance of any bias, partiality, or impropriety, as I believe the faithful discharge of this obligation is essential to maintaining public confidence in the judiciary. I would follow any applicable statutes, including 28 U.S.C. § 455, and ethical canons, including Canon 3(C) of the Code of Conduct for United States Judges, and I would recuse myself from any case where my impartiality might reasonably be questioned. I would also seek the advice of my judicial colleagues on any recusal matter, and I would carefully consider the facts of the case and the legal arguments made by the parties in deciding whether to recuse.

b. If you would not feel compelled to recuse yourself, what factors would you as a judge consider in evaluating the constitutionality of the educational provisions that you criticize?

Response: If confirmed as a judge, I would decide whether to recuse myself in a particular case by considering the factors described in the response to subpart (a). If I were to decide not to recuse, I would not evaluate the constitutionality of those educational provisions in the abstract. I would consider the facts on record and the legal arguments made by the parties in the specific case or controversy, and I would faithfully apply Supreme Court and circuit precedent, not my own views, to the facts and legal arguments in the case.

c. Do you believe that your judgments about the constitutionality of these educational provisions “would have [a] bearing on [your] role as a judge”?

Response: No. If confirmed as a judge, I would set aside the views I have taken as a scholar and faithfully follow the law as set forth in applicable Supreme Court and circuit precedents.

15. In your hearing testimony, you said that it was “too early to tell” if the recently passed Patient Protection and Affordable Care Act (P.L. 111-148) gave rise to a cognizable constitutional welfare right.

- a. **What further amount of “vigorous public contestation” would you need to see in order to conclude that the act had “sufficient ambition and durability” to create constitutional welfare rights? See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 245 (2008).**

Response: I have not read the Patient Protection and Affordable Care Act and have not expressed any view on whether the act creates any welfare rights. The Supreme Court has generally held that the Constitution does not guarantee welfare rights, *see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970), and if confirmed, I would faithfully follow the Court’s precedents.

- b. **What rights do you anticipate the act might create if it garners a “sufficient ambition and durability”?**

Response: I have not read the Patient Protection and Affordable Care Act and have not expressed any view on whether the act creates any welfare rights.

- c. **You also said at your hearing that the act “could always be repealed.” But if a judge recognized a right stemming from the act as a constitutional welfare right, wouldn’t the only path to repeal be a constitutional amendment?**

Response: I have written that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, and define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 244-45, 264-66 & n.324 (2008). The judicial role I have described in my writings is one that “ultimately defer[s] to legislative supremacy.” *Id.* at 265

16. **In your white paper on *Judge Alito and the Death Penalty*, ACS, at 1 (Dec. 2005), you wrote: “The use of capital punishment continues today amid growing evidence of its uneven application, *departure from international norms*, and high susceptibility to error.”**

- a. **Do you believe that international norms should have any bearing on the constitutionality or application of the death penalty? Why or why not?**

Response: The Supreme Court has evaluated Eighth Amendment claims against the death penalty by examining whether there is a “national consensus” against a challenged practice, and the Court has said that international norms are not “controlling.” *Roper v. Simmons*, 543 U.S. 551, 564, 575 (2004). If confirmed, I would faithfully follow the Court’s precedents. In general, international norms have no legal authority in the interpretation or application of the U.S. Constitution or federal or state laws concerning the death penalty unless U.S. law so provides.

- b. Although you noted at your hearing that you “have no opposition to the death penalty” and would “have no problem enforcing the law as written,” how would you, as a judge, square application of the death penalty with your concerns about the “growing evidence of its uneven application, departure from international norms, and high susceptibility to error”?

Response: The Supreme Court has interpreted the Constitution to establish various safeguards that ensure due process of law in the application of the death penalty. If confirmed, I would faithfully follow the Court’s precedents and applicable statutes concerning the death penalty.

17. You testified at your confirmation hearing that the “role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That’s simply not the role of a judge.” In many of your writings, however, you advocate broad and novel readings of the Constitution. For example, you write that under the Citizenship Clause of the Fourteenth Amendment,

the duty of the federal government cannot be reduced to simply providing the basic necessities of life. Welfare provision in the form of cash assistance, food stamps, and public housing may prevent destitution . . . , but such provision, with its accompanying stigma of dependence and bureaucratic control, does not assure its beneficiaries the dignity of full membership in society. Beyond a minimal safety net, the legislative agenda of equal citizenship should extend to systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation. The main pillars of the agenda would include basic employment supports such as expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit. Further the citizenship guarantee would find expression in antidiscrimination laws that promote inclusion in social, economic, and political spheres.”

Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 407-08 (2006).

- a. If confirmed, you will have the opportunity to interpret statutes and constitutional challenges on which the Supreme Court has not ruled. In these instances, to what extent will you feel it proper to incorporate your unique views of the Constitution? Will your advocacy for a sweeping legislative agenda encourage you to espouse broad readings of statutes or the Constitution?

Response: If confirmed, I would set aside the views I have expressed as a scholar and faithfully follow any Supreme Court and circuit precedents that provide

guidance on a legal question on which the Supreme Court has not ruled, including any guidance in such precedents on how to interpret particular constitutional provisions or statutes. As my writings make clear, I do not believe that courts can or should interpret the Constitution in the same way as the legislature, *see Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339-40 (2006), and the quoted passage above refers to “the legislative agenda of equal citizenship” because I agree with Supreme Court precedent that it is not the role of courts to create those programs and benefits, *id.* at 407; *see Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 247, 252 (2008).

- b. Under your reading of the Citizenship Clause, what limits do you think exist on the power of legislators to add to the list of social and economic benefits necessary to ensure “the dignity of full membership in society”?**

Response: Legislators generally have broad discretion to decide what social or economic benefits to provide to the citizenry. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31-33 (1973); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970). In exercising this discretion, legislators must consider “what is reasonable, feasible, and likely to be effective.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 409 (2006).

- c. Has any federal court endorsed your reading of what rights the Fourteenth Amendment guarantees?**

Response: No. My article acknowledges that “positive rights [are] disfavored in Supreme Court doctrine,” and for that reason, “my thesis is chiefly directed at Congress, . . . not to courts.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336, 339 (2006).

- d. On what basis did you determine your list of “necessary” social and economic rights?**

Response: My article sought to identify “systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 407 (2006).

- 18. In your hearing testimony, you stated: “I think that the interpretation of the Constitution always has to be on the basis of legal principle and not on the basis of what a majority of the society thinks or what the judge in question thinks.” But in your article *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 228 (2008), you say that “the enduring task for the judiciary . . . is to find a way to articulate constitutional law that the nation can accept as its own,” and you add that “[t]his imperative has special resonance in considering the justiciability of constitutional welfare rights, since the substance of welfare rights is inextricably intertwined with the nation’s changing social and economic norms.” You also have**

written: “*The problem of courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.*” *Id.* at 254 (emphasis added).

- a. **How is determining the constitutionality of welfare rights based on the “trajectory of social norms . . . as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus” not interpreting the Constitution “on the basis of what a majority of the society thinks or what the judge in question thinks”?**

Response: In many areas of constitutional law, the Supreme Court has required judges to consider social norms and understandings while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms.” *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Bond v. United States*, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the inquiry is objective and does not direct the judge to act on what he or she personally believes or on what a majority of society thinks.

- b. **Isn’t your article asking judges to look beyond the text of statutes and the Constitution to determine whether a “majority of society” has reached a “social consensus” about the constitutionality of a certain welfare right? What do you mean by the phrase “the problem of courts”?**

Response: My article does not ask judges to look beyond the text of statutes or the Constitution. To the contrary, my article discusses with approval cases in which the Supreme Court identified *in the text of a statute* “the broad, expressly stated purpose of the welfare program and treated that purpose as a deliberate, democratic expression of public values to which implementing provisions are presumed to be aligned.” *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 263 (2008) (citing *Schweiker v. Hogan*, 457 U.S. 569 (1982), *Schweiker v. Wilson*, 450 U.S. 221 (1981), and *USDA v. Moreno*, 413 U.S. 528 (1973)).

The phrase “the problem for courts” refers to the question posed by the remainder of that sentence (quoted above) in the context of the concern that “appealing to societal

values too easily becomes a Trojan horse for imposing the judge's own values." *Id.* at 253.

- c. **Will you, as a judge, make determinations about the constitutionality of welfare rights in accordance with the judicial role that you described in *Rethinking Constitutional Welfare Rights*?**

Response: No. If confirmed as a judge, I would faithfully follow Supreme Court and circuit precedent on these issues as with all other issues.

19. **In your recent book, *Keeping Faith with the Constitution* (2009), you review and analyze the Supreme Court's decision in *District of Columbia v. Heller*. Describing Justice Scalia's majority opinion as an "interest-balancing" approach, you say that "the Court interpreted the constitutional principle to have the 'capacity of adaptation to a changing world.'" You then note that "[e]volving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court."**

- a. **In what way do you think that "evolving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court"?**

Response: The quoted language is a reference to the Supreme Court's limitation of the Second Amendment's protection to weapons "in common use at the time." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (internal quotation marks and citation omitted). My book observed that the Court decided whether the Second Amendment protects handguns by looking to "contemporary social practice" and, in particular, "the fact that 'handguns are the most popular weapon chosen by Americans for self-defense in the home.'" *Keeping Faith with the Constitution* 32 (2009) (quoting *Heller*, 128 S. Ct. at 2818). The book noted that if "what 'the American people have considered . . . to be the quintessential self-defense weapon'" were to change, then under *Heller* the weapons protected by the Second Amendment would also change. *Id.* at 32-33 (quoting *Heller*, 128 S. Ct. at 2818).

- b. **Are there any "evolving social norms" that you presently think should "change the ambit of the Second Amendment's protection"?**

Response: I am not aware of any evidence calling into question the Supreme Court's statement that "handguns are the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 128 S. Ct. at 2818.

20. **President Obama has stated: "[W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court . . . what matters . . . is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last**

mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy. In those 5 percent of hard cases . . . the critical ingredient is supplied by what is in the judge's heart."

- a. **Do you agree with the President that legal precedent and rules of statutory or constitutional construction sometimes fail to provide an answer in hard cases? If so, what percentage of cases do you think constitute "hard cases"?**

Response: I believe all cases must be decided by applying the law to the facts from beginning to end.

- b. **Assuming for the sake of argument that there is a "hard case" where the law is indeterminate, what factors and concerns would you, as a judge, consider in deciding the case?**

Response: Where the law is indeterminate, I would, if confirmed, faithfully follow any Supreme Court and circuit precedents that provide guidance on legal questions related to the one at issue in the specific case or controversy, including any guidance in such precedents on how to interpret particular constitutional provisions or statutes.

21. In *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 241-43 (2008), you discuss the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, which, you say, "up[h]eld school funding disparities based on local property taxes and declin[ed] to recognize education as a fundamental right." You state in your discussion: "From today's vantage point, this interpretation of educational norms no longer seems persuasive, as centralizing trends have eroded local control of public schools in favor of state and increasingly federal authority." You also remark that the holding of *Rodriguez* "seems open to reexamination," and you say that shifting norms "may one day prompt a court to revisit and distinguish the outdated norms of school finance and organization that prevailed in *Rodriguez*."

- a. **If confirmed, will you feel compelled to reexamine the holding in *Rodriguez* if a case relating to substantially the same issues is appealed to the Ninth Circuit? If so, what new social norms would you consider in your reexamination of the case?**

Response: No, I would not feel compelled to reexamine the holding in *Rodriguez* if I were confirmed as a Ninth Circuit judge. *Rodriguez* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- b. **Would you seek "to revisit and distinguish the outdated norms of school finance and organization that prevailed in *Rodriguez*"?**

Response: No. *Rodriguez* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

22. As a legal scholar you have had many opportunities to consider and express your views on contentious issues of constitutional law. I am interested in your views as an academic on a range of these issues.

- a. Do you believe that the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), was correct? Have you ever previously expressed your position on this question? What did you say?**

Response: I have cited *Hamdan v. Rumsfeld* with approval as an example of a case where the Court rejected the notion that the President has power to disregard statutes duly enacted by Congress. *See* Keeping Faith with the Constitution 81 (2009) (citing *Hamdan*, 548 U.S. at 593 n.23). I have not previously expressed any view on the correctness of *Hamdan* in any other respect. *Hamdan* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- b. Do you believe that the Court correctly decided *California v. Hodari D.*, 499 U.S. 621 (1991), which held that a seizure for purposes of the Fourth Amendment requires the application of physical force or submission to a show of authority? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *California v. Hodari D.* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- c. Do you believe that Ninth Circuit correctly decided *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), which held, in part, that the addition of the words "under God" to the pledge of allegiance violated the First Amendment? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if confirmed.

- d. Do you believe that the Supreme Court correctly decided *Terry v. Ohio*, 392 U.S. 1 (1968)? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Terry v. Ohio* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- e. **Do you believe that the Supreme Court correctly decided *Herring v. United States*, 555 U.S. __ (2009)? Have you ever previously expressed your position on this question? What did you say?**

Response: I have cited Justice Ginsburg's dissent in *Herring v. United States* in stating that "'a forceful exclusionary rule' continues to be 'the only effectively available way' to deter and remedy Fourth Amendment violations, especially in an age of increasing bureaucratization and technological sophistication of law enforcement." Keeping Faith with the Constitution 96 (2009) (citing 129 S. Ct. 695, 706, 707 (2009) (Ginsburg, J., dissenting)). I have not previously expressed any other views on *Herring*. *Herring* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- f. **Do you believe that the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), was correct? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Massachusetts v. EPA* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- g. **Do you think that the Court correctly decided *Ricci v. DeStefano*, which invalidated the city of New Haven's refusal to honor the results of a merit-based promotion test as "antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race"? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Ricci v. DeStefano* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

23. **At your confirmation hearing, you stated that "most of [your] writings on education, on welfare, and on . . . social policy . . . have been directed actually at policymakers and at legislators, not at judges." Can you please identify those writings of yours that are directed at judges? More broadly, can you identify those writings of yours that you believe are relevant to our evaluation of your judicial philosophy?**

Response: Keeping Faith with the Constitution (2009); *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008); *The First Justice Harlan*, 96 Cal. L. Rev. 1383 (2008); "History Will Be Heard": *An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol'y Rev. 53 (2008); *Seattle and Louisville*, 95 Cal. L. Rev. 277 (2007); *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. &

Inequality 81 (2006); Brown, Bollinger, *and Beyond*, 47 How. L.J. 705 (2004); *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002); *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381 (1998); Brief of 19 Former Chancellors of the University of California as *Amici Curiae* in Support of Respondents, *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, and *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (U.S. Supreme Court, Oct. 10, 2006).

Responses of Goodwin Liu
 Nominee to be U.S. Circuit Judge for the Ninth Circuit
 to the Written Questions of Senator Tom Coburn, M.D.

1. In response my question about using foreign law in interpreting the Constitution, you noted that “what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument.”

a. Do you believe that the Court “[chose] the law that is favorable to [their] argument] in *Lawrence v. Texas*, which cited to foreign law when undercutting the reasoning in *Bowers v. Hardwick*?

Response: Yes. The Supreme Court in *Lawrence v. Texas* cited an act of the British Parliament and decisions of the European Court of Human Rights in support of its assertion that the “references [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.” 539 U.S. 558, 572-73, 576-77 (2003).

b. Do you believe that is what the Court did in *Roper v. Simmons*, which cited the death penalty laws of foreign nations in an effort to show that sentencing a person under 18 years old to death, regardless of the severity of the crime, constituted cruel and unusual punishment under the Eighth Amendment?

Response: Yes. The Supreme Court in *Roper v. Simmons* cited the laws of several nations as well as the United Nations Convention on the Rights of the Child in support of its assertion that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” 543 U.S. 551, 575-78 (2003).

c. At your hearing, you indicated that it was appropriate for courts to cite foreign law for “ideas and other forms of guidance.” To your credit, you said that “[a]uthority is the basis on which cases are decided, not ideas or other forms of guidance.” However, in a constitutional law case, the relevant authority is the Constitution. The only possible relevance I can see for citing foreign law as a source of “ideas [and] other forms of guidance” in such a case is to influence how a judge interprets the Constitution, the relevant authority; therefore, while your answer may have shown your understanding that foreign law may not *control* the meaning of the Constitution, I am still unsure of how you think it is permissible for foreign law to *influence* the interpretation of our Constitution. Do you think there is another relevant purpose for citing to foreign law, other than influencing how a judge interprets authority and legal standards?

Response: Legal standards may occasionally require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts. Apart from circumstances where American law requires a judge to rely on foreign law, however, I do not believe a judge should rely on foreign law as legal authority in interpreting U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have

no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

- d. In your view, is it ever proper for judges to look to contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution? If so, under what circumstances?**

Response: Because foreign law has no legal authority in our legal system, judges should not rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution, unless American law so requires. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

- e. If so, how would you choose which foreign law to consider as you interpret the Constitution?**

Response: Please see response to subpart (d) above.

- f. How do contemporary foreign and international legal materials have any genuine relevance to the issue of American law being decided?**

Response: In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have no relevance as legal authority in the interpretation of American law, foreign law likewise has no relevance as legal authority in the interpretation of American law, except where American law so provides.

- g. There is a surprising dearth of Supreme Court case law on the Second Amendment. Given the paucity of case law on the subject and the clearly unsettled areas of Second Amendment law, would it be appropriate for the Supreme Court to look to “wise solutions” in foreign law when deciding whether the right to bear arms in America is a fundamental right and should be incorporated on to the states?**

Response: Whether the right to bear arms is a fundamental right that should be incorporated on to the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- h. Would foreign law be relevant to any aspect of your efforts to interpret the Second Amendment?**

Response: If confirmed, I would faithfully follow the Supreme Court’s precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment.

i. Why is foreign law relevant when interpreting the Eighth Amendment and not the Second Amendment?

Response: If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment and the Eighth Amendment, including any instructions in those precedents on how to interpret these amendments.

2. You have written a number of articles arguing that the Citizenship Clause of the 14th Amendment creates a positive right to whatever welfare benefits are necessary to facilitate full participation as a citizen.

In "Interstate Inequality in Educational Opportunity," you argued that "the Fourteenth Amendment guarantee of national citizenship [was] a generative source of substantive rights."¹ You also argued that "contrary to the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties,' the social citizenship tradition assigns equal status to negative rights . . . and positive rights to government assistance."²

In a companion article entitled "Education, Equality, and National Citizenship," you stated: "by virtue of its affirmative character, the substantive protections of the Citizenship Clause are guaranteed not only against state abridgment, but also as a matter of positive right."³ You ultimately concluded that the "the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit."⁴

Throughout our history, most lawyers and judges have not viewed the Constitution in this way. The predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."⁵

a. Why do you think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative-right guarantee, rather than a set of restrictions on government power?

Response: In general, I do not think Congress or the Court has interpreted the Constitution to recognize affirmative rights. My writings make clear my awareness that "[t]he concept of positive rights [is] disfavored in Supreme Court doctrine." *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). If confirmed as a judge, I would faithfully follow the Supreme Court's precedents, not the views I have expressed as a scholar.

¹ Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044-2047-48 (2006).

² Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 336 (2006).

³ *Id.* at 358.

⁴ *Id.* at 407.

⁵ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

3. **You have argued that the Constitution creates, in all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. Although you claim these rights arise from the Citizenship Clause of the Fourteenth Amendment, you have also stated that: “we must be careful to ensure that the ideal of national citizenship does not infuse public education with nativism, cultural conformity, or chauvinistic nationalism and we should not use the concept of citizenship to deny education to noncitizen children, not least because the Equal Protection Clause extends to ‘persons,’ not only to citizens.”**

- a. **Do you personally believe that people whose presence in this country violates our immigration laws nonetheless have a constitutional right to public education?**

Response: The Supreme Court has held under the Equal Protection Clause that a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See Plyler v. Doe*, 457 U.S. 202 (1982). *Plyler* dealt only with “innocent” children who “can affect neither their parents’ conduct nor their own status.” *Id.* at 220, 230 (internal quotation marks and citation omitted). The Court also said that a state’s prerogative to deny public education to children who are here illegally might be different if such denial were supported by congressional policy. *See id.* at 224-26. I would faithfully follow the Court’s precedent if I were confirmed. I have written that “we should not use the concept of citizenship to deny education to noncitizen children,” citing *Plyler* to support the proposition that “the Equal Protection Clause extends to ‘persons,’ not only to citizens.” *National Citizenship and the Promise of Equal Educational Opportunity* 130 & n.22, in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009). I have not previously expressed any view on whether people who are here illegally have a constitutional right to public education, and I believe it would not be appropriate for me to do so now.

- b. **Do you personally believe the U.S. Constitution guarantees any “persons” living in the United States a right to healthcare and other welfare benefits?**

Response: The Supreme Court has generally held that the Constitution does not guarantee a right to health care or welfare, and where Congress has restricted the eligibility of noncitizens for such benefits provided by statute, the Court has upheld it. *See Mathews v. Diaz*, 426 U.S. 67 (1976). I would faithfully follow the Court’s precedent if I were confirmed. My writings have not claimed that there is a constitutional right to health care or welfare for any citizen or person. My writings have indicated that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, or define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 244-45, 264-66 & n.324 (2008).

4. **You were one of several law professors who filed an amicus brief with the California Supreme Court in a suit seeking to have California’s definition of marriage as between a man and a woman declared unconstitutional. Your brief argued that California’s definition of marriage violated the equal protection guarantees of the U.S. Constitution, and, therefore, also violated the equal protection guarantees of the California constitution. You also have repeatedly used the language of the majority opinions in *Plessy v. Ferguson* and *Brown v. Board of Education* to describe most states’ definition of marriage as a union between a man**

and a woman. In discussing the recognition of only civil unions among same-sex couples, you have repeatedly made statements to the effect that “[e]ven if marriage provides no greater rights than domestic partnership, a separate-but-equal regime unavoidably signals that same-sex relationships are of lesser worth.”⁶

- a. **Do you stand by your repeated statements that even if marriage provides no greater rights than domestic partnership, such an arrangement is a “separate but equal regime” similar to the majority opinion in *Plessy*?**

Response: I stand by my use of the term “separate but equal” and will leave any comparison to *Plessy* to others. The amicus brief I joined did not argue that California’s definition of marriage violated the U.S. Constitution. The brief urged the court to “rely solely on California, rather than federal, constitutional law” and noted that “California’s Constitution has often been construed to provide broader protection than its federal counterpart.” Brief of Amicus Curiae Professors of Constitutional Law at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The brief discussed federal cases “to illustrate” an “analytic methodology for interpreting the California Constitution.” *Id.* The brief expressed no view and made no attempt to resolve whether California’s definition of marriage violated the U.S. Constitution.

- b. **Do you personally believe that the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states?**

Response: My writings have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

- c. **In an *LA Times* article on Prop. 8, you stated: “Each of the 18,000 same-sex couples and their families in California represents a potential catalyst for broader acceptance of gay marriage. The more familiar we become with gay spouses and their children -- as our friends, neighbors and co-workers -- the more gay marriage will become an unremarkable thread of our social fabric. Proposition 8 may then come to be viewed, in the long run, not as an enduring constitutional principle but as the will of a narrow and ultimately temporary majority.” The idea of marriage as between a man and a woman is one that has endured for thousands of years, since the dawn of man. Do you still believe that traditional marriage, which Proposition 8 protects, “is not as an enduring constitutional principle but... the will of a narrow and ultimately temporary majority?”**

Response: Marriage between a man and a woman is an institution that has endured for thousands of years, and my statement in the *Los Angeles Times* editorial did not say that traditional marriage is the will of a narrow and ultimately temporary majority. My statement was a speculative prediction of how a particular state ballot measure, Proposition 8, “may ... come to be viewed, in the long run.”

- d. **Is the right to marry an example of the constitutional interpretation that you believe properly considers “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?”**

⁶Goodwin Liu, *The Next Verdict on Prop. 8*, LOS ANGELES TIMES, Nov. 10, 2008, at A-19.

Response: I have written that “the history of litigation over the right to marry” is an example of how “changes in social understandings often, and rightly, change how constitutional principles are applied.” Keeping Faith with the Constitution 111 (2009) (discussing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated laws against interracial marriage).

5. **You have been extremely critical of Justice Alito saying that “[h]e approaches law in a formalistic, mechanical way abstracted from human experience.”⁷ This statement seems to reflect the sentiments of Justice Sotomayor who believed that human experiences should influence a judge’s decisions. She stated: “Personal experiences affect the facts that judges choose to see,” and “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Do you agree with Justice Sotomayor’s statement?**

a. **Why or why not?**

Response: I do not believe that a judge may “choose to see” particular facts in a case based on personal experiences or for any other reason. A judge has a duty to consider fully and fairly all the facts in the record of a given case or controversy. I also do not believe that the life experiences that arise from being a member of a particular race or gender would lead a judge “more often than not [to] reach a better conclusion” than the life experiences that arise from being a member of another race or gender.

6. **Please describe the criteria and methodology the Supreme Court employs to determine whether a right is a “fundamental right?”**

Response: The Supreme Court has used the term “fundamental” to describe various rights expressly stated in the Constitution. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (“the arms provision of the Bill of Rights [was] one of the fundamental rights of Englishmen”); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise of religion guaranteed by the First Amendment is a “fundamental concept of liberty”). In those cases, the Court has looked to the history and traditions of Anglo-American jurisprudence to determine whether a right is fundamental. *See, e.g.*, *Benton*, 395 U.S. at 795-96. The Court has also used the term “fundamental right” in interpreting the substantive liberty protected by the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests”). In that context, the Court has similarly looked to “[o]ur Nation’s history, legal traditions, and practices” as “the crucial guideposts” for determining whether a right is “implicit in the concept of ordered liberty” and therefore fundamental. *Id.* at 721 (internal quotation marks and citations omitted).

The Court has occasionally used the term “fundamental” to describe other rights not expressly stated in the Constitution. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210 (2008) (“fundamental right to vote”); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (“fundamental right of access to the courts”); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972)

⁷ Daniel Eisenberg, *How Alito Looks Under the Lens*, TIME, Nov. 14, 2005, at 20.

(describing “the right to travel” as a “fundamental personal right”). In those cases, it does not appear that the Court has used specific criteria or a specific methodology in describing a right as “fundamental.”

7. **In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ____ (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you believe the right to bear arms is a fundamental right?**

Response: Whether the right to bear arms is a fundamental right such that it should be incorporated against the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: The Supreme Court has understood several explicitly guaranteed rights in the Bill of Rights to be fundamental rights based on their roots in Anglo-American jurisprudence. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Sixth Amendment right to trial by impartial jury); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (First Amendment right to free exercise of religion); *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 235-36 (1897) (Fifth Amendment right against takings without just compensation). However, the Supreme Court has not recognized all of the rights explicitly guaranteed in the Bill of Rights to be “fundamental.” *See, e.g.*, *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment requirement of indictment by grand jury).

- b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. My understanding of Supreme Court precedent is that the Court decides whether a provision of the Bill of Rights should apply to the States by examining whether the provision is properly understood as fundamental within the history and traditions of Anglo-American jurisprudence. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-36 (1897). Whether the Second Amendment embodies a fundamental right that applies to the States is a question currently pending in the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521).

- c. *Heller* further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: The Supreme Court has said that the Second Amendment codified a pre-existing right, and I would faithfully follow the Court's precedent if confirmed as a judge.

- d. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The Supreme Court has determined that the best reading of the text of the Second Amendment is that it protects an individual right to bear arms and that the Second Amendment codified a pre-existing right. I would faithfully follow the Court's precedent if confirmed as a judge.

- e. You testified that "the interpretation of the Constitution ... has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accurred up to that time." What underlying principles would you apply when interpreting the Second Amendment?**

Response: The Supreme Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), and I would faithfully follow the Court's precedent if I were confirmed.

- f. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: The Supreme Court in *Citizens United* applied the doctrine of stare decisis in overruling prior cases contrary to the Court's holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." 130 S. Ct. 876, 911-13 (2010). *Citizens United* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- 8. You stated during your hearing that "the role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories." Do you believe there was no invention or creation of new legal theories in Justice Blackmun's decision in *Roe v. Wade* when he found a right to abortion in the penumbras of the Constitution? Please explain.**

Response: My writings have "locate[d] *Roe [v. Wade]* within the broader constellation of cases extending constitutional protections to individual decision-making on intimate questions of family life, sexuality, and reproduction." *Keeping Faith with the Constitution* 97 (2009). I have written that "nothing about the Court's interpretive method distinguishes the core right in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, as in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner*, *Griswold* and *Eisenstadt*, the Court reasoned from constitutional text, principles, and precedent to the conclusion that that the 'right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... is broad enough to

encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.* at 104 (quoting *Roe*).

- a. **Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's March 11, 2010 dissent in *Newdow v. Rio Linda Union School District* (05-17257) when he ruled that including "Under God" in the pledge was unconstitutional? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- b. **You also testified that "a court .. judge would have to simply follow what the Supreme Court has instructed the courts to do on particular issues." Do you believe Judge Reinhardt did this in the *Newdow* case? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- c. **Do you believe Judge Diane Wood simply followed what the Supreme Court has instructed the courts to do in *NOW v. Scheidler*? Please explain.**

Response: In *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006), the Supreme Court held that threatening or committing physical violence unrelated to robbery or extortion which obstructs, delays, or affects commerce falls outside the scope of the Hobbs Act. I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Wood's opinion in *NOW v. Scheidler*, and I believe it would not be appropriate for me to do so now.

- d. **Do you believe there was no invention or creation of new legal theories in Judge Reinhart's decision in *Silveira v. Lockyer*, 312 F.3d 1052, which held that the right to bear arms is a collective right? Please explain.**

Response: The Supreme Court has held that the right to bear arms is an individual right, and I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Reinhardt's opinion in *Silveira v. Lockyer*, and I believe it would not be appropriate for me to do so now.

- e. **Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's decision in *Gonzales v. Carhart*, 550 U.S. 124, striking down the Partial Birth Abortion Ban? Please explain.**

Response: The Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and I would faithfully follow the Court's precedent if I were confirmed.

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
To the Reply Questions of Senator Cornyn**

- 1. In question 4(a) of my previous questions, I asked whether you thought the arrest challenged in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), violated the defendant’s constitutional rights. You did not answer this question. Please answer it now.**

Response: My concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification and thus might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation. My view on whether the arrest violated the defendant’s constitutional rights would depend on whether the arrest policy was based on “mere negative attitudes” or “vague, undifferentiated fears.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 449 (1985); *see id.* at 446-50 (applying rational basis review to invalidate the denial of a local use permit for operation of a group home for the mentally retarded). But that argument was not addressed in the court’s opinion.

- 2. In your answer to my previous question 4(a), you noted that your “concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification,” and you cited then-Judge Roberts’s statement that “it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears,” *Hedgepeth*, 386 F.3d at 1157. But in your op-ed, *Roberts Would Swing the Supreme Court to the Right*, Bloomberg (July 22, 2005), you used the *Hedgepeth* case as the sole example of how then-Judge Roberts’s “legal career is studded with activities unfriendly to civil rights”**

- a. What part of then-Judge Roberts’s opinion in *Hedgepeth* proved that he was “unfriendly to civil rights”?**

Response: My concern was that the court’s opinion did not address the possibility that the mandatory arrest policy for juvenile offenders might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation.

- b. Do you agree with Judges Roberts, Henderson, Williams, and Sullivan that the arrest policy challenged in *Hedgepeth* was constitutional?**

- i. If not, on what basis do you think it was unconstitutional?**

- ii. If so, on what basis were you criticizing Judge Roberts’s *Hedgepeth* opinion?**

Response: Please see response to Question 1 above.

- c. In retrospect, do you think that you fairly used Chief Justice Roberts’s opinion in *Hedgepeth* to label him as “unfriendly to civil rights”?**

Response: For the reason stated in my response to subpart (a) above, the *Hedgepeth* opinion gave me some concern with respect to civil rights. If I may clarify, I did not use the *Hedgepeth* case as the sole example of then-Judge Roberts’s record on civil rights. My op-ed also expressed concern about his contributions as a Justice Department lawyer to “efforts to oppose school desegregation, to prevent employers from using affirmative action to remedy past discrimination, and to defeat a bipartisan consensus to expand voting rights protections.”

- 3. In answering my previous questions (5)(a)-(c), you stressed that a judge must have a “genuine understanding of how the law affects the parties to a given case or controversy.” Is this statement of yours consistent with President Obama’s statement that, in hard cases, the determinative factors for a judge are “the basis of [his or her] deepest values, [his or her] core concerns, [his or her] broader perspectives on how the world works, and the depth and breadth of [his or her] empathy”?**

Response: I do not know whether President Obama intended his statement to encompass the quality of judging identified in my statement above. However, I did not intend my statement to have anything to do with a judge’s “deepest values,” “core concerns,” “broader perspectives on how the world works,” or “depth and breadth of empathy.” My statement referred only to the notion that a judge must understand how the law affects the parties to a given case in order to apply the law objectively and impartially. One example I have used to illustrate the point is *Plessy v. Ferguson*, where the Supreme Court’s misapprehension of how segregation laws affected black Americans led to an erroneous reading of the Fourteenth Amendment. *See* 163 U.S. 537, 551 (1896) (dismissing the argument that “the enforced separation of the two races stamps the colored race with a badge of inferiority” on the ground that “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”); *“History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision*, 2 *Harv. L. & Pol’y Rev.* 53, 60-61 (2008).

- 4. In answering my previous question 7(a) you refused again to say whether you consider yourself a transnationalist or nationalist as described by Dean and State Department Advisor Harold H. Koh in *Why Transnational Law Matters*, 24 *Penn. St. Int’l L. Rev.* 745, 749-50 (2006). Likewise, in your answer to question 7(b), you declined to say whether you agree with Dean Koh that courts have “a critical role to play in domesticating international law into**

U.S. law” and “should use their interpretive powers to promote the development of a global legal system.” In both answers, you stated only: “This subject lies outside of my expertise, and I have not previously expressed a view on this question.”

- a. **You have been nominated to a court with jurisdiction over many areas of law in which you are not an expert. Keeping this in mind, please now answer:**
 - i. **Do you consider yourself a transnationalist or nationalist as described by Dean Koh in *Why Transnational Law Matters*, 24 Penn. St. Int’l L. Rev. 745, 749-50 (2006)?**
 - ii. **Do you believe domestic courts have “a critical role to play in domesticating international law into U.S. law” and “should use their interpretive powers to promote the development of a global legal system”?**

Response: In stating that the subject of Question 7 “lies outside of my expertise,” I intended only to note that the contrast between “nationalists” and “transnationalists” is a complex area of academic debate, and not one where I have sufficient familiarity to categorically identify myself with one camp or the other, given the broad range of views subsumed under each label. If I may move past the labels, I would say that my scholarship has generally treated the American legal system as an autonomous system of law; it has focused on the development of U.S. law as a national system of law; it has not sought to blend international and domestic law; and it has not urged U.S. courts to domesticate international law into U.S. law or to use their interpretive powers to promote the development of a global legal system. In these respects, my record is aligned with the “nationalist” approach as defined by the excerpt from Dean Koh’s article.

- b. **Would you, as a judge on the Ninth Circuit, refrain from deciding a case involving a subject outside your expertise?**

Response: If confirmed as a judge on the Ninth Circuit, I would faithfully discharge my duty to decide all cases that are properly within the court’s jurisdiction, including cases involving a subject outside of my scholarly expertise.

5. **In question 9 of my previous questions, I asked: “Do you agree with Professor Cole that courts should ‘employ the rhetoric and tactics of the international human rights movement to help frame our constitutional**

vision'?" **Your answer was nonresponsive. Please answer now whether you agree with Professor Cole's quoted statement.**

Response: To the extent that Professor Cole believes "the rhetoric and tactics of the international human rights movement" include "steer[ing] clear of appeals to citizenship," my writings have rejected that view. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006). My writings have also rejected the view that our Constitution can be interpreted in accordance with theories of justice that aspire to universalism. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 218-27 (2008).

- 6. In answering my previous question 12(a), you cited *Roper v. Simmons*, 543 U.S. 551, 575-58 (2005), and *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003), as examples of cases in which Supreme Court Justices chose foreign law that was favorable to their argument.**

- a. Do you believe Justice Kennedy was wrong to reference selectively foreign law in his *Roper* and *Lawrence* opinions for the Court?**

Response: As a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique a sitting Justice of the Supreme Court or precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed. As I said at my confirmation hearing, "choos[ing] the law that is favorable to the argument" is one of "many hazards involved in looking at foreign law as guidance for how we interpret our own principles."

- b. Do you think that the Supreme Court's reasoning in *Roper* or *Lawrence* was flawed?**

Response: I have written with approval that *Lawrence's* reasoning follows the Supreme Court's precedents interpreting "liberty" under the Due Process Clause, *see Keeping Faith with the Constitution* 105-06 (2009), although my writings do not address *Lawrence's* citations to foreign law. I have not expressed any view about *Roper*, and as a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed.

- 7. If social norms changed so that handguns were not "the most popular weapon chosen by Americans for self-defense in the home," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008), would you believe that the Second Amendment still protected the right of Americans to possess handguns?**

Response: The Supreme Court in *Heller* held that the sorts of weapons protected by the Second Amendment are those “in common use at the time.” 128 S. Ct. 2783, 2817 (2008). Whether or not handguns are “the most popular weapon chosen by Americans for self-defense in the home,” they will remain protected by the Second Amendment so long as they are “in common use at the time.”

Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Grassley

1. How do you define “judicial activism”?

Response: “Judicial activism” is a term often used to criticize a judicial decision for usurping the prerogatives of democratic decision-making, for failing to follow text or precedent faithfully, for going beyond the facts on record or the arguments made by the parties, for imposing the judge’s own values or beliefs, or for committing other legal errors in order to achieve a desired result. In general, I have not used the term “judicial activism” very often because it has no settled meaning and “often conveys little of substance beyond the fact that the decision has produced a result with which the critic disagrees.” *Keeping Faith with the Constitution* 41 (2009). In general, unelected judges must be very cautious in exercising power that displaces judgments made through the democratic process. At the same time, one of the crucial functions of an independent judiciary is to protect constitutional rights and liberties against encroachment by the political branches. *See* 1 *Annals of Cong.* 457 (1789) (statement of Rep. Madison); *The Federalist No. 78* (Hamilton). I believe that labeling a judicial decision “activist” is less illuminating than identifying the specific legal errors that the decision committed.

2. Could you identify three recent Supreme Court cases that you believe are examples of “judicial activism”? Please explain why you believe these cases are examples of “judicial activism”.

Response: My writings have identified some Supreme Court cases as “activist” based on a failure to adhere to constitutional text (*Alden v. Maine*, 527 U.S. 706 (1999)) and lack of deference to precedent (*FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Bowles v. Russell*, 551 U.S. 205 (2007)).

3. How do you define “judicial restraint”?

Response: I have written that judicial restraint “is an important value” and “requires judges to refrain from enacting their own policy preferences into law.” *Keeping Faith with the Constitution* 41 (2009). At the same time, “while the notion of judicial restraint instructs judges to be vigilant against abuses of their own power, it does not provide much guidance as to what interpretive methods or substantive judgments properly fall within the scope of judicial power.” *Id.* For this reason, I believe the term “judicial restraint,” like “judicial activism,” is of limited utility in describing the virtues or vices of a particular judicial decision.

4. Could you identify three recent Supreme Court cases that you believe are examples of “judicial restraint”? Please explain why you believe these cases are examples of “judicial restraint”.

Response: My writings have identified *Gonzales v. Raich*, 545 U.S. 1 (2005), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), as examples of cases where the Court deferred to the institutional competence or prerogatives of the political branches, a feature commonly associated with judicial restraint.

- 5. Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: I do not believe it is ever appropriate for judges to indulge their own values or policy preferences in determining what the Constitution and the laws mean.

- 6. Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: To the extent that empathy means an ability to understand a claim from another person's point of view, I think it can help a judge to appreciate the arguments on all sides of a case and to ensure that the litigants' claims have been fully heard. However, to the extent that empathy causes a judge to be biased or prejudiced or to identify with a particular litigant or outcome, it is inappropriate and must have no role in judicial determinations of what the Constitution and the laws mean.

- 7. Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups of persons? For example, do you believe that it's appropriate for judges to favor those who are poor? Do you believe that it's appropriate for judges to disfavor corporations?**

Response: I do not believe it is ever appropriate for judges to indulge their empathy for particular groups of persons. A judge must approach every case objectively and impartially.

- 8. Should the courts, rather than the elected branches, ever take the lead in creating a more just society?**

Response: If "creating a more just society" means addressing issues of distributive justice, I have written that it is solely the prerogative of the elected branches, not the courts, to take the lead. See *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008). If "creating a more just society" means protecting the rights and liberties specified in the Constitution against encroachment by the political branches, I have written that this is a task appropriate for the courts because of their "independence from the political branches and public passions of the moment." *Keeping Faith with the Constitution* 24 (2009).

9. In your hearing testimony, you spoke about the role of a judge by paraphrasing now Chief Justice Roberts's umpire analogy: "I think the role of the judge is to be an impartial, objective and neutral arbiter of specific cases and controversies that come before him or her, and the way that that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case." However, in your book *Keeping Faith with the Constitution*, you expressed a very different view. There, quoting Chief Justice Roberts's umpire analogy, you argued that it did "not withstand scrutiny." Specifically, you stated "Ironically, the significance of Chief Justice Roberts's baseball analogy is exactly the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary understandings of the game, so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." Do you stand by your position that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context"? How do you reconcile your statements in your book and your statements before the Judiciary Committee?

Response: Chief Justice Roberts's umpire analogy makes the point that judges must be impartial and objective arbiters of the specific cases and controversies that come before them. I fully agree with that important point. At the same time, my book explains that the umpire analogy, to the extent it compares constitutional adjudication to calling balls and strikes, does not provide a complete account of how judges interpret the Constitution and tends to oversimplify the process. See *Keeping Faith with the Constitution* 28 (2009).

My hearing testimony urged "fidelity" to applicable precedents and the language of laws, statutes, and regulations at issue in a given case. My book does not address interpretation of statutes or regulations. The book defines "fidelity" to the Constitution to require that judges "interpret its words and ... apply its principles in ways that sustain their vitality over time." *Keeping Faith with the Constitution* 25 (2009). Using various Supreme Court cases as examples, including *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the book shows that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." *Keeping Faith* 28.

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Bond v. United States*, 529 U.S. 334,

338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices requires the judge to be objective and impartial.

If confirmed, I would faithfully follow Supreme Court and circuit precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

- 10. In your hearing testimony, you stated that academics, when they write, are not bound in the same way judges are when they judge. You said: “The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, be creative . . .” You have certainly been creative and inventive during your academic career and have written in/spoken with “unnecessarily flowery language.” Doesn’t your written and spoken academic record shed light on what your judicial philosophy is and what your judicial method would be if you were confirmed to be a judge? How can you assure us that your academic creativity and inventiveness would be in check if you were confirmed to be a judge?**

Response: If confirmed as a circuit judge, I would set aside my own views and fully commit myself to the obligation of deciding cases impartially and objectively, with faithful adherence to the applicable law, including Supreme Court and circuit precedent. I recognize that the role of a judge is not to bend the law in service of any academic theory or to pontificate on what the law should be. The role of a judge is to apply the law *as it is* to the facts and arguments raised in specific cases or controversies.

I believe my academic record sheds light on my qualifications to serve as a judge in at least three respects. First, it shows that I would bring to the bench a broad knowledge of the law. Second, my academic writings clearly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

- 11. In your hearing testimony, you said that statements you made in writings¹ were not an “agenda” but rather “my endorsement of precedents of the court that have done**

¹ “Once a legislative body creates a welfare program it’s the proper role of the courts to grasp the community meaning and purpose for that welfare benefit. When necessary, courts should expand the wealth redistributing effects of the program to satisfy needs of equality and national citizenship.”

precisely those things.” Are you saying that you endorse judges and courts that expand rights that have been legislatively created?

Response: My testimony was a reference to published work in which I have endorsed the reasoning of Supreme Court precedents that have applied the Constitution in cases involving social welfare benefits and programs. *See Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 255-66 (2008).

12. You also indicated in your testimony that you believe your writings demonstrate “a perspective of judicial restraint”. I’m not so sure they do. Could you please explain in detail how your writings demonstrate “a perspective of judicial restraint”?

Response: The comment in my testimony was made in reference to my academic writings on education and welfare rights. Most of my writings on these subjects have been directed at legislators and policymakers, not judges, reflecting my belief in the limited role of courts. For example, my article, *Education, Equality, and National Citizenship*, 116 *Yale L.J.* 330 (2006), was “chiefly directed at Congress” and urged Congress to adopt educational policies that enable all children to become full and equal citizens. *Id.* at 339. In that article, I sought to avoid “the language of *rights*” because of “its deep undertone of judicial enforceability,” *id.*, and I have not urged any court to hold that a right to education exists under the Constitution.

Similarly, my article, *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203 (2008), agrees with Supreme Court precedent that courts have no role in creating social or economic entitlements. *See id.* at 247 (social or economic “rights cannot be reasoned into existence by courts on their own”); *id.* at 252 (the judicial role “does not license courts to declare rights to entirely new benefits or programs not yet in existence”); *id.* at 264 n.324 (there is “no role for courts” to question Congress’s decision in the 1996 welfare overhaul to end the entitlement of poor families to cash assistance). My writings further agree with Supreme Court precedent that the necessity of social or economic entitlements is a judgment for legislatures, not courts, to make. *See id.* at 210 (“the existence of any welfare right depends on democratic instantiation”); *id.* at 265 (courts must defer to “legislative supremacy” in this area).

13. In your hearing testimony, you stated: “If originalism is taken to mean instead that the original meaning, and of course the text of the Constitution, are very important considerations that any judge, in interpreting a provision of the Constitution, must look to, absolutely. I believe that it is absolutely true. In many cases, that could be determinative. But it is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.” What other “touchstones” are there? What “other considerations” are you talking about? What do you consider to be the “ultimate touchstone against which all other considerations must yield”?

Response: I have written that “judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document’s text, history,

structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." Keeping Faith with the Constitution 33-34 (2009). The Supreme Court has evaluated the text and original meaning of the Constitution in the context of other considerations in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See Keeping Faith 26-28, 47-51 (discussing those cases). If confirmed, I would faithfully follow the Court's precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

- 14. One reason you thought it was necessary to oppose Chief Justice Roberts was because of his association with the National Legal Center for the Public Interest, and specifically "its mission to promote, among other things, free enterprise, private ownership of property, and limited government." Please explain your fundamental concerns with free enterprise, private ownership of property, and limited government, addressing each issue separately.**

Response: I do not have any concerns with free enterprise, private ownership of property, or limited government. From the time of America's founding, our nation and our Constitution have reflected an unwavering commitment to those values, and I am personally committed to and strongly believe in those values. The quotation above was from an op-ed in which I was objecting to one organization's use of those values in opposition to government efforts to ensure that our free market system is a fair, sustainable, and level playing field. In retrospect, I can see how the language I used may be read to suggest disparagement of the values of free enterprise, private property, and limited government, even though that was not my intention. For that reason, it was a poor choice of words. Free enterprise, private property, and limited government are cornerstones of America's prosperity and success as a free society, and I regret that the language I used may have suggested otherwise.

- 15. In your hearing testimony, you stated: "whatever I have written in the books and in the articles would have no bearing on my role as a judge." A number of those books and writings specifically discuss the role of a judge and how judges should perform their constitutional duties. Why should the Committee disregard those writings and which one of your writings should the Committee look to in order to grasp an understanding of your judicial philosophy? In responding to the question, please explain whether the writings you no longer embrace should be referred to by others as supporting the proper role of a judge.**

Response: That statement in my hearing testimony was intended to mean that, if confirmed as a judge, my duty would be to follow the law and not my personal views on legal issues. It was not intended to suggest that the Committee should disregard my writings in evaluating my qualifications to be a judge. I believe my writings shed light on my qualifications in at least three respects. First, they show that I would bring to the

bench a broad knowledge of the law. Second, my academic writings clearly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

- 16. At the hearing, Senator Sessions asked you about the Second Amendment in regard to your theory of constitutional fidelity that "[it] may be valid when the object of interpretation is one of the Constitution's concrete and precise commands. For example, all bills for raising revenue must originate in the House of Representatives" Senator Sessions' specific question was whether the Second Amendment, which states the right to bear arms shall not be infringed, provides such a concise command? I don't believe that you actually answered the Senator's question. Please explain if the Second Amendment is one of the precise commands in the Constitution or whether evolving norms might be use to modify its clear meaning.**

Response: In *District of Columbia v. Heller*, the Supreme Court engaged in a lengthy discussion of historical and contextual sources in interpreting the text of the Second Amendment, *see* 128 S. Ct. 2783, 2788-2804 (2008), which suggests that the amendment does not have the same precision that Article I, Section 7 has when it says "[a]ll bills for raising Revenue shall originate in the House of Representatives." Based on its extensive historical inquiry, the Court in *Heller* rested its holding that the Second Amendment protects an individual right to bear arms on "the original understanding of the Second Amendment." *Id.* at 2816. The Court further held that the Second Amendment covers only those arms "in common use at the time," *id.* at 2817 (internal quotation marks and citation omitted), and it considered contemporary societal norms in applying this limitation to the case at bar, *see id.* at 2818 ("handguns are the most popular weapon chosen by Americans for self-defense in the home"). If confirmed, I would faithfully follow the Court's precedent, including any instructions in the precedent on the proper way to apply the Second Amendment to a specific case or controversy.

- 17. The First Amendment contains the phrase "Congress shall make no law." Yet, in *Keeping Faith with the Constitution*, you wrote that the word "no" in this phrase does not mean no. You also wrote, in *Keeping Faith with the Constitution*, that the word "necessary" in the "necessary and proper" clause does not mean necessary. I am concerned about common words having different or changing meanings. For example, in response to a question from Senator Coburn, you stated that your testimony about Proposition 8 was that it "should" be upheld. Senator Coburn noted that your testimony was that it "would" be upheld, not "should" be upheld. If "no" does not mean no and "necessary" does not mean necessary, how can legal**

rulings be consistent and predictable as intended when the Constitution was drafted?

Response: Those examples are from a discussion in the book about strict construction that sought to illustrate that “the Constitution contains phrases that do not bear a literal reading.” Keeping Faith with the Constitution 42 (2009). For example, in reading the Necessary and Proper Clause, the Supreme Court in *McCulloch v. Maryland* rejected the ordinary meaning of the term “necessary” and held that “necessary” means “convenient,” “useful,” “plainly adapted,” or “conducive to the end.” 17 U.S. 316, 413-15, 421 (1819). This holding does not appear to have produced inconsistency or unpredictability; *McCulloch*’s reading of the Necessary and Proper Clause remains a stable and authoritative precedent on the scope of Congress’s power.

18. You’ve written that “[t]he enduring task of the judiciary . . . is to ‘find a way to articulate constitutional law that the nation can accept as its own.’”

a. Is it your position, then, that Constitutional law is whatever the nation is willing to “accept as its own,” rather than what the text of the Constitution provides?

Response: No. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

b. How, exactly, is a judge supposed to decipher what the “nation can accept as its own”?

Response: Judges may not decide cases on the basis of public opinion polls, majority sentiments, or the likely approval or disapproval of political leaders. Judges must decide cases on the basis of legal principles. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

19. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge.

a. In cases involving a close question of law, what would you look to when determining which way to rule?

Response: The intent of the legislature is the ultimate touchstone of statutory interpretation. The best evidence of legislative intent is the text of the relevant statute, and the Supreme Court has said that a judge must “identify and give effect to the best reading of the words in the provision at issue” regardless of the policy

wisdom of the resulting interpretation. *Harbison v. Bell*, 129 S. Ct. 1481, 1493 (2009). Further, “[i]n reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute.” *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008) (internal quotation marks and citation omitted).

Where the statutory text is ambiguous, the Supreme Court has applied various rules of construction where appropriate, such as the rule of constitutional avoidance, the rule of lenity, or the rule against absurdity. Statutory purpose and legislative history also may provide evidence of legislative intent. *See, e.g., Zedner v. United States*, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, neither legislative history nor any other extrinsic source may be used to create ambiguity or an alternative meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”). If confirmed, I would faithfully follow the Court’s precedents on statutory interpretation.

b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?

Response: The Supreme Court has held that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009). These cases hold that, where the text is clear, the text is decisive as to the meaning of the statute notwithstanding any other evidence of how the law was understood when it was enacted. If confirmed, I would faithfully follow the Court’s precedents on statutory interpretation.

c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?

Response: The Supreme Court has looked to legislative history for evidence of legislative intent. *See, e.g., Zedner v. United States*, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, legislative history may not be used to create ambiguity or an alternative meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”). If confirmed, I would faithfully follow the Court’s precedents on the use of legislative history.

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Hatch**

1. **In *Keeping Faith with the Constitution*, you write that “constitutional meaning is a function of both text and context. In many instances, a court cannot be faithful to the principle in the text unless it takes into account the social context in which the text is interpreted.” Do you equate the meaning of the text and the principle in the text? If not, please explain the difference.**

Response: Because our Constitution is a written document, the text is central to the Constitution’s meaning. In some places, the text is very specific and prescriptive. For example, Article I, Section 7 dictates that “[a]ll bills for raising revenue shall originate in the House of Representatives.” The application of such provisions is straightforward on the basis of the text alone.

Elsewhere, the Constitution’s text is more general and abstract. For example, the First Amendment protects “freedom of speech” and “free exercise” of religion. In such instances, the text has been understood to express an underlying principle. For example, the Supreme Court has read the First Amendment to protect “freedom of conscience.” *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). In other places, the Constitution’s text has been understood to reflect a pre-existing principle. For example, the Supreme Court has said that the Second Amendment “codified a *pre-existing* right,” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), and that the Eleventh Amendment “confirm[s]” rather than “establish[es]” a principle of state sovereign immunity “implicit in the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

The Supreme Court has also recognized constitutional principles that do not appear in any particular textual provision but derive from the structure of the Constitution as a whole. For example, the terms “separation of powers” and “federalism” do not appear in the text of the Constitution, yet they are well-established constitutional principles that courts apply in specific cases and controversies.

2. **In *Keeping Faith with the Constitution*, you write that the Supreme Court considers “social practices, evolving norms, and practical consequences in order to give concrete, every meaning to text and principle.”**
- **Do you believe that judges may properly consider social practices, evolving norms, and practical consequences in order to determine the meaning of constitutional provisions? I am asking about your view of this approach, not whether the Supreme Court has used it or whether you would, if confirmed, follow the Supreme Court’s precedents.**

Response: Throughout American history, Justices of all stripes have examined text, original meaning, and precedent, as well as social practices, evolving norms, and

practical consequences when applying the Constitution's provisions to specific cases and controversies. I have written approvingly of this approach because it explains why the Constitution's text and principles have endured even as our society has changed. For example, this approach explains why a telephone wiretap is a "search" under the Fourth Amendment despite the absence of a physical trespass, *see Katz v. United States*, 389 U.S. 347 (1967); why the Equal Protection Clause protects women against gender discrimination even though the original understanding was otherwise, *see United States v. Virginia*, 518 U.S. 515 (1996); and why Congress's power to address twenty-first century challenges in our economy is not limited by eighteenth-century definitions of "commerce," *see Gonzales v. Raich*, 545 U.S. 1 (2005).

Judges who serve on the lower federal courts are bound by Supreme Court precedents, including any instructions in those precedents on how to interpret specific constitutional provisions. If confirmed, I would faithfully follow the Court's precedents, not my own views on constitutional interpretation.

- **This passage refers separately to constitutional "text and principle." Please explain the difference.**

Response: Please see response to Question 1.

3. **In your article *Rethinking Constitutional Welfare Rights*, you write that "the problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine."**

- **What do you mean by "legal doctrine?" Does this refer to the meaning of a constitutional provision?**

Response: By "legal doctrine," I mean the holdings, rules, and analytical tests that comprise adjudicated case law. For example, the strict scrutiny test is a part of equal protection doctrine. As a matter of usage, I would not say that the strict scrutiny test states the "meaning" of the Equal Protection Clause. But the test directs how the Equal Protection Clause applies in a specific case or controversy where, for example, a government policy treats individuals differently on the basis of race.

- **This passage appears to say that judges may consider collective values in giving meaning to constitutional provisions. Is this your view?**

Response: The meaning of the passage is perhaps best explained through examples. In applying the Fourth Amendment guarantee against "unreasonable searches and seizures," the Supreme Court has asked whether the person subject to search has a "reasonable expectation of privacy." *Bond v. United States*, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that asks "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider

collective values in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. In applying the Equal Protection Clause to sex-based classifications, the Supreme Court has asked whether the classification is based on “outmoded,” “outdated,” or “archaic” notions of gender roles. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135, 139 n.11 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982). Judges properly consider collective values in applying the Equal Protection Clause insofar as they must determine whether a sex-based classification reflects outmoded, outdated, or archaic notions of gender roles.

4. In an interview you gave to the Brennan Center for Justice, you said that looking at constitutional text and asking “how did the people in 1789 or the people in 1868 understand it...misses an entire range of experience that the nation has, itself, learned and that judges can rightly take into account in reading legal principles and legal texts.”

- **Does your reference to how a text was understood at a particular point in the past refer to its meaning?**

Response: In that interview, my reference to “how did the people in 1789 or the people in 1868 understand it” is a reference to the original expected application of constitutional text and principle, that is, “the Framers’ expectations of how [the Constitution’s] principles would have applied at the time they were adopted.” *Keeping Faith with the Constitution* 35 (2009). The term “original meaning” is often used to mean the original expected application of the Constitution. However, original expected application is distinct from original meaning understood as “the underlying principles that the Framers’ words were publicly understood to convey.” *Id.* My writings have urged fidelity to original meanings in the latter sense and not to original expected applications. *See id.* at 35-36.

- **If so, then do you believe that judges can change or depart from the original meaning of constitutional provisions by taking into account experience the nation has learned?**

Response: Judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to “the underlying principles that the Framers’ words were publicly understood to convey.” *Keeping Faith with the Constitution* 35; *see id.* at 36 (“When ‘original meaning’ refers to the core principles that underlie the Constitution’s broad and general terms, fidelity to the Constitution requires that its original meaning be preserved over time.”). My writings have agreed with Justice Holmes that judges, in order to preserve the Constitution’s original meaning, can take into account experience that the nation has learned when applying the Constitution to new issues and circumstances. *See id.* at 1-2 (quoting *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920)). In other words, judges may depart from the original expected application of a constitutional provision or principle in order to remain faithful to its original meaning.

- **If so, are there any limitations, criteria, or other restraints on how judges take into account experience the nation has learned when determining the meaning of constitutional provisions?**

Response: Judges may take into account experience the nation has learned when applying the Constitution's text and principles to new issues and circumstances. In so doing, judges may not engage in free-wheeling inquiry into the nation's experience. Judges are constrained insofar as they apply constitutional text and principles not in the abstract, but in concrete cases and controversies; insofar as they seek guidance in precedent, which itself is part of the nation's experience; and insofar as they look to objective evidence of relevant historical facts or evolution of legal traditions.

For example, in *United States v. Lopez*, 514 U.S. 549, 556 (1995), the Supreme Court said: "*Jones & Laughlin Steel, Darby, and Wickard* ... greatly expanded the previously defined authority of Congress under [the Commerce] Clause" because of "a recognition of the great changes that had occurred in the way business was carried on in this country" and "a view that earlier Commerce Clause cases artificially had constrained the authority of Congress." In *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954), the Court said: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." And in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 428, 442-43 (1934), the Court said: "To ascertain the scope of the [Contracts Clause], we examine the course of judicial decisions in its application.... It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

- **Please explain the difference between legal principles and legal texts.**

Response: Please see response to Question 1.

5. **In your Brennan Center for Justice interview, you said that the Obama administration should appoint judges who are "broad minded in their view of the kinds and sources that are legitimate to take into account in reading especially the Constitution, but...legal texts of all sorts." By "reading" the Constitution, do you mean determining the meaning of constitutional provisions? In other words, do you believe that judges may consider a broad range of kinds and sources in determining the meaning of constitutional provisions?**

Response: I have written that "judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document's text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less

than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." *Keeping Faith with the Constitution* 33-34 (2009).

If confirmed, I would set my own views aside and faithfully follow the Supreme Court's precedents, including any instructions in those precedents on the kinds of sources that may be used to determine how a particular constitutional provision should be applied in a specific case or controversy.

6. **In your article *Separation Anxiety: Congress, the Courts, and the Constitution*, you wrote that the Constitution "has shown a remarkable capacity to absorb new meanings and new commitments forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience." Please explain what you mean by "new meanings" and "new commitments."**

Response: Those terms refer to applications of the Constitution's text and principles to new circumstances brought about by political, economic, or social change. During the New Deal, for example, the Supreme Court rejected its earlier applications of the Commerce Clause when it applied the clause to uphold novel legislation that sought to stabilize and protect the national economy. *See Separation Anxiety: Congress, the Courts, and the Constitution*, 91 *Geo. L.J.* 439, 440-42 (2003).

- **The same article refers to the "ongoing search for constitutional meaning." Do you believe that judges may consider the elements you mentioned such as dialogue, debate, dissent, and disobedience in determining the meaning of constitutional provisions?**

Response: No. My reference to dialogue, debate, dissent, and disobedience was a reference to processes by which ordinary citizens and their elected representatives seek to understand and express their view of the Constitution.

7. **I understand originalism to be an approach to discovering the meaning of the Constitution's text, not to determining its application. You have criticized originalism for its indeterminacy. In your own writings and speeches, however, you discuss a very broad range of factors and considerations that judges may use to interpret the Constitution.**

- **How are things such as evolving social norms, "dialogue and debate," "experience" that the nation has learned, social practices, collective values, or practical consequences any more determinate than the factors originalism uses to determine the meaning of constitutional provisions?**

Response: My writings do not contend that the method of constitutional fidelity is more determinate than originalism, only that originalism is often no more determinate than constitutional fidelity. *See Keeping Faith with the Constitution* 37-38 (2009). My writings have acknowledged that "the interpretive methodology we describe does

not dictate a single ‘right answer’ in every case” but rather serves to promote “transparency” in the judicial decision-making process. *Id.* at 35.

- **How are the factors you discussed to be weighed in reaching a conclusion, relative to the original meaning of a constitutional provision?**

Response: The Supreme Court has weighed those factors along with the original meaning of a constitutional provision in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

8. **In *Keeping Faith with the Constitution*, you criticize originalism because it “cannot account for many of the constitutional understandings that Americans take for granted today.”**

- **By “constitutional understandings,” do you mean the meaning of constitutional provisions or its application?**

Response: In the above-quoted sentence, I use “constitutional understandings” to mean the ways in which the Constitution has been applied over time.

- **This criticism suggests that the proper approach or method for interpreting the Constitution should be driven by the “constitutional understandings” for which it can account. Is this your view? Please explain.**

Response: My writings have suggested that in assessing a method for interpreting the Constitution, it is appropriate to consider whether the method can explain basic understandings of the Constitution that Americans take for granted today, such as the unconstitutionality of racial segregation in public schools or the unconstitutionality of policies that exclude women from service on juries or in various occupations.

9. **In your article “National Citizenship and Equality of Educational Opportunity,” you wrote that the Fourteenth Amendment guarantees substantive rights that are necessary for “equal standing in the national political community.” Do you believe that judges may determine what these substantive rights are?**

Response: My writings have not claimed that judges may determine what the substantive rights of national citizenship are, apart from rights protected elsewhere in the Constitution. The above-referenced article was addressed to Congress, not the courts, and my writings have approached this subject from the standpoint that Congress is best situated to determine what the substantive rights of national citizenship are. See *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339-40 (2006).

- 10. In a January 2009 broadcast of the National Public Radio broadcast “Weekend Edition,” you said that “in the nomination of judges, the decision-makers are entitled to consider a broad range of factors, including the political background and affiliations of the candidates.” Please explain why political background and affiliation is a legitimate consideration in the nomination or confirmation of federal judges.**

Response: The quotation above occurred in a portion of the radio broadcast that reported findings by the Justice Department’s inspector general that “managers there regularly hired conservative Federalist Society members over liberal ACS members for nonpartisan jobs, even if the ACS members were more qualified. That violates federal laws and civil service rules.” Ari Shapiro, *Balance of Power Swings to Liberal Legal Group*, NPR Weekend Edition, Jan. 3, 2009. After identifying this issue, the broadcast then quoted me saying that “I have a lot of confidence, actually, that the new people in the Justice Department and elsewhere in the government are keenly aware of that issue, and that in the hiring of career staff, that will not be an issue.” That statement then led to my statement partially quoted in the question above, which drew a contrast between the hiring of civil servants and “the hiring of political staff as well as . . . the nomination of judges.” The quoted statement indicated that, unlike the rules for hiring civil servants, it is permissible for decision-makers to consider a broad range of factors, including political background and affiliations, in appointing judges. The statement did not say, and I do not believe, that decision-makers *should* consider political background and affiliations. Factors that decision-makers should consider are whether the judicial candidate will approach each case impartially and objectively; whether the candidate will faithfully apply the law to the facts of each case or controversy and not his or her personal views; and whether the candidate is fully committed to upholding the Constitution.

- 11. In your confirmation hearing, you said that the role of the judge “is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That’s simply not the role of a judge.”**

- **Please give some examples of court decisions that improperly invented or created new theories.**

Response: *Lochner v. New York*, 198 U.S. 45 (1905), improperly invented a constitutional right of contract. *Plessy v. Ferguson*, 163 U.S. 537 (1896), improperly invented the doctrine of separate but equal.

- **It appears that you were referring to the lower courts. Is it permissible or appropriate for the Supreme Court to invent or create new theories when it interprets and applies the Constitution or statutes? Why or why not?**

Response: Because the Supreme Court decides cases in which the law is unsettled, the legal rules and tests announced by the Court are sometimes “new” in that respect. Even so, however, it is not appropriate or permissible for the Court to invent or create

new theories because the Court must be faithful to the text and principles of the Constitution and to the statutes it interprets, and because the Court must faithfully apply the doctrine of stare decisis, which requires adherence to precedent unless certain conditions are met.

- 12. In *Keeping Faith with the Constitution*, you wrote that “a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted.” You also wrote that the Supreme Court gives meaning to the principles of the Constitution by considering “social practices, evolving norms, and practical consequences.” Social contexts and practices, evolving norms, and practical consequences all change over time. In your confirmation hearing, however, you said that “the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change.” Please reconcile what appear to be contradictory positions.**

Response: The principles embodied in the Constitution’s text endure over the ages and do not change. To preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy. My writings have cited *Katz v. United States*, 389 U.S. 347 (1967), as an example. See *Keeping Faith with the Constitution* 28 (2009). In *Katz*, the Supreme Court said that “the Fourth Amendment protects people, not places,” 389 U.S. at 351, an enduring principle embodied in the text that makes the finding of an unreasonable search or seizure turn on expectations of privacy rather than physical trespass. To uphold this principle, the Court took social context and practices into account when it said that “a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.” *Id.* at 352.

- 13. In your confirmation hearing, you said that “the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change.” A moment later, however, you said that to “preserve the meaning of that text,” it is necessary for judges to “give those phrases and those words meaning in the light of the current conditions of the society.” Those conditions obviously change over time. You were referring to the meaning of constitutional provisions, not their application. Please reconcile what appear to be contradictory positions.**

Response: The above-quoted statement from my confirmation hearing does not state my view clearly. The principles embodied in the Constitution’s text endure over the ages and do not change. In order to preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy.

14. In your confirmation hearing, you said that the original meaning of constitutional provisions is a “very important” consideration that judges may consider. In your writings, you describe how judges may also look to “social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning” to those provisions. In an interview, you said that judges should be “broad minded” regarding the sources they may take into accounting in interpreting the Constitution. And in an amicus brief you joined, you argued that “constitutional interpretation appropriately takes into account changes in social circumstances and cultural understandings.”

- **If the original meaning of a constitutional provision is at odds with or inconsistent with current social practices or circumstances, evolving norms, or cultural understandings, is a judge free to choose which meaning he or she will attribute to a constitutional provision?**

Response: I have written that judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to “the underlying principles that the Framers’ words were publicly understood to convey.” *Keeping Faith with the Constitution* 35; *see id.* at 36 (“When ‘original meaning’ refers to the core principles that underlie the Constitution’s broad and general terms, fidelity to the Constitution requires that its original meaning be preserved over time.”). The Supreme Court has addressed instances where the original expected application of a constitutional provision is at odds with contemporary norms in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

- **Are there considerations or factors which you believe judges may not consider in interpreting the Constitution or, as you put it in one article, engaging in “the ongoing search for constitutional meaning”?**

Response: In interpreting the Constitution, a judge must be impartial and objective; a judge may not consider his or her own personal views (whether like or dislike) of a constitutional provision or principle. A judge may not interpret the Constitution based on sympathy for or bias toward a particular group, interest, or party. A judge may not interpret the Constitution based on any economic, political, social or other theory or ideology extrinsic to the text and principles of the Constitution. A judge may not rely on foreign law as legal authority in interpreting the Constitution unless American law so requires. In general, a judge may not consider any factor that would cause him or her to ignore or depart from the text or principles of the Constitution.

15. In your writings, you have argued that judges may consider many factors and what appear to be quite subjective considerations such as evolving social norms, practices, and circumstances as well as cultural understandings and other elements.

During your confirmation hearing, however, you told Senator Kaufman that personal beliefs “never have a role in the act of judging.” Please reconcile what appear to be contradictory positions. How can a judge take into account, consider, and utilize evolving and changing norms to interpret the Constitution without his personal beliefs playing any role whatsoever?

Response: Personal beliefs have no role in the faithful discharge of judicial duty, and the consideration of social norms and practices in judging is not inconsistent with this idea. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms.” *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Bond v. United States*, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices is objective and neither requires nor permits the judge to consider his or her personal beliefs.

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Kyl**

1. **You co-authored a recent book published by the American Constitution Society entitled *Keeping Faith with the Constitution*. In that book, you claimed that constitutional interpretation**

“requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society.”¹

You went on to argue that constitutional interpretation properly considers “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice.”² It seems from these statements that you believe the meaning of the Constitution is not fixed at what the framers intended it to mean.

- a. **If confirmed, what “changing needs, conditions, and understandings of our society” would you choose to consider as you interpret the Constitution?**

Response: If confirmed, I would faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy. In many areas of constitutional law, the Supreme Court has required judges to consider social understandings while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms.” *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Bond v. United States*, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002).

¹ GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 2 (2009).

² *Id.* at 3.

- b. **At your hearing, I read a shortened form of the quotation below that omitted the words “in order to sustain its vitality.” You testified that you believed that the missing words were: “to preserve the power and meaning of the text and the principles.” Obviously, your recollection of the missing words (versus the real text) changed the meaning. The full quotation is: “The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society.” Looking at the full quotation, how would you decide how the Constitution “should” be applied today?**

Response: I apologize for misremembering the missing words of the quotation, and I stand corrected. I had in mind a similar quotation from the book: “Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society.” *Keeping Faith with the Constitution* 25 (2009). I believe the two quotations express the same idea, *i.e.*, that the Constitution should be applied in a way that preserves the meaning or sustains the vitality of its text and principles. My writings do not claim that the Constitution should be applied to conform to the changing needs, norms, or understandings of society. Instead, my writings state that the application of the Constitution should always be faithful to its text and principles, and that such fidelity may require judges to consider the changing needs, norms, or understandings of society. *See id.* at 24-29.

- c. **What is legal test for how you decide how the Constitution “should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society”?**

Response: My book provides several examples of how Supreme Court implements this approach in its legal reasoning on a wide range of constitutional issues. The examples include *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). *See Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

- d. **Do you stand by the quotation as written in the book (*i.e.*, “The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society.”)?**

Response: I stand by the quotation as an expression of my scholarly views on constitutional interpretation. If confirmed, I would set aside my scholarly views and faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

2. **At your confirmation hearing, you testified that you have “the highest regard for Justice Alito’s intellect and his career as a lawyer.”**

a. **Do you have high regard for Justice Alito himself?**

Response: Yes. In addition to his intellect and professional accomplishments, I have particular respect and admiration for his personal background. Justice Alito grew up in an immigrant family, and he was raised by parents who worked very hard and made sacrifices for their children. He went to public schools, he studied hard, he was an active member of his community, and he went on to Princeton and Yale Law School. I believe he was the first person in his family to become a lawyer. He is an American success story, and he has served our country honorably as a prosecutor and as a judge.

3. **At the confirmation hearing of Samuel Alito (January 12, 2006), you offered the following testimony:**

Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit that this is not the America we know. Nor is it the America we aspire to be.

a. **Do you really believe that that is his view of America?**

Response: No. The passage above described a series of opinions that Justice Alito had written as a government lawyer and as a Third Circuit judge regarding what he believed to be permissible under the Constitution. Those writings were analyzed in my 2006 testimony, and the passage above was not intended to suggest that he supported, condoned, or endorsed those practices as a policy matter. However, upon rereading and reflecting on this passage in response to this question, I believe the passage is unduly harsh and provocative and does not add to the fifteen pages of legal analysis that preceded it. What troubles me most is that the passage has an *ad hominem* quality that is unfair and hurtful to the nominee—a reality that, in all

candor, I did not appreciate then nearly as much as I appreciate now. The passage does not reflect and indeed obscures the respect I have for Justice Alito as a person who rose from humble origins to serve our country honorably as a prosecutor, judge, and now Supreme Court Justice. For these reasons, I regret having written this passage, and I would omit it if I had the opportunity to rewrite my testimony.

Responses of Goodwin Liu
 Nominee to be U.S. Circuit Judge for the Ninth Circuit
 to the Written Questions of Senator Jeff Sessions

1. At your hearing, I asked you about your characterization of Justice Alito’s decisions in death penalty cases as

“envision[ing] an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some.”

You replied that your statement was “perhaps unnecessarily colorful language,” but went on to say that you had “criticisms and concerns” with his record in “the area in which individual rights come up against assertions of government power.”

- a. The Supreme Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), upheld the power of Congress to regulate the growing of wheat for private consumption on private property under the Interstate Commerce Clause of Article I, Section 8 of the Constitution. More recently, the Court reaffirmed this holding in *Gonzales v. Raich*, 541 U.S. 1 (2005).
- i. Do you think that case posed troubling concerns in “the area in which individual rights come up against assertions of government power”?
- ii. Do you think that case was correctly decided?

Response: In *Wickard v. Filburn*, after upholding the Agricultural Adjustment Act of 1938 as a valid exercise of Congress’s commerce power, the Court proceeded to examine whether the Act deprived the plaintiff of property without due process of law under the Fifth Amendment. The Court unanimously rejected the due process claim on the ground that “[i]t is hardly lack of due process for the Government to regulate that which it subsidizes.” 317 U.S. 111, 131 (1942). The Court said that to find a due process violation would have allowed the plaintiff to “get all that the Government gives and do nothing that the Government asks.” *Id.* at 133. *Wickard* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

b. **In *Kelo v. City of New London*, 545 U.S. 469 (2005) the Supreme Court upheld the City of New London, Connecticut’s exercise of eminent domain power to take a private home from a private citizen and give it to a private developer as part of a comprehensive redevelopment plan.**

i. **Does that case raise any troubling concerns for you regarding the power of government trumping individual rights?**

ii. **Do you think that case was correctly decided?**

Response: *Kelo* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. I am aware that many states have enacted legislation to restrict the exercise of eminent domain upheld in *Kelo*, and some Members of Congress have introduced similar legislation at the federal level.

2. **In your testimony in opposition to then-Judge Alito’s nomination, it seems that you deliberately obscured the distinction between what is permissible under the Constitution and what may be prohibited by statutes and policies. To take just one example, in your summation, you asserted that “Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse.” There, you were referring to a Department of Justice memo that Judge Alito wrote on the “fleeing felon” rule that took the same position that Justice O’Connor took in her dissent in *Tennessee v. Garner*. Do you acknowledge that there was absolutely nothing in then-Judge Alito’s record that would prevent governments from adopting policies that limited the scope of the traditional “fleeing felon” rule?**

Response: Yes. My testimony described only what Judge Alito believed to be permissible under the Constitution, and it noted (on page 4) that his Department of Justice memorandum expressly mentioned that “federal law enforcement agencies ... uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) than [sic] the court of appeals’ rule.”

3. **At your hearing, you were asked about your belief that the Citizenship Clause of the Fourteenth Amendment creates a positive right to certain welfare benefits. That belief is well documented in your writings, speeches, and press interviews over recent years. You responded to concerns that this belief indicates an agenda you would bring with you to the bench by saying that your writings were directed at policymakers and not judges. You even seemed to have resorted to that argument with regard to your article entitled “Rethinking Constitutional Welfare Rights.” In that article, you explicitly stated your purpose and the intended audience: “I attempt in this Article a small step toward ‘reformation of thought’ on how welfare rights may be recognized *through constitutional adjudication* in a democratic society.”¹**

¹ Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 206 (2008).

- a. **I am certainly aware of Senators' constant need to evaluate the constitutionality of legislative proposals, but do you contend that policymakers are empowered to engage in "constitutional adjudication"?**

Response: I do not believe policymakers are empowered to engage in constitutional adjudication. My writings have said that Congress, in the exercise of its enumerated powers, has an obligation to consider what the Constitution requires. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339 (2006).

- b. **If Congress fails to provide for a necessary social or economic entitlement, how should courts remedy the situation?**

Response: The Supreme Court has held that courts have no role in creating social or economic entitlements. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court's precedents if I were confirmed. My writings agree with Supreme Court precedent that courts have no role in creating social or economic entitlements. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 247 (2008) (social or economic "rights cannot be reasoned into existence by courts on their own").

- c. **What tools should judges use to make judgments about the necessity of social entitlements?**

Response: The Supreme Court has held that judgments about the necessity of social entitlements are the purview of legislators, not judges. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court's precedents if I were confirmed. My writings agree with Supreme Court precedent that the necessity of social entitlements is a judgment for legislatures, not courts, to make. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 265 (2008) (courts must defer to "legislative supremacy" in this area).

4. **You have argued that the Constitution creates, for all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. You have claimed that there is a constitutional right to education and healthcare, in particular. Although you claim these rights arise from the Citizenship Clause of the Fourteenth Amendment, you have also stated that**

"we must be careful to ensure that the ideal of national citizenship does not infuse public education with nativism, cultural conformity, or chauvinistic

nationalism and we should not use the concept of citizenship to deny education to noncitizen children”

- a. **Do you believe that the Constitution guarantees people who are here illegally a right to healthcare and welfare benefits?**

Response: The Supreme Court has generally held that the Constitution does not guarantee a right to health care or welfare, and where Congress has restricted the eligibility of noncitizens for such benefits provided by statute, the Court has upheld it. *See Mathews v. Diaz*, 426 U.S. 67 (1976). I would faithfully follow the Court’s precedent if I were confirmed. I have not claimed that there is a constitutional right to health care or welfare. My writings indicate that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, and define the contours of any such right. *See Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 244-45, 264-66 & n.324 (2008).

- b. **Please explain what you mean by “welfare rights.”**

Response: My writings “use the term ‘welfare right’ to mean an affirmative constitutional right to particular social goods such as ‘education, shelter, subsistence, health care and the like, or to the money these things cost.’” *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 208 n.18 (2008).

5. **In “Rethinking Constitutional Welfare Rights,” you state that “judicial recognition of welfare rights is best conceived as an act of interpreting the shared understandings of particular welfare goods as they are manifested in our institutions, laws, and evolving social practices.” You also state:**

“The problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.”

At your hearing, you portrayed as modest the judicial role that you urge in your writings.

- a. **What in your proposed methodology would constrain a judge from imposing his or her own policy views in the guise of recognizing rights to a broad array of welfare goods?**
- b. **Please cite the passages in your writings or in your speeches that you believe best substantiate your testimony.**

Response: The methodological constraints that prevent judges from imposing their own policy views are discussed in *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 253-66 (2008), and they are illustrated by the Supreme Court opinions discussed in those pages. The principal constraint I propose is that judges may not evaluate the “substantive rationality” of legislative judgments with respect to social welfare provision. *Id.* at 258-60, 263-65; *see id.* at 265 (courts must give “ultimate deference to legislative supremacy”).

6. You testified: “whatever I may have written in the books and in the articles would have no bearing on my role as a judge.” In your book, *Keeping Faith with the Constitution*, you state that its purpose is to “describe and defend” a “dynamic process of [constitutional] interpretation” that you label “constitutional fidelity.” You wrote: “[i]nterpreting the Constitution requires adaptation of its broad principles to the conditions and challenges faced by successive generations.” Your interpretive approach draws on a variety of considerations: original understandings, “the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society.” Such an approach, you assert, is “richer than originalism or strict construction, more consistent with the history of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding.” Indeed, you claim that your approach “is what enables the American people to keep faith with the Constitution from one generation to the next.”

In chapter two, you make clear your view that judges should adopt the interpretive approach that you “describe and defend”:

“Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society.”

In an interview about your book, you described this approach as follows:

“what we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation.”

- a. How do you square your testimony that your writings would have no bearing on your role as a judge with the interpretive approach described in your book that you believe is “require[d]” and essential to “enable[] the American people to keep faith with the Constitution from one generation to the next”?

Response: If confirmed as a judge on the U.S. Court of Appeals for the Ninth Circuit, I would be bound by U.S. Supreme Court and Ninth Circuit precedents. In deciding cases that come before me as a judge, I would set aside the views I have expressed as a scholar and follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in such precedents on how to interpret specific constitutional provisions.

- b. **You also argue that “constitutional fidelity” is different from the concept of a “living Constitution.” Please explain the difference.**

Response: The concept of a “living Constitution” misleadingly suggests that the Constitution itself changes over time and can come to mean whatever a judge or a sufficient number of people think it ought to mean. Describing our Constitution as a “living” document unduly minimizes the fixed and enduring character of its text and principles. I use the term “constitutional fidelity” to indicate that constitutional interpretation must take seriously the fact that our Constitution is an enduring written document and, as such, does not grow or evolve except by formal amendment under Article V. Constitutional interpretation must preserve the power and meaning of the text and the principles it expresses. *See* Keeping Faith with the Constitution 24-29 (2009).

7. **In the above-mentioned interview on your book, you said that “social understanding and popular movements throughout our history have informed our understanding of the Constitution” and that the Constitution “encompass[es] more than the specific applications that the framers had in mind.” You summed up your position by stating that when we interpret the Constitution, “what we’re trying to do is try to *make* the Constitution make sense in terms of how people actually live.”²**

- a. **If we accept your notion that unelected, life-tenured judges should be free to “adapt” the Constitution to meet the “challenges and conditions of our society in every single generation,” who will decide when the courts are being faithful to the Constitution and when they are simply being faithful to their own view of what Constitution should be?**

Response: The Supreme Court had held that its interpretation of the Constitution “is the supreme law of the land.” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Accordingly, the Supreme Court is the ultimate arbiter of when courts have been faithful to the Constitution.

- b. **Justice Oliver Wendell Holmes had a view of the Constitution not unlike yours, and his view is one of which you have written favorably. In *Missouri v. Holland*, Justice Holmes wrote: “when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could**

²ACSBlog, Podcast/Interview with Goodwin Liu on “Keeping Faith with the Constitution,” <http://www.acslaw.org/nodc/13374> (at 0:16 - 2:32).

not have been foreseen completely by the most gifted of its begetters.”³ Presumably applying that same theory, in *Buck v. Bell*, Justice Holmes upheld a law that called for the compulsory sterilization of patients in state mental hospitals. He said:

“We have seen more than once that the *public welfare* may call upon the best citizens *for their lives*. . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”⁴

It is not my intent to take up the question addressed in the case. It seems, though, that Justice Holmes had “the evolving understandings of the Constitution forged through social movements [and] legislation” in mind when he rendered his decision in *Buck v. Bell*. As terrible as we now view them, at the time, eugenics laws were popular and accepted in society as a whole.

- i. **Do you think that Justice Holmes decided that case correctly, given that a there was broad consensus that the laws in question met a vital social and economic need consistent with the Constitution?**

Response: In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Supreme Court applied the Equal Protection Clause to invalidate a state law that required sterilization as punishment for certain crimes but not for other, similar crimes. Although *Skinner* did not overrule *Buck v. Bell*, it cast considerable constitutional doubt on compulsory sterilization laws. I would faithfully follow the Court’s precedents if I were confirmed.

- ii. **If not, how do we decide which broadly-accepted policies are inconsistent with the Constitution?**

Response: If confirmed, I would take my instruction from Supreme Court and Ninth Circuit precedents applicable to the specific case or controversy before me.

8. **In response to a question from Senator Leahy, you stated at your hearing that “there is no room for invention or creation of new theories. That’s simply not the role of a judge.” Yet, in an article you co-authored, you wrote that**

“the meaning of the Constitution cannot be completely discovered by simply sitting down with the text and reading the words. Our [Constitution] has shown a remarkable capacity to absorb new meanings and new commitments

³ 252 U.S. 416, 433 (1920).

⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience.”⁵

In my view, other than through the amendment process set out in Article V, no new meaning or rule can be added to the Constitution. It has a fixed, determinate meaning. If these new “new meanings and new commitments” do not appear in the text or original understanding of the Constitution, then is it not true that they can only become part of our constitutional law through the decisions of judges?

Response: Judges may not add new rules, new meanings, or new commitments to the Constitution beyond its text and principles. The role of a judge is to apply the Constitution to the specific case or controversy before him or her in a way that is faithful to the Constitution’s text and principles. The judiciary is not alone in its obligation to be faithful to the Constitution, and the above-quoted passage referred to historical instances in which “Congress, the courts, and the executive branch have together reflected, refined, and given expression to the fundamental principles that the American people wish to make ‘more firmly law.’” *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 *Geo. L.J.* 439, 444 (2003).

9. **You once wrote that “neither originalism nor strict construction has proven to be a persuasive and durable methodology” for interpreting the Constitution.⁶ Yet, at your hearing, you stated that you “don’t think there’s any one specific way” of interpreting the Constitution. You went on to say that the original meaning of the Constitution “is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.”**

Thomas Jefferson said that “[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by Construction.”⁷ Furthermore, James Madison commented:

“I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.”⁸

- a. **Do you disagree with Thomas Jefferson and James Madison?**

Response: I am not familiar with those quotations from Thomas Jefferson and James Madison or the context in which they were written or said. In my writings,

⁵ Hillary Rodham Clinton & Goodwin Liu, *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 *Geo. L.J.* 439, 444 (2003).

⁶ Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *KEEPING FAITH WITH THE CONSTITUTION* 5 (2009).

⁷ Letter from Thomas Jefferson to Wilson Carey Nicholas (Sept. 7, 1803), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 418-19 (Albert E. Bergh ed., 1903).

⁸ Letter from James Madison to Henry Lee (June 25, 1824), in 9 *THE WRITINGS OF JAMES MADISON* 192 (G. Hunt, ed., 1910).

I have said that constitutional interpretation must be faithful to “the fixed and enduring character of [the Constitution’s] text and principles.” *Keeping Faith with the Constitution* 29 (2009). I have also written that “constitutional fidelity is not at odds with originalism if originalism is understood to mean a commitment to the underlying principles that the Framers’ words were publicly understood to convey.” *Id.* at 35.

b. Under your theory of interpretation, who will determine when the original meaning of the Constitution must yield to other considerations?

Response: The Supreme Court has made this determination in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the instructions of the Supreme Court when applying the Constitution to specific cases or controversies.

c. Under your theory of interpretation, how is it determined whether the original meaning of the Constitution controls?

Response: The Supreme Court has made this determination in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the instructions of the Supreme Court when applying the Constitution to specific cases or controversies.

10. You have written that you support only those school choice programs that you believe will lead toward a racial composition of particular schools that, in your words, “reflect[s] the racial and socioeconomic diversity of the metropolitan area—not the local school district—where they are located.”⁹ You also seemed to indicate support for a federal law that would prohibit local school districts from rejecting transferees from other school districts.

a. In view of the Supreme Court’s decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), do you agree that the racial balancing rules you advocated would be unconstitutional, as well as the measures needed to enforce them?

Response: In *Parents Involved*, the Supreme Court held that the use of race in a student assignment policy is subject to strict scrutiny and is thus unconstitutional unless narrowly tailored to serve a compelling government interest. See 551 U.S. 701, 720 (2007). The Court further held that narrow tailoring is not satisfied if “race, for some students, is determinative standing alone” as opposed to “simply

⁹ Goodwin Liu, *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* 791, 808 (2005).

one factor weighed with others in reaching a decision.” *Id.* at 723 (citing *Gratz v. Bollinger*, 539 U.S. 244 (2003)). In a separate opinion, Justice Kennedy said that “having classrooms that reflect the racial makeup of the surrounding community” is one of “our highest aspirations” and that “[a] compelling interest exists in avoiding racial isolation ... [and in] achiev[ing] a diverse student population.” *Id.* at 782, 797-98 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy distinguished individual classifications based on race, which are subject to strict scrutiny, from “mechanisms [that] are race conscious but do not lead to different treatment based on [individual] classification,” which are “unlikely [to] demand strict scrutiny to be found permissible.” *Id.* at 789.

I would faithfully follow the Court’s precedents if I were confirmed. My writings have proposed flexible policies to reward charter schools whose enrollments roughly reflect the racial and socioeconomic diversity of their surrounding communities. See *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* at 808-09. My writings have not proposed any individualized use of race or any other mechanism for achieving diverse enrollments that would violate the Court’s holding in *Gratz* or *Parents Involved*.

- b. **Do you believe that the Court’s decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which ruled that school choice programs that include religious schools do not violate the Establishment Clause, was correctly decided?**

Response: *Zelman* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. My article, *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* 791 (2005), treats *Zelman* as settled law.

- i. **Have you ever previously expressed your position on this question? When and with whom? What did you say?**

Response: I do not recall any specific conversations I have had about the question presented in *Zelman*.

- c. **When you testified that you “do not support racial quotas” and that you believe that “they are unconstitutional,” what precisely did you mean by the term “quotas”?**

Response: I understand “quota” to mean a rigid numerical goal. The paradigmatic example is the University of California, Davis Medical School’s reservation of sixteen seats for minority students in the 100-person entering class that the Supreme Court held unconstitutional in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

- d. **When you testified that you believe that racial quotas “are unconstitutional,” were you describing the current state of case law or were you offering your own best reading of the Constitution?**

Response: I was describing both the current state of case law and my own view of the Constitution.

- e. **Please cite the passages in your writings or in your speeches that you believe best substantiate your testimony that you “do not support racial quotas” and that you believe that “they are unconstitutional.”**

Response: While my writings have analyzed and occasionally raised questions about the Supreme Court’s doctrine on affirmative action, I have stated and accepted the basic proposition that racial quotas are unconstitutional. *See* Brown, *Bollinger, and Beyond*, 47 *How. L.J.* 705, 762 (2004); *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 *Harv. C.R.-C.L. L. Rev.* 383, 389 (1998).

11. **At your hearing, Senator Cornyn asked whether you believed the Tenth Amendment was a “dead letter.” You responded that “[t]he Supreme Court has made amply clear that the Tenth Amendment stands for the fundamental principle of Federalism that imbues our structure of government.” Do you believe that your views favoring strong federal control over education policy are consistent with the dual system of sovereignty inherent in the federalist system and explicit in the Tenth Amendment to our Constitution? Please explain your answer.**

Response: As recently as last year, the Supreme Court has said that “public education” is an “area[] of core state responsibility.” *Horne v. Flores*, 129 S. Ct. 2579, 2593 (2009); *see* *United States v. Lopez*, 514 U.S. 549, 564 (1995) (identifying “education” as an area “where States historically have been sovereign”). At the same time, the Court has noted the “breadth” of Congress’s power to enact conditional spending programs that touch on matters beyond those specified in Congress’s enumerated powers. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). I would faithfully follow the Court’s precedents if I were confirmed.

My writings on the federal role in education have not proposed any policy that exceeds the scope of Congress’s powers under Supreme Court precedent. My writings acknowledge the need for balance between federal and state policy. For example, I have written in favor of national (but not federal) education standards that states may voluntarily adopt, while also supporting “state and local flexibility to design curriculum, instruction, and assessment” related to those standards. *Interstate Inequality in Educational Opportunity*, 81 *N.Y.U. L. Rev.* 2044, 2108 (2006). I have written in favor of greater equity in the distribution of federal education aid, *see* *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 *Iowa L. Rev.* 973 (2008), while also recognizing that states have a central role in improving school finance, *see* *Getting Beyond the Facts: Reforming California School Finance* (2008).

12. In August 2003, you participated in a panel on “Segregation, Integration, and Affirmative Action After *Bollinger*” at the American Constitution Society’s national convention. In your questionnaire response, you stated that you do “not have copies of any notes, transcript, or recording” of your presentation. But, as I think you may now know, a transcript of the panel discussion is available online at an American Constitution Society webpage. The transcript shows that your presentation advocated reviving (in your words) “the idea of remedying societal discrimination as a justification for affirmative action.” Although you agreed with the Supreme Court majority in the Michigan racial preference cases that “educational diversity is a compelling interest,” you said that that rationale was too limited and pragmatic. You criticized the Supreme Court precedent that holds that “remedial motives for affirmative action are permissible only where the policy is remedying an institution’s own discrimination, and not society’s,” and you argued that “the issue is really not as settled as it seems” and that people should not “abandon the notion of remedying societal discrimination.”

In his plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice Powell warned:

“[A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”

You plainly do not share Justice Powell’s concern about timelessly “imposing discriminatory legal remedies that work against innocent people.” In your words, “if it seems like the cumulative effects of societal discrimination will take a long time to remedy, that is because it will.” And as you put it, quoting Justice Brennan, concerns that “remedying societal discrimination ... has no foreseeable endpoint” are nothing more than “a fear of too much justice.”

In your comments, you do not recognize, much less give any weight to, the concerns of innocent victims of racial preferences. Instead, your approach would lead to the imposition of racial quotas in education, employment, and contracting *ad infinitum* since any persisting disparities would be attributed to past societal discrimination.

- a. If that is not an accurate reading of your comments, please explain why.

Response: The Supreme Court has held that remedying societal discrimination is not a compelling interest that can justify the use of affirmative action under the Equal Protection Clause. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). I have stated my disagreement with this aspect of *Croson* in my published work. See *Brown, Bollinger, and Beyond*, 47 *How. L.J.* 705, 759-63 (2004). However, I acknowledged in that article and at the August 2003 panel

that *Croson* is the law. I would faithfully follow the Court's precedent, not my personal views, if I were confirmed.

The Supreme Court has held that affirmative action policies are not narrowly tailored unless they have a "logical stopping point." *Croson*, 488 U.S. at 498 (internal quotation marks and citation omitted). I would faithfully follow the Court's precedent if I were confirmed. I have written that "[w]hereas 'diversity' entails no inherent aspiration for an end to race-consciousness, a desire to remedy discrimination and its vestiges logically motivates the hope that affirmative action will some day end." *Brown, Bollinger, and Beyond*, 47 How. L.J. at 761.

The Supreme Court has held that affirmative action policies are not narrowly tailored if they "unduly burden individuals who are not members of the favored racial and ethnic groups." *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (internal quotation marks and citation omitted). I would faithfully follow the Court's precedent if I were confirmed. My writings have affirmed and endorsed this principle. *See Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007) ("race-conscious student assignment is not immune to the risk of improper stereotyping and other harms associated with government decision-making based on race"); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1099 (2002) ("the risk of improper stereotyping [of white applicants] ... raises valid constitutional concerns").

b. Do you believe that the Constitution, properly interpreted, permits the government to engage in so-called "reverse" racial discrimination against whites or males?

Response: The Supreme Court has set forth the applicable standards for evaluating "reverse" racial discrimination policies in cases such as *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). I would faithfully follow the Court's precedents if I were confirmed. I have agreed with Supreme Court precedent that all government uses of race, including affirmative action, are constitutionally suspect and therefore subject to strict scrutiny. *See Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002); *Segregation, Integration, and Affirmative Action After Bollinger* (American Constitution Society panel, 2003) (transcript at 30).

The Supreme Court has set forth the applicable standards for evaluating policies that employ gender classifications in cases such as *Nguyen v. INS*, 533 U.S. 53 (2001), *United States v. Virginia*, 518 U.S. 515 (1996), *Califano v. Webster*, 430 U.S. 313 (1977), *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Craig v. Boren*, 429 U.S. 190 (1976). I would faithfully follow the Court's precedent if I were

confirmed. I have written that “[t]he application of heightened scrutiny to gender classifications is now a firmly settled principle of constitutional law.” *Keeping Faith with the Constitution* 56 (2009).

13. For each of the following, please explain your position. I am asking for views and not whether, if confirmed, you would follow the Supreme Court’s precedents.

a. Do you believe that the Constitution, properly interpreted, confers a right to same-sex marriage?

Response: I have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

In 2007, I joined an amicus brief filed in the California Supreme Court arguing that the state’s definition of marriage violated the California Constitution. The brief urged the court to “rely solely on California, rather than federal, constitutional law” and noted that “California’s Constitution has often been construed to provide broader protection than its federal counterpart.” Brief of Amicus Curiae Professors of Constitutional Law at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The brief discussed federal cases “to illustrate” an “analytic methodology for interpreting the California Constitution.” *Id.* The brief expressed no view and made no attempt to resolve whether California’s definition of marriage violated the U.S. Constitution.

b. Do you believe that the Court’s Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) was correctly decided?

Response: My writings have discussed the interpretive methodology of the majority and dissenting opinions in *Heller* without expressing any view on the merits. See *Keeping Faith with the Constitution* 30-33 (2009). *Heller* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

c. Do you believe that the Constitution, properly interpreted, confers a right to human cloning?

Response: I have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

d. Do you believe that the Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?

Response: *Boumediene v. Bush* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- e. **Do you believe that the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), which held that a nonsectarian invocation at a public school graduation violated the Establishment Clause, was correctly decided?**

Response: *Lee v. Weisman* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- f. **Do you believe that the Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), which ruled that the independent counsel statute did not violate the constitutional separation of powers, was correctly decided?**

Response: *Morrison v. Olson* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- g. **Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?**

Response: The Supreme Court has said that "[o]bscene speech ... has long been held to fall outside the purview of the First Amendment," *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002), and I would faithfully follow the Court's precedents if I were confirmed.

- h. **In 2008, the Supreme Court ruled in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) that the death penalty for the crime of raping a child always violates the Eighth Amendment. Do you believe that the Court reached the correct ruling?**

Response: *Kennedy v. Louisiana* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- i. **In 2007, the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), by a vote of 5 to 4, rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act's application. Do you believe that the Court's ruling in *Gonzales v. Carhart* was correctly decided?**

Response: I have cited *Gonzales v. Carhart* as an example of "lack of deference to judicial precedent," *Keeping Faith with the Constitution* 40 & n.72 (2009), but have not expressed any view on the correctness of the ruling. *Gonzales v. Carhart* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- j. **Do you believe that the Constitution, properly interpreted, confers a right to abortion?**

Response: My writings have “locate[d] *Roe v. Wade* within the broader constellation of cases extending constitutional protections to individual decision-making on intimate questions of family life, sexuality, and reproduction.” Keeping Faith with the Constitution 97 (2009). I have written that “the joint opinion in *Planned Parenthood v. Casey* was correct to note in 1992 that “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions,” and that “[t]oday, no woman of reproductive age in the United States has ever lived under a regime where she did not have the constitutional right to control her fertility.” *Id.* at 104.

k. Do you believe that the Constitution, properly interpreted, compels taxpayer funding of abortion?

Response: The Supreme Court has held that the Constitution does not compel taxpayer funding of abortion, *see Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1997), and I would faithfully follow the Court’s precedents if I were confirmed.

l. Do you believe that the Constitution, properly interpreted, prohibits informed consent and parental involvement provisions for abortion?

Response: The Supreme Court has upheld informed consent and parental involvement provisions in abortion regulations, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and I would faithfully follow the Court’s precedents if I were confirmed.

14. According to your April 5th questionnaire supplement, during a panel discussion entitled “The Legacy of *Brown v. Board of Education*” at the American Constitution Society’s 2004 national convention, you observed that *Brown v. Board of Education* “overruled” *Plessy v. Ferguson* and *Lawrence v. Texas* “overruled” *Bowers v. Hardwick*. You then said:

“I’m not saying there’s anything inevitable about this, but if we work hard, if we stick to our values, if we build a new moral consensus, then I think someday we will see Millikan [sic], Rodriguez, Adarand, be swept into the dustbin of history.”

When you referenced “Adarand,” you were presumably referring to the court’s 1995 ruling in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which a majority opinion by Justice O’Connor held that racial classifications imposed by the federal government must be subject to strict scrutiny. I asked you about that statement at your hearing, and you responded that you thought

“the only agreement [you] had with *Adarand* was its extension of the principles of the *Croson* case, which dealt with the obligations of states rather

than the Federal Government, with respect to the latitude given to implement Affirmative Action programs.”

I presume you were speaking of *City of Richmond v. J.A. Croson Co*, 488 U.S. 469 (1989), which affirmed a decision of the Fourth Circuit holding a city’s public contracting set-aside plan unconstitutional under the strict scrutiny test.

- a. **Was your testimony intended to suggest that it should be easier for the United States government to discriminate on the basis of race than it is for the state governments to do so? Please explain your answer.**

Response: No. *Adarand* extended the principles of *Croson* to the federal government. *Adarand* and *Croson* are precedents of the Supreme Court, and I would faithfully follow those precedents if I were confirmed. My writings agree with *Adarand* and *Croson* that all governmental classifications based on race are subject to strict scrutiny. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002). My testimony was meant to indicate that I have disagreed with *Croson* and, by extension, *Adarand* insofar as those cases held that societal discrimination is not a constitutionally valid purpose for implementing affirmative action. See *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 759-63 (2004). I recognize, however, that *Adarand* and *Croson* are the law, and I would follow the Court’s precedents, not my personal views, if I were confirmed.

- b. **If your answer to subpart (a) includes a reference to Section 5 of the Fourteenth Amendment, please explain any tension there is between that answer and the application of Equal Protection principles to the Federal Government through the Due Process Clause of the Fifth Amendment, as endorsed by the Court in *Washington v. Davis*, 426 U.S. 229 (1976).**

Response: My answer to subpart (a) does not include a reference to Section 5 of the Fourteenth Amendment.

- c. **If the Court were to overrule *Adarand* and discard the strict scrutiny standard of review of federal laws that treat people differently based solely on their race, what do you think should be the standard for determining if such a law is constitutional?**

Response: I have agreed with *Adarand* that all governmental classifications based on race are subject to strict scrutiny. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002); Segregation, Integration, and Affirmative Action After *Bollinger* (American Constitution Society panel, 2003) (transcript at 30).

- i. **Should this standard of review be the same, regardless of whether the law helps or harms minority groups?**

Response: Yes.

- d. **The Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), prevented courts from ordering school desegregation remedies across district lines except in situations where the plaintiffs could prove that "there has been a constitutional violation within one district that produces a significant segregative effect in another district."**

- i. **Do you agree that the overruling of *Milliken* would make it much easier for courts to order massive busing of students across district lines in order to achieve so-called racial balancing in the schools?**

Response: *Milliken* is a precedent of the Supreme Court, and I would faithfully follow it if I were confirmed. If *Milliken* were overruled, federal district courts could order interdistrict remedies where necessary to eliminate the vestiges of unconstitutional *de jure* segregation.

- ii. **You have previously acknowledged that *Milliken* "seems firmly embedded in the law." Is there anywhere besides this 2004 panel where you have called for *Milliken* to be "be swept into the dustbin of history"?**

Response: No. Although my writings have expressed concern that *Milliken* contributed to the isolation of inner cities from surrounding suburbs, see *Brown, Bollinger, and Beyond*, 47 *Howard L.J.* 705, 724-27 (2004); *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* 791, 792-93 (2005), I have not called for *Milliken* to be overruled. See *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* at 793 ("*Milliken* seems firmly embedded in the law"). Instead, I have proposed school choice initiatives, including charter schools and vouchers, to address the challenge of urban-suburban integration of public schools. See *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* at 808-11; *Real Options for School Choice*, *N.Y. Times*, Dec. 4, 2002, at A35. These are policy proposals; I have not urged the Court to revisit *Milliken's* holding that courts may not order busing across district lines.

In addition to references to *Brown* and *Lawrence*, the "dustbin" quotation was preceded by my observation that "[t]he Women's Movement overcame cases like *Bradwell vs. Illinois* and *Hoyt vs. Florida*," indicating that judicial decisions can become disfavored in ways other than being overruled. The Legacy of *Brown v. Board of Education* (American Constitution Society panel, 2004) (transcript at 22).

- e. **In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court held that education is not a fundamental right subject to strict judicial scrutiny under the Fourteenth Amendment. A contrary ruling would have subjected systems of school finance and all other aspects of public education to federal judicial micromanagement.**

- i. **Do you disagree with the Supreme Court’s holding in *Rodriguez* that local governments have the power to determine how to finance their local schools?**

Response: No. My writings have urged “a decrease in regulation and an increase in local flexibility” in the area of school finance. *Getting Beyond the Facts: Reforming California School Finance 16* (2008).

- ii. **Do you acknowledge that allowing federal courts to review the adequacy of all local school finance systems – even in cases where there is no evidence whatsoever of any discriminatory intent in the design of that system – could lead to a greatly expanded federal role in education?**

Response: Yes. While noting that the Supreme Court has left open the question whether the Constitution guarantees a minimally adequate education, my writings have not urged federal courts to answer this question or to review the adequacy of local school finance systems. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339 (2006).

- iii. **Is the power to determine local school finance systems ever mentioned as a power of the federal government in the text of the Constitution?**

Response: No.

- iv. **Besides this 2004 panel, on what other occasions have you called for *Rodriguez* to “be swept into the dustbin of history”?**

Response: No. Although I have expressed concern about the *Rodriguez* decision in *Brown, Bollinger, and Beyond*, 47 Howard L.J. 705, 722-24, 765-68 (2004), I have not called for *Rodriguez* to be overruled. I have written that *Rodriguez* reflects “considerations of judicial restraint arising from the countermajoritarian difficulty and limitations on institutional competence.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 338 (2006). For that reason, most of my scholarly work on equal educational opportunity has been directed at legislators and policymakers, not the courts.

In addition to references to *Brown* and *Lawrence*, the “dustbin” quotation was preceded by my observation that “[t]he Women’s Movement overcame cases like *Bradwell vs. Illinois* and *Hoyt vs. Florida*,” indicating that judicial decisions can become disfavored in ways other than being overruled. The Legacy of *Brown v. Board of Education* (American Constitution Society panel, 2004) (transcript at 22).

15. In the context of the Due Process Clause of the Fourteenth Amendment, the Supreme Court has taken the view that the Constitution guarantees only negative rights. Former Chief Justice Rehnquist, in *Deshaney v. Winnebago County*, 489 U.S. 189 (1989), held that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” I recognize that the Citizenship Clause does not use the same language as the Due Process Clause and that the Citizenship Clause affirmatively states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” But that language does not obligate the federal government to do anything.

a. Why do you believe that we should depart from this settled understanding of the Fourteenth Amendment and instead take the view that the Constitution guarantees welfare benefits?

Response: My views on the meaning of the Citizenship Clause are set forth in my article, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).

b. Senator Jacob Howard of Ohio was the author of the Citizenship Clause. When the Senate was considering the Fourteenth Amendment, he said that the clause would simply recognize that “every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.” Do you disagree with the author of the Citizenship Clause, that it merely recognizes that, if you are born in this country, you are a citizen?

Response: By its terms, the Citizenship Clause of the Fourteenth Amendment guarantees U.S. citizenship to persons born in the United States. I do not know whether the quotation above reflects Senator Howard’s complete understanding of the national citizenship guarantee. My writings have cited statements by Senator Howard in which he said that citizenship entails various privileges, immunities, and rights, and that Section 5 of the Fourteenth Amendment empowers Congress to protect “these fundamental rights and privileges which pertain to citizens of the United States.” Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard), cited in *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 367 (2006).

16. In a 2001 interview with Chicago Public Radio, then-State Senator Obama made some comments that expressed a view very similar to your own. Obama commented that the Warren Court

“wasn’t that radical. It didn’t break free from the essential constraints that were placed by the founding fathers in the Constitution, at least as it’s been interpreted, and the Warren court interpreted it in the same way that generally the Constitution is a charter of negative liberties. It says what the states can’t do to you, it says what the federal government can’t do to you, but it doesn’t say what the federal government or the state government must do on your behalf. And that hasn’t shifted. One of the I think tragedies of the civil rights movement was because the civil rights movement became so court focused, I think that there was a tendency to lose track of the political and community organizing and activities on the ground that are able to put together the actual coalitions of power through which you bring about redistributive change and in some ways we still suffer from that.”

Later in that same broadcast, a caller asked: “[Mr. Obama] made the point that the Warren Court wasn’t that radical with economic changes. My question is, is it too late for that kind of reparative work, economically, and is that the appropriate place for reparative economic work to take place – the court – or would it be legislation at this point?” Obama responded that he was “not optimistic about bringing about major redistributive change through the courts.”

- a. Given your view that the Constitution guarantees welfare benefits, and given that you argued in your article *Rethinking Constitutional Welfare Rights* that courts may recognize welfare rights through constitutional interpretation, is it fair to say that you believe that the courts are the appropriate place for “redistributive change”?
- i. If so, what would be included in this “redistributive change”?
 - ii. Who would be responsible for the cost?

Response: The Supreme Court has held that courts have no role in creating social or economic entitlements and that judgments about the necessity of social or economic entitlements are the purview of legislators, not judges. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court’s precedents if I were confirmed. My writings have said that courts are generally not the appropriate place for “redistributive change.” *See Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203 (2008). My writings agree with Supreme Court precedent that courts have no role in creating social or economic entitlements. *See id.* at 247 (social or economic “rights cannot be reasoned into existence by courts on their own”); *id.* at 252 (the judicial role “does not license courts to declare rights to entirely new benefits or

programs not yet in existence”); *id.* at 264 n.324 (there is “no role for courts” to question Congress’s decision in the 1996 welfare overhaul to end the entitlement of poor families to cash assistance). My writings further agree with Supreme Court precedent that the necessity of social or economic entitlements is a judgment for legislatures, not courts, to make. *See id.* at 210 (“the existence of any welfare right depends on democratic instantiation”); *id.* at 265 (courts must defer to “legislative supremacy” in this area).

17. **In an interview with the Brennan Center for Justice in 2008, you commented on the Federal government’s bailout of A.I.G., saying you believed it was**

“a symbol, it’s the . . . tip of the iceberg of, you know, a much larger problem of . . . wealth, you know, flowing to a small number of people . . . even though the productivity and the . . . ingenuity of America is really due to a quite large number of people. And I think the current debate, right now, is how to engineer a set of rules that are far more fair with respect to the average American.”¹⁰

- a. **Do you believe it is a legitimate end of the federal government to manage the economy to control the distribution of wealth among individual citizens?**

Response: The Supreme Court has held that Congress has wide latitude to enact economic legislation that affects wealth distribution. *See, e.g.,* FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Wickard v. Filburn, 317 U.S. 111 (1942). I would faithfully follow the Court’s precedents if I were confirmed.

- b. **Do you believe the courts have a role in “engineering a set of rules that are far more fair” concerning the redistribution of wealth in this country?**

Response: No. The role of courts is to decide specific cases or controversies that come before them based on the facts and applicable law.

18. **With respect to traditional Fourteenth Amendment analysis, Professor Mark Tushnet has written:**

“The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom unto which the Constitution doesn’t reach. We would be well rid of the doctrine.”

¹⁰ YouTube-Prof. Goodwin Liu Interviewed at White Oak, <http://www.youtube.com/watch?v=cY1F07YqJRY>.

You yourself have argued that “[t]he Citizenship Clause [of the Fourteenth Amendment] is an affirmative recognition of national citizenship and its essential rights. Congress may protect those rights regardless of state action or inaction.”¹¹

- a. Given your belief that Congress may act “regardless of state action or inaction,” is it fair to say that you agree with Professor Tushnet that there is no “domain of freedom unto which the Constitution doesn’t reach”?**

Response: I am not familiar with Professor Tushnet’s views on the state action doctrine. The Supreme Court has held that Congress’s power under Section 5 of the Fourteenth Amendment is limited by the state action doctrine. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). If confirmed, I would faithfully follow the Court’s precedents, not my personal views.

- b. Do you believe the state-action doctrine should be abolished?**

Response: The Supreme Court has consistently affirmed the state-action doctrine as a key limitation on federal power and important safeguard of individual liberty. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1992); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). I would faithfully follow the Court’s precedents if I were confirmed.

- c. Some academics believe the Constitution is outdated because it does not restrict the behavior of private actors. Given your views on state action and inaction, is it fair to conclude that you subscribe to that notion?**

Response: My writings do not take the view that the Constitution is outdated. To the contrary, I have written that “the United States Constitution is the world’s most enduring written constitution” and that “[t]he United States Constitution ... not only endures—it thrives.” *Keeping Faith with the Constitution* 1, 109 (2009). The Supreme Court has consistently affirmed the state-action doctrine as a key limitation on federal power and important safeguard of individual liberty. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1992); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). I would faithfully follow the Court’s precedents if I were confirmed.

- 19. Some legal commentators believe that the Privileges or Immunities Clause of the Fourteenth Amendment was eviscerated by the Supreme Court in the *Slaughterhouse Cases*. Professor Erwin Chemerinsky has said that “in the long term, the Court should interpret the Constitution as creating a right to minimum entitlements for all Americans to the necessities of life: food, shelter, and medical**

¹¹ Goodwin Liu, *National Citizenship and The Promise of Equal Opportunity*, in *THE CONSTITUTION IN 2020*, 127 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

care.”¹² He went on to predict that, someday, “a more humane Supreme Court will find a constitutional right for every person to have the minimum entitlements needed for subsistence.”¹³ In doing so, he argued that “the Privileges or Immunities Clause of the Fourteenth Amendment might be construed to include a right to basic entitlements.”¹⁴ You have said that “[n]ew rights would not ‘flood in’ if *Slaughter-House* were reversed today” but that “[i]t would be case-by-case, and people would argue over the meaning.”¹⁵

- a. **Do you agree with Professor Chemerinsky that the Privileges or Immunities Clause grants every person a right to force taxpayers to provide them with “food, shelter, and medical care”?**

Response: No. My writings have not claimed that there is a constitutional right to food, shelter, or medical care.

- b. **You have argued that, “at a minimum,” the Privileges or Immunities clause stands for the proposition that all citizens enjoy substantive rights essential to realizing “equal standing in the national political community,” and that both the courts and the Congress “may determine what civil and political rights, and what social and economic entitlements are necessary to make national citizenship meaningful and effective.”¹⁶ It seems like you view the Privileges or Immunities Clause as establishing positive rights.**

- i. **How do you square your view with the text of the Privileges or Immunities Clause, which speaks in negative terms, saying “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”?**

Response: The Supreme Court has held that Section 1 of the Fourteenth Amendment “is prohibitory in its character, and prohibitory upon the states.” *The Civil Rights Cases*, 109 U.S. 3, 10 (1883); see *United States v. Morrison*, 529 U.S. 598, 620-21 (2000). If confirmed, I would faithfully follow the Court’s precedents, not my personal views. The above quotation from my article refers to Congress’s power to enforce the Citizenship Clause of the Fourteenth Amendment, not the Privileges or Immunities Clause. See *National Citizenship and Equality of Educational Opportunity*, 116 *Yale L.J. Pocket Part* 145, 147 (2006) (“the citizenship guarantee is affirmatively declared”).

¹² Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 *CHAP. L. REV.* 31, 33 (2003).

¹³ *Id.* at 42.

¹⁴ *Id.* at 40.

¹⁵ Jess Bravin, *Rethinking Original Intent*, *WALL STREET JOURNAL*, Mar. 14, 2009, available at <http://online.wsj.com/article/SB123699111292226669.html#printMode>.

¹⁶ Goodwin Liu, *National Citizenship and Equality of Educational Opportunity*, 116 *YALE L. J.* 145, 147 (2006).

ii. **What enumerated rights do you think are included within the scope of the Privileges or Immunities Clause?**

Response: While noting that there are “fundamentally differing views concerning the coverage of the Privileges or Immunities Clause,” the Supreme Court has applied the clause to protect the right of a newly arrived citizen of a state to enjoy the same privileges and immunities enjoyed by other citizens of the same state. *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999). I would faithfully follow the Court’s precedents if I were confirmed. My writings have not expressed any view on what enumerated rights are included within the scope of the Privileges or Immunities Clause. I recall one panel discussion in which I said that the privileges or immunities of national citizenship include a guarantee of equality. *See* The Privileges or Immunities Clause, American Constitution Society Conference on “The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union” (2008).

c. **In your view, is there any objective standard in the text of the Constitution for determining whether a state’s law violates the Privileges or Immunities Clause, if that clause creates a positive right to “minimum entitlements for all Americans”?**

Response: The Supreme Court has applied the Privileges or Immunities Clause in cases such as *Saenz v. Roe*, 526 U.S. 489 (1999), and I would faithfully follow the Court’s precedents if I were confirmed. My writings have not expressed any view on the standards for determining whether a state’s law violates the Privileges or Immunities Clause if the clause creates a positive right to minimum entitlements.

20. **Professor Thomas Grey of Stanford Law School has stated that the Ninth Amendment constitutes a “license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein.” It was well-understood by the framers that the guarantees of the Bill of Rights comprised a partial enumeration of rights reserved to the people. The Ninth Amendment was designed to dispel any notion that by enumerating particular rights in the Bill of Rights, the people had implicitly relinquished to the new federal government any rights not set listed. As Justice Kennedy has written, the Ninth Amendment expresses a “recognition of state sovereignty . . . and role of states in defining human rights.” It is not an open-ended grant of judicial authority that would allow federal judges to transform a statement of limited constitutional government into a warrant for unlimited government.**

a. **Do you agree with Justice Kennedy that the Ninth Amendment expresses a “recognition of state sovereignty . . . and role of states in defining human rights”?**

Response: My writings have not expressed any view on the meaning of the Ninth Amendment beyond noting that the Framers adopted it “to make clear that the bill of rights did not comprise an exhaustive list of fundamental rights.” *Keeping Faith with the Constitution* 14 (2009).

- b. **Do you agree with Professor Grey that the Ninth Amendment is a “license” for judges to “look beyond the substantive commands of the constitutional text” in determining if the federal Constitution protects a certain behavior?**

Response: My writings have not expressed any view on the meaning of the Ninth Amendment beyond noting that the Framers adopted it “to make clear that the bill of rights did not comprise an exhaustive list of fundamental rights.” *Keeping Faith with the Constitution* 14 (2009). In general, because our Constitution is a written document, interpretation of the Constitution must be an interpretation of its text, although the Supreme Court has recognized some non-textual constitutional principles as well. *See, e.g.*, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 382-83 (2004) (separation of powers); *Alden v. Maine*, 527 U.S. 706, 728-29 (1999) (state sovereign immunity).

21. **According to your April 5th questionnaire supplement, you authored a 2004 blog post, which said that you had “launched a new project . . . called ‘Rethinking Rodriguez: Education as a Fundamental Right.’” You wrote that “[t]he project was not focused on mapping a litigation strategy for overruling [*San Antonio Independent School District v. Rodriguez*, although that might be one result.”¹⁷**

- a. **Are all the conclusions you reached during this project reflected in your published work? If not, please provide them to the Committee.**

Response: Yes. My published work from the project consists of two articles—*Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006), and *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006)—as well as any publications that are derivative of those articles.

- b. **Have those conclusions influenced your thinking about the Fourteenth Amendment?**

Response: Yes. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).

- c. **In the same blog post, you argued that “[f]orging a strong link between a right to education and the guarantee of national citizenship is a potential beachhead for broader thinking on social and economic rights.”¹⁸ Do you**

¹⁷ The Constitution in 2020: Post by Goodwin Liu, <http://constitutionin2020.blogspot.com/2004/11/post-by-goodwin-liu.html>.

¹⁸ *Id.*

think judges should participate in this “broader thinking on social and economic rights?”

Response: My writings in this area have been directed primarily at legislators and policymakers, not judges. I have written on the limited role of courts in this area in *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008).

GOODWIN LIU
*Associate Dean and
Professor of Law*
(510) 642-7509
gliu@law.berkeley.edu

BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Boalt Hall

May 12, 2010

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Sessions:

Thank you for your letter of May 10 and for the opportunity to provide additional information in response to your written questions. In answering your letter, I begin with a brief explanation of how I approached some of the questions on which you have requested more information.

Some of your questions ask for my views on specific Supreme Court cases or doctrines beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of Supreme Court cases and doctrines in an effort to advance understanding and betterment of the law and to promote the education of future lawyers. Where I have expressed views about a particular case or doctrine in my scholarly work, I have identified those views and cited the relevant book, article, or speech, while noting that if confirmed I would faithfully follow the law, regardless of my academic views. Where I am able to supply additional information of this sort, I have done so below.

The role of a scholar, however, is distinct from the role of an inferior court judge. As I said at my confirmation hearing and in my responses to written questions, the role of a circuit judge—unlike that of a scholar—is not to evaluate or opine on the correctness of Supreme Court cases or doctrines. It is to apply the law faithfully and impartially to the facts of each case. Accordingly, like prior nominees who have been nominated to serve as an inferior court judge, I do not believe it is appropriate for me now to critique or speculate on the correctness of Supreme Court precedents or doctrines that I will be duty-bound to apply faithfully and impartially if I am confirmed. My responses to some of your questions reflect this concern.

Questions 1(a)(i) and (ii)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. Accordingly, I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to critique or speculate on the correctness of *Wickard v. Filburn* because it is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed. In general, my writings have supported a functional approach to Commerce Clause jurisprudence as well as judicial deference to Congress's legislative prerogatives under the clause. See *Keeping Faith with the Constitution* 65-72 (2009); *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003).

Questions 1(b)(i) and (ii)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. *Kelo v. City of New London* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 6(a)

The book *Keeping Faith with the Constitution* describes how constitutional interpretation has in fact been practiced by the Supreme Court of the United States. This description does not apply to inferior court judges, for they must accept Supreme Court precedent as controlling. Even when an inferior court judge hears a case of first impression or reviews a panel decision *en banc*, Supreme Court precedent is binding and constrains the decision-making process. Thus, a circuit judge, even in a novel or *en banc* case, must take his guidance from Supreme Court precedent and lacks authority to improvise his own approach to constitutional interpretation, as recent *en banc* decisions in the Ninth Circuit demonstrate. See, e.g., *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010) (*en banc*) (applying *Jackson v. Virginia*, 443 U.S. 307 (1979), to sustain federal conviction for being a felon in possession of a firearm and ammunition); *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*) (applying the Supreme Court's Fourth Amendment precedents to uphold the strip search policy of the county jail system). This understanding of the role of an inferior court judge is what I had in mind when I testified that my writings would have no bearing on my role as a judge.

Question 7(a)

I understand your concern that, without accountability, courts can move away from the law. At one level, our system provides that the American people

retain the ultimate power to determine whether the judiciary has been faithful to the Constitution. On occasion, the American people have exercised this power to overrule Supreme Court precedent. *See, e.g.*, U.S. Const. amend. XIII, *overruling* *Dred Scott v. Sandford*, 60 U.S. 393 (1857); U.S. Const. amend. XI, *overruling* *Chisholm v. Georgia*, 2 U.S. 419 (1793).

Apart from the process of constitutional amendment, I understand your question to ask how unelected life-tenured judges can be held accountable to the Constitution if they may adapt the Constitution to meet the challenges and conditions of each generation. The independence of our judiciary means that constitutional decisions are not reversible by the elected branches of government. However, in the case of inferior courts, the Supreme Court serves as the ultimate arbiter of when the lower courts have been faithful to the Constitution. In the case of the Supreme Court itself, that institution is constrained by its own commitment to the Constitution and by the doctrine of *stare decisis*, whose faithful application promotes judicial accountability and safeguards the rule of law.

For example, in applying the Fourth Amendment guarantee against “unreasonable searches and seizures,” the Supreme Court has asked whether the person subject to search has a “reasonable expectation of privacy.” *Bond v. United States*, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that turns in part on “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider the challenges and conditions of our society in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. But this is not a free-wheeling, unaccountable inquiry. When the Supreme Court decides cases under the Fourth Amendment, it does so against the backdrop of its own precedents. The process of precedent-based, analogical reasoning disciplines and constrains judicial inquiry into what privacy expectations are reasonable. *See, e.g., id.* at 336-38.

Questions 7(b)(i) and (ii)

(i) I have written disapprovingly of *Buck v. Bell* when I described it as “the notorious ‘[t]hree generations of imbeciles is enough’ case in which Justice Holmes dismissively referred to the Equal Protection Clause as ‘the usual last resort of constitutional argument.’” *Keeping Faith with the Constitution* 99 (2009).

(ii) The fact that a policy is broadly accepted does not make it constitutional, for our Constitution includes express guarantees of individual rights and liberties as safeguards against “tyranny of the majority.” Where a broadly accepted policy infringes on a constitutional right, the policy is invalid. Where no countervailing constitutional right exists, however, our system gives the democratic process wide latitude to enact broadly accepted policies. In resolving

conflicts between majoritarian policies and individual rights, the judiciary plays a crucial role. Because it is “[i]nsulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favor toward the political majority. As Alexander Hamilton said, independent courts serve as an ‘excellent barrier to the encroachments and oppressions of the representative body,’ and they play a ‘peculiarly essential’ role in safeguarding individual rights and liberties.” *Id.* at 24. My writings have discussed *Skinner v. Oklahoma* as an example of how the Supreme Court properly applies the Constitution’s principles of individual liberty and equal protection of the laws to invalidate a broadly accepted policy. *See id.* at 98-99.

Questions 9(b) and (c)

My writings have generally agreed that the Supreme Court is authorized to make this determination based on whether the original expected application of a constitutional provision would preserve or undermine the vitality of the constitutional text or principle in light of societal change. In my book, I use *Katz v. United States*, 389 U.S. 347 (1967), as an example: “*Katz* illustrates how an approach to interpretation that relies too heavily on original understandings of the reach of a constitutional principle would defy our own understanding of the Constitution as a document meant to retain not lose its significance over time. In reading the terms ‘search’ and ‘seizure’ to cover non-physical intrusions such as wiretapping, the Court famously declared that ‘the Fourth Amendment protects people, not places,’ and effectively heeded Justice Brandeis’s admonition that the Constitution ‘must have a . . . capacity of adaptation to a changing world’ if ‘[r]ights declared in words [are not to] be lost in reality.’” *Keeping Faith with the Constitution* 95 (2009) (citing *Katz*, 389 U.S. at 351, and *Olmstead v. United States*, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting) (internal quotation marks and citation omitted)).

Question 10(b)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. *Zelman v. Simmons-Harris* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 13(b), (d), (e), (f), (g), (h), and (i)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. (b) *District of Columbia v. Heller*, (d) *Boumediene v. Bush*, (e) *Lee v. Weisman*, (f) *Morrison v. Olson*, (g) the Court’s precedents concerning obscene speech, (h) *Kennedy v. Louisiana*, and

(i) *Gonzales v. Carhart* are precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 17(a)

Yes, I believe that affecting the distribution of wealth in our society is a permissible constitutional basis for the federal government to enact legislation, provided that the legislation is authorized by one of Congress's enumerated powers.

No, I do not believe that affecting the distribution of wealth in our society is a permissible basis for a judicial decision, unless a court is faithfully applying a duly enacted statute with that purpose or a provision of the Constitution, such as the Due Process Clause or Takings Clause, that protects property rights.

Question 18(a)

I do not agree with Professor Tushnet that there is no "domain of freedom unto which the Constitution doesn't reach."

Question 18(b)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. The state action doctrine is governed by precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 19(c)

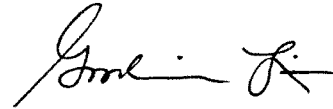
The text of the Constitution says that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The text does not specify a standard for determining whether a state's law violates the Privileges or Immunities Clause, just as the text of the First Amendment does not specify what "speech" is constitutionally protected and the text of the Fourteenth Amendment does not specify what inequalities violate "equal protection of the laws." See *Keeping Faith with the Constitution* 42-43 (2009). The proper application of these generally worded constitutional provisions has been determined through a gradual process of case-by-case judicial interpretation, and that gradual process is what I meant when I said that "[n]ew rights would not 'flood in' if *Slaughterhouse* were reversed today" and that "[i]t would be case-by-case."

Questions 20(a) and (b)

(a) I agree with Justice Kennedy insofar as the Ninth Amendment, like the rest of the Bill of Rights, was originally understood to apply only to the federal government and the Framers generally trusted the states to protect individual rights and liberties.

(b) I do not agree with Professor Grey that the Ninth Amendment is a “license” for judges to “look beyond the substantive commands of the constitutional text.” The Ninth Amendment does not say whether unenumerated rights that are retained by the people are judicially enforceable, and the Supreme Court has not read the Ninth Amendment as an independent source of rights beyond those protected elsewhere in the Constitution.

Sincerely,

A handwritten signature in black ink, appearing to read "Goodwin Liu". The signature is fluid and cursive, with a large initial "G" and a distinct "Liu" at the end.

Goodwin Liu

Responses of Kimberly J. Mueller
Nominee to the U.S. District Court for the Eastern District of California
to the Written Questions of Senator Tom Coburn, M.D.

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: I would not use the word “living” to describe the Constitution. I believe its text is established as written.

- 2. Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: I believe *Lopez* and *Morrison* are consistent with the Supreme Court’s earlier Commerce Clause decisions because the decisions themselves indicate as much and the Court in *Gonzales v. Raich*, 545 U.S. 1 (2005), confirmed it.

- 3. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: As a United States Magistrate Judge, I have not had occasion to consider the analysis referenced here. If confirmed and appointed as a District Judge, and called upon to reach this question in the future, I would undertake the analysis required to reach the result required by law.

- a. How would you determine what the evolving standards of decency are?**

Response: If a dispute did require that I reach the question of what “evolving standards of decency” are, I would ascertain the holdings of the Supreme Court and relevant appellate court authority and apply that precedent to the facts of the case before me in a reasoned written decision.

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: As the Supreme Court has determined that the death penalty itself is Constitutional, a finding that it is not Constitutional is precluded by law.

c. What factors do you believe would be relevant to the judge's analysis?

Response: The only factors that should be relevant to a judge performing any such analysis are those required by the Supreme Court and the appellate court with jurisdiction over the trial court conducting the analysis in the first instance. To the extent there is no controlling circuit authority, it may also be appropriate to consider the decisions of other circuit courts.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: I would not consider foreign or international law in determining a Constitutional question unless the Supreme Court or controlling authority from the circuit court required as much. If I am confirmed as a District Judge for the Eastern District of California, I expect to be applying the laws of the United States day in and day out.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting the Constitution unless Supreme Court precedent or controlling appellate authority required it, and those precedents were implicated by a dispute before me.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: If presented with such an argument in a dispute before me, I would answer the question with reference to Supreme Court and controlling appellate court authority. As a United States Magistrate Judge, the only times I recall considering foreign law in any respect have been in the context of extradition proceedings or foreign governments' requests for assistance in carrying out criminal investigations.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting any Constitutional amendment unless the Supreme Court or controlling appellate court authority required me to do so.

Responses of Kimberly J. Mueller
 Nominee to the U.S. District Court for the Eastern District of California
 to the Written Questions of Senator Jeff Sessions

1. **In *Riel v. Woodford* (2003), a habeas proceeding, you considered a death row inmate's discovery request for data maintained by the California attorney general in support of his challenge to the constitutionality of the death penalty as applied in California. The inmate had presented a study that he claimed showed the death penalty was unconstitutionally applied because only 11.4% of those eligible for the death penalty received it and, therefore, was "cruel and unusual punishment" under the Eighth Amendment. While I understand that you ultimately denied the motion on the grounds that there was not good cause for the discovery request, before doing so, you discussed the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which held that several death sentences violated the Eighth Amendment based on statistics showing that only a small percentage of convicted murderers and rapists were sentenced to death. Assuming the inmate's study was correct and only 11.4% of convicted murderers eligible for the death penalty in California actually received that punishment, do you believe the California death penalty law would constitute cruel and unusual punishment under the Eighth Amendment? Please explain your answer.**

Response: Even though I denied the petitioner's discovery motion in *Riel*, I was reversed. As a result, the discovery is proceeding and has not yet been completed. As the Magistrate Judge to whom the *Riel* matter is referred for pre-dispositive purposes, I must at this point assume the discovery may be before me with respect to petitioner's claim alleging that the death penalty in California is applied disproportionately. I cannot prejudge how I would resolve the claim. In resolving the claim, I would ascertain all applicable provisions of the Constitution, as well as Supreme Court and Ninth Circuit precedent, and develop a clear sense of the entire record on the claim. I would apply the law to the facts in reaching the result required by law.

2. **Justice Scalia, writing for himself and Justice Rehnquist in *Harmelin v. Michigan*, 501 U.S. 957 (1991), said the Cruel and Unusual Punishment Clause of the Eighth Amendment only "disables the Legislature from authorizing particular forms or 'modes' of punishment - specifically, cruel methods of punishment that are not regularly or customarily employed." The Clause does not, in his view, impose a requirement of proportionality of punishment to the severity and harm of the crime. I recognize that a majority of the Supreme Court has not adopted Justice Scalia's view. I also recognize that, if confirmed, you would be bound to apply the rule adopted by the majority of the Supreme Court.**

a. **What are your personal views of the meaning of the Cruel and Unusual Punishment Clause?**

Response: In performing my duties as a United States Magistrate Judge I do not consider what my personal views are of any provision of the Constitution. Nor would I consider such views if confirmed as a District Judge. In resolving any application of the Cruel and Unusual Punishment Clause, I would start with the Clause itself, and review all Supreme Court and appellate court cases interpreting and applying the Clause in identical and analogous circumstances. Based on a conscientious review of the applicable law, and careful consideration of the record and the parties' briefs and arguments, I would prepare a decision reflecting my application of the law to the facts of the case.

b. **In the same opinion, Justice Scalia wrote that "appellate review of sentencing that includes a proportionality analysis merely substitutes judges' subjective views of the gravity of offenses for legislative determinations." Do you agree that the proportionality analysis, by its very definition, permits unelected judges to substitute their judgment regarding appropriate punishments for that of the elected legislatures?**

Response: I do not believe judges should substitute their opinions for any policy judgments that are properly the province of elected legislatures. If I am required to consider a proportionality analysis in the future, I will ascertain the controlling precedent with respect to the question before me and apply that precedent faithfully, in a written decision that makes clear the method and reasons for my analysis.

3. **In 1995, you joined a group of students and law professors who opposed California's Proposition 209, which amended the state constitution to prohibit the state from discriminating based on race, color, gender, or ethnicity. At the time, you were quoted as saying that proponents of the initiative wanted "to devour our society's main way of achieving equal opportunity . . . under the pretense that discrimination no longer exists."**

a. **Do you still agree with that statement?**

Response: I believe the statement referenced is from a press release that I did not prepare or approve. While I do not have notes of my remarks and do not recall precisely what I said during the one press conference opposing Proposition 209 that I attended, I participated in my capacity as a law student. I did so without performing the type of equal protection analysis I would today as a Magistrate Judge, or if confirmed as a District Judge, if required to resolve a legal dispute arising from alleged discrimination.

b. Do you believe Proposition 209 violates the federal constitution?

Response: Proposition 209 was passed by the California electorate and amended the California Constitution. The Ninth Circuit Court of Appeals has rejected challenges to the proposition's constitutionality. If called upon to consider a new case challenging the proposition, I would take account of all applicable Supreme Court and appellate law in reaching the decision required by law.

c. As recently as a few months ago, there were legal challenges to Proposition 209. If confirmed and presented with such a challenge, are you prepared to set aside your own personal views and rule based solely on the law?

Response: Yes.

4. During the 2008 presidential campaign, President Obama described the types of judges that he will nominate to the federal bench as follows:

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

a. Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama's criteria for federal judges, as described in his quote?

Response: Because I have been nominated by President Obama, I have to assume I satisfy the criteria he is applying in selecting a nominee to fill the current vacancy for a District Judge in the Eastern District of California.

b. During her confirmation hearing, Justice Sotomayor rejected this so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?

Response: I agree with the two sentences attributed to Justice Sotomayor here.

c. What role do you believe empathy should play in a judge's consideration of a case?

Response: I do not believe empathy should play a role in a judge's determination of how the law applies to the facts of a case. I do believe a judge must be a good listener and reader in order to properly ascertain the factual record and fully comprehend the legal positions of all the parties to a given dispute. The one setting in which I believe a judge may at times properly display some degree of empathy is when acting not as a judge of the law, but as a settlement judge.

- d. Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. If so, under what circumstances?**

Response: Not applicable.

- ii. Please identify any cases in which you have done so.**

Response: I have not indulged my own subjective sense of empathy in determining what the law means in any case.

- iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: In every case that comes before me as a judge of the law, I set aside any personal views or feelings in identifying and then applying the controlling law to the facts of the dispute I am called to resolve.

- e. As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: I believe a judge can be aware and communicate an awareness of the consequences for those affected by a decision. I do not believe such awareness should ever affect or dictate the outcome in any given decision. Any decision by a judge should reflect rigorous application of the law to the facts as established by the record in any given matter submitted for judicial determination.

- 5. Please describe with particularity the process by which these questions were answered.**

Response: I received the questions on Friday, April 23rd. I worked on my responses over the weekend. I consulted briefly with representatives of the Department of Justice at one point regarding my responses, and then finalized them before authorizing their transmittal to the Committee.

- 6. Do these answers reflect your true and personal views?**

Response: Yes.

SUBMISSIONS FOR THE RECORD

March 19, 2010

Senator Patrick J. Leahy, Chairman
Senator Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6225

Dear Chairman Leahy and Ranking Member Sessions:

As your Committee considers the nomination of Goodwin Liu to serve on the U.S. Court of Appeals for the Ninth Circuit, it is our privilege to speak to his qualifications and character, and to urge favorable action on his nomination in the discharge of your constitutional duties of advice and consent. In short, Goodwin is a person of great intellect, accomplishment, and integrity, and he is exceptionally well-qualified to serve on the court of appeals. The nation is fortunate that he is willing to leave academia to engage in this important form of public service.

The Committee is no doubt familiar with Goodwin's personal story as the son of immigrants from Taiwan and his sterling record of achievements and accolades. We know Goodwin as a fellow teacher and scholar of the law; we have read some of his writings, and we have seen him speak in academic and public settings. What we wish to highlight, beyond his obvious intellect and legal talents, is his independence and openness to diverse viewpoints as well as his ability to follow the facts and the law to their logical conclusion, whatever its political valence may be. These are the qualities we expect in a judge, and Goodwin clearly possesses them.

Two examples help make the point. First, Goodwin (and his co-author Bill Taylor) wrote an article in *Fordham Law Review* in 2005 defending the use of school vouchers to provide better educational opportunities for children trapped in failing schools. The article provides a careful and candid review of the evidence on how vouchers have worked in practice, and it responds to the critics of vouchers in a direct and forceful way. We are fairly sure that this piece did not win Goodwin any friends in the liberal establishment, but it reflected his sincerely reasoned view about one way to improve the life chances of some of our most disadvantaged children. Goodwin's commitment to this issue brought him to Pepperdine in 2006 for a meeting organized by Clint Bolick, then president of the Alliance for School Choice. Given how far apart he and Clint are on other issues, Goodwin's enthusiastic participation in that meeting demonstrates his willingness to find common ground even with people who have quite different beliefs from his own.

A second example hits closer to home for one of us. In 2008, Goodwin joined an amicus brief by constitutional law professors in support of the plaintiffs who challenged California's marriage laws in the state supreme court. The court ruled for the plaintiffs, but in November 2008 the voters of California effectively reversed that ruling by enacting Proposition 8, a state constitutional amendment that limits marriage to opposite-sex couples. In October 2008, before Proposition 8 passed, Goodwin was called to testify at a joint

hearing of the California Assembly and Senate Judiciary Committees on the legal issues raised by Proposition 8. He was asked to testify as a neutral legal expert (indeed, he was the sole witness tapped for that role), and on the core issue that later became the subject of a state constitutional challenge, Goodwin correctly forecasted that Proposition 8 would be upheld by the California Supreme Court under applicable precedents. Again, Goodwin's position, which he also stated in a *Los Angeles Times* editorial, could not have pleased his friends who sought to invalidate Proposition 8. But, as the example shows, Goodwin knows the difference between what the law is and what he might wish it to be, and he is fully capable and unafraid of discharging the duty to say what the law is.

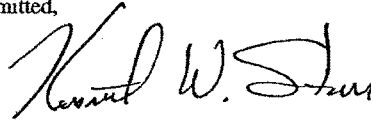
As his academic colleagues, we would add a further point. Given what we know of Goodwin, it seems no accident that he was asked by his dean (literally before the ink was dry on his tenure review) to assume the role of associate dean. If Berkeley is like other law schools, the duties of that position include planning the curriculum and, importantly, serving as something of a catch-all for faculty requests and complaints. His appointment to that role is additional evidence of his reputation for collegiality, fairness, and good judgment.

In sum, you have before you a judicial nominee with strong intellect, demonstrated independence, and outstanding character. We recognize that commentators on all sides will be drawn to debate the views Goodwin has expressed in his writings and speeches. In the end, however, a judge takes an oath to uphold and defend the Constitution, and in the case of a circuit judge, fidelity to the law entails adherence to Supreme Court precedent and (apart from the en banc process) adherence to circuit precedent as well. Thus, in our view, the traits that should weigh most heavily in the evaluation of an extraordinarily qualified nominee such as Goodwin are professional integrity and the ability to discharge faithfully an abiding duty to follow the law. Because Goodwin possesses those qualities to the highest degree, we are confident that he will serve on the court of appeals not only fairly and competently, but with great distinction. We support and urge his speedy confirmation.

Respectfully submitted,



Akhil Reed Amar
Sterling Professor of Law
and Political Science
Yale Law School



Kenneth W. Starr
Duane and Kelly Roberts Dean
and Professor of Law
Pepperdine University School of Law



Jay A. Sekulow*
Chief Counsel
**Admitted in GA & DC*

Colby M. May **
Senior Counsel and Director, Washington Office
***Admitted in DC & VA*

April 1, 2010

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

We are writing on behalf of the American Center for Law & Justice (“ACLJ”) to express concerns about the nomination of Goodwin Liu to the United States Court of Appeals for the Ninth Circuit. The ACLJ is a not-for-profit organization dedicated to the defense of constitutional liberties secured by law. Although Professor Liu has many academic credentials, his published works and public statements raise concerns about how he would interpret the Constitution if confirmed as a federal judge.

Under Professor Liu’s approach to constitutional interpretation, the Constitution’s meaning cannot be ascertained by interpreting the text (in the sense of attempting to determine a provision’s meaning by examining the text in light of its context in the Constitution as a whole and evidence of its originally understood public meaning); rather, because meaning can evolve as society changes, interpretation requires the interpreter to take into account that societal evolution. In an article that Professor Liu co-published with then-Senator Hillary Clinton, which was based on a speech of Senator Clinton’s, he and Clinton wrote:

What we learn from the civil rights movement, and also from the New Deal, is that the meaning of the Constitution cannot be completely discovered by simply sitting down with the text and reading the words. Our fundamental law has shown a remarkable capacity to absorb new meanings and new commitments arising from extraordinary social, political, and economic change. Those meanings and commitments are forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience. The process is not always tidy. But the key to its legitimacy lies in the unique ways in which Congress, the courts, and the executive branch have together reflected, refined, and given expression to the fundamental principles that the American people wish to make “more firmly law.”

Similarly, in a book that Professor Liu co-authored for the American Constitution Society on constitutional interpretation, *Keeping the Faith*, Professor Liu and his co-authors wrote that “[t]he question that properly guides interpretation is not how the Constitution would have been applied at the Founding, but rather how it should be applied today in order to sustain its vitality in light of the changing needs, conditions, and understandings of our society.” Professor Liu and his co-authors claimed that their approach to constitutional interpretation was, among other things, “more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding.” They viewed being “faithful to the Constitution” as “interpret[ing] its words and . . . apply[ing] its principles in ways that preserve the Constitution’s meaning and democratic legitimacy over time,” and that while

[o]riginal understandings are an important source of constitutional meaning, . . . so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society.

As Professor Liu explained in an interview about the book, the “basic thesis” of the book

is that the way the Constitution has endured is through an ongoing process of interpretation and that where that interpretation has succeeded, is because of, not in spite of, fidelity to our written Constitution. And what we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its texts to the challenges and conditions of our society in every succeeding generation.

Professor Liu’s approach to constitutional interpretation, however, could lead to indeterminacy in constitutional interpretation, as different judges could reach different

interpretations of the Constitution based on their own views of the “evolving norms and traditions of our society.” It could also lead to judges allowing their personal preferences to guide their understanding of the “evolving norms and traditions” and thus guide their judicial decision-making. In short, Professor Liu’s approach to constitutional “interpretation” is an invitation to judicial policy-making. Indeed, if the words, meaning, and rights of the Constitution may change over time, based on present day “interpretations” and “evolving norms and traditions,” it is fair to ask if any of its rights and protections are ever secure.

Professor Liu has provided insight into his view on the role of a judge. In a law review article, he “developed a . . . conception of judicial review of welfare rights . . . that envisions the judiciary . . . as a culturally situated interpreter of social meaning.” Professor Liu’s view of the role of a judge can also be seen in remarks that he gave as part of a panel at the American Constitution Society’s 2004 national convention entitled “The Legacy of *Brown v. Board of Education*.” Ed Whelan, who writes for National Review’s Bench Memos, noted that Professor Liu omitted to list the presentation on his Senate Questionnaire. At the panel, Professor Liu stated:

[S]ome observers conclude that the legacy of *Brown* is that courts, and more broadly law, can only do so much to change society. That some things, some problems are best left to politics and not principle, and that to believe otherwise is to indulge a hollow hope.

I want to disagree with this view, . . . because the lack of progress since *Brown* is a testament to the power of courts to influence society, to a testament to the power of legal principle to ratify inequality.

. . . Now The Federalist Society will tell you that one of its core principles is that the job of judges is to say what the law is and not what it should be. Do not believe it.

The Constitutional world that we inherit today is not the revelation of some natural law or some neutral principle. It is an edifice carefully crafted and aggressively built in the image of conservative ideology.

. . .

But my point is not that we should spend time longing for some bygone day. Instead my point is that we need to be mindful of how this early progress was undone. By presidents, by politicians, by judges, and by an agenda that was dedicated, and still is dedicated, to a few simple values: private choice over public

good, formal equality over structural equality, and liberty at the expense of justice for all.

Professor Liu's remarks demonstrate his belief that judges can and do effectuate an agenda and societal change, rather than simply interpreting the law and applying it to the case at hand. In fact, he accused the current Supreme Court of doing just that—building a conservative agenda. As Whelan noted, Professor Liu also expressed his own agenda, which promotes “build[ing] a new moral consensus” that would lead to the overruling of three Supreme Court cases, including a case written by Justice O'Connor in which the Court held that federal government imposed racial classifications must satisfy strict scrutiny. Professor Liu's comments certainly raise the question whether, if confirmed, he would respect precedent with which he disagreed.

Additionally, Professor Liu has expressed a desire to promote and put into practice a “progressive vision of the Constitution.” Following President Obama's election, Professor Liu told NPR's *Weekend Edition*,

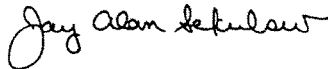
Whereas I think in the last seven or eight years [referencing the Bush Administration] we [the American Constitution Society] had mostly been playing defense in the sense of trying to prevent as many – in our view – bad things from happening. Now we have the opportunity to actually get our ideas *and the progressive vision of the Constitution and of law and policy* into practice.

Professor Liu's progressive vision of the Constitution can be seen by his signing on to a brief advocating for allowing same-sex couples to marry in California. It can also be seen in a speech turned law review article that he gave at the Daito Bunka University School of Law in Tokyo in which he said “[t]he use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years.” Professor Liu commented, however, that “[t]he resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.”

We urge the Committee to carefully question Professor Liu about his views on the Constitution and constitutional interpretation. The Committee should also question Professor Liu about his “progressive vision of the Constitution” to ensure that, if confirmed, he would faithfully apply the law, as written, independent of his personal beliefs and policy preferences. Professor Liu himself has acknowledged the Committee has an important role in “ensuring that our federal judges are fair, disciplined, and faithful to the law.” Regarding Chief Justice Roberts' nomination to the Supreme Court, Professor Liu stated that because Roberts would have “life tenure on the nation's highest court, it's fair and essential to ask how he would interpret the

Constitution and its basic values. Americans deserve real answers to this question, and it should be the central focus of the Senate confirmation process." If confirmed, Professor Liu would have life tenure to one of the second highest federal courts in the country. Americans deserve to know his views on these important issues.

Sincerely,



Jay A. Sekulow
Chief Counsel



Colby M. May
Senior Counsel
Director of Washington Office

CC: Members of the Senate Committee on the Judiciary

A A A B A

April 14, 2010

The Honorable Jon Kyl
Committee Member
Committee on the Judiciary
United States Senate
730 Hart Senate Office Building
Washington, D.C. 20510
FAX: 202-224-2207

Re.: Arizona Asian American Bar Association Support of the
Nomination of Goodwin H. Liu to the U.S. Court of Appeal for the
Ninth Circuit

Dear Senator Kyl:

I write on behalf of the Arizona Asian American Bar Association (AAABA) regarding the nomination of University of California Berkeley School of Law Associate Dean and Professor Goodwin H. Liu to serve on the United States Court of Appeals for the Ninth Circuit. AAABA is pleased to support the confirmation of Professor Liu to the Ninth Circuit.

Professor Liu's confirmation is historic for the Asian Pacific American community because there are currently no Asian Pacific American judges among the approximately 175 active federal appellate court judges nationwide. Professor Liu joins Judge Denny Chin, nominee to the U.S. Court of Appeals for the Second Circuit, as the second Asian Pacific American nominated to the federal appellate courts by the President. If confirmed, Professor Liu would be the only Asian Pacific American among the 25 active federal appellate court judges in the Ninth Circuit. That statistic is particularly troubling given that over 12% of the population of the Ninth Circuit is Asian Pacific American. Moreover, only four Asian Pacific Americans have ever served as federal appellate court judges and it has been over five years since there has been an active Asian Pacific American federal appellate court judge.

Professor Liu is well qualified to serve as a federal appellate court judge because he has a wide range of legal experiences and a talented legal mind. Professor Liu graduated with distinction from Stanford University, Oxford University, and Yale Law School and he is a Rhodes Scholar, a former Supreme Court clerk, and a member of the American Law Institute. At U.C. Berkeley School of Law, Professor Liu quickly earned tenure and promotion to Associate Dean and has garnered awards for his scholarship and teaching.

ARIZONA ASIAN AMERICAN BAR ASSOCIATION
P. O. Box 3496, Phoenix, Arizona 85030-3496

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Melissa S. Ho

VICE PRESIDENT:

Bryce A. Suzuki

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Mingyi Kang

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Eileen Sullivan

J. Walters

EX OFFICIO:

Art M. Lee

The Honorable Jon Kyl
April 14, 2010
Page 2

Professor Liu also has experience in both the public and private sectors. Before law school, he spent two years at the Corporation for National Service in Washington, D.C., helping to launch the AmeriCorps program. As Senior Program Officer for Higher Education, Liu led the agency's effort to build community service programs at colleges and universities nationwide. Between his clerkships, Liu returned to government service as a Special Assistant to the Deputy Secretary at the U.S. Department of Education. In that capacity, he advised the Secretary and Deputy Secretary on a range of legal and policy issues, including the development of guidelines to implement a \$134 million congressional appropriation in 2000 to help turn around low-performing schools. Professor Liu was also an attorney with the corporate litigation practice of O'Melveny & Myers in Washington, D.C.

Professor Liu's confirmation is also important because his story is a source of inspiration for all Asian Pacific Americans. Born in Augusta, Georgia, to Taiwanese doctors recruited to work in the United States by American medical institutions seeking assistance in serving underserved areas, Professor Liu's story is the American Dream. Professor Liu's family eventually settled in Sacramento, California, where Professor Liu attended public schools. Remarkably, Professor Liu did not learn to speak English until kindergarten because his parents worried that he and his brother would acquire an accent if they were taught at home. During high school, Professor Liu had the unique opportunity to serve as a page in the U.S. House of Representatives, thanks to the sponsorship of Congressman Robert Matsui. It was his first real exposure to law and politics, and it sparked a deep interest in government that eventually drew him to the law.

Professor Liu is a talented and experienced judicial nominee whose confirmation will bring intellect and objectivity to his service as a judge on the U.S. Court of Appeals for the Ninth Circuit. We proudly support his nomination and urge his speedy confirmation.

Sincerely,



Melissa Ho
President
Arizona Asian American Bar
Association

ARIZONA ASIAN AMERICAN BAR ASSOCIATION
P. O. Box 3496 Phoenix, Arizona 85030-3496

The Honorable Jon Kyl
April 14, 2010
Page 3

cc:

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

ARIZONA ASIAN AMERICAN BAR ASSOCIATION
P. O. Box 3496 Phoenix, Arizona 85030-3496

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NATIONAL OFFICE

Malcolm Amado Uno
Executive Director
 Anna Stuart
Executive Assistant



March 18, 2010

The Honorable Patrick J. Leahy, Chairman
 United States Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
 United States Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Re: Nomination of Goodwin H. Liu to the United States Court of Appeals for the Ninth Circuit

Dear Senators Leahy and Sessions:

It is an honor and pleasure to submit a letter of support on behalf of the Asian Pacific American Labor Alliance (APALA), AFL-CIO for Professor Goodwin H. Liu's nomination to the Ninth Circuit Court of Appeals. Briefly, APALA is the first and only national organization for Asian American and Pacific Islander union members to advance worker, immigrant and civil rights.

As you may know, Professor Liu's nomination to the Ninth Circuit Court of Appeals is historic in that there are currently no Asian Pacific Americans on the federal appellate court. More importantly, Professor Liu's qualifications, intellectual curiosity and commitment to fairness are demonstrated in his body of work.

Professor Liu's life story is an inspiration to many. The child of immigrant parents, Professor Liu did not learn English until he started kindergarten out of his parent's fear that he would acquire an accent if taught at home. He went on to become his high school valedictorian, a graduate from Stanford University, obtained his Master's Degree at Oxford University as a Rhodes Scholar and attended Yale Law School.

Professor Liu's distinguished career, which spans academia and the federal government as a public servant, is equally impressive. He served at UC Berkeley's School of Law, one of the top public universities in the country, and as Special Assistant to the Deputy Secretary at the U.S. Department of Education. It is APALA's belief that these accomplishments will carry over to a successful career in the federal appellate court.

Finally, judges in the Ninth Circuit Court of Appeals routinely preside over claims and issues that strongly impact working families. Thus, it is imperative that judges are able to fairly assess and interpret our laws in a manner that promotes equity and the goals of our legal system. We believe Professor Liu has the qualifications and experience necessary to be a fair judge for the Ninth Circuit Court of Appeal. Thus, strongly recommend that his nomination be voted out of committee unanimously, and confirmed by the full Senate without further delay.

Sincerely,

A handwritten signature in black ink, appearing to read "John Delloro". The signature is stylized and cursive, with a large initial "J" and "D".

John Delloro
APALA National President

GOLDWATER
I N S T I T U T E
in defense of liberty

CENTER FOR CONSTITUTIONAL LITIGATION
January 20, 2010

Hon. Orrin Hatch
U. S. Senate
104 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Goodwin Liu to Ninth Circuit

Dear Sen. Hatch:

I hope the new year is off to a good start for you.

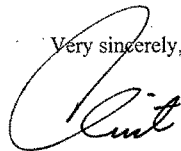
I understand that the President will send to the Senate the nomination of Goodwin Liu to serve on the U.S. Court of Appeals for the Ninth Circuit. He is associate dean and professor of law at Boalt Hall at the University of California, and a former Rhodes Scholar and clerk to Justice Ruth Bader Ginsburg. Although Prof. Liu and I differ on some issues, I strongly support his nomination.

I have known Prof. Liu for several years, since reading an influential law review article he co-authored with William Taylor of the Citizens' Commission on Civil Rights supporting school choice as a solution to the crisis of inner-city public education. It took a great deal of courage and integrity for Prof. Liu and Mr. Taylor to take such a strong and public position. Subsequently, Prof. Liu participated in a program hosted by the Alliance for School Choice bringing together diverse supporters of expanded educational opportunities.

Having reviewed several of his academic writings, I find Prof. Liu to exhibit fresh, independent thinking and intellectual honesty. He clearly possesses the scholarly credentials and experience to serve with distinction on this important court.

Thank you for considering my comments, and I hope our paths cross soon. With all best wishes.

Very sincerely,



Clint Bolick | DIRECTOR

Goldwater Institute | 500 East Coronado Rd., Phoenix, AZ 85004 | Phone (602) 462-5000 | Fax (602) 256-7045

GOLDWATER
I N S T I T U T E
in defense of liberty

CENTER FOR CONSTITUTIONAL LITIGATION

January 20, 2010

Hon. Jon Kyl
U. S. Senate
730 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Goodwin Liu to Ninth Circuit

Dear Jon:

I hope the new year is off to a good start for you.

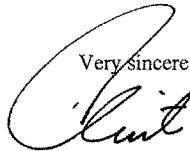
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Thank you for considering my comments, and I hope our paths cross soon. With all best wishes.

Very sincerely,



Clint Bolick | DIRECTOR

Goldwater Institute | 500 East Coronado Rd., Phoenix, AZ 85004 | Phone (602) 462-5000 | Fax (602) 256-7045

U.S. Senator Barbara Boxer

**Statement for the Record for Senate Judiciary Committee Confirmation Hearing of
Goodwin Liu for the U.S. Ninth Circuit Court of Appeals, and Kimberly Mueller for
the U.S. District Court for the Eastern District of California**

April 16, 2010

I am honored to support Goodwin Liu and Judge Kimberly Mueller, two great California nominees who will be appearing today before the Judiciary Committee.

I want to congratulate each of them on their historic nominations. And I want to welcome them and welcome their families, who are with us today.

I was so pleased when President Obama nominated Goodwin Liu to serve on the U.S. Ninth Circuit Court of Appeals. He is considered one of the brightest legal scholars in the country. He is a respected authority on constitutional law. At UC Berkeley's Boalt Hall School of Law – where he is an associate dean and professor – he is widely admired both for his writings and his devotion to his students.

When confirmed, Professor Liu will be the only active status Asian-American judge on the Ninth Circuit Court of Appeals.

Born in Augusta, Georgia, he is the son of Taiwanese immigrants who came to this country to practice medicine in underserved areas. In 1977, they moved to Sacramento where they were primary care physicians for over 20 years.

His parents instilled in him both perseverance and a strong work ethic. As a high school student, he pulled all-nighters studying the dictionary to expand his vocabulary and raise his SAT scores.

His hard work paid off – propelling him to Stanford University, where he graduated Phi Beta Kappa, studies at Oxford University where he was a Rhodes Scholar, and finally to Yale Law School.

Professor Liu will bring to the bench a strong record of public service in education.

At the Corporation for National Service, he helped launch the AmeriCorps program.

He won the Education Law Association’s Steven S. Goldberg Award for Distinguished Scholarship in 2007. He also won UC Berkeley’s Distinguished Teaching Award in 2009 – the university’s highest honor for teaching excellence.

Berkeley Law School Dean Christopher Edley describes Professor Liu this way:
“Goodwin Liu is an outstanding teacher, a brilliant scholar, and an exceptional public servant.”

Holly Fujie, a past president of the California State Bar, said: “As an accomplished scholar and teacher who has also worked in government and private practice, Goodwin has a breadth of experience that will be an invaluable addition to the Ninth Circuit.”

The American Bar Association has rated Professor Liu as unanimously well qualified.

Out of more than 170 active-status federal appellate judges across the country, there are currently no Asian-Americans. That is why legal groups like the National Asian Pacific American Bar Association and the Asian American Justice Center are right to call on the Senate to move quickly to confirm this qualified and talented nominee.

I also want to introduce the nominee whom I had the pleasure of recommending to the President – Judge Kimberly Mueller.

I have such admiration for Judge Mueller, who is a public servant in the truest sense of the words. She will be an excellent addition to the U.S. District Court for the Eastern District of California.

A daughter of the Midwest, she is the oldest of three daughters born to Ted and Berneil Mueller, who are here with us today from Kansas. Ted was a high school social studies teacher and Berneil was the fine arts coordinator at Grinnell College.

The valedictorian of her high school, she found her calling – serving others – at a young age, through a public policy class at Pomona College.

Judge Mueller has had a diverse career of public service. She served as a legislative aide and also as the health and safety director for the California Firefighter Foundation.

In 1987, she was elected to the Sacramento City Council, representing about 40,000 city residents and helping with their day-to-day problems and needs.

She attended Stanford Law School, receiving legal training that only enhanced her natural leadership skills.

After law school, she joined the Sacramento firm of Orrick, Herrington & Sutcliffe, where she was a litigator specializing in intellectual property matters such as copyrights, trademarks and trade secrets. She later opened her own firm.

In 2003, she was appointed a Magistrate Judge of the United States District Court's Eastern District of California – becoming only the second woman to sit as a magistrate judge in Sacramento.

Judge Mueller has presided over more than 50 trials and seen 230 cases to verdict or judgment since 2003.

Along the way, she has earned a reputation as a fair, thoughtful judge with a keen intellect – someone who is well respected by her colleagues on the bench and in the legal community.

Here is what Magistrate Judge John Moulds said about Judge Mueller when she replaced him upon his retirement:

Having a judge “with a sense of how the world works is important. Kim is someone who knows the community and has earned great respect.”

The American Bar Association has rated her as unanimously well qualified.

Her nomination is also historic. When confirmed, she will be the first woman to serve as a U.S. District Court Judge for the Eastern District of California.

The Eastern District of California carries the highest number of case filings per judge in the country – more than 1,100 per judge.

Judge Mueller’s nomination is not only historic – it is necessary to help our overburdened judges in the Eastern District.

Both of these nominees, Professor Liu and Judge Mueller, are gifted legal minds who will be an asset to their respective benches.

We should act quickly to confirm them.

###

March 23, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 224-9516

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 224-9102

Re: Federal Judicial Nomination of Goodwin H. Liu, U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Ranking Member Sessions:

We are a bipartisan group of 22 leaders in education law, policy, and research who support the nomination of Professor Goodwin Liu to be a judge on the U.S. Court of Appeals for the Ninth Circuit. Your committee will undoubtedly receive much commentary about Professor Liu's scholarly work in constitutional law. We write to highlight his scholarship and reputation in the field of education law and policy. Collectively, we have read his work in this area; we have seen him speak at many panels and conferences; and some of us have worked closely with him on research projects or on policy issues when he served in the U.S. Department of Education. Based on his record, we believe Professor Liu is a careful, balanced, and intellectually honest scholar with outstanding academic qualifications and the proper temperament to be a fair and disciplined judge.

Professor Liu is one of the nation's leading experts on educational equity. His scholarly work on topics such as school choice, school finance, desegregation, and affirmative action is unified by a deep and abiding concern for the needs of America's most disadvantaged students. In analyzing problems and proposing solutions, Professor Liu's writings are thorough, pragmatic, and scrupulously attentive to facts and evidence. His work is nuanced and balanced, not dogmatic or ideological. For example:

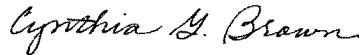
- He has argued for more resources for low-performing schools while also advocating greater opportunities, including school vouchers, to enable disadvantaged students to choose better schools.
- He has argued for greater equity in school finance while also urging reforms that would loosen regulations and increase local control over spending decisions.
- He has praised the No Child Left Behind Act for focusing education policy on achievement outcomes and inequities while also urging reforms to ameliorate the Act's unintended negative consequences.

- He has argued that the Fourteenth Amendment guarantee of national citizenship encompasses a duty to provide adequate education while emphasizing that the responsibility for enforcement belongs to Congress, not the judiciary.
- He has written in support of affirmative action while also emphasizing that affirmative action primarily benefits middle- and high-income minorities and does not do enough to promote socioeconomic diversity.

We do not necessarily agree with all of Professor Liu's views. But we do agree that his record demonstrates the habits of rigorous inquiry, open-mindedness, independence, and intellectual honesty that we want and expect our judges to have. His writings are meticulously researched and carefully argued, and they reflect a willingness to consider ideas on their substantive merits no matter where they lie on the political spectrum. Moreover, we are confident in Professor Liu's ability to decide cases based on the facts and the law, regardless of his policy views. His scholarship amply demonstrates that kind of intellectual discipline, and our high regard for his work is widely shared. Indeed, the Education Law Association selected Professor Liu in 2007 to be the first-ever recipient of the Steven S. Goldberg Award for Distinguished Scholarship in Education Law.

In short, Professor Liu is exceptionally qualified to serve on the federal bench. He would make an outstanding judge, and we urge his speedy confirmation.

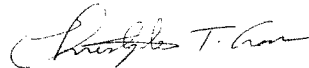
Sincerely,



Cynthia G. Brown
Vice President for Education Policy, Center for American Progress Action Fund



Michael Cohen
President, Achieve, Inc.; Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, 1999–2001



Christopher T. Cross
Chairman, Cross & Joftus LLC; Assistant Secretary for Educational Research and Improvement, U.S. Department of Education, 1989–91



Linda Darling-Hammond
Charles E. Ducommun Professor of Education, Stanford University

/S/

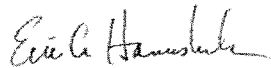
James Forman Jr.
Professor of Law, Georgetown University Law Center; Co-Founder and Board Chair, Maya
Angelou Public Charter School*



Patricia Gándara
Professor of Education and Co-Director of The Civil Rights Project/Proyecto Derechos Civiles,
UCLA

/S/

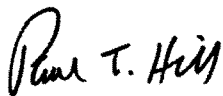
James W. Guthrie
Senior Fellow and Director of Education Policy Studies, George W. Bush Institute



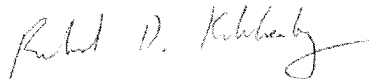
Eric A. Hanushek
Paul and Jean Hanna Senior Fellow, Hoover Institution, Stanford University



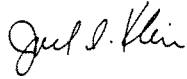
Frederick M. Hess
Director of Education Policy Studies
American Enterprise Institute



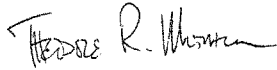
Paul Hill
John and Marguerite Corbally Professor and Director of the Center on Reinventing Public
Education, University of Washington



Richard D. Kahlenberg
Senior Fellow, The Century Foundation*



Joel I. Klein
Chancellor, New York City Department of Education; Assistant Attorney General, Antitrust
Division, U.S. Department of Justice, 1997–2001



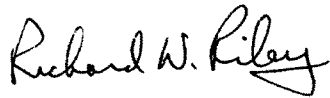
Ted Mitchell
President and Chief Executive Officer, NewSchools Venture Fund



Gary Orfield
Professor of Education, Law, Political Science, and Urban Planning and Co-Director of The Civil
Rights Project/Proyecto Derechos Civiles, UCLA



Michael J. Petrilli
Vice President for National Programs and Policy, Thomas B. Fordham Institute; Research
Fellow, Hoover Institution, Stanford University; Associate Assistant Deputy Secretary, Office of
Innovation and Improvement, U.S. Department of Education, 2001–05



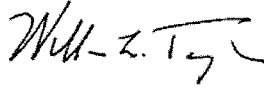
Richard W. Riley
Partner, Nelson Mullins Riley & Scarborough LLP; U.S. Secretary of Education, 1993–2001;
Governor of South Carolina, 1979–87



Andrew J. Rotherham
Co-Founder and Publisher, Education Sector

/S/

James E. Ryan
William L. Matheson & Robert M. Morgenthau Distinguished Professor of Law, University of
Virginia School of Law



William L. Taylor
Chairman, Citizens' Commission on Civil Rights



Martin R. West
Assistant Professor of Education, Harvard University



Judith A. Winston
Principal, Winston Withers & Associates, 2002-2009; General Counsel, U.S. Department of
Education, 1999-2001, 1993-97



Bob Wise
President, Alliance for Excellent Education; Governor of West Virginia, 2001-2005; Member,
U.S. House of Representatives, 1983-2001

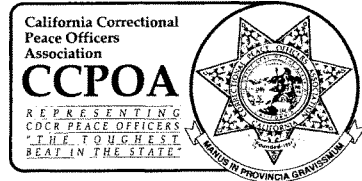
(* affiliation listed for identification purposes only)

Senate Judiciary Committee
Statement on Judge Catherine Eagles
Nominee for the U.S. District Court for the Middle District of North Carolina
By Senator Richard Burr

It is my pleasure to submit this statement in support of Judge Catherine Eagles, for the U.S. District Court for the Middle District of North Carolina. Judge Eagles has solid experience that will prove valuable for a district court judge. She has served as a North Carolina Superior Court judge since 1993, where she was the first woman to sit as a Superior Court Judge in Guilford County. Before that, she spent nearly ten years as a civil litigator. She estimates that she has presided over more than 500 civil and criminal trials and has sentenced thousands of individuals.

Judge Eagles was born in Memphis, Tennessee, and received her J.D. from the National Law Center at George Washington University in 1982, where she was a member of the George Washington Law Review and graduated as a member of the Order of the Coif. She received her B.A. from Rhodes College and was inducted into the *Phi Beta Kappa* honor society.

Judge Eagles has come highly recommended to me as a person of intellect, integrity, and humility, and as a judge who is "scrupulously fair." These are key qualifications that I look for in a judge, and it is my hope that she proves true to this reputation if confirmed.



755 Riverpoint Dr., Ste. 200 • West Sacramento, CA 95605-1634 • (916) 372-6060

March 17, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 224-9516

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 224-9102

Re: Support for the Nomination of Professor Goodwin Liu for a Seat on the US Court Of Appeals for the Ninth Circuit

Dear Chairman Leahy and Ranking Member Sessions:

I write on behalf of the California Correctional Peace Officers' Association (CCPOA) concerning the above. CCPOA is pleased to support the confirmation of Professor Goodwin Liu to the Ninth Circuit.

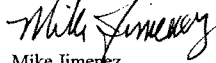
CCPOA represents roughly 30,000 peace officers employed by the State of California and its California Department of Corrections and Rehabilitation. Our members include parole agents, youth counselors, and correctional officers, and it has correctly been said that in dealing with incarcerated adult offenders and

Page 2
March 17, 2010

Historically, our organization has supported both Republicans and Democrats. Our members and our organization's leaders care deeply about criminal justice issues and the constitutional rights of all citizens, including crime victims and peace officers. We have done our "due diligence" with reference to the background, qualifications, and philosophy of Professor Goodwin Liu. We are confident that he will further the cause of justice and follow the law and Constitution for all parties that come before his Court, again including crime victims and peace officers.

We are, again, pleased to support his confirmation.

Very truly yours,



Mike Jimenez,
President

SENT VIA FACSIMILE: 2 pages

March 26, 2010

Sen. Patrick Leahy, Chairman
 Sen. Jeff Sessions, Ranking Member
 Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Re: Nomination of Goodwin Liu for U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Senator Sessions:

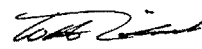
The undersigned California District Attorneys have the responsibility for prosecuting violations of the criminal law within our respective counties. For many years, our ability to enforce the law and protect the citizens of our jurisdictions has been hampered by erroneous decisions of the United States Court of Appeals for the Ninth Circuit. This court has been far out of the judicial mainstream, as indicated by its frequent and often summary reversal by the Supreme Court, at a rate far above the national average.

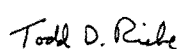
The Supreme Court cannot reverse all of the Ninth Circuit's errors, however. Despite the efforts of Congress to rein in the federal courts with the 1996 passage and subsequent amendment of the Antiterrorism and Effective Death Penalty Act, miscarriages of justice remain routine. This is particularly true in the most heinous of crimes, those where a jury has unanimously decided that only the death penalty is sufficient punishment.


Under no circumstances should any judicial nominee be confirmed to the Ninth Circuit who would take that court even further in the wrong direction. Regrettably, the President has sent to the Senate just such a nominee. The paper written by Goodwin Liu in opposition to the nomination of Justice Samuel Alito shows that he would vote to reverse nearly every death sentence. He exaggerates minor issues in jury instructions that no one at trial thought were problems, while simultaneously brushing off the brutal facts of heinous crimes as inconsequential. He jumps to the conclusion that prosecutors are guilty of racism on scant evidence and despite the considered judgment of the state trial court to the contrary. The paper and its implications are discussed more fully in the letter of the Criminal Justice Legal Foundation submitted to the committee in this matter.

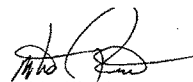
Professor Liu's paper demonstrates beyond serious question that his views on criminal law, capital punishment, and the role of the federal courts in second-guessing state decisions are fully aligned with the judges who have made the Ninth Circuit the extreme outlier that it presently is. We urge the Judiciary Committee and the full Senate to reject this nomination.

Sincerely,


 Will Richmond
 District Attorney
 Alpine County

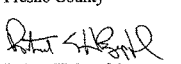

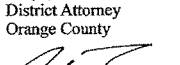

 Todd D. Riebe
 District Attorney
 Amador County


 John R. Poyner
 District Attorney
 Colusa County


 Michael D. Riese
 District Attorney
 Del Norte County

03/26/2010 7:14PM

Page 2 — Letter re Nomination of Goodwin Liu

 Vernon Pierson District Attorney El Dorado County	 Michael Kentz District Attorney Madera County	 Rod Pacheco District Attorney Riverside County	 Gerald Benito District Attorney Shasta County
 Elizabeth Egan District Attorney Fresno County	 Ed Berberian District Attorney Marin County	 Jay Scully District Attorney Sacramento County	 David W. Paulson District Attorney Solano County
 Robert Holzapfel District Attorney Glenn County	 Robert H. Brown District Attorney Mariposa County	 Candice Hooper District Attorney San Benito County	 Birgit Fladager District Attorney Stanislaus County
 Arthur Maillet District Attorney Inyo County	 Gary Woolverton District Attorney Modoc County	 Michael A. Ramos District Attorney San Bernardino County	 Carl V. Adams District Attorney Sutter County
 Edward R. Jagels District Attorney Kern County	 George Booth District Attorney Mono County	 Bonnie M. Dumanis District Attorney San Diego County	 Gregg Cohen District Attorney Tehama County
 Ronald L. Calhoun District Attorney Kings County	 Dean H. Flippo District Attorney Monterey County	 James Willett District Attorney San Joaquin County	 Michael B. Harper District Attorney Trinity County
 John Hopkins District Attorney Lake County	 Clifford Newell District Attorney Nevada County	 Gerald T. Shea District Attorney San Luis Obispo County	 Phillip J. Cline District Attorney Tulare County
 Robert M. Burns District Attorney Lassen County	 Tony Rackauckas District Attorney Orange County	 Ann Bramsen Acting District Attorney Santa Barbara County	 Gregory D. Totten District Attorney Ventura County
 Steve Cooley District Attorney Los Angeles County	 Bradford R. Fenocchio District Attorney Placer County	 Lawrence R. Allen District Attorney Sierra County	 Jeffrey W. Reising District Attorney Yolo County
		 J. Kirk Andrus District Attorney Siskiyou County	 Patrick J. McGrath District Attorney Yuba County

03/26/2010 7:14PM

**Twenty-Four Circuit Court Nominees Confirmed During Bush Administration
With No Prior Judicial Experience**

110th Congress

1. Raymond M. Kethledge, to be United States Circuit Judge for the Sixth Circuit

Age at nomination: 39

Experience: briefing/arguing cases before US Supreme Court, US Court of Appeals, and Michigan Supreme Court; Partner at Bush, Seygerth, Kethledge, and Paige LLC and focused on appellate class-litigation & commercial litigation practice (2003-nomination); partner at Feeney, Kellett, Weinner & Bush (2002-2003); Counsel for Ford Motor Company (2001-2002); Partner at Honigman, Miller, Schwartz, and Cohn ('98-2001); Clerked for Justice Anthony Kennedy ('97-'98); Counsel for former US Senator Spencer Abraham ('95-'97); Associate for Sidley & Austin ('94); Clerked for Judge Ralph B. Guy, Jr. ('93-'94)

2. Debra Ann Livingston, to be United States Circuit Judge for the Second Circuit

Age at nomination: 47

Experience: Paul J. Kellner Professor of Law and Vice Dean of the Columbia Law School teaching criminal law, procedure, and evidence; also seminar on national security and terrorism ('94 - nomination); Law professor at University of Michigan Law School ('92 -'94); Served as Assistant US Attorney for the Southern District of New York prosecuting public corruption cases; also served as Deputy Chief of Appeals ('86 -'91); Associate at Paul, Weiss, Rifkind, Wharton & Garrison ('85 -'86 & '91 -'92); Clerked for Judge J. Edward Lumbard on the U.S. Court of Appeals for the Second Circuit ('84 -'85)

109th Congress

1. Kimberly Ann Moore, to be United States Circuit Judge for the Federal Circuit

Age at nomination: 38

Experience: Professor at George Mason University teaching patent law, intellectual property law and practice before the Federal Circuit; for first three years was Associate Professor then Professor of Law (2000 - nomination); Returned to private practice at Morgan, Lewis & Bockius (2000-'03); Clerked for Judge Glenn L. Archer, Jr., Chief Judge of the US Court of Appeals for the Federal Circuit ('95 -'97); Associate at Kirkland & Ellis focused on intellectual property litigation ('94 -'95)

2. Neil M. Gorsuch, to be United States Circuit Judge for the Tenth Circuit

Age at nomination: 38

Experience: Served as Principal Deputy to the Associate Attorney General at United States Department of Justice ('05-nomination); Practiced at Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC first as an associate then made partner three years later ('95 -'05); Clerked for Justices Byron R. White and Anthony M. Kennedy on the United States Supreme Court; Clerked first for Judge David B. Sentelle on the United States Court of Appeals for the District of Columbia (1991)

3. Jerome A. Holmes, to be United States Circuit Judge for the Tenth Circuit

Age at nomination: 44

Experience: Director at Crowe & Dunley in Oklahoma (2005-nomination); Federal prosecutor in US Attorney's Office, Western District of Oklahoma ('94 -'05); Litigation Associate at Steptoe & Johnson ('91-'94); Clerked for Judge William J. Holloway, Jr., U.S. Circuit Court of Appeals for the Tenth Circuit ('90-'91); Clerked for Judge Wayne E. Alley, U.S. District Court for the Western District of Oklahoma ('88 -'90)

4. Milan D. Smith, Jr., to be United States Circuit Judge for the Ninth Circuit

Age at nomination: 63

Experience: Worked as a private practitioner with mostly transactional practice; Commissioner of the California Fair Employment & Housing Commission ('88 -'91); Founding partner of Smith Crane Robinson & Parker in California ('72 -'06); Associate Attorney at O'Melveny & Myers in Los Angeles (1969-1972)

5. Sandra Segal Ikuta, to be United States Circuit Judge for the Ninth Circuit

Age at nomination: 51

Experience: Did not frequently appear in court, and when she did it was entirely in state court; Deputy Secretary & General Counsel of California Resources Agency ('04 - nomination); Associate Attorney at O'Melveny & Myers, Los Angeles ('90-'97) and as Partner ('97 -'04); practice included litigation, compliance, and transactional matters primarily in environmental and natural resources law; Clerked for Justice Sandra Day O'Connor on US Supreme Court; Clerked for Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit Court

6. Michael A. Chagares, to be United States Circuit Judge for the Third Circuit

Age at nomination: 43

Experience: Partner at Cole, Schotz, Meisel, Forman & Leonard in New Jersey ('04 - nomination); Hearing Officer for the 9/11 Victim Compensation Fund ('03-'04); Office of the United States Attorney for the District of New Jersey; became Chief of Civil Division in '99 ('90 -'04); Adjunct Professor at Seton Hall School of Law ('91 - present); Associate at McCarter and English ('89 -'90); Clerked for Judge Morton Greenberg, U.S. Circuit Court of Appeals, Third Circuit ('87-'88)

7. Brett M. Kavanaugh, to be United States Circuit Judge for the District of Columbia Circuit

Age at nomination: 41

Experience: Overall 10 years of legal experience (aside from time in clerkships); Staff Secretary to President George W. Bush; Associate White House Counsel to the President; was lawyer in charge of judicial nominations (2001-2003); Short time at Kirkland & Ellis in between time at Office of Independent Counsel; Office of Independent Counsel; worked on (3 yrs); Clerked with Justice Anthony Kennedy, U.S. Supreme Court; year long fellowship at DOJ for Solicitor General Kenneth Starr; Clerked for Judge Walter Stapleton, U.S. Third Circuit Court of Appeals; Clerked for Judge Alex Kozinski, U.S. Ninth Circuit Court of Appeals

8. Thomas B. Griffith, to be United States Circuit Judge for the District of Columbia Circuit

Age at nomination: 49

Experience: General Counsel for Brigham Young University (2000-nomination); U.S. Senate's Legal Counsel; helped Senate leadership w/ trial of President Clinton (95-99); Wiley, Rein & Fielding; almost exclusively handled civil litigation; Robinson, Bradshaw & Hinson in North Carolina; almost exclusively handled civil litigation

9. William H. Pryor, Jr., to be United States Circuit Judge for the Eleventh Circuit

Age at nomination: 41

Experience: Attorney General of the State of Alabama (1997 – nomination); Deputy Attorney General for the State of Alabama (2 yrs); Associate at Walston, Stabler, Wells, Anderson and Bains (4 yrs); Associate at Cabaniss, Johnston, Gardner, Dumas and O'Neal (3 yrs); Clerked for Judge John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit

108th Congress

1. Peter W. Hall, to be United States Circuit Judge for the Second Circuit

Age at nomination: 55

Experience: U.S. Attorney in Vermont (2001 – nomination); Served as President of Vermont Bar Association; Partner at law firm in Rutland, VT (1986-2001); Federal prosecutor in Vermont U.S. Attorneys' office (1978 – 1986?); Clerked for Judge Albert W. Coffin, U.S. District Court for Vermont

2. Raymond W. Gruender, to be United States Circuit Judge for the Eighth Circuit

Age at nominations: 40

Experience: U.S. Attorney for Eastern District of Missouri (2001 – nomination); 15 yrs litigation experience appearing in court frequently; Tried 8 cases to conclusion and served as lead or sole trial attorney in 5 of the 8; Involved in prosecuting several high-profile cases, one involving high level of corporate fraud

3. D. Michael Fisher, to be United States Circuit Judge for the Third Circuit

Age at nomination: 59

Experience: Partner at Fisher & Flynn (1984-1997); Majority Whip (1990-1996); Republican Policy Chairman (1988-1990); State Senator in Pennsylvania (1980 – 1996) and served as Chair of Environmental Resources & Energy Committee (1980-1990) and Judiciary Committee (1980 – 1996); Representative in Pennsylvania House (1974-1980) serving as member of House Judiciary Committee (1975-1980) & Chair of Subcommittee on Crimes & Corrections (1979 – 1980); Assistant District Attorney for Allegheny County District Attorney’s Office in Pittsburg (1970-1974); Worked with father at Brenlove & Fisher, Fisher & McGinley in Pittsburg (1970-1980); Law clerk for Wilkes & Artis (1969); Law clerk to General Accounting Offices (1968)

4. Steven M. Colloton, to be United States Circuit Judge

Age at nomination: 40

Experience: U.S. Attorney, Southern District of Iowa (2001-nomination); Attorney at Belin, Lamson, McCormick, Zumbach, Flynn in Des Moines (1999-2001); While working at Office of Independent Counsel assisted in Whitewater investigation and “Filegate” – case involving improper possession by White House of personal FBI files on Republican political appointees; Detailed to Office of Independent Counsel under Ken Starr (1995-1996 & briefly in 1998); Assistant U.S. Attorney, Northern District of Iowa (1991-1999); Special Assistant to Assistant Attorney General in Office of Legal Counsel at DOJ (1990-1991); Clerked for Justice Rehnquist, U.S. Supreme Court; Clerked for Judge Laurence Silberman, U.S. Court of Appeals for D.C. Circuit

5. Timothy M. Tymkovich, to be United States Circuit Judge for the Tenth Circuit

Age at nomination: 47

Experience: General Counsel, Colorado Republican Party (98-01); Joined Hale Pratt Midgley Hackstaff Gren & Laitos; named partner in 1997 (1996-nomination); Served as Solicitor General for State of Colorado (91-96); “Of counsel” position at Bradley Cambell Carney & Madsen (90-91); Associate at David Graham & Stubb in Denver; 2 of these years in D.C. office (1983-1989); Clerked for Justice William H. Erickson, Colorado Supreme Court (82-83)

6. Jeffrey S. Sutton, to be United States Circuit Judge for the Sixth Circuit

Age at nomination: 42

Experience: Partner at Jones, Day, Reavis & Pogue in Ohio; Adjunct professor of law, Ohio State University College of Law teaching Supreme Court litigation and state constitutional law; State Solicitor of Ohio (‘95 -‘98); Clerked for Justice Powell and Justice Scalia (‘91-‘92); Clerked for Judge Thomas Meskill, U.S. Court of Appeals, Second Circuit (‘90)

7. Jay S. Bybee, to be United States Circuit Judge for the Ninth Circuit

Age at nomination: 50

Experience: Associate Professor of Law at M. Hebert Law Center, Louisiana State University and became Full Professor in '99 ('91-nomination); Associate Counsel to the President ('89-'91); Attorney in Civil Division/Appellate Staff of DOJ ('86-'89); Attorney-Advisor at Office of Legal Policy, U.S. Department of Justice ('84-'86); Associate at Sidley & Austin in D.C. ('81-'84); Clerked for Judge Honorable Donald Russell, in the United States Court of Appeals for the Fourth Circuit (1980); Participated in 13 matters before Supreme Court and a few important appellate matters

107th Congress

1. John M. Rogers, to be United States Circuit Judge for the Sixth Circuit

Age at nomination: 53

Experience: Litigator to Civil Division's Appellate Staff at DOJ ('83-'85); Worked in appellate section of the Civil Division at DOJ (4 yrs); Law professor at University of Kentucky College of Law in Lexington ('78- nomination)

2. Jeffrey R. Howard, to be United States Circuit Judge for the First Circuit

Age at nomination: 46

Experience: Sole legal practitioner in Salisbury, NH; Ran for Republican nomination to be Governor of NH, was unsuccessful (2000); "Of Counsel" position Choate, Hall & Stewart in Boston where previously had Partner position ('93-'00); Attorney General for the State of new Hampshire ('93-'97); U.S. Attorney for District of NH ('89 - '93); Deputy Attorney General; Staff Attorney in NH Attorney General's Office

3. Richard R. Clifton, to be United States Circuit Judge for the Ninth Circuit

Age at nomination: 51

Experience: Joined Cades Schutte Fleming & Wright, later becoming partner; concentrated in commercial litigation and some appellate practice (1977-nomination); Clerked for Judge Herbert Choy , U.S. Circuit Court of Appeals, Ninth Circuit

4. Sharon Prost, to be United States Circuit Judge for the Federal Circuit

Age at nomination: 50

Experience: Minority Chief Counsel to Senator Hatch on Senate Judiciary Committee ('93 - nomination); Counsel to Senator Hatch in personal office and later as Minority Chief Labor Counsel for him on Senate Committee on Labor and Human Resources ('89-'93); Assistant Solicitor, the Associate Solicitor and the Acting Solicitor at the National Labor Relations Board ('84-'89); Attorney in Office of General Counsel's Internal Revenue Office, Department of Treasury (1983); Field attorney with Federal Labor Relations

Authority ('80-'83); Labor relations specialist at United States General Accounting Office ('76-'80);
Labor relations specialist at the U.S. Civil Service Commission ('73-'76)

5. Michael W. McConnell, to be United States Circuit Judge for the Tenth Circuit

Age at nomination: 46

Experience: Professor at the University of Utah Law School ('97 – nomination); Special consultant to the law firm of Mayer, Brown & Platt ('89 – nomination); Professor at University of Chicago ('85 – '96); Assistant General Counsel at the Office of Management and Budget and then an Assistant Solicitor General under Reagan Administration ('81-'85); Clerked for Justice William Brennan, U.S. Supreme Court ('80-'81); Clerked for Judge J. Skelly Wright of the D.C. Circuit ('79-'80)

6. William J. Riley, to be United States Circuit Judge for the Eighth Circuit

Age at nomination: 54

Experience: Practiced civil law at Omaha firm, Fitzgerald, Schorr, Barmettler & Brennan; Clerked for Judge Donald Lay of the U.S. Court of Appeals for the Eighth Circuit



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March 23, 2010

Hon. Patrick J. Leahy
Chairman
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510Hon. Jeff Sessions
Ranking Member
Senate Judiciary Committee
326 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions,

On behalf of the Congressional Asian Pacific American Caucus (CAPAC), I write to provide CAPAC's strong endorsement of President Obama's nomination of Goodwin Liu for the United States Court of Appeals for the Ninth Circuit. CAPAC is a bipartisan, bicameral caucus, comprised of 29 Members of Congress who advocate on behalf of the Asian American and Pacific Islander (AAPI) community.

Judicial diversity is an important priority for CAPAC, and as such the caucus has endorsed Asian American, Pacific Islander, and other diverse candidates for the judicial bench, including Professor Goodwin Liu. Currently, there are no Asian Americans and Pacific Islanders (APIs) serving as a federal appellate court judge. With Liu's distinguished background and the lack of diversity in the appellate courts, CAPAC strongly supports his nomination.

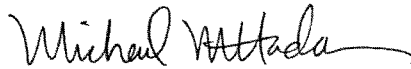
Liu is currently Associate Dean and Professor at the University of California Berkeley School of Law, and is highly qualified for this appointment. He is an acclaimed education and constitutional law scholar, winning the Education Law Association's Steven S. Goldberg Award for Distinguished Scholarship in Education Law in 2007, and the UC Berkeley Distinguished Teaching Award in 2009. I have personally worked with him for many years, particularly in ensuring access and equity in our education system. Not only is he a leader in the Asian American and Pacific Islander community, he has proven himself in the legal profession, with support from renowned legal minds from a diversity of ideological backgrounds.

Prior to joining the Berkeley faculty in 2003, Liu was an associate at O'Melveny & Myers in Washington, D.C. He clerked for Justice Ruth Bader Ginsburg in the October 2000 Term, and for Judge David S. Tatel on the Court of Appeals for the D.C. Circuit from 1998-1999. Between his clerkships, Liu served as a Special Assistant to the Deputy Secretary at the U.S. Department of Education. He has also worked for the Corporation for National Service, where he helped launch the AmeriCorps program.

Liu was born in Augusta, Georgia, to parents who emigrated from Taiwan, and he grew up in Sacramento where he attended public schools. Liu earned a B.S. from Stanford University in 1991, an M.A. from Oxford in 2002, where he studied as a Rhodes Scholar, and a J.D. from Yale Law School in 1998.

The Members of CAPAC strongly urge you to confirm Professor Goodwin Liu as an appellate judge on the Ninth Circuit Court of Appeals. He is a legal scholar of the highest caliber and his appointment would be an important step in addressing the underrepresentation of Asian Americans and Pacific Islanders in the federal judiciary.

Sincerely,

A handwritten signature in black ink that reads "Michael M. Honda". The signature is written in a cursive style with a long, sweeping underline.

Michael M. Honda
Chair, CAPAC

**Statement of the Honorable James E. Clyburn
Representative 6th District, South Carolina
Senate Judiciary Committee, Nominations Hearing
April 16, 2010**

Thank you Madam Chair, Members of the Committee; I am honored to speak here today on behalf of Michelle Childs and Richard Gergel. I want to begin by thanking my colleague from South Carolina, Senator Graham and associating myself with his remarks. Senator Graham and I are from different sides of the aisle, but we both agree on the fitness and judicial temperament of these two distinguished nominees.

I have known these two outstanding nominees for years, and could go on for hours vouching for their character and reputations. However, in the interest of time, I will ask that my statement be included in the record along with their resumes.

President Obama has chosen two very well qualified individuals whose nominations are historic. I use the word historic because each of them brings a new level of diversity to the South Carolina federal courts. Once confirmed Richard Gergel will be the first Jewish Justice and Michelle Childs will be the second African American female Justice to sit on the federal bench in South Carolina. In fact, Judge Childs will also be the third woman and the third African American Justice.

In addition to their diverse backgrounds and experience as public throughout their careers, Michelle Childs and Richard Gergel have displayed exceptional integrity and an unwavering commitment to justice.

J. Michelle Childs: Nominee for the District Court of South Carolina

Madam Chair, As Senator Graham indicated, Judge Childs currently sits on the South Carolina Circuit Court, the state's trial court of general jurisdiction. She serves as the Chief

Administrative Judge for General Sessions, the state's Criminal Court, and a Chief Administrative Judge for the state's Business Court.

According to Chief Justice Jean Toal, Judge Childs has demonstrated a dedication to the job and a work ethic unmatched by any other justice. Chief Justice Toal told me a story that I would like to share that demonstrates what kind of Judge Michelle Childs is and shows how valuable she will be on the federal bench. Late one Friday afternoon before Christmas, the Chief Justice had a difficult, emergency issue that needed to be resolved. So she called the Richland County Courthouse and found that Michelle Childs was still on the bench and able to solve the issue with intelligence and compassion. A few days later, she delivered her first Child. In the words of Chief Justice Toal "Commitment is Judge Childs watchword and I hate to lose her."

Judge Childs has served as an Acting Justice for the South Carolina Supreme Court. Prior to taking the bench in 2006, she was a Commissioner with the South Carolina Workers' Compensation Commission from 2002 to 2006, and was Deputy Director, Division of Labor of the South Carolina Department of Labor, Licensing and Regulation from 2000 to 2002. She has also been in private practice. Judge Childs is a member of the House of Delegates for the American Bar Association and serves on the Standing Committee on Constitution and By-Laws. She is formerly President of the South Carolina Bar's Young Lawyers Division, and currently serves on the South Carolina Bar's House of Delegates. Judge Childs received her B.S. from the University of South Florida in 1988, her J.D. from the University of South Carolina School of Law and her Masters in Personnel and Employment Relations from the University of South Carolina School of Business in 1991.

Richard Mark Gergel: Nominee for the District Court of South Carolina

Madam Chair, I also have the pleasure of introducing Richard Gergel. I have known Richard Gergel since he was the first student body president at the newly integrated Keenan high school in Columbia, South Carolina, the high school from which my three daughters graduated.

Richard Gergel has the ability and experience to serve well on the trial bench. He has extensive experience as a trial lawyer, and is a principal and senior partner with Gergel, Nickles and Solomon, P.A, in Columbia, South Carolina, where he has specialized in personal injury litigation, employment discrimination matters, and complex government litigation since 1983. Prior to that, he worked as an attorney with Medlock and Davis in South Carolina where he handled employment cases in state and federal court and in administrative proceedings.

Gergel has served as President of the Columbia Hebrew Benevolent Society and the Jewish Historical Society of South Carolina. He has been listed in "South Carolina Super Lawyers" and in 2001 received the Jonathan Jasper Wright Award from the University of South Carolina Black Law Students Association. Mr. Gergel received his B.A. from Duke University in 1975, and J.D. from Duke in 1979.

I want to conclude by urging the Committee and the Senate as a whole to move expeditiously to confirm these two candidates. Currently, 30 percent of seats on the federal bench in South Carolina are vacant. An expeditious confirmation of these outstanding nominees, Richard Gergel and Michelle Childs, will do the legal profession proud and be a good thing for the state of South Carolina and the United States of America.

Thank you.



Wednesday, March 24, 2010

Senator **Patrick J. Leahy**
U.S. Senate Judiciary Chairman

Senator Jeff Sessions
U.S. Senate Judiciary Ranking Member

Dear Senator,

Concerned Women for America Legislative Action Committee (CWALAC) and its more than half-a-million members write to urge you to reject the nomination of Goodwin Liu to the United States Court of Appeals for the Ninth Circuit. Throughout Mr. Liu's short career he has demonstrated beyond any reasonable doubt he is unfit to serve as an objective officer of the court. Mr. Liu's radical ideology would actually move what has been considered one of the most liberal circuits in the country, and one of the most overturned, even further away from the mainstream.

Liu believes the Constitution is a living, breathing document that must change to accommodate new progressive ideas. He has said, "The Framers deliberately chose broad words so they would be adaptable over time." The real danger of this ideology is that someone must decide what those "adaptations" to the Constitution are, and in Liu's radical world, he, as a judge, is the one that would decide how the Constitution should "evolve."

For example, he argues that judges should read into the Constitution a constitutional right to welfare. In a 2008 *Stanford Law Review* article, Liu argued that judges should "determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine."

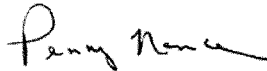
Another of those doctrines that, according to Mr. Liu, has evolved and should be now "crystallized" as a constitutional right is the right to a same-sex "marriage." In his left-wing radical activism, Liu offered a friend of the court brief to the California Supreme Court arguing the Court should invalidate the will and the vote of Californians to find unconstitutional the state's definition of marriage as the union between one man and one woman.

Liu's ideology is so outside the mainstream as to be hostile to some of the most basic ideas of freedom. He has said that phrases like "private ownership of property" and "limited government" are really "code words for an ideological agenda hostile to environmental, workplace, and consumer protections."

The proof of Mr. Liu's radical ideology is overwhelming. No explanation, no matter how clever, should be enough to dismiss the avalanche of evidence against him. Mr. Liu shows no sign of judicial restraint, or respect for the law and the Constitution. No one should be fooled by whatever spin the nominee tries to put on these issues at the hearings.

The bottom line is Goodwin Liu is a "loose cannon" who would be deadly to American freedom if empowered with the respect and responsibility of deciding some of the most important cases in our nation as a circuit court judge. He should never be confirmed as a judge.

Sincerely,

A handwritten signature in black ink that reads "Penny Nance". The signature is written in a cursive, flowing style.

Penny Nance
Chief Executive Officer

cc. Senate Judiciary Members



April 23, 2010

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-224-9102

Dear Senator Sessions:

On behalf of the 80-20 Initiative, by far the largest Asian American political organization with over 700,000 individuals and families on our e-mail list, I write in support of Goodwin Liu for appointment to the 9th Circuit Court of Appeals.

Prof. Liu is a nationally recognized scholar in education and constitutional law, who has been unanimously rated "Well Qualified" (its highest rating) for the bench by the American Bar Association. In addition, he is active in his community, including service in various community organizations.

As a scholar, Prof. Liu has not been afraid to speak his mind honestly, or to consider positions that might be considered controversial. Now, Republicans are unfairly imputing his scholarly integrity as a mark of judicial activism. Those who so simplistically tie a scholar's attempts to wrestle with issues with the way he will rule on the bench should look to the example of Felix Frankfurter, a prominent New Dealer and Harvard Law School professor, who was a model of judicial restraint on the Supreme Court.

Similarly, whatever positions Prof. Liu has taken as an academic will not necessarily reflect his judicial rulings. Rather, one should look to Goodwin Liu's integrity as a scholar who takes original positions, as a lawyer who strongly advocates for his clients, and a citizen who cares for his community.

Regarding a specific issue, the death penalty, Prof. Liu has stated that he will consider death penalty cases on the merits. Moreover, he has stated that he will follow the court's existing jurisprudence on the death penalty.

04/23/2010 3:28PM

A judge's qualifications are honesty and respect for the law. Politics has no place in it.

We implore you and you colleagues of the Senate to consider Prof. Liu on his merits.

Sincerely,



S. B. Woo
Founding President of 80-20 Initiative
on behalf 80-20 Board
(sbw@udel.edu; www.80-20initiative.net)

Cc: The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-224-9516

04/23/2010 3:28PM

April 13, 2010

Senator Patrick Leahy, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Nomination of Goodwin Liu for U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Senator Sessions:

We are former judges and prosecutors -- including former judges for the United States Courts of Appeal, former United States Attorneys, and former state judges and prosecutors -- who have had significant experience in the criminal justice system, including with capital punishment. Some of us support the death penalty; others of us oppose it. However, all of us are alarmed by certain recent, baseless attacks against Professor Goodwin Liu, President Obama's nominee to the United States Court of Appeals for the Ninth Circuit. These attacks, related to statements by Professor Liu regarding the death penalty, have been so erroneous and improper that we felt compelled to correct the record prior to the Committee's April 16th hearing to consider Professor Liu's nomination.

In its March 23, 2010, letter to the Committee, the Criminal Justice Legal Foundation ("CJLF") concluded that if confirmed, Professor Liu would advance his "anti-death penalty agenda" by ruling against prosecutors in every capital case brought before him. CJLF bases this conclusion on a six-year old memorandum Professor Liu co-authored in response to Justice Alito's nomination to the Supreme Court (the "Alito Memorandum"). Citing CJLF's analysis, which we regard as erroneous in many significant aspects, a group of California district attorneys has urged the Committee to reject Professor Liu's nomination. In our view, these conclusions are absolutely incorrect and unsupported by Professor Liu's record. Moreover, we believe, the rhetoric surrounding the criticism of his nomination has reached an unacceptable level, beyond what is appropriate in a civil, spirited debate.

Nowhere in the Alito Memorandum does Professor Liu state that he is opposed to the use of capital punishment or that he would not uphold death sentences as required by law. Nor are we aware of any of his other writings or public statements that reflect such a position. In fact, explaining why he did not examine one of Judge Alito's decisions, Professor Liu observed that sometimes an opinion upholding a death sentence may "involve[] fairly straightforward issues," where no constitutional violations occurred.

An examination of Professor Liu's record by attorney John A. Freedman at the law firm Arnold & Porter LLP confirms our conclusions. Mr. Freedman analyzed both the Alito Memorandum and the CJLF's letter discussing the memorandum. In stark contrast to CJLF's conclusions, he found that "Professor Liu takes no position on the death penalty... other than to state that he believes 'the Supreme Court has the ultimate responsibility for ensuring fairness in the administration of the death penalty.' This is an unremarkable position." We have provided a copy of his full analysis for the Committee's review following this letter.

Professor Liu has expressed a belief that every United States judge must exercise the utmost care to ensure that the fundamental due process rights of persons accused of crimes are protected. While our individual views about the propriety of the death penalty may vary, we all believe that it is the appropriate role of an appellate judge to ensure that these due process rights have not been violated and that every defendant is afforded a fair trial. This is especially true in death penalty cases, where the nature of the punishment is uniquely irreversible.

We applaud Professor Liu's commitment to ensuring the constitutional rights of defendants facing the death penalty. Contrary to his critics' claims, his commitment to the Constitution is commendable and vital for anyone seeking a position in what is often the court of last resort for individuals seeking to protect their constitutional rights.

Sincerely,

Rebecca A. Betts

United States Attorney, Southern District of West Virginia (1994-2001)

Robert C. Bundy

United States Attorney, District of Alaska (1994-2001)

J. Joseph Curran

Attorney General, State of Maryland (1987-2007)

Michael H. Dettmer

United States Attorney, Western District of Michigan (1994-2001)

Robert DelTufo

Attorney General, State of New Jersey (1990-1993)

United States Attorney for the District of New Jersey (1977-1980)

W. Thomas Dillard

United States Attorney, Northern District of Florida (1983-1986)

United States Attorney, Eastern District of Tennessee (1981)

Hon. Bruce J. Einhorn

United States Immigration Judge (Ret.) (1990-2007)

Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

Prof. Bennett L. Gershman

Prosecutor, Manhattan District Attorney's Office (1967-1972)

Hon. John J. Gibbons

United States Circuit Judge (Ret.), United States Court of Appeals for the Third Circuit (1970-1990); Chief Judge (1987-1990)

Daniel F. Goldstein

Assistant United States Attorney, District of Maryland (1976-1982)

Hon. Isabel Gomez

Judge (Ret.), Fourth Judicial District of Minnesota (1984-2006)

Hon. Joseph Grodin

Associate Justice (Ret.), California Supreme Court (1982-1987)

Chief Justice (Ret.), California Court of Appeals (1981-1982)

Associate Justice (Ret.), California Court of Appeals (1979-1981)

Hon. Shirley M. Hufstедler

United States Circuit Judge (Ret.), United States Court of Appeals for the Ninth Circuit (1968-1979)

United States Secretary of Education (1979-1981)

Associate Justice (Ret.), California Court of Appeal (1966-1968)

Judge (Ret.), Los Angeles County Superior Court (1961-1966)

Prof. Bruce R. Jacob

Former Assistant Attorney General, State of Florida

Hon. Nathaniel R. Jones

United States Circuit Judge (Ret.), United States Court of Appeals for the Sixth Circuit (1979-2002)

Assistant United States Attorney, Northern District of Ohio (1962-1967)

Miriam Krinsky

Assistant United States Attorney, Central District of California (1987-2002); Chief, Criminal Appellate Section (1992-2002); Chief, General Crimes Section (1991-1992)

Chair, Solicitor General's Appellate Working Group (2000-2002)

Kenneth J. Mighell

United States Attorney, Northern District of Texas (1977-1981)

Sam D. Millsap

District Attorney, Bexar County, San Antonio, Texas (1982-1987)

Thomas Campbell Morrow

Assistant State's Attorney, Dade County, Florida (1979-1980)

Assistant Attorney General, Maryland Criminal Investigations Division (1978-1979)

Assistant State's Attorney, Baltimore County (1975-1978)

Hon. William A. Norris

United States Circuit Judge (Ret.), Ninth Circuit Court of Appeals (1980-1997)

Hon. Stephen M. Orlofsky

United States District Judge (Ret.), District of New Jersey (1996-2003)
United States Magistrate Judge (Ret.), District of New Jersey (1976-1980)

A. John Pappalardo

United States Attorney, District of Massachusetts (1992-1993)

James H. Reynolds

United States Attorney, Northern District of Iowa (1976-1982)
United States Attorney, District of South Dakota by Special Appointment of Attorney General
(1978-1979)

James K. Robinson

United States Attorney, Eastern District of Michigan (1977-80)
Assistant Attorney General, Criminal Division, United States Department of Justice (1998-2001)

Thomas P. Sullivan

United States Attorney, Northern District of Illinois (1977-81)
Co-Chair, Illinois Governor's Commission on Capital Punishment

Hon. Joseph D. Tydings

United States Senator, (D-MD) (1965-1971)
United States Attorney, District of Maryland (1961-1963)

James J. West

United States Attorney, Middle District of Pennsylvania (1985-1993)
First Assistant United States Attorney, Middle District of Pennsylvania (1983-1985)
Assistant United States Attorney, Western District of Pennsylvania (1974-1979)

cc: Senate Judiciary Committee

Response to Criminal Justice Legal Foundation March 23, 2010 Analysis

John A. Freedman, Arnold & Porter LLP

On March 23, 2010, the Criminal Justice Legal Foundation submitted a letter to the Senate Judiciary Committee purporting to analyze the death penalty “record” of Professor Goodwin Liu. This analysis is based entirely on a paper Professor Liu co-authored in December 2005 entitled “Judge Alito and the Death Penalty.” That analysis noted that then-Judge Alito had participated in ten capital cases during his time on the Third Circuit Court of Appeals, and analyzed the five cases where there was “strong disagreement between Judge Alito and his colleagues.”

Of the five decisions analyzed in Professor Liu’s paper, then-Judge Alito wrote dissenting minority opinions in two (*Riley v. Taylor*, 277 F.3d 2001 (3d Cir. 2001) (en banc) and *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997)), and was reversed by the Supreme Court in a third (*Rompilla v. Beard*, 125 S. Ct. 2456 (2005)). Accordingly, CLJF’s declaration that Professor Liu “would have voted to reverse” the capital sentences in these decisions actually indicates that Liu’s views on the constitutional errors found to exist in these cases were consistent with a majority of judges on the Third Circuit or the Supreme Court at the time these cases were considered.

Moreover, the primary conclusions drawn by the CJLF from this paper – that Professor Liu is “intensely hostile to capital punishment,” that he will look “for any excuse to overturn a [capital] sentence,” and “will vote for the murderer on every remotely debatable point” – are entirely unsupported by the analysis. Rather, Professor Liu takes no position on the death penalty in this paper, or in his other writings, other than to state that he believes “the Supreme Court has the ultimate responsibility for ensuring fairness in the administration of the death penalty.” This is an unremarkable position.

The following is a summary of the five cases discussed in Professor Liu’s paper, as well as CJLF’s commentary on Professor Liu’s analysis.

1. *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997).

The majority decision in *Smith* was written by Judge Cowen (a former state prosecutor appointed to the Third Circuit by President Reagan) and joined by Judge Mansmann (another former state prosecutor appointed to the Third Circuit by President Reagan). The decision affirmed the findings of a federal district judge (Judge Harvey Bartle, a former Pennsylvania state Attorney General appointed by President George H.W. Bush) that the state trial judge improperly instructed the jury that the defendant could be convicted for first degree murder as an accomplice without specifically finding beyond a reasonable doubt that he intended to commit a murder. This error was compounded by repeated statements of the prosecutor during closing argument that the jury need not consider whether the defendant actually killed the decedent in order to convict. The majority found that the error in instructions, combined with the

prosecutors' comments, violated the defendant's due process rights, and remanded with directions that the defendant be released "unless the Commonwealth retries him."

CJLF's analysis of this case is limited to the point that the defendant's lawyers failed to object at the time to the jury instruction or on direct appeal to the state court. CJLF's assertion that "Professor Liu did not mention these facts" is incorrect – Professor Liu discussed these issues at pages 5 and 6 of his paper, noting that the majority decision rejected Judge Alito's argument on this point, because the government had failed to argue that the defendant did not preserve his objection.

2. *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (*en banc*).

Riley was an *en banc* decision written by Judge Sloviter. The majority of active Third Circuit judges found that a grant of *habeas corpus* was appropriate both because (a) there had been a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), because the prosecutor struck all of the prospective African-American jurors from the jury; and (b) the prosecutor made inappropriate remarks during the sentencing phase to the effect that the jury was not making a final decision because the verdict would be "automatically reviewed by the Supreme Court."

CJLF describes this case as one where "false allegations" of racism were made, and criticizes Professor Liu for "a propensity to indict and convict prosecutors of racism on flimsy evidence and to disregard the evidence to the contrary." These claims are without merit. Professor Liu never accused the prosecutors of racism. With regard to the *Batson* claim, the Third Circuit concluded that: (a) the prosecutor struck every prospective African-American juror from the *Riley* jury; (b) the prosecutor's office in question had struck every other prospective African-American juror in the three other first degree murder trials that occurred within a year of the *Riley* trial; and (c) two of the three *Riley* prospective jurors who were struck gave virtually identical responses to white jurors who were allowed to sit. In light of this record, the Third Circuit noted it was not "necessary to have a sophisticated analysis by a statistician to conclude there is little chance of randomly selecting four consecutive all white juries." Professor Liu's analysis of this case in the article is consistent with these conclusions and CJLF does not address any of these facts.

With regard to the prosecutor's remark, the Third Circuit found it was "misleading as to the scope of appellate review" and "misled the jury to minimize its role in the sentencing process," in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This aspect of the Professor Liu's analysis is not discussed in CJLF's letter.

3. *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004) *reversed sub nom. Rompilla v. Beard*, 125 S.Ct. 2455 (2005).

Rompilla was a 2-1 panel decision written by then-Judge Alito rejecting a claim that the defendant had failed to receive effective assistance of counsel in conjunction with the sentencing phase of his trial where defense counsel failed to develop or present evidence (i) that the defendant was subject to severe child abuse including being locked by his father in "a small wire

mesh dog pen that was filthy and excrement filled” and being beaten with “fists, leather straps, belts, and sticks,” and (ii) that the defendant suffered from “organic brain damage, an extreme mental disturbance impairing several of his cognitive functions” and that these issues may have been caused by fetal alcohol syndrome.

The Supreme Court reversed then-Judge Alito’s opinion in 2005, with Justice O’Connor calling the Third Circuit opinion “objectively unreasonable” under “clearly established” law. Professor Liu cited this language in his article. CJLF does not mention this case in its March 23, 2010 letter.

4-5. *Flamer v. Delaware and Bailey v. Snyder*, 68 F.3d 736 (3d Cir. 1995) (*en banc*) (consolidated for appeal).

This was an *en banc* decision concerning two consolidated cases written by Judge Alito, which rejected an argument that two capital sentences should be vacated where the Delaware Supreme Court had subsequently found that one of the “aggravating” factors relied upon by the jury in sentencing these defendants to death was unconstitutionally vague. Judge Alito concluded that the juries had found sufficient other “aggravating” factors to support the sentences.

CJLF’s analysis criticizes Professor Liu for failing to discuss the facts of the underlying crime, and states that his analysis of *Flamer* “demonstrates a propensity to overturn capital sentences on grounds that have little or nothing to do with the reliability of the verdict and that depend on changes in the rules made long after trial.” Neither of these conclusions is supported by Professor Liu’s analysis. Judge Alito’s decision barely discusses the underlying facts concerning the defendants’ crime, and accordingly, it is gratuitous to criticize Professor Liu on this basis. (CJLF does not discuss the facts particular to *Bailey* in its March 23, 2010 letter, and focused on the *Flamer* facts instead.)

Professor Liu’s analysis summarizes the two competing lines of Supreme Court cases that the Third Circuit considered. Professor Liu also notes that the trial judge in the case had given the jury interrogatories which included the unconstitutionally vague language and accordingly could have potentially “focus[ed] the jury’s attention on the statutory aggravating factor.” Professor Liu also notes both that the dissent had made this point and that Judge Alito stated that the majority “strongly disapproved of the practice” of using an interrogatory in these circumstances because it is “potentially misleading and injects unnecessary confusion into the jury’s deliberation.” There is nothing in this analysis that suggests a “propensity to overturn capital sentences.”

Jud

March 5, 2010

Senator Patrick Leahy
United States Senate

Dear Senator Leahy,

I am writing in support of the nomination of Goodwin Liu to the Ninth Circuit Court of Appeals.

When I retired as Professor of English after forty years on the Berkeley faculty I was able to indulge my long-standing interest in constitutional law, and for several years attended courses and seminars in the subject, offered by a number of Berkeley School of Law faculty. Among the many distinguished teachers I listened to and learned from, Professor Goodwin Liu stood out for his comprehensive, balanced, and probing analyses of Supreme Court decisions, their contexts and traditions.

So impressed was I by Professor Liu's abilities that when I learned that he was being considered for tenure I wrote, unsolicited, a letter to the Dean urging his promotion. (I should add that, as an indication of my bona fides, I informed the Dean that I had served as a Dean and also as member and chair of the campus Academic Personnel Committee, which reviews all advancement and promotion cases for Berkeley faculty).

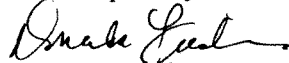
Not long after, I learned that Professor Liu has been nominated for the campus Distinguished Teaching Award, and wrote enthusiastically in support. This is the highest honor the Berkeley faculty awards for teaching, and I was delighted when Professor Liu was given the award.

What I admired about Professor Liu's teaching was, among other qualities, the clarity of his thinking, his comprehensive grasp of the basic issues in specific cases, his ability to identify and explain those issues, and his equally valuable ability to relate them to relevant social, economic, and political contexts. His mastery of such matters extended to the history of the Court and its role in American society, so that students were always provided with materials necessary to understand how that role developed. In short, he does not rest his analysis on the traditional "case" system of legal instruction, but recognizes a responsibility for shaping for his students an idea of the place of the law in the education of citizens.

What shone through his lectures and remarks at all times is his profound commitment to the rule of law and his utter dedication to its importance in the continued health of our democratic republic.

I urge you to give his nomination your most serious consideration. In my judgment, he would be an outstanding addition to the federal judiciary.

Yours respectfully,



Donald M. Friedman

**Remarks by the Honorable Kay R. Hagan
Judiciary Committee Hearing on the nomination of Catherine Eagles
April 16, 2010**

I would like to thank the Judiciary Committee, and particularly Chairman Leahy, Ranking Member Sessions and Senator Feinstein for holding this hearing on the nomination of Catherine Eagles to be United States District Judge for the Middle District of North Carolina. I strongly support Judge Eagles' nomination and I urge her quick approval by this committee and confirmation by the full Senate.

I have known Judge Eagles for more than 15 years. Throughout the years I have been able to see, time and again, the demeanor she brings to both her personal and professional life – she is approachable, kind and fair. All across the state, she has earned a reputation as highly intelligent, and she is respected by all her peers, regardless of political affiliation.

Judge Eagles comes from the small town of Marianna, Arkansas, where she sang in the choir at the First United Methodist Church. Her mother was a registered dietician and ran the lunch program at several county schools, then brought that experience here to Washington and worked for the Department of Agriculture on nutrition issues. Even though there were no female lawyers where Judge Eagles grew up, her mother had demonstrated to her that women could play a leadership role in their community, and Judge Eagles eventually chose to pursue a leadership role through a path in the law.

Eagles graduated from Rhodes College, which was then known as Southwestern College, in 1979. In 1981 she earned her juris doctorate at the National Law Center at George Washington University, and she went on to clerk for Judge J. Smith Henley on the U.S. Circuit Court of Appeals for the Eighth Circuit.

Life then brought Judge Eagles to my home town of Greensboro, North Carolina, where she practiced law at Smith Moore Leatherwood, specializing in complex civil litigation, products liability, trade secrets and covenants not to compete. She became a judge in the Guilford County Superior Court in 1993 and voters have returned her to that position three times. As a judge, Eagles has been honored for her fair administration of the law. She has led sessions on collegiality and professionalism and, in 2006, she became the first woman to hold senior resident status on the Court.

The Greensboro News and Record praised her nomination to the federal bench in March, saying "President Obama continues to pick experienced, mainstream North Carolina judges for federal court positions. The latest is Catherine Eagles...In 17 years on the Superior Court bench, she's proved to be a hardworking judge who applies the law firmly and fairly." Columnist Doug Clark noted last summer that she "is regarded in local legal circles as very smart and an important member of the N.C. Conference of Superior Court Judges." These statements echo my belief that Judge Eagles will make a strong, positive contribution to our federal courts.

It is my goal for North Carolina to have the most qualified, competent and fair-minded justices in its Federal Courts -- and Judge Eagles has all of these qualities in spades. She has tremendous experience after 17 years on the Superior Court in Guilford County, and I have full faith that she will serve with distinction on the Middle District Court.



THE AMERICAN CONSERVATIVE UNION

Dear Senator Sessions:

On behalf of the American Conservative Union, I urge you to reject the nomination of Goodwin Liu to the Ninth Circuit Federal Court of Appeals.

Not only does his record lack the experience for this critical position which, once confirmed, would make him an automatic candidate for a future Supreme Court vacancy, but his extensive record reads more like that of a political activist than a law professor.

Liu has made it clear that he believes the Constitution is merely a guide to judicial decisions and that what he calls "our collective values," "evolving norms" and "social understandings" should be the key to judicial decisions. Liu has backed race-based admissions to our universities in an *amicus* brief regarding a Seattle School District case. Liu's views on criminal law have drawn the opposition of 42 of California's 58 county district attorneys. Here is what they had to say referring to a paper on the subject Liu wrote in 2005:

"This document demonstrated beyond serious question that his (Liu's) views on criminal law, capital punishment and the role of the federal courts in second-guessing state decisions are fully aligned" with an appeals court that is "far outside of the judicial mainstream."

As for the issue of congressional deference to presidential nominees, it was Goodwin Liu who helped lead an attack on the Supreme Court nominations of Chief Justice John Roberts and Justice Samuel Alito. Liu said that Roberts had "an ideological agenda hostile to environmental workplace and consumer protections." In testifying against the Alito nomination, he claimed that Justice Alito was not "in the mainstream."

It is Professor Liu who is out of the mainstream and should be rejected by the Senate.

Sincerely,

Larry Hart
 Director of Government Relations
 The American Conservative Union

STANFORD
UNIVERSITYJOHN L. HENNESSY
President

March 18, 2010

The Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

This letter is being submitted on behalf of the three most recent presidents of Stanford University in support of the nomination of Goodwin Liu to the Ninth Circuit Court of Appeals.

Goodwin Liu attended Stanford University while Donald Kennedy was president, and he graduated *Phi Beta Kappa* in 1991. He was the recipient of numerous awards for his academic excellence, leadership, and contributions to the university, including the Lloyd W. Dinkelspiel Award for Outstanding Service to Undergraduate Education, the James W. Lyons Dean's Award for Service, the Boothe Prize for Excellence in Writing, the Walter Vincenti Prize, a David Starr Jordan Scholar, and the University President's Award for Academic Excellence. Dr. Kennedy worked with Goodwin Liu when he was one of the early student volunteers and leaders for the Haas Center for Public Service at Stanford (started by Dr. Kennedy), and while he was co-president of the student body in his senior year. In 1990 Donald Kennedy wrote a personal letter recommending Mr. Liu for the Rhodes Scholarship, which he won and used to obtain a Master's degree at Oxford University.

Gerhard Casper, President Emeritus of Stanford University and former Dean of the Law School and Provost at the University of Chicago, is now a constitutional law scholar at Stanford. Dr. Casper has come to know Mr. Liu as a Stanford alumnus and then as a colleague in constitutional law. He considers Mr. Liu as a measured interpreter of the Constitution. In expounding the Constitution, Mr. Liu fully appreciates that the commitments of the framers are decisive in finding and preserving constitutional meaning as we face new issues and challenges. In terms of fidelity to the Constitution and its interpretation by the Supreme Court, Mr. Liu will be a distinguished and faithful addition to the appellate bench.

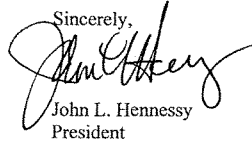
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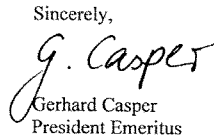
Building 10, Main Quadrangle Stanford, CA 94305-2060 T (650) 723-2481 F (650) 725-6847

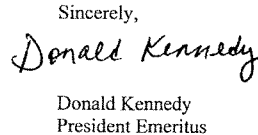
The Honorable Patrick J. Leahy
 The Honorable Jeff Sessions
 March 18, 2010
 Page 2

Goodwin Liu is currently a member of the Board of Trustees of Stanford University, the governing body for the university. John Hennessy has worked closely with him since his appointment as a trustee in 2008. Mr. Liu is an invaluable member of the Board, serving on the Committees on Audit and Compliance, Academic Policy, Planning & Management, and Alumni & External Affairs. In a group of highly accomplished trustees, he is widely regarded as insightful, hard working, collegial, and of the highest ethical standards.

In summary, Goodwin Liu as a student, scholar, and trustee has epitomized the goal of Stanford's founders, which was "to promote the public welfare by exercising an influence on behalf of humanity and civilization, teaching the blessings of liberty regulated by law, and inculcating love and reverence for the great principles of government as derived from the inalienable rights of man to life, liberty and the pursuit of happiness." We highly recommend Goodwin Liu for the honor and responsibility of serving on the United States Court of Appeals for the Ninth Circuit.

Sincerely,

 John L. Hennessy
 President

Sincerely,

 Gerhard Casper
 President Emeritus

Sincerely,

 Donald Kennedy
 President Emeritus

BUSINESS OFFICE
ONE PERIMETER PARK SOUTH
SUITE 330 NORTH
BIRMINGHAM, AL 35243
(205) 970-2211
FAX (205) 278-8522



MEETINGS ONLY LOCATION:
409 2ND STREET N.E.
WASHINGTON, DC 20002
WWW.JUDICIALACTIONGROUP.COM
PJ@JUDICIALACTIONGROUP.COM

March 22, 2010

The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
United States Senate
Washington, DC 20510

**Re: Examination of Goodwin Liu, Nominee to the United States Court of Appeals
for the Ninth Circuit**

Dear Chairman Leahy and Ranking Member Sessions:

President Obama has nominated Goodwin Liu to serve as an Article III judge for the United States Court of Appeals for the Ninth Circuit. As you consider whether to vote in favor of Mr. Liu, I respectfully request that you measure Mr. Liu first and foremost according to the standards provided in the Constitution which provides that an Article III judge must limit himself to the exercise of judicial power and must refuse to attempt to legislate from the bench.

This letter seeks to: (1) provide you with authority and support for the application of the constitutional standards of judges; (2) provide you with information regarding Mr. Liu's judicial philosophy which is inconsistent with constitutional standards, and (3) ask you to examine Mr. Liu during the Senate Judiciary Committee hearing according to the same criteria that Mr. Liu applied to John Roberts.

1. The Constitutional Standard.

The Constitution's division of legislative and judicial power is exact and express. Legislative power is the first and foremost subject addressed in our Constitution (following the preamble) at Article I, Section 1. The Constitutional text begins: "*All legislative powers* herein granted shall be vested in a *Congress* of the United States" Art. I, Sec. 1 (emphasis added). The judicial power on the other hand is addressed later in Article III, Section 2, which provides: "[t]he *judicial power* shall extend to all *cases*, in law and equity, arising under this Constitution, [and] the laws of the United States" Art. III, Sec. 2 (emphasis added).

In short, the first duty of a judge is to exercise "judicial power," not "legislative power." All legislative powers are reserved exclusively to Congress. Judges must decide cases according to previously stated principles of law which are made by the elected representatives of the People. Judges cannot legislate from the bench and judges may not substitute their own view of "empathy" for the American People's view of "empathy," which is expressed in their laws.

The idea of protecting one branch's power against usurpation by another branch is not a new concern. Our Nation's first President, George Washington, understood this concept and in his famous "Farewell Address" warned the government to avoid such encroachments.¹ He also

said that when society changes, the Constitution may be changed by amendment pursuant to Article V, but should never be changed by dishonest usurpation, because such *is the customary weapon by which free governments are destroyed.*ⁱⁱⁱ

The constitution provides that all – not most, but all – federal legislative power is given to the legislative branch, i.e., Congress. Accordingly, judges do not have authority to “legislate” from bench. Instead, judges must decide “cases” according to the laws enacted by those with legislative power.

2. Liu’s Judicial Philosophy is Inconsistent with the Constitution.

The judicial philosophy of Goodwin Liu is abundantly evident from his numerous publications, law reviews, opinion pieces, media interviews, and video statements. In short, Liu is opposed to the idea that the Constitution has defined meanings that can be known simply by reading its text and understanding the intent of who wrote and voted for the constitutional and/or legislative enactments. Instead, Liu believes that the Constitution changes and adapts over time not by amendment but rather as society evolves.

In his book, curiously named, “Keeping Faith with the Constitution,” Liu argues:

“Originalism – an exclusive reliance on public understandings of the text at the time it was ratified – has been vigorously championed by judges such as Antonin Scalia, Clarence Thomas, and Robert Bork, and by prominent conservatives such as Edwin Meese, who as Attorney General issued litigation guidelines directing government attorneys to “advance constitutional arguments based only on [the document’s] ‘original meaning.’” In addition to (and allied with) calls for originalism, a familiar refrain among conservative politicians is their promise to appoint only “strict constructionists” to the bench. Although the meaning of strict construction is far from clear, popular invocations of the term, like appeals to originalism, have served as a powerful polemic in opposition to evolving understandings of individual liberty, equal protection, federalism, and other constitutional concepts. Whether applied with rigor or intoned as rhetoric, originalism and strict construction have also served to legitimize conservative dominance of the federal judiciary for more than three decades.

In this book, we describe and defend an approach to constitutional interpretation that is richer than originalism or strict construction, more consistent with the history of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding. Interpreting the Constitution, we argue, requires *adaptation* of its broad principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the Founding, but rather how it should be applied today in order to sustain its vitality in light of the changing needs, conditions, and understandings of our society.

We use the term *constitutional fidelity* to describe this approach. To be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution’s meaning and democratic legitimacy over time. ***Original understandings are an important source of constitutional meaning, but so too are the other sources ... [including] the evolving norms and traditions of our society.***ⁱⁱⁱ

Liu is constitutionally wrong; original understands of legislative enactments are not “an important source,” but the only source of legislative meaning because all legislative power under the Constitution is reserved exclusively to Congress.

In a recent interview at the Brennan Center, Liu explained why he disagrees with the judicial philosophy of “originalism.” Liu stated:

"Conservatives have I think been remarkably successful in using language about strict construction of the Constitution or originalism as a way of reading the Constitution to try to reduce constitutional interpretation, and adjudication more generally, into something formulaic and mechanical that you can hold judges accountable for."

"I think that's nice in theory, but the reality is every judge really knows, and every lawyer really knows, is that the job of courts really involves fundamentally acts of judgment, especially in the hard cases. And how do people come at their judgments? Well, I think they, in our system, they've come at it through a variety of ways that, over time, represents the gradual accretion of precedent, of principal, lessons learned from experience and *an awareness of the evolving norms and social understandings of our country.*"

"And I think that to say that all we do is we look at the text and we read the words literally, or all we do is we look at the text and ask how did the people in 1789 or the people in 1868 understand it – that I think misses an entire range of experience that the nation has itself learned and that judges can rightly take into account in reading legal principles and legal text."

"So I would hope that the Obama administration would appoint judges who are broad minded in their view of the kinds of sources that are legitimate to take into account in reading especially the Constitution but broadly legal texts of all sorts."^{iv}

In a recent 2009 article in the ABA Journal, Liu stated, “We believe there’s room for refashioning the legal culture to meet contemporary challenges. The Constitution is meant to be a simple and spare document that adapts to the many changes the country would confront.”^v

Perhaps the most concise statement of Liu’s judicial philosophy is seen in his 2003 piece published in the Georgetown Law Journal, wherein Liu argued that “the meaning of the Constitution cannot be completely discovered by simply sitting down with the text and reading the words.”^{vi}

Liu does not believe in the judicial philosophy of originalism, i.e., the idea that judges should apply the meaning of the text as it was intended by those who wrote and voted for the subject text. Instead, he believes that judges may change the meaning of constitutional and statutory texts to arrive at results that are inconsistent with the laws’ original meaning. The Constitution does provide a manner for the law to change and adapt by way of the constitutional amendment process found in the text of the Constitution at Article V. Any other mode of adaptation is simply unconstitutional.

3. Fairness Dictates that the Senate Judiciary Committee Apply the Same Criteria to Liu that Liu Applied to John Roberts.

During the 2005 Senate confirmation battle of John Roberts as Chief Justice of the United States Supreme Court, Goodwin Liu wrote an opinion piece arguing that a very stringent standard should be applied to the nominee by the Senate.^{vii}

Liu said that Roberts' potential confirmation was a "worrisome prospect" and, accordingly, Liu argued that "it's fair and essential to ask how [Roberts] would interpret the Constitution and its basic values. Americans deserve real answers to this question, and it should be the central focus of the Senate confirmation process." Liu then listed a number of areas of inquiry and concluded that Roberts needed to tell "the Senate and the American people in the weeks ahead his honest and considered beliefs about the Constitution he is sworn to uphold."

The areas that Liu listed as appropriate during a judicial confirmation process included: so called "gay rights," "abortion rights," "the environment," "home grown marijuana," "environmental laws," "affirmative action," professional associations, and a host of other issues.

Liu called on Roberts and the Senate to get to the bottom of Roberts' views on these issues, because as Liu said, a federal judge "sit[s] with life tenure." Liu articulated an exacting standard for judicial nominees. Fairness dictates that this same standard should be applied to Liu.

Conclusion

Goodwin Liu has proven through his many publications, law reviews, opinion pieces, media interviews and video statements that he rejects the notion that the meaning of the Constitution is fixed per the intent of those that wrote and voted for it. Liu's judicial philosophy is inconsistent with the Constitution. Accordingly, unless Mr. Liu is able to show during his hearing before the Senate Judiciary Committee that his judicial philosophy is not represented by his previous publications and statements of record, then I believe you will find that his judicial philosophy is inconsistent with the Constitution and, accordingly, that he is not suited to serve as an Article III judge.

Respectfully,

Phillip L. Jauregui

ⁱ George Washington's Farewell Address, The Independent Chronicle, September 26, 1796. (Emphasis added.)

ⁱⁱ Specifically, Washington stated:

It is important, likewise, that the habits of thinking in a free country should inspire caution in *those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another.* The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. *If, in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.*"

George Washington's Farewell Address, The Independent Chronicle, September 26, 1796. (Emphasis added.)

ⁱⁱⁱ Goodwin Liu, et al, KEEPING FAITH WITH THE CONSTITUTION, 1-2 (2009) (internal footnotes omitted) (emphasis added).

^{iv} The video of the interview is available at:

<http://www.youtube.com/watch?v=eY1F07YqJRY&feature=related> (see the 1:55 mark)

(emphasis added). A transcription of the remarks is available at

<http://www.obamajudge.com/index.php/jag/94>.

^v Leslie A. Gordon, "Left Turn Permitted," ABA Journal, March 1, 2009, and see

http://www.abajournal.com/magazine/article/left_turn_permitted/print/. Liu was referring to himself and the group that he chairs, the American Constitution Society.

^{vi} Goodwin Liu, et al, *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L. J. 439 at 444 (2003).

^{vii} See at:

http://www.bloomberg.com/apps/news?pid=newsarchive&sid=alGK4Jy5eXwc&refer=columnist_liu-redirectoldpage#.



Judicial Watch

Because no one is above the law!

March 24, 2010

The Honorable Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
United States Senate
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Senator Sessions:

Judicial Watch is a non-partisan, educational foundation that advocates for transparency, accountability, and transparency in government, politics, and the law. Judicial Watch is America's largest and most effective government watchdog, with nearly 200,000 active supporters who are committed to the rule of law.

We have grave concerns about the pending nomination of Goodwin Liu to be United States Circuit Judge for the Ninth Circuit.

In a book he co-authored, *Keeping Faith with the Constitution*, Mr. Liu suggests that the Constitution should be interpreted using the "evolving norms and traditions of our society." This activist theory for interpreting the Constitution would substitute the whims of individual judges over the text and original meaning of the U.S. Constitution. A copy of this book is available [here](http://www.acslaw.org/keepingfaith) (<http://www.acslaw.org/keepingfaith>).

Mr. Liu joined an amicus brief that suggests that the Constitution's equal protection clause requires allowing same-sex couples to marry. Brief of Amici Curiae Professors of Constitutional Law In Support of Respondents Challenging the Marriage Exclusion, *In Re Marriage Cases*, Case No. S147999 (CA Supreme Court)¹ Mr. Liu has

¹ See *In Re Marriage Cases*, Case No. S147999 (CA Supreme Court) <http://data.lambdalegal.org/pdf/legal/inre_ca_ba_20070928_supreme_professors-sullivan-and-karlan.pdf> accessed March 23, 2010.

The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
March 24, 2010
Page Two

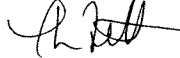
a radical and expansive view of judicially-enforceable rights to "welfare,"² and seems to oppose the notion that the Constitution is colorblind.³

Also of concern is Mr. Liu's lack of practical legal experience. Mr. Liu has practiced law for just a little over ten years. Judicial nominees ought to have significant practical experience as a lawyer or a judge, especially nominees for appellate seats.

Judicial Watch requests that the Committee thoroughly examine Mr. Liu's record and judicial philosophy. The rule of law is harmed when activist judges substitute their own will for the plain text and meaning of the U.S. Constitution. The Committee should be prepared to oppose his nomination if such an examination confirms that he embraces an activist judicial philosophy.

Thank you.

Sincerely,



Thomas Fitton
President

cc: Senate Judiciary Committee Members
By: Fax and Mail

² See Liu Goodwin, "Rethinking Constitutional Welfare Rights," *Stanford Law Review*, November 2008 <http://findarticles.com/p/articles/mi_hb3435/is_200811/ai_n32305705/> accessed March 23, 2010.

³ See Liu Goodwin, "The meaning of Brown vs. the Board," *Los Angeles Times*, December 25, 2006 <<http://www.latimes.com/news/opinion/la-oe-liu25dec25.0.382863.story?col=la-opinion-center>> accessed March 23, 2010.

The Leadership Conference
on Civil and Human Rights

1629 K Street, NW 202.466.3311 voice
10th Floor 202.466.3435 fax
Washington, DC www.civilrights.org
20006



CONFIRM GOODWIN LIU TO THE 9TH CIRCUIT

May 13, 2010

The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of The Leadership Conference on Civil and Human Rights, we write to express our strong support for the confirmation of Professor Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit. Professor Liu's stellar background, his intellectual honesty and independence, and his utmost respect for the Constitution and its values all make him an outstanding candidate. We urge the Senate Judiciary Committee and the full Senate to confirm Professor Liu without delay.

Professor Liu's credentials are truly outstanding. The son of Taiwanese immigrants who instilled in him a tremendous commitment to democracy and an abiding love of education, Liu graduated from his high school as a co-valedictorian, graduated Phi Beta Kappa from Stanford University, and subsequently studied in Oxford University as a Rhodes Scholar. At Yale Law School, he distinguished himself by serving as an editor of the Yale Law Journal and through numerous awards for his oral advocacy and writing skills. Following law school, he served as a law clerk for both Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and Justice Ruth Bader Ginsburg on the Supreme Court, interrupting his clerkships only for a stint with the U.S. Department of Education in which he worked on policies affecting disadvantaged children.

In 2003, after several years in private practice with the prominent law firm O'Melveny & Myers, Liu joined the faculty of the University of California, Berkeley School of Law (Boalt Hall). Within five years, he earned tenure and was promoted to Associate Dean. At the same time, he has remained active as a practicing attorney and a policy advisor, and has written extensively on education, constitutional law, and a number of other issues.

Professor Liu's writings and other legal work show that he takes a highly thoughtful approach to difficult issues, carefully analyzing all sides of arguments and reaching conclusions based on well-established law rather than political ideology. He consistently displays the highest level of intellectual honesty,




independent thinking, and commitment to fairness – meaning that litigants before him will feel certain, regardless of the outcome, that they were given a fair day in court. It is no wonder that his nomination has garnered strong support, from across the political and ideological spectrum, among those who know him best.

We hope you will support Professor Liu's prompt confirmation, and that you will reject the efforts by some ideological extremists to tarnish his outstanding reputation. Thank you for your consideration. If you have any questions, please feel free to contact Senior Counsel Rob Randhava at (202) 466-6058.

Sincerely,


Wade Henderson
President & CEO


Nancy Zirkin
Executive Vice President

Statement of

The Honorable Patrick LeahyUnited States Senator
Vermont
April 16, 2010

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On Judicial Nominations
April 16, 2010

Today, the Committee finally welcomes two of President Obama's nominees to fill vacancies on the Federal bench in California, Professor Goodwin Liu, nominated to fill a vacancy on the Ninth Circuit, and Magistrate Judge Kimberly Mueller, nominated to a judgeship in the Eastern District of California. These nominees were prepared to appear before the Committee March 24, and I was disappointed that Republicans employed a seldom-used procedural rule at the last minute to prevent them from appearing. They and their families had traveled across the country, and have done so again to appear today. I welcome them at last to the Committee.

I also look forward to hearing from the other nominees before the Committee today: Catherine Caldwell Eagles, nominated to a seat on the Middle District of North Carolina, and who's nomination is supported by Senator Hagan and Senator Burr; and two nominees to seats in the District of South Carolina, Richard Mark Gergel and J. Michelle Childs, both of whom are supported by Senator Graham, a member of this Committee.

I thank Senator Feinstein for chairing this important hearing today. Committee Republicans have requested that we delay Professor Liu's hearing a third time. I first accommodated their request not to schedule it until the end of March; it was delayed a second time through the use of the two-hour rule. As was noted yesterday at our business meeting, delaying this hearing yet again would have permitted an extension of the weeks of unanswered attacks on Professor Liu and his record. Those attacks should not continue.

Professor Liu has not been a stealth candidate. He has produced voluminous materials. Committee members have had more than seven weeks to review this nominee's record. They have also had two weeks to review the small amount of new, supplemental materials provided by Professor Liu on April 5. Republican members seem to be applying a standard to President Obama's nominees that they did not demand of President Bush's, many of which provided far less detail about their records to the Committee than Professor Liu has provided. Contrary to suggestions that the April 5 supplement was extensive, that supplement contained less than two dozen unique items including comments in Professor Liu's own words. The remaining items were duplicates of already-submitted items, cursory updates, listings of events or news articles.

Two weeks is more than sufficient time for a fair and thoughtful review of this small amount of information, especially as none of the new items presented new issues or unfamiliar topics from those in the rest of Professor Liu's record, which he had previously provided to the Committee, and which could already serve as a basis for inquiry and questioning of the nominee.

This is especially true in light of Professor Liu's well-known record as a widely-respected constitutional law professor. As conceded by a Fox News commentator, Professor Liu's qualifications for the appellate bench are "unassailable." It has been apparent since he was nominated that Senate Republicans were familiar with his record, immediately declaring themselves "disappointed" by the President's nomination of Professor Liu and claiming that Professor Liu was "far outside the mainstream of American jurisprudence." This opposition was instantaneous and has continued. Republicans continue to try to prevent Professor Liu from appearing, from answering their questions, and from addressing their concerns. They are being unfair. Their obstruction has prevented him from addressing these questions, while the attacks continue. It is time to hear from Professor Liu.

The son of Taiwanese immigrants, Professor Liu would bring much-needed diversity to the Federal bench. There are currently no active Asian American Federal appeals court judges in the country. Judge Denny Chin of New York has been nominated to the Second Circuit, but Senate Republicans have stalled his nomination for over three months, despite his unanimous approval by the Senate Judiciary Committee. The Senate majority leader yesterday was forced to file cloture on his nomination.

Goodwin Liu is a widely-respected constitutional law professor with sterling credentials. He has a brilliant legal mind, and is admired by legal thinkers and academic scholars from across the political spectrum. Professor Liu has spent his career in public service, private practice and as a teacher since receiving degrees from Stanford University and Yale Law School. He is a Rhodes Scholar. After law school, Professor Liu clerked for D.C. Circuit Judge David Tatel and Supreme Court Justice Ruth Bader Ginsburg.

I urge all Members of the Committee to treat Professor Liu fairly and to give serious and open-minded consideration to his nomination. This hearing is our opportunity to ask questions, and for Professor Liu to respond. Reflexive opposition risks rendering these hearings a meaningless roadblock and a source of delay, rather than an important component of the confirmation process. That would be an abuse of this process and wrong. I recall another widely-regarded law professor who appeared before our Committee as a nominee, University of Utah Professor Michael McConnell. Like Professor Liu, he was supported by a senior member of this Committee, Senator Hatch. Professor McConnell was nominated by President Bush to fill a seat on the Tenth Circuit. Professor McConnell's provocative writings included staunch advocacy for reexamining the First Amendment Free Exercise Clause and the Establishment Clause jurisprudence. He had expressed strong opposition to *Roe v. Wade* and to the clinic access law, and he had testified before Congress that he believed the Violence Against Women Act was unconstitutional. Professor McConnell's writings on the actions of Federal District Court Judge John Sprizzo in acquitting abortion protesters could not be read as anything other than praise for the extra-legal behavior of both the defendants and the judge.

Each of these issues was explored in connection with his hearing before this Committee. I had concerns that Professor McConnell would turn out to be a conservative activist on the Tenth Circuit. I was concerned about his refusal to take responsibility for his harsh criticism of the Supreme Court's decision in the Bob Jones case.

I put faith in Professor McConnell's assurances that he understood the difference between his role as a teacher and advocate, and his future role as a judge. He assured us that he respected the doctrine of stare decisis, and that as a Federal appeals court judge, he would be bound to follow Supreme Court precedent. I supported his nomination, as did other Democratic Senators. He was reported favorably by this Committee, and he was confirmed to the Tenth Circuit by voice vote in the Senate just one day after his nomination was reported.

I hope that Republican Senators serving on this Committee and in the Senate will apply these same standards to the nomination of Professor Liu, another brilliant law professor and advocate. I hope they will give the same credence to Professor Liu's assurances that he understands the proper role of a judge. I hope they will keep the same open mind kept by Democratic Senators in reviewing Professor McConnell's qualifications for the bench. I hope they will not apply a double standard to this extraordinary nominee.

Of course, Senate Republicans threatened to filibuster President Obama's judicial nominations before the President had made a single one. They insisted on filibustering the nomination of Judge David Hamilton of Indiana, a well-respected mainstream district court judge who had the support of Indiana Senator Dick Lugar, the senior Republican in the Senate. The same philosophy of delay forced the Senate to invoke cloture, a time consuming process, on the nomination of Justice Barbara Keenan of Virginia the Fourth Circuit. She was then confirmed by a vote of 99 to zero.

These filibusters and stalling tactics have been evident since President Obama took office. Indeed, 15 of the 18 Federal circuit and district court judges confirmed have been without opposition. Nonetheless, their confirmations have delayed and stalled. That lack of progress stands in stark contrast to this date in 2002, when a Democratic Senate majority had proceeded to confirm 43 of President Bush's judicial nominations. Another 25 nominations are being stalled on the Senate Executive Calendar. The vast majority of these 25 nominations were reported with no opposition in Committee. If the Senate confirmed those 25 nominees, we would achieve the same record of filling vacancies with President Obama's nominees as we did for President Bush's by this date in 2002. Yet, Republicans drag out the process and stall Senate consideration by withholding their consent. I am hopeful the logjam will break now that the majority leader has filed cloture on two long-pending circuit court nominees, Denny Chin and Thomas Vanaskie. Both nominations were reported by the Committee in December.

During President Bush's first two years the Senate confirmed 100 of his judicial nominees. Republican obstruction has us on pace to confirm fewer than 30 Federal circuit and district court nominees before this Congress adjourns. Their approach has led to skyrocketing judicial vacancies, again, like the pocket filibusters they employed during the Clinton presidency that led to a vacancy crisis in the 1990s. They do a disservice to the American people seeking justice in our overburdened Federal courts. We have to do far more to address the growing crisis of

unfilled judicial vacancies, which now top 100 and judicial emergency vacancies, which now top 40. We owe it to the American people to do better.

I welcome the nominees and their families to the Committee today and I want to congratulate Professor Liu and his wife Ann O'Leary on the birth of their son the week before his originally scheduled hearing.

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Post Office Box 540774
Orlando, FL 32854-0774
Telephone: 800-671-1776
Facsimile: 407-875-0770
www.LC.org

1015 Fifteenth St. N.W., Ste. 1100
Washington, DC 20005
Telephone: 202-289-1776
Facsimile: 202-216-9656

Post Office Box 11108
Lynchburg, VA 24506-1108
Telephone: 434-592-7000
Facsimile: 434-592-7700
liberty@LC.org

Reply to: DC Office

March 16, 2010

The Honorable Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20515

Re: Nomination of Goodwin Liu

Dear Chairman Leahy:

Liberty Counsel is a non-profit litigation, education and policy organization with offices in Florida, Virginia, Texas and Washington, D.C., and hundreds of affiliate attorneys across the Nation. As an organization that defends the Constitution, Liberty Counsel writes on behalf of Americans concerned about political activism in the judicial branch.

As you know, President Barack Obama recently nominated Goodwin Liu for the United States Court of Appeals for the Ninth Circuit. As you consider the Committee hearing regarding Liu, Liberty Counsel encourages you to consider his ideology and judicial philosophy, and when you vote regarding whether to report the nomination and have it placed on the Senate's Executive Calendar, we ask that you vote no.

After you consider Goodwin Liu's ideology and judicial philosophy, we are confident you will conclude that Liu is not qualified for a federal judgeship. He graduated from law school less than twelve years ago and after graduating, practiced law for only two years, never gaining experience as a trial attorney. His inexperience becomes obvious when considering statements Liu made on a number of important issues, one of which being the interpretation of the Constitution of the United States.

It is important for you to engage Liu regarding how he intends to interpret the Constitution, and just as he said in reference to Chief Justice Roberts' confirmation, this "should be the central focus of the Senate confirmation process," because a federal judge sits "with life tenure." In that regard, it is central to note that Goodwin Liu is an unapologetic judicial activist.

Rather than construing the Constitution in accordance with the intent of its drafters, Liu argues that constitutional scrutiny “requires adaptation” because of the “evolving norms of our society.”

Liu’s concept of the Constitution is so misguided he has stated that when adjudicating questions involving social values and concerns, courts should look to “public policies, institutions, and practices as well as predictive judgment,” rather than to the Constitution and related legislation. Liu has even confounded the Constitution to the extent of propagating the idea that individuals have a constitutional right to welfare.

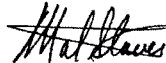
Liu not only lacks sufficient understanding of the Constitution to sit on the Ninth Circuit, but he is also decidedly biased on a number of issues. This is evident based on his association with organizations like the American Constitution Society, the ACLU, the National Women’s Law Center, and the Chinese for Affirmative Action. He has also been vocal on a number of issues, including same-sex marriage and abortion, denouncing the California Marriage Amendment and advocating for abortion, including federally funded.

Liu’s lack of understanding about America, its judicial system and its economic system were further illuminated when he commented that Chief Justice Roberts was unqualified because of his belief in free enterprise, private ownership of property, and limited government.

Confirming Liu would only add more chaos in a circuit that is already overturned more than any other circuit in the nation (in one term 94% of the Ninth Circuit cases reviewed by the Supreme Court were overturned). Liberty Counsel asks that you weigh Liu’s inexperience, lack of understanding about the Constitution, and obvious bias in considering his nomination.

Your vote is one of the most important and lasting votes a senator can make and to prevent an individual like Goodwin Liu from legislating from the bench is a key purpose of the “advice and consent” process and the duty of the Senate Judiciary Committee.

Respectfully,



Mathew D. Staver

MDS/mc



NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

April 15, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re.: Nomination of Goodwin H. Liu to the U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Ranking Member Sessions:

I write on behalf of the undersigned Asian Pacific American organizations to support President Barack Obama's nomination of University of California Berkeley School of Law Associate Dean and Professor Goodwin H. Liu for the United States Court of Appeals for the Ninth Circuit. The organizations represent diverse constituencies on a wide variety of issues but share a common interest in ensuring that qualified Asian Pacific Americans have the opportunity to succeed and excel in the legal profession.

Professor Liu's confirmation is important and significant to the Asian Pacific American community, which currently has no representation in the federal appellate courts. Professor Liu is the second Asian Pacific American nominated to the federal appellate courts by President Obama, who earlier nominated Judge Denny Chin for the Second Circuit Court of Appeals. Out of approximately 875 federal judgeships nationwide, there are only 10 Asian Pacific American judges. If confirmed, Professor Liu would be the only Asian Pacific American among the 25 active federal appellate court judges in the Ninth Circuit. That statistic is particularly troubling given that over 12% of the population of the Ninth Circuit is Asian Pacific American. Moreover, it has been over five years since there has been an active Asian Pacific American federal appellate court judge and only four Asian Pacific Americans have ever served as federal appellate court judges.

1612 K STREET, NW, SUITE 1400 • WASHINGTON, DC 20006
PHONE: (202) 775-9555 • FAX: (202) 775-9333 • WWW.NAPABA.ORG

04/15/2010 11:59AM

The Honorable Patrick J. Leahy and the Honorable Jeff Sessions
April 15, 2010
page 2

Professor Liu has impressive credentials and a broad range of experiences that make him well qualified to serve as a federal appellate judge. A distinguished graduate of Stanford University, Oxford University, and Yale Law School, Professor Liu is a Rhodes Scholar, a former Supreme Court clerk, and a member of the American Law Institute. He is also a nationally recognized scholar and distinguished Professor at U.C. Berkeley School of Law who earned tenure and promotion to Associate Dean in only five years.

Professor Liu also has the practical experience necessary for a federal appellate judge. He served as a Special Assistant to the Deputy Secretary at the U.S. Department of Education, where he advised the Secretary and Deputy Secretary on a range of legal issues, including the development of guidelines to implement a \$134 million congressional appropriation in 2000 to help turn around low-performing schools. In addition to his public service, Professor Liu was a corporate litigation attorney with O'Melveny & Myers in Washington, D.C.

Professor Liu's background is an inspiring story for all Asian Pacific Americans. He was born in Augusta, Georgia, to Taiwanese doctors recruited to work in the United States by American medical institutions seeking assistance in serving underserved areas. Living in Georgia and then Florida in the late 1960s and early to mid-1970s, Professor Liu did not learn to speak English until kindergarten because his parents worried that he and his brother would acquire an accent if they were taught at home. Professor Liu's interest in public service and the law was sparked when he served as a page in the U.S. House of Representatives, thanks to the sponsorship of the late Congressman Robert Matsui.

Professor Liu is an outstanding and qualified judicial candidate who will bring intellect and objectivity to his service as a judge on the U.S. Court of Appeals for the Ninth Circuit. Accordingly, we proudly support the nomination of Associate Dean and Professor Goodwin H. Liu for the U.S. Court of Appeals for the Ninth Circuit and urge for his speedy confirmation.

Sincerely,



Joseph J. Centeno
President
National Asian Pacific American Bar Association

On behalf of:

National Council of Asian Pacific Americans (NCAPA)
Arizona Asian American Bar Association
Asian American Bar Association of the Greater Bay Area
Asian American Bar Association of the Greater Chicago Area
Asian American Bar Association of Houston

04/15/2010 11:59AM

The Honorable Patrick J. Leahy and the Honorable Jeff Sessions
April 15, 2010
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Asian American Citizens for Justice / Asian American Center for Justice
Asian American Institute
Asian American Lawyers Association of Massachusetts
Asian American Legal Defense and Education Fund
Asian American Justice Center
Asian Law Alliance
Asian Law Caucus
Asian Pacific American Bar Association of D.C.
Asian Pacific American Bar Association of Los Angeles County
Asian Pacific American Bar Association of Maryland
Asian Pacific American Bar Association of Pennsylvania
Asian Pacific American Bar Association of South Florida
Asian Pacific American Bar Association of Virginia
Asian Pacific American Community Support and Service Association
Asian Pacific American Labor Alliance
Asian Pacific American Lawyers Association – New Jersey
Asian Pacific American Legal Center
Asian Pacific Bar Association of Sacramento
Asian Pacific Bar of California
Asian Pacific Bar Association of Silicon Valley
Asian & Pacific Islander American Health Forum
Asian & Pacific Islander American Vote
Boat People S.O.S.
Dallas Asian American Bar Association
Filipino Bar Association of Northern California
Japanese American Bar Association of Greater Los Angeles
Japanese American Citizens League
Korean American Bar Association of Southern California
Korean American Bar Association of Washington
Korean American Resource and Cultural Center (Chicago)
Korean Resource Center (Los Angeles)
Missouri Asian American Bar Association
National Alliance of Vietnamese American Service Agencies
National Asian American Pacific Islander Mental Health Association
National Asian Pacific American Bar Association
National Asian Pacific American Bar Association – Minnesota
National Asian Pacific American Families Against Substance Abuse
National Asian Pacific American Women's Forum
National Association of Asian American Professionals
National Coalition for Asian Pacific American Community Development
National Korean American Service & Education Consortium

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The Honorable Patrick J. Leahy and the Honorable Jeff Sessions
April 15, 2010
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Orange County Asian American Bar Association
Orange County Korean American Bar Association
Oregon Asian Pacific American Bar Association
Organization of Chinese Americans (OCA)
Philippine American Bar Association of Los Angeles
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June 23, 2010

The Honorable Patrick J. Leahy
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Subject: Judge Catherine Eagles

Dear Senator Leahy:

On behalf of the North Carolina Bar Association and its more than 15,000 members, I am writing to urge the United States Senate to endorse one of President Obama's recent nominations to the U.S. District Court.

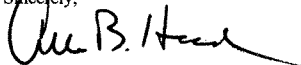
Specifically, the Bar Association supports the nomination of Judge Catherine Eagles for the Middle District of North Carolina. Judge Eagles is well qualified and has strong support from her home state Bar Association. She has a proven record of judicial fairness and would make a valuable addition to the United States District Court.

In your capacity as Chairman of the Senate Judiciary Committee, I am convinced that you understand that our judicial system must provide judicial officers in each jurisdiction, consonant with the state's population and judicial needs, to fulfill its mission of promoting the equitable and effective administration of justice. Judge Eagles meets this requirement.

Toward this end, the North Carolina Bar Association would greatly appreciate your support and leadership on this important issue.

Please feel free to contact me with any questions or concerns.

Sincerely,



Allan B. Head
Executive Director

cc: Senator Kay R. Hagan
Senator Richard Burr
John R. Wester

Eugene C. Pridgen
Kimberly Y. Crouch

PO Box 3688 • GARY, NC 27519-3688
NC BAR CENTER • 8000 WESTON PARKWAY • GARY, NC 27513
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California Labor Federation AFL-CIO

www.workingcalifornia.org
Headquarters: 600 Grand Ave
 Suite 410
 Oakland, CA 94610-3561

 1127 11th St
 Suite 425
 Sacramento, CA 95814-3809

 3303 Wilshire Blvd
 Suite 415
 Los Angeles, CA 90010-1798

 510.653.4000 tel
 510.653.4099 fax

 916.444.3676 tel
 916.444.7693 fax

 213.736.1770 tel
 213.736.1777 fax

March 19, 2010

The Honorable Jeff Sessions
 Ranking Member
 U.S. Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

RE: Nomination of Goodwin H. Liu
 to the United States Court of Appeals for the Ninth Circuit

Dear Senator Sessions:

President Obama has stated that he will seek to appoint to the federal bench individuals who are dedicated to the rule of law, who honor our constitutional traditions, and who respect the integrity of the judicial process and the appropriate limits of the judicial role. Professor Goodwin H. Liu, a Californian, is such a person. The California Labor Federation, representing 1.4 million working families, wholeheartedly supports his nomination to the Ninth Circuit Court of Appeals.

Professor Liu's upbringing represents the American Dream. His parents emigrated from Taiwan with little money but worked hard to make the most of the opportunities that America offered. Professor Liu and his older brother did not learn English until they started kindergarten. Yet, he graduated high school in Sacramento as valedictorian. After graduating from Stanford and obtaining a Master's Degree at Oxford University as a Rhodes Scholar, he attended Yale Law School, where he was editor of the Yale Law Journal. He clerked for Judge David S. Tatel on the U.S. Court of Appeals for the D.C. Circuit and with Justice Ruth Bader Ginsburg on the U.S. Supreme Court. These are remarkable accomplishments for a first generation American.

He has a strong belief in the importance of giving back to society. Although he was a biology major in college and was admitted to top medical schools such as Harvard and the University of California at San Francisco, Professor Liu's involvement in student government and as a summer school teacher for low-income youth moved him toward law and public service. He has worked extensively on creating public service opportunities, and while working for the federal government, assisted in the start of the AmeriCorps program.

Professor Liu has had a distinguished academic career at the University of California-Berkeley School of Law. He is highly regarded by his students, and greatly respected by his peers. In 2009, Professor Liu received UC Berkeley's Distinguished Teaching Award, the



The Honorable Jeff Sessions
March 19, 2010
Page 3

university's most prestigious award for teaching excellence, and he was selected that year by the graduating class to be a commencement speaker. He has published numerous scholarly treatises.

Professor Liu's background and life experiences show that he would be an excellent jurist. As a Supreme Court Justice recently noted, it is important for the courts to have people with varied backgrounds and many different experiences sitting on the bench. The court is enriched by such jurists, and Professor Liu would bring a fresh view to the Ninth Circuit.

The courts are regularly presented with claims that affect working families, such as the failure to pay overtime; discrimination based on race, gender, disability or other grounds; the improper use of pension fund assets; and attacks on their unions by employers unhappy with their union's efforts to organize and represent more workers. Judges need to fairly assess these claims, and to interpret the Nation's laws in a manner that promotes the goals of those laws. We believe that Professor Liu will be such a judge.

In sum, we believe that Professor Liu has the skills, temperament and qualifications to be a first-rate judge. He would be an outstanding addition to the Ninth Circuit Court of Appeals. We strongly urge that his nomination be voted out of committee unanimously, and confirmed without delay by the Senate.

Sincerely,



Art Pulaski
Executive Secretary-Treasurer

AP:em

opeiu3afl(31)em

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The Honorable Patrick Leahy
Chair, Senate Judiciary Committee
493 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

The Republican National Lawyers Association (RNLA) does not support the confirmation of Goodwin Liu as a United States Circuit Judge for the Ninth Circuit and urges you and all senators to vote against his confirmation.

A federal judge holds a position of great influence and respect, and can hold it for a lifetime. It is the position of the RNLA that judicial nominees must be fully committed to impartially adjudicating the cases that come before them. Judges are not elected and do not answer to the people for their decisions. A judge's role is to apply the law as written and not to engage in policymaking. These are fundamental principles to which the judicial branch must adhere, and in our view, Mr. Liu does not agree with them. We make this determination based on articles and statements made by Mr. Liu.

Mr. Liu's comments demonstrate his judicial philosophy is not within the mainstream and he emphasizes a commitment to placing ideology first in judicial decision-making. In a 2009 speech, Mr. Liu stated, "[b]ut the overarching question it poses is not simply how the Constitution would have applied during the Framing era, but rather how it should apply today in order to preserve its meaning and authority in the light of evolving precedent, historical experience, practical consequences, and societal change." Moreover, in describing his approach to Constitutional interpretation, Mr. Liu has stressed "constitutional fidelity" stating that he "envisions the judiciary . . . as a culturally situated interpreter of social meaning." Such an approach allows a judge to insert his or her own opinions about what the Constitution *should* mean, as opposed to what it says. It is this type of theory that allows judges to ignore the plain meaning of the Constitution and laws and to replace it with that they personally think is right based upon their own interpretation of "social meaning."

Mr. Liu summarized his troubling judicial philosophy in a book, *Keeping Faith with the Constitution*:

"The problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be

persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.”

Americans must have confidence that when they appear before a judge, they will receive a fair and unbiased hearing and determination of their claims and defenses. That standard is abased when judges at the highest level of the judiciary demonstrate that they are less than stalwart defenders of “blind justice.” Mr. Liu’s writings and statements make clear that he does not believe in and will not adhere to the fundamental principle that justice must be blind and impartial. Consequently, his confirmation as a United States Circuit Judge for the Ninth Circuit would send the wrong message to all Americans, rich and poor alike, that judges are “advocates” on behalf of groups and causes with which they identify and not neutral arbitrators obligated to impartially adjudicate the cases that come before them.

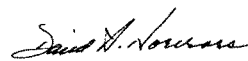
Moreover, Mr. Liu lacks the experience to serve as a federal judge. He has been out of law school for only eleven years and has little practical courtroom experience. Despite his American Bar Association rating, he clearly fails to satisfy the standard for federal judgeships outlined by the American Bar Association, which includes substantial courtroom and trial experience, and at least twelve years practicing law. Mr. Liu’s inexperience is glaring, regardless of the quality of his intellect.

Mr. Liu has shown no respect for the Senate’s Constitutional advice and consent role with respect to judicial nominations. Time and again he failed to supply the Senate with the materials requested in the Committee’s questionnaire. His multiple omissions call into question whether he was entirely forthcoming with the Committee.

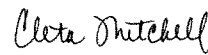
The RNLA continues to support the elevation of highly qualified men and women of all racial and ethnic backgrounds to high judicial office, provided they have demonstrated consistently in their decisions, their speeches and their confirmation statements, and responses to questions, an abiding commitment to honor in all their actions what the judges swear and affirm when they take their oath of office.

In conclusion, the RNLA generally believes that a President is entitled to deference with judicial nominees. However, the RNLA’s deep concerns about Mr. Liu’s troubling views and record, which are clearly outside the legal mainstream, in addition to his inexperience, compel us to urge senators to vote against his confirmation.

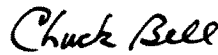
Sincerely,



David Norcross
Chairman



Cleta Mitchell
Co-Chair



Charles H. Bell, Jr.
President

511



CRIME VICTIMS UNITED
OF CALIFORNIA

11400 Atwood Road; Auburn, CA 95603 (530)885-9544 cvuc@sbcglobal.net

March 25, 2010

SENATOR DIANE FEINSTEIN
331 HART SENATE OFFICE BUILDING
WASHINGTON D.C. 20510

Dear Senator Feinstein:

I am writing in regards to the nomination of Goodwin Liu for the U.S. Court of Appeals for the Ninth Circuit. Crime Victims United of California strongly opposes this nomination.

Due to crime escalating and becoming a violent country, especially in California we need the courts to enforce the law. We feel strongly Mr. Liu's writing show a strong bias against victims. We are concerned he will not uphold the constitution, but rather interpret it in his own views and thus put public safety at risk.

We strongly urge you to oppose his nomination.

Sincerely,

Harriet Salarno,
Chair

Criminal Justice Legal Foundation



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March 23, 2010

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Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Goodwin Liu for U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Senator Sessions:

The U.S. Court of Appeals for the Ninth Circuit is presently the worst court in the country in terms of its handling of capital cases. Not only is that court frequently reversed by the Supreme Court, but its decisions are often so clearly wrong that the high court reverses summarily, without needing to hear oral argument, or unanimously, without a single Justice believing the Ninth Circuit's opinion was correct. As Judge Posner's paper in the *Journal of Legal Studies* showed, these reversals are greater than the national average by a far wider margin than can be attributed to chance, even after taking the size of the circuit into account.¹

Unfortunately, the cases reversed by the Supreme Court are only the tip of the iceberg. Many other well-deserved and legally imposed judgments in capital cases are wrongly overturned, resulting either in a new sentence and new round of appeals or in the watered-down justice of a lesser sentence for a crime that clearly warrants death.² On top of that, the Ninth Circuit delays decision for years in cases that should take months, routinely violating the rights of victims of crime under 18 U.S.C. §3771.

In addressing this problem with the Ninth Circuit, we suggest that the President and the Senate borrow a page from medical ethics, and "first, do no harm." Life tenure limits the ability of the elected branches to remove the judges who perpetrate these massive injustices, but they can certainly refrain from adding any more. Regrettably, the Administration has chosen to nominate as a judge of the Ninth Circuit a person whose work indicates he will vote for the murderer on every remotely debatable point.

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
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When Judge Samuel Alito was nominated for the Supreme Court, Professor Goodwin Liu wrote a paper entitled "Judge Alito and the Death Penalty." The paper was nominally about Judge Alito's views on the death penalty, but it is Professor Liu's views on that subject that come through most clearly. The view that comes through is intensely hostile to capital punishment, looking for any excuse to overturn a sentence in cases with no question whatever that the defendant was guilty of murder. This is a view fully in accord with the very worst of the existing Ninth Circuit judges.

Professor Liu's paper discusses in some detail five capital cases where the Third Circuit was divided on the decision. Each one of these cases was affirmed by the Pennsylvania Supreme Court or the Delaware Supreme Court, neither of which is a particularly conservative court. None of the cases involves a genuine claim of actual innocence. Under these circumstances, one would expect that most of the sample would be affirmed by the federal court as well, as the clearly reversible judgments have already been reversed by the state court. It is abundantly clear from Professor Liu's paper that he would have voted to *reverse every single one* had he been on the Third Circuit at the time.

Mountains Out of Molehills and Vice Versa: Professor Liu's discussion of *Flamer v. Delaware*³ demonstrates a propensity to overturn capital sentences on grounds that have little or nothing to do with the reliability of the verdict and that depend on changes in the rules made long after the trial. Flamer was found eligible for the death penalty on four separate grounds, one of which was later held to be too vague to make a defendant death-eligible *by itself*.⁴ He remained properly eligible for the death penalty on the other three grounds. Further, the circumstance that the murders were "outrageously or wantonly vile, horrible, or inhuman" was a perfectly valid consideration in deciding whether to actually sentence Flamer to death after he had been found eligible.⁵ Yet Professor Liu's discussion of the case makes clear that he thinks the sentence should have been overturned on the very remote speculation that the label of "aggravating factor" might have caused the jury to give undue weight to the heinousness of Flamer's crime.

Nowhere in the discussion does Professor Liu mention the facts of the crime. Flamer robbed and murdered an elderly couple, his own uncle and aunt, stabbing Mr. Byard Smith 79 times and Mrs. Alberta Smith 66

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
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times.⁶ Knowing how brutal and shocking this crime was is essential to evaluate the probability that a mere label would have carried significant weight with the jury, yet Professor Liu considers the facts to be so insignificant that they are not worth mentioning. This is a pattern that we see often in decisions wrongly overturning valid death sentences. The final decision in a capital case inevitably involves weighing the aggravating against the mitigating circumstances, and the most powerful aggravators are often the circumstances of the crime itself. Yet despite the strong relevance of the facts of the crime, we see those facts brushed aside and mentioned, if at all, only in a cursory and sanitized fashion. Throughout the whole paper, Professor Liu barely mentions what these monsters did, even when highly relevant to the legal issue under discussion.

No Objection at the Time: In his discussion of *Smith v. Horn*,⁷ Professor Liu shows a disregard for the state's own review process and a willingness to let a defendant have it both ways with an ambiguous jury instruction. The defendant in a two-perpetrator, robbery-murder case had *no objection* at trial to a jury instruction that could have been worded more clearly as to what the jury must find regarding each perpetrator. Smith's lawyers also did not raise the instruction issue on appeal. Looking at the evidence in the case, it is clear that defense counsel for Smith might very well not *want* the jury focusing on precisely who did what, because the evidence that was available indicated, although not conclusively, that Smith and not his accomplice was the shooter.⁸ Professor Liu did not mention these facts in his analysis, even though they were essential to understanding what actually happened at the trial.

Congress has long required that defendants raise every federal question to the state courts first, before raising them in federal court, and in 1996 Congress went so far as to say this requirement cannot be waived unless the state makes an express waiver.⁹ Judge Alito's position in the *Smith* case was that the court should call for briefing on the effect of Smith's failure to raise the issue to the state courts.¹⁰ Although the 1997 decision in *Smith* was not governed by the 1996 act, Judge Alito's position was fully consistent with the congressional policy then on the statute books. Yet Professor Liu castigated this decision and said that Judge Alito has "troubling perspectives on federalism...." What this really shows is that Professor Liu is the one with troubling perspectives on federalism. The state courts had properly reviewed and resolved every claim the defendant made, yet he would have the federal courts overturn that

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
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decision on a ground the defendant never raised to the state courts despite multiple opportunities to do so.

Presuming Prosecutors Guilty: The most incendiary charge that can be made against public officials in America today is a claim that they have discriminated on the basis of race in the discharge of their duties. While substantial claims of discrimination must be taken seriously, it is equally important to use caution against false accusations. Regrettably, Professor Liu's discussion of the case of *Riley v. Taylor*¹¹ indicates a propensity to indict and convict prosecutors of racism on flimsy evidence and to disregard the evidence to the contrary.

In a criminal trial, both sides are allowed to peremptorily challenge potential jurors they believe would be unfavorable to their position. This system of symmetrical challenges is an important part of the mechanism for getting an unbiased jury that has a reasonable chance of being able to reach the unanimous verdict that most states require. Traditionally, parties need not give a reason for their challenges, but the Supreme Court has held that challenges may not be made on the basis of race.¹²

The regrettable but undeniable social reality in America today is that many of the legitimate reasons parties have for their challenges are not evenly distributed across racial groups. In capital cases, for example, a juror's beliefs on the death penalty are an entirely legitimate factor to consider in making a challenge, but polls consistently show that opposition to the death penalty is far higher among African-Americans than in the population as a whole.¹³ For this reason, among others, if the parties exercise their challenges on entirely legitimate grounds, we would *not* expect that the proportion of challenges by racial group would mirror the composition of the venire.

The Supreme Court has held that a large enough disparity in numbers alone is sufficient to require that the prosecution explain the reasons for the challenges,¹⁴ but at that point the ruling of the trial judge becomes critical. Whether the race-neutral reasons are genuine or a pretext for discrimination is an issue of fact, and the usual deference due to the trial court's superior position on the scene fully applies.¹⁵ In addition, Congress has specifically required that federal courts on habeas corpus not overturn state findings of fact unless they are unreasonable based on the record.¹⁶

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
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In his discussion of the *Riley* case, Professor Liu attacked Judge Alito's opinion for not finding discrimination on the numbers alone, never even mentioning the critical fact of the state trial judge's finding that discrimination was not the reason for the challenges. His implication that the Supreme Court found discrimination from statistics alone in *Miller-El v. Dretke*¹⁷ is a highly misleading representation of that case. Most of the Court's opinion discusses other evidence showing discrimination, and the statistics are a relatively minor factor in the discussion.¹⁸

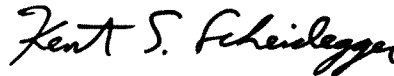
Professor Liu is willing to jump to a conclusion of racism, and he is willing to distort a Supreme Court precedent to reach his desired conclusion. Both of these propensities would further aggravate what is presently wrong with the Ninth Circuit if he were confirmed to that court.

The other two cases are discussed in CJLF's rebuttal paper written at the time of the Alito nomination, "Judge Alito and the Death Penalty: A Closer Look."¹⁹ That discussion need not be repeated here.

The picture that emerges from this paper is that of a person who is ready, willing, and able to seize on every excuse to reverse a capital sentence and to brush aside every reason to affirm one. We have too many such judges on the Ninth Circuit already. The last thing we need is one more.

The Criminal Justice Legal Foundation urges the committee to reject this nomination.

Sincerely,



Kent S. Scheidegger

KSS:iha

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
March 23, 2010
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Endnotes:

1. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 *J. Legal Studies* 711 (2000).
2. See, e.g., *Styers v. Schriro*, 547 F.3d 1026 (CA9 2008) (sentence for cold-blooded murder of 4-year-old boy overturned because state court said that posttraumatic stress disorder with no connection to the crime is not mitigating).
3. 68 F.3d 736 (CA3 1995) (en banc).
4. *Godfrey v. Georgia*, 446 U.S. 420 (1980).
5. See *Zant v. Stephens*, 462 U.S. 862, 888 (1983).
6. *Flamer v. State*, 490 A.2d 104, 107-110 (Del. 1983).
7. 120 F.3d 400 (1997).
8. See *Commonwealth v. Smith*, 511 Pa. 343, 350-351 (1986).
9. 28 U.S.C. §2254(b)(1), (b)(3).
10. 120 F.3d, at 422.
11. 277 F.3d 261 (CA3 2001) (en banc).
12. *Batson v. Kentucky*, 476 U.S. 79 (1986).
13. See, e.g., Saad, *Racial Disagreement Over Death Penalty Has Varied Historically* (Gallup 2007) (26% of whites opposed; 56% of blacks opposed).
14. *Batson*, 476 U.S., at 96.
15. *Hernandez v. New York*, 500 U.S. 352, 364-365 (1991).
16. See 28 U.S.C. §2254(d)(2).
17. 545 U.S. 231 (2005).

Sen. Patrick Leahy, Chairman
Sen. Jeff Sessions, Ranking Member
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18. See *id.*, at 241-263.

19. Available at
<http://www.cjlf.org/deathpenalty/AlitoCapitalSummary.pdf>.

JOHN M. SPRATT, JR.
5TH DISTRICT, SOUTH CAROLINA

www.house.gov/spratt
1401 LONGWORTH BUILDING
WASHINGTON, D.C. 20515
(202) 225-5501

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DARLINGTON, SOUTH CAROLINA 29532
(843) 393-3998

April 14, 2010

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of J. Michelle Childs to the
United States District Court for the District of South Carolina

Dear Chairman Leahy:

Along with Congressman Clyburn and Senator Graham, I recommended J. Michelle Childs for appointment to a federal judgeship, and I now write to support the President's nomination of Judge Childs to the United States District Court for the District of South Carolina. Judge Childs currently serves on the South Carolina Court of General Sessions and Common Pleas and is known throughout our state for her fairness, integrity, and judicial temperament. During four years on the bench, she has served as Chief Administrative Judge for General Sessions Court and now serves as Chief Administrative Judge of the Business Court, handling business and corporate disputes with case management practices similar to those in the federal courts.

Prior to her election to the Circuit Court, she was appointed to serve as a Commissioner on the South Carolina Workers' Compensation Commission and as Deputy Director for the South Carolina Department of Labor, Licensing, and Regulation's Division of Labor. Through her service in these capacities, she developed substantial skills in appellate review. While at the Division of Labor, she handled appeals from regulatory decisions of lower management; and as a Workers' Compensation Commissioner, she served on the Full Commission, where she reviewed appeals from individual Commissioner's orders. As a trial judge, she has considered appeals from administrative agencies, municipal court and magistrate's court. She has also served as an Acting Justice for the South Carolina Supreme Court.

Prior to public service, Judge Childs practiced law at Nexsen Pruet, LLC, where she concentrated on labor and employment law and general litigation. Judge Childs informs me that she was the first African-American female to become a partner in a major law firm in South Carolina, and if confirmed, will be the third female and the third African-American to serve as a United States District Judge for the District of South Carolina.

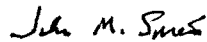
Judge Childs has been active in local, state and national bar organizations, as well as community and civic organizations. She serves in the House of Delegates for both the American Bar Association and the South Carolina Bar Association. She has received various awards for her

leadership and service. The American Bar Association has reviewed her background and found her "unanimously well qualified" to serve as a United States District Judge.

Judge Childs received her B.S. degree in Management from the University of South Florida and M.A. degree in Personnel and Employment Relations from the University of South Carolina's Moore School of Business. She received her J.D. from the University of South Carolina School of Law.

Judge Childs is eminently qualified, and I urge your Committee to act swiftly and favorably to confirm her as a United States District Judge.

Respectfully yours,



John M. Spratt, Jr.
Member of Congress

JMSj/tm

JOHN M. SPRATT, JR.
5TH DISTRICT, SOUTH CAROLINA

www.house.gov/spratt
1401 LONGWORTH BUILDING
WASHINGTON, D.C. 20515
(202) 225-5501

COMMITTEES:
CHAIRMAN, BUDGET
ARMED SERVICES

**Congress of the United States
House of Representatives
Washington, D.C. 20515**

DISTRICT OFFICES:

TOM GETTYS BUILDING
BOX 350
ROCK HILL, SOUTH CAROLINA 29731
(803) 327-1114

707 BULTMAN DRIVE
SUMTER, SOUTH CAROLINA 29150
(803) 773-3362

88 PUBLIC SQUARE
DARLINGTON, SOUTH CAROLINA 29532
(843) 333-3988

April 14, 2010

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Richard Mark Gergel to the
United States District Court for the District of South Carolina

Dear Chairman Leahy:

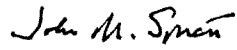
Along with Congressman Clyburn and Senator Graham, I recommended Richard Mark Gergel for appointment as a federal judge. I now write in support of the President's nomination of Richard Gergel as a United States District Judge for the District of South Carolina. Mr. Gergel is one of our state's most experienced and respected litigators. He has handled with distinction and success some of the most complex matters tried in recent years in our state and federal courts. His practice has been diverse, representing both plaintiffs and defendants, employees and employers, and persons suing the government and government officials defending against lawsuits. Mr. Gergel is widely respected in the South Carolina Bar for his diligence, fairness and strong work ethic, as reflected in his American Bar Association rating as "unanimously well qualified" to be a United States District Judge.

Mr. Gergel also enjoys great respect for his intellect and scholarship. He is a *summa cum laude* graduate of Duke University, was an Angier Biddle Duke Scholar to Oxford University and earned his Juris Doctor at Duke University School of Law, where he was a member of the Editorial Board of the Duke Law Journal. He, along with his wife, Dr. Belinda Gergel, have written extensively on the history of South Carolina, including a widely respected book on the history of the Jews of Columbia, South Carolina. They have also done notable work on our state's early African American Bar. Mr. Gergel has also served as founding president of the South Carolina Supreme Court Historical Society and past president of the South Carolina Jewish Historical Society.

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Richard M. Gergel is eminently qualified, and I urge your Committee to act swiftly and favorably on his nomination as a United States District Court Judge.

Respectfully yours,

A handwritten signature in black ink that reads "John M. Spratt, Jr." in a cursive style.

John M. Spratt, Jr.
Member of Congress

JMSj/tm

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Moritz College of Law

March 4, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Federal Judicial Nomination of Goodwin H. Liu, U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Ranking Member Sessions:

Professor Goodwin H. Liu is a person of great intellect, accomplishment, and integrity, and he is exceptionally well-qualified to serve on the federal judiciary. We write on behalf of the Conference of Asian Pacific American Law Faculty (CAPALF), the nation's leading organization of Asian American law professors. We are proud to endorse with great enthusiasm President Barack Obama's nomination of Berkeley School of Law Goodwin H. Liu for the U.S. Circuit Court of Appeals for the Ninth Circuit.

Professor Liu joined the Berkeley Law faculty in 2003 and quickly established himself as an outstanding scholar and teacher. In 2008, he earned tenure and promotion to Associate Dean, and was elected to the American Law Institute. An expert on constitutional and education law and policy, Liu is one of the nation's leading authorities on the subject of educational equity. His writings on school choice, school finance, and desegregation focus on the needs of America's most disadvantaged students, and his articles appear in many top law journals. His 2006 article in the Yale Law Journal, "Education, Equality, and National Citizenship," won the Education Law Association's inaugural Steven S. Goldberg Award for Distinguished Scholarship in Education Law.

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CAPALF CONFERENCE OF ASIAN PACIFIC AMERICAN LAW FACULTY

Nomination of Goodwin Liu
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Professor Liu's work is widely accepted and has gained praise from Republicans. Clint Bolick, director of constitutional litigation at the Goldwater Institute and national expert on state-based school choice programs said, "Having reviewed several of his academic writings, I find Prof. Liu to exhibit fresh, independent thinking and intellectual honesty. He clearly possesses the scholarly credentials and experience to serve with distinction on this important court." Tom Campbell, former Dean of the Haas School of Business at UC Berkeley, former Congressman (R-CA), and current Republican California Senatorial candidate said, "Liu will bring scholarly distinction and a strong reputation for integrity, fair-mindedness, and collegiality to the Ninth Circuit."

In addition to his career in academia, Professor Liu has a distinguished background in the private sector and in the government. Professor Liu clerked for Justice Ruth Bader Ginsburg and D.C. Circuit Court of Appeals Judge David S. Tatel prior to becoming a member of the appellate practice at O'Melveny & Myers where he filed numerous appellate court briefs and argued before the U.S. Court of Appeals for the D.C. Circuit. Walter E. Dellinger, chair of O'Melveny's appellate practice, said Professor Liu was "widely respected in law practice for his superb legal ability, his sound judgment, and his warm collegiality."

Professor Liu was also Special Assistant to the Deputy Secretary of the U.S. Department of Education, where he served as an advisor on legal and policy issues, including the development of guidelines to implement a \$134 million Congressional appropriation for the purpose of turning around low-performing schools. U.S. Secretary of Education and former South Carolina Governor Richard Riley called Professor Liu "the 'go-to' person for important projects and complex issues because of his ability to see the big picture while also mastering the details of legal and policy problems." Lastly Professor Liu served as a Senior Program Officer for Higher Education, Corporation for National Service, where he directed a \$12.5 million federal program to assist colleges and universities in integrating community service with academic study.

It should also be noted that President's Obama's nomination of Professor Liu is of significance to the Asian American community. Out of approximately 175 active federal appellate court judges, there are currently none who are Asian American. Professor Liu joins Judge Denny Chin, nominee to the Second Circuit Court of Appeals as the second Asian Pacific American nominated to the court of appeals by the President. There has not been an Asian American on the Ninth Circuit since Judge Wallace Tashima who took senior status in 2004.

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Nomination of Goodwin Liu
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We could not imagine a person more suited for the federal bench. Professor Liu would bring exceptional qualifications and valuable experience in government, law practice, and academia to his service as a judge on the U.S. Court of Appeals for the Ninth Circuit. The American Bar Association rated Professor Liu unanimously well qualified based on his integrity, professional competence, and judicial temperament. We urge his swift confirmation.

Sincerely,



Frank H. Wu
Chancellor and Dean Designate
University of California Hastings College of the Law
frankhwu@mac.com
+1 202.487.5775

On behalf of the Board of Directors of the Conference of Asian Pacific
American Law Faculty

cc: Mr. Robert Bauer, Esq.
Ms. Susan Davies, Esq.
White House Counsel's Office

Senator Dianne Feinstein
Senator Barbara Boxer

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