AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 109–397, Pt 5

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 21, JUNE 28, AND AUGUST 1, 2006

Serial No. J–109–4

PART 5

Printed for the use of the Committee on the Judiciary

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

S. HRG. 109–397, Pt 5

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 21, JUNE 28, AND AUGUST 1, 2006

Serial No. J–109–4

PART 5

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

32–199 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

MICHAEL O'NEILL, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

WEDNESDAY, JUNE 21, 2006

STATEMENTS OF COMMITTEE MEMBERS

	Page
Graham, Hon. Lindsey, a U.S. Senator from the State of South Carolina	1
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	52

PRESENTERS

Allard, Hon. Wayne, a U.S. Senator from the State of Colorado presenting Neil M. Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit	1
Salazar, Hon. Ken, a U.S. Senator from the State of Colorado presenting Neil M. Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit	3

STATEMENT OF THE NOMINEE

Gorsuch, Neil M., Nominee to be Circuit Judge for the Tenth Circuit	4
Questionnaire	6

QUESTIONS AND ANSWERS

Responses of Neil M. Gorsuch to questions submitted by Senator Leahy	39
Responses of Neil M. Gorsuch to questions submitted by Senator Leahy on behalf of Senator Wyden	45

SUBMISSION FOR THE RECORD

Allard, Hon. Wayne, a U.S. Senator from the State of Colorado	49

WEDNESDAY, JUNE 28, 2006

STATEMENTS OF COMMITTEE MEMBERS

	Page
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	53
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	131

PRESENTERS

Lincoln, Hon. Blanche, a U.S. Senator from the State of Arkansas presenting Bobby E. Shepherd, Nominee to be Circuit Judge for the Eighth Circuit	53
Pryor, Hon. Mark, a U.S. Senator from the State of Arkansas presenting Bobby E. Shepherd, Nominee to be Circuit Judge for the Eighth Circuit	54
Warner, Hon. John, a U.S. Senator from the State of Virginia presenting Kimberly Ann Moore, Nominee to be Circuit Judge for the Federal Circuit	56

STATEMENTS OF THE NOMINEES

Moore, Kimberly Ann, Nominee to be Circuit Judge for the Federal Circuit	58
Questionnaire	59
Shepherd, Bobby E., Nominee to be Circuit Judge for the Eighth Circuit	91
Questionnaire	93

SUBMISSIONS FOR THE RECORD

Page

Allen, Hon. George, a U.S. Senator from the State of Virginia 128
Warner, Hon. John, a U.S. Senator from the State of Virginia 133

TUESDAY, AUGUST 1, 2006

STATEMENTS OF COMMITTEE MEMBERS

Page

Cornyn, Hon. John, a U.S. Senator from the State of Texas 137
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin 197
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 194
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts ... 191
prepared statement 368
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont 187
prepared statement 372
Schumer, Hon. Charles E., a U.S. Senator from the State of New York 189
prepared statement and attachment 382
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania 201

PRESENTERS

Boxer, Hon. Barbara, a U.S. Senator from the State of California presenting Valerie L. Baker, Nominee to be District Judge for the Central District of California and Philip S. Gutierrez, Nominee to be District Judge for the Central District of California 139
Feinstein, Hon. Dianne, a U.S. Senator from the State of California presenting Valerie L. Baker, Nominee to be District Judge for the Central District of California and Philip S. Gutierrez, Nominee to be District Judge for the Central District of California 138

STATEMENTS OF THE NOMINEES

Baker, Valerie L., Nominee to be District Judge for the Central District of California 202
Questionnaire 203
Besosa, Francisco Augusto, Nominee to be District Judge for the District of Puerto Rico 245
Questionnaire 246
Gutierrez, Philip S., Nominee to be District Judge for the Central District of California 276
Questionnaire 277
Keisler, Peter D., Nominee to be Circuit Judge for the District of Columbia Circuit 141
Questionnaire 142

QUESTIONS AND ANSWERS

Responses of Peter D. Keisler to questions submitted by Senators Leahy, Kennedy, Biden, Durbin and Schumer 313

SUBMISSIONS FOR THE RECORD

Bar of the District of Columbia, members who support the nomination of Peter Keisler, Washington, D.C., joint letter 348
Berenson, Bradford A., Sidley Austin LLP, Washington, D.C. letter 350
Carpenter, David W., Sidley Austin LLP, Washington, D.C. letter 352
Chopra, Marie, Esq., FLEOA, Legislative Affairs, Washington, D.C., letter and attachment 354
Coalition for a Fair and Independent Judiciary, Washington, D.C., joint letter 357
Comey, James B., McLean, Virginia, letter 360
Fortuño, Hon. Luis G., Resident Commissioner of Puerto Rico, statement 361
Fraternal Order of Police, Chuck Canterbury, National President, Washington, D.C., letter 364
Jones, George W., Jr., Sidley Austin LLP, Washington, D.C. letter 366

Page

Kronman, Anthony, Professor of Law, Yale Law School, New Haven, Connecticut, letter 370
Minow, Newton N., Sidley Austin LLP, Washington, D.C. letter 376
Phillips, Carter G., Sidley Austin LLP, Washington, D.C. letter 377
Sachs, Stephen H., Wilmer Cutler Pickering Hale and Dorr LLP, Baltimore, Maryland, letter 380
Seitz, Virginia A., Sidley Austin LLP, Washington, D.C. letter 389

ALPHABETICAL LIST OF NOMINEES

Baker, Valerie L., Nominee to be District Judge for the Central District of California 202
Besosa, Francisco Augusto, Nominee to be District Judge for the District of Puerto Rico 245
Gorsuch, Neil M., Nominee to be Circuit Judge for the Tenth Circuit 4
Gutterrez, Philip S., Nominee to be District Judge for the Central District of Claifornia 276
Keisler, Peter D., Nominee to be Circuit Judge for the District of Columbia Circuit 141
Moore, Kimberly Ann, Nominee to be Circuit Judge for the Federal Circuit, prepared statement 58
Shepherd, Bobby E., Nominee to be Circuit Judge for the Eight Circuit 91

NOMINATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT

WEDNESDAY, JUNE 21, 2006

UNITED STATES SENATE,

Washington, D.C.

The hearing was convened, pursuant to notice, at 4:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Lindsey Graham, presiding.

OPENING STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. The hearing will come to order.

I apologize for being late. I would like to welcome my two colleagues from Colorado. I appreciate you taking the time to come before the Committee and testify.

If you are ready, Senator Allard.

PRESENTATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. WAYNE ALLARD, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Mr. Chairman, it is good to see you here. I am glad I yielded to you on the floor so you could be here to preside over this hearing.

Senator GRAHAM. For the audience, he said, "I have to be at a hearing at 4:00." I said, "I do, too." No we know why.

Senator ALLARD. Now we realize we are both at the same meeting. So, thank you.

Well, Chairman Graham and members of the Committee, it is my pleasure to introduce to you Neil M. Gorsuch, President Bush's nominee to the U.S. Court of Appeals for the Tenth Circuit. Mr. Gorsuch is an extraordinarily well-qualified nominee and, if confirmed, would capably serve the citizens of Colorado, the Tenth Circuit, and indeed the United States.

I would like to begin by thanking Chairman Specter for so promptly scheduling this hearing. I look forward to the Committee's continuing the tone of expediency set by the Chairman by swiftly reporting the nominee to the floor for a timely up or down vote. It is critical to the administration of justice that this seat, which has been vacant since last year, be filled immediately.

I am pleased that we are joined today by Senator Salazar, in what I hope is an early indicator of broad bipartisan support for

this nominee. I would also like to welcome Mr. Gorsuch's wife, Louise, and her tow children, Emma and Belinda, to the U.S. Senate.

Senator GRAHAM. And let the record reflect, they are beautiful children and a lovely wife.

Senator ALLARD. They are wonderful. All three of you no doubt played an important role in your husband and father being here today. Speaking from my own experience in public service, your love and support will continue to be instrumental to his ability to perform his public duties. You are embarking on this journey together.

I would also like to welcome Mr. Gorsuch back to the U.S. Senate. Some of you, including the Ranking Member, may remember Mr. Gorsuch from his service as a Senate page in the early 1980's. It was here in the Senate that he made his foray into public service, and developed the passion for it that he exudes today.

As a fifth-generation Coloradan, I am pleased that President Bush chose a nominee with deep Colorado roots. Born in Denver, Mr. Gorsuch is a fourth-generation Coloradan who, if confirmed, would carry on his family history of public service in the State. His mother, Ann Gorsuch, served in the Colorado State Legislature, and as EPA Director during the Reagan Administration.

Moreover, his grandfather founded a successful Denver law firm, Gorsuch Kirgis, where both he and Neil's father were active in the community throughout the firm's 60-year history.

Neil, if confirmed, you no doubt look forward to returning to Colorado, for family and the Rocky Mountains there await you.

Mr. Chairman, if I were asked to succinctly characterize Mr. Gorsuch, I would have to say well rounded: well rounded educationally, professionally, and personally.

Mr. Gorsuch pursued a rigorous and geographically diverse course of academic study. He earned his undergraduate degree from Columbia University, including a summer at the University of Colorado, his law degree from Harvard, and a doctorate in legal philosophy from Oxford University.

Mr. Gorsuch began his distinguished professional career as a law clerk to Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. He then went on to clerk for two Supreme Court justices, Justice Kennedy and Colorado's own Byron White.

Following his prestigious clerkship, Mr. Gorsuch entered private practice and became a partner in the law firm of Kellogg, Huber, Hanson, Todd, Evans & Figel. While in private practice, Mr. Gorsuch litigated matters of clients large and small, ranging from individuals, to non profits, to corporations.

Moreover, he litigated cases on a range of issues, from simple contract disputes to complex antitrust and securities fraud matters.

He left private practice in 2005 to return to public service, this time at the U.S. Department of Justice, where he currently serves as the principal deputy to the Associate Attorney General.

Looking collectively at his career, the picture of an appellate judge-in-training emerges. Mr. Gorsuch has served in all three branches of the government, including the highest levels of the judicial and executive branches: he has represented both plaintiffs and defendants; he has represented both individuals and corpora-

tions; he has litigated civil cases and criminal cases; and he has litigated in both Federal and State courts.

In sum, the breadth and depth of Mr. Gorsuch's experience makes him ideally suited to serve on the Federal appellate bench.

While Mr. Gorsuch is highly qualified, I also promised the people of Colorado I would support judicial nominees who I believe would rule on the law and the facts before then, not judges who would legislate from the bench. My support of Mr. Gorsuch here today is consistent with that promise.

Mr. Chairman, I see my time has expired. May I have permission to finish my comments, which is just about a minute and a half?

Senator GRAHAM. Take all the time you need.

Senator ALLARD. Thank you.

From my conversation with Mr. Gorsuch, I am certain that he recognizes the proper role of the judiciary. The role of the judiciary is to interpret the law, not make the law.

I believe that Mr. Gorsuch is temperamentally and intellectually inclined to stick to the facts and the law in cases that would come before him and he would refrain from legislating from the bench.

Moreover, Mr. Gorsuch's personal views would not determine the outcome of cases that come before him. Mr. Gorsuch himself says, "Personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

I believe this statement also speaks to Mr. Gorsuch as a person. He is humble, unassuming, polite, and respectful. This sentiment is reflected in the numerous letters pouring into my office from people that have worked with him over the years. Mr. Gorsuch possesses the temperament befitting an appellate judge.

In conclusion, Mr. Gorsuch is a top-flight nominee who I am proud to introduce to the distinguished members of the Committee. I look forward to a fair and dignified confirmation process, the outcome of which I am confident will reveal a highly qualified nominee, deserving of confirmation.

Congratulations, Neil. On behalf of the citizens of Colorado, I thank you, Mr. Chairman, for allowing me the extra time to finish the introduction of an exceptional individual.

Senator GRAHAM. Thank you, Senator Allard. That was well done. We appreciate you testimony.

Senator Salazar?

PRESENTATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. KEN SALAZAR, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator SALAZAR. Thank you, Chairman Graham. To the chairman of this Committee, Senator Specter and Senator Leahy, I thank them for their leadership, and I thank you for the work that you do on this Committee.

Unfortunately, it often seems that bipartisanship is a lost art here in Washington, D.C., so when I was asked to join my friend Senator Allard in introducing Neil Gorsuch to the Judiciary Committee, I was very pleased to accept that invitation.

I would also like to welcome Mr. Gorsuch's wife, Louise and his young and beautiful daughters, Emma and Belinda, here today.

While Mr. Gorsuch has spent the majority of his professional life in Washington, D.C., his roots in Colorado are strong, going back four generations. If confirmed he will return back to Colorado, where I hope that he will live up to the standards set by a long line of distinguished jurists from our State, including the late U.S. Supreme Court Justice Byron White.

At the young age of 38, Mr. Gorsuch has already had a very impressive legal career. After earning degrees from Columbia University, Harvard Law School and Oxford University, he went on to work and clerk on the D.C. Circuit of the U.S. Supreme Court.

Following his clerkships, he spent nearly 10 years in private practice before becoming principal deputy to the Associate Attorney General of the United States.

While I do not know Mr. Gorsuch well, I have had the chance to visit with him and learn about both his personal background and his professional experience. During our meeting, I found him to be very intelligent, thoughtful, and appreciative of the great honor it is to be nominated to the Federal bench. Today's hearing will provide Mr. Gorsuch with a chance to share these qualities with the Committee.

Of course, it takes much more than a great resume to be a great judge. In addition to the professional excellence as a lawyer, a judicial nominee should have a demonstrated dedication to fairness, impartiality, precedent, and the avoidance of judicial activism from both the left and the right.

By exploring Mr. Gorsuch's record, judicial philosophy and his views on a wide range of important issues, these hearings will help Senators evaluate whether Mr. Gorsuch meets that very high standard.

As always, I look forward to learning more from the careful and thorough examination, which is a hallmark of this Judiciary Committee.

Chairman Specter, Senator Leahy, Senator Graham, and all my distinguished colleagues on this Judiciary Committee, I am very pleased to introduce to you a person that I believe will make an excellent judge on the Tenth Circuit Court of Appeals, Mr. Neil Gorsuch.

Senator GRAHAM. Thanks, Senator Salazar. It was very kind of you to do this. Well done by both. Thank you very much. We appreciate you coming to the Committee.

Mr. Gorsuch, if you would come forward. Raise your right hand, please.

[Whereupon, Mr. Gorsuch was duly sworn.]

Senator GRAHAM. Well, I would like to add my welcome to you and your family, and all of your friends. I am glad to be able to chair this hearing.

I will turn over the floor to you, if you would like to say anything in an opening statement.

STATEMENT OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Mr. GORSUCH. I would like to just say a few thank yous, Senator, if that is all right. First and foremost, to the President for nominating me, to Senator Specter and Ranking Member Leahy for

holding this hearing, and to you, Senator, for agreeing to be here. I cannot tell you how much it means to me. The kind introductions from my home-State Senators, that, too, means a very great deal to me, both of them.

I have here with me, Senator, as well, a bit of my family that you have already been introduced to. I know my two daughters have what they would consider to be better things to do with a summer afternoon, so I am grateful that they are here with their dad.

Senator GRAHAM. They are behaving better than most Senators.

[Laughter].

Mr. GORSUCH. What can I say?

[Laughter].

Senator, I would also like to say, I have gratitude for my family back home in Colorado. I feel their thoughts today deeply, and am looking forward to being with them soon.

I would also like to thank the members of the Department of Justice who are here, a lot of folks lending moral support, both who are appointed and a number of the career staff at the Department, who I have come to respect and admire greatly for their service to the country under very difficult conditions, often.

I also have some of my former partners and colleagues from the law firm that have come here today, and I am grateful to have them here.

Finally, my parents and grandparents, most of whom are deceased, but all of whom are here, I think, in my thoughts, and all of whom have served Colorado in many different ways over the course of their lives.

I look forward to your questions.

The biographical information of Mr. Gorsuch follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

   Neil McGill Gorsuch

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

   Residence: Vienna, VA

   Office: U.S. Department of Justice, Room 5706, Washington, D.C. 20530

3. **Date and place of birth.**

   August 29, 1967 in Denver, Colorado

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

   Married; Marie Louise Gorsuch; mother and homemaker.

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

   College:
   Columbia University (1985-1988); BA with honors, 1988
   University of Colorado at Denver (summer 1986, no degree)

   Law School:
   Harvard Law School (1988-1991); JD with honors, 1991

   Doctorate:
   Oxford University (1993-1995); D.Phil., 2004

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

   United States Department of Justice, Office of the Associate Attorney General, 2005 to the present (Principal Deputy to the Associate Attorney General)

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1995-2005 (partner 1998-2005; associate, 1995-1997)

Supreme Court of the United States, 1993-94 (law clerk to Hon. Byron R. White and Hon. Anthony M. Kennedy)

U.S. Court of Appeals, D.C. Circuit, 1991-92 (law clerk to Hon. David B. Sentelle)

Sullivan & Cromwell, summer 1991 (summer associate)

Harvard Government Department, 1990-91 (Head Teaching Fellow for political philosophy course)

Cravath, Swaine & Moore, summer 1990 (summer associate)

Harvard Government Department, 1989-90 (Teaching Fellow for political philosophy course)

Davis, Graham & Stubbs, summer 1989 (summer associate)

Walden Group, LLC, 2005 to the present (part owner of Grand County, Colorado property)

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

I have not served in the military.

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

Marshall Scholarship to Oxford University

Harry S. Truman Scholar at and cum laude graduate of Harvard Law School

Phi Beta Kappa and cum laude graduate of Columbia University

Council on Foreign Relations

Harry S. Truman 2006 Scholarship Selection Committee

Listed in Who's Who in America, Who's Who in American Law, Who's Who in the World

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

American Bar Association (since approx. 2002), including its Litigation and Antitrust sections

American Trial Lawyers Association (since approx. 2002)

American Inns of Court (approx. 1997-1999)

I occasionally represent the Department of Justice before judicially-related groups and committees with respect to the Department's initiatives, including for example the federal rules of appellate procedure advisory committee, the federal judicial conference, and various federal circuit courts. I have also periodically attended the D.C. Circuit Judicial Conference.

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

I know of no organizations to which I belong, other than those listed above, which are active in lobbying before public bodies. Other organizations to which I belong include:

Phi Beta Kappa

Columbia University Alumni Representative Committee

Harry S. Truman Scholarship 2006 Selection Committee

Association of Marshall Scholars

Holy Comforter Parish

Republican National Lawyers Association

Trout Unlimited

Westwood Country Club

University Club

Walden Group, LLC

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

New York (1992)
Colorado (1994)
District of Columbia (1997)
Supreme Court of the United States (1998)
U.S. Court of Appeals for the Second Circuit (2004)
U.S. Court of Appeals for the Third Circuit (1998)
U.S. Court of Appeals for the Fourth Circuit (1997)
U.S. Court of Appeals for the Sixth Circuit (2000)
U.S. Court of Appeal for the Seventh Circuit (2006)
U.S. Court of Appeals for the Tenth Circuit (2005)
U.S. District Court for the District of Colorado (1996)
U.S. District Court for the District of Washington, D.C (2001)
U.S. District Court for the Southern District of New York (2002)
U.S. District Court for the Eastern District of New York (2002)

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

I have written or co-authored the following materials since law school:

Author -

The Future of Assisted Suicide and Euthanasia (book forthcoming from Princeton University Press 2006)

Ensuring Class Action Fairness, Federal Trade Commission Workshop (Sept. 2004)

Justice White and Judicial Excellence, distributed by UPI (May 2002)

The Legalization of Assisted Suicide and the Law of Unintended Consequences, 2004 Wisconsin Law Review 1347 (2004)

Letter to the Editor, Washington Post, March 18, 2004.

Liberals and Lawsuits, National Review Online (Feb. 2005)

The Right to Assisted Suicide and Euthanasia, 23 Harvard Journal of Law and Public Policy 599 (2000)

Co-author -

No Loss, No Gain, The Legal Times (2005)

Settlements in Securities Fraud Class Actions: Improving Investor Protections, Washington Legal Foundation (April 2005) and Andrews Class Action Litigation Reporter (August 2005)

Letter to the Editor, The Legal Times (Sept. 2004)

Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits, 20 Hofstra Law Review 341 (1991) and Policy Analysis on Term Limits, Cato Institute Policy Analysis No. 178 (1992)

The Constitutional Case for Term Limits, Wall Street Journal (Nov. 1992)

Prior to law school, I wrote for student newspapers in college and high school. I have given remarks or made presentations before the following organizations:

National White Collar Crime Center
American Association for the Advancement of Science
Washington, D.C. Bar Association
Wisconsin Bar Association
Federal Trade Commission workshop
Common Good
Prime Time Radio
British Marshall Scholarship Commission

Some of these remarks have touched on a legal issue; others have not. Generally I have not made a practice of keeping copies of my remarks and often have spoken from handwritten notes rather than a prepared text.

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

I am in excellent health; my last physical examination was in May 2006.

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

I have not held a judicial office.

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

I have not been a judge.

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

I have never been a candidate for or held an elective public office. Since law school, I have held the following appointed positions:

Law clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, from 1991 to 1992.

Law clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, from 1993 to 1994.

United States Department of Justice, Principal Deputy to the Associate Attorney General, 2005-present.

17. **Legal Career:**

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

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

Law clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, from 1991 to 1992.

Law clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, from 1993 to 1994.

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

I have never practiced alone.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

Sullivan & Cromwell, 1701 Pennsylvania Ave., NW, Washington, D.C. 20006, summer associate, summer 1991.

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Washington, D.C. 20036, associate from 1995 to 1997 and partner from 1998 to 2005.

U.S. Department of Justice, Principal Deputy to the Associate Attorney General, Washington, D.C. 20530, from 2005 to present.

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

Immediately after law school, I spent the summer working for the law firm of Sullivan & Cromwell where I assisted with corporate transactional work while studying for the bar. Thereafter, I served as a law clerk to the U.S. Court of Appeals for the D.C. Circuit with Judge David Sentelle, from 1991 to 1992. In that capacity, I wrote bench briefs and assisted with the preparation of opinions and dissents in matters ranging from criminal law to constitutional and administrative law. It was an intensive immersion into federal appellate law and practice. In addition, during the summer of 1992, Judge Sentelle sat by designation on the U.S. District Court for the Western District of North Carolina. There I assisted the Court with several criminal trials and the disposition of civil district court matters.

From 1993 to 1994, I was fortunate to serve as law clerk to the Hon. Byron R. White. Justice White had just resigned from the Supreme Court and I served as his first law clerk in retirement and his only law clerk that year. Despite his "retirement," Justice White

took on a heavy load of appellate cases, sitting by designation on the Tenth Circuit. I assisted Justice White with his work on the Tenth Circuit, preparing bench briefs prior to argument and helping with opinions. Justice White also asked me to assist another sitting Justice, and Justice Kennedy kindly agreed to allow me to help in his chambers. During my clerkships, approximately half of the cases I worked on were civil matters and half were criminal matters. Most involved federal appeals but, of those that involved trials, all were criminal trials.

Between my clerkships and again after them (1992-93, 1994-95), I attended Oxford University as a British Marshall Scholar studying for a doctorate in legal philosophy. My academic research and writing involved both criminal and civil law issues in proportions of roughly 60% criminal and 40% civil.

In 1995, I joined Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. In 1998, I became a partner at the firm and I remained there through May 2005. During my time in private practice, I was involved in matters large and small for clients ranging from individuals to non-profits to corporations; my cases ranged from simple breach of contract disputes to complex antitrust, RICO, and securities fraud matters. I tried cases, participated in substantial injunctive and evidentiary hearings, and argued motions of all kinds, including case dispositive motions to dismiss and for summary judgment, discovery disputes, in limine motions in preparation for trial, post-trial motions, etc. I also took and defended depositions regularly, worked on appeals before federal and state courts of appeals across the country, and provided antitrust and other legal counsel to clients. I estimate that, during my time in private practice, roughly 70% of my litigated matters were in federal court and 30% in state courts. Approximately 90% of these matters involved civil disputes, with the remainder involving criminal matters.

Since June 2005, I have served as Principal Deputy to the Associate Attorney General, the number three officer at the Department of Justice. In that capacity I assist in managing the Department's civil litigating components (antitrust, civil, civil rights, environment, and tax). Major litigation decisions in certain significant cases -- such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms -- are reviewed by the Office of the Associate Attorney General. I also spend a substantial amount of time reviewing and editing trial and appellate court legal briefs and plotting case strategy. Virtually all of these matters are civil, though there are occasional criminal matters. I act as Associate Attorney General during periods when the Associate Attorney General is unavailable or recused and assist in the development and implementation of a variety of civil justice initiatives and policies.

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

I have consciously sought to maintain a general litigation practice and avoid specialization. While in private practice, my matters ranged from complex antitrust, securities, and class actions to relatively straightforward breach of contract and breach of fiduciary duty disputes. I sought to and enjoyed representing plaintiffs and defendants in roughly equal proportions and my clients ranged from individuals to non-profits to small and large corporations. My work at the Department of Justice is, if anything, even more varied, involving cases and issues arising from each of the Department's civil litigating components.

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

I appeared in court frequently throughout my years in private practice and have appeared more occasionally in my current position.

2. **What percentage of these appearances was in:**
   - **(a) federal courts;** Overall, 70%
   - **(b) state courts of record;** 30%
   - **(c) other courts.**

3. **What percentage of your litigation was:**
   - **(a) civil;** Overall, 85%
   - **(b) criminal.** 15%

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

While in private practice, I tried four jury trials to verdict, two as chief counsel and two as associate counsel. Two of the trials involved damages claims in excess of $1 billion; three were reported as among the top 100 verdicts for the years in which they were tried; all lasted between 2 and 6 weeks. I participated in three other jury trials, including one as lead counsel, which settled. I participated in at least five non-jury injunctive proceedings that involved substantial evidentiary hearings.

5. **What percentage of these trials was:**
   - **(a) jury;** 100%
   - **(b) non-jury.**

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

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

Some of my more significant matters while in private practice included the following:

1. *NCRIC v. Columbia Hospital for Women*, No. 00-7308 (D.C. Super.) (Judge Anna Blackburne-Rigsby) (trial 2004)

NCRIC, an insurance company that provided medical malpractice insurance to doctors, sued my client, Columbia Hospital for Women. NCRIC claimed that Columbia failed to pay certain insurance premiums owed by the hospital on behalf of the hospital's ob/gyn physicians, and NCRIC sought recovery of approximately $3 million dollars. Columbia denied NCRIC's allegations and counterclaimed, contending that NCRIC, not Columbia, owed money under the parties' contract. Columbia also contended that, when Columbia brought this to NCRIC's attention and threatened to move its business to another insurance carrier, NCRIC began a multi-faceted campaign designed to induce doctors at Columbia to move their practices other area hospitals where NCRIC was the exclusive malpractice insurance carrier. Columbia contended that NCRIC's conduct amounted to tortious interference with its business relations with its attending physicians, many of whom had served at the hospital for decades, and that the loss of so many doctors contributed to the closure of the hospital, a non-profit with more than 130 years of community service. After a 2 week trial in which I served as lead counsel, the jury rejected NCRIC's breach of contract claim and found for Columbia on both its contract and its tortious interference counterclaims, awarding Columbia $18.2 million. The matter was one of the top 100 reported verdicts of 2004.

Co-counsel included Priya Aiyar and Mike Zuckman of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900, as well as Eli Schulman, formerly of Kellogg Huber. Lead opposing counsel: Rodney Page, Bryan Cave, LLP, 700 Thirteenth Street N.W., Washington, DC 20005-3960, (202) 508-6002; John G. Kester, Williams & Connolly LLP, 725 Twelfth St., N.W., Washington, DC 20005, (202) 434-5069.

2. *Conwood v. UST*, Case No. 5:98-CV 00108 (W.D. Ky), 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 US 1148 (2003) (Judge Thomas Russell, W.D. Ky.) (1997- 2003)

The U.S. Court of Appeals for the Sixth Circuit upheld a $1.05 billion treble damages award on behalf of my client, Conwood, against United States Tobacco Company ("UST") after a jury concluded that UST had engaged in illegal monopolization. Conwood alleged that UST, which controlled nearly 80% of the U.S. market for moist snuff smokeless tobacco, had attempted to exclude competing products by entering into exclusive deals with retailers, removing competitors' sales racks, burying competitors' products in UST racks, and destroying point-of-sale advertising, the industry's primary marketing medium. The verdict, reached after a four week jury trial, is believed to be the largest affirmed private damages award in the history of U.S. antitrust laws as of 2002; in its verdict, the jury also rejected UST's counterclaims seeking millions of dollars in damages. After trial, the court took additional evidence, conducted additional motions practice, and granted a four year injunction against certain anticompetitive conduct by UST, a result also affirmed on appeal. UST petitioned for review in the Supreme Court, we opposed, and the Supreme Court ultimately denied review. The case involved scores of depositions and massive discovery, as well as ancillary proceedings in several jurisdictions. I helped manage and run the case at all stages, from the pre-suit investigation through the drafting of the complaint; the discovery process; pre-trial motions practice; trial, where I served as second chair and handled many witnesses on direct and cross; post-trial motions practice; and the preparation of appellate briefs.

Co-counsel included Mike Guzman and Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Ben Powell, formerly of Kellogg Huber and now General Counsel to the Director of National Intelligence, (202) 395-2366; David Simpson, Eddie Foster and John S. ("Tripp") Wilson of the Conwood Company, 813 Ridge Lake Blvd., #100, Memphis, TN 38120, (901) 761-2050; Hank Handelsman of the Pritzker Organization, 71 South Wacker Drive Suite 4700, Chicago, IL 60606, (312) 873-4900; Richard Roberts, Whitlow, Roberts, Houston & Straub, PLLC, Old National Bank Building, 300 Broadway, Paducah, KY 42001, (270) 443-4516; L. Clifford Craig and John Nalbandian, Taft, Stettinius & Hollister, LLP, 425 Walnut St., Suite 1800, Cincinnati, OH 45202, (513) 381-2838. Counsel for third parties included Alice Fisher, formerly of Latham & Watkins and currently Assistant Attorney General for the Criminal Division, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530, (202) 514-7200. Lead counsel for defendants was Neal Stoll, Skadden Arps, 4 Times Square, New York, NY, 10036, (212) 735-3000.

3. *Zachair, Ltd. v. Driggs Corp. et al.*, 762 A.2d 991, 1003 (Md. Ct. Spec. App. 2000), cert. denied, 768 A.2d 524 (2001) (Judge Steven I. Platt) (1997-2001)

Defendants owned a valuable airport and mining facility. According to my client, plaintiff Zachair, defendants deliberately loaded the property with debt and ran it into bankruptcy. Zachair contended that defendants schemed to purchase the property fraudulently out of bankruptcy for an artificially low price, thereby "washing" the property of the debt associated with it. Zachair, unaware of this plan at the time, attended the bankruptcy auction as the only bidder unaffiliated with defendants, and won the auction when it bid the highest price. Zachair contended that defendants then proceeded to engage in a pattern of conduct designed to defeat Zachair's purchase and wrest control of the property from Zachair. According to Zachair, defendants maliciously used and abused legal process by filing multiple baseless proceedings against Zachair; improperly refused to vacate the property after the auction was consummated and they were legally obliged to leave; and proceeded to denude the property of valuable minerals resources and airport revenues. The case involved substantial dispositive motions practice and discovery which I handled. A 2 ½ week trial in which I served as lead counsel followed and the jury returned a verdict in favor of Zachair on counts including abuse of process, misuse of process, conversion, and tortious interference. The jury awarded approximately $4.8 million in compensatory damages as well as punitive damages of approximately the same amount (substantially more in punitive damages than Zachair sought at trial). In post-trial motions practice, the trial judge affirmed the compensatory award of approximately $4.8 million but granted the defendants' motion to reduce the punitive award to $775,000. On appeal, where I also briefed and argued, the court of appeals affirmed the trial court's judgment in all respects. Defendants then petitioned for review in the state Supreme Court and I prepared an opposition brief; the state Supreme Court denied review, thus sustaining Zachair's award.

Co-counsel: Matt Bester, formerly of Kellogg Huber and now with the U.S. Department of Justice Antitrust Division, (202) 353-3491 and Sarah Jorgensen, formerly of Kellogg Huber. Lead counsel for defendants: Shelby Mitchell, Baker & Hostetler, Suite 1100, 1050 Connecticut Ave., N.W., Washington, D.C. 20036, (202) 861-1601.

4. *Automall v. American Express*, Civil Action No. 01-1705-A (E.D. Va.) (Chief Judge Hilton) (trial in 2002)

In this case, I was retained by defendant American Express approximately two weeks before trial to supplement existing lawyers from another firm and serve as lead counsel in a breach of contract jury trial. Prior to my firm's involvement, the Court had decided under *Daubert* to permit plaintiff's expert to testify to damages in excess of $70 million. After our involvement, we crafted a new theory for exclusion of the expert witness and presented it to the Court during trial toward the close of plaintiff's case. After reviewing our new theory for exclusion, the Court encouraged the plaintiff to settle, something which subsequently occurred on satisfactory terms.

Co-counsel included Mike Guzman and David Ross of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202)

236-7900; Stuart Alderoty, American Express Chief Litigation Counsel, American Express Tower, 200 Vesey St., New York, NY 10385, (212) 640-2000; Julie Quagliano, Steve Seeger, and Jim Faughnan, Quagliano & Seeger, 2620 P Street, N.W., Washington, D.C. 20007, (202) 822-8838. Lead counsel for plaintiff: Herbert Milstein, Cohen, Milstein, Hausfeld, & Toll, P.L.L.C., 1100 New York Ave., N.W., Suite 500 West, Washington, D.C. 20005, (202) 408-4600.

5. (a) *California Public Employees' Retirement System v. Felzen*, 525 U.S. 215 (1999)
   (b) *Devlin v. Scardelletti*, 536 U.S. 1 (2002)

My involvement in these two cases arose as a result of the desire of the Council of Institutional Investors and various of its state public employee pension fund members to establish the right of class members to object to class action and derivative suit settlements and pursue those objections on appeal. The Council and its members claimed that, due to dynamics associated with the class action mechanism, class action settlements sometimes benefit lead class members, their counsel, and defendants at the expense of other class members. Council members CalPERS and the Florida State Board of Administration (SBA), together with the United States Government, first pursued the issue before the U.S. Supreme Court in the *Felzen*. In that case, I wrote the successful petition for certiorari on behalf of CalPERS and SBA, helped convince the U.S. Government to participate in the case on the merits on the side of our clients, and helped prepare the merits briefs. *Felzen* resulted in a tie 4-4 vote, leaving the question of objector participation unresolved, but the issue emerged again 3 years later in *Devlin*. This time the Council participated as amicus and I wrote the Council's brief. The question of objector standing to appeal was resolved in *Devlin* in favor of the Council and its members by a vote of 6 to 3.

Co-counsel in *Felzen* included Michael Kellogg of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900. Lead counsel for respondent in the *Felzen* was John G. Kester, Williams & Connolly LLP, 725 Twelfth St., N.W., Washington, DC 20005, (202) 434-5069; counsel for the government in *Felzen* was David Frederick, now with Kellogg, Huber. Lead counsel for petitioner in *Devlin* was Thomas Goldstein, 4607 Asbury Pl., N.W., Washington, D.C., 20016, (202) 237-7594; counsel for respondent in *Devlin* was Laurence Gold, Bredhoff & Kaiser, PLLC, 805 15th St., Suite 1000, Washington, D.C. 20005, (202) 842-2600.

6. *Z-Tel v. SBC Communications*, No. 5:03-CV-229 (E.D. Tex.) (Judge David Folsom and Magistrate Judge Caroline Craven) (2003-05)

This case involved antitrust allegations against my client, SBC Communications. Plaintiff Z-Tel alleged that SBC sought to drive Z-Tel and other competitive local exchange carriers (CLECs) out of business by refusing to share certain allegedly essential

elements of its network. Z-Tel sought damages in excess of $1 billion under federal antitrust laws, federal communications laws, and various tort theories. In turn, SBC counterclaimed, alleging that Z-Tel was ailing financially due to a poor business plan and that it had sought to avoid failure by improperly shifting certain of its operating costs onto SBC. Certain portions of Z-Tel's complaint were dismissed at the outset of the case but other portions survived into discovery. Substantial discovery ensued with multiple rounds of motions practice as well as depositions and ancillary proceedings across the country before the case was settled on satisfactory terms. I directed the defense of the case on a day-to-day basis, drafting or editing extensive pleadings, arguing many motions, and taking and defending key depositions.

Co-counsel included: Steve Benz, Ken Fetterman, Mark Hansen and Aaron Panner of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Martin Grambow of SBC Communications (now AT&T), 175 E. Houston, PO Box 2933, San Antonio, TX, 78299-2933, (210) 351-5966; Damon Young, John Pickett, and Lance Lee, of Young, Pickett & Lee, 4122 Texas Boulevard, Texarkana, TX 75504, (903) 794-1303; Judge Joseph Kendall, Provost & Umphrey, Dallas, TX, 3232 McKinney Avenue, Suite 700, Dallas, Texas 75204, (214) 744-3000. Counsel for plaintiff included Nick Patton of Patton, Tidwell & Schroeder, LLP, 4605 Texas Boulevard, Texarkana, TX 75505, (903) 792-7080.

7. (a) *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005)
   (b) *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2003)

In these two cases, I prepared amicus briefs in the U.S. Supreme Court and Second Circuit, respectively, on behalf of the Chamber of Commerce. While the facts and question presented in the two cases differed somewhat, broadly speaking both raised the question whether plaintiffs are permitted to sue in securities fraud class actions for losses not proximately caused by the fraud they allege. Our client's position, that such claims are not viable as a matter of law, prevailed before both the Second Circuit and Supreme Court in unanimous opinions.

Co-counsel in *Dura* and *Lentell* included Paul Matey, formerly of Kellogg Huber and now with the U.S. Attorney's Office in New Jersey, 790 Broad Street, Newark, NJ 07102, (973) 645-2930; Robin S. Conrad and Stephanie A. Martz, the U.S. Chamber of Commerce, 1615 H Street, N.W., Washington, D.C. 20062, (202) 463-5337. In *Lentell* counsel for defendant was Scott D. Musoff, Skadden Arps, 4 Times Square, New York, NY, 10036, (212) 735-3000; counsel for plaintiff was Herbert Milstein, Cohen, Milstein, Hausfeld, & Toll, P.L.L.C., 1100 New York Ave., N.W., Suite 500 West, Washington, D.C. 20005 (202) 408-4600. In *Dura* counsel for petitioner was William Sullivan, Paul Hastings, 3579 Valley Centre Drive, San Diego, CA 92130, (858) 720-2525; counsel for respondent was Patrick Coughlin, Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, 655 W. Broadway, Suite 1900, San Diego, CA 92101, (619) 231-1058.

8. *Teachers Retirement System of Louisiana v. Regal Entertainment*, No. 444 (Del. Chanc.) (Hon. William Chandler) (2004)

In this case, plaintiff filed a shareholder derivative suit and motion for injunction challenging a $710 million special dividend and concomitant capital restructuring by my client, a leading movie theater chain. Plaintiff contended that the dividend and restructuring amounted to a breach of fiduciary duty and self-dealing. The Court set the case on an expedited discovery schedule and then held an extensive evidentiary hearing on the injunction motion before ruling on the merits in my client's favor. I directed our client's defense, wrote the briefs, defended and took depositions, and argued. After the hearing, plaintiff dropped the remainder of its suit.

Co-counsel included: Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Peter Brandow, General Counsel of Regal Entertainment, 7132 Regal Lane, Knoxville, Tennessee 37918, (865) 922-1123; William Lafferty, Morris, Nichols, Arsht & Tunnell, LLP, 1201 N. Market St., Wilmington, DE 19899, (302) 658-9200. Lead counsel for plaintiff: Stuart Grant, Grant & Eisenhofer, PA, 1201 North Market St., Wilmington, DE 19801, (302) 622-7000.

9. *Ashley v. Coopers & Lybrand Deloitte*, Law No. CL95-6466 (Albermarle Co., VA) (Judge Paul Peatross) (1995-1998)

With his late wife, Sir Bernard Ashley co-founded the Laura Ashley company. As an outgrowth of that enterprise, Sir Bernard started a Laura Ashley inspired country house hotel business and hired his longtime consultants, Coopers & Lybrand UK, to advise him on prospective hotel acquisitions and to manage the business. Sir Bernard alleged that his advisors eventually became more interested in their own financial advancement than his interests and led him into a hotel deal that they knew was not feasible in order to enrich themselves. He sued for breach of fiduciary duty and fraud, among other things, claiming damages of approximately $50 million. I was responsible for the prosecution of this case on a day-to-day basis, arguing various motions regularly; taking and defending depositions; responding to, preparing, and arguing case dispositive motions; and preparing the matter for trial. Among other things, during discovery the Court barred defendant from presenting much of its case at trial after, the Court found, defendant repeatedly refused to supply appropriate witnesses for deposition. After defendant's motion for mandamus to overturn the trial court's order barring its ability to put on evidence was denied by the Virginia Supreme Court, the case settled at the outset of trial on undisclosed terms.

Co-counsel included Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Richard Milnor, Zunka, Milnor, Carter & Inigo, Ltd. 414 Park Street, P.O. Box 1567, Charlottesville, Virginia 22902, (434) 977-0191. Lead counsel for defendants were Jay

Kelly Wright and Roger Fendrich, Arnold & Porter, LLP, 555 12th Street, N.W., Washington, D.C. 20004, (202) 942-5000.

10. *Goff v. Ford Motor Company and David Bickerstaff*, No. 2:97-0341 (S.D.W.Va.) (Judge John Copenhaver) (1997-2000)

In this case, we represented a former car designer and expert witness for Ford Motor Company against charges that he conspired with Ford to provide false testimony in prior cases brought by product liability plaintiffs, thereby improperly securing verdicts in Ford's favor. This individual, along with Ford, was charged with violations of RICO, subject to class action allegations, and alleged to be personally liable for multiple millions of dollars in damages. We defeated the class action allegations early in the case but the case was permitted to proceed to trial. I wrote and edited various dispositive motions, the opposition to the motion for class certification, as well as motions in limine I argued prior to trial. Our client was dismissed from the case at the outset of the trial. During the ensuing trial against Ford, I provided strategic legal advice to defense counsel.

Co-counsel included David Ross and Chris Todd of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; John McHugh, Allen Guthrie McHugh & Thomas PLLC, 500 Lee St. East, Suite 800, Charleston, WV 25301, (304) 345-7250. Counsel for the other defendant included Ed Stewart, Wheeler, Trigg & Kennedy, LLP, 1801 California St., Suite 3600, Denver, CO 80202, (303) 244-1800. Lead counsel for plaintiff included A. Camden Lewis, Lewis & Babcock, 1513 Hampton St., Columbia, SC 29211, (803) 771-8000.

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

I have devoted a significant amount of time to legal matters that do not involve court appearances, including by way of example:

(a) In my current job I help oversee all of the Department of Justice's civil litigating units. Major litigation decisions in certain significant cases -- such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms -- are reviewed by the Office of the Associate Attorney General. I also spend a substantial amount of time reviewing and editing trial and appellate court legal briefs, plotting case strategy, and assisting in the development and implementation of a wide variety of civil justice initiatives and policies.

(b) While in private practice, I provided a substantial amount of antitrust counseling for small and large companies, including: (1) assessing the antitrust implications of contemplated mergers and acquisitions; (2) analyzing the antitrust consequences of certain proposed and existing courses of business (e.g., sales and marketing techniques); and (3) assisting my clients with efforts before federal antitrust authorities, including the Department of Justice and the Federal Trade Commission, to contest acquisitions made by rival companies as violations of federal antitrust law.

(c) In private practice I advised a wide array of clients faced with potential civil and criminal liability seeking to mitigate or avoid those issues short of litigation. These matters included, among others, assisting with the representation of a member of the Administration of President William J. Clinton in connection with a then-pending investigation.

(d) While in private practice I was engaged to conduct a top to bottom internal review of a client's legal department and litigation docket, as well as to assess the legality of certain management practices under federal law.

(e) I obtained a doctorate in legal philosophy at Oxford and have devoted a significant amount of time to the academic research and legal writings discussed above.

(f) I served as a law clerk to two federal appellate judges where my responsibilities included preparing bench memos analyzing cases prior to argument; preparing draft opinions; analyzing draft opinions written by others; and, in the case of the Supreme Court, assessing petitions for certiorari.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   I retain an interest in certain contingency matters with my former law firm. Under an agreement reached when I left the firm, I will be compensated according to certain predetermined rules if and when those matters result in recoveries for the firm.
   In addition, I have an agreement with Princeton University Press concerning royalties arising from the sale of my book. Any sums received above certain costs I incurred in connection with the book I intend to donate to hospice charities.

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

   If confirmed, I intend to abide by the Code of Conduct for United States Judges and applicable statutes. I also intend to consult the practices employed by my colleagues, as appropriate. While I cannot predict all of the potential conflicts that might emerge, I would include among the potential conflicts that could arise during my initial service the following: cases argued by my former partners, close friends, or family members; cases involving the clients I represented in private practice; and matters on which I worked while at the Department of Justice.

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

   I have no such commitments or agreements, though I cannot rule out the possibility that I might seek opportunities to provide volunteer services to appropriate charitable causes, teach young persons, or otherwise participate in the life of my community. I would do so, however, within the limits of the Code of Conduct for United States Judges.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items**

exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see the attached Financial Disclosure Report.

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

Please see the attached Net Worth Statement.

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

I have volunteered in various political campaigns, and participated in groups such as "Lawyers for Bush-Cheney," but have not managed or held a formal position of significance in any campaign.

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks		3	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		410	000
Real estate owned-add schedule	1	050	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		60	000				
Cash value-life insurance							
Other assets itemize:							
See attached schedule	2	443	400				
				Total liabilities		410	000
				Net Worth	3	146	400
Total Assets	3	556	400	Total liabilities and net worth	3	556	400
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax		105	000				
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$ 1,050,000
Other Assets	
Spouse 403(b) account	$ 2,400
Vacation property (partial ownership)	200,000
Thrift Savings Plan	14,000
IRA accounts	47,000
College Savings Accounts	350,000
USAA Money Market	320,000
USAA Mutual Funds	1,200,000
ABA 401(k)	310,000
Total Other Assets:	$ 2,443,400
Real Estate Mortgages Payable	
Personal residence	$ 410,000

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2004

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Gorsuch, Neil M.	Tenth Circuit Court of Appeals	May 12, 2006
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* Circuit Judge- Nominee	5. Report Type (check appropriate type) _X_ Nomination, Date May 10, 2005 ___ Initial ___ Annual ___ Final	6. Reporting Period January 1, 2005 - May 12, 2006
7. Chambers or Office Address U.S. Department of Justice, Room 5706 950 Pennsylvania Ave., N.W. Washington, D.C. 20530	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

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

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	**NONE** (No reportable positions.)	
1	Partner	Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC (resigned May 2005)
2		
3		

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

	DATE	PARTIES AND TERMS
☐	**NONE** (No reportable agreements.)	
1	2005	Kellogg Huber - I retain an interest in certain contingency cases in recognition of legal services rendered and will be compensated if and when the firm obtains recoveries.
2		

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

	DATE	SOURCE AND TYPE	GROSS INCOME
A. Filer's Non-Investment Income			
☐	**NONE** (No reportable non-investment income.)		
1	2004	Kellogg Huber	$ 1,419,050
2	2005	Kellogg Huber	$ 1,144,538
3	2006	Kellogg Huber	$ 277,662

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

☑	**NONE** (No reportable non-investment income.)		
1			
2			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Neil M. Gorsuch	May 12, 2006

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

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
☐	**NONE** (No such reportable gifts.)		
1	Exempt		$
2			$
3			$
4			$

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

	CREDITOR	DESCRIPTION	VALUE CODE*
☑	**NONE** (No reportable liabilities.)		
1			
2			
3			
4			
5			

*Value Codes: J - $15,000 or less K - $15,001-$50,000 L - $50,001-$100,000 M - $100,001-$250,000
N - $250,001-$500,000 O - $500,001-$1,000,000 P1 - $1,000,001-$5,000,000
P2 - $5,000,001-$25,000,000 P3 - $25,000,001-$50,000,000 P4 - $50,000,001-$100,000,000
P5 - $100,000,001-$500,000,000 P6 - $500,000,001-$1,000,000,000 P7 - More than $1,000,000,000

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Neil M. Gorsuch	May 12, 2006

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets)	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (Int., Div., Rent or Int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	Place "O" after each asset exempt from prior disclosure.									
☐	**NONE** (No reportable income,									
1	USAA Money Market Fund	D	Interest	N	T	exempt				
2	USAA Bond Fund	D	Interest	M	T					
3	USAA High Yield Bond Fund	C	Dividend	M	T					
4	USAA Intl Fund	D	Dividend	M	T					
5	USAA S&P Fund	C	Dividend	M	T					
6	USAA Value Fund	A	Dividend	M	T					
7	USAA Tax Ex Interm. Bond Fund	D	Interest	N	T					
8	USAA Small Cap Fund	A	Dividend	L	T					
9	USAA GNMA Trust	E	Dividend							
10	Senate Credit Union checking	A	Dividend	C	T					
11	Walden Group LLC		none	M	W					
12	529 Plans - Potomac and		none	N	T					
13	ABA 401K Value Fund		none	M	T					
14	ABA 401K Growth Fund		none	L	T					
15	ABA 401K Equity Index Fund		none	M	T					
16	Alpine FDS Dynamic Div Fund	B	Dividend							
17	Provident Energy Trust Common	A	Dividend							
18	Vanguard Total Market Index Sh	A	Dividend							

1 Income/Gain Codes: (See Cat. II, Instr.) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Cat. III, Instr.) J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=More than $25,000,000

3 Value Method Codes: (See Cat. III) Q=Appraisal U=Book value R=Cost (real estate only) S=Assessment V=Estimated T=Cash/Market W=Other

19	IRA - USAA GNMA Fund	A	Dividend							
20	IRA - USAA Growth & Income Fund	A	Dividend	J	T					
21	IRA - USAA High Yield Fund	A	Dividend	J	T					
22	IRA - USAA Total Return Fund	A	Dividend	J	T					
23	IRA - USAA World Growth Fund		none	J	T					
24	Spouse IRA - USAA GNMA Fund	A	Dividend	J	T					
25	Spouse IRA - USAA Growth & Income Fund	A	Dividend	J	T					
26	Spouse IRA - USAA High Yield Fund	A	Dividend	J	T					
27	Spouse IRA - USAA Total Return Fund	A	Dividend	J	T					
28	Spouse IRA - World Growth Fund		none	J	T					
29	US Senate Credit Union Checking	A	Dividend	J	T					
30	Spouse 403B Plan - TIAA CREF Growth Fund		none	J	T					
31	Thrift Savings Plan		none	J	T					
32										
33										
34										
35										
36										
37										
38										
39										
40										
41										
42										

1	Income Gain Codes: (See Col. B1, D4)	A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000	D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001-$100,000	G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000		
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000	N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=More than $5,000,000			
3	Value Method Codes: (See Col. C2)	Q=Appraisal R=Book value	S=Cost (real estate only) T=Other	U=Assessed value V=Estimated	W=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Neil M. Gorsuch	May 12, 2006

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

Notes to Part III.A:

1. Income from Kellogg Huber for 2005 represents income for a partial year before I joined the government, as well as a return of capital.

2. Income from Kellogg Huber for 2006 represents a payment of contingency fee income pursuant to an agreement reached with the firm prior to my departure.

3. Additional non-investment income in 2005 and 2006 was received as United States government salary.

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 _____ **Date** May 12, 2006

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 201
One Columbus Circle, N.E.
Washington, D.C. 20544

III. GENERAL (PUBLIC)

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

   I began pro bono legal work in law school, participating in the Harvard Prison Legal Assistance Project, assisting with the representation of inmates in Massachusetts state prisons with respect to, among other things, hearings on disciplinary actions taken against them. I later participated in the Harvard Defenders program, representing defendants in criminal proceedings in Massachusetts state courts. While in private practice, I took on matters for non-profit organizations and individuals who could not pay my firm's normal hourly rates. In these matters, fees were reduced, modified in unconventional ways, or waived to allow the client to obtain legal representation. These clients included the Columbia Hospital for Women, the Council of Institutional Investors, as well as private individuals. In addition, I have spent more than three years of my career in public service for the U.S. Government. Since I began at the Department of Justice, I have sought to foster efforts to encourage pro bono work by Department lawyers despite concerns that have historically served to discourage government lawyers from engaging in pro bono activities; I have, for example, spoken on the issue and participated in the District of Columbia's legal aid clinic with other Department lawyers. Beyond my legal work, I have volunteered for our children's schools, my college, and for the Harry S. Truman Scholarship Foundation which seeks to encourage university students' to become change agents in our society and government. I have assisted the Truman foundation by interviewing applicants, serving as a mentor to a recent college student, and arranging opportunities for college age scholars doing public service summer internships in Washington, D.C. to meet and hear from government leaders. I have not attempted to keep records of the hours devoted to the matters described above.

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

   No, other than an all male fraternity during college.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please**

describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no applicable selection commission. I was interviewed by individuals from the White House Counsel's Office and the Department of Justice. I also reached out to speak with both of the Senators from Colorado. After completing nomination paperwork and undergoing a background investigation, I was notified that I would be nominated.

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

No.

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

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

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

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The Constitution requires federal judges to strike a delicate balance. The separation of powers embodied in our founding document provides the judiciary with a defined and limited charter. Judges must allow the elected branches of government to flourish and citizens, through their elected representatives, to make laws appropriate to the facts and circumstances of the day. Judges must avoid the temptation to usurp the roles of the legislative and executive branches and must appreciate the advantages these democratic institutions have in crafting and adapting social policy as well as their special authority, derived from the consent and mandate of the people, to do so.

At the same time, the founders were anxious to ensure that the judicial branch never becomes captured by or subservient to the other branches of government, recognizing that a firm and independent judiciary is critical to a well-functioning democracy. The Constitution imposes on the judiciary the vital work of settling disputes, vindicating civil rights and civil liberties, ensuring equal treatment under law, and helping to make real for all citizens the Constitution's promise of self-government.

There may be no firmly fixed formula on how to strike the balance envisioned by the Constitution in specific cases, but there are many guideposts discernable in the best traditions of our judiciary. A wise judge recognizes that his or her own judgment is only a weak reed without being fortified by these proven guides. For example:

A good judge recognizes that many of the lawyers in cases reaching the court of appeals have lived with and thought deeply about the legal issues before the court for months or years. A lawyer in the well is not to be treated as a cat's paw but as a valuable colleague whose thinking is to be mined and tested and who at all times deserves to be treated with respect and common courtesy. A good judge will diligently study counsel's briefs and the record and seek to digest them fully before argument and then listen with respectful discernment to the arguments made by his or her colleagues at the bar.

A good judge will recognize that few questions in the law are truly novel, that precedents in the vast body of federal law reflect the considered judgment of those who have come before us and embody the settled expectations of those in our own generation. A good judge will seek to honor precedent and strive to avoid its disparagement or displacement.

A good judge will also listen to his or her colleagues and strive to reach consensus with them. Every judge takes the same judicial oath; every judge brings a different and valuable perspective to the office. A good judge will appreciate the different experiences and perspective of his or her colleagues and know that reaching consensus is not always easy but that the process of getting there often tempers the ultimate result, ensuring that the ultimate decision reflects the collective wisdom of multiple individuals of disparate backgrounds who have studied the issue with care.

Throughout the process of adjudicating an appeal, a good judge will question not only the positions espoused by the litigants but also his or her own perceptions and tentative

conclusions as they evolve. And a good judge will critically examine his or her own ideas as readily and openly as the ideas advanced by others. A good judge will never become so wedded to any view of any case as to preclude the possibility of changing his or her mind at any stage -- from argument through the completion of a written opinion. Pride of position, fear of embarrassment associated with changing one's mind, along of course with personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do.

AFFIDAVIT

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

May 8, 2006
(DATE)

(NAME)

JEANETTA M. ROBINSON
Notary Public
District of Columbia
My Commission Expires August 14, 2008

(NOTARY)

Sworn to and subscribed before me, in my presence this 8th day of May, 2006. A District of Columbia Notary Public, In and for the State at Large

Notary Public

My commission expires August 14, 2008

Senator GRAHAM. I am very impressed with your legal abilities, but more importantly, with your disposition and demeanor. What I think Senators Allard and Salazar said about you is dead on. You have a humble spirit and a keen mind. But being a judge is more than being smart.

Mr. GORSUCH. Yes, sir.

Senator GRAHAM. That is very important, but you have got to understand people underneath.

What is the difference, in you opinion, if you could share with me, between being an advocate and a judge?

Mr. GORSUCH. Being an advocate is a great deal easier, in some respects. Your client's position defines your objective, and your obligation is to represent him or her zealously.

I have to tell you, Senator, I love being a lawyer. I love that aspect of the profession, of being in the arena and fighting it out within the rules of civility, decency, and common sense.

Being a judge is however, the greatest honor that any lawyer, practicing lawyer, could ask to have because your client becomes not an individual, a corporation, a partnership, it becomes the case of justice. There is no greater client than that.

Senator GRAHAM. That was well said.

I know this is something you have not really done yet. But what is your philosophy about judging and how you fit into this constitutional democracy that we have been trying to get better and tinker with for 200 years?

Mr. GORSUCH. Well, you are right, I have not done it yet so it is a little presumptuous.

Senator GRAHAM. How you see yourself fitting in.

Mr. GORSUCH. But if I were to be confirmed, Senator, I resist pigeon holes. I think those are not terribly helpful, pigeon-holing someone as having this philosophy or that philosophy. They often surprise you. People to unexpected things and pigeon holes ignore gray areas in the law, of which there are a great many.

I can tell you how I think I would like to view approaching decisions. That is, first and foremost, with this thought in mind: to those clients who are affected, to that lawyer in the well, that may be the most important thing in their life and that case deserves the attention, the care and the scrutiny of a complete lawyer and the complete attention of the judge without being diverted by personal politics, policy preferences, or what you ate for breakfast. Those people deserve your very best at all times. There are certain tools that I think can get you there.

First, you listen to that lawyer in the well. You do not treat them as a cat's paw. He is not some pawn in a game to be played with and batted around. He is to be taken seriously. He has studied this issue for, sometimes, months, years, and lived with it.

Having litigated cases in 16 different States and Courts of Appeals, I appreciate that, and I know the importance and difficulty of that role and I respect it greatly.

The second tool, I think, is respecting your colleagues and trying to reach unanimity where possible, Senator. As a practitioner, fractured opinions are very difficult to deal with and understand what the law is sometimes. I often find that the process of getting to a single position with different minds leads to a better result.

Justice White used to tell us in chambers, "Two heads are better than on." He is right. He was one of the most humble men I ever met, and was very well aware of the limitations of any single person, though he may have been among the brightest people I ever met. So I think working with your colleagues and trying to get to agreement is hugely important.

Then, finally, precedent. Precedent is to be respected and honored. It is not something to be diminished or demeaned. It is something you should try to uphold wherever you can, with the objective being, follow the law as written and not replace it with my own preferences, or anyone else's Senator.

Senator GRAHAM. The best you can, describe what you think an idealogue would be and why that would be bad.

Mr. GORSUCH. In terms of being a Federal judge, Senator?

Senator GRAHAM. Yes.

Mr. GORSUCH. Someone who is not willing to do what I just talked about. That is, someone who is not willing to listen with an open mind to the arguments of counsel, to this colleagues, and to precedent, someone who is willing to just, willy-nilly, disregard those three things, to effect his own personal views, his politics, his personal preferences. That is unacceptable.

Senator GRAHAM. In the area of assisted suicide and euthanasia, I think you have been a fairly prolific writer and you certainly have an interest in that area.

How will your past positions affect your ability to judge in cases that may contain those questions?

Mr. GORSUCH. Senator, my personal views, as I hope I have made clear, have nothing to do with the case before me in any case. The litigants deserve better than that, the law demands more than that.

That said, Senator, my writings, just to clarify, have been largely in defense of existing law, that is, they are consistent with the Supreme Court's decisions in this area and existing law in most places.

So, I do not think there is actually much tension between my writings and anything that might come before the court, but I can pledge to this Committee, Senator, that I will reach any question before me, should I become a judge, with an open mind and listen tot he arguments of counsel, the views of my colleagues and prior case law from the Supreme Court, and the various Courts of Appeals.

Senator GRAHAM. What concern, if any, do you have about the future of the judiciary or the judiciary as it stands now?

Mr. GORSUCH. Senator, I think some of the things you have touched on are the challenges. The independence of the judiciary depends upon people in both parties being willing to serve, good people being willing to serve who are capable and willing to put aside their personal politics and preferences to decide cases and to follow the law and not try and make it.

Senator GRAHAM. Of all the jobs you have had, which job do you think has the most relevance to what you are about to attempt to do here?

Mr. GORSUCH. Well, I cannot help but think back to my clerkships, and most particularly my time with Justice White. I cannot

help but go back and think there. If confirmed, I would be serving at the Justice Byron White Courthouse and replacing former Justice White law clerk, David E. Bell, a wonderful judge. That is a humbling, humbling though, Senator.

Senator GRAHAM. Well, I have the statement of Senator Leahy I would like to submit for the record. I know he wishes he could be here, but we will introduce his statement in the record.

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

Senator GRAHAM. Is there anything else you would like to let the Committee know about?

Mr. GORSUCH. Just that I am very honored to be here, very pleased to be here. Thank you very much, Senator, for chairing this.

Senator GRAHAM. The record will remain open until June 28 at 5:00 p.m.

I would just close the hearing with a personal observation. I have had the pleasure of working with Mr. Gorsuch during my time in the Senate, and not only are you intellectually gifted, you do seem to have all of the qualities that I would be looking for in terms of someone with the power to wear the robe.

You have lived a very beneficial and fruitful life, and I know your family is tremendously important to you. I know they appreciate the honor that have been bestowed upon you.

I would just like to leave you with one thought. I am very concerned about the future of the judiciary. I hope people in my business, the political business, will realize that being a judge and a politician are two different things. You can be a conservative judge and a liberal judge, but that is totally different than being a conservative or liberal politician.

I do hope we can get back on track—Senator Salazar's presence here today meant a lot to me—in the confirmation process so that we will encourage good men and women, from a variety of backgrounds, of wanting to be judges and not make the process so difficult that they would not want to participate. I find every reason to believe that you will be well received by the Committee and the Senate as a whole, and I look forward to talking with you more. Hopefully we can get you on the bench soon.

The hearing is adjourned.

[Whereupon, at 4:28 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

950 Pennsylvania Ave., N.W.
Room 5706
Washington, D.C. 20530

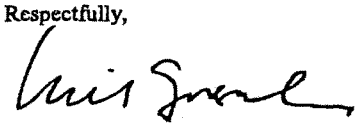
June 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Leahy.

Respectfully,



Neil M. Gorsuch

Enclosure

Responses to Written Questions from Senator Patrick Leahy
Neil M. Gorsuch, nominated to be a United States Circuit Judge
for the Tenth Circuit

1. In your February 2005 article for the National Review titled "Liberals 'n' Lawsuits: Too much reliance on litigation is bad for the courts and the Dems," you criticize "liberals" for raising constitutional challenges in the courts to protect what you describe as a "social agenda." However, the issues you have described as part of a "social agenda," like school vouchers for use at parochial schools, raise questions of fundamental rights protected by the Constitution, in that instance the First Amendment's Establishment Clause. Can you discuss the importance of the courts in stepping in to ensure the protection of individual constitutional rights, especially when those rights are contrary to popular political positions and so would not be protected by the political process?

Response: I appreciate very much the chance to answer these questions from Senator Leahy.

The Constitution requires federal judges to strike a delicate balance. Under our charter, judges must allow the elected branches of government to flourish and the people, through their elected representatives, to make laws appropriate to the facts and circumstances of the day. Judges must avoid the temptation to usurp the roles of the democratic branches and must appreciate the advantages those branches have in crafting and adapting social policy as well as their mandate, derived from the people, to do so.

At the same time, the founders were anxious to ensure that the federal judiciary never becomes captured by or subservient to the other branches, recognizing that a firm and independent judiciary is critical to the protection of *all* citizens' constitutional rights and to a well-functioning democracy. The Constitution imposes on the judiciary the vital role of ensuring the equal protection of each and every citizen – whatever his or her views – and the vindication of personal civil rights and liberties – however unpopular – as well as the work of making real for every American the Constitution's promise of self-government. If confirmed by the Senate, I would take these duties seriously and discharge them to the best of my abilities.

I also appreciate the chance to clarify the article referenced in the question. That article drew attention to a newspaper column that, in turn, argued that our society has become increasingly litigious, with parties often proceeding to court without first attempting to resolve disputes through the electoral process. I wrote to express the view that, when it is possible, resolving our political and policy disputes through the electoral process, rather than increased litigiousness, is a healthy thing for our society and for the judiciary.

At the same time, I did not argue that litigation to protect civil rights and civil liberties is inappropriate. To the contrary, I expressly pointed to *Brown v. Board of Education* as an example of those cases where the judiciary has played and must play an essential role in securing civil rights for all Americans. I deeply admire and respect the judiciary's

tradition of independence and its history of vindicating the constitutional rights and liberties of the unpopular. If confirmed, I would do my best to honor and carry on that tradition.

2. Your February 2005 article does not discuss the many constitutional challenges raised in court by conservatives, corporations, and industry groups to further their own agenda. These groups have aggressively pursued constitutional challenges in courts under the Takings Clause, the Commerce Clause and the non-delegation doctrine in order to overturn environmental laws passed by an overwhelming bipartisan majority of Congress, such as Safe Drinking Water Act, RCRA, the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

A. Do you believe your critique of those who pursue a "social agenda" through constitutional challenges in the court applies equally to these conservative, and industry groups challenging environmental law? Is their "overweening addiction to the courtroom" also "bad for the country and bad for the judiciary"?

Response: Yes, the point of the article can be applied to groups of all kinds across the political spectrum. The newspaper column referenced in my article focused on litigation from one end of the political spectrum, but the essential point of my argument – that we as a society can often benefit from resolving our differences through the electoral process rather than through litigation – applies equally to all points of view.

B. You conclude your February 2005 article by praising "a generation of Democratic-appointed judges, from Louis Brandeis to Byron White, [who] argued for judicial restraint and deference to the right of Congress to experiment with economic and social policy." Do you believe that these judges' approach of judicial restraint should be applied in the same manner to constitutional challenges by industry groups to environmental laws as you have advocated it be applied to groups pursuing the protection of individual rights?

Response: Yes. The concept of judicial restraint, like justice itself, should be blind – blind to the identity or beliefs of the litigants before the court.

C. The court to which you have been nominated, the Court of Appeals for the Tenth Circuit, hears many appeals involving the management of the Nation's many public lands that lie within its jurisdiction, including national parks, national wildlife refuges, and wilderness areas. In particular, the Tenth Circuit hears appeals brought by parties dissatisfied with federal agency decisions. This is another area in which concerned citizens turn to the courts to vindicate their interests. If confirmed, can you assure the Committee your courtroom would be open to intervention in litigation by those concerned with the administration of those public lands?

Response: Yes. Judges owe the same obligation of fidelity to the record and the law in all cases and to all persons appearing before them – regardless of who the litigant is or

what the nature of the claim may be. If confirmed, those challenging agency decisions involving the management of the Nation's public lands would receive the same openness, care, and attention – free of bias and extra-record influences – as every other litigant who might appear before me.

As a practicing lawyer for many years, litigating matters in state and federal courts across the country on behalf of plaintiffs and defendants, individuals, non-profits, corporations, and class actions, I never allowed my personal views and policy preferences to interfere with the zealous representation of my clients. My duty of loyalty meant preferring my clients' interests and objectives to my own views, even when I may not have agreed with my client's point of view or purpose. If confirmed, I would have a new client: the law itself. Just as my personal and political views had no proper place in my job as an advocate and counselor, neither would they have any place in my role as a judge. I would seek only and always to follow the law faithfully and fairly in each and every case.

As a fourth generation Colorado native and someone who spends as much time as I can manage in the Colorado mountains, I cherish the natural beauty of the West and the remarkable legacy our forefathers bequeathed us there in the form of protected national parks and lands and I deeply respect all of those – of all points of view – who seek to protect and enhance that legacy.

3. Over the past decade, the Supreme Court has struck down an unprecedented number of federal statutes, most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997), *Kimel v Florida Board of Regents*, 120 S. Ct. 631 (2000), and *Board of Trustees v. Garrett*, 19 S. Ct. 2240 (1999). The Supreme Court has also recently struck down statutes as being outside the authority granted to Congress by the Commerce Clause, such as in the case of *U.S. v. Lopez*, 115 S. Ct. 1624 (1995) or *U.S. v. Morrison*, 120 S. Ct. 1740 (2000). I am hopeful that the Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) signals a turn away from the diminishing of the authority of Congress to legislate to protect the American people.

In light of your advocacy for judicial restraint and deference to Congress, what is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

Response: As the question indicates, one of the Court's most recent pronouncements with respect to the Commerce Clause came last year in *Gonzales v. Raich*. There the Court made clear that "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce is firmly established." The precedents of the Supreme Court addressing the Fourteenth Amendment have likewise repeatedly demonstrated that Congress's authority to enact legislation pursuant to Section 5 is very broad. If confirmed, I would enforce these Supreme Court rulings fully in cases that may come before me, applying the same

judicial restraint and deference to congressional judgment in these arenas as I would in any other.

4. You are currently the Principle Deputy to the number three official at the Department of Justice and your responsibilities include managing the Department's civil litigating components and helping make litigation decisions in significant cases. If confirmed, on what cases involving what subject matter will you recuse yourself? Will you commit to recusing yourself from participating in any cases in which you were involved at the Justice Department?

Response: If confirmed and a case in which I was personally involved during my service at the Department of Justice should come before me as a judge, I would expect to recuse myself. Under 28 U.S.C. Section 455(b)(3), a government lawyer should, among other things upon becoming a judge, recuse himself or herself when he or she "participated as a counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy." It is difficult to predict what other potential conflict of interests might arise from my service at the Department, but in each such instance I intend, if confirmed, to consult the Code of Conduct for United States Judges, applicable congressional statutes, and the practices of my colleagues to make an appropriate decision given the particular facts and circumstances.

5. You have written extensively about end of life choices. Almost a decade ago, in *Washington v. Glucksberg*, the Supreme Court declined to find that terminally ill patients had a "generalized" constitutional right to a physician's aid in dying, preferring that this matter be left to the states in part because "throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide." The late Chief Justice Rehnquist noted that the court's "holding permits this debate to continue, as it should in a democratic society."

Last spring, the nation witnessed a fierce legal battle over the medical treatment of Terri Schiavo, who was in a persistent vegetative state for more than a decade. Politicians engaged in extraordinary measures to override what state courts determined to be her own wishes. The power of the federal government was wielded by some to determine deeply personal choices. Some even made medical diagnoses on the floor of the Senate, and the President came back to Washington in the middle of his vacation to sign legislation to override the precise wishes of this one patient.

Do you agree that end of life decisions are deeply personal issues? Do you agree with the idea advanced in the *Cruzan* case, that the wishes of an unconscious patient, to the degree they can be known, should govern decisions regarding life sustaining therapies?

Response: In *Cruzan* the Supreme Court expressly recognized that end of life treatment cessation decisions are "deeply personal" and that life sustaining care can be rejected on behalf of unconscious patients by their surrogates for many upright reasons, including in

order to effect the patient's prior expressed desire to avoid the burdens associated with certain intrusive modern life sustaining therapies. The Court further recognized a "legitimate interest" by the State of Missouri in enacting laws designed to "safeguard[] the personal element of this choice" by requiring proof about the patient's previously expressed intentions in order to guard against "potential abuses" by the surrogate decisionmaker. If confirmed, I would faithfully follow the Supreme Court's guidance should the matter come before me. I also appreciate this opportunity to clarify that my writings express no disagreement whatsoever with *Cruzan*, including its holding about the "deeply personal" nature of this issue.

6. As the one undemocratic branch, the courts have a special responsibility to make sure they are available to those Americans most in need of the courts to protect their rights. You have publicly criticized consumer class action lawsuits and advocated limitations on the ability of plaintiffs to bring securities fraud cases and, for limiting the liability of corporations for wrongdoing.

What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff? What assurances can you give that litigants will be treated fairly even if they are plaintiffs bringing categories of cases that you don't personally support, but that the law allows?

Response: In my years as a practicing lawyer -- working on matters in approximately 16 different states and 8 federal courts of appeal as well as in state appellate courts and the U.S. Supreme Court -- I represented plaintiffs; putative and certified statewide consumer class actions; public employee pension funds; prominent Democrats and Republicans active in national politics; a non-profit hospital serving the women, children, and poor of the District of Columbia as well as defendants; those challenging class actions; and corporations. I represented each and every client with equal vigor and zeal, whatever the client's views or lawful objectives may have been. And I deeply appreciated how critical a fair shake – free of a judge's political or policy preferences – was to my clients who often had their businesses, life savings, or fundamental liberty interests at stake. As advocate and counselor, what I wanted most for my clients was a judge capable of putting aside his or her personal views and deciding the case based on the facts in the record, the arguments of counsel, and the controlling legal precedents – not on the basis of any personal biases or beliefs. If confirmed, that is the sort of judge I would strive to be. The identity of the litigants and the sorts of claims they raise would play no role in my decisions; nor would my personal views or policy preferences. Instead, if confirmed, I would decide each and every case on the facts developed by the parties in the record and law alone.

I also appreciate the chance to clarify my record. My writings on class action lawsuits have expressly recognized the valuable social functions they serve and sought to offer suggestions aimed at, among other things, improving their efficacy so that class members, rather than lawyers, oversee the management of such suits and recoup a greater percentage of settlement funds. With respect to my work as an advocate, I have represented the interests of my clients alone, not my own. Some of those clients have sought to contest class actions or narrow them while others have sought expressly and actively to certify class actions and expand their scope.

950 Pennsylvania Ave., N.W.
Room 5706
Washington, D.C. 20530

June 27, 2006

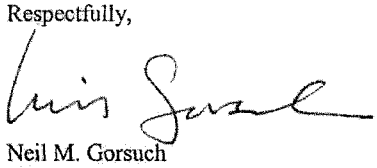
By Hand Delivery

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Leahy, which were forwarded to me on behalf of Senator Wyden.

Respectfully,



Neil M. Gorsuch

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Response to written questions from Senator Leahy on behalf of Senator Wyden
Neil M. Gorsuch, nominated to be a United States Circuit Judge
for the Tenth Circuit

1. While the U.S. Supreme Court has not found a clear constitutional right to physician aid in dying, it has encouraged the states to continue to experiment. Do you believe a State has the constitutional right to regulate the practice of medicine within its borders? And if so, do you believe the right to regulate medicine within its own borders extends to a state's right to permit physician aid in dying as acceptable medical practice flowing from its power to license providers, determine their scope of practice, and discipline those providers?

I very much appreciate the chance to answer these questions from Senators Leahy and Wyden.

The Supreme Court has held that the traditional regulatory powers of the States include the regulation of the practice of medicine. Just earlier this year, the Supreme Court of the United States reaffirmed that the "regulation of health and safety is primarily, and historically, a matter of local concern." *Gonzales v. Oregon*, No. 04-623, Slip Op. at 24 (Jan. 17, 2006) (internal quotation marks omitted). In the same decision, the Court further emphasized that the States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all person." *Id.* at 23 (internal quotation marks omitted).

In the last ten years, the Supreme Court also has twice vindicated the power of States to make their own laws with respect to physician-assisted suicide. Specifically, in 1997, the Court rejected an effort to establish a uniform constitutional rule requiring States to permit physician-assisted suicide, instead emphasizing that "the States are currently engaged in serious, thoughtful examination of physician-assisted suicide and other issues." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This year, the Court rejected an effort by a federal officer to issue regulations under the Controlled Substances Act that would have "substantially disrupt[ed]" the operation of Oregon's physician-assisted suicide law and "radical[ly] shift[ed]" authority to federal administrative agencies. *Gonzales v. Oregon*, Slip Op. at 7, 28. Concurring in the judgment in *Glucksberg*, Justice O'Connor emphasized that, given the States' "extensive and serious evaluation of physician-assisted suicide and other related issues, . . . the challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States . . . in the first instance." 521 U.S. at 737 (internal quotation marks omitted).

If confirmed, I would follow the Supreme Court's guidance on these and all matters.

2. Your writings on physician aid in dying appear to conclude that you believe there is no constitutional right to physician aid in dying. Should a case come

before you concerning this issue in any way, would you be able to consider it without that bias?

If confirmed, my personal views on this -- or any -- matter would play no role in my decisions as a judge. A judge's personal policy preferences and politics have no place in the process of deciding cases. Regular and healthy doses of self-skepticism and humility always do.

As a practicing lawyer for many years, litigating matters in state and federal courts across the country on behalf of plaintiffs and defendants, individuals and corporations, I never allowed my personal views and policy preferences to interfere with the zealous representation of my clients. My duty of loyalty meant preferring my clients' interests and objectives to my own views. If confirmed, I would have a new client: the law itself. Just as my personal and political views had no proper place in my job as an advocate and counselor, neither would they have any place in my role as a judge. I would seek only and always to follow the law faithfully and fairly.

From my years in practice, too, I know that, to the litigant before the court, the case at hand often means the world to him or her. A business, property interest, a fundamental liberty interest, may be at stake. Each and every litigant wants and deserves a fair shake from a judge based on the facts in the record, the arguments of counsel, and the controlling legal precedents -- not a decision based on extra-record biases or beliefs. That is what I always hoped for in the judges in front of whom I appeared. And that is what I would always seek, if confirmed, to provide to litigants who appear before me.

3. What weight do you give to legislative history in making a ruling?

The Supreme Court has repeatedly instructed that, when a statute's language is clear, its language alone governs but that, when ambiguities exist in statutory text, legislative history can be employed to resolve those ambiguities. The Court has put the point succinctly: "courts may appropriately refer to a statute's legislative history to resolve statutory ambiguity." *Patterson v. Shumate*, 504 U.S. 753, 761 (1992) (internal quotation marks and citation omitted). If confirmed, I would faithfully follow the Supreme Court's guidance in this area.

4. In the article "the Legalization of Assisted Suicide and the Law of Unintended Consequences: A review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change" you repeat many of the arguments of those who have opposed or do oppose Oregon's law.

In this article you conclude that Oregon's physicians do not know enough about palliative care. However, you appear to overlook several significant facts. For example, Oregon is one of two states that have disciplined physicians for the under treatment of pain, and, historically, more Oregonians die at home than in

hospitals. These facts might point to a different conclusion than the one you draw in your article.

The medical literature is full of studies that demonstrate medical practice differs from state to state. Why do you believe that the treatment of end of life care must be uniform throughout the United States, as you seem to suggest in this article, when it and medicine in general is practiced differently through out the United States?

I do not presume that I have answers to all of the many difficult questions the physician-assisted suicide issue raises, or that my work is even close to the last word on such a complex subject. The Supreme Court has written that the American people are engaged in an "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide." *Glucksberg*, 521 U.S. at 735. I hope only that I have -- in some very small way -- contributed to a body of scholarship and knowledge that will eventually provide all of us with a fuller, more informed understanding of the issues at stake in this most profoundly difficult arena.

I also appreciate the opportunity to clarify the article referenced in the question. In that article, I did not take the position that all end of life care must be treated uniformly throughout the country. Instead, the article begins by noting that the Supreme Court rejected a uniform right to physician-assisted suicide in its 1997 decisions, choosing instead to leave intact state legislative judgments in this arena. That is to say, the Supreme Court left the matter to the States. The article then proceeds to explain that, since 1997, a number of States have debated whether or not to pursue the legalization of physician-assisted suicide through voter referenda and state legislative processes. Thereafter, the article focuses on just one of the many questions that everyone engaged in such discussions must face: whether or not the benefits flowing from a decision to legalize physician-assisted suicide are likely to outweigh any attendant problems or costs associated with such a change in law. This, the article points out, was a question posed by Justice O'Connor and Justice Souter in *Glucksberg* as an important, but unresolved matter worthy of further consideration. After analyzing the legalization experiments in the Netherlands and Oregon, the article ultimately concludes that "to be sure, benefits would flow from legalization [of physician-assisted suicide]. I do not seek here to discount such benefits or suggest that they are 'outweighed' by attendant costs. Instead, I have sought to show only that legalization may also entail real and material costs" and thus that people of good faith striving to address the assisted suicide question are presented with a "nontrivial choice." 2004 Wisc. L. Rev. at 1418. That is, the article does not suggest that the costs of choosing to legalize assisted suicide would outweigh the benefits of legalization. Nor does it contend that every State must reach a uniform judgment on this question. Instead, the article simply argues that any State's decision to legalize assisted suicide would likely bring with it *both* benefits *and* some attendant costs and, accordingly, the legalization question presents a difficult moral and legal choice.

SUBMISSIONS FOR THE RECORD

Senator Allard's Introduction of Neil M. Gorsuch at Judiciary Committee Confirmation Hearing

June 21, 2006

Chairman Specter, Ranking Member Leahy, distinguished members of the Committee, it is my pleasure to introduce to you today Neil M. Gorsuch, President Bush's nominee to the United States Court of Appeals for the Tenth Circuit. Mr. Gorsuch is an extraordinarily well qualified nominee and, if confirmed, would capably serve the citizens of Colorado, the Tenth Circuit, and, indeed, the United States.

I would like to begin by thanking Chairman Specter for so promptly holding this hearing. I look forward to the Committee's continuing the tone of expediency set by the Chairman by swiftly reporting the nomination to the floor for a timely up-or-down vote. It is critical to the administration of justice that this seat, which has been vacant since last year, be filled immediately. I am pleased that we are joined today by Senator Salazar in what I hope is an early indicator of broad, bipartisan support for this nominee.

I would also like to welcome Mr. Gorsuch's wife, Louise, and his two children, Emma and Belinda, to the United States Senate. All three of you no doubt played an important role in your husband and father's being here today. Speaking from my own experience in public service, your love and support will continue to be instrumental to his ability to perform his public duties. You are embarking on this journey together.

I would also like to welcome Mr. Gorsuch *back* to the United States Senate. Some of you, including the Ranking Member, may recognize Mr. Gorsuch from his service as a Senate page in the early 1980s. It was here in the Senate that he made his foray into public service and developed the passion for it that he exudes today.

As a 5th generation Coloradan, I am pleased that President Bush chose a nominee with deep Colorado roots. Born in Denver, Mr. Gorsuch is a 4th generation Coloradan who, if confirmed, would carry on his family's history of public service in the State. His mother, Anne Gorsuch, served in the Colorado State Legislature and as EPA Director during the Reagan Administration. Moreover, his grandfather founded a successful Denver law firm, Gorsuch Kirgis, where both he and Neil's father were active in the community throughout the firm's 60 year history. Neil, if confirmed, you no doubt look forward to returning to Colorado where family and the Rocky Mountains await.

Mr. Chairman, if I were asked to succinctly characterize Mr. Gorsuch, I would have to say well-rounded. Well-rounded educationally, professionally, and personally.

Mr. Gorsuch pursued a rigorous and geographically diverse course of academic study. He earned his undergraduate degree from Columbia University, including a summer at the University of Colorado; his law degree from Harvard; and a Doctorate in Legal Philosophy from Oxford University.

Mr. Gorsuch began his distinguished professional career as a law clerk to Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. He then went on to clerk for two Supreme Court Justices, Justice Kennedy and Colorado's own Byron White.

Following his prestigious clerkships, Mr. Gorsuch entered private practice and became a partner in the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. While in private practice, Mr. Gorsuch litigated matters for clients large and small, ranging from individuals to non-profits to corporations. Moreover, he litigated cases on a range of issues from simple contract disputes to complex antitrust and securities fraud matters.

He left private practice in 2005 to return to public service, this time at the United States Department of Justice where he currently serves as the Principal Deputy to the Associate Attorney General.

Looking collectively at his career, the picture of an appellate judge in training emerges. Mr. Gorsuch has served in all three branches of government, including the highest levels of the Judicial and Executive branches. He has represented both plaintiffs and defendants. He has represented both individuals and corporations. He has litigated civil cases and criminal cases. He has litigated in both federal and state courts. In sum, the breadth and depth of Mr. Gorsuch's experience makes him ideally suited to service on the federal appellate bench.

While Mr. Gorsuch is highly qualified, I also promised the people of Colorado that I would support judicial nominees who I believe would rule on the law and the facts before them, not judges who would legislate from the bench. My support of Mr. Gorsuch here today is consistent with that promise.

From my conversations with Mr. Gorsuch, I am certain that he recognizes the proper role of the judiciary. The role of the judiciary is to interpret the law, not make the law. I believe that Mr. Gorsuch is temperamentally and intellectually inclined to stick to the facts and the law in cases that would come before him, and that he would refrain from legislating from the bench.

Moreover, Mr. Gorsuch's personal views would not determine the outcome of cases that come before him. Mr. Gorsuch himself says "personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

I believe this statement also speaks to Mr. Gorsuch as a person. He is humble, unassuming, polite, and respectful. This sentiment is reflected in numerous letters pouring into my office from people who have worked with him over the years. Mr. Gorsuch possesses the temperament fitting of an appellate judge.

In conclusion, Mr. Gorsuch is a top-flight nominee who I am proud to introduce to the distinguished members of the Committee. I look forward to a fair and dignified

confirmation process, the outcome of which I am confident will reveal a highly-qualified nominee deserving of confirmation.

Congratulations, Neil, and, on behalf of the citizens of Colorado, thank you for your willingness to serve this great country.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Nomination of Neil Gorsuch
June 21, 2006

Today, we consider the nomination of Neil Gorsuch for a lifetime appointment to the Court of Appeals for the Tenth Circuit. I know that Senator Salazar is pleased that we have been able to expedite the Committee's background review of Mr. Gorsuch's nomination and move quickly to a hearing.

Earlier this week, the Senate confirmed another lifetime appointment, Sandra Segal Ikuta, to a seat on the Court of Appeals for the Ninth Circuit. Judge Ikuta had the support of her home-state Senators, Senator Feinstein and Senator Boxer, and was easily confirmed. I am pleased that the Republican leadership is this month taking notice of the fact that we can cooperate on swift consideration and confirmation of consensus nominations. Working together, we confirmed five judges in one week earlier this month. All of them could have been confirmed last month if the Republican leadership had chosen to make progress instead of picking a fight on a controversial nomination.

I, again, want to commend the Republican Senate leadership for wisely passing over the controversial nominations of William Gerry Myers III, Terrence W. Boyle and Norman Randy Smith to turn to Judge Ikuta's nomination. The Republican leadership was right to have avoided such controversial nominations that were reported out of the Committee on a party-line vote.

During the 17 months I was Chairman of the Judiciary Committee and the Senate was under Democratic control, we confirmed 100 of President Bush's nominees. After Judge Ikuta's confirmation, in the last 17 months under Republican control, the Senate will have confirmed 44. The 22 judicial nominations the Senate has confirmed this year is equal to the total number of nominees we confirmed for all of last year. We could exceed that total if the Republican leadership would schedule debate and consideration of Andrew Guilford, who has been nominated to the United States District Court for the Central District of California.

There are just under 50 judicial vacancies currently, but more than half of these vacancies have no nominee. I urge the White House to work with Senators from both parties to select nominees who can be expeditiously considered and confirmed.

On the basis of his record, Mr. Gorsuch appears to be a very conservative nominee. However, I hope that after hearing his answers to questions from members of this Committee I will be convinced that Mr. Gorsuch is the kind of nominee who understands that the role of the judge is to act as a check and balance to protect the rights and liberties of all Americans. I welcome Mr. Gorsuch and his friends and family to the Committee today. I look forward to hearing his testimony.

# # # # #

NOMINATIONS OF KIMBERLY ANN MOORE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT; AND BOBBY E. SHEPHERD, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

WEDNESDAY, JUNE 28, 2006

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

The hearing was convened, pursuant to notice, at 2:06 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, presiding.

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

Senator HATCH. The Committee will come to order.

Today we will have a confirmation hearing for two of the President's Judicial nominees. I do appreciate your willingness to appear before the Committee today, and I hope we can quickly move both of your nominations through the Committee and get them voted on the floor as soon as possible.

We are privileged to have our two distinguished Senators from Arkansas here today, and we are happy to see both of you.

We will start with Senator Lincoln, first, then Senator Pryor.

PRESENTATION OF BOBBY E. SHEPHERD, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT BY HON. BLANCHE LINCOLN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator LINCOLN. Well, thank you, Mr. Chairman. We appreciate you and the members of the Judiciary Committee and all that you do in your thoughtful review of the nominees that come before you.

I appreciate the opportunity to appear before you this afternoon to introduce Judge Bobby Shepherd, who has been nominated to be the U.S. Eighth Circuit Court of Appeals Judge.

And certainly not being an attorney, but based on my review of the record that is available, my visits with Judge Shepherd and feedback that I have received from members of the Arkansas legal community who know Judge Shepherd very well, I believe he is certainly qualified to serve in this position and I support his nomination.

Judge Shepherd is a native of Arkadelphia, Arkansas. As a sideline, Judge, I have just got to tell you, I dropped my children off

at camp on Sunday in Arkadelphia, so I am feeling a little lonesome these days, Mr. Chairman.

Senator HATCH. I will bet you are.

Senator LINCOLN. They are having a high time, though.

After high school, Judge Shepherd graduated magna cum laude from Ouachita Baptist University in 1973. Not satisfied with only a baccalaureate degree, he continued his education by earning a law degree from the University of Arkansas, graduating with High Honors.

It was during his time at Ouachita that Judge Shepherd had enrolled in the Reserve Officer Training Corps. He was commissioned as Second Lieutenant in the U.S. Army Reserve in 1973, and he served honorably until his discharge in 1981.

Judge Shepherd began his professional career as an attorney in private practice at Spencer and Spencer law firm in El Dorado, Arkansas, where he resides now. From 1984 to 1987, he worked as a solo practitioner.

In 1991, he began his career as a Jurist, serving as a Circuit-Chancery Judge for the 13th District of Arkansas, until his appointment as a Magistrate Judge for the Western District of Arkansas in 1993.

Throughout this process of his nomination, numerous Arkansas from all walks of life have contacted me, urging me to support Judge Shepherd. Some of these people have been advocates in Judge Shepherd's courtroom, and others just simply consider themselves his friends, but to a person, Mr. Chairman, they all found Judge Shepherd to be a man of honor, respected by his peers and in his community.

So in closing, Mr. Chairman, I would like to ask, from you and all our colleagues here on the committee, to consider this nominee, and encourage you all to support his nomination.

We also want to thank you and the members of the Committee for working with me and my staff in preparing for this hearing today and giving Judge Shepherd every consideration.

So we thank you. We are pleased with the consideration of this nominee and encourage the members to support him in his confirmation.

Senator HATCH. Well, thank you so much. That is very, very good testimony. Judge Shepherd, I think it is great for her to be here.

It is also great to have Senator Pryor.

PRESENTATION OF BOBBY E. SHEPHERD, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT BY HON. MARK PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Thank you, Mr. Chairman. You and I have talked many times before about the Judiciary Committee and all the great things that it does, the important work the Judiciary Committee does for the Senate and for our country. So, thank you, as a member of the committee, for your service.

I have also told you that I am glad I am not on the committee, because sometimes you get into some very controversial matters and it gets very partisan.

Senator HATCH. What do you mean, sometimes?

[Laughter.]

Senator PRYOR. And that has been, as you well know, particularly true when it comes to judicial nominations. I am very proud to say that this nomination is not one of those.

This is a nominee that, in Arkansas, the Republicans and the Democrats like, the Plaintiff's Bar, the Defense Bar, the Criminal Defense Bar, the prosecutors like him, liberals and conservatives. He really has proven to be the consensus nominee in Arkansas.

When I look at Judicial nominations, I always have a three-part test: first, are they qualified? Clearly, he is qualified. Second is, do they have the proper judicial temperament? Yes, clearly he does. Third, does he have the ability to be fair and impartial? There is no question in anyone's mind that he does.

One thing that I like about him, is that in his time as a Magistrate, he has, if you can call it, mediated, I guess is the best term, hundreds—maybe thousands—of cases where parties will come in, and as part of the process that they have there in the Western District, he will try to resolve those cases before they go to trial.

Of course, that is great for judicial economy, but it also shows what kind of person he is, a consensus builder, and is able to bring people to the point where justice can be done in a very positive manner.

He is from a small town, he has small-town values, he has practiced in a small town, he has been an elected judge. He is now a Federal Magistrate. One thing that is interesting, is all the District Court judges I have talked to in Arkansas are very enthusiastic about him, so he is going to catapult over them and go to the Eighth Circuit. But they are very, very, very enthusiastic about his nomination, and so am I. So, thank you for your time and thank you for expediting this nomination.

Senator HATCH. Thanks to both of you. I know that there are lots of demands on your time, so we will let you go so you can get back to what you need to get done. Of course, you are welcome to stay if you want to.

Thanks so much. We appreciate you coming in.

Why do we not have the two nominees come forward and we will swear you in?

[Whereupon, the nominees were duly sworn.]

Senator HATCH. Thank you. Please be seated.

Now, Senator Warner is trying to get here on behalf of Professor Moore. If he gets here, we will interrupt whatever we are doing right at that time and show him that deference. But I thought we would move ahead here and see what we could do.

Our first nominee is Professor Kimberly Ann Moore, nominated to be U.S. Circuit Court Judge for the Federal Circuit Court of Appeals. Professor Moore received a BS from the Massachusetts Institute of Technology in 1990, an MS from the Massachusetts Institute of Technology in 1991, and a J.D. cum laude from Georgetown University Law Center in 1994.

Professor Moore began her legal career as an associate at Kirkland & Ellis, working on intellectual property matters. In 1995, Professor Moore accepted a clerkship with Judge Glenn L. Archer, Jr. former Chief Judge of the U.S. Circuit Court of Appeals for the Federal Circuit.

Following her 2-year clerkship, Professor Moore entered academia, serving as an Assistant Professor of Law at Chicago-Kent College of Law. From 1998 through 1999, she was Associate Director of the Intellectual Property Law program at Chicago-Kent.

In 1999, Professor Moore joined the law faculty at the University of Maryland, before joining the faculty at George Mason University School of Law in 2000. She is currently a full Professor of Law at George Mason. We congratulate you for all of the achievements you have done.

Professor Moore is considered an expert in patent law and patent litigation. She has been retained as an expert witness in numerous patent cases in the District Courts, and as a consultant on many Federal Circuit appeals.

Professor Moore serves on the board of numerous professional organizations, including the Federal Circuit Bar Association, Intellectual Property Owners Education Foundation, and the publication, Patent Strategy and Management.

The American Bar Association has unanimously rated Professor Moore "qualified" to serve on the Federal Circuit. We congratulate you and compliment you on the excellent record that you have.

Our second nominee today, as has been explained by our two Senators, is Judge Bobby E. Shepherd, who has been nominated to be U.S. Circuit Judge for the Eighth Circuit.

John? Why do you not come here and you can testify. All right, either way. I will tell you what. I will introduce you, Judge Shepherd, as soon as Senator Warner finishes his introduction.

We are honored to have you here, Senator Warner. It is a great honor for Professor Moore to have you, as busy as you are, to come here.

PRESENTATION OF KIMBERLY ANN MOORE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. I am sorry to be a minute or two late here. I apologize to this distinguished candidate. I will just put my statement in the record, because I have a feeling she can make a better statement than I can make.

But I simply say, I am trying to think how long ago. It was over a half a century ago that I became a law clerk on the Federal Circuit Court of Appeals in the Nation's Capital, under one Judge Prettiman.

I have acknowledged that what little success I have had in life, seriously, is owing to what that wonderful man taught me and the inspiration that he gave me, so much so that one night here about 3 years ago the Senate was in one of its all-night sessions, and I do not know where anybody was, but I suddenly found I had the floor, all by myself. Guess what? I named the courthouse after him.

[Laughter.]

Thank you very much, Mr. Chairman. Maybe that will happen to you, some day.

[Laughter.]

Senator HATCH. Thank you, Senator Warner. We appreciate your taking time to come. That is a tribute to you, Professor Moore. We will put his complete statement in the record.

Senator WARNER. Thank you, Mr. Chairman.

Senator HATCH. You bet. Thank you, Mr. Chairman.

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

Senator HATCH. Let me go back. Magistrate Judge Shepherd was nominated by the President on May 18, 2006. Judge Shepherd has a long and distinguished legal career in Western Arkansas, during which he has handled a wide range of legal issues, both civil and criminal, as a judge and as an advocate.

Judge Shepherd received his BA cum laude from Ouachita Baptist University in 1973, and his J.D. with High Honors from the University of Arkansas School of Law in 1976.

Upon graduating from law school, he embarked on a career as a private attorney in western Arkansas, practicing either as a solo practitioner or in small partnerships.

Judge Shepherd was a true general practitioner. He handled personal injury cases, collections, domestic relations, probate, criminal defense, banking, real estate, and other matters. During this period of his career, he tried over 150 cases to verdict, which is quite a record.

In 1991, Judge Shepherd was elected as a Circuit- Chancery Court Judge in Arkansas' 13th Judicial District. In that capacity, he presided in over 30 major felony jury trials, including capital murder cases. Since 1993, Judge Shepherd has served as the U.S. Magistrate Judge in the Western District of Arkansas.

The American Bar Association has unanimously rated Judge Shepherd "well qualified" to serve on the Eighth Circuit.

So we welcome both of you today before the committee, and of course we would be pleased to hear any statements you would care to make. I would just ask you to introduce your family and friends who are here for the hearing.

We will start with you, Professor Moore.

Ms. MOORE. Thank you, Mr. Chairman. It is an honor to be here.

I would like to introduce my family: my husband, Matthew Moore, my son, William Moore. We call him Billy. He is the oldest of my three boys.

Senator HATCH. He looks pretty good there.

Ms. MOORE. This is my mother, Linda Pace, and my in-laws, who traveled down from Fayettville, New York, Jane and Frank Price. Also, my brother-in-law, Mark Moore, as well.

Senator HATCH. Well, we are delighted to have all of you here It is quite a nice family.

Ms. MOORE. Thank you.

Senator HATCH. We are glad you could introduce them.

Judge Shepherd?

Judge SHEPHERD. Yes, sir, Mr. Chairman. I have a sizable group that has made the trip from Arkansas. This is my wife, Bobbi, who has just retired as a tenth grade U.S. history teacher in our community.

Senator HATCH. Oh, great. Is that not a little tough to have two Bobbys in the same household?

[Laughter.]

Judge SHEPHERD. To her right is our son, John Thomas. He is a sophomore at Rhys University in Houston.

Senator HATCH. Right.

Judge SHEPHERD. Our daughter, Sarah, is a nurse at Arkansas Children's Hospital in Little Rock. Across the aisle is our oldest son, Matthew, who is an attorney in our community, and his wife, Allie.

Behind my wife is my mother-in-law, Doris Faulkner; to her right, my mother, Jeanne Shepherd. To her right is a friend of almost 30 years who has made the trip today, Tommy May from Pine Bluff, Arkansas.

I would also like to recognize Tom Metowski of the Magistrate Judge Division of the Administrative Office of the Courts who is attending the hearing this afternoon.

Senator HATCH. Well, that is great. We welcome all of you here, especially you mothers and fathers, and your companions and your children. It is just great to have you all here.

Well, we will begin with you, Professor Moore. If you have a statement you would care to make, we would be happy to hear it at this time, then we will turn to Judge Shepherd.

STATEMENT OF KIMBERLY ANN MOORE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Ms. MOORE. I have no statement. It is just a tremendous honor to be here at this hearing and to be considered by the committee. Thank you.

[The biographical information of Ms. Moore follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Kimberly Ann Moore
Kimberly Ann Pace (maiden name)

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

Residence: Falls Church, VA 22043

Office: George Mason University School of Law
3301 Fairfax Drive, Arlington, VA 22201

3. **Date and place of birth.**

June 15, 1968
Baltimore, Maryland

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

Married to Matthew John Moore, Partner, Howrey, 1299 Pennsylvania Avenue, NW, Washington, DC 20004

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

Georgetown University Law Center, Washington, DC, 1991-1994
Juris Doctorate (J.D.) -1994

Massachusetts Institute of Technology, Cambridge, MA, 1986-1991
Master of Science -1991
Bachelor of Science in Electrical Engineering -1990

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

George Mason University School of Law
Professor of Law, 2004-present
Associate Professor of Law, 2000-2004

Morgan, Lewis & Bockius
Intellectual Property Litigation Counsel, 2000-2003
Summer Associate, 1993

University of Maryland School of Law
Assistant Professor of Law, 1999-2000

Chicago-Kent College of Law
Assistant Professor of Law, 1997-1999
Associate Director of the Intellectual Property Law Program, 1998-1999

The Honorable Glenn L. Archer, Jr., (former) Chief Judge of the United States Court of Appeals for the Federal Circuit
Law Clerk, 1995-1997

Kirkland & Ellis, Los Angeles, CA
Associate, 1994-1995

Finnegan, Henderson, Farabow, Garrett & Dunner
Law Clerk, 1993-1994

Naval Surface Warfare Center, Silver Spring, MD
Electrical Engineering, 1988-1992
Working full-time in summers, during some semesters and breaks.

Other:
Federal Circuit Bar Association
Board Member, 2004-present
Chair, Publications Committee, 1999-present
Co-Chair, Intellectual Property Section, 1997-1999

Federal Circuit Bar Journal
Editor-in-Chief, 1998-present
Associate Editor, 1997-1998

Intellectual Property Owners Education Foundation
Board Member, 2005-present

Patent Strategy & Management
Board Member, 2001-present

CPR Institute for Dispute Resolution,
Board Member Judicial Subcommittee, 2003-present

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

I did not serve in the military.

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

Cum laude, Georgetown University Law Center (JD)

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

Maryland State Bar Association
Georgetown Patent Institute Advisory Board
American Intellectual Property Law Association
Federal Circuit Bar Association
- Board Member, 2004-present
- Co-Chair, Intellectual Property Section, 1997-1999
- Chair, Publications Committee, 1999-present
- Editor-in-Chief, Federal Circuit Bar Journal (1998-present)
- Associate Editor, 1997-1998, Federal Circuit Bar Journal

American Bar Association
Intellectual Property Section, American Bar Association
Giles Sutherland Rich Inn of Court (1995-1997).
Federalist Society, Member and Intellectual Property Advisor
Board Member, Patent Strategy & Management (2001-present)
Board Member, CPR Institute for Dispute Resolution, Judicial Subcommittee (2003-present)
Board Member, Intellectual Property Owners Education Foundation (2005-present)

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

St. John Catholic Church
MIT Alumni Association

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

State Bar of Maryland, 2/2/1995 (voluntary inactive status)
Bar of the District of Columbia, 11/03/1995
United States Court of Appeals for the Federal Circuit, 5/6/1997
Supreme Court of the United States, 6/14/1999

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

Articles:

Worthless Patents, 20 BERKELEY TECH. L.J. 1521 (2005).

Markman Eight Years Later: Is Claim Construction More Predictable?, 9 LEWIS & CLARK L. REV. 231 (2005) (symposium).

Empirical Statistics on Willful Patent Infringement, 14 FED. CIR. B.J. 227 (2004) (symposium), research won scholarship grant from Oracle/George Washington Law School.

Valuable Patents, 92 GEORGETOWN L. J. 435 (2004), *reprinted in* INTELLECTUAL PROPERTY LAW REVIEW (2005), co-authored with John Allison, Mark Lemley and R. Derek Trunkey.

Ending Abuse of Patent Continuations, 84 BOSTON U. L. REV. 63 (2004), co-authored with Mark Lemley.

Xenophobia in American Courts, 97 NW. U. L. REV. 1497 (2003).

Juries, Patent Cases, & A Lack of Transparency, 39 HOUS. L. REV. 779 (2002) (symposium).

Jury Demands: Who's Asking?, 17 BERKELEY TECH. L. J. 847 (2002) (symposium).

Rethinking Forum Shopping in Cyberspace, 77 CHICAGO KENT L. REV. 1325 (2002), coauthored with Francesco Parisi (symposium).

Are District Court Judges Equipped to Resolve Patent Cases?, 15 HARV. J. L. & TECH. 1 (2001) reprinted at 12 FED. CIR. B.J. 1 (2002) *reprinted in* INTELLECTUAL PROPERTY LAW REVIEW (2003).

Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?, 79 N.C. L. REV. 889 (2001) reprinted at 83 JPTOS 558 (2001).

Judges, Juries & Patent Cases: An Empirical Peek Inside the Black Box, 98 MICH. L. REV. 365 (2000) reprinted at 11 FED. CIR. B.J. 209 (2001)

Recalibrating the Scales of Justice Through National Punitive Damage Reform, 46 AM. U. L. REV. 101 (1997).

The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden of Corporate Misconduct?, 47 ALA. L. REV. 825 (1996).

What Does it Mean to Be a Salaried Employee?: The Future of Paydocking, 21 J. LEGIS. 49 (1995).

The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?, 22 PEPP. L. REV. 7 (1994) *reprinted in* INTELLECTUAL PROPERTY LAW REVIEW (1996). This article also won second place in the Ladas Memorial Award, a worldwide prize for scholarship on trademark law, given by the Brand Names Foundation.

The Legal Profession as a Standard for Improving Engineering Ethics: Should Engineers Behave Like Lawyers?, 9 HIGH TECH. L.J. 93 (1994).

Books:

PATENT LITIGATION AND STRATEGY (WEST PUBLISHING CO. 1999) co-authored with the Honorable Paul R. Michel and Raphael V. Lupo.

PATENT LITIGATION AND STRATEGY SUPPLEMENT (WEST PUBLISHING CO. 2002) co-authored with the Honorable Paul R. Michel and Raphael V. Lupo.

PATENT LITIGATION AND STRATEGY, SECOND EDITION (WEST PUBLISHING CO. 2003) co-authored with the Honorable Paul R. Michel and Raphael V. Lupo.

Speeches:

I have listed below the speeches I have given. I do not have written speeches or notes. Many of the speeches, however, are based upon one or more of my articles which are listed above.

2006 American Bar Association, 21st Annual Intellectual Property Conference, What IP Lawyer Need to Know, Apr. 6, 2006.

2006 Oldham Intellectual Property Law Lecture, Patent Lemmings, Feb. 23, 2006.

2005 Advanced Patent Law Institute, Patent Lemmings: Forum Shopping, Nov. 2005.

2005 George Washington University School of Law, Populism and Patents, Fall 2005

2005 Innovation and Its Discontent: Patent Reform and Innovation Policy in the 21st Century, John Marshall Law School, Improving Federal Court Adjudication of Patent Cases, Oct. 2005.

2005 Giles S. Rich American Inn of Court, The Federal Circuit and the Legal Academy, Sept. 2005.

2005 George Mason University School of Law, Hot Topics in Patent Law, Could You Be Guilty of Prosecution Laches?, July 2005.

2005 ABA-Section of Intellectual Property Law Annual Conference, Empirical Studies of Patent Cases, April 2005.

2005 NYU Colloquium on Innovation Policy, Populism & Patents, February 2005.

2004 USC Law School 2004 Intellectual Property Institute, *Preparing For Battle: Critical Steps Before Filing Patent Suits*, May 2004.

2004 Morgan Lewis & Bockius Lecture, *Empirical Studies of Patent Cases*, March 2004.

2004 George Washington University School of Law/Oracle Sponsored Conference on *Knorr*, *Empirical Statistics on Willful Patent Infringement*, March 2004.

2003 Berkeley Center for Law & Technology Advanced Patent Law Institute, *Discovery Issues: Forum Shopping and Prelitigation Strategies,* December 2003.

2003 Berkeley Center for Law & Technology Fall IP Speaker Series, *Populism and Patents*, December 2003.

2003 Northwestern University Faculty Workshop Series, *Populism and Patents*, November 2003.

2003 The University of Texas School of Law's 8th Annual Advanced Patent Law Institute, *Discovery Issues: Forum Shopping and Prelitigation Strategies*, October 2003.

2003 National Bureau of Economic Research Summer Institute for Intellectual Property, July 2003.

2002 Cardozo Workshop, *David and Goliath in the U.S. Patent System,* October 2002.

2002 Hot Topics in Patent Law, George Mason University Law School Conference, *Empirical Research on Patent Cases*, July 2002.

2002 Houston Law School Conference on Patent Reform, *The Need for Transparency and Jury Verdict Reform*, Santa Fe, NM, June 2002.

2002 American Law and Economics Conference, Harvard Law School, *Xenophobia in American Courts*, May 2002.

2002 American Bar Association Annual Antitrust Conference, *Antitrust and the Federal Circuit: Speaking Different Languages*, Washington, D.C., April 2002.

2002 Berkeley Center for Law & Technology Patent Reform Conference, *Jury Demands: Who's Asking?*, March 2002.

2002 Cardozo Intellectual Property Speakers Series, *Xenophobia, Patents, & Courts,* February 2002.

2001 National Academies Committee on Intellectual Property Rights in the Knowledge-Based Economy Conference on The Operation of the Patent System, *Conflict and Litigation*, October 2001

2001 Association of Corporate Patent Counsels, *Forum Shopping in Patent Cases,* February 2001

2001 Kenyon & Kenyon Intellectual Property Retreat, *Empirical Reports of Patent Case Statistics*

2000 Federal Bar Association Annual Conference, *Judges, Juries & Patent Cases*

2000 Morgan, Lewis & Bockius Intellectual Property Conference, *Judges, Juries & Patent Cases: Empirical Evidence to Peek Inside the Black Box*

2000 8th Annual Fordham Conference on International Intellectual Property Law & Policy, *District Court Patent Litigation: An Empirical Study – Is it Accurate, Predictable, Efficient?*

2000 PriceWaterhouseCoopers Intellectual Property Leadership Forum, *Moving the Odds in Your Favor*

2000 Nihon University Graduate School of Business Seminar, Tokyo, Japan, *U.S. Business Model Patents*

2000 George Mason University Law Center, *Judges, Juries and Patent Cases*

1999 Medtronics Intellectual Property Meeting, *Judges, Juries and Patent Cases: A Peek Inside the Black Box*

1999 All Ohio Annual Institute on Intellectual Property, *Judges, Juries and Patent Cases*

1999 Aerospace Industries Association Intellectual Property Meeting, *Judges, Juries and Patent Cases.*

1999 AIPLA, *The Implications of Pfaff and the On-Sale Bar to Patentability*

1999 Catholic University of Lublin Poland, *The Nature of the American Intellectual Property System* (1 week course).

1999 Association of Corporate Patent Counsels, *Juries, Judges and Patent Cases*, February 1999.

1998 Finnegan Lectures at George Washington University Law Center, *Functional Claiming: What is the Meaning of Means-Plus-Function Language*, September 1998.

1998 Washington and Oregon State Patent Law Association Annual Meeting, *Current Legal State of the Doctrine of Equivalents*, April 1998.

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

I am in excellent health. The date of my last physical examination is Dec. 14, 2005

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

I have never held a judicial office.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues,**

together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

I have never been a judge.

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

I have never held a public office. I have never been a candidate for elective public office.

17. **Legal Career:**

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

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

From 1995-1997, I served as a law clerk to The Honorable Glenn L. Archer, Jr., Chief Judge of the United States Court of Appeals for the Federal Circuit.

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

I was never a solo practitioner.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

Kirkland & Ellis
300 South Grand Avenue
Los Angeles, CA 90071
Associate, 1994-1995

Morgan Lewis & Bockius
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Intellectual Property Litigation Consultant, 2000-2003

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I was an associate for Kirkland & Ellis from 1994-1995 working on intellectual property litigation matters. I served as a law clerk to The Honorable Glenn L. Archer, Jr., Chief Judge of the United States Court of Appeals for the Federal Circuit from 1995-1997.

In 1997, I became a law professor and have taught at three different law schools: Chicago-Kent College of Law, University of Maryland School of Law and George Mason University School of Law. I received tenure at George Mason and was subsequently promoted to full professor. As a law professor, I have taught a variety of intellectual property courses including: Practice Before the Federal Circuit, Patent Law I, Patent Law II, Trademark Law, and Introduction to Intellectual Property (a basic survey course covering Patents, Copyright, Trademarks and Trade Secrets).

I have also taught intellectual property law courses or seminars at private law firms including Oblon Spivak McClelland Maier and Neustadt (2001-present). I have also taught in the BarBri Patent Bar Review course for six years (2000-present). This is a course to prepare students to take the Patent Bar Exam.

As an academic, I have been involved in the detailed study of patent law and the patent litigation process. Along with the Chief Judge of the Federal Circuit, and a prominent practitioner, I co-authored the casebook Patent Litigation and Strategy which is used by many law schools for their patent litigation courses. This book gives a detailed account of the litigation process from cradle to grave, from pre-filing considerations through to appeal. I have also written more than a dozen law review articles on intellectual property topics, most of which focus on patent litigation.

I was recently selected by the Federal Circuit to participate as a mediator in its Pilot Appellate Mediation Program.

I have been retained as an expert witness in dozens of patent cases in the district courts and as a consultant on many Federal Circuit appeals.

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

I specialized in patent litigation. While at Kirkland & Ellis, I worked on matters for Hughes Aircraft, Cistron, and Hitachi. As an expert consultant, I have worked for companies such as Apple, Harley Davidson, Inc., Medtronic, Verizon, IBM, Cisco, St Jude Medical, Inc., and Motorola. I have consulted with law firms including Kirkland & Ellis, Fish & Richardson, Finnegan, Henderson, Farabow, Garrett & Dunner, Cravath, Swaine & Moore LLP, Foley & Lardner, Howrey, Weil, Gotshal & Manges, Kenyon & Kenyon, and Irell & Manella.

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

I appeared in court occasionally while working for Kirkland & Ellis and have appeared in court as an expert on a couple of occasions.

2. **What percentage of these appearances was in:**
   - **(a) federal courts:** 100%
   - **(b) state courts of record:**
   - **(c) other courts:**

3. **What percentage of your litigation was:**
   - **(a) civil:** 100%
   - **(b) criminal:**

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

None. My work has been primarily as an academic and expert consultant.

5. **What percentage of these trials was:**
   - **(a) jury:** I have had no trials
   - **(b) non-jury:**

18. **<u>Litigation</u>: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify**

the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

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

I have not personally handled any litigated matters. There are many cases in which I have worked as an expert consultant for various companies and law firms. In most cases, I am retained to provide opinions on points of patent law or procedure. In some cases, I am retained to advise the client on venue selection, litigation strategy, or to assist in the Federal Circuit appeals.

1. In *Verizon California Inc. v. Ronald A. Katz Technology Licensing, LLP* (N.D. Cal.) (No. CV-0109871), I was retained to provide data on patent pendency periods. I filed several reports and was deposed twice in this case. I was retained by Howrey as a consultant.

   William Rooklidge
   Howrey LLP
   2020 Main St., Suite 1000
   Irvine, CA 92614
   (949) 759-3904

2. In *Medrad, Inc. v. MRI Devices Corp.* (W.D. Pa.) (No. 02-2044), I was retained as an expert in patent law and procedure. I filed an expert report and offered testimony in court at a hearing. I was retained by Winston & Strawn LLP.

   Derek Sarafa
   Winston & Strawn LLP
   35 W. Wacker Drive
   Chicago, IL 60601-9703
   (312) 558-8084

3. In *Budde v. Harley Davidson, Inc.* (N.D. Cal.), I was retained as an expert in patent law and patent office procedure. I filed an expert report and testified in court at a hearing. I was retained by Michael Best & Friedrich.

   Michael Husmann
   Michael Best & Friedrich

100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
(414) 225-4972

4. In *Ransomes, Inc. v. Great Dane Power Equipment Inc.* (W.D. Wisc.) (No. 97 C 612 S), I was retained as an expert in patent law and procedure. I filed an expert report and testified by deposition in this case. I was retained by Michael Best & Friedrich.

   Michael Husmann
   Michael Best & Friedrich
   100 East Wisconsin Avenue
   Suite 3300
   Milwaukee, WI 53202-4108
   (414) 225-4972

5. In *Tyco Healthcare Group LP v. Daniels Sharpsmart Pty. Ltd.* (E.D.Va.)(Civ. Action No. 2:04cv229), I was retained as an expert in patent office procedure. I filed an expert report and testified by deposition in this case. I was retained by Howrey LLP.

   Jen Dzwonczyk
   Howrey LLP
   1299 Pennsylvania Ave., NW
   Washington DC 20006
   (202) 783-0800

6. In *Seagate Tech LLC v. Cornice, Inc.* (D. Del. 04-418(SLR)), I was retained to give expert opinion on patent office procedure. I filed an expert report and testified by deposition in this matter. I was retained by Weil, Gotshal & Manges LLP.

   David C. Radulescu
   Weil, Gotshal & Manges LLP
   767 Fifth Avenue
   New York, NY 10153
   (212) 310-8007

7. In *Takada Corp. v. AlliedSignal, Inc.* (D.Del.), I was retained as an expert consultant on patent office procedure. I filed an expert report and testified by deposition. I was retained by Kirkland & Ellis.

   Bob Kruptka
   Kirkland & Ellis LLP
   777 South Figueroa St.
   Los Angeles, CA 90017

(213) 680-8456

8. In *Biax v. Texas Instruments, Inc.*, I was retained by Jones Day as an expert consultant. I presented empirical data on patent pendency periods in an expert report.

Alan Whitehurst
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3647

9. In *Guidant Corp. v. St. Jude Medical, Inc.* (D. Del.) (Civ Case No. 04-0067), I was retained by Irell & Manella LLP as an expert consultant. I prepared an expert report in this case.

David McPhie
Irell & Manella LLP
840 Newport Center Dr., Ste. 400
Newport Beach, CA 92660
(949) 760-5216

10. In *Unova, Inc. v. Hewlett Packard Co.* (CV-02-03772ER), I was retained by Irell & Manella LLP as an expert consultant on patent office procedure. I prepared an expert report in this case.

Lisa Partain
Irell & Manella LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067
(310) 203-7952

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

Teaching: I have been a law professor since 1997. As a professor, I teach students about the law and legal process. As discussed above, I have taught a variety of different intellectual property and Federal Circuit classes.

Scholarship: As discussed above, I have written more than a dozen intellectual property articles which have been published in major law reviews. Most of my scholarship

focuses on patent law and the patent litigation process. I also had the opportunity to testify before the House Judiciary Committee, Subcommittee on Courts, the Internet, and Intellectual Property.

Bar Associations: In addition to my work as a professor, I have been actively involved in Bar Associations especially the Federal Circuit Bar Association. I serve on the Board, have served as a Chair or Co-Chair of two of the Committees, and have been the Editor-in-Chief of the Federal Circuit Bar Journal for eight years. The Journal is a law review style bar journal publishing articles on all topics within the Federal Circuit's jurisdiction and providing case comments on all significant Federal Circuit decisions. In 1999, the Association decided that the Journal was an excellent vehicle for educating and working with law students. At this point, we created a student editorial board which I supervise to work on the Journal.

I am on the Board of a number of other significant publications and organizations and have been involved in the American Intellectual Property Law Association, Intellectual Property Owners Educational Foundation, and the American Bar Association's Intellectual Property section.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   I have not yet received payment for my work as an expert consultant for St. Jude Medical, Inc --$14,671.25.

   I have a George Mason University retirement account through TIAA/Cref

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

   I will faithfully follow all applicable statutes, court decisions, and policies regarding recusal, including 28 U.S.C. 455. I will be particularly sensitive to any matters involving law firms or companies I previously advised as an expert, as well as any matters involving the Howrey law firm, where my husband is an equity partner. In all circumstances, I will adhere to the Code of Conduct for United States Judges.

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

   I have no such plans, commitments, or agreements.

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

   See attached Financial Disclosure Report

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

   See attached Net Worth Statement

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

   I have not held a position or played a role in a political campaign.

AO-10
Rev. 1/2004

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 name, Middle initial) Moore, Kimberly A	2. Court or Organization Federal Circuit	3. Date of Report 5/19/2006
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge Nominee	5. ReportType (check appropriate type) (●) Nomination, Date 5/18/2006 ( ) Initial ( ) Annual ( ) FInal	6. Reporting Period 1/1/2005 to 5/19/2006
7. Chambers or Office Address George Mason University Law 3301 Fairfax Drive Arlington, VA 22201	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.	Professor of Law	George Mason University School of Law
2.	Expert Consultant	Irell & Manella LLP
3.	Lecturer	BarBri Patent Bar Review
4.	Lecturer	Oblon Spivak McClelland Maier & Neustadt
5.	Expert Consultant	Howrey LLP
6.	Expert Consulatant	Foley Hoag
7.	Expert Consultant	Quinn Emanuel Urquhart Oliver
8.	Expert Consultant	McDermott Will Emery LLP
9.	Expert Consultant	Weil, Gotshal & Manges LLP
10.	Expert Consultant	Winston & Strawn LLP
11.	Expert Consultant	Jones Day
12.	Expert Consultant	Fish & Richardson
13.	Expert Consultant	Wilmer Cutler Pickering Hale and Dorr
14.	Board Member	Federal Circuit Bar Association
15.	Editor-in-Chief	Federal Circuit Bar Journal
16.	Board Member	Intellectual Property Owners Education Foundation
17.	Board Member	Patent Strategy & Management
18.	Board Member	CPR Institute for Dispute Resolution
19.	Expert Consultant	St. Jude Medical, Inc.
20.	Expert Consultant	The Cypress Group

21.	Expert Consultant	Texas Instruments Inc
22.	Expert Consultant	Genzyme
23.	Expert Consultant	Biogen Idec
24.	Expert Consultant	Monsanto Company
25.		
26.		

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

☐ **NONE** - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		TIAA/CREF 401K
2.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Moore, Kimberly A	5/19/2006

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	GROSS INCOME (yours, not spouse's)
1.	2006	George Mason University School of Law	85999.95
2.	2005	George Mason University School of Law	156,416.71
3.	2004	George Mason University School of Law	163604.08
4.	2006	University of Akron	5000
5.	2006	Oblon Spivak McClelland Maier & Neustadt	30000
6.	2005	Oblon Spivak McClelland Maier & Neustadt	60000
7.	2004	Oblon Spivak McClelland Maier & Neustadt	60000
8.	2006	Irell & Manella	32495
9.	2005	Irell & Manella	10000
10.	2005	Wilmer Cutler Pickering Hale and Dorr	18765.25
11.	2005	St. Jude Medical Center	38,237.50
12.	2005	Howrey LLP	8245
13.	2005	Foley Hoag LLP	1385
14.	2005	Fish & Richardson PC	15000
15.	2005	BARBRI Patent Bar	5800
16.	2005	Monsanto Company	31,946.25
17.	2005	West Services Inc.	2403.03
18.	2006	West-Thomson	1728.21
19.	2005	McDermott Will Emery LLP	22000

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Moore, Kimberly A	5/19/2006

20.	2005	Weil, Gotshal & Manges LLP	58,158.25
21.	2005	Biogen Idec	7931.25
22.	2005	Genzyme	7931.25
23.	2005	Winston & Strawn LLP	38,796.25
24.	2005	Texas Instruments Inc.	27460
25.	2005	Quinn Emanuel Urquhart Oliver	4122.50
26.	2005	The Cypress Group	26550
27.	2004	Quidel Corp.	27325.00
28.	2004	Foley Hoag	19012.50
29.	2004	Jenkins & Gilchrist	15400
30.	2004	Cravath Swaine & Moore LLP	59964.40
31.	2004	Apple Computer	33410.00
32.	2004	Morgan Lewis & Bockius LLP	17085.10
33.	2004	Howrey Simon Arnold & White LLP	45587.00
34.	2004	Oracle	6000
35.	2005	Lewis & Clark	500
36.	2006	St. Jude Medical	26,732.50
37.	2006	BarBri Patent Bar	2900

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Moore, Kimberly A	5/19/2006

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

☐ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2006	Howrey LLP, salary
2.	2005	Howrey LLP, salary
3.		

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	EXEMPT	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Moore, Kimberly A	5/19/2006

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

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	EXEMPT		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	National City Mortgage Co.	Mortgage on Rental Property (Corolla N.C.)	O
2.	Chase Card Visa -- United Mileage Plus Visa	Credit Card	J

FINANCIAL DISCLOSURE REPORT
Page 1 of 4

Name of Person Reporting	Date of Report
Moore, Kimberly A	5/19/2006

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div. rent or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1. Rental Property (Corolla, N.C.)	F	Rent	P1	S	EXEMPT				
2. Chevy Chase Bank Checking Account	A	Interest	M	T					
3. Chevy Chase Bank Certificate of Deposit	A	Interest	K	T					
4. United Bank Checking Account		None	J	T					
5. TIAA/CREF Retirement Account									
6. -CREF Global Equities		None							
7. -CREF Equity Index		None							
8. -TIAA CREF International Equity Mutual Fund	A	Dividend	K	T					
9. -TIAA CREF Large Cap Value Mutual Fund	A	Dividend	K	T					
10. -TIAA CREF Small-Cap Value Mutual Fund	A	Dividend	J	T					
11. -TIAA CREF Real Estate Fund		None	J	T					
12. -CREF STOCK		None	K	T					
13. -CREF Infl Linked Bond		None	J	T					
14. -CREF Social Choice		None	K	T					
15. -CREF Growth		None							
16. Northwestern Mutual Life Insurance	B	Dividend	J	T					
17. Northwestern Mutual Life Insurance	B	Dividend	J	T					

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
(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 Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
(See Column C2)	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 2 of 4

Name of Person Reporting	Date of Report
Moore, Kimberly A	5/19/2006

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div. rent. or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(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. Berkshire Life Insurance	A	Dividend	J	T					
19. Howrey Fidelity Retirement Account									
20. -Fid Equity Income	A	Dividend	K	T					
21. -Fid Diversified Intl	A	Dividend	K	T					
22. -Fid Contrafund	A	Dividend	K	T					
23. -Lord Abbett Sm Cap Vsl A	A	Dividend	J	T					
24. -Fid Puritan	A	Dividend	K	T					
25. -Fidelity US Govt Res	A	Dividend	K	T					
26. -Fidelity Aggressive Growth	A	Dividend							
27. -LMValue Trust FLCL	A	Dividend							
28. -Spartan US Equity Index	A	Dividend							
29. -Fidelity US Gov Res	A	Interest	K	T					
30. AG Edwards Brokerage Accounts									
31. -S&P MidCap 400 Value Index Fund	B	Dividend							
32. -Dow Jones US Telecom Sector Index Fund	A	Dividend							
33. -Dow Jones US Hlthcare Sector Index Fund	A	Dividend							
34. -Sector Spdr TR SHS Ben Int Consumer Staples	A	Dividend							
35. -Sector Spdr TR SBI Consumer Discretionary	A	Dividend							

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
(See Columns B1 and 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 Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
(See Column C2)	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 3 of 4

Name of Person Reporting	Date of Report
Moore, Kimberly A	5/19/2006

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure									
36. -Sector SPDR TR SBI Energy	B	Dividend							
37. -Sector SPDR TR SBI Financial	A	Dividend							
38. -Sector SPDR TR SBI Industrial	A	Dividend							
39. -Sector SPDR TR SBI Technology	A	Dividend							
40. -S&P 500 Growth Index Fund	A	Dividend							
41. -S&P 500 Value Index Fund	A	Dividend							
42. -EAFE Index Fund	A	Dividend							
43. -American CAP strategies Mutual Fund	A	Dividend	J	T					
44. -Wells Fargo CAP Trust Preferred	A	Interest	J	T					
45. -First Eagle FDS Inc. Overseas FD	A	Dividend	L	T					
46. -Franklin Real Estate Securities Fund	A	Dividend							
47. -Oppenheimer Main ST FDS OPPty Fund	A	Dividend	L	T					
48. -Thornburg Invt TR Invt Income Builder Fund	A	Dividend	J	T					
49. -Grant Park Futures Fund	A	Dividend	K	T					
50. -S&P 500 Index Fund	A	Distribution							
51. -Goldman Sachs Corp Bd Fund	A	Dividend							
52. -13 yr Treas Index Fund		None							
53. -Trust MSCI EAFE Index Fund	B	Dividend							

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 4 of 4

Name of Person Reporting	Date of Report
Moore, Kimberly A	5/19/2006

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
54. -Dow Jones US Consumer Cyclical Sect Index Fund	A	Dividend							
55. -S&P MIDCap 400 Growth Index Fund	A	Dividend							
56. -Government Obligations Fund-Money Market	A	Interest	J	T					
57. -Centennial Money Market	A	Interest	J	T					
58. -Goldman Sachs Trust Growth Strategy PortFund	A	Dividend	M	T					
59. -Motorola Inc. Stock	A	Dividend							
60. -General Electric Co. Stock	A	Dividend							
61. -First Eagle FDS Inc. Mutual Fund	A	Dividend							
62. -Dow Jones US Utils Sector Index Fund	A	Dividend							
63.									
64.									

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
(See Columns B1 and 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 Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
(See Column C2)	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Moore, Kimberly A	5/19/2006

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Moore, Kimberly A	5/19/2006

IX. CERTIFICATION.

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

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

Signature Kimberly A Moore Date 5/19/06

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		86	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		683	704	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	1	295	000
Real estate owned-add schedule	3	400	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		26	000				
Cash value-life insurance		22	000				
Other assets itemize:							
				Total liabilities	1	295	000
				Net Worth	2	922	704
Total Assets	4	217	704	Total liabilities and net worth	4	217	704
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
Howrey Fidelity Retirement Account	
Fidelity Equity Income	31,583
Fidelity Diversified Int'l	17,239
Fidelity Contrafund	22,365
Ld Abbett SmCpVal A	11,337
Fidelity Puritan	25,844
Fidelity US Govt Res	37,109
TIAA/CREF Retirement Account	
Cref Stock	16,853
International Equity	40,218
Large-Cap Value	44,663
Small-Cap Value Index	9,666
TIAA Real Estate	8,168
Cref Inflation Linked Bond	7,144
Cref Social Choice	47,253
AG Edwards Brokerage Account	
Goldman Sachs Trust Grwth Strategy Cl C	183,237
Grant Park Futures FD B	17,175
American Cap Strategies Ltd	6,178
First Eagle Funds Inc Overseas Fund Cl C	50,094
Oppenheimer Main Str Funds Inc. Opportunity Fund Class C	87,956
Thornburg Investment Trust Investment Income Builder Fund Class C	8,031
Wells Fargo Cap Tr IV 7%	6,050
Centennial Money Market	5,541
Total Listed Securities	$ 683,704

Real Estate Owned	
Personal residence	$ 1,200,000
Rental property	2,200,000
Total Real Estate Owned	$ 3,400,000

Real Estate Mortgages Payable	
Personal residence	$ 330,000
Rental property	965,000
Total Real Estate Mortgages Payable	$ 1,295,000

III. GENERAL (PUBLIC)

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

   As a law professor, my career has largely been devoted to educating current and future lawyers. My work in the various bar associations and the Federal Circuit Bar Journal is unpaid. Being editor-in-chief of the Federal Circuit Bar Journal for eight years has been a significant undertaking. I often speak to bar associations, law schools, and other groups on patent law and litigation topics. In addition, I have agreed to serve as a pro bono Mediator in the Federal Circuit's Pilot Mediation Program. I also contribute to a number of charities including various Catholic churches, fire departments and police stations.

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

   I have never belonged to any such organization.

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

   There was no commission process. In 2006, Office of the White House Counsel discussed with me a vacancy on the Federal Circuit. At separate meeting, I discussed the same vacancy with staff of the Department of Justice. In March 2006, Office of the White House Counsel informed me of the President's intent to nominate me to the Federal Circuit. I underwent a background investigation and completed all nomination paperwork. On May 18, 2006, I was informed my nomination would be submitted to the Senate.

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

No

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

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

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

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The Constitution clearly delineates and distinguishes between judicial, legislative, and executive powers. Appellate court judges need be mindful of their role, careful not to exceed their constitutional authority, and avoid legislating or regulating from the bench. Judicial restraint and self-discipline are critical to maintaining the proper balance among the branches of government. Judges should be arbiters of disputes, not policy makers, regulators, or law makers. Judges should interpret the law, not make it. A judge must interpret the Constitution and statutes without regard to her personal views on any issue.

As the criticisms indicate, judicial activism results when a judge decides issues that are not properly before the court either because they lack jurisdictional basis or they

are not ripe for decision. Judges should not reach to decide issues not required by the case and should refrain from deciding cases which are not properly before the court.

Recognizing these important limits on judicial power as well as the doctrine of stare decisis helps maintain consistency and predictability in law. Where precedent exists, judges are not free to ignore it and decide anew settled legal issues. In the long run, justice is best served when judges adhere to their limited role in the process rather than exceeding their authority to achieve a desired result in a particular case.

Judges are entrusted with an important, but limited, role and should approach the task with great humility and respect for the parties involved in the cases.

AFFIDAVIT

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

5/24/06 (DATE)

Kimberly A Moore (NAME)

(NOTARY)

City/County of [illegible] Commonwealth/State of [illegible]
Sworn to and subscribed before me this [illegible] day of May, 2006. Witness my hand and official seal.

[illegible], Notary Public

Senator HATCH. Judge Shepherd?

STATEMENT OF BOBBY E. SHEPHERD, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Judge SHEPHERD. Mr. Chairman, thank you. First of all, I would like to thank the Chairman and the Committee for holding the hearing today.

I have no formal statement, except to express my thanks to the President for allowing me to have the honor of this nomination, and I wish to thank Senator Lincoln and Senator Pryor, who have attended today, for their kind words. Also, for the support of Congressman Boseman of Arkansas, who has been very supportive.

Senator HATCH. That is great. All right.

Well, I do not intend to ask many questions, because I have a pretty good understanding of both of you and your careers, and I think you both deserve high commendation for being chosen by the President of the United States.

It is a great honor to serve in the Federal Courts, and especially on the Circuit Courts of Appeal. Both of you have made it here because of your excellent records and your excellent reputations as well.

Personally, let me just ask you, Professor Moore, just one question that might be good for you to answer. You have had an impressive record as a scholar, as an academic. However, you do not have any experience as a judge, and you appear to have had limited litigation experience.

Now, how do you feel your career experiences have prepared you to be a Federal Circuit Court Judge?

Ms. MOORE. Thank you, Mr. Chairman, for that important question, and giving me an opportunity to clarify and explain my experience.

When I went to MIT and pursued an electrical engineering degree, I knew I loved technology. We had a professor from a local area law school that came down to the MIT students and offered a class on patent law, which I took.

From that moment, I knew my course was set. I found the perfect meld for me between two great loves, the love of the law and the love of technology; patent law is a natural in that regard for someone who has a technical background.

After graduating from college, I then did work as an engineer for the Navy for a little while, where I continued to think about law school. Went off to law school, and ever since then I have studied the litigation process in great detail. I participated in litigation at Kirkland & Ellis, going through several trials.

After leaving Kirkland, I got the wonderful opportunity to be a clerk for a very distinguished Jurist, Judge Archer. I am honored to have worked for him, and that was a wonderful opportunity to see the Federal Circuit behind the scenes and learn about the process.

After clerking for the Judge, I went off into academia. But as an academic, I do not consider myself to be an ivory tower academic. My primary research has been entirely in litigation.

I have written a book on patent litigation and strategy with the current Chief Judge of the Federal Circuit, Paul Michelle, and a

prominent practitioner, Ray Lupo. In addition to that book, I have written more than 60 articles and/or given speeches on the topic of patent law.

I have been an extremely active participant in the Bar organizations, on the Board of Governors, as you recognized at the Federal Circuit Bar Association, and I have served as the editor-in-chief of that journal for the Federal Circuit Bar Association for the last 8 years.

In addition to that, I have had the great fortune of being chosen as an expert witness in many cases, which has continued to keep me very heavily involved in the practice of patent law, and in particular, in patent trials. As an expert witness, I have gotten to work with many great attorneys, many great clients, and have been very fortunate to have that experience.

So in summing up, I have had a lot of experience with litigation, both as an expert, as a lawyer, and as a patent law professor, in particular. So, thank you for giving me an opportunity to address that.

Senator HATCH. I knew I should not have asked you that question.

[The biographical information of Judge Shepherd follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Bobby Ed Shepherd

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

Residence: El Dorado, Arkansas

Office: U.S. Post Office and Courthouse
101 South Jackson Street, Suite 306
El Dorado, Arkansas 71731

3. **Date and place of birth.**

November 18, 1951; Arkadelphia, Arkansas

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

I am married to Bobbi Doris (Beeson) Shepherd. Public school teacher, El Dorado, Arkansas School District, 200 W. Oak, El Dorado, AR 71730.

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

1969-1973: Ouachita Baptist University, B.A., 1973

September 1973 – December 1975: University of Arkansas School of Law, Fayetteville, Arkansas, J.D., 1976

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

1993- Present	United States District Court, Western District of Arkansas; United States Magistrate Judge
1991-1993	13th Judicial District, State of Arkansas; Circuit-Chancery Judge
1987-1990	Landers and Shepherd Attorneys at Law; Partner
1984-1987	Bobby E. Shepherd Attorney at Law; sole practitioner
1981-1984	Spencer, Spencer and Shepherd, P.A.; Partner
1976-1981	Spencer and Spencer; Associate attorney
1975-1976	Niblock, Hipp & Odom; Law Clerk

1974-1975	University of Arkansas School of Law, Library Worker
1973	Caddo Creek Golf Course; Greenskeeper
1980-1987	MSM Investments, Partner
1987-1998	Owner as tenant in common, with additional owners, of four residential rental houses.
1987-Present	Meridian Properties, Inc; Part Owner, 1987- present; Director, 1987-1994
1990-1993:	Director, Exchange Bank and Trust Company (name later changed to Citizens First Bank)
1985-Present	Boys and Girls Club of El Dorado, Arkansas; Director
1991-1996	Arkansas Baptist Childrens Homes and Family Care Ministries, Director
1987-1992	Arkansas Interest on Lawyer's Trust Account Foundation, Director; 1991-1992 Chairman
1987-1989	El Dorado Camp Fire Girls, Director
1982-1993	Union County Chapter American Red Cross, Director; 1982 Chairman
1976-Present	Union County Bar Association, Member; 1982 President
1976-Present	El Dorado Golf & Country Club, Member; Former Director and Board Secretary

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

Yes, I was enrolled in the Reserve Officers Training Corp. at Ouachita Baptist University in April 1971. I was commissioned a 2nd Lieutenant in the United States Army Reserve on May 12, 1973. During April - July, 1976 I was on active duty for training at Aberdeen Proving Ground, Maryland. From July 1976 to May 11, 1981, I was in the U.S. Army Reserve. I was honorably discharged on May 11, 1981, as a First Lieutenant.

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

Ouachita Baptist University: I received a Sturgis Foundation Scholarship which paid for full tuition, fees and books for all four years of my undergraduate education; Member Alpha Chi National Honor Society; graduated Magna Cum Laude.

University of Arkansas School of Law: Lawyers Group Criminal Award; Jim G. Ferguson Award; Member and Articles Editor, Arkansas Law Review; Graduated with high honors.

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

any offices which you have held in such groups.

Arkansas Bar Association, 1976 - present
Member House of Delegates 1985 - 1986
Member Executive Council 1985 - 1988

Union County Bar Association, 1976 - present
Former President, Secretary

Federal Magistrate Judges Association, 1993 - present

Arkansas Trial Lawyer's Association, 1989 - 1990

American Bar Association, 1977 - 1990

Arkansas Interest On Lawyer's Trust Account Foundation, 1987 - 1992
Chairman, 1991-1992

Arkansas Supreme Court Client Security Fund Committee
Secretary and Chairman, 1986-1987

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

To the best of my knowledge, the organizations to which I belong that are active in lobbying before public bodies are the Arkansas Bar Association and the Federal Magistrate Judges Association.

In addition to organizations previously listed, I belong to the following organizations:

First Baptist Church; El Dorado, AR;1976 – present; Deacon, Trustee

Boys and Girls Club of El Dorado, Arkansas; 1985 - Present; Director

El Dorado Golf & Country Club; 1976 - Present

Arkansas Officials Association; 1992 - Present

South Arkansas Officials Association; 1992 - Present

Razorback Club; 1983 - Present

Owl Club, Rice University Athletics; 2005 - Present

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

Arkansas Supreme Court; March 17, 1976 to present;

United States District Courts for the Eastern and Western Districts of Arkansas; October 20, 1976 to July 27, 1993, the date that I entered service as a United States Magistrate Judge;

The United States Court of Appeals for the Eighth Circuit; January 7, 1980 to July 27, 1993, the date I entered service as a United States District Judge;

The United States Court of Appeals for the Fifth Circuit; March 24, 1980 to 1983. I was admitted to this court for purposes of specific litigation only;

The Supreme Court of the United States, December 15, 1979.

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

Case note, "Domestic Relations - Child Custody - Death of the Custodial Parent and Jurisdiction to Modify the Decree," *29 Arkansas Law Review* 104 (1975).

"Settlement Conferences in the United States District Court for the Western District of Arkansas: An Attorney's Guide," *Arkansas Lawyer*, Vol. 40 Spring 2005.

To my knowledge I have never given a speech on issues involving constitutional law or legal policy. I have spoken at numerous Continuing Legal Education Seminars. I have maintained records of the following presentations. It is possible that I have spoken at other seminars and workshops for which I did not retain records. Any reference to constitutional law or policy would have been incidental to the subject matter of the presentation.

Banking Law in the 80's
February 18, 1983
Little Rock, Arkansas
Sponsor: Arkansas Bar Association
Topic: Product development, ARM's, Investor Accounts

El Dorado Rotary Club
March 21, 1994
El Dorado, Arkansas
Topic: Juvenile Justice

1994 Criminal Justice Act Trial Skills Training Seminar April 15, 1994
Fayetteville, Arkansas
Sponsor: The United States District Court, Western District of Arkansas, Defender Services Division of the Administrative of the Courts, and the University of Arkansas School of Law
Topic: Opening Statements

1995 Trial Practice Institute, October 13, 1995
United States Court House
El Dorado, Arkansas
Sponsor: The Public Defender for Arkansas
Topic: How to effectively handle criminal appointments in Federal court

1996 Labor Law Seminar
May 16-17, 1996
Lake Hamilton Resort
Hot Springs, Arkansas
Sponsor: Arkansas Bar Association
Topic: Mediation and Alternative Dispute Resolution

1997 5th District Trial Practice Seminar
February 7, 1997
Fordyce, Arkansas
Sponsor: Arkansas Bar Association
Topic: The differences between state and federal court from the judge's perspective

1998 Federal Practice Institute
September 18, 1998
University of Arkansas at Little Rock School of Law
Sponsor: Federal Practice Committee for the U.S. District Court for the Eastern District of Arkansas
Topic: Practice before United States Magistrate Judges

1999 Alternative Dispute Resolution Seminar
October 29, 1999
University of Arkansas at Little Rock School of Law
Sponsor: Arkansas Bar Association
Topic: Alternative Dispute Resolution

1999 Social Security Law Seminar
May 20, 1999
Hilton Inn
Fayetteville, Arkansas
Sponsor: Arkansas Bar Association
Topic: An ethical perspective from the federal bench

2000 Social Security Law Seminar
April 17, 2000
Little Rock, Arkansas
Sponsor: Arkansas Bar Association
Topic: Ethics in Social Security Litigation

2000 Tools for Advocacy of Civil and Criminal Cases Seminar
November 28, 2000
Fort Smith, Arkansas
Sponsor: Arkansas Trial Lawyers Association
Topic: Important Changes in Rule 26, Federal Rules of Civil Procedure

Discovery in the New Millennium
September 29, 2000
Hot Springs, Arkansas
Sponsor: Arkansas Trial Lawyers Association
Topic: Changes in Rule 26, Federal Rules of Civil Procedure

2000 Federal Practice Institute
December 1, 2000
University of Arkansas at Little Rock School of Law
Sponsor: Arkansas Bar Association
Topic: Practice before United States Magistrate Judges in Arkansas

2001 Labor and Employment Law Conference
March 22-23, 2001
Hot Springs, Arkansas
Sponsor: Arkansas Bar Association
Topic: Changes in the Federal Rules of Civil Procedure

2001 Social Security Seminar
April 6, 2001
Pulaski Technical College
Little Rock, Arkansas
Sponsor: Arkansas Bar Association
Topic: Ethics in Social Security litigation

2002 Disability Law Seminar
April 12, 2002
Riverfront Hilton
North Little Rock, Arkansas
Sponsor: Arkansas Bar Association
Topic: Ethics in Social Security Litigation

2002 Case Negotiation and Settlement Strategies Seminar
September 20, 2002
Holiday Inn
Texarkana, Arkansas
Sponsor: Arkansas Trial Lawyers Association
Topic: Settlement Conferences in Federal Court

2003 "Pickens by the Bench"
September 19, 2003
Walnut Lake Country Club
Pickens, Arkansas
Sponsor: Arkansas Association of Criminal Defense Lawyers
Topic: Pretrial release and detention in federal court

2004 Union County Bar Association
Summer 2004
Topic: New developments in the U.S. District Court for the Western District of Arkansas

While in the private practice of law I taught the following courses offered by South Arkansas University, El Dorado Branch:

"Law and the Layman", October 1 - 29, 1981, and

"Real Estate Law", January 22 - March 5, 1980.

While in private practice I was regularly called upon to speak to local public school classes about the legal system. These presentations were given extemporaneously or with notes which I did not retain.

As a judge in the state and United States District Court, I have also been asked, on occasion to speak to local public school classes about the legal system and my duties. Again, these presentations were given extemporaneously or with notes that I did not retain. I do have notes with respect to the following:

Ouachita County Victim Assistance Program
April 28, 1992
Fairview Middle School

Camden, Arkansas
Sponsor: Ouachita County Victim Assistance Office
Topic: Child abuse

Over my career as a private attorney and judge I have spoken on a handful of occasions to civic clubs in our community. I spoke about the legal system and my duties as a judge. These talks were given extemporaneously or with notes that I did not retain.

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

I am in good health. The date of my last physical was April 4, 2006.

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

Union County Municipal Court Magistrate, by appointment of the Union County Municipal Judge from April 29, 1983, to December 1990.

Circuit-Chancery Judge, 13th Judicial District, Arkansas, January 1, 1991 to July 27, 1993. Elected.

United States Magistrate Judge, United States District Court, Western District of Arkansas, July 27, 1993, to present. Appointed.

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

(1) Significant opinions:

a. *Adams v. International Paper Company*, United States District Court, Western District of Arkansas, Texarkana Division, No. 92-4085 (Oct. 15, 1993).

b. *Carr, et al v. El Dorado Chemical Company*, United States District Court, Western District of Arkansas, El Dorado Division, No. 96-1081 (August 15, 1997).

c. *United States v. Prescott*, United States Court, Western District of Arkansas, Hot Springs Division, No. 93-60007 (January 7, 1998).

d. *Dvorak v. Arkansas School for Math and Sciences, et al*, United States District Court, Western District of Arkansas, Hot Springs Division, No. 96-6137 (January 27, 1998).

e. *Brown v. Union Pacific Railroad Company, et al*, United States District Court, Western District of Arkansas, Texarkana Division, No. 98-4021 (October 15, 1999).

f. *United States v. Carniglia*, United States District Court, Western District of Arkansas, Hot Springs Division, No. 00-6127 (Feb. 6, 2001).

g. *Lenners, et al v. Hill*, United States District Court, Western District of Arkansas, Hot Springs Division, No. 02-6030 (Sept. 13, 2002).

h. *Hedges v. Barnhart*, 269 F.Supp. 2d 1048 (W.D. Ark. 2003)

i. *Alton v. Norris*, United States District Court, Western District of Arkansas, Texarkana Division, No. 03-4073 (Sept. 1, 2004).

j. *In re White Sign Company*, United States District Court, Western District of Arkansas, Texarkana Division, No. TX-05-sm-01 (Feb. 28, 2005).

(2) Reversals

a. *Cochran v. Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992). In this Chancery case, the plaintiff ex-wife brought an action for an increase in child support and income withholding. The Chancery Court ordered an increase in the amount of support but declined to order income withholding. On appeal, the Arkansas Supreme Court affirmed the refusal to order income withholding but reversed and remanded the case as to the child support adjustment finding that the trial court did not adequately explain why the child support chart amount was not adopted.

b. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992). A municipal court found the defendant guilty of driving while intoxicated, refusing to submit to blood alcohol testing and improper display of car license plates. On appeal to circuit court, a jury found the defendant guilty of only refusal to submit to blood alcohol testing. The trial court set aside the verdict, on motion of the defendant, concluding that under Arkansas law as it stood at the time a defendant must be convicted of DWI in order to be convicted of refusing to submit to blood alcohol testing. On appeal by the state, the Arkansas Supreme Court reversed finding that under Arkansas statute, DWI conviction is not a prerequisite to a conviction for refusal to submit to blood alcohol testing.

c. *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994). At a jury trial the appellant was convicted of arson and burglary. The Arkansas Court of Appeals reversed finding that the trial court erroneously found that evidence of previous fires suffered by the victim was irrelevant to any issue in the case.

d. *Rice v. Shalala*, 46 F.3d 1136 (8th Cir. 1995)(Table). Plaintiff appealed the decision of the district court affirming the denial of plaintiff's disability insurance benefits and supplemental security income benefits claims. After *de novo* review, the Court of Appeals affirmed the district court's decision as to the DIB claim but reversed and remanded as to the SSI claim finding that the ALJ did not develop or consider evidence as to the claimant's physical condition as of the date he filed his SSI claim.

e. *Ferrif v. City of Hot Springs, Arkansas*, 82 F.3d 229 (1996). Plaintiffs, who owned record title to an undivided one-third interest in land on which homes were located, brought an action against the City of Hot Springs, Arkansas to recover just compensation after the homes were condemned and destroyed by the city. The trial court determined that the plaintiffs' constitutional rights had been violated and awarded compensation of one-third of $36,500.00. Applying Arkansas law, the court of appeal determined that, in fact, the plaintiffs owned equitable title to the entirety of the proper and remanded for entry of judgment awarding the plaintiffs the entire $36,500.00.

f. *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996). Former employee of the defendant bakery sued for race discrimination, alleging constructive discharge. After a jury trial the plaintiff was awarded back pay, front pay and attorney's fees. On appeal by the employer, the court of appeals reversed and dismissed the case finding that there was insufficient evidence, as a matter of law, to establish that the plaintiff was constructively discharged.

g. *Walden v. Carmack*, 156 F.3d 861 (8th Cir. 1998). Property owner and occupant brought suit against a sheriff, deputy sheriff and the county pursuant to 42 U.S.C. § 1983 alleging violation of their Fourth, Fifth and Eighth Amendment rights in connection with the officers' search of plaintiffs property, the arrest of the occupant and subsequent forfeiture proceedings. The defendants moved for summary judgment asserting qualified immunity. The trial court denied the motion and the defendants appealed. The court of appeals reversed finding that the trial court erred in denying summary judgment to the sheriff on all claims except an occupant's Fourth Amendment claim regarding an alleged unreasonable search and seizure. The denial of summary judgment to the county was affirmed and the county's appeal was dismissed.

h. *White v. Crane,* 45 Fed. Appx. 552, 2002 WL 2010394 (8th Cir. 2002). The plaintiff brought this action under *42 U.S.C. § 1983* alleging that jailers failed to

protect him from attack by another inmate. The district court granted summary judgment in favor of the jailers on qualified immunity grounds. The Court of Appeals reversed and remanded the case for further proceedings.

i. *Van Winkle v. Barnhart,* 55 Fed. Appx. 784 (8th Cir. 2003). Plaintiff appealed the decision of the district court affirming the denial of plaintiff's disability insurance benefits and supplemental insurance benefits claims. After *de novo* review, the court of appeals reversed finding that the Administrative Law Judge's decision to discount the opinion of the plaintiff's community counseling service team and the ALJ's credibility findings were not adequately supported by the record. The matter was remanded for further proceedings.

j. *Draper v. Barnhart,* 425 F.3d 1127 (8th Cir. 2005). Plaintiff appealed the decision of the district court affirming the denial of plaintiff's disability insurance benefits and supplemental security income benefits claims. After *de novo* review, the court of appeals reversed and remanded finding: that there were inconsistencies in the Administrative Law Judge's findings and conclusions; that the ALJ's credibility findings were not supported by substantial evidence on the record as a whole; and, that the ALJ improperly failed to call a vocational expert.

(3) Significant opinions on state or federal constitutional issues

a. *Piggee v. Jimmy Jones, et al,* United States District Court, Western District of Arkansas, Texarkana Division, No. 93-4107 (Jan. 23, 1995); *aff'd Piggee v. Jones, et al,* 84 F.3d 303 (8th Cir. 1996).

b. *Burnett v. Norris*, United States District Court, Western District of Arkansas, Hot Springs Division, No. 96-6059 (December 24, 1996).

c. *United States v. Francis F. Littlejohn, Jr.*, United States District Court, Western District of Arkansas, No. 02-60008 (Sept. 30, 2002).

d. *United States v. Ranulfo Vasquez-Martinez,* United States District Court, Western District of Arkansas, Hot Springs Division, No. 05-60016 (Feb. 9, 2006).

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

I have never been an unsuccessful candidate for public office.

From 1976 to approximately 1983 I assisted my law partner who was the elected El Dorado, Arkansas City Attorney. Although I was referred to as the "Assistant City Attorney" I do not believe I was ever formally so appointed to such position.

17. Legal Career:

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

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

I have never served as a clerk to a judge.

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

1984 - 1987: Bobby E. Shepherd, Attorney at Law, 609 Exchange Bank Building, 214 North Washington, El Dorado, AR 71730.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

January 1, 1976 - March 17, 1976: Spencer and Spencer, Attorneys at Law, 305 North Washington Street, El Dorado, AR 71730. During this time period I served as a law clerk and studied for the Arkansas Bar Examination.

March 17, 1976 - 1981: Spencer and Spencer, Attorneys at Law, 305 North Washington Street, El Dorado, AR 71730. I was an associate.

1981 - 1984: Spencer, Spencer and Shepherd, P.A., Attorneys, 305 and 215 North Washington Street, El Dorado, AR 71730. After the death of the senior partner of the firm I continued to practice for the firm and became a partner.

1984 - 1987: Bobby E. Shepherd, Attorney at Law, 609 Exchange Bank Building, 214 North Washington, El Dorado, AR 71730. During this time period I practiced law as a sole practitioner.

1987 - 1990: Landers and Shepherd, Attorneys at Law, 111 West Elm Street, El Dorado, AR 71730. I practiced as a partnership with Mr. Michael R. Landers.

1991 – 1993: State of Arkansas, 13th Judicial District; Union County Courthouse, 101 N. Washington; El Dorado, AR 71730; Circuit-Chancery Judge

1993 – Present: United States District Court, Western District of Arkansas; 101 S. Jackson; El Dorado, AR 71730 United States Magistrate Judge

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my practice did not change during my career as a private attorney. I was engaged in the general practice of law in a small community, handling: personal injury cases, collections, domestic relations, probate, criminal defense, banking, real estate matters, and other general practice matters.

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

My typical former clients were: local community banks and small businesses as well as individuals and families in our community and from the surrounding area. Occasionally I was retained to represent larger, out of area corporations and businesses. I did not specialize.

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

I appeared in court frequently. The frequency of my court appearances remained constant during the years of my private law practice.

2. **What percentage of these appearances was in:**
   - (a) **federal courts:** 20%
   - (b) **state courts of record:** 70%
   - (c) **other courts.** 10%

3. **What percentage of your litigation was:**
   - (a) **civil:** 95%
   - (b) **criminal.** 5%

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

   I estimate the number of cases in courts of record that I tried to verdict to be 150 cases. In approximately 120 of these cases I served as sole counsel and in approximately 30 of these cases I would have served as associate counsel.

5. **What percentage of these trials was:**
   - (a) **jury:** 10%
   - (b) **non-jury.** 90%

18. **<u>Litigation:</u> Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**
    - **(a) the date of representation;**
    - **(b) the name of the court and the name of the judge or judges before whom the case was litigated; and**
    - **(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

1. *State of Arkansas v. Gloria Williams*, Columbia County Circuit Court, No. CR 78-109 (1979); *rev'd Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980). I represented the defendant who was charged with first degree battery upon her ten month old daughter. She was convicted at a jury trial and was sentenced to ten years in the Arkansas Department of Correction. On appeal to the Arkansas Supreme Court, the conviction was reversed and a new trial was ordered. The case was not retried.

   - (a) 1978-79.
   - (b) Columbia County Circuit Court; Hon. John Graves, Circuit Judge.

(c) Opposing counsel: Prosecuting Attorney Mike Kinard, 118 E. Calhoun St., P.O. Box 727, Magnolia, AR 71754-0727, (870) 234-4727; Deputy Prosecuting Attorney Michael G. Epley, Suite 205, 124 S. Jackson Street, Magnolia, AR 71754-1029, (870) 234-3550.

2. *State of Arkansas v. Kenneth Langston,* Union County Circuit Court, First Division, No. Cr-80-107 (1981). I represented the defendant who was charged with first degree murder in a shooting death. After a jury trial, the defendant was found guilty of manslaughter and was sentenced to six years in the Arkansas Department of Correction. There was no appeal.

   (a) 1980-81.
   (b) Union County Circuit Court, First Division; Hon. John Graves, Circuit Judge.
   (c) Opposing counsel: Prosecuting Attorney Robert S. Laney, 303 Jackson St. SW, P.O. Box 777 Camden, AR 71711-0777, (870) 836-5771; Deputy Prosecuting Attorney Bill McLean, Suite 308, 100 W. Grove Street, El Dorado, AR 71730, (870) 862-1498.

3. *William R. Johnson v. Bobby Tucker*, Union County Circuit Court, Second Division, No. 80-90 (1980); *rev'd Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). I represented the defendant, Bobby Tucker. A default judgment was awarded against Tucker after he failed to file a timely answer in the action brought by Johnson. The trial court overruled Tucker's motion to set aside the default judgment. On appeal, the Arkansas Supreme Court reversed, finding that the summons served upon Tucker did not comply with the requirements of the *Arkansas Rules of Civil Procedure*. The case was remanded for trial.

   (a) 1980-82.
   (b) The Union County Circuit Court, Second Division; Hon. Melvin Mayfield, Circuit Judge.
   (c) Opposing counsel: Donald Frazier, current address unknown.

4. *Arthur Bradley, Jr. v. Arkansas Louisiana Gas Co.*, Union County Chancery Court, Second Division, No. Civ 80-129 (1982); *reversed and remanded, Bradley v. Arkansas Louisiana Gas Company*, 280 Ark. 492, 659 S.W.2d 180 (1983). I represented the plaintiff individual in this action against a natural gas utility company. Plaintiff brought this action in ejectment to require the gas company to remove its pipeline and equipment from his lands. The gas company alleged that it had the right to lay its pipelines upon plaintiff's land pursuant to a 1960 easement. The trial court held that the 1960 easement gave the gas company the right to proceed. On appeal, the Arkansas Supreme Court reversed holding that the 1960 easement did not allow the gas company to lay additional pipelines upon plaintiff's land.

(a) 1980-82
(b) Union County Chancery Court, Second Division; Hon. Henry Yocum, Chancery Judge.
(c) Opposing counsel: Ian Vickery, 315 E. Main Street, El Dorado, AR 71730, (870) 862-5565.

5. *Nell Stewart and George Stewart, her husband v. Tom Lofin, et al*, Union County Circuit Court, Second Division, No. Civ 82-392 (1984). I represented the plaintiff, Mrs. Stewart, who suffered injuries to her lungs when she inhaled chlorine fumes that came into her home through the community water system. She brought this action against the contractors who were working on the water system and who caused the chlorine to be introduced. The case was tried to a jury which returned a verdict for the plaintiffs for a $140,000.00 compensatory and $25,000.00 in punitive damages. There was no appeal.

(a) 1982-84.
(b) Union County Circuit Court, Second Division; Harry F. Barnes, Circuit Judge.
(c) Co-counsel: J.V. Spencer, III, Highway 280, Meadowbrook Corporate Park, 1200 Corporate Drive, Suite 107, Birmingham, AL 35242 (205) 995-5080. Opposing counsel: Robert D. Trammel, 13608 Kanis Road, Little Rock, AR 72211, (501) 223-3100; George McWilliams, 2900 St. Michael Drive, Suite 400, Texarkana, TX 75503, (903) 334-7000; Floyd Thomas, 423 N. Washington, El Dorado, AR; and, Robert Compton (now deceased), 423 N. Washington, El Dorado, AR 71730, (870) 862-3478.

6. *R.R. Ramsey Contractors, Inc. v. Bituminous Casualty Corporation*, United States District Court, Western District of Arkansas, El Dorado Division, No. 82-1099 (1990). I represented the plaintiff, R.R. Ramsey Contractors, Inc., which brought suit against the defendant liability insurance company for bad faith failure to defend the plaintiff against a negligence claim asserted against Ramsey by one of its customers. After a nonjury trial, the court awarded judgment to the plaintiff.

(a) 1982-84.
(b) The United States District Court, Western District of Arkansas, El Dorado Division; Hon. Oren Harris.
(c) Opposing counsel: Teresa M. Wineland, 100 E. Church St., El Dorado, AR 71730, (870) 862-5523.

7. *Ira Willard Booth, et al v. National Bank of Commerce, Trustee, et al*, Union County Chancery Court, Second Division, No. 83-432 (1984); *aff'd Kimrey v. Booth*, 285 Ark. 18, 685 S.W.2d 139 (1985). Tom Booth was convicted of voluntary manslaughter in the death of his parents, Calvin Leslie Booth and Betty Renfro Booth. Following the deaths of Mr. and Mrs. Booth, Tom Booth and the

surviving heir of Calvin Leslie Booth entered into a settlement agreement with respect to the estate of the deceased. Under the agreement, a trust was created for the benefit of Tom Booth with National Bank of Commerce as the trustee. The plaintiffs were collateral heirs of Calvin Booth who brought the action asserting that, as a matter of public policy, Tom Booth should not be permitted to benefit from his wrongful act and that the trust should be voided. I represented intervenors, heirs of Betty Renfro Booth and remaindermen under the terms of the trust, asserting their rights as heirs should the trust be set aside. The court ruled that the settlement agreement was entered into by the necessary parties and that notice to collateral heirs was not required. The court determined that application of the doctrine of res judicata prevented the reopening of the matter. On appeal the decision was affirmed.

(a) 1983-84.
(b) Union County Chancery Court, Second Division; Hon. Jim Gunter, Chancery Judge.
(c) Opposing counsel: Robert L. Brown, 625 Marshall Street, Little Rock, AR 72201, (501) 682-6864; William I. Prewett (now retired), 423 North Washington Ave., El Dorado, AR 71730, (870) 862-3478; William T. Finnegan, Suite 213, 100 S. University Ave., Little Rock, AR 72205, (501) 666-0415; Edward P. Jones (now retired), 4222 N. Stone Creek Hts, Fayetteville, AR 72703, (479) 587-9044; Gary D. McDonald, Suite 308, 100 W. Grove Street, El Dorado, AR 71730, (870) 862-1498; Steven R. Crane, 118 E. Calhoun Street, Magnolia, AR 71754, (870) 234-4727; Dennis L. Shackleford, 100 E. Church Street, El Dorado, AR 71730, (870) 862-5523.

8. *Phillip R. Oswalt v. Smackover State Bank,* Union County Circuit Court, Second Division, No. Civ 88-246 (1990); *aff'd Smackover State Bank v. Oswalt,* 307 Ark. 432, 821 S.W.2d 757 (1991). I represented the defendant bank. In this action, plaintiff alleged that the bank was negligent and breached a contract with respect to its preparation of a certificate of deposit. Plaintiff alleged that the certificate should have been prepared by the bank to create a joint tenancy with right of survivorship between plaintiff's mother and the plaintiff. Upon the death of the plaintiff's mother, the probate court determined that no right of survivorship had been created and the proceeds of the certificate passed as part of her estate. After a non-jury trial, the court found that the certificate did not comply with the Arkansas statute with respect to joint and survivorship accounts and that the bank was liable to the plaintiff. On appeal, the decision was affirmed.

(a) 1988-90.
(b) Union County Circuit Court, Second Division; Hon. Harry F. Barnes, Circuit Judge.
(c) Opposing counsel: Joseph Hickey, 423 North Washington Ave., El

Dorado, AR 71730, (870) 862-3478.

9. *State of Arkansas v. Mark Randall Davis*, Lafayette County Circuit Court, No. 89-26-1 (1990). I represented the defendant who was charged with first degree battery with respect to a shooting. The defendant was convicted at a jury trial and was sentenced to 15 years in the Arkansas Department of Correction and a fine of $25,000.00. There was no appeal.

   (a) 1989-90.
   (b) Lafayette County Circuit Court; Hon. Jim Gunter, Circuit Judge.
   (c) Opposing counsel: Prosecuting Attorney Jim Hudson, 202 Courthouse, 400 Laurel Street, Texarkana, AR 71854, (870) 772-9618.

10. *Porterco, Inc. v. Igloo Products, Corp.*, United States District Court, Western District of Arkansas, El Dorado Division, No. 89-1087 (1990); *aff'd Igloo Products Corp. v. Porterco, Inc.*, 955 F.2d 1164 (8th Cir. 1992). I represented Igloo Products Corp., the buyer of soft sided coolers manufactured by Porterco, Inc. Porterco brought this action against Igloo for breach of contract and Igloo counterclaimed also alleging breach of contract. At a jury trial, Porterco was awarded a judgment for $30,000.00. On appeal, the judgment was affirmed.

    (a) 1989-91.
    (b) The United States District Court for the Western District of Arkansas, El Dorado Division; Hon. Oren Harris, United States District Judge.
    (c) Co-counsel: J. Ray Riley, 2411 South Blvd., Houston, TX (713) 527-0335; Opposing counsel: Robert C. Compton (now deceased), 423 North Washington, El Dorado, AR 71730, (870) 862-3478.

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

As a United States Magistrate Judge, I have presided over numerous court ordered settlement conferences. In this role I have successfully mediated settlements in the majority of such cases referred to me, thus saving the resources of the court as well as conserving attorney and litigant time and expense. Examples of the most significant of these settlement conferences occurred in the series of lawsuits that were filed, under the Federal Tort Claims Act, by the estates and survivors of those passengers killed in the 2000 sinking of an amphibious tour boat on Lake Hamilton in Hot Springs, Arkansas. I presided over seven settlement conferences with respect to this group of cases and I mediated settlements in all of them.

As magistrate judge I have authored opinions in over 1,500 social security disability appeal cases with reversals or partial reversals in only three cases.

As Circuit-Chancery Judge in the 13th District of Arkansas, I presided in over approximately thirty major felony jury trials including capital murder cases. Additional duties as a state court judge included presiding over a large juvenile, child abuse and dependent and neglected children docket.

In fourteen years of private practice I represented several small communities in South Arkansas in municipal water projects funded by Farmer's Home Administration.

A large part of my private practice was devoted to representing several area community banks in: rendering title opinions, drafting of loan documents, collections and bankruptcy practice. Further, as is typical of any small community general practitioner, I handled a significant number of probate matters as well as real estate litigation including adverse possession and boundary line disputes. My criminal defense practice consisted of representation in cases in which I was retained as well as in many cases in which I was appointed by the state and federal courts.

My oil and gas practice included representing the buyer in a transaction involving the sale of 39 producing oil and gas leases in Columbia, Ouachita and Union Counties in Arkansas in 1989. My work included examining title, and the preparation and review of assignments and other documents. The purchase price for the assigned leases was $970,000.00. I also examined title and provided other services with respect to a 1.8 million dollar loan from a Houston, Texas bank secured by Arkansas oil and gas properties.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   I am the owner of 25% of the stock of Meridian Properties, Inc., a closed corporation that has as its sole asset an office building in El Dorado, Arkansas. In approximately four years this asset will begin generating net income that will be payable to the three stockholders.

   I own a Federal Employees Thrift Savings Plan.

   My wife and I each own an individual retirement account at Bancorp South, El Dorado, Arkansas.

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

   If confirmed I will seek to follow the requirements of the *Code of Conduct for United States Judges*, the Ethics reform Act of 1989, *28 U.S.C. § 455* and any other applicable guidelines. I have followed these requirements throughout my tenure on the District Court bench. I will continue to avoid even the appearance of impropriety. Further, I would recuse from any case in which I participated as a United States Magistrate Judge in the United States District Court for the Western District of Arkansas or as a state court judge.

   Because I have been continuously on the state and federal court benches for the past 15 years and my financial interests are very limited, I know of no categories of litigation or financial arrangements that are likely to present potential conflict of interests during my initial service.

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

   No.

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

   See attached Financial Disclosure Report

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

   See attached Net Worth Statement

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

   I was an unopposed candidate for Circuit-Chancery Judge, 13th Judicial District, in Arkansas in 1990. Other than this experience, I have never held a position in or played a role in a political campaign.

AO-10 (WP)
Rev. 1/2006

FINANCIAL DISCLOSURE REPORT

NOMINATION REPORT

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. app. §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Shepherd, Bobby E.	Eighth Circuit	May 22, 2006
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) _x__ Nomination, Date _5/18/2006_ ___ Initial ___ Annual ___ Final 5b. ___ Amended Report	6. Reporting Period 1/1/2005 to 4/30/06
7. Chambers or Office Address P.O. Box 1733 El Dorado, AR 71731-1733	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

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

	POSITION	NAME OF ORGANIZATION/ENTITY
[ ]	NONE (No reportable positions.)	
1	Director	Boys and Girls Club of El Dorado
2		
3		

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

	DATE	PARTIES AND TERMS
[X]	NONE (No reportable agreements.)	
1		
2		

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

A. Filer's Non-Investment Income

	DATE	SOURCE AND TYPE	INCOME
[X]	NONE (No reportable non-investment income.)		
1			$
2			$

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

[X]	NONE (No reportable non-investment income.)		
1	2005	El Dorado School District (teacher's salary)	
2	2006	El Dorado School District (teacher's salary)	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Shepherd, Bobby E.	5/22/2006

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

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
☐	**NONE** (No such reportable gifts.)		
1	Exempt		$
2			$
3			$
4			$

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

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	**NONE** (No reportable liabilities.)		
1	Timberland Bank, El Dorado, AR	Loans (unsecured)	J
2	Capital One	Credit card	J
3			
4			
5			

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Shepherd, Bobby E,	5/22/2006

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period (1) Amt. Code1 (A-H)	(2) Type (e.g. div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	(2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
1 Meridian Prop. Inc. Com. St.		None	L	T	Exempt				
2 Montag & Caldwell Growth Fund	A	Dividend	J	T					
3 Bancorp South Common Stock	A	Dividend	J	T					
4 Fidelity Invst Short Interm Gvt	A	Dividend	J	T					
5 Fidelity Low Price Stock Fnd #316	A	Dividend	J	T					
6 Longleaf Partners Fund	A	Dividend	J	T					
7 Govt Oblig Fund #5	A	Distrib.	J	T					
8 T Rowe Price Equity Income Fnd	A	Dividend	J	T					
9 T Rowe Price Mid Cap Growth	A	Distrib.	J	T					
10 Simmons 1st Nat Corp	A	Dividend	J	T					
11 Vanguard Intern. Growth Fund	A	Dividend	J	T					
12 Vanguard Bond Ind #222	A	Dividend	J	T					
13 Vanguard Interm Treas Fund	A	Dividend	J	T					
14 Vanguard Explorer Fund 24	A	Dividend	J	T					
15 Vanguard Ind S&P 500 Fund	A	Dividend	J	T					
16 Gvt Oblig Fund #05	A	Dividend	J	T					
17 Timberland Bank Common Stock		None	K	T					

1 Income/Gain Code: (See Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2 Value Code: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001-$100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3 Value Method Code: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Shepherd, Bobby E.	5/22/06

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

	A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
		(1)	(2)	(1)	(2)	(1)	(Prior exempt from disclosure)			
	Place "(X)" after each asset exempt from prior disclosure	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code (Q-W)	Type (e.g., buy, sell, merger, redemption)	(3) Date Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets, or transactions)									
18	Timberland Bank (bank acct)	A	Interest	J	T					
19	Regions Bank (bank accts)	A								
20	Equitable Life Ins Co	A	Dividend	K	T					
21	Overriding Royalty Int Union County, AR	B	Royalty	J	W					
22	Mineral Interest Union County, AR	A	Royalty	J	W					
23	Mineral Interest Union County, AR	A	Royalty	J	W					
24	Mineral Interest Union County, AR	A	Royalty	J	W					
25	Mineral Interest Union County, AR	A	Royalty	J	W					
26	Goldman Sachs Govt M/M	A	Dividend	J	T					
27	Goldman Sachs Short Duration Govt Fund	A	Dividend	J	T					
28	Fidelity Advisor Diversified International CL 1 #734	A	Dividend	J	T					
29	Vanguard 500 Index Fund	A	Dividend	J	T					
30										
31										
32										
33										
34										

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Shepherd, Bobby E.	5/22/06

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

Part III Non-investment Income: Additional income was received as U.S. Government salary for services as a United States Magistrate Judge.

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 _____ Date May 22, 2006

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		20	000	Notes payable to banks-secured		12	450
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		35	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		236	001
Real estate owned-add schedule		400	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		140	000				
Cash value-life insurance		26	500				
Other assets itemize:							
(See attached schedule)		422	200				
				Total liabilities		283	451
				Net Worth		725	249
Total Assets	1	008	700	Total liabilities and net worth	1	008	700
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		67	000	Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$ 400,000
Other Assets	
25% ownership in Meridian Properties, Inc.	$ 83,000
IRA #1	53,900
IRA #2	27,300
Federal Employee Thrift Savings Plan	224,100
Arkansas Teacher Retirement Plan	23,900
Oil & Gas interest and royalty interest	10,000
Total Other Assets	$ 422,200
Schedule of Contingent Liabilities	
Co-maker promissory note from Meridian Properties, Inc.	$ 67,000
Real Estate Mortgages Payable	
Personal residence	$ 236,001

III. GENERAL (PUBLIC)

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

   My private practice of law extended from 1976 to my assuming the state court bench 15 years ago. During that time I did indeed devote time to serve the disadvantaged.

   During my private practice the state and federal court in my county did not utilize a public defender for the defense of indigent defendants. Instead, the court appointed private attorneys to defend such defendants. I regularly received such appointments.

   Further, practicing in a small community, I was taught by my attorney mentors that an attorney should provide legal services on a regular and continual basis to those who otherwise would not be able to afford an attorney. I regularly followed this advice throughout my practice. This included providing discounted legal services as well as providing legal resources on a pro bono basis.

   I have also served for over 20 years as a member of the Board of Directors of the Boys & Girls Club of El Dorado. This organization provides the principal mentor, recreation, substance abuse and personal responsibility education for the boys and girls of our county. The Club provides its services at low or no cost.

   I have coached youth baseball, basketball and soccer for over 20 years, working with many disadvantaged young people.

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

   To my knowledge I do not belong and have not belonged to such an organization.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to**

end (including the circumstances which led to your nomination and interviews in which participated).

My jurisdiction does not have such a selection committee.

In October 2005 I learned that the Hon. Morris Sheppard Arnold would take senior status in October 2006. After consideration, I wrote a letter to President Bush asking that I be considered for nomination to that position. I also wrote letters to Congressman John Boozman and Governor Mike Huckabee of Arkansas asking for their recommendation.

In November 2005 I was contacted by Congressman Boozman's office and asked to meet with the Congressman in Washington. I met with Congressman Boozman on November 17, 2005.

On February 16, 2006, I was contacted by the Office of the Counsel to the President and asked to meet with the Counsel Harriet Miers on February 24, 2005 in Washington. I was also contacted by the office of the Attorney General and asked to meet with the Attorney General on that same date.

On February 24, 2005, I was interviewed at the White House by Counsel to the President Harriet Miers, and members of her staff. On that same date I was interviewed by Attorney General Alberto Gonzales and members of his staff.

Following these interviews, I underwent a background investigation and completed all nomination paperwork. On May 18, 2006 my nomination was submitted to the United States Senate.

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

No.

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

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

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

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

I am aware of the charge that some judges in the federal judiciary engage in so called "judicial activism." To a large degree, this criticism expresses a perception that some judges have departed from their constitutional and traditional role of being arbiters of real disputes between real and interested parties and have entered into the realm of making or attempting to unnecessarily impact public policy.

Canon 1 of the *Code of Conduct for United States Judges* speaks of "[a]n independent and honorable judiciary" being "indispensable to justice in our society." In order to remain "independent and honorable", the federal judiciary must always recognize its unique role under the doctrine of separation of powers and must remain acutely aware that it is the one branch of government not directly chosen by the people. Accordingly, the judiciary should exercise restraint.

Such restraint, in my judgment, flows in large measure from a profound sense of humility. Humility compels a judge to extend courtesy to litigants and lawyers alike. Moreover, humility instructs the judge that he or she is not vested with the authority to use the power of the federal judiciary to further a personal political or social agenda. A sense of humility requires that the court apply the law to the issues before it, in order to reach a result, rather than finding the law that will support a preconceived outcome. Finally, humility reminds the court that it exists to *decide* cases and controversies and not to assume the policy making role of the legislature or the executive.

Appropriate judicial restraint is shown by respect for jurisdictional limits and by proper application of principles such as standing, mootness and ripeness. Respect for such constraints on judicial power assures that only issues which need to be decided and are ready to be decided are presented to the court. Legislature-made restrictions such as statutes of limitations, prohibitions against successive applications for relief and the like,

should also be carefully applied.

Proper judicial restraint mandates that the court's role is not to act as a self-appointed super legislature, imposing the court's personal philosophy upon the litigants and the public. The court should restrain itself from going beyond a decision on the issues actually before the court. The exercise of such restraint also means that the court will remain true to the Constitution and strive to remain immune from the shifting winds of public opinion. The spirit of this principle is found in Canon 3 of the Code, which clearly admonishes that a judge should not be "swayed by partisan interests" or "public clamor."

The court must have a proper respect for the legislative branch and, in the area of statutory interpretation, seek to give effect to the intent of the Congress, starting with the words which the Congress chooses to use in drafting the legislation in question. Such judicial restraint also compels a similar respect for the state courts and legislatures.

Judicial restraint also means that the court should respect the doctrine of stare decisis. As a judge of trial level courts for the past 15 years, I can attest to the importance of trial courts and intermediate appellate courts respecting and following authority from superior courts. Respect for such authority provides predictability and dependability to which the public is entitled and which is essential for an orderly and law-respecting society to survive, and it insulates the federal judiciary from the perception that its decisions are simply the exercise of raw power.

While exercising appropriate judicial restraint and humility, the federal judiciary should never fail to be true to its obligation to "decide" cases, and to do so with dispatch, clarity and necessary force, particularly in the vindication of constitutional protections and the protection of constitutional rights. When jurisdiction exists and where justiciable issues are before the court, the court must make decisions with courage and intellectual integrity.

To me, the maxim that a judge should "apply the law and not make it" is simply a shorthand description of a judge who judges with humility and restraint in keeping with the historical traditions of the federal judiciary and in keeping with our Constitution.

AFFIDAVIT

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

May 25, 2006
(DATE)

(NAME)

(NOTARY)

REBECCA A. KALDEM
Union County
My Commission Expires
July 25, 2010

[Laughter.]

You do have a lot of experience, and that is why I asked it, because I think it is important for this record to show that.

Now, Mr. Shepherd, you remained a generalist in private practice. Did you choose that course rather than specializing, and if so, why?

Judge SHEPHERD. Thank you, Mr. Chairman.

Senator HATCH. I might also add, how did your general practice prepare you for your service, not only on the State bench, but then as a Magistrate Judge? Do you see it having the same benefit on the Eighth Circuit Court of Appeals?

Judge SHEPHERD. Thank you, Mr. Chairman, for that question. I think my general nature of my practice, in 14 years of private practice, was probably a product of the community, the small-town environment in which my wife and I chose to live and raise our children. By the very nature of that small-town environment, general practice is the norm rather than the exception.

As far as preparation, I do feel that a general practice provides an excellent background for service in the Judiciary, both at the State Court level and on the Federal bench, because both at the State Court level and on the Federal bench the judge sees, simply, a wide variety of cases: criminal, civil, administrative.

I found that I was basically seeing the same types of cases, the same kinds of litigation, except from a different perspective, no longer as the advocate, but from the bench. That has continued during my service as a Magistrate Judge, and I believe it will continue to benefit me, should I be fortunate enough to be confirmed to the Circuit Court bench.

Senator HATCH. Well, thank you so much.

I just want to say that I have seen a lot of nominees come through here, and almost all of them are just excellent, whether Democrat Presidents have chosen them or Republican Presidents have chosen them.

I just have to say, both of you are excellent. You both deserve the support of not only this committee, but of the Senate as a whole, and of course of the country as a whole. So on behalf of the Senate Judiciary Committee, I want to thank you for your appearances today.

Now, as you can see, I am easier than most people, but I do look at these things carefully and I take them as seriously as anybody has ever taken them. You both are going to make wonderful judges in your respective courts.

I believe that you will both be honest, decent, honorable people who will do what we have asked you to do, and that is, be fair, reasonable, and honor the attorneys who appear before you and, of course, have a good temperament and do the very best you can.

Now, we are going to leave the record open for 1 week, until 5 p.m. on Wednesday, July 5, for members to submit written questions.

Now, if you receive written questions, we would ask that you immediately turn them around as promptly as you can because we want to be able to move ahead on your nominations as quickly as possible and we do not want any delays.

It is important that we get these Court positions filled, and it is important that we do it in a nonpartisan way. Frankly, both of you, I think, will be great nonpartisan judges on the bench.

So I just want to compliment you and wish you the best, and tell you that I will do everything in my power to get you through as quickly as we can. I want to again congratulate you and thank you for being willing to serve in the Federal Circuit Courts of Appeal. It means a lot to me, personally.

With that, this hearing is adjourned.

[Whereupon, at 2:25 p.m. the hearing was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

STATEMENT OF SENATOR GEORGE ALLEN
INTRODUCTION OF KIMBERLY MOORE TO BE
CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
Wednesday, June 28, 2006 at 2:00 P.M.

- Chairman Hatch, thank you for the opportunity to appear before you today to tell you about Kimberly Moore. Kimberly is here today with her husband, Matt, and one of their three sons, Billy. Their youngest children, Bobby and Matthew, ages three and one, could not be here today.

- Kimberly is a Falls Church resident and a full tenured law professor at George Mason University.

- President Bush has nominated Kimberly to be a Circuit Judge on the United States Court of Appeals for the Federal Circuit. Among other cases, the Federal Circuit hears all patent appeals from the district courts and the United States Patent and Trademark Office.

- First, Kimberly has a strong technical background with two degrees from the Massachusetts Institute of Technology, a Bachelor of Science in Electrical Engineering and a Master of Science, and work experience as an engineer with Naval Surface Warfare Center.

- Also, Kimberly has a great deal of experience with the Federal Circuit itself. She is on the Board of Governors of the Federal Circuit Bar Association, has been Editor-in-Chief of the Federal Circuit Bar Journal for eight years, and has been selected as a Mediator in the Federal Circuit's Pilot Appellate Mediation Program.

- As a professor, Kimberly has taught courses in Patent Law, Patent Litigation, Trademark Law, and Federal Circuit Practice. In fact, she co-authored the casebook Patent Litigation & Strategy with the current Chief Judge of the Federal Circuit, Paul Michel, and a prominent practitioner Raphael Lupo. Kimberly has written more than a dozen law review articles on patent law and litigation and spoken at more than forty conferences on patent topics.

- As a lawyer, Kimberly has consulted with firms on patent cases and appeals to the Federal Circuit. She has also served as an expert witness in dozens of patent cases. In fact, just this month, Kimberly was named one of the 100 most influential lawyers in America by the National Law Journal.

- I am pleased that President Bush has chosen to nominate someone with such a strong background in patent law to the Federal Circuit. Kimberly will be an excellent addition to the court.

- Chairman Specter, thank you for allowing me to introduce Kimberly to you. I strongly support her nomination to be Circuit Judge of the United States Court of appeals for the Federal Circuit and urge the Committee again to recommend the confirmation of Kimberly Moore.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on Judicial Nominations
June 28, 2006

Today, the Committee will consider two candidates for lifetime appointments to the federal courts of appeals, Bobby E. Shepherd, who has been nominated for a seat on the United States Court of Appeals for the Eighth Circuit, and Kimberly Ann Moore who has been nominated for a seat on the United States Court of Appeals for the Federal Circuit.

Judge Shepherd is a United States Magistrate Judge and former Arkansas state Circuit-Chancery Judge who has the support of both home state Democratic Senators. Professor Moore, a former clerk to the Chief Judge of the Federal Circuit, has been nominated to a seat on that specialized court, which has nationwide jurisdiction in a variety of subject areas including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, and veterans' benefits. I look forward to hearing from both of these nominees today and I hope that they are the kind of consensus nominees who can easily be confirmed.

I am pleased that we continue to make progress in filling the many vacancies that remain on our Nation's federal courts. Judicial vacancies remain at just under 50, and more than half of these vacancies have no nominee. I urge the White House to work with Senators from both parties to select nominees who can be expeditiously considered and confirmed.

The Judiciary Committee and the Senate could continue to be productive if the President and his allies on the right would pick judges instead of political fights. I have praised the Republican Senate leadership this past month for wisely passing over the controversial nominations of William Gerry Myers III, Terrence W. Boyle and Norman Randy Smith to turn to well-qualified nominees that could be easily confirmed. The Republican leadership was right to have avoided such controversial nominations that were only reported on a party-line vote.

However, I am concerned that again the Republican leadership is heeding the clarion call of the far right-wing to pick a fight over the nomination of Judge Boyle to the U.S. Court of Appeals for the Fourth Circuit. Nearly two months ago, we learned from news reports that, as a sitting United States District Judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. In at least one instance, he is alleged to have bought General Electric stock while presiding over a lawsuit in which General Electric was accused of illegally denying disability benefits to a long-time employee. Two months later, he ruled in favor of GE and denied the employee's claim for long term and pension disability benefits. Publicly available documents, including court docket sheets and Judge Boyle's financial disclosure forms, appear to support the public reports that Judge Boyle ruled in multiple cases in which he held stock in one party.

These matters used to be investigated in a bipartisan way. In fact, after these developments were reported in the media, the seven Democratic members in the group that helped avert the Republican "nuclear option" wrote a letter asking for a new hearing to look into the conflict of interest allegations. I regret that the Republican leadership is apparently determined not to allow a bipartisan investigation to be completed and determined not to hold the follow-up hearing. Instead, they have sent Judge Boyle a letter asking for him to comment.

As I have said several times with respect to this troubled nomination, the President should heed the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of Senator John Edwards, and withdraw his ill-advised nomination of Judge Terrence Boyle. Law enforcement officers from North Carolina and law enforcement officers from across the country oppose the nomination. Civil rights groups oppose the nomination. Those knowledgeable and respectful of judicial ethics oppose this nomination. This nomination has been pending on the calendar in the Republican-controlled Senate since June of last year when it was forced out of the Committee on a party-line vote. It should be withdrawn.

If this nomination is not withdrawn, and the Republican leadership is determined to move forward with this nomination in response to right-wing pressure groups, issues arising from Judge Boyle's many alleged conflicts of interest can be best addressed in a hearing, where Senators can ask questions of the nominee, listen to his answers, and assess the credibility of his explanations regarding the conflicts. That is our process. There is no reason to depart from it now.

I hope that after the answers of Judge Shepherd and Professor Moore to questions I will be convinced that they are the kind of nominees who understand that the role of the judge is to act as a check and balance to protect the rights and liberties of all Americans. I welcome the nominees and their friends and families to the Committee today.

# # # # #

SENATOR WARNER'S STATEMENT TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF KIMBERLY A. MOORE TO SERVE AS A JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
JUNE 28, 2006

Chairman Specter, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing today.

I am pleased to introduce to the Committee Ms. Kimberly Moore - a resident of Falls Church, Virginia. Ms. Moore has been nominated to serve as a judge on the United States Court of Appeals for the Federal Circuit.

Our nominee is joined here today by her husband, Matthew; her eldest son, Billy; her Mother, Linda Pace; her uncle, Joseph Yelinek; her mother-in-law and father-in-law, Jane and Frank Price; and her brother-in-law, Mark Moore. Ms. Moore's two youngest children, Bobby, age 3, and Matthew, who is almost two years old, are understandably absent today.

All of us recognize the importance of the position to which President Bush has nominated Ms. Moore. The United States Court of Appeals for the Federal Circuit stands as one of the thirteen federal circuit courts of appeals that operate just under the United States Supreme Court. The Federal Circuit - which consists of 12 judges - is a unique court in that it has nationwide jurisdiction in a variety of subject areas, including: international trade, government contracts, patents, trademarks, certain money claims against the United States government, and veterans' benefits cases.

Given the court's highly technical jurisdiction, there is no doubt that serving on the United States Court of Appeals for the Federal Circuit is a challenging task. In my view, based on Ms. Moore's educational background and her legal and technical expertise, she is clearly up to the task.

Ms. Moore received her undergraduate degree in 1990 in electrical engineering from the prestigious Massachusetts Institute of Technology. A year later, she earned her Masters of Science and earned an impressive grade point average of 4.8 out of a 5 point scale. The nominee then went on to graduate cum laude from Georgetown University Law Center in 1994.

Subsequent to graduation, Ms. Moore entered private practice where she worked as an associate at the well respected law firm of Kirkland & Ellis. While at the firm, Ms. Moore specialized in intellectual property litigation.

In 1995, the nominee left private practice to serve as a law clerk for the Honorable Glenn L. Archer, Jr. - then Chief Judge of the United States Court of Appeals for the Federal Circuit. Ms. Moore served a two-year clerkship on the court.

After her clerkship, the nominee joined the faculty at the Chicago-Kent College of Law and, later, the University of Maryland School of Law. At both law schools, Ms. Moore taught patent and trademark law. Beginning in 2000, Ms. Moore spent three years as an intellectual property litigation counsel at the firm of Morgan, Lewis & Bockius in Washington D.C. At the same time, however, she still managed to work in academia, teaching law as an Associate Professor at the George Mason University School of Law. In 2004, Ms. Moore became a full Professor of Law at George Mason University where she teaches intellectual property law.

It is impressive to note that throughout her legal career, the nominee has written and delivered over 60 published articles, books, and speeches, mostly in the realm of intellectual property law. In addition, the National Law Journal recently selected her as one of the one hundred most influential lawyers in America.

Mr. Chairman, Ms. Moore is obviously very well-qualified to serve as a judge on this prestigious court. I thank the Committee for holding today's hearing, and I look forward to supporting the nominee when her nomination comes before the full Senate.

NOMINATIONS OF PETER D. KEISLER, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT; VALERIE L. BAKER, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; PHILIP S. GUTIERREZ, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; AND FRANCISCO AUGUSTO BESOSA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF PUERTO RICO

TUESDAY, AUGUST 1, 2006

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

The Committee met, pursuant to notice, at 2:06 p.m., in room 226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Specter, Hatch, Leahy, Kennedy, Feinstein, Feingold, and Schumer.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. The Committee will come to order.

Today we have a confirmation hearing for four of the President's judicial nominees. Our first panel will consist of one of the President's Court of Appeals nominees, and the second panel will consist of three District Court nominees.

Let me express to each one of you that we appreciate your willingness to appear before the Committee here today. I hope we will quickly move all your nominations through the Committee and onto the floor as soon as possible.

We will probably be joined off and on by other members of the Committee as the hearing proceeds. There are a lot of different things going on this last week before the August adjournment of the Senate, but we will go ahead and proceed.

If I may ask Peter D. Keisler to come forward and have a seat. I know my colleague, Senator Boxer, is going to be here at some point, and we will break for her. But if you will have a seat, please.

Mr. Keisler, now that I have asked you to take your seat, may I ask you to stand and raise your right hand?

[Whereupon, Mr. Keisler was duly sworn.]

Senator CORNYN. Thank you very much.

Our first nominee is Peter Douglas Keisler, nominated to be U.S. Circuit Court Judge for the DC Circuit. Mr. Keisler comes before this Committee with a distinguished academic and professional record. He received a B.A. *magna cum laude* from Yale University in 1981, and a J.D. from Yale Law School in 1985.

While at Yale, he served as Note Editor of the Yale Law Journal. Following law school, Mr. Keisler clerked for Judge Robert H. Bork of the U.S. Court of Appeals for the DC Circuit.

In 1986, Mr. Keisler joined the Office of Counsel to President George H.W. Bush as assistant counsel; in 1987, he was promoted to Associate Counsel to the President.

In 1988, Mr. Keisler accepted a clerkship with Justice Anthony M. Kennedy of the U.S. Supreme Court. After his clerkship, he joined the DC office of Sidley & Austin as an associate, becoming a partner in 1993.

In 2002, Mr. Keisler left private practice to join the U.S. Department of Justice as Principal Deputy Associate Attorney General. He served as Acting Associate Attorney General before being nominated by President Bush to serve as Assistant Attorney General for the Civil Division. He was confirmed by the U.S. Senate to that position in June of 2003.

During his government service, Mr. Keisler has been involved in defending the constitutionality of statutes and the lawfulness of government regulation, policies, and decisions.

Mr. Keisler, I welcome you to the committee. Before I ask for your opening statement, I observe we are now joined by our two colleagues, Senator Feinstein, a member of the committee, and our colleague Senator Boxer.

Let us stop at this point, and we will come back, Mr. Keisler for your opening statement. Let me, first, recognize Senator Feinstein for any statement she would care to make.

PRESENTATION OF VALERIE L. BAKER, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA AND PHILIP S. GUTIERREZ, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. My colleague and friend and I are here to make an opening statement with respect to the two California judges that are on the calendar. One, is Judge Valerie Baker, and the other, Judge Philip Gutierrez.

The Central District, which is based in Los Angeles, is the largest and busiest Federal judicial district in the Nation. Judges Baker and Gutierrez would be welcome additions to this court. Both currently sit on the Los Angeles Superior Court, and both have track records of professional excellence and commitment to public service.

Judge Baker has been a trial judge on the Superior Court for nearly 20 years, and previously served on the Municipal Court. In 1994, she was awarded the Alfred J. McCortney Trial Judge of the Year Award from the Consumer Lawyers of Los Angeles. She is a

seasoned litigator, with Federal experience in criminal and civil cases.

As an Assistant U.S. Attorney, she prosecuted bank robberies, major drug violations, and fraudulent enterprises. She attended the University of California at Santa Barbara, earned a B.A. and a Master's degree in English, received a law degree from UCLA.

Now, let me just speak for a moment about Judge Gutierrez. Since 2000, Judge Gutierrez has been a Los Angeles County Superior Court judge. Like Judge Baker, he also served as a Municipal Court judge before joining the Superior Court.

Before becoming a judge, he spent more than a decade in private practice. He was the managing partner of the law firm of Cotkins & Collins, where he specialized in business litigation. He is a Los Angeles native. He did his undergraduate work at Notre Dame, before returning home for law school at UCLA.

Since joining the bench, he has taken an active role in judicial management. He sits on the Superior Court's Executive Committee. I was pleased to learn that he is a former Chair of the California Judges Association on Judicial Ethics.

Now, the American Bar Association has given both nominees a unanimous "Well Qualified" rating.

I think, on behalf of both Senator Boxer and myself, we are both really well pleased with the screening Committee that typifies the California appointment process, where a committee, equally divided between Republicans and Democrats, meets.

They send five potential nominees for each vacancy to the President and the President chooses from that list. Actually, they have been able to send their nominees with total consensus, which has taken the element of any controversy out of this hearing. So, I think we both believe that these two judges are easy to confirm.

Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Senator Feinstein, for those remarks.

Senator Boxer, we would be pleased to hear from you.

PRESENTATION OF VALERIE L. BAKER, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA AND PHILIP S. GUTIERREZ, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA BY HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Mr. Chairman, thank you so much for your courtesy. I am so pleased to join my friend and colleague, Senator Feinstein, in endorsing and supporting the two California judges you have before you today. Both are so well regarded by those who know them in the California legal community.

I am confident, should Judge Gutierrez and Judge Baker be confirmed, they will discharge their responsibilities with dignity, integrity, intelligence, and fairness.

I also want to quickly comment on the process that we use in California. Senator Feinstein alluded to it, and I thought she was right on point, but it bears repeating. In a time of such great partisanship in this institution, unfortunately, and out in the country,

I think Republicans and Democrats came together in California and set up a process that really works well.

We bring before you these particular nominees—and all the others that have come out of this system—before you with total consensus, Mr. Chairman, which means that they have been vetted by Republicans and Democrats, and we get the best of the best. I think you will find, today, we are giving you the best of the best.

Quickly, just to fill in the blanks. Judge Gutierrez has deep roots in California. Born in Los Angeles in 1959, after finishing college at Notre Dame, he returned to attend UCLA School of Law. Following law school, he embarked on a very impressive legal career, beginning in private practice in 1986, and serving on the Superior Court of California since 1997.

He has an excellent reputation as a good and fair judge. One of Judge Gutierrez's strengths is problem solving, a skill that has served him well. Over the past 4 years he has used his skills on the California Judges Association Committee on Judicial Ethics, again, at a time when we need a really hard look at our ethics in public life.

He believes strongly that you strengthen the system by constantly working to solve problems as they arise, before they reach a crisis point. I agree with him strongly on that.

Judge Baker came to our great State in 1967 to attend college at the University of California in Santa Barbara. She, too, attended UCLA Law School. She has practiced in both the private and public sectors, including three years as an Assistant U.S. Attorney in Los Angeles. She has been on the bench of the Superior Court of California for over 19 years, serving with distinction and honor.

In closing, I want to tell you a little story about one of the greatest honors that she received. It did not come from any organization or government, but from the humble words of a single person.

Judge Baker presided over a murder trial, and during the sentencing of the defendant she spoke about the victim in very personal terms. A woman approached Judge Baker afterwards and said, "Thank you, Judge. The victim was my son." The mother of the victim went on to tell Judge Baker that she was able to take some comfort and solace in the way the trial was conducted, and that justice was served.

So I think you have before you, from California, two exceptional people. The Central District will benefit greatly from the exemplary service of Judges Gutierrez and Baker. I fully support their nominations, along with Senator Feinstein, and we both urge quick confirmation.

Thank you very much for your courtesies. And I might thank Mr. Keisler for his pausing. I know this is the moment of your life, and we took some time away, and we apologize. But such is the life of a Senator.

Mr. KEISLER. My pleasure, Senator.

Senator CORNYN. Senator Boxer, thank you for those remarks on behalf of these two nominees. We certainly understand you have other commitments, so thank you for the time you have spent here.

Senator BOXER. Thank you, Senators.

Senator CORNYN. Resident Commissioner Luis Fortuño of Puerto Rico is unavailable to be here today, but he has submitted a state-

ment on behalf of Francisco Besosa, who has been nominated to be U.S. District Judge for the District of Puerto Rico. The statement will be inserted into the record, without objection.

[The prepared statement of Resident Commissioner Fortuño appears as a submission for the record.]

Senator CORNYN. Now, Mr. Keisler, we were going to give you a chance to make any opening remarks that you would care to make. Perhaps if you could begin by introducing your family.

STATEMENT OF PETER D. KEISLER, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. KEISLER. Thank you very much for that opportunity, Senator Cornyn.

I have here with me my wife, Sue Keisler, my oldest daughter Sydelle, who is 11 and entering sixth grade, my son Alex, who is 9 and entering fourth grade, and my son, Philip, who is 6 and is entering first grade.

Senator CORNYN. I think I see them there, behind you.

Mr. KEISLER. All I would like to say, Senator, is I would like to thank you very much for that very kind introduction. I would like to thank both you, Senator Cornyn, and Senator Kennedy for the opportunity to appear before the committee.

Of course, I would like to thank the President for the confidence he expressed by nominating me for this position.

[The biographical information of Mr. Keisler follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Peter Douglas Keisler

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

Residence: Bethesda, Maryland

Office: United States Department of Justice, 950 Pennsylvania Avenue, NW
Washington, DC 20530

3. **Date and place of birth.**

October 13, 1960
Hempstead, New York

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

I am married to Susan Gomory Keisler. Her maiden name was Susan Gomory. She is not presently employed outside the home.

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

Yale Law School (1982-1985)	J.D. (June 1985)
Yale College (1977-1981)	B.A. *magna cum laude* (May 1981)

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

2002-present	United States Department of Justice Assistant Attorney General, Civil Division (July 2003-present) Principal Deputy Associate Attorney General (June 2002-June 2003) and Acting Associate Attorney General (October 7, 2002 - March 28, 2003)

1989-2002	Sidley Austin Brown & Wood (formerly Sidley & Austin) Partner (1993-2002), Associate (1989-1993)
1989-1990	Yale Law School Alumni Association of Washington, D.C. Secretary
1988	Chambers of Justice Anthony M. Kennedy United States Supreme Court Law Clerk
1986-1988	Office of the Counsel to the President Associate Counsel to the President (1987-1988) Assistant Counsel (1986-1987)
1985-1986	Chambers of Judge Robert H. Bork United States Court of Appeals, D.C. Circuit Law Clerk
Summer 1984	Simpson Thacher & Bartlett Summer Associate
Summer 1983	Center for Research on Institutions and Social Policy Summer Intern
1983-2000	Federalist Society for Law and Public Policy Studies Director and Secretary
1982 (estimate)	Committee for Responsible Youth Politics Board Member (I have no records relating to this, and am not certain of either the position or the date, but this is my best recollection)
1981-1982	Leadership Institute Executive Vice President

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

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

Note Editor, *Yale Law Journal*

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

Advisory Committee on Civil Rules (advisory committee to the Judicial Conference's Committee on Rules of Practice and Procedure)
American Bar Association
D.C. Bar Association
Maryland Bar Association
Montgomery County Bar Association
Pennsylvania Bar Association
Federalist Society for Law and Public Policy Studies (Director and Secretary, 1983-2000)
State and Local Legal Center (Advisory Board, 1991-1998)

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

Organizations that lobby before public bodies:
D.C. Bar Association
Maryland Bar Association
Westmoreland Citizens Association

Other organizations to which I belong (all family memberships):
Temple Sinai
Little Falls Swimming Club
Port Discovery

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

Supreme Court of the United States (admitted April 20, 1992)
United States District Court for the District of Columbia (admitted January 8, 1990)
United States Court of Appeals for the District of Columbia Circuit (admitted November 27, 1989)
United States Court of Appeals for the Second Circuit (admitted December 29, 2000)
United States Court of Appeals for the Fifth Circuit (admitted November 23, 2004)
United States Court of Appeals for the Seventh Circuit (admitted November 22, 1991)
United States Court of Appeals for the Eighth Circuit (admitted July 30, 1991)

United States Court of Appeals for the Tenth Circuit (admitted July 14, 1997)
United States Court of Appeals for the Eleventh Circuit (admitted August 22, 1994)
District of Columbia Court of Appeals (admitted January 27, 1989)
Maryland Court of Appeals (admitted December 28, 2004)

In addition, I was admitted to the Pennsylvania Bar on November 21, 1985, and therefore admitted to practice before the Pennsylvania courts. My status there has been "non-resident active" or "voluntarily inactive" since 1995, because I do not live or practice law in Pennsylvania.

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

Remarks at Press Conference on Fireworks Enforcement (June 27, 2006)
Remarks at Press Conference on Fireworks Enforcement (June 2005)
Remarks, Press Conference on Business Opportunity Fraud (February 22, 2005)
Remarks (notes) to Yale World Fellows Program (October 15, 2004)
Remarks at Taxpayers Against Fraud Annual Conference (October 14, 2004)
Remarks at Press Conference on Fireworks Enforcement (June 30, 2004)
Remarks to the Fourth Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 15, 2004)
Remarks at Press Conference with Senator Grassley on False Claims Act (April 22, 2004)
"Representing the United States in Litigation," before National Legal Center for the Public Interest (March 2004)
Remarks at American Bar Association, Section of Public Contract Law, Conference on "Contract Litigation with a Sovereign Party: An Evolving Landscape," Panel Discussion on "Court of Federal Claims Jurisdiction: Visions of the Court's Future" (May 2, 2003)
Remarks to the Seventh Annual Immigration Litigation Conference (April 23, 2003)
"The Need for National Rules to Foster Local Competition in Telecommunications," Legal Times, November 11, 1996 (co-authored)
"*Yale Lit*: Literary, legal flap," Washington Times, January 3, 1984
"Solidarity and Dissent," Institute for Government and Politics (1984)
"Corporate PACs: How to Distinguish Friends from Foes," Human Events, April 17, 1982
"U.S. Interests Jeopardized by Law of Sea Treaty," Human Events, January 23, 1982
"Yale's Giamatti and the Moral Majority," Human Events, November 28, 1981
Letter to the Editor, New York Times, June 7,1980

In addition, while at Yale I wrote and edited some college newspaper pieces, but did not save any of them, and sometime in 1996 I made informal remarks at a meeting of the State and Local Legal Center on *Printz v. United States*, but they were never written down.

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

I am in excellent health. My last physical examination was June 10, 2005.

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

I have not held judicial office.

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

I have never been a judge.

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

Assistant Attorney General, Civil Division, United States Department of Justice (July 2003-present) (appointed)
Acting Associate Attorney General, United States Department of Justice (October 7, 2002- March 28, 2003) (appointed)
Principal Deputy Associate Attorney General (June 2002 - June 2003) (appointed)
Associate Counsel to the President (June 1987-February 1988) (appointed)
Assistant Counsel, Office of the Counsel to the President (September 1987-June 1987) (appointed)
National Advisory Council on Women's Educational Programs (late-1984 - mid-1985) (appointed)

I have never been a candidate for elective office.

17. Legal Career:

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

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

Beginning in June 1985, I clerked for approximately one year for Judge Robert H. Bork of the United States Court of Appeals for the D.C. Circuit.

Beginning in February 1988, and through the end of that calendar year, I clerked for Justice Anthony M. Kennedy of the United States Supreme Court.

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

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

In approximately September 1986, I joined the Office of the Counsel to the President in the White House as an Assistant Counsel. On June 5, 1987, I was promoted to Associate Counsel to the President.

In February, 1989, I joined the Washington, D.C. office of Sidley & Austin as an associate. In 1993, I became a partner. (During the time I was a partner, Sidley & Austin changed its name to Sidley Austin Brown & Wood, and after I departed it changed its name again, to Sidley Austin.) The current address of its Washington, D.C. office is 1501 K Street NW, Washington, D.C. 20005.

In June of 2002, I left what was then Sidley Austin Brown & Wood to join the United States Department of Justice as Principal Deputy Associate Attorney General. From October 7, 2002 to March 28, 2003, I also served as Acting Associate Attorney General. On April 10, 2003, I was nominated by the President to serve as Assistant Attorney General for the Civil Division. I was confirmed by the Senate on June 5, 2003, and began work in the position on July 1, 2003.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My first experience as a practitioner was as an attorney in the Office of the Counsel to the President. I shared generally in the work of that office in providing legal advice as a member of the White House staff from the fall of 1986 through early 1988. My subsequent private practice, from 1989 to 2002, focused on litigation and regulatory matters. Since joining the Department of Justice in 2002, my practice has focused upon litigation in which the United States – its departments, agencies, and/or personnel -- are parties or otherwise have an interest.

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

In private practice I specialized in general appellate litigation, telecommunications regulation and litigation, and, to a lesser extent, professional liability. My professional liability work was largely confined to the period 1992 through 1996; my work in both appellate litigation and telecommunications regulation and litigation spanned the entirety of my years in private practice. Some of my former clients from my years in private practice are AT&T Corp., the National Cable & Telecommunications Association, Deloitte & Touche, Stroock & Stroock & Lavan, Ashland Oil, the United States General Accounting Office (as it was then called), Microsoft, the late Mr. Elhadi Omer Abdelhalim, and Mr. Judd Hirschberg.

In my government practice, my "clients" are generally government departments and agencies, although we also often represent government employees who are named in a lawsuit in their individual capacity when the claims nonetheless arise from their official government employment. The Civil Division's work includes litigation before both trial and appellate courts, and, among other subject matters, includes (1) commercial cases (such as contract, takings, intellectual property, bankruptcy, and affirmative civil fraud cases), (2) cases defending the constitutionality of statutes and the lawfulness of government regulations, policies, and decisions, (3) civil and criminal cases enforcing consumer protection laws, and (4) tort cases.

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

In my first three years in private practice (1989-1991), I did not appear in court at all, although I did appear in an arbitration proceeding. I reached the point in my practice where I began arguing cases in 1992, and while in private practice argued before the United States Supreme Court, the United States Courts of Appeals for the D.C., Second, Seventh, and Eighth Circuits, and the United States District Court for the Eastern District of Virginia. I also appeared frequently while in private practice in adjudications and

rulemaking proceedings before the Federal Communications Commission. Since joining the Department of Justice, I have argued several times in federal court on behalf of the United States, including arguments before the United States Courts of Appeals for the D.C., Second, Fifth, and Tenth Circuits and the United States District Court for the Northern District of California.

2. What percentage of these appearances was in:

(a)	**federal courts:**	100%
(b)	**state courts of record:**	
(c)	**other courts**	

3. What percentage of your litigation was:

(a) civil:	95%
(b) criminal	5%

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

I have not personally tried any cases in courts of record to verdict or judgment, although while in private practice I obtained summary judgments and dismissals in federal district court (both as chief counsel and as associate counsel) in several cases. During my tenure as Assistant Attorney General for the Civil Division, Civil Division lawyers have of course tried numerous cases to verdict or judgment, but I have not personally served on the trial teams in those cases.

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

N/A

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

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *National Cable & Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002)

(a) 2000-2002

(b) United States Supreme Court

(c) Co-counsel:

Paul J. Zidlicky
Sidley Austin
1501 K Street NW
Washington, D.C. 20005
(202) 736-8013

Daniel L. Brenner
National Cable & Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3550

Paul Glist
Cole Raywid & Braverman
1919 Pennsylvania Avenue, NW
Washington, D.C. 2006
(202) 659-9750

Counsel for Federal Communications Commission:

James Feldman
Assistant to the Solicitor General
United States Department of Justice
Washington, D.C. 20530
(202) 514-4277

Counsel for Respondent electric utility companies:

Thomas P. Steindler
McDermott Will & Emery
600 13th Street, N.W.
Washington, D.C. 2005
(202) 756-8000

This case arose at a time when cable companies were just beginning to provide high-speed Internet access service. It concerned the Pole Attachment Act, 47 U.S.C. 224, which grants cable operators the right to obtain access on reasonable terms to telephone and electric utility poles in order to attach their cable equipment. In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), a divided panel of the 11th Circuit held that cable operators forfeit the protections of the Pole Attachment Act if they choose to use their cable attachments to provide high-speed Internet access services to their subscribers in addition to the more traditional video programming.

I began representing the National Cable Television Association (NCTA) – which subsequently changed its names to the National Cable & Telecommunications Association – when it decided to ask the Supreme Court to grant certiorari and review the 11th Circuit's decision. I filed the petition for certiorari and the reply brief on that petition and, after the Supreme Court granted the petition, filed the merits briefs and presented the oral argument on behalf of NCTA. The Supreme Court reversed the 11th Circuit, and held that cable operators continue to enjoy the rights conferred by the Pole Attachment Act when they add high-speed Internet service to their offerings.

2. *United States v. Frank Lafayette Bird*, 401 F.3d 633 (5th Cir. 2005)

(a) 2004

(b) United States Court of Appeals for the Fifth Circuit (Judges Emilio Garza, Harold DeMoss, and Carl Stewart)

(c) Co-counsel:

Mark Stern
Civil Division, Appellate Staff
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-5089

Counsel for Mr. Bird:

Brent E. Newton
Assistant Federal Public Defender
440 Louisiana, Suite 310
Houston, TX 77002
(713)718-4600

There were several amici, but the only counsel for amici with whom I dealt directly was:

Maria Vullo
Paul Weiss Rifkind Wharton and Garrison
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3346

The defendant in this case was indicted for violating the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. 248, after he deliberately drove a van into a Planned Parenthood clinic. The District Court dismissed the indictment on the ground that FACE was, in the District Court's judgment, facially unconstitutional. Relying on the Supreme Court's decisions in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), the District Court held that FACE was an impermissible federal regulation of state and local activity and therefore violated the Commerce Clause.

I became involved in the case when that judgment was appealed. I argued the appeal before the Fifth Circuit on behalf of the United States and in support of the constitutionality of FACE. A divided panel reversed the District Court and upheld the statute.

3. *Salim Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005)

(a) 2004-2005

(b) United States Court of Appeals for the D.C. Circuit (Judges A. Raymond Randolph, John Roberts, and Stephen Williams)

(c) Co-counsel:

Douglas Letter
Jonathan Marcus
Robert Loeb
Sharon Swingle
Eric Miller
United States Department of Justice
950 Pennsylvania Avenue NW

Washington, D.C. 20530
(202) 514-2000

Counsel for Salim Hamdan:

Professor Neal Katyal
Georgetown University Law Center
600 New Jersey Avenue
Washington, D.C. 20001
(202) 662-9000

This was a habeas action brought by Salim Hamdan challenging the lawfulness of the President's use of military commissions. Mr. Hamdan had been charged with committing offenses against the laws of war in connection with his alleged involvement in Al Queda, and was referred for trial to a military commission. The District Court enjoined the military commission proceedings on the grounds that (1) Mr. Hamdan was entitled to a hearing under Article 5 of the Third Geneva Convention to first determine whether he should be afforded prisoner-of-war status and protection from trial by military commission, and (2) the military commission procedures were unlawful insofar as they could deny Mr. Hamdan the right to be present for some of the proceedings.

I first became involved in the case after the District Court decision. I argued the appeal of that decision before the D.C. Circuit, which reversed the District Court. (Mr. Hamdan then sought and obtained a grant of certiorari from the Supreme Court and, as is customary, the representation of the government before the Supreme Court was then led by the Solicitor General's office. The Supreme Court recently reversed the decision of the Court of Appeals.)

4. *Mainstream Marketing Services v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004)

(a) 2004

(b) United States Court of Appeals for the Tenth Circuit (Judges Stephanie Seymour, David Ebel, and Robert Henry)

(c) Co-counsel:

Mark Stern
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-5089

Lawrence DeMille-Wagman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580
(202) 326-2448

Jacob M. Lewis
Federal Communications Commission
445 Twelfth Street SW
Washington, D.C. 20554
(202) 418-1740

Counsel for Mainstream Marketing and other plaintiffs:

Robert Corn-Revere
Davis Wright Tremaine, LLP
1500 K Street NW Suite 450
Washington, D.C. 20005
(202) 508-6600

Thomas F. O'Neill III
Piper Rudnick
1200 19th Street NW
Washington, D.C. 20036
(202) 861-3900

This case was brought by telemarketing companies challenging the constitutionality of the "do-not-call" regulations adopted by the Federal Trade Commission and the Federal Communications Commission. Those regulations establish a do-not-call registry on which individuals may choose to have their phone numbers listed, and generally prohibit commercial telemarketers from calling phone numbers listed on that registry.

Two district courts held those regulations unlawful. The principal district court decision held that the program violated the commercial free speech rights of telemarketers because it unconstitutionally distinguished between commercial telemarketers (who were generally forbidden from calling telephone numbers on the registry) and telemarketers for charitable and political causes (who were not).

I became involved in connection with the appeal. I argued the case on behalf of the Justice Department and the United States before the Tenth Circuit. The Tenth Circuit unanimously reversed the district courts and upheld the constitutionality of the program. The Supreme Court subsequently denied certiorari.

5. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2nd Cir. 2004)

(a) 2004

(b) United States Court of Appeals for the Second Circuit (Judges Guido Calabresi, Pierre Leval, and Ellsworth van Graafeiland)

(c) Co-counsel:

Lowell Sturgill
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-3427

Counsel for Westchester Day School:

Joel C. Haims
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104-0050
(212) 468-8238

Counsel for Village of Mamaroneck:

Kevin J. Plunkett
Thacher Proffitt & Wood LLP
50 Main Street
White Plains, New York 10606
(914) 421-4155

This case involved a dispute between a Jewish day school and its village zoning board. The village had declined to approve zoning applications the school had submitted in order to expand its facilities. The school then filed this lawsuit, claiming that the actions of the village were unlawful under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc(a)(1) (RLUIPA). The District Court agreed, and the village appealed.

On appeal, the village argued that RLUIPA was unconstitutional on several independent grounds – specifically, that it violated the Fourteenth Amendment, the Tenth Amendment, the Establishment Clause of the First Amendment, and the Commerce Clause. The Department of Justice intervened to defend the constitutionality of the statute. We did not address the specific facts of this particular dispute.

I became involved in the case in connection with the appeal, and argued the constitutional issues on behalf of the United States before the Second Circuit. The Court of Appeals remanded the case to the district court on other grounds, and so ultimately did not reach the constitutional issues in its decision.

6. *TCG New York, et. al. v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002)

(a) 2001-2002

(b) United States Court of Appeals for the Second Circuit (Judges John Walker, Jon Newman, and Fred Parker)

(c) Co-counsel:

Stephen B. Kinnaird
Sidley Austin
1501 K Street NW
Washington, D.C. 20005
(202) 736-8153

Robert G. Scott, Jr.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington D. C. 20006
(202) 659-9750

Counsel for City of White Plains:

Philip W. Horton
Arnold & Porter
555 Twelfth Street NW
Washington, D.C. 20004
(202) 942-5000

This case concerned the efforts of TCG, a competitive provider of telecommunications service, to offer telephone service in White Plains, New York. A local ordinance in White Plains imposed a series of requirements that had to be met before a competitive provider of telephone service could be granted a franchise, including a requirement that the provider agree to pay the City annually a franchise fee equal to 5 percent of its gross revenues. The District Court invalidated some of the requirements, but upheld the most onerous, including the 5 percent gross revenues fee.

After the issuance of the decision, I was retained to argue the appeal before the Second Circuit on behalf of TCG. The Second Circuit reversed the District Court and held that the franchise fee, as well as many of the City's other requirements, were preempted by federal law and therefore unlawful.

7. *AT&T v. FCC*, 292 F.3d 808 (D.C. Cir. 2002)

(a) 2000-2002

(b) United States Court of Appeals for the D.C. Circuit (Judges Douglas Ginsburg, A. Raymond Randolph, and David Tatel)

(c) Co-counsel:

David Carpenter
Sidley Austin
Bank One Plaza
10 South Dearborne Street
Chicago, Illinois 60603
(312) 853-7237

James F. Bendernagel, Jr.
Sidley Austin
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000

Counsel for FCC:

Richard K. Welch
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554
(202) 418-7225

This case was an outgrowth of a series of cases filed against AT&T in federal district court in the Eastern District of Virginia by a group of competitive local telephone service providers. The plaintiffs claimed that AT&T had failed to pay for certain services it had received from them. AT&T responded by arguing that it had not ordered the plaintiffs' services and therefore had no obligation to pay for them. The plaintiffs contended that AT&T was required by federal law to order their services, and the District Court referred this question to the FCC.

The FCC then issued an order siding with the plaintiffs, concluding that AT&T had been obligated to order plaintiffs' services under 47 U.S.C. 201(a), a provision of the Communications Act. I argued the appeal of that order before the D.C. Circuit, which reversed the FCC and held that the FCC had misconstrued the Communications Act.

8. *United States v. Hirschberg*, 988 F.2d 1509 (7th Cir. 1993).

(a) 1991-1993

(b) United States Court of Appeals for the Seventh Circuit (Judges William Bauer, Richard Cudahy, and Harlington Wood)

(c) Co-counsel:

Carter Philips
Paul Kalb
Sidley Austin
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000

Edward Genson
Genson & Gillespie
53 W. Jackson Blvd.
Chicago, Illinois 60604
(312) 726-9015

Counsel for co-defendant/appellant Richard Lowrance:

Jeffrey Cole
Cole & Staes, Ltd.
Suite 1150, 321 South Plymouth Court
Chicago, Illinois 60604
(312) 697-0200

Counsel for the United States:

Jerome Krulewitch
Last known employment:
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

This was a criminal case. Judd Hirschberg and Richard Lowrance were accused of staging a phony "theft" of Mr. Hirschberg's car and defrauding the insurance company. They were convicted of several counts of mail fraud and tampering with a vehicle identification number. Both defendants appealed.

I represented Mr. Hirschberg in the appeal, and argued on his behalf before the Seventh Circuit. We contended that the evidence was insufficient to support his convictions. The panel unanimously threw out the convictions for tampering with vehicle identification numbers, but in a split vote (with Judge Cudahy dissenting) upheld the mail fraud convictions.

9. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998)

(a) 1997-1998

(b) United States Court of Appeals for the Eighth Circuit (Judges Pasco Bowman, Roger Wollman, and David Hansen)

(c) Co-counsel:

David Carpenter
Sidley Austin
Bank One Plaza
10 South Dearborne Street
Chicago, Illinois 60603
(312) 853-7237

Counsel for petitioner U S WEST:

William Lake
Wilmer Cutler Pickering Hale & Door
2445 M Street NW
Washington, D.C. 20037
(202) 663-6000

Counsel for FCC:

James Carr
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554
(202) 418-1762

In this case, U S WEST and SBC Communications petitioned for review of an order of the FCC that required them, and other local telephone companies, to make the transport facilities used in their telephone networks to carry their own traffic available to be leased by competitors. U S WEST and SBC claimed that the FCC order was both contrary to the Telecommunications Act of 1996 and arbitrary. AT&T intervened in the appeal on the side of the FCC.

I participated in the original proceedings at the FCC that led to the FCC's decision on this issue, and argued the appeal before the Eighth Circuit on AT&T's behalf. The Eighth Circuit held that the FCC's decision was consistent with the statute and not arbitrary, and therefore upheld it.

10. *Association of Communications Enterprises (ASCENT) v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)

(a) 1998-2001

(b) United States Court of Appeals for the D.C. Circuit (Judges Harry Edwards, Judith Rogers, and Laurence Silberman)

(c) Co-counsel:

Michael J. Hunseder
C. Frederick Beckner III
Sidley Austin
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000

Counsel for ASCENT:

Charles Hunter
Last known employment:
Hunter Communications Law Group
1620 Eye Street NW
Washington, D.C. 20006
(202) 293-2500

Counsel for FCC:

John Ingle
Deputy Associate General Counsel
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554
(202) 418-1746

Counsel for SBC Communications:

Michael Kellogg
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
Sumner Square, 1615 M Street NW, Suite 400
Washington, D.C. 20036
(202) 326-7900

This case related to the merger of SBC Communications, Inc. and Ameritech Corp. The FCC granted approval of the merger, subject to certain conditions. One such condition was that the merged entity, for a period of time, would not provide "advanced telecommunications services" such as DSL except through a separate affiliate. In establishing this condition, the FCC held that the separate affiliate would not be considered a "successor" or an "assign" of SBC or

Ameritech under the Communications Act, and therefore would not be subject to the same statutory and regulatory obligations as SBC, Ameritech, and other incumbent local exchange carriers under that Act. ASCENT appealed that holding to the D.C. Circuit, and AT&T intervened on the side of ASCENT.

I represented AT&T before the FCC in opposing the merger, and argued the appeal before the D.C. Circuit on AT&T's behalf. The Court held that the FCC's interpretation of the Telecommunications Act of 1996 was unreasonable, and vacated the portion of the FCC's order that had held that the advanced services affiliate would not be a successor or assign of SBC and Ameritech.

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

The most significant legal activities in my practice have been litigation matters which I have handled, such as those described in my response to the previous question. In addition:

(a) Since July 2003, I have served as Assistant Attorney General for the Civil Division in the Department of Justice. The focus of the Division is on litigating cases, and that has therefore been the focus of my work. In addition, however, matters are often settled before they proceed to trial, and I have therefore also frequently been involved in negotiating and reviewing proposed settlements. For example, I met personally to discuss settlement with some of the plaintiffs and their counsel in Rosner v. United States, a case brought by Hungarian Holocaust survivors and others seeking compensation arising out of the actions by the United States after World War II in connection with property that had been taken from the Hungarian Jewish community by the pro-Nazi Hungarian government; we were ultimately able to achieve a creative settlement under which the United States is providing approximately $25 million to fund social service benefits for needy members of the class.

I have also been involved in administering compensation programs established by federal statute. Both in this position and in my work in the Associate Attorney General's office (described in (b) below), I had the privilege of working closely with Special Master Ken Feinberg to assist him in administering the 9-11 Victims Compensation Fund – an especially challenging assignment given the unprecedented and pathbreaking nature of the program, the depth of the underlying tragedy and the powerful emotions associated with it. I have separately overseen, in my capacity as Assistant Attorney General for the Civil Division, the administration of the Radiation Exposure Compensation program.

In addition, I have served during the last three years on the Advisory Committee

on Civil Rules, which proposes to the Committee on Rules of Practice and Procedure of the Judicial Conference amendments to the Federal Rules of Civil Procedure. During this period, we have worked intensively and successfully on two very substantial sets of changes to the Rules – a front-to-back restyling of the Rules to make their language more simple, clear, and consistent, and a series of amendments to several Rules to establish new procedures for electronic discovery. We have also worked on smaller and more discrete sets of changes to individual Rules on other subjects, such as asset forfeiture, electronic access to court records, jury polling, the obligation of a party challenging a statute's constitutionality to notify the Attorney General, and time counting, among others.

I also served as a member of the Attorney General's Task Force on Intellectual Property, which examined ways in which the Department could be more effective in protecting intellectual property rights.

(b) I joined the Department of Justice in June 2002 as Principal Deputy Associate Attorney General. When the Associate Attorney General, Jay B. Stephens, left the Department in early October, 2002, I became Acting Associate Attorney General, a position in which I continued to serve until March 28, 2003. In those capacities, I participated substantially in the work of the Department in representing the United States in civil litigation. That work involved, among other responsibilities, participating in overall strategic decisionmaking with respect to cases, reviewing briefs, dealing with client agencies, and reviewing and passing upon proposed settlements. The Associate's office also shares in some of the general management responsibilities of the Department, and I was therefore also called upon to address budgetary and similar matters as the need arose.

(c) As a member of my former law firm's informal Appellate Resource Group, I frequently provided conceptual and strategic assistance in appellate matters to other attorneys in my office, both partners and associates, by reviewing and commenting on briefs and by assisting attorneys in their preparation for oral arguments through moot courts or other discussions. These cases involved a wide range of legal issues and subject matters before the Supreme Court and Courts of Appeals, including, for example, antitrust law, criminal law, tax law, health care law, constitutional law, contract law, and commercial law.

(d) In addition to the types of court-litigated matters described in the responses to the questions above, I also had while in private practice a substantial practice in administrative and regulatory proceedings before the Federal Communications Commission. These proceedings have included both rulemakings and adjudications. They have typically involved extensive briefing and often involved either formal on-the-record oral arguments or less formal oral presentations. Such proceedings have included, for example:

– the merger of Bell Atlantic and GTE (*see* Order, *Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310*

Authorizations, 15 FCC Rcd. 14032 (2000))

– litigated complaint proceedings (*see, e.g.*, *AT&T v. Ameritech*, 13 FCC Rcd. 21438 (1998); *AT&T, et al. v. Bell Atlantic, et al.*, 14 FCC Rcd. 556 (1998); *Total Telecommunications, et al.* v. *AT&T*, File No. E-97-03 (released March 13, 2001)).

– rulemakings concerning the rules that should be adopted to implement the local competition provisions of the Telecommunications Act of 1996 (*see, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996); Order, *Petition of MCI for Declaratory Ruling The New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements*, 15 FCC Rcd. 13896 (2000))

– rulemakings concerning the rules that should be adopted to spur deployment of advanced, high-speed telecommunications services (*see, e.g.*, First Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 4761 (1999); Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237 (1999); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (1999)).

– rulemakings concerning the rules that should be adopted to prevent anticompetitive conduct by carriers with market power (*see, e.g.*, First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905 (1996));

– proceedings adjudicating applications by Bell Operating Companies to offer long-distance service (*see, e.g.*, Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997))

– proceedings to determine whether provisions of state law are or should be preempted by federal law (*see, e.g.*, Memorandum Opinion and Order, *Public Utility Commission of Texas*, 13 FCC Rcd. 3460 (1997)

(e) I have been involved in litigated and non-litigated *pro bono* matters, which are described in more detail in Part III of this questionnaire.

(f) I served as Hiring Partner for the Washington, D.C. office of my former law firm, now known as Sidley Austin, from approximately 1995-2002.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

– *Sidley Austin LLP Savings and Investment Plan.* Balance as of 6/23/2006 is $268,100.99. This is a Defined Contribution Plan. The balance available for distribution to me in the future cannot be known now. I may elect at any time to receive my balance, and it will be distributed as a lump sum cash payment. After I reach the age of 65 (October 13, 2025), the lump sum may be distributed to me without my consent. This lump sum cash payment may not be deferred past April 1, 2032.

– *Sidley Austin LLP Retirement Plan for Partners.* Balance as of 6/23/2006 is $189,257.41. The balance available for distribution to me in the future cannot be known now. I may elect at any time to receive in a lump sum payment or installments the portion of the balance attributable to contributions made prior to 1994 and earnings thereon. The remaining portion of my balance may be distributed to me only after I reach the age of 55 (October 13, 2015) and only as a lump sum payment. Distributions may be made in cash or, upon my request and the trustee's approval, in-kind. I may elect to defer distribution until April 1, 2032.

– *Sidley Austin LLP 1994 Retirement Plan for Partners.* Balance as of 6/23/2006 is $134,324.52. The balance available for distribution to me in the future cannot be known now. I may elect to receive my balance at any time after I reach the age of 55 (October 13, 2015). Distribution will be a lump sum payment and may be made in cash or, upon my request and the trustee's approval, in-kind. I may elect to defer distribution until April 1, 2032.

– *Sidley Austin LLP Retirement Plan for Secretarial Staff* (a successor to the Sidley & Austin Retirement Plan which split in two in 1994). This is a Defined Benefit Pension Plan. I am entitled to receive a monthly pension in the amount of $1,387.85 starting on November 1, 2025 (the first day of the month after my 65th birthday) and continuing until my death. If I elect to commence pension payments earlier than November 1, 2025, the benefit will be reduced by a formula described in the plan documents. I may elect at any time after I reach the age of 55 to receive my benefit in the form of a monthly pension or an actuarial equivalent single lump sum payment. The approximate lump sum value of my benefit is $74,944.

– *Sidley Austin Cash Balance Retirement Plan for Partners*. This is a pension plan adopted in 2000. My account balance is $56,879. My balance will continue to increase at a rate generally equal to the 30-year Treasury security rate. The plan benefits are payable to me after I reach the age of 55. The benefits are paid out in the form of an annuity unless I elect to receive the distribution in a lump sum.

– *Sidley Austin LLP Savings and Investment Plan*. Balance as of 6/23/2006 for my wife, a former associate at Sidley & Austin, is $59,649.71. This is a Defined Contribution Plan. The balance available for distribution to my wife in the future cannot be known now. She may elect at any time to receive her balance and it will be distributed as a lump sum cash payment. After she reaches the age of 65 (October 29, 2027), the lump sum may be distributed to her without her consent. This lump sum cash payment may not be deferred past April 1, 2034.

– *SA Investment Partnership*. I am a participant in the SA Investment Partnership. I pledged to invest $100,000 pursuant to capital calls which may be made from time to time. As of 12/31/2005, I have invested $57,533 of that $100,000. The future benefits from this investment partnership are uncertain.

– *Thrift Savings Plan*. This is the retirement plan for government employees. As of 6/23/06, my account balance was $70,243.02.

– *Federal Employee Retirement System (FERS)*. In addition to the Thrift Savings Plan (above), the FERS, in which I am a participant, provides Social Security benefits and a Basic Benefit Plan. The Basic Benefit Plan provides a monthly retirement benefit that is determined based on a formula that reflects years of service and compensation received.

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

I would adhere to the letter and spirit of Canon 3(C) of the Code of Conduct for United States Judges and 28 U.S.C. 455, which require a judge to disqualify himself or herself from any proceeding in which, *inter alia*, the judge has a financial interest. Any of the securities or other financial instruments I own could potentially create such a conflict. In addition, I would follow the Code in any potential conflicts arising from my service as Assistant Attorney General or from my service in any other capacity at the Department of Justice.

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

No.

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

See attached financial disclosure report.

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

See attached net worth statement.

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

I have never held a paid or full-time position in a campaign. I have played small volunteer roles in the 2000 Bush campaign, the 1996 Dole campaign, and the 1980 Reagan campaign, and I once helped organize a fundraiser for former United States Representative Connie Morella.

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Calendar Year 2005

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial) Keisler, Peter D	2. Court or Organization Ct of Appeals, D.C.Cir	3. Date of Report 6/30/2006
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge -- Nominee	5. Report Type (check appropriate type) (●) Nomination, Date 6/29/2006 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2005 to 6/23/2006
7. Chambers or Office Address US Dept of Justice 950 Pennsylvania Ave NW Washington, DC 20530	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.	Co-Trustee	Trust #1
2.	Co-Trustee	Trust #2
3.	Co-Trustee	Trust #3
4.	Custodian	Custodial Account #1
5.	Custodian	Custodial Account #2
6.	Custodian	Custodial Account #3

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	4/1/90	Sidley Austin LLP Savings and Investment Plan, with Sidley Austin. A 401-K Plan. I select from offered mutual funds. Bal distributed to me when I elect.
2.	6/1/93	Sidley Austin LLP Retirement Plan for Partners, with Sidley Austin. I select from offered mutual funds. Some bal distr'd when I elect, rest distrib'd aft 55.
3.	1/1/94	Sidley Austin LLP 1994 Retirement Plan for Partners, with Sidley Austin. I select from offered mutual funds. Bal distrib't to me when I elect aft age 55.
4.	2/13/90	Sidley Austin LLP Retirement Plan for Secretarial Staff, with Sidley Austin. Defined Bnft Plan. At age 55 I may elect reduced bnfts, or full bnft aft 65.
5.	1/1/00	Sidley Austin Cash Balance Retirement Plan for Partners, with Sidley Austin. No control over investment of plan assets. Benefits paid after age 55.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Keisler, Peter D	6/30/2006

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
6.	8/24/00	SA Investment Partnership with some Sidley Austin partners. Required to invest up to $100,000 pursuant to captl calls. No contol over partnership assets.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Keisler, Peter D	6/30/2006

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	GROSS INCOME (yours, not spouse's)
1.			

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

☑ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.		

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Keisler, Peter D	6/30/2006

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children See pp 34-57 of filing instructions)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e g div rent or int)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e g buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Wachovia Bank Accounts (includes IRA)	A	Interest	K	T	Exempt				
2. Citibank NA Account through Smith Barney Bk Dep Progrm	A	Interest	L	T					
3. Nicholas Fund, Inc.	C	Dividend	K	T					
4. Nuveen MD Prem Income Mun. Fund	A	Dividend							
5. Tiers Principal Protected Min Return Ctf Ser Russell 2004-1		None	L	T					
6. Tiers Principal Prot Min Ret Asst Bk Ctf Ser S&P 2003-7		None	L	T					
7. Tiers Principal Prot Min Ret Asst Bk Ctf Ser DJIA 2003-16		None	L	T					
8. Tiers Principal Prot Min Ret Asst Bk Ctf Ser S&P 2003-23		None	L	T					
9. Tiers Princ Prot Min Ret Tr Ctf Ser NASDAQ-100 Index 2003-12		None	K	T					
10. Citigroup Global Mkts Prin Prot Equity Lkd S&P 500 Ind (PSC)	B	Interest	M	T					
11. Citigrp Global Mkts Princ Prot Eqty Lkd DJIA (PPN)	B	Interest	M	T					
12. Citigrp Global Mkts Princ Prot Eqty Lkd DJIA (PDD)	A	Interest	K	T					
13. Citigroup Global Mkt Prin Prot Nt Global Titans 50 Ind (PNJ)	A	Interest	J	T					
14. MD St Transn Au Transn Facs Projs Rev Frdg Mat 7/1/2007		None	L	T					
15. Balt MD CPN M-Raes Mat 10/15/2007		None	J	T					
16. MD St Cmnty Dev Admin Dept Hsg&Cmnty Dv Mat 1/1/2008	A	Interest	J	T					
17. MD St Transn Auth Trans Facs Prjs Mat 7/1/2008		None	K	T					
18. Prince Georges Co MD Rfdg G/O Cons Pub Impt Mat 7/1/2008		None	K	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes. (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 2 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19.	San Jose Ca USD Santa Clara Co Mat 8/1/08, orig mat 8/1/2019		None	K	T					
20.	NYS Dorm Au Revs Un of Rochester mat 7/1/10, orig mat 7/1/24		None	J	T					
21.	Baltimore MD Rfdg-Cons Pub Imp Mat 10/15/2010		None	K	T					
22.	Lamar Tex Cons Isd Ref Psf Gty Mat 2/15/2011		None	K	T					
23.	Alameda Corridor Trans Au Rev Calif Mat 10/01/2012		None	K	T					
24.	Clovis Calif USD Electn 2001-B Mat 8/1/2013		None	K	T					
25.	Ector Cnty Tex Indpt Sch Dist Ref Psf Mat 8/15/2013		None	K	T					
26.	Alameda Corridor Trans Au Rev Calif Mat 10/1/2014		None	K	T					
27.	Lake Cnty Ill Wtr & Swer Sys Rev Ser C Ambac Mat 12/1/2014		None	K	T					
28.	Fontana Calif USD Ref Ser A Mat 7/1/2015		None	K	T					
29.	Wylie Tex Indpt Sch Dist Rfg Psf Gty U/T Mat 8/15/2015		None	K	T					
30.	Metropolitan Pier & Expo Au Ill McCorm Pl Expn Mat 6/15/2016		None	K	T					
31.	Midlothian Tex Indpt Sch Dist Rfdg Psf Gy U/T Mat 2/15/2017		None	K	T					
32.	Cook Cnty Ill Cmnty Sch Dist No 097 Iak Pk Mat 12/1/2017		None	K	T					
33.	Massachusetts St Tpk Auth Mst Hwy Sys Mat 1/1/2018		None	K	T					
34.	Mounds View Minn ISD #621 G/O Alt Fac Mat 2/1/2019		None	J	T					
35.	New Jersey Econ Dv Auth Rev St Barnabas Mat 7/1/2019		None	J	T					
36.	Las Virgenes Calif USD Election of 1997 Mat 11/1/2019		None	K	T					

1. Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes. (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 3 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children See pp. 34-57 of filing instructions)

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div rent or int)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e g buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
37.	Washington Cnty Md Cap U/T Wtr&Swr Mat 1/1/2020		None	K	T					
38.	Traver JT Elem S/D Ca G/O Election Mat 8/1/2020		None	J	T					
39.	Jackson Miss Pub Sch Dt U/T Nts Mat 10/1/2020		None	J	T					
40.	West Contra Costa Ca USD G/O Election 2002 Mat 8/1/2021		None	K	T					
41.	Knox Cnty Tenn Health Edl&Hsg Facs Brd Hosp Mat 1/1/2022		None	K	T					
42.	Piedmont MPA S.C Elec Rev Mat 1/1/2022		None	K	T					
43.	San Joaquin Hills Ca Tran Corr Agy Toll Rd Mat 1/15/2022		None	K	T					
44.	Texas Tpk Au Central Tex Tpk Sys 1st Tier Mat 8/15/2022		None	K	T					
45.	Midpeninsula CA Rgl Open Space Dist Fing Au Mat 9/1/2023		None	K	T					
46.	Miami-Dade Co FL Spl Oblig Ref Mat 10/1/2024		None	K	T					
47.	Elk Grove CA U/S/D Spl Tax-Cmnty Facs Dst #1 Mat 12/1/2025		None	K	T					
48.	New York NY Ser D Mat 2/15/2005, orig Mat 2/15/2025	A	Interest							
49.	NJ St Edl Facs Auth Rev Rfdg-Princeton Theolog Mat7/1/2005	A	Interest							
50.	NY State Loc Govt Assist Co Ser A Mat 4/1/05 orig mat 4/1/24	A	Interest							
51.	CD - Cole Taylor Bank, IL	B	Interest							
52.	Sidley Austin Ret Plan for Sec Staff fixed bnft		None	L	T					
53.	Sidley Austin Cash Bal Ret Plan for Partners		None	L	T					
54.	Sidley Austin Retirement Plan for Partners		None	M	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1 000,001-$5,000,000	H2 = More than $5,000,000		
2. Value Codes. (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500 001-$1,000,000	P1 = $1,000,001-$5 000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT
Page 5 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
73. Trust #1 (Co-Trustee)	C	Dividend	M	T					
74. --Citibank NA Account, through Smith Barney Bank Dep Program									
75. --CD, Capital One Bank, VA									
76. --Franklin Rising Dividends Fund Class C									
77. --Growth Fund of America Class C									
78. --Franklin Mutual Shares Fund Class C									
79. --Tiers Princ Protected Min Ret Asset Bk Ser Russell 2004-1									
80. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-7									
81. --Tiers Princ Prot Min Ret Asset Bk Ser DJIA 2003-16									
82. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-23									
83. --Tiers Princ Prot Min Ret Asset Bk NASDAQ-100 Ind 2003-12									
84. --Citigrp Glbl Mkts Hldgs Prin Prot Eq Lk DJIA (PDD)									
85. Trust #2 (Co-Trustee)	C	Dividend	M	T					
86. --Citibank NA, through Smith Barney Bank Dep Program									
87. --CD, Capital One Bank, VA									
88. --Franklin Rising Dividends Fund Class C									
89. --Growth Fund of America Class C									
90. --Franklin Mutual Shares Fund Class C									

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes. (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 6 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children See pp. 34-57 of filing instructions)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
91. --Tiers Princ Protected Min Ret Asset Bk Ser Russell 2004-1									
92. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-7									
93. --Tiers Princ Prot Min Ret Asset Bk Ser DJIA 2003-16									
94. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-23									
95. --Tiers Princ Prot Min Ret Ser NASDAQ-100 Index 2003-12									
96. --Citigrp Glbl Mkts Hldgs Prin Prot Eq Lk DJIA (PDD)									
97. Trust #3 (Co-Trustee)	C	Dividend	M	T					
98. --Citibank NA Account, through Smith Barney Bank Dep Program									
99. --CD, Capital One Bank, VA									
100. --Franklin Rising Dividends Fund Class C									
101. --Growth Fund of America Class C									
102. --Franklin Mutual Shares Fund Class C									
103. --Tiers Princ Prot Min Ret Asset Bk Ser Russell 2004-1									
104. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-7									
105. --Tiers Princ Prot Min Ret Asset Bk Ser DJIA 2003-16									
106. --Tiers Princ Prot Min Ret Asset Bk Ser S&P 2003-23									
107. --Tiers Princ Prot Min Ret Asset Bk NASDAQ-100 Ind 2003-12									
108. --Citigrp Glbl Mkts Hldgs Prin Prot Eq Lk DJIA (PDD)									

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
(See Columns B1 and 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 Codes.	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
(See Column C2)	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT
Page 7 of 7

Name of Person Reporting	Date of Report
Keisler, Peter D	6/30/2006

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children See pp 34-57 of filing instructions)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
109. Custodial Acct #1 -Vanguard Small-Cap Index Fund (Custodian)	A	Dividend	K	T					
110. Custodial Acct #2 -Vanguard Small-Cap Index Fund (Custodian)	A	Dividend	K	T					
111. Custodial Acct #3 -Vanguard Small-Cap Index Fund (Custodian)	A	Dividend	K	T					
112. SA Investment Partnership (See Addendum)	D	Distribution	L	U					

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
(See Columns B1 and 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 Codes.	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
(See Column C2)	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Keisler, Peter D	Date of Report 6/30/2006

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

Part III.A. Filer's Non-Investment Income. During the reporting period I received compensation for current employment by the United States.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Keisler, Peter D	Date of Report 6/30/2006

IX. CERTIFICATION.

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

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

Signature Pete K Date 6-30-06

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		115	725	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	2	499	875	Notes payable to relatives			
Unlisted securities--add schedule		57	890	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule		750	270	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		9	200				
Cash value-life insurance							
Other assets itemize:							
Frozen benefit from SA Retirement Plan		74	944				
Cash Balance SA Retirement Plan		56	879				
				Total liabilities			0
				Net Worth	3	564	783
Total Assets	3	564	783	Total liabilities and net worth	3	564	783
CONTINGENT LIABILITIES			0	GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	YES		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT NET WORTH

SCHEDULE 1 - LISTED SECURITIES

MUTUAL FUNDS	CURRENT VALUES
Nicholas Fund	*46,062.44
Vanguard Small-Cap Index Fund	**99,607.38
Vanguard Equity Income Fund	**114,100.82
Harbor Capital Appreciation Fund	**304,039.99
Harbor International Fund	**127,905.36
SSGA S&P 500 Index Fund	**105,286.36
2030 L Fund (Life Cycle)	**70,243.02
	$867, 245.37
PREFERRED STOCK***	
TIERS Principal-Protected Minimum Return Asset Backed Trust Certificates, Trust Series Russell 2004-1	93,100.00
TIERS Principal-Protected Minimum Return Asset Backed Trust Certificates, Trust Series S&P 2003-7	106,743.00
TIERS Principal-Protected Minimum Return Asset Backed Certificates, Trust Series DJIA 2003-16	103,000.00
TIERS Principal-Protected Minimum Return Asset Backed Certificates, Trust Series S&P 2003-23	103,000.00
TIERS Principal-Protected Minimum Return Trust Certificates, Series NASDAQ-100 INDEX 2003-12	48,592.50
Citgroup Global Markets Holdings Principal-Protected Equity Linked Notes Based upon S&P 500 INDEX 1.00% (PSC)	112,872.50
Citgroup Global Markets Holdings Principal-Protected Equity Linked Notes Based upon DJIA (PPN)	103,400.00
Citgroup Global Markets Holdings Principal-Protected Equity Linked Notes Based upon DJIA (PDD)	48,601.85
Citigroup Global Markets Holdings Principal-Protected Notes Dow Jones Global Titans 50 Index (PNJ)	10,021.00
	$729,330.85

*Value as of 6/7/06
**Value as of 6/23/06
***Value as of 5/31/06

BONDS***	CURRENT VALUES
MD ST TRANSN AU TRANSN FACS PROJS REV RFDG CAP APPREC FGIC, Maturity 7/1/2007	81,741.95
BALT MD CPN M-RAES, Maturity 10/15/2007	9,515.80
MARYLAND ST CMNTY DEV ADMIN DEPT HSG&CMNTY DV, Maturity 1/1/2008	5,055.85
MARYLAND ST STRANSN AUTH TRANSN FACS PRJS, Maturity 7/1/2008	23,171.00
PRINCE GEORGES CO MD RFDG G/O CONS PUB IMPT, Maturity 7/1/2008	27,810.90
SAN JOSE CA USD SANTA CLARA CO, Maturity 8/1/2008, Original Maturity 8/1/19	27,061.50
N.Y.S. DORM AU REVS UNIV OF ROCHESTER, Maturity 7/1/2010, Original Maturity 7/1/2024	8,657.50
BALTIMORE MD RFDG-CONS PUB IMP, Maturity 10/15/2010	21,197.00
LAMAR TEX CONS ISD REF PSF GTY, Maturity 2/15/2011	28,980.70
ALAMEDA CORRIDOR TRANS AU REV CALIF, Maturity 10/01/2012	27,046.60
CLOVIS CALIF USD ELECTN 2001-B, Maturity 8/1/2013	29,452.80
ECTOR CNTY TEX INDPT SCH DIST REF PSF GTY, Maturity 8/15/2013	18,477.50
ALAMEDA CORRIDOR TRANS AU REV CALIF, Maturity 10/01/2014	27,991.20
LAKE CNTY ILL WTR & SWR SYS REV SER C AMBAC INSD C/A, Maturity 12/01/2014	17,064.50
FONTANA CALIF. USD REF SER A, Maturity 7/1/2015	37,040.30
WYLIE TEX INDPT SCH DDIST RFDG PSF GTY U/T, Maturity 8/15/2015	33,307.50
METROPOLITAN PIER&EXPO AU ILL MCCORMICK PLC EXPANS, Maturity 6/15/2016	31,926.00
MIDLOTHIAN TEX INDPT SCH DIST RFDG PSF GUARANTY U/T, Maturity 2/15/2017	30,647.00
COOK CNTY ILL CMNTY SCH DIST NO 097 OAK PK, Maturity 12/01/2017	19,773.25
MASSACHUSETTS ST TPK AUTH MET HWY SYS, Maturity 1/01/2018	29,325.00
MOUNDS VIEW MINN ISD #621 G/O ALT FAC-B-S/D CRD ENHANCE, Maturity 2/1/2019	13,464.50
NEW JERSEY ECON DV AUTH REV ST BARNABAS, Maturity 7/1/2019	13,648.50
LAS VIRGENES CALIF USD ELECTION OF 1997, Maturity 11/01/2019	18,643.80
WASHINGTON CNTY MD CAP U/T WTR&SWR, Maturity 1/01/2020	24,229.80
TRAVER JT ELEM S/D CA G/O ELECTN-A-FSA, Maturity 8/1/2020	7,919.25
JACKSON MISS PUB SCH DT U/T NTS, Maturity 10/01/2020	12,057.25
WEST CONTRA COSTA CA USD G/O ELECTN 2002, Maturity 8/01/2021	29,092.80

KNOX CNTY TENN HEALTH EDL & HSG FACS BRD HOSP FACS REV FSA, Maturity 1/01/2022	23,501.50
PIEDMONT MPA S.C ELEC REV-A-2 REF SUBSR, Maturity 1/01/2022	28,347.00
SAN JOAQUIN HILLS CA TRAN CORR AGY TOLL RD RV, Maturity 1/15/2022	23,614.50
TEXAS TPK AU CENTRAL TEX TPK SYS 1ST TIER REV, Maturity 8/15/2022	27,598.20
MIDPENINSULA CA RGL OPEN SPACE DIST FING AU RV, Maturity 9/1/2023	30,479.25
MIAMI-DADE CO FL SPL OBLIG REF SER A, Maturity 10/01/2024	26,742.10
ELK GROVE CA U/S/D SPL TAX-CMNTY FACS DST#1, Maturity 12/01/2025	28,862.40
	$843,444.70
CERTIFICATES OF DEPOSIT***	
Capital One Bank – VA DTD 1/12/05 Maturity 7/12/2006	$59,853.60
Total Listed Securities	$ 2,499,874

SCHEDULE 2 - UNLISTED SECURITIES

	CURRENT VALUES
A partnership interest in SA Investment Partnership, an Illinois General Partnership*	$57,290
Lingraphicare America, Inc., a California Corporation, 10,000 Shares Series C Preferred Stock	estimated $600
Total Unlisted Securities	$ 57, 890

*Value as of 12/31/05

SCHEDULE 3 - REAL ESTATE OWNED

Personal Residence	$ 750,270

SCHEDULE 4 - ASSETS PLEDGED

I am committed to invest up to $100,000 in SA Investment Partnership upon demand. As of 12/31/2005, I have invested $57,533, leaving $42,467 which I am committed to invest in the future as capital calls are made.

III. GENERAL (PUBLIC)

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

During my time at the Department of Justice, all of the work I have done has reflected an effort to serve the broad public interest. With respect to aspects of that work that specifically served the disadvantaged, the consumer protection enforcement work has been directed towards protecting the rights of consumers who have been victimized in a variety of ways, including through business opportunity fraud, adulterated or misbranded drugs, faulty and dangerous medical devices, and odometer rollback fraud.

While in private practice, I represented *pro bono* Dr. Elhadi Omer Abdelhalim in applying for political asylum and then permanent residency in the United States. This case was referred to me by the Washington Lawyers Committee for Civil Rights and Urban Affairs. Dr. Elhadi had been Senior Medical Officer at Kober Prison in Sudan, where the Sudanese government sent many of its most prominent political prisoners. Dr. Elhadi covertly helped the imprisoned party and trade union leaders communicate with their supporters outside, and also prepared an official medical report describing the injuries inflicted by the government's abuse of political prisoners at Kober, which was later published in an Egyptian newspaper and used by human rights groups protesting the policies of the Sudanese government. When the Sudanese government began to suspect Dr. Elhadi, he fled to the United States. His application for asylum attracted the support of Senators Kennedy, Lugar, and Kassebaum, and was granted. I devoted approximately 200 hours to this representation. I also worked with other attorneys at Sidley Austin who represented aliens seeking political asylum by reviewing and editing their work and helping them prepare for INS interviews.

Along with two of my colleagues at Sidley Austin, I also represented before the Court of Appeals for the 11th Circuit two indigent aliens who had been deported by the INS – Fequiere Theodore and Rallin Moultain. *See Theodore v. Immigration and Naturalization Service*, No. 98-3048 (11th Cir.); *Moultain v. Immigration and Naturalization Service*, No. 98-3504 (11th Cir.). The two cases raised several issues in common, and I devoted approximately 120 hours collectively to working on the briefs in both cases. We lost both cases.

I also was part of a team at my former firm that represented *pro bono* the Vietnam Veterans of America in *Vietnam Veterans of America v. Department of the Navy*, 876F.2d 164 (D.C. Cir. 1989), which involved an unsuccessful attempt to gain access under the Freedom of Information Act to certain legal opinions issued by the Judge Advocate Generals of the Army and Navy that were of importance to veterans.

I assisted in preparing for oral argument the attorney (a former partner of mine at Sidley Austin) who was appointed by the United States Supreme Court to represent Scott Carmell in *Carmell v. Texas*, 529 U.S. 513 (2000). Carmell was an indigent criminal defendant who successfully challenged some of his convictions as violating the Constitution's *Ex Post Facto* clause.

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

No.

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

I did not interview with any selection commission. I was contacted by the White House, and interviewed by officials from the White House Counsel's office and the Justice Department.

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

No.

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

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

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

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

Both the legitimacy of a judge's actions, and their acceptance by the public, rest centrally on the principle that the judge in rendering a decision is not seeking to apply his or her political or policy views, but is instead following the law as established by others. For example, federal statutes are afforded a presumption of constitutionality, and when a judge construes and applies a federal statute, the judge is seeking to discern and implement Congress' conclusions about appropriate public policy and not his or her own. It is a fundamental feature of our system of constitutional government, reflected in the doctrine of separation of powers, that policymaking judgments are made in legislation by Congress, and that the role of the judicial branch is to apply those judgments and not to revise them. It is because of that understanding that our system permits individuals who have not been elected, and who generally cannot be removed, to resolve important legal disputes as judges.

Moreover, the judicial process works best when the judge is attempting to resolve the particular case at hand, rather than using it as a vehicle for issuing pronouncements that may be unnecessary to settle the issues actually presented. Of equal importance, courts are never writing on a blank slate, but are required faithfully to apply precedent to new cases as they arise. Adherence to those principles permits the law to develop gradually and incrementally rather than through sudden shifts, because legal questions are then answered only as they are actually presented by the facts of a particular case, and resolved consistently with the principles of prior decisions.

Finally, an additional way in which a judge may fail to stay within his or her proper role is by failing carefully to abide by the limits of his or her position within the judicial hierarchy itself. For a circuit judge, for example, there are substantial constraints imposed by both higher and lower courts. A circuit judge is absolutely bound to follow faithfully the decisions of the Supreme Court. A circuit judge must also respect the proper role of the District Courts, which are given substantial latitude on factual findings, case management, and other matters for which the scope of appellate review is limited. Respecting these boundaries is essential for the system to function properly, and for litigants to be treated fairly.

AFFIDAVIT

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

7-5-06
(DATE)

(NAME)

Joan Turman
Notary Public, District of Columbia
My Commission Expires 06-30-2009

Joan Turman
(NOTARY)

Senator CORNYN. Well, thank you very much for that introduction. Congratulations to you and your family for being here today.

Having a name like Cornyn, it is frequently mispronounced. I want to make sure I give you an opportunity to tell us how to pronounce your name correctly.

Mr. KEISLER. I have always pronounced it "Keisler."

Senator CORNYN. Keisler. All right. We will try to do that today as well.

I would maybe start, Mr. Keisler, by asking you a question that almost every employer asks a prospective employee, and that is, why do you want the job?

Mr. KEISLER. Senator, I have worked as a litigator in the legal system for about 20 years and I have seen it from a lot of different angles. I think anybody who has worked in the legal system as a litigator can certainly wax eloquently about flaws they might perceive, or ways in which the system could be made better.

But for me, at bottom, what stands out about it is that it is a system which values and aspires to, and achieves, principles of fairness and neutrality. It is a system which is accessible.

Anybody can file a case, make an argument, be heard directly by the decisionmaker. The decisionmaker, the judge, does not only have to make a decision, the judge has to give reasons for what he or she does.

We have in this country what I think of as a distinctly American value, which is, people say they are entitled to their day in court. I think that is a very revealing formulation. People do not say they are entitled to win.

They understand that they are not always going to be entitled to win. But they say they are entitled to their day in court because they value the process, because it does stand for those values of fairness and neutrality.

I have felt it a great honor and privilege to work in the system as a lawyer, and I would consider it a special honor and privilege to work in the system as a judge, if I am confirmed, to help sustain and promote those values of fairness, neutrality, balance, and independence. I cannot think of anything else I would rather dedicate my professional life to.

Senator CORNYN. I take it that, in working for both Judge Bork and Justice Kennedy, you have gotten some ideas about how you would comport yourself as a judge from those experiences. Could you share that with the committee, please?

Mr. KEISLER. Certainly, Senator. One thing that strikes me from both of those experiences that I learned from the first day on the job, was how important it is to keep an open mind throughout the process and to always be open to the possibility that you might be wrong.

I remember, the first week I was clerking at the Court of Appeals I received a Petition for Re-hearing to review in a case that Judge Bork had decided and written the opinion about before I had even come on board.

I just naturally assumed, at age 25, that he had made his decision, he had written the opinion. This was a Petition for Re-hearing. It was arguing something against what he had decided. The position of the chambers was set.

Judge Bork asked me, what was in the Petition for Re-hearing. I think I must have said something that was unduly dismissive. He said to me very gently, these are complicated cases. We often get them wrong. We need to be conscious of the fact that we can often get them wrong. I never forgot that. In that clerkship, and for Justice Kennedy, the rule of the chambers was that nothing was ever closed and settled.

The judge could have voted, the justice could have written an opinion, but when someone pointed out or thought of something new, he went back to the beginning and we were as open to the idea—and most importantly, they were as open to the idea—of rethinking things as they would have been the first day they confronted the case. Taking that today, I find frequently, when I first confront a problem, my initial reaction is often so different than what I find after study.

The one thing I have learned, the red flag is when you think one side is 100 percent right and the other side is 100 percent wrong. Then you have got to do more studying, because it is always more complicated than that.

Senator CORNYN. You have a very impressive record of pro bono representation. For the general public, that means free, right?

Mr. KEISLER. Yes.

Senator CORNYN. You have donated your services, of course, to help people in the legal system who could not otherwise afford your services.

Could you describe some of your pro bono representation?

Mr. KEISLER. Thank you, Senator Cornyn, for giving me that opportunity. Absolutely the most rewarding and personally satisfying case that I ever had the opportunity to work on was a pro bono case.

It was a case I worked on for an indigent, heroic refugee from Sudan, a young doctor in his 20's, Dr. al-Hadi Omar Abdul-Halim, who had been a doctor at the biggest prison in Sudan, the Cober Prison.

Dr. al-Hadi was there when they imprisoned pro-democracy activists and trade union activists, and he served covertly as a go-between between the people inside the prison and their supporters outside. He documented some of the abuses that they had experienced in the prison, and his documentation was smuggled out. An Egyptian newspaper published it from a human rights group.

At that point, the Sudanese government began to suspect him, and he fled here. That was a case that was referred to me by the Washington Lawyers Committee for Civil Rights when I asked for the opportunity to do an immigration case for them.

I was honored that Senator Kennedy, Senator Kassebaum, and Senator Lugar all sent in letters to the INS supporting the application, and I was proud of my country, that it provided shelter to this heroic individual, and very, very grateful for the opportunity to have assisted in that process, because they did grant him asylum, they did grant him permanent residency, and it was a privilege to do it.

Senator CORNYN. We have been joined by three other members of the committee, as I told you we would, since the Senate's schedule is pretty hectic this time of year.

Let me now turn the floor over to our distinguished Ranking Member, Senator Leahy, for any comments or questions he would care to make.

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

Senator LEAHY. Thank you, Mr. Chairman. Knowing that my other colleagues are here, why do I not just put my statement in the record.

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

Senator LEAHY. Mr. Keisler, I wanted to be here especially for your hearing today. One of the reasons, is the Federal law enforcement officers. I began my career in law enforcement. I keep close ties with them.

They have written to me to express concerns about your nomination based on your involvement in the case of *Adams* v. *United States* in the Court of Federal Claims. For others who do not know what that is, that was a case brought by thousands of Federal law enforcement officers seeking substantial back pay. It has been stuck in the court since at least 1990.

Over the years, the government settled with some groups; others remain in limbo. The plaintiff's attorneys attempted to reach a settlement for additional class of Federal officers following a December of 2004 court ruling. Those officers were entitled to back pay.

According to plaintiff's attorneys, after months of negotiations they reached a tentative agreement with the career attorney handling that case. The proposed settlement was approved by five Federal law enforcement agencies.

In July, you wrote a letter to Representative Clay Shaw, responding to inquiry about the settlement. You set out some arguments against it. Just days later, the DOJ rejected the settlement.

Your staff also, twice, refused to meet with plaintiff's attorneys in the case just before DOJ rejected the proposed settlement. You are still overseeing the component of the Department of Justice handling this case.

So, you have several thousand senior Federal law enforcement officers who see no end in sight to their case. Why did you reject this after it was apparently accepted by the career attorneys handling the case, and the five law enforcement agencies?

Mr. KEISLER. Senator Leahy, thank you for giving me the opportunity to address that letter. I saw there was a letter sent to the Attorney General by this organization Friday morning.

I was very surprised to see it, because it said that I had personally rejected a settlement that I had never passed upon. It said that I had refused to meet with them, when I had never received a request to meet with them, and certainly never declined to meet with them.

When I saw that letter, I asked the Deputy Assistant Attorney General who oversees the Commercial Branch of the Civil Division, which is where that case is being handled, what the story was.

He told me that this particular group had made a proposal for a $300 million settlement, that the trial attorney had recommended it, but that the trial attorney's career supervisor, and this deputy,

who was also a career attorney, had rejected it. I think they had told the plaintiffs that a meeting with them would not be productive.

Senator LEAHY. Were you involved in any way with the decision not to accept it?

Mr. KEISLER. Only in the sense that, at one point, my deputy told me that there was a settlement, he thought it was too high, and he was going to reject it. I did not go further than that because it is always open to plaintiffs in a position like this—

Senator LEAHY. It was not more than just a casual conversation like that?

Mr. KEISLER. That is right. Senator, they were absolutely free—and they still are—to request a meeting with me to review the full matter, fresh. I have never turned anyone down for a meeting like that.

In fact, a few weeks ago I was speaking to a group of summer associates at a law firm. They asked me, what is the difference between the government practice and private practice?

I said, one difference is, you meet with anybody who wants to meet with you, because you are part of the government and they have a right to talk to their government, whether they are the opposing counsel or they are on your side in a particular case. So, absolutely, I would meet with them. I would be happy to hear their—

Senator LEAHY. I will followup with them. My time is going to run out.

But in *Hamdan*, the court held the administration system for prosecuting detainees at Guantanamo Bay is illegal, and ruled that Common Article 3 at Geneva is a law, and on. Do you accept, now, the Supreme Court position in *Hamdan* is right?

Mr. KEISLER. Yes, Senator.

Senator LEAHY. And that the administration's position which you argued was wrong?

Mr. KEISLER. I argued that in the Court of Appeals. That is correct, Senator Leahy. I do think that the Supreme Court has now established—

Senator LEAHY. Is that unusual for an Assistant Attorney General for the Civil Division to be arguing the *Hamdan* case in the DC Circuit?

Mr. KEISLER. No. I have argued several cases personally in the Court of Appeals, and one case in the District Court.

Senator LEAHY. No. But of this nature. You are the Assistant Attorney General for the Civil Division. Did it seem at all unusual for you to be handling this one?

Mr. KEISLER. You mean, because it is the Civil Division as opposed to some other?

Senator LEAHY. Yes.

Mr. KEISLER. *Hamdan* had no obvious home within the different litigating divisions. It was a habeas action. It was civil in nature, but it was not really like any of the other cases that any of the divisions normally handle.

I think it was a constitutional and statutory challenge to a President's program in a civil proceeding, so I think people thought it was most natural that the appeal would be handled within the Civil Division.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman. My time is up. I will have a series of further questions that I will submit for the record.

Senator SCHUMER. Mr. Chairman? I have an opening statement that I would like to read and forego questions. I would ask Senator Kennedy if I might go now, because I have to be on the floor at the same time. Thank you.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. I want to thank you, Mr. Chairman, Senator Leahy, and particularly Senator Kennedy for, as always, his graciousness.

I certainly want to welcome the nominee here today. Ordinarily, I would begin by thanking the Chairman for holding this hearing.

But with respect to this nomination, I believe the hearing is premature. Mr. Keisler is, by all accounts, a smart, accomplished lawyer. He has impeccable academic and professional credentials. But I must say, we may be putting the cart before the horse.

It appears we are trying to break the land speed record for confirming a nominee to the second-highest court in the land for a seat that may not even need filling, when there are other identified judicial emergencies that deserve our more immediate attention.

To that effect, all eight Democrats sent a letter to Chairman Specter last Thursday, urging that we first address some critical threshold issues before holding a hearing on the Keisler nomination. First things first, in other words. To my knowledge, that letter has not received a response.

So let me reiterate some of the concerns we expressed about proceeding so hastily on this nomination. First, we have barely had time to consider the nominee's record. Mr. Keisler was named to this seat 33 days ago. So, we are having this hearing with astonishing and inexplicable speed. The average time from nomination to hearing for the last seven nominees to that court is several times that long.

Second—and this is the point I think most important—we have been hearing from our friends across the aisle in strident and emphatic tones, we simply do not need to fill the seat to which Mr. Keisler has been nominated, the eleventh seat on the DC Circuit. We have been told repeatedly that to fill this seat would be a waste of taxpayer money and a shameful triumph for big government. Why, then, are we speeding toward confirmation here?

Here are just some of the statements made by those who, in the past when there was a different President, same circumstances, decried the need to fill the eleventh seat.

Senator Sessions: "The eleventh judgeship, more than any other judgeship in America, is not needed." Senator Grassley: "I can confidently conclude that the DC Circuit does not need 12, or even 11, judges."

Senator Kyl: "If another vacancy occurs, thereby opening the eleventh seat again, I plan to vote against filling this seat, and of course the twelfth seat, unless there is a significant increase in the caseload or some other extraordinary circumstance."

More recently at a hearing on the DC Circuit, Senator Sessions, citing the Chief Judge of the DC Circuit, reaffirmed his view. "I thought 10 was too many," he said. "I will oppose going above 10, unless the caseload is up." That was in 2002.

In making their case, Senators expressed alarm at the thought of spending an estimated $1 million a year in taxpayer funds to finance an unneeded judgeship. Indeed, my friend from Alabama suggested that filling the eleventh seat would be "an unjust burden on the taxpayers of America." At that time in 1997, Senators Lott, Ashcroft, Thurmond, Hatch, and Faircloth made similar declarations.

Since these emphatic objections were raised in 1997, the caseload for the DC Circuit is down even further. The caseload has not gone up, it has gone down. Here are some statistics on that from the Administrative Office of the U.S. Courts.

As measured by written decisions per active judge, the workload has declined by 17 percent since 1997. As measured by number of appeals resolved on the merits per active judge, it has declined by 21 percent.

As measured by total number of appeals filed, it has declined by 10 percent. As measured by the total number of appeals resolved, the caseload has declined by a whopping 37 percent.

So, Mr. Chairman, given the strident statements from some of my colleagues and the undeniable data from the administrative office, I am surprised we are rushing so fast here.

I am especially surprised we are pushing forward, given that Mr. Keisler is now leap-frogging ahead of several nominees for seats that the nonpartisan Judicial Conference has identified as "bona fide judicial emergencies."

Indeed, every other Circuit nominee awaiting a hearing in committee, save one, has been selected for a vacancy that has been deemed a judicial emergency. Should they not come first?

Furthermore, just one other point here, which, again, causes some doubt. Again, we have not had a chance to review Mr. Keisler's judicial philosophy, but at least Bob Novak reported that Mr. Keisler's nomination became possible because conservatives blocked the more moderate lawyer, Debra Livingston from New York, my State, from becoming the nominee for this seat.

So I will ask unanimous consent that the rest of my statement be read into the record.

Here are the questions that just loom out there: 1) why are we proceeding so fast here? 2) is there a genuine need to fill this seat? 3) has the workload of the DC Circuit not gone down? 4) should taxpayers be burdened with the cost of filling that seat? 5) does it not make sense, given the passion with which arguments were made only a few years ago, to examine these issues before we proceed?

I ask unanimous consent that my entire statement be read in the record.

Again, I thank you and Senator Kennedy.

Senator CORNYN. Without objection, it will be made part of the record.

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

Senator CORNYN. Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Well, welcome, Mr. Keisler. There are obviously issues on process and procedure. That is not your particular issue here. You have been nominated by the President and deserve congratulations on that. I am concerned about just the general kind of timeframe as a matter of issue.

In preparation, I have had a number of people that have worked with you that I have high regard for that have represented about your basic fairness and good common sense and judgment. But it has been a very fast-moving process.

I think the points that Senator Schumer has made are issues which I am familiar with. We have Ellen Kagan, and the nominee never even got a hearing at the time. Now she is the Dean of the Harvard Law School, and a distinguished one, and doing very well there.

So there is a past history, which you have not been a part of, and there is no reason that you ought to be part of that. But that is the background of where we are considering this nomination, and that is the context, which I am sure you are very much aware of.

I was interested in a number of different areas that you have been involved in, going back to when you were counsel during that period of time. There were at least some suggestions that you were involved in issues during that period of time involving arms sales, Contra aid, as well as signing statements.

Can you tell us what you did in the Reagan White House, and have materials been made available to us in this Committee that have dealt with that period of time?

Mr. KEISLER. Thank you, Senator Kennedy. In terms of what I was involved with, with respect to Iran Contra, I only became aware of the Iran Contra issues when there was that press conference in September 1986, when it was first announced that it had been discovered that there was the relationship with the Iran, the Contras, and arms. I had never heard anything about it before then.

Once that was announced, the entire White House Counsel's Office became involved in responding to the Congressional inquiries and dealing with the independent counsel, so I was involved as a lawyer with those events, but not in the formulation of any policies or any legal analysis of the policies when they were being considered, but just as part of the general work in the office once the thing became a scandal.

With respect to signing statements, it was generally one of the things that was shared among all the lawyers in the office, that whenever the President signed a bill and a signing statement accompanied it, it would be assigned to one of us to review, and we did. But I had no special responsibility for signing statements beyond that.

Senator KENNEDY. Have you expressed the view about signing statements, about whether you support, or do you agree with Judge Aleto? For example, OLC's interpretation of the signing statements.

Mr. KEISLER. I have not expressed a view or had an occasion in the Justice Department to work on that issue. I will say this, just based on what I have read in the newspapers about the issue.

I know that, at least at some point—and I do not know whether this was something that Justice Aleto was saying or was just part of the discussion at the time—there was a suggestion that signing statements by he President could be used as some sort of counter legislative history or supplement to legislative history, that courts would look to it the way they look to legislative history to guide their interpretation of a statute. I do not think that is right. Courts do look to legislative history. They do not, to my knowledge, look to signing statements.

I think the statement that the President makes in the signing statement is entitled to no more or less consideration by a court than a statement the President makes in a brief. It is an argument to be considered, but I do not see it as part of the process that is binding in a strong or a weak way on a court in interpreting the statute.

Senator KENNEDY. Just quickly, because there is one area I want to come to and I am running out of time. With regards to any of the arms sales, were you, while you were in the White House, involved in any negotiations or any advice with regards to arms sales?

Mr. KEISLER. No. As I said, the only involvement that I recollect—and it was a long time ago, so maybe I was asked. I do not want to rule out the possibility that there was some memo somewhere that I do not remember, because it was 20 years ago. But the only recollection I have of being involved with Iran Contra was in the post-revelation defense of what had happened.

Senator KENNEDY. Let me, if I can—my time is running out here—you were, as I understand it, the political appointee directly responsible for the government's tobacco lawsuit. In that litigation, the career attorneys recommended damage requests of $130 billion, but political appointees cut that to $10 billion.

We found afterwards that the lead career attorney for the government resigned shortly after the episode. So did you support the reduction of damages, and can you describe your dealings with the career attorneys in this case?

Mr. KEISLER. Certainly, Senator. I agreed with the decision by the Associate Attorney General as to what the damage remedies we should seek, and that involved a reduction from a number that had previously been put forward.

Let me say at the outset that I do not think there is any more important part of my job as head of the Civil Division than maintaining the professionalism of the Department's work. That is what I sought to do throughout, and that is what I sought to do here.

The Associate Attorney General's decision was based on the recommendations by the career prosecutors in the Criminal Division who supervised RICOH litigation, and the tobacco case is a case under the RICOH statute.

He accepted their recommendation. He declined to adopt a contrary recommendation by the director of the tobacco team. But it was not a question of career versus political. There were competing recommendations from two different sets of career attorneys.

I did agree that his decision was correct, and I was very distressed after it was made to see allegations in the newspaper that maybe this decision was in some way politically motivated. So I was very grateful that the Office of Professional Responsibility conducted a full investigation of those charges.

Of course, the do not report to me, they do not report to the associate. They are an independent group of career investigators who do nothing but investigate allegations of possible misconduct at the Department. They found, unequivocally, there was no impropriety, no political influence.

What the Associate Attorney General was doing, and what I was agreeing with, was a decision to seek a remedy that would be the strongest possible remedy that could be sustained on appeal.

Senator KENNEDY. Thank you. My time is up. I have some additional questions. I thank the Chair.

Senator CORNYN. Senator Kennedy, we would be glad to give you time to ask those now if you wish, or you can reserve them, at your pleasure.

Senator KENNEDY. Well, just some. Mr. Keisler, you stated August 1, 1987—this goes back to Judge Bork, and it goes back a long way—that you thought Bork was in the mainstream.

I would be interested, specifically, if you think it was in the mainstream to contend that the Constitution did not contain a right to privacy. Do you accept now the fact that the Constitution does protect privacy?

Mr. KEISLER. Oh, yes, Senator. I do. When I said that Judge Bork was in the mainstream, that was not to indicate that I would adopt every single one of his positions, or that of anyone else who might be in the mainstream.

Senator KENNEDY. Well, maybe you could just elaborate. You do recognize, then, the right to privacy that is in the Constitution. Do you accept that concept?

Mr. KEISLER. I do, Senator.

Senator KENNEDY. I guess you do not want to expand.

Mr. KEISLER. I would be happy to expand, Senator.

Senator KENNEDY. Yes.

Mr. KEISLER. I did not mean to be abrupt. I think it has been settled for decades, that the protection of liberty in the Due Process Clause of the Fourteenth Amendment includes the protection of personal privacy, in addition to the many other parts of the Constitution that protect other aspects of privacy.

When the Fourteenth Amendment talks about liberty, it is not simply saying a freedom from restraint, and it is not simply saying that you have to give people due process in terms of procedural protections.

It is saying, as the Supreme Court has repeatedly held, that there are aspects of personal privacy that are fundamental and that are constitutionally protected, and that goes back even before Griswold to the Myron Pierce cases at the beginning of the 20th century. So, I think that is an absolutely settled and established part of our law.

Senator KENNEDY. Could we talk about the executive power? Specifically, do you accept the framework described by Justice

Jackson in the Steel Seizure cases? Then do you believe that *Hamdan* was correctly decided?

Mr. KEISLER. I think the Supreme Court has decided what the law is in that area. I think what *Hamdan* underscores, my view of executive power is that there are very few absolutes that make sense in the area of separation of powers.

There are very few powers that are exclusive to one branch or another. I mean, only the President can pardon, only the Senate can confirm nominees. But most powers are shared. That is absolutely the case with respect to matters of national security and military affairs.

What *Hamdan* underscored in saying that the President had exceeded the powers granted him by Congress in the Uniform Code of Military Justice when he established military commissions in the way that they were established, is that this is an area where Congress has both specific and general powers to legislate, powers to make rules for capture, to make regulations for the Army and Navy, to define and punish offenses against the laws of nations. Those are all parts of the Constitution and Article 1, and they have the powers to make all laws necessary and proper for executing those powers.

That is why the administration and Congress, as I understand it, are now under way in a process of trying to determine what rules Congress will write for military commissions. So, I think that is certainly an area of shared power, not an area of exclusive power to any branch, and certainly not the President.

Senator KENNEDY. Very good.

Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Senator Kennedy.

Senator Hatch?

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

Senator HATCH. Thank you, Mr. Chairman.

Welcome to the committee. We are happy to have you here, Mr. Keisler. I have known you for a long, long time. I know what a brilliant young lawyer you are, and what a straight shooter you are. Those are important aspects, to me.

I just wanted to ask a few questions. First of all, Mr. Chairman, I will put into the record the letter dated August 1, 2006 by Chuck Canterbury, who is National President of the Grand Lodge of the Fraternal Order of Police.

Senator CORNYN. Without objection.

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

Senator HATCH. He says in that letter to the Chairman and Senator Leahy: "I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Peter Keisler to serve on the U.S. Court of Appeals for the DC Circuit.

Peter has served for the past 4 years as Assistant Attorney General for the Civil Division of the Department of Justice. In this capacity, Peter handled many cases that were of great concern to the law enforcement community. His service has been marked by a

strong desire to advance the interests and protect the rights of law enforcement officers," et cetera. I will put the whole letter in.

Let me just read one last sentence: "On behalf of the more than 324,000 members of the Fraternal Order of Police, I have every confidence that Peter Keisler's experience, will, temperament, and leadership will prove him to be an extraordinary judge on the U.S. Court of Appeals." I think that is a pretty high accolade for you in that particular area.

But in addition to objective qualifications, the kind that might be listed on a resume, one of the most important criteria for evaluating a judicial nominee, is the kind of judge that nominee is likely to be, or you would likely be.

There are some who would agree with that statement, but the only thing that some are interested in is how a nominee would rule on certain issues, or which side would win in certain kinds of cases.

Now, I do not think anybody with brains would say that is the right standard. That is the wrong standard. Politics may be the results, but judging is about the process of arriving at results.

Now, in your Judiciary Committee questionnaire, you addressed some questions about the role of judges in our system of government. I would like you to expand on one aspect of your answer.

In your words, you said that for a Circuit Judge "there are substantial constraints imposed by both higher and lower courts." Now, please elaborate on that, because it goes to the heart of what we might call your judicial philosophy.

Mr. KEISLER. Thank you very much, Senator. I think there are two very different, but equally important, sets of constraints that operate on a Circuit Judge, one from the Supreme Court and one from District Courts. The constraints from the Supreme Court are, of course, that the Supreme Court establishes what the law is when it issues decisions.

Those are binding precedents. The judge is no more free to depart from them than he or she is to depart from statutes or constitutional provisions themselves. The system could not possibly function if Circuit Judges were lone rangers that went off on their own rather than following binding precedent.

And not only binding precedent, but I do think that every judge writing a decision writes on a mosaic, a mosaic which includes all the decisions which came before, both binding and controlling decisions, and other decisions that may not be binding because they may be from another court, but which need to be taken into account because they are the result of careful consideration by intelligent men and women who focused on the kinds of problems the judge is focusing on. So I think all of those are very important constraints.

But I also think a Circuit Judge faces constraints from the other direction as well, which is, District Judges are managing their cases. They are entitled to a substantial amount of discretion in case management, in factual finding, in other areas.

A Circuit Judge can exceed his or her role not simply by disregarding finding Supreme Court precedent, but by overstepping that role with respect to review of District Court decisions as well.

Senator HATCH. Some, in evaluating your nomination, want to use your nomination as an excuse to attack the Bush administra-

tion. Some will raise the *Hamdan* v. *Rumsfeld* case. Critics are quick to point out that the court ruled against the administration regarding procedures for military commissions.

I did not find the case that offensive, personally. But you argued that case before the U.S. Court of Appeals for the DC Circuit. Do I recall that you won the case there with a unanimous ruling from the three-judge panel?

Mr. KEISLER. That is correct, Senator.

Senator HATCH. All right. And is it not true that the three justices on the Supreme Court also agreed with your position?

Mr. KEISLER. Yes, sir.

Senator HATCH. It seems to me that you did an exemplary job in advancing the position of your client, the government, at this point. By my count, a majority of the appellate judges in this case, between the Court of Appeals and the Supreme Court, agreed with you.

But I hardly think that justifies the charge that the position that you advanced was extreme, unusual or out of the mainstream. This was a difficult case. It changed laws that, in my opinion, have been on the books since the time of George Washington, at least in that one respect of military commissions.

I have gone over my time. I had one other question. Let me just ask this one. As you know, I was co-sponsor of the Religious Land Use and Institutionalized Persons Act. This is a Federal statute protecting the right to freely exercise religion.

You were involved in a case challenging this statute, *Westchester Day School* v. *Village of Mamaroneck*. Could you please tell the Committee about that case, your role in it, and why was it important for protecting individual rights?

Mr. KEISLER. Sure. The Religious Land Use and Institutionalized Persons Act protects two categories of religious liberty, the religious liberty of prisoners and other incarcerated persons with respect to how they are treated in an institution, and the religious rights of religious institutions that are engaged in land use and zoning disputes with State and local governments.

It has faced persistent constitutional challenges by State and local governments who claimed that it exceeds Congress' remedial power under Section 5 of the Fourteenth Amendment, that it is a violation of federalism under the Commerce Clause and Tenth Amendment, and in some cases that it violates the Establishment Clause.

It has fallen to the Civil Division, in many cases, to defend the constitutionality of that act. I was honored to have the opportunity to argue the issue before the Second Circuit. In the end, the Second Circuit did not need to reach that issue in the case that I argued, because it resolved the case on other grounds.

But other courts, including the Supreme Court, have upheld that statute against a variety of challenges. So, I am proud to say that we were successful in defending Congress' judgment that religious liberties should be protected in those areas.

Senator HATCH. Well, thank you so much. I have other questions, but I will submit them in writing.

Senator CORNYN. Thank you, Senator Hatch.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

Like my colleagues, I am not pleased that the Committee is holding this hearing today. As we wrote to you last week, Mr. Keisler was nominated only a month ago. The question of whether another judge should be named to the DC Circuit is an issue that needs further study and discussion in this committee.

Many members of our Committee strongly opposed confirming an eleventh Circuit Judge to this important Circuit when the nominations are made by President Clinton. The caseload for this Circuit is, I am told, even smaller now than it was then.

In addition, I understand that there are likely quite a few documents that concern Mr. Keisler at the Reagan Library that have not been made available to the committee. These documents will almost certainly be of assistance to the Committee in evaluating Mr. Keisler's suitability for this important judicial position.

This is the second nomination the Committee has considered this year of an administration official directly to the DC Circuit. I am troubled by this. Administration officials say we cannot judge them by the positions they have taken as government lawyers because they are representing a client. Attorneys in private practice, which is where Mr. Keisler spent about a decade prior to joining the Justice Department, say the same thing.

I think when we are talking about the second-highest court in the land, we should, at the very least, be willing to take another month to gather all of the relevant evidence to help Senators make a decision. Otherwise, all we have to go on are testimonials from nominees' friends and colleagues, of whom Mr. Keisler, and like Judge Cavenaugh before him, has many.

So, Mr. Chairman, I hope we will have the opportunity to bring Mr. Keisler back after we have had a chance to review those documents.

In the time I have left, I will just ask him a few questions.

I understand you have been involved in civil litigation concerning the NSA wire tapping program.

Mr. KEISLER. That is correct, Senator.

Senator FEINGOLD. I assume, then, that you have been read into the program. Is that right?

Mr. KEISLER. That is correct, Senator.

Senator FEINGOLD. When were you read into the program?

Mr. KEISLER. I think it was mid-to late December, 2005.

Senator FEINGOLD. Were you involved in putting together the Department's legal justification for the program after it was disclosed in December of 2005, and prior to the litigation that you are working on now?

Mr. KEISLER. I think at one point someone sent me, and many other people, a draft of the OLC white paper, but I did not, a the time, review it or provide comments.

Senator FEINGOLD. You did not review it?

Mr. KEISLER. I did not. My involvement in the case has been on the litigation side, that when cases were filed, it falls to the Civil Division to defend the position in court.

Senator FEINGOLD. As I mentioned, you are the second high-level administration official who are being asked to confirm to the DC Circuit this year. The administration has undertaken some very controversial actions and policies already, and I expect will end up in court.

I do not think it will help public confidence and decisions that the courts reach if the judges in these cases used to work for the administration. There are, of course, recusal statutes that are intended to deal with this problem.

One part of those statutes, 28 USC Section 455(b) requires judges to recuse themselves in a variety of specific circumstances, including where they participated in, or have direct knowledge of, the case.

But Section 455(a) also requires recusal when the impartiality of the judge might reasonably be questioned. So, that is a judgment call that you would have to make as a judge. I assume you agree that 455(a) is an independent test to be applied even if none of the specific circumstances in 455(b) are applicable.

Mr. KEISLER. I think any occasion in which a judge believes that his or her impartiality could reasonably be questioned, they should not participate in the case.

Senator FEINGOLD. And that is, in fact, not only a general principle, but one that is derived from 455(a). Correct?

Mr. KEISLER. I wold have to go back over the statute to be sure, and I would have to have the subsections in front of me, but I have always understood it to be a requirement.

Senator FEINGOLD. How will you go about analyzing and deciding the question of whether your impartiality can reasonably be questioned?

Mr. KEISLER. I think there are at least some easy cases, Senator. I think, certainly, any case in which I served as litigation counsel, is an easy call. You cannot represent a party in a case, then turn around and sit on the case as a judge.

Certainly, any case in which I have financial interests, or there are family relationships that come within some of the specific prohibitions, those would apply as well.

Obviously, there is a gray area beyond that in which it is a question not of rigid rules, but of perception. It is hard to answer those questions in the hypothetical sense, except to say that I think one should give a wide berth to the need to ensure a high degree of public confidence. That is an area where I would not want to even get close to the line.

Senator FEINGOLD. Would the fact that you were an administration official, and the fact that some of these are particularly controversial decisions, be something that you would consider as a factor in the question of impartiality?

Mr. KEISLER. I would certainly consider everything in that, although I think I would be inclined to focus most specifically on whether there was any actual involvement that I or the Civil Division had had in the matter.

If, for example, the U.S. Attorney's Office is bringing a criminal prosecution and I had nothing to do with it. I would not tend to think that merely by the fact that I had served with members of that office in this capacity, would likely warrant recusal. But there

can be closer questions. As I said, that is not a line I would want to get close to.

Senator FEINGOLD. Well, then would you recuse yourself in any case involving the NSA wire tapping program in any way?

Mr. KEISLER. Yes, Senator. I have engaged in confidential attorney-client discussions on that issue. Even if it was a new case that had not been filed, I think that would be required.

If I might just amend or supplement one answer I gave you earlier. You had asked me whether I had reviewed or commented on the white paper. I think I said I did not review or comment on it. My best recollection is that I did not comment on it, but I may have seen it and read it before it was published.

Senator FEINGOLD. Yes. Because I asked you specifically whether you had reviewed it, and you said no.

Mr. KEISLER. Right. That was why I was going over it in my mind.

Senator FEINGOLD. So now you are changing your answer.

Mr. KEISLER. I do not remember whether I read it before it was published or not.

Senator FEINGOLD. All right.

Mr. KEISLER. But I do not want to foreclose the possibility that I did.

Senator FEINGOLD. Well, I am glad you did because I was assuming that you had not reviewed it. Apparently you are not certain when you reviewed it, but you did review it.

Mr. KEISLER. That is right.

Senator FEINGOLD. All right. I thank you for your answer.

Thank you, Mr. Chairman.

Senator CORNYN. Mr. Keisler, I am advised that yesterday the American Bar Association Committee on Judicial Nominations has given your nomination a designation as unanimously "Well Qualified." Is that your understanding?

Mr. KEISLER. That is what I was told, Senator.

Senator CORNYN. Do you know what they look at when they assess the qualifications of nominees to Federal courts?

Mr. KEISLER. They sent me a booklet in advance of the process, Senator, which said they look at, I think, legal ability, integrity, and temperament.

Senator CORNYN. Senator Hatch referred to a letter dated August 1, 2006 from the Grand Lodge of the Fraternal Order of Police, which is now part of the record.

But I was interested in part of the body of that letter, and particularly a case that it refers to. That is the *United States Exrel Westric* v. *Second Chance Body Armor, Inc., et al*. Then there is apparently maybe a related case—it is hard for me to tell from this letter—involving bullet-proof vests.

Could you explain your involvement in that case or those cases, please?

Mr. KEISLER. Certainly, Senator. Those are cases against two companies, Second Chance Body Armor and Toyobo, which manufactured bullet-proof vests made with Zylon. At some point, those companies became aware, but did not disclose, that Zylon degrades rapidly under certain conditions of temperature and humidity.

Obviously, that is a subject of the gravest possible concern when you are talking about bullet-proof vests. There have been law enforcement individuals who were wearing those vests and who were wounded when bullets passed through and injured them.

We brought a fraud case against the manufacturers, Second Chance and Toyobo, for not being straight with the government when they sold these vests to Federal, State, and local law enforcement.

For me, one thing that case and others like it captures, is people think of these government fraud cases are about money. And many of them are about money, and sometimes a lot of money. That is, itself, of course, very important.

But there are a lot of ways, sometimes, when people cheat the Federal Government, when it turns out to be something a lot more than money. In this case, men and women in law enforcement's lives were placed at risk by the callous conduct of these companies, and we are pursuing the matter in litigation.

Senator CORNYN. Thank you very much for that. Thank you for your presence here today. I can tell you from experience that there will probably be more questions that will be coming in writing.

We appreciate your willingness to serve in this important position, and your family's willingness to support you in that endeavor. So, thank you very much.

Mr. KEISLER. Thank you, Senator. I am very grateful to you.

Senator CORNYN. I would now ask our District Court nominees to come forward and be sworn, please. Raise your right hand, please.

[Whereupon, Judge Baker, Judge Gutierrez, and Mr. Besosa were duly sworn.]

Senator CORNYN. Please have a seat.

Mr. Besosa? Did I pronounce that correctly?

Mr. BESOSA. Yes, Senator.

Senator CORNYN. Again, I am very sensitive to mispronunciation of names, given a name like mine.

But we have had introductions of two of the nominees, and Representative Fortuño has submitted a statement in writing. But let me review the qualifications of the three nominees that we have before us today.

The first, is Francisco Besosa, nominated to be U.S. District Judge for the District of Puerto Rico. Mr. Besosa received an A.B. from Brown University in 1971, and a J.D. from Georgetown University Law Center in 1979.

Before attending law school, Mr. Besosa served as an intelligence officer in the U.S. Army, and was awarded the Meritorious Service Medal. Following law school, Mr. Besosa served as an associate attorney at O'Neill & Borges.

In 1980, Mr. Besosa became a partner at Bobonis, Besosa & Rodriguez Poventud before entering the public sector in 1983 as an Assistant U.S. Attorney for the District of Puerto Rico.

In 1986, he returned to private practice and was associated with several Puerto Rico law firms, until 1994 when he joined his current firm as a partner. The American Bar Association has rated Mr. Besosa unanimously "Well Qualified."

Judge Valerie Baker has been nominated to be District Judge for the Central District of California. Judge Baker received her Bachelor of Arts summa cum laude from the University of California, Santa Barbara in 1971, as well as her Master's degree cum laude from the same institution a year later.

In 1975, she received her J.D. from the UCLA School of Law, and soon thereafter became working as an associate for the firm of Overton, Lymon & Prince in Los Angeles. During her 2 years at Overton, Judge Baker focused on business litigation, representing such clients at Getty Oil Company in antitrust litigation, and automobile manufacturers in breach of warranty actions.

In 1977, Judge Baker joined the U.S. Attorney's Office in Los Angeles, where she served in the Criminal Division. In 1980, Judge Baker joined the law firm of Lillick, McHose & Charles (now Pillsbury, Winthrop, Shaw & Pittman) as an associate, and was admitted into the partnership 2 years later.

In 1986, Judge Baker was appointed to serve on the Los Angeles Municipal Court, where she presided over civil matters and criminal misdemeanors. In 1987, she was elevated to the Los Angeles County Superior Court, where she currently serves.

The American Bar Association has rated Judge Baker unanimously "Well Qualified."

Our third nominee to the District bench is Judge Philip Gutierrez, nominated to be District Judge for the Central District of California as well. Judge Gutierrez received his B.A. from the University of Notre Dame in 1981, and a J.D. from the UCLA School of Law in 1984.

He began his legal career as an associate at the Los Angeles firm of Wolf, Pocrass & Reyes, where he worked until 1986, when he joined Kern & Wooley. At both firms, Judge Gutierrez worked on civil tort liability litigation.

In 1988, Judge Gutierrez joined the firm of Cotkin & Collins in Santa Ana as managing partner. At Cotkin, he focused his practice on business litigation, with an emphasis on professional liability and insurance coverage.

In 1997, Judge Gutierrez was appointed to serve on the Whittier Municipal Court, where he presided over misdemeanors, felony arraignments, and civil matters.

In the year 2000, he was elevated to the Los Angeles County Superior Court, where he currently sits in the Pomona division, and presides over felony trials, preliminary hearings, probation violations, and pre-trial motions.

The American Bar Association has rated Judge Gutierrez unanimously "Well Qualified."

Welcome to each one of you.

We are honored to have the Chairman of the Judiciary Committee join us. I would be happy to recognize him or turn the gavel over to him, as the case may be, whatever he wishes at this time.

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

Chairman SPECTER. Thank you very much, Mr. Chairman. That should answer the question about the gavel.

Senator CORNYN. I like the sound of that. Thank you.

Chairman SPECTER. Well, in due course. I sat here for many years with Chairman Thurmond with the gavel, and it was a great learning experience to just sit and listen.

Mentioning Senator Thurmond, I might tell you one short story which has, I think, an important moral. I had been here a very short period of time when two nominees came up from Pennsylvania for the Federal Court, Judge Mansman in the Western District, Judge Caldwell in the Central District.

When Senator Thurmond started the proceedings, he said, "If you are confurhmed, do you promise to be cuhrteous?" Which is translated, "If you are confirmed, do you promise to be courteous?"

I thought to myself, what a question. What are they going to say, but yes? Both of them said yes. Then Senator Thurmond said, "Because the more pohwer a puhson has, the more cuhrteous he should be," translated, the more power a person has, the more courteous he or she should be. That is a very important thing for a judge to realize, especially a Federal judge with life tenure.

Once you put on those black robes, if and when confirmed, there is enormous power. Sometimes there is an inclination on a bad day, or lawyers who are not well prepared, witnesses who are not responsive, a lot of reasons to get mad at people and exert your power. Nominees have heard that.

When I appear and preside, I frequently will tell that story. Years after the nomination proceedings, nominees have said, "That story you told about Senator Thurmond, I have really remembered that and I have tried to follow it." So, thank you very much, Mr. Chairman.

Senator CORNYN. Thank you, Chairman Specter.

Let me proceed, now, with some questions. Well, first of all, before I start, it is likely that you have brought some family members or people close to you here today, and I want to give each one of you a chance to introduce those, if you would like, so they can sort of bask in your reflected glory as a result of this nomination.

Judge Baker, do you have any family or friends you would like to introduce to the committee?

STATEMENT OF VALERIE L. BAKER, NOMINEE TO BE JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge BAKER. Yes. First, I would like to thank the Committee and thank Senators Boxer and Feinstein for introducing me, and, of course, thank the President for his nomination. It is an honor and privilege to appear before you today.

I am here with my husband, Robert Fairbank, and his brother, Richard Fairbank, his wife, Chris Fairbank, and her son, Brian Fairbank, who is now in college at University of Virginia, and their daughter, Ashley-Ann Fairbank, who will be in the sixth grade next year.

[The biographical information of Judge Baker follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

My full name is Valerie Lynn Baker.

(Socially, I am sometimes referred to by my married name, Valerie Fairbank or Mrs. Robert H. Fairbank.)

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

Residence: Santa Monica, CA.

Office address: Superior Court for the County of Los Angeles, 1725 Main Street, Department L, Santa Monica, CA 90401.

3. Date and place of birth.

June 25, 1949; Minneapolis, Minnesota

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

I am married to Robert Harold Fairbank who is an attorney. He is the co-founding partner of the law firm, Fairbank & Vincent located at 11755 Wilshire Boulevard, Suite 2320, Los Angeles, CA 90025.

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

University of California , Santa Barbara; 9/67-6/71; B.A. English, with highest honors; Degree granted 6/71

University of California, Berkeley, winter 1969; I attended UC Berkeley for only one quarter and did not receive a degree.

University of East Anglia (as an exchange student); Norfolk, England; 9/70-6/71; I did not receive a degree through the exchange program.

University of California, Santa Barbara; 9/71-6/72; M.A. English, with honors; Degree granted 6/72

University of California, Los Angeles; 9/72-6/75; Juris Doctor; Degree granted 6/75

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

Employment

1987 – Present, Los Angeles Superior Court; Judge

1986 – 1987, Municipal Court, Los Angeles; Judge

1980 – 1986; Lillick, McHose & Charles (now Pillsbury, Winthrop, Shaw & Pittman); Associate (1980-1982), Partner (1982-1986)

1977-1980; United States Attorneys Office; Assistant United States Attorney

1975 – 1977; Overton, Lyman & Prince; Associate

Summer 1974; Luce, Forward, Hamilton & Scripps; Summer clerk

Summer 1972 and 1973; Hendy International Company; Secretary

Other organizations

The Braille Institute (for the blind), Board of Directors, 2001-2003

University of California, Los Angeles, School of Law Alumni Association, Board of Directors, 1997-1999; Chair, Recruitment Committee

My Friends Place (a shelter for homeless teenagers), Board of Directors, 1993-1995

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No. I have not had any military service.

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

1994: Alfred J. McCourtney Trial Judge of the Year Award, Consumer Lawyers of Los Angeles.

1986-1987: the Constitutional Rights Foundation ("CRF") Commendation for Outstanding Participation in the "Judge in the Camp" Program (wherein judges visited juvenile detention centers).

1983: Election to Partnership, Lillick, McHose & Charles (now Pillsbury, Winthrop,

Shaw & Pittman).

1974-1975: University of California, Los Angeles, School of Law, Law Review, Book Review Editor (1975).

1974: University of California, Los Angeles, School of Law, Moot Court Honors Program.

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

I have been an active member of several professional associations and committees, including the following:

Complex Litigation Task Force Committee of the Judicial Council, State of California, 1997-1999. As a member of this Committee, I participated in establishing California's Complex Litigation Courts and the Rules governing Complex Litigation. (Rules, 1800 et. seq of the California Rules of Court)

Los Angeles County Bar Association (LACBA) since 1975

- Board member and Program Committee member, Litigation Section, 1999-2002
- Municipal Courts Committee, LACBA, 1986
- Law and Justice Committee, LACBA, 1986-1987
- Anti-Trust Executive Committee, LACBA, 1985-1987
- International Law Section Executive Committee, LACBA, 1983-1984

Century City Bar Association, Board of Directors, 1993-1995

Association of Business Trial Lawyers, Board of Directors, 1987-1990; 2001-2004

Lawyer Delegate, Ninth Circuit Judicial Conference, 1985 (I resigned after appointment to the Superior Court in 1986.)

California Judges Association, member, 1986-present

I was previously a member of the following professional associations:

American Judicature Society

National Association of Women Judges

Federal Bar Association

American Bar Association

- Litigation Section
- Criminal Justice Section
- Judicial Administration Section
- Legal Malpractice Section

California Women Lawyers

Women Lawyers of Los Angeles

10. <u>Other Memberships</u>: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The only organization to which I belong that is active in lobbying before a public body is the California Judges Association.

In addition to the organizations previously listed in this questionnaire, I am a member of MountainGate Country Club in Los Angeles, CA and the YMCA in Santa Monica, CA.

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

During my years as an attorney from 1975 through 1986, I was admitted to practice in the following courts:

State of California (admitted in 1975)
United States District Court for the Central District of California (admitted in 1976)
United States Court of Appeals for the Ninth Circuit (admitted in 1978).

My status with the State Bar has been inactive since my appointment in 1986 to the state bench.

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

Professional articles that I have authored:

Winter 2001	"Noteworthy Changes for Practitioners in State Court," Los Angeles County Bar Association, Litigation Section Newsletter
Fall 1997	"Making Fast Track Rules Work for You" and "A Look at New Procedures in State Courts," Los Angeles County Bar Association, Litigation Newsletter
Fall 1997	"Recent Legislative Developments and Case Law in Civil Procedure," Los Angeles County Bar Association, Litigation Section Newsletter
May/June 1995	"Professional Malpractice," The Rutter Group (a summary of recent developments in the law pertaining to professionals such as lawyers, accountants, lenders, real estate brokers, architects, engineers and insurance brokers)
October 1993	"Conflicts of Interest for In-House Counsel" for the Peninsula Association of General Counsel, "All Hands Workshop", October 26, 1993
December 1993	"Fundamental Trial Tips," Century City Lawyer, Vol. III, No. 12
December 1974	University of California, Los Angeles, School of Law, Law Review, Comment, "Bar Restriction on Advertising by Lawyers".

As a Superior Court Judge, I have also been a panelist, speaking at educational programs for lawyers and judges, including the following:

April 2006	Closing Arguments, American Bar Association, Litigation Section Annual Conference
2005	Seminar on Complex Litigation, Association of Business Trial Lawyers and Los Angeles County Bar Association
2003	Preparing for Trial, The Rutter Group

March 2003	Special Issues With Special Verdicts, Association of Business Trial Lawyers
September 2002	Preliminary Injunctions, Association of Business Trial Lawyers
February 2002	Know Your Jury Pool in Your Courthouse, Association of Business Trial Lawyers
December 2001	Fundamentals of Pre-Judgment Remedies, Los Angeles County Bar Association
January 2001	Malicious Prosecution, Association of Business Trial Lawyers
1997	Preparing for Trial, The Rutter Group
April 1996	Developments in Legal Malpractice Litigation, Malpractice Section of the American Bar Association
Nov./Dec. 1995	Developments in Insurance Law, Los Angeles County Bar Association
September 1995	Civil Procedure Before Trial, The Rutter Group
September 1995	Basic Training for Litigators, The Rutter Group
May-June 1995	Professional Malpractice (The Rutter Group), seminars in San Diego, Los Angeles, Orange County and San Francisco
January 1995	Professional Malpractice, California Judges Association/The Rutter Group
June 1994	Preparing for Trial, The Rutter Group
April 1994	Jury Selection, Barristers, Los Angeles County Bar Association
January 1994	Developments in Civil Procedure, The Rutter Group
October 1993	Conflicts of Interest for In-House Counsel, Peninsula Association of General Counsel, Fifth Annual All Hands Meeting
January 1993	Civil Procedure Before Trial, Barristers, Los Angeles County Bar Association
December 1992	Civil Procedure Before Trial, The Rutter Group

May 1992	"Current Developments in Prejudgment Remedies", Provisional and Post-Judgment Remedies Section, Los Angeles County Bar Association
March 1992	Civil Procedure Before Trial, Barristers, Los Angeles County Bar Association
January 1992	"Bridging the Gap" Programs, Los Angeles County Bar Association
October 1991	Civil Procedure Before Trial, The Rutter Group
September 1991	Law & Motion, Los Angeles County Bar Association
June 1991	"Bridging the Gap" Programs, Los Angeles County Bar Association
May 1991	Sanctions in State Court, Litigation Section, State Bar of California
April 1991	Law & Discovery, Association of Business Trial Lawyers
February 1991	Law & Motion, Beverly Hills Bar Association
June 1984	CEB Federal Practice Institute

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

My health is excellent. My last physical examination was on January 19, 2006.

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

I was appointed to the Los Angeles Municipal Court by California's Governor George Deukemejian in February 1986. The jurisdiction of the Municipal Court was limited to trials of misdemeanors and civil cases where the amount in controversy is less than $25,000.

In February 1987, Governor Deukemejian appointed me to the Superior Court for the County of Los Angeles. I have been re-elected without opposition in 1988, 1994 and 2000 and remain a Superior Court Judge today. The jurisdiction of the Superior Court is not limited. Superior Court Judges preside over felony cases and civil cases where the amount in controversy exceeds $25,000.

My judicial assignments have included the following: criminal and civil individual calendar courts where I have handled thousands of cases from filing to disposition; a long cause criminal trial department; civil law & motion departments; and a long cause civil trial department. Although I spent most of my judicial career in the central downtown criminal and civil courts, I have also worked in district courts, including Eastlake, Downey, Van Nuys, Beverly Hills and most recently, Santa Monica.

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

15.(1) Citations for the ten most significant opinions you have written:

I authored six opinions while sitting by assignment on the California Court of Appeal, Second Appellate District, Division Three, in 1987:

1. *City of Agoura Hills v. LAFCO*, Case No. B020506 (1998) 198 Cal.App.3d 480.
2. *Marchell Leekins v. American Honda Motor Co., Inc.*, Case No. B015429 (Superior Court no. C318086), unpublished opinion.
3. *Velma De Ponte v. County of Los Angeles, Department of Human Relations*, Case No. B025788 (Superior Court No. C621813), unpublished opinion.
4. *Gary L. Richards v. Interinsurance Exchange of The Automobile Club of Southern California*, Case No. B020506 (Superior Court No. C525400), unpublished opinion.
5. *The People v. Jeffrey A. Littlejohn*, Case No. B019101 (Superior Court No. A091083), unpublished opinion.
6. *The People v. Kevin Joseph*, Case No. B015702 (Superior Court No. A762563), unpublished opinion.

As a trial judge for the state court, I do not write published opinions.

15.(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings:

I do not believe that any of my judgments have been affirmed with significant criticism.

The following section cites and summarizes the opinions reversing my decisions:

1. Federal Deposit Insurance Corporation v. Charlton (August 9, 1993) 17 Cal.App.4th 1066.

The Court of Appeal reversed the grant of summary judgment in favor of purchasers and remanded with directions to permit the receiver appointed by the bank to foreclose its judgment lien. The appellate court found that an order expunging the lis pendens did not affect the previously recorded abstracts of judgment which remained of record at the time the purchasers acquired the property.

2. Commercial Underwriters Insurance Co. v. Superior Court (October 16, 2000) B139105, 84 Cal.App.4th 181.

The appellate court issued a writ vacating my order granting summary judgment, citing jurisdictional grounds.

3. Aylsworth v. Palmer (November 14, 2001) B143720, 2001 Cal.App. Unpublished LEXIS 1638

The appellate court reversed my order granting summary judgment in favor of the property owner defendant in a negligence action.

4. Village Trailer Park, Inc. v. Willis (January 14, 2002) B145493, 2002 Cal.App. Unpublished LEXIS 4925

The appellate court reversed the portion of my order which denied a petition to compel arbitration of tenants' claims until the rent issues were first addressed by the rent control board.

5. Jenny v. Hughes Aircraft Company and Barron v. Menzies, (June 13, 2002) Cal.App. Unpublished LEXIS 5302

The appellate court reversed this court's injunction which ordered that a drainage system be built.

6. Bedrosian v. National Medical Enterprises (August 12, 2002) B146573, 2002 Cal.App. Unpublished LEXIS 7580; and (August 28, 2003) B166742, 2003 Cal.App. Unpublished LEXIS 10110.

In these opinions, the appellate court reversed this court's orders and judgments regarding the determination of benefits due a co-founding officer under terms of his written contract.

7. Del, Shaw, Blye & Moonves (August 22, 2003) 2003 Cal.App. Unpublished LEXIS 8070

The appellate court reversed this court's order confirming an arbitration award.

8. Daley v. Azafrani (October 8, 2003) B156018 2003 Cal.App. Unpublished LEXIS 9595

The appellate court modified this court's order taxing costs after judgment.

9. Johnson v. Nadir (December 30, 2003) B163805

The appellate court affirmed the court's order denying an anti-SLAPP motion but reversed the portion of the order awarding costs.

10. Barton Properties, Inc. v. King Purtich Holmes Paterno & Berliner (January 27, 2004) B157149

The appellate court reversed an order of summary adjudication on causes of action alleging legal malpractice and breach of fiduciary duties.

11. Norris & Galanter v. Gray Gieleghem Belcher (February 19, 2004) B160503

The appellate court affirmed this court's order dismissing claims for legal malpractice, breach of fiduciary duty and fraud on grounds that they were barred by the statute of limitations and the claim for abuse of process on the ground of litigation privilege. The court's order dismissing the declaratory relief cause of action, however, was reversed on the ground that the court should have granted the Plaintiff leave to amend their pleading.

12. Qingdao Aucma Group v. Superior Court (March 29, 2004) B170150, 2004 Cal.App Unpublished LEXIS 2790

A peremptory writ of mandate issued directing the trial court to vacate its order and enter a new order granting the Plaintiff's motion to quash service of summons due to lack of personal jurisdiction.

13. Socorro Sanchez v. H.H. Saud Bin Khaled Abdullah Al-Saud (September 13, 2001) B141635

This was a wrongful death action where an employee's child drowned in a swimming pool located on property leased by defendant Al-Ansary for the benefit of his employers, the Al-Sauds. The appellate court affirmed the trial court's order granting the defendant Al-Ansary's motion for summary adjudication on the ground that the defendant did not owe any duty to the plaintiff for which he could be personally liable. The trial court's order granting the defendant Al-Saud's motion for summary adjudication was reversed on the ground that there was a triable issue of fact as to the defendant's vicarious liability.

14. Jonathan A. Stein v. Ken Strong (August 2, 2001) B138525

The appellate court found that the trial court properly dismissed the action when the attorney plaintiff who was representing himself failed to appear during the trial. The appellate court reversed the trial court's order denying plaintiff's motion for relief from the dismissal pursuant to

California Code of Civil Procedure Section 473.

15. Harriet Pessis v. City of Beverly Hills (November 30, 2000) B135080

The trial court's order granting summary judgment in favor of the City on the plaintiff's complaint for negligence and premises liability was reversed on the ground that a triable issue of material fact existed as to whether the defect in the sidewalk on which the Plaintiff tripped was trivial.

16. Barry Beitler v. The Superior Court (Westwood Village Development Company, et al., Real Parties in Interest) (November 2, 2000) B140203

A writ of mandate was issued directing the trial court to set aside its order that valuation of a good faith settlement was without prejudice to later review by the trial court. The court of appeal held that valuation of a settlement and the amount of offset could not be deferred until the time of trial. A conclusive valuation must be made at the time of the good faith determination under California Code of Civil Procedure Section 877.6.

17. Helen Scher v. Regents of the University of California (June 7, 2000) B130013

In a medical malpractice action, the appellate court reversed the trial court's order granting summary judgment in favor of the health care provider defendants on statute of limitations grounds.

18. Tom Eilken v. Bruce Hill (March 29, 2000) B126697

In this legal malpractice action, the appellate court reversed the trial court's order granting summary judgment in favor of the defendant attorney. The appellate court found that the defendant had not met his burden of showing that there were no material factual disputes.

19. Bonnie Gallardo v. Ameriquest Mortgage Company (February 28, 2000) B126657

In this case, the plaintiff borrower brought an action against a lender and her attorney. The trial court sustained the defendants' demurrers to the plaintiff's Second Amended Complaint, without leave to amend and entered an order of dismissal. The appellate court reversed the trial court's order, finding that the claims for breach of contract, fraud and professional negligence were adequately pled.

20. Baston Capital Fund v. CIBC Wood Gundy Securities Corp. (Sept. 24, 1999) B124763

In this action involving the sale of securities, the appellate court reversed the trial court's dismissal of a cause of action for breach of oral contract and affirmed the dismissal of a cause of action for negligent misrepresentation. The appellate court disagreed with the lower court's findings that the breach of oral contract cause of action was defective because it was (1) barred by the statute of frauds and (2) because material terms of the oral agreement were not pled. The appellate court agreed with the lower court's findings that the misrepresentation cause of action

should be dismissed because it was based on a promise of future performance which was not actionable.

21. Shearwood Fleming v. City of Los Angeles (August 30, 1999) B128270

In this action against the City of Los Angeles and its police officer, the appellate court reversed the trial court's order granting summary judgment on the ground that the plaintiff's action was barred by a federal judgment under the doctrine of res judicata.

22. Vernon Zimmerman v. Joseph Mannis, et al. (June 1, 1999) B 111158

In this legal malpractice action, the appellate court held that the trial court erred in granting one of the defendants' four motions in limine. Each motion challenged the legal sufficiency of a discrete theory of professional negligence. While the court of appeal upheld the lower court's finding that three of the theories were untenable, it found that the court erred in granting the defendants' motion in limine objecting to all evidence that they had negligently failed to advise the plaintiff concerning the statute of limitations on claims against third parties in the underlying action.

23. Cecil C. Laqui Medical Clinic, Inc., et al. v. Josephine Segumatay, et al. (April 27, 1999) B122230

The court of appeal found that the trial court erred in its interpretation and enforcement of a settlement agreement under California Code of Civil Procedure Section 664.6.

24.. Theresa O'Brien- Plunkett v. Glendale Adventist Medical Center (March 16, 1999) B115885

In this employment dispute, the trial court granted the employer defendant's motion to compel arbitration pursuant to contract and dismissed the action when the plaintiff failed to comply with court orders compelling arbitration. The court of appeal reversed, finding that California's arbitration law was not preempted by federal law, and that under California law, the provision in the arbitration agreement that the parties arbitrate without counsel was invalid and unenforceable.

25. Jose Raymundo Vallejo v. Angie Codina (January 5, 1999) B113032

In this legal malpractice action, the appellate court held that the trial court erred in failing to set aside the default and default judgment against the defendants.

26. Elsie Rips, Plaintiff & Respondent v. Orrin P. Miller, Karl Hodgson & Janice Hodgson, Defendants & Respondents; Imperial Home Mortgage Co., Inc., Appellant (August 20, 1998) B113200

This was a professional negligence case by borrowers against Imperial Home Mortgage Company that had acted as their loan broker and escrow. After a bench trial, the trial court found in favor of the borrowers and awarded damages against Imperial Home Mortgage. The court also

found the defendant lender to be liable for 15% of the damages. The appellate court affirmed the determinations of liability but reversed the judgment because the damages awarded included an award for emotional distress.

27. Eleanor C. Mayer et al. v. C.W. Driver et al.; Huntington Breakers Managing Partnership, Movant and Appellant (July 24, 1998) B111160

In this lawsuit for defective construction, the appellate court reversed the trial court's order denying an ex parte application for leave to file a complaint-in-intervention on grounds that it was untimely filed on the eve of trial. The appellate court found that intervention was not permissive. Intervention was as a matter of right, a compulsory joinder.

28. Tim Liu v. Preston K. Young (September 11, 1997) B102734

In this dispute regarding a loan agreement, the appellate court reversed the trial court's order granting the defendant's motion for summary judgment on the grounds that the plaintiff's action was time-barred.

29. Rancho Mortgage & Investments Corporation v. Best, Best & Krieger (April 16, 1997) B105794

In this legal malpractice case, the court of appeal reversed the trial court's order sustaining demurrers by two law firm defendants asserting that the suit was barred by the statute of limitations. The appellate court found that the plaintiff had alleged facts sufficient to satisfy the delayed discovery rule.

30. Ruby Rosenthal et al. v. Great Western Financial Securities Corp. et al. (Feb. 25, 1997) B094426

In this action by investors against a financial institution, the court of appeal reversed the trial court's order denying the defendants' petition to compel arbitration as to certain of the plaintiffs.

The trial court's rulings in this case are also the subject of a published decision of the California Supreme Court, Rosenthal v. Great Western Fin. Securities Corp. (Dec. 1996) 14 Cal.4th 394. The California Supreme Court held that the trial court erred in denying the defendants' motions to compel arbitration. The Supreme Court reversed an order by the court of appeal directing the trial court to conduct jury trials on the plaintiffs' claims of fraud in the inception of the agreement.

31. Rosetta Wesner v. Longwood Management Corporation and View Park Convalescent Hospital (March 12, 1997) B100716

In this premises liability case, the appellate court reversed the trial court's order granting defendants' summary judgment motion, holding that the plaintiff's request to continue the hearing to complete discovery should have been granted.

32. People v. Trent Carnes (January 27, 1997) B101078

The appellate court reversed the trial court's granting of a new trial on the ground of juror misconduct. Although jury misconduct was established, the appeals court held that prejudice to the defendant was not established so as to justify a new trial.

33. Lampkin v. Home Budget Loans (October 9, 1996) B096710

The appellate court reversed the trial court's denial of a motion to compel arbitration. The issue presented was whether the Dispute Resolution Agreement between the plaintiff borrower and the defendant lender also covered a dispute arising from defendant's alleged role in obtaining disability insurance for the plaintiff. The language of the Agreement was found to be broad enough to cover the dispute regarding disability insurance.

34. Gale Hayman, Inc. v. Florasynth, Inc. (February 6, 1996) B094173

This case involved a business dispute between the plaintiff and defendants, a New York corporation and its president. The defendant corporation moved to dismiss or stay on the ground of inconvenient forum and the defendant individual moved to quash service of summons for lack of personal jurisdiction or, in the alternative, to dismiss or stay the action on the ground of inconvenient forum. The trial court ruled that it lacked personal jurisdiction over the individual defendant and stayed the action as to both defendants on the ground that New York was a more convenient forum. The appellate court affirmed the trial court's ruling that it lacked jurisdiction over the individual defendant but reversed the granting of the defendants' inconvenient forum motion.

35. Denise Barnes v. Eric Wright, pka Easy E., Lorenzo Patterson, pka M.C. Ren (September 2, 1993) B065152

In this libel action, the appellate court reversed the trial court's judgment dismissing the plaintiff's action following the grant of a motion for judgment on the pleadings, without leave to amend. The appellate court held that the plaintiff should have been given leave to amend her complaint.

36. People v. Eugene M. Poole (August 8, 1991) B033443

The defendant in this criminal case appealed from the trial court's order revoking his probation. The appellate court reversed, holding that the trial court erred in considering a preliminary hearing transcript as evidence.

37. People v. Johnson (May 13, 1992)

A jury verdict finding the defendant guilty of grand theft was reversed on the ground of instructional error. The prosecution had charged the defendant with theft and embezzlement of his employer's cash and other property. The appellate court found error in a portion of the jury instruction on embezzlement.

38. Michael Roshkind v. Bel Air Crest, Ltd. (May 17, 2003) B131588

In this case, the plaintiffs filed a complaint for possession of personal property and damages arising out of the defendants' post-foreclosure and post-eviction disposition of plaintiffs' personal property. The appellate court found a triable issue as to the defendants' negligence and reversed the trial court's order granting the defendants' summary judgment motion.

39. Tara Ferdows v. The Office of Robert Wasserwald and Associates (August 23, 1994) B065457

In this legal malpractice action, the appellate court reversed the trial court's order awarding $5,014 in sanctions against the plaintiff and her attorneys, pursuant to California Code of Civil Procedure Section 128.5 ("Every trial court may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause delay.") The appeals court found insufficient grounds to support sanctions.

40. J.D. Hadley, Inc. v. Developers Insurance Co. (October 21, 1993) B064185

In this insurance bad faith action, the appellate court held that the trial court erred in awarding attorney's fees to the prevailing party since the matter was not based "on a contract" and therefore attorney's fees were not statutorily allowable under California's Civil Code Section 1717.

41. Robert Hughes v. State of California (September 7, 1993) B060940

The plaintiffs/appellants were licensed hearing aid dispensers who employ, train and supervise licensee applicants. They brought this action against the State's Hearing Aid Dispenser Examining Committee, asserting that the Committee's rules and regulations were applied to them and their trainees in an arbitrary and discriminatory manner. Plaintiffs also asserted that the Committee adopted rules and regulations in violation of the Administrative Procedure Act. The trial court dismissed the plaintiff's second amended complaint, (sustained the defendant's demurrer without leave to amend), on several grounds. The order of dismissal was affirmed in part and reversed in part. The appellate court affirmed the trial court's ruling that the plaintiffs lacked standing regarding denial of licenses to their trainees and that they failed to exhaust their administrative remedies with regard to the claims pertaining to denial or revocation of their own authority to supervise trainees. The appellate court reversed the trial court's dismissal of the plaintiffs' declaratory relief claim, finding that the plaintiffs were not obligated to exhaust administrative remedies with respect to their claim that the Committee's regulations were adopted without conformity to the Administrative Procedures Act.

42. Varcenig Gross v. Hillside Memorial Park and Mausoleum (November 16, 1992) B057327

This action pertained to the defendant's sale of two cemetery plots to the plaintiff. The appellate court reversed the trial court's order dismissing the action after the court sustained the demurrer

to the plaintiff's second amended complaint with leave to amend and the plaintiff failed to amend. The court of appeal found that the cause of action for breach of contract and the other causes of action were adequately pled.

43. Charles P. Reilly v. American Medical International, Inc. (October 14, 1992) B060796

In this breach of employment contract action, the appellate court reversed the trial court's order granting summary judgment in favor of the defendant employer. The issues raised pertained to interpretation of a bonus payment ("golden parachute") provision in an employment agreement.

44. Susan Clarke v. Charles T. Fowler (July 16, 1992) B060472

In this action alleging fraud and breach of fiduciary duties, the court of appeal reversed the trial court's order denying the defendants' motion to set aside their defaults and a default judgment. The appellate court found that the damage award was not supported by the complaint and evidence presented by the plaintiff.

45. Melody Delarroz v. CHW/Marion Medical Center (October 24, 2005) B171658

The court of appeal reversed the trial court's order granting summary judgment in favor of the defendant Catholic Healthcare West dba Marion Medical Center, concluding that triable issues existed as to whether the standard of care was breached by the Center's staff.

46. George Russell Weller v. Superior Court (Los Angeles Times) (September 2004) B176939

In the pending Farmer's Market cases, the trial court had granted in part and denied in part a motion by Defendant Weller for a protective order which would prohibit the disclosure of an accident investigation report. The court of appeal granted Defendant's petition for writ of mandate and ordered the lower court to grant the protective order in its entirety.

47. Daewoo Motor Co., Ltd. v. Superior Court (Starpoint USA, Inc.) (April 10, 2006) B189505

The appellate court held that the trial court lacked jurisdiction to grant reconsideration, having previously entered an order of dismissal after sustaining a demurrer without leave to amend.

15.(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(a) In Re Farmers' Market (Related Actions), Lead Case No. SC080283

Since 2004 I have been presiding over all of the civil cases filed in connection with the July 2003 incident at the Farmers' Market in Santa Monica, where an elderly driver killed and injured shoppers and vendors. Defendants include the City of Santa Monica and other public entities as well as the elderly driver, George Russell Weller. At this time, there are forty-one wrongful death/personal injury actions.

First, Fourth, Fifth and Sixth Amendment issues have been raised because of the pending criminal proceeding against Defendant George Weller and the actions taken by the press to obtain access to certain materials deemed confidential and subject to a protective order. The Court of Appeal in a recent unpublished opinion reversed part of my order which directed that certain information be made public.

(b) While a judge presiding over criminal cases, I frequently decided Fourth and Fifth Amendment questions, relating to the admissibility of confessions and evidence obtained during searches. Many issues in criminal trials also concerned the right to confront and cross-examine witnesses, the right against self-incrimination and the right to a speedy trial.

(c) In civil and criminal cases, I often decide privacy issues raised by discovery and equal protection issues arising during jury selection. As a judge in civil cases, I preside over actions against employers alleging discrimination in violation of civil rights and actions against police officers alleging excessive force in violation of civil rights.

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

Assistant United States Attorney in the Central District of California, 1977-1980, appointed.

17. Legal Career:

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

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

I did not serve as a clerk to a judge.

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

I never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Feb. 1987-Present; Superior Court of Los Angeles, 111 North Hill Street, Los Angeles, CA 90012-3014; Judge

Feb. 1986-Feb. 1987; Municipal Court, Los Angeles; 111 North Hill Street, Los Angeles, CA 90012-3014; Judge

1980-1986; Lillick McHose & Charles (Now Pillsbury, Winthrop, Shaw & Pittman); 725 South Figueroa Street, #2800, Los Angeles, CA 90017-5443; Associate (1980-82); Partner (1982-86)

1977-1980; United States Attorneys Office Criminal Division Courthouse; 312 North Spring Street, #G-8, Los Angeles, CA 90012-4793; Assistant United States Attorney

1975-1977 Overton Lyman & Prince; 520 South Grand Avenue, Floor 7, Los Angeles, CA 90071; Associate

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Prior to assuming judicial responsibilities in 1986, I had a criminal trial practice as an Assistant United States Attorney from 1977 through 1980 and eight years of civil litigation experience at two law firms in Los Angeles, Overton, Lyman & Prince (1975-77) and Lillick, McHose & Charles, now Pillsbury, Winthrop, Shaw & Pittman, (1980-1986).

In the Criminal Division of the United States Attorneys Office, I tried criminal cases in the District Court and handled the appeals in a few of those cases, writing briefs and arguing before the Ninth Circuit. The criminal cases included prosecutions of bank robberies, major drug violations and fraudulent enterprises. My eight years in private practice involved mostly business litigation in federal court. Although I had several trials, much of my time was devoted to discovery and motion practice. As a partner at Lillick McHose & Charles, I specialized in anti-trust and other complex business litigation.

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

Typical former clients in private practice included small businesses, large corporations and financial institutions. I commenced my legal career representing the Getty Oil Company in anti-trust litigation. I also represented technology companies in major contractual disputes. I gained early experience trying cases as a junior attorney representing automobile manufacturers in breach of warranty actions. As a partner at Lillick McHose and Charles, I managed more complex business litigation, involving allegations of antitrust violations, breach of contract and fraud. Clients included a health maintenance organization and a manufacturer of automobile parts. I also represented ABC Entertainment Center in commercial real estate disputes. Much of

my time was spent representing banks and an agricultural corporation in their lawsuits against the Iranian Government.

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

In my years as an attorney between 1975 and 1986, I appeared regularly in court for status conferences and hearings on motions. As an Assistant United States Attorney, my court appearances were more frequent. I had hearings on at least a weekly basis and had at least a couple of jury trials a year.

2. **What percentage of these appearances was in:**
   - **(a) federal courts:** 70%
   - **(b) state courts of record:** 30%
   - **(c) other courts.**

3. **What percentage of your litigation was:**
   - **(a) civil:** 75%
   - **(b) criminal:** 25%

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

I tried a total of at least ten cases to verdict as an attorney. I was the sole attorney in all but one trial, an antitrust case which was tried in federal court early in my career.

5. **What percentage of these trials was:**
   - **(a) jury:** 70%
   - **(b) non-jury:** 30%

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

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

1. Early in my career as an attorney at Overton, Lyman and Prince, I was assigned to work on major anti-trust litigation pending in the United States District Court for the Northern District of Illinois. In re Uranium Antitrust Litigation, MDL 342. See e.g. 473 F. Supp. 382, 473 F. Supp. 393 and 617 F.2d 1248 (7th Cir. 1980). In this litigation, a uranium supplier, Westinghouse Electric Corporation sued multiple corporations, including my client The Getty Oil Company for antitrust violations, asserting conspiracy to fix prices. The oil companies cross-complained alleging monopolization and price fixing on the part of Westinghouse. I worked with a senior partner in the motion and discovery phases of this litigation. One of the attorneys who supervised me during this period is Frederick Clark, Esq., McKenna Long & Aldridge, 444 South Flower Street, #800, Los Angeles, CA 90071-2901, 213-688-1000.

2. From approximately 1978 through 1980, as an Assistant United States Attorney, I supervised the investigation of a major fraud in a government school lunch program and was the sole attorney in a month-long jury trial against multiple defendants in that case. Justice Malcolm Lucas, then a District Court Judge, presided over the trial which resulted in convictions. I could not locate the case name or citation. Nor do I have a record of defense counsel. The United States Attorney for the Central District at the time was Andrea S. Ordin. Her current business address is Morgan, Lewis, Bockius, 300 South Grand Avenue, Floor 22, Los Angeles, CA 90071, 213-612-1090.

3. In Len-Jack's and Jack Kushner v. Robert Bosch Corporation, I represented the Defendant Robert Bosch Corporation, who was accused of antitrust conduct in the distribution of its Blaupunkt radios. The case was filed in the early 1980s in the United States District Court, Central District of California, Judge Gadbois presiding.. The Plaintiff was represented by Judianne Jaffe, Esq., De Castro West Chodorow, 10960 Wilshire Boulevard, #1400, Los Angeles, CA 90024-3804, 310-478-2541. The senior partner working with me on this case was John Kimberling, Esq., 1180 Los Robles Drive, Palm Springs, CA 92262, 706-323-9999. General Counsel for Robert Bosch was William Thompson, Esq., P.O. Box 584, Wheaton, Illinois 60189, 630-690-1971. I actively represented the client in all pre-trial proceedings including discovery and a summary judgment motion. The case settled shortly before trial.

4. In Koudsy v. Robert Bosch Corporation, I represented the Defendant Robert Bosch Corporation. The action was filed in the Central District, United States District Court, for antitrust violations and breach of contract. I actively participated in discovery and motion practice prior to settlement. Counsel for a co-defendant in this case and the Len-Jack's case was David Pasternak, Esq., Pasternak, Pasternak & Patton, 1875 Century Park East, Suite 2200, Los Angeles, CA 90067-2722, 310-553-1500.

5. In First Interstate Bank v. the Government of Iran and ABN Bank v. Government of Iran, I represented banks in their commercial actions against Iran. The representative of my client ABN Bank was Nancy Olson, now residing at 4472 Snowmass Court, Salt Lake City, UT 84124, 801-594-8232. In the ABN Bank case, the issue of the bank's payment of a stand by letter of credit was raised.

In addition to the above cases which were litigated more than twenty years ago, I am providing a summary of significant cases I have handled as a judge:

(1) In Re Farmers' Market (Related Actions), Lead Case No. SC080283

Dates: 2004-Present; an all-purpose, individual calendar assignment.
Court: Los Angeles Superior Court, Santa Monica Courthouse

I am presiding over all of the civil cases filed in connection with the July 2003 incident at the Farmers' Market in Santa Monica, where an elderly driver killed and injured shoppers and vendors. Defendants include the City of Santa Monica and other public entities as well as the elderly driver, George Russell Weller. At this time, there are forty-one wrongful death/personal injury actions.

First, Fourth, Fifth and Sixth Amendment issues were presented in the Farmers' Market actions when the Los Angeles Times sought access to police reports which the Defendant Weller and the District Attorney claimed were privileged in light of the criminal proceedings pending against Defendant Weller. Copies of my written rulings and the appellate decision partially reversing my rulings are attached.

The following is a representative list of the attorneys for the Plaintiffs and Defendants:

Plaintiffs' counsel:

John H. Wolf, Esq. of John H. Wolf & Associates, 11755 Wilshire Boulevard, 15th floor, Los Angeles, California 90025-1506, (310) 477 2744;

Steven D. Archer, Esq. of Robins, Kaplan, Miller & Ciresi, 2049 Century Park East, Suite 2700, Los Angeles, California 90067, (310) 552-0130;

Stanley K. Jacobs, Esq. of Jacobs, Jacobs & Rosenberg, 11755 Wilshire Boulevard, Suite 2150, Los Angeles, California 90025, (310) 473-9211;

Timothy J. Wheeler, Esq. of Green, Broillet, & Wheeler LLP, 100 Wilshire Boulevard, Suite 2131, Santa Monica, CA 90407, (310) 576-1200;

Brian J. Panish, Esq. of Panish, Shea & Boyle, LLP, 11111 Santa Monica Boulevard, Suite 700, Los Angeles, CA 90025, (310) 477-1700;

Gregory W. Moreno, Esq. and Arnoldo Casillas, Esq. of Moreno, Becerra, Guerrero & Casillas, 3500 West Beverly Boulevard, Montebello, CA 90640, (323) 725-0917;

Luis A. Carrillo, Esq., 3500 West Beverly Boulevard, Montebello, CA 90640, (323) 722-6298;

Barry I. Goldman, Esq. of Rose, Klein & Marisas LLP, 801 South Grand Avenue, 18th Floor, Los Angeles, CA 90017, (213) 626-0571; and

David R. Olan, Esq. of Olan Law Corporation, 11601 Wilshire Boulevard, Suite 760, Los Angeles, CA 90025, (310) 312-3898.

Defendants' counsel:

Mark W. Flory, Esq. and Kelly A. Ward, Esq., 1055 West 7th Floor, 29th Floor, Los Angeles, CA 90017-2547, (213) 489-3222;

Dana Alden Fox, Esq. and Phillip M. Hayes, Esq. of Lynberg & Watkins, 888 South Figueroa Street, 16th Floor, Los Angeles, CA 90017-5449, (213) 624-8700;

Jeanette Schachtner, Chief Deputy, Civil Liability Division, City of Santa Monica, 1685 Main Street, 3rd Floor, Santa Monica, CA 90401, (310) 458-8328; and

Richard J. Schneider, Esq. and Lea A. Plaskin, Esq. of Daley & Heft, 462 Stevens Avenue, Suite 201, Solana Beach, CA 92075, (858) 755-5666.

(2) Charles Khalil & Exxon Mobil Corp. v. Michael Stern & U&M Services Co., Case No. SC085982

Dates: 2005, an all-purpose, individual calendar assignment
Court: Los Angeles Superior Court, Santa Monica Courthouse

This is a real property dispute, involving claims of trespass, easement and the right to injunctive relief.

Plaintiff's counsel: Elizabeth P. Beazley, Esq. and Scott E. Hinsche, Esq. of Keesal, Young & Logan, 400 Oceangate, P.O. Box 1730, Long Beach, CA 90801-1730, (562) 436-2000.

Defendants' counsel: Steven S. Davis, Esq. and Peter Steinman, Esq. of Gaims, Weil, West & Epstein, 1875 Century Park East, #1200, Los Angeles, CA 90067-2513, (310) 553-6666.

(3) Eli Sayers v. City of West Hollywood, Case No. SC 069640

Dates: 2001 - 2005, an all-purpose, individual calendar assignment, including bench trials
Court: Los Angeles Superior Court, Santa Monica Courthouse

The Plaintiff sued the City of West Hollywood, claiming that the sidewalk where he was hit by a car constituted a dangerous condition. The issues of design immunity, liability and damages were trifurcated. Bench trials were held before me on the issues of design immunity and liability. Judgment was rendered for the City on the ground that liability was not established.

Plaintiff's counsel: Browne Greene, Esq., Mark T. Quigley, Esq., and Robert D. Jarchi, Esq. of Greene, Broillet, & Wheeler, 100 Wilshire Blvd. Suite 2100, P.O. Box 2131, Santa Monica, CA 90407-2131, (310) 576-1200.

Defendant City's counsel: Scott Haith, Esq. and D. Michael Lyden, Esq. of Robertson & Vick, 26050 Mureau Road #102, Calabasas 91302, (818) 878-1800.

(4) Berry Gordy v. Edward J. Holland, Jr., Case No. SC066303

Dates: 2004, an all-purpose individual calendar assignment and bench trial.
Court: Los Angeles Superior Court, Santa Monica Courthouse

This was a malicious prosecution action by a record company against one of its composers. The action settled after bench trials before me on a statute of limitations defense and on the "favorable termination" and "lack of probable cause" elements of malicious prosecution.

Plaintiff's counsel: Yakub Hazzard, Esq. of Alschuler, Grossman, Stein & Kahan, The Water Garden, 1620 26th Street, Fourth Floor, North Tower, Santa Monica, CA 90404-4060, (310) 907-1000; and Daniel M. Petrocelli, Esq. and Drew Breuder, Esq. of O'Melveny & Myers, 1999 Avenue of the Stars, Suite 700, Los Angeles, CA. 90067-6035, (310) 553-6700.

Defendant's counsel: Richard P. Towne, Esq., 21550 Oxnard Street, Suite 980, Woodland Hills, CA 91367, 818-587-4838; and Clarence B. Tucker, Esq. of Tucker & Hughes, 615 Griswold, Suite 920, Detroit, MI 48226, (313) 230-7892.

(5) City of Beverly Hills v. Masry & Vititoe, et al., Case No. SS011900

Dates: 2003 - 2004, an all-purpose, individual calendar assignment.
Court: Los Angeles Superior Court, Santa Monica Courthouse

This proceeding involved a Petition by the City of Beverly Hills and its Mayor for an Order of Attachment for Contempt of Legislative Subpoenas, pursuant to California's Government Code Sections 37104 through 37108. After lengthy hearings, I granted the Petition to enforce legislative subpoenas that were issued by the City Council to investigate the health and safety at Beverly Hills High School.

Petitioners' counsel: Louis R. Miller, Esq. and Warren A. Koshofer, Esq. of Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, 10250 Constellation Blvd., 19th Floor, Los Angeles, CA 90067, (310) 553-3000; and Aaron M. McKown, Esq. of Preston, Gates & Ellis, 1900 Main Street, Suite 600, Irvine, CA 92614-7319, (949) 253-0900.

Respondents' counsel: Paul R. Kiesel, Esq. of Kiesel, Boucher & Larson, 8648 Wilshire Boulevard, Beverly Hills, CA 90211-2910, (310) 854-4444; and Ric C. Ottaiano, Esq.of Lynberg & Watkins, 333 City Boulevard West, Suite 640, Orange, CA 92868-5915, (714) 937-1010.

(6) Fifth/Arizona Investors v. City of Santa Monica, Case No. SC 083204

Dates: 2004 - 2005; an all-purpose, individual calendar assignment and lengthy hearing
Court: Los Angeles Superior Court, Santa Monica Courthouse

In this Petition for Writ of Mandate action, Plaintiff developers requested that the court order the City to allow an extension of an administration approval. After a lengthy hearing, the court denied the Petition, finding that the city acted lawfully.

Counsel for the Petitioner: Kenneth Kutcher, Esq. and Christopher Harding, Esq., Harding, Larmore, Mullen, Jakle, Kutcher, 1250 Sixth Street, Suite 300, Santa Monica, CA 90401, 310-393-1007

Counsel for the Respondent: Cara Silver, Esq. and Carol Kurtz, Esq., Santa Monica's City Attorney Office, 1685 Main Street, Suite 310, Santa Monica, CA 90401, 310-458-8336.

(7) United States Auto Security v. John Morrison, et al., Case No. SC052051

Dates: 1998 - 2001, an all-purpose, individual calendar assignment and lengthy bench trial.
Court: Los Angeles Superior Court, Santa Monica Courthouse

A corporation sued former employees for breach of contract, breach of fiduciary duty, fraud and conversion, alleging anti-competitive conduct on the part of the former employees and their companies.

Plaintiff's counsel: Cheri O'Laverty, Esq. and Robert M. Ungar, Esq. of O'Laverty & Ungar, 701 Palomar Airport Road, 3rd Floor, Carlsbad, CA 92011, (760) 931-9300.

Defendants' counsel: Gregory S. Dovel, Esq. of Dovel & Luner LLP, 201 Santa Monica Boulevard, Suite 600, Santa Monica, CA 90401-2212, (310) 656-7066; and Donald B. Rosen, Esq. (formerly of Dovel & Luner LLP) 6230 Wilshire Boulevard, Suite 2100, Los Angeles, CA 90048, (310) 704-2693.

(8) The Estate of Jose Antonio Gutierrez v. City of Los Angeles, BC143831

Dates: 1998, an all-purpose, individual calendar assignment and jury trial.
Court: Los Angeles Superior Court, Stanley Mosk Courthouse

I presided over pretrial proceedings and a lengthy jury trial in this emotionally charged wrongful death action alleging civil rights violations by the Los Angeles Police Department. Parents of the deceased minor claimed that police officers wrongfully shot and killed their teenage son. The jury reached a defense verdict.

Plaintiff's counsel: John Taylor, Esq., Taylor & Ring, 10900 Wilshire Blvd., #920, Los Angeles, CA 90024, (310) 209-4100.

Defendant's counsel: Don W. Vincent, Esq., Office of City Attorney, 200 No. Main Street, City Hall East #700, Los Angeles, CA 90012-4110, (213) 978-2205.

(9) The Energy Contract Dispute - JCCP 003197 (Judicial Council Coordinated Proceeding, Case No. BC 098597)

Dates: 1996 - 1998; an all-purpose, individual calendar assignment and lengthy bench trial.
Court: Los Angeles Superior Court, Stanley Mosk Courthouse

This litigation involved breach of contract disputes between Southern California Edison and numerous energy providers. After pretrial proceedings, I presided over a ten-week court trial in which hundreds of exhibits were introduced and over thirty witnesses called.

Plaintiffs' and Cross-Defendants' counsel: Brown Smith, Esq. (currently inactive, formerly of Hillyer & Irwin) PO Box 990, Del Mar, CA 92014, (858) 755-0629; and Tad Seth Parzen, Esq. (formerly associated with Hillyer & Irwin, now with San Diego Unified School District), 4100 Normal St., San Diego, CA 92103, (619) 725-5630.

Defendant and Cross-Complainant Edison's Counsel: James Polish, Esq. and Albert H. Ebright, Esq. of Carlsmith Ball (formerly Carlsmith, Ball, Wichman Case & Ichiki), 444 South Flower Street, 9th Floor, Los Angeles, CA 90071-2901, (213) 955-1200.

(10) Major Insurance Coverage Litigation Relating to Underlying Environmental Contamination lawsuits.

(a) Montrose Chemical Corporation of California v. Admiral Insurance Company et al. Lead Case No. C 594 148, consolidated with C 597389, related to BC 005158, BC 046677, BC 077158, BC 096685, BC 142024 and BC 164315.

Dates: 1994 - 1998; an all-purpose, individual calendar assignment
Court: Los Angeles Superior Court, Stanley Mosk Courthouse

This is a complex insurance coverage dispute which arose from three groups of environmental contamination lawsuits. The underlying actions included the Stringfellow, Iron Mountain and Parr-Richmond cases. (See e.g. Montrose Chemical Corp. v. Superior Court (1994) 25 C.A.4th 902, 905, footnotes 1 & 2.) Plaintiff, a chemical company manufacturer, sued multiple insurers seeking a declaration that the insurers had a duty to defend and indemnify in suits brought against it for damages to natural resources over an extended period of time. While trial in this insurance coverage dispute was stayed pending resolution of the underlying lawsuits, I decided a large number of motions relating to the stay, discovery, protective orders and motions for summary judgment and summary adjudication.

The following is a representative list of the attorneys for the Plaintiffs and for the Defendants:

Dorn Bishop, Esq. of Law offices of Dorn G. Bishop (formerly of Latham & Watkins), 701 B. Street, Suite 1000, San Diego, CA 92101, (619) 233-3380;

Hon. Robert Dahlquist of Superior Court of California, County of San Diego, North County (formerly a partner of Latham & Watkins), 325 South Melrose, Vista, CA 92081, (760) 940-4587;

H. Douglas Galt, Esq. of Woolls & Peer (formerly of O'Melveny & Myers), 1 Wilshire Boulevard, 22nd Floor; Los Angeles, CA 90017, (213) 629-1600;

Cary Lerman, Esq. of Munger, Tolles & Olsen, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071-1560, (213) 683-9163;

Marc Mayerson, Esq. of Spriggs & Hollingsworth (formerly of Covington & Burling), 1350 1 St. Northwest, 9th Floor, Washington D.C. 20005-3305, (202) 898-5877;

Fred Gregory, Esq. of Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071, (310) 375-7991;

Scott M. Dreyer, Esq. of Berman & Aiwasian (formerly of Gibson, Dunn & Crutcher), 725 South Figueroa St., Suite 1050, Los Angeles, CA 90017, (213) 833-3200; and

Paul Albus, Esq. of Roseman & Antoni LLP (formerly of Charlston, Revich & WMS), 10940 Wilshire Boulevard, 18th Floor, Los Angeles, CA 90024, (310) 208-7400.

(b) News America, Inc. (formerly Chris-Craft Industries, Inc.) v. Fireman's Fund Insurance. Co., et al, BC 142024, and related case C594148

Dates: 1996 - present; an all-purpose, individual calendar assignment
Court: Los Angeles Superior Court, Stanley Mosk Courthouse and Santa Monica Courthouse

Like the Montrose case above, this is a complex insurance coverage dispute where a manufacturer sued multiple insurers seeking a declaration that the insurers had a duty to defend and indemnify it in the underlying environmental contamination lawsuits, including United States v. Montrose, USDC Case No. CV-90-3122. Although much of the case was stayed pending resolution of the underlying lawsuits, I have managed the case and presided over issues pertaining to discovery, settlement and motions for summary adjudication and summary judgment.

Plaintiff's counsel: Kelly E. Richardson, Esq. of Latham & Watkins, 600 W. Broadway, Suite 1800, San Diego, CA 92101-8197, (619) 236-1234; and Hon. Robert Dahlquist of Superior

Court of California, County of San Diego, North County (formerly a partner of Latham & Watkins), 325 South Melrose, Vista, CA 92081, (760) 940-4587.

The following is a representative list of defense counsel:

Steven P. Rice, Esq. of Crowell & Moring LLP, 3 Park Plaza, 20th Floor, Irvine, CA 92614-8505, (949) 263-8400;

Micheal P. Schibly, Esq. (currently inactive, formerly of Lillick & Charles LLP), 380 De Anza Avenue, San Carlos, CA 94070, (650) 365-1609; and

Donald T. McMillan, Esq. of McMillan & Shureen LLP (formerly of Rivkin, Radler & Kremer LLP), 50 Santa Rosa Avenue, 5th Floor, Santa Rosa, CA 95404-4952, (707) 525-5400.

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

As a judge, I believe that I have a duty to be active in the legal community, especially through participation in educational programs and other bar association activities. To further this important objective, I have authored numerous articles on the law, edited a professional treatise on tort litigation and have regularly participated as a panelist in educational programs for lawyers and judges. I have also served on the boards of several bar associations, including the Association of Business Trial Lawyers and the Litigation Section of the Los Angeles County Bar Association. The interaction and exchange of ideas with lawyers and other judges at educational programs and other professional events is an important part of my role as a judge.

In serving on professional boards, I have also participated in efforts to foster interest in the legal profession. For example, as a member of the Public Service Committee of the Association of Business Trials Lawyers, I have worked on various projects including the development of scholarship programs for law students. While on the Board of the UCLA Law School Alumni Association, I chaired a committee to recruit qualified minority students to the Law School. On a more informal basis, I have talked to groups of school children and prospective jurors about our legal system. I have also mentored groups of young lawyers and law students about law practice and trial skills.

One of my most significant contributions resulted from my participation in the Complex Litigation Task Force Committee of the Judicial Council, State of California. As a member of this Committee, I participated in establishing California's Complex Litigation Courts and Rules governing Complex Litigation.

I take pride in this kind of effort and interaction outside of the courtroom because of my belief that it is a significant part of my service as a judge and my work to improve our legal system and to foster respect for the courts and the law.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I do not have any arrangements to be compensated in the future for any financial or business interest. I am not entitled to receipts from any of the sources referred to in this question, except I do expect to receive a pension from the State of California after twenty years of service on the state court bench. The monthly pension payments, amounting to seventy-five percent of a judge's salary, should commence on my sixtieth birthday in June 2009.

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

Should I be confirmed, in handling potential conflicts I would adhere to the Code of Conduct for United States Judges and all applicable laws, policies and procedures. I would follow the same general procedure that I have applied as a state court judge. As a trial judge, I examine each case for potential conflicts and pursuant to California's statutory provisions and Code of Judicial Ethics, disclose potential conflicts to the parties and where appropriate, disqualify myself. I have always been scrupulous in the area of potential conflicts and believe I have a high reputation for impartiality and integrity. I am not aware of any financial or other arrangements that would pose a conflict problem at this time. I am not aware of any categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during my service in the position to which I have been nominated.

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

No.

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

See attached Financial Disclosure Report

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

See attached Financial Net Worth Statement

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

No

AO-10
Rev. 1/2004

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 name, Middle initial) Baker, Valerie L.	2. Court or Organization USDC, Central District of CA	3. Date of Report 5/5/2006
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) US District Judge Nominee	5. ReportType (check appropriate type) (●) Nomination, Date 5/4/2006 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2005 to 4/30/2006
7. Chambers or Office Address Superior Court, Dept. L 1725 Main Street Santa Monica, CA 90401	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.	
2.	

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

☐ NONE - (No reportable agreements.)

DATE	PARTIES AND TERMS
1. 1986	Judges' Retirement System, State of California, pension payments to commence 6/25/09.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Baker, Valerie L	5/5/2006

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	GROSS INCOME (yours, not spouse's)
1.	2006	State of California, Judge's Salary	61,389.70
2.	2005	State of California, Judge's Salary	140,159.63
3.	2004	State of California, Judge's Salary	133,847.00

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

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2005-06	Self employed, Lawyer, Law Partnership
2.	2005-06	University of Southern California (USC), Teaching
3.	2005-06	The Rutter Group (West Publishing), Royalties (for book authorship)

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	EXEMPT	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Baker, Valerie L	5/5/2006

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	EXEMPT		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

INANCIAL DISCLOSURE REPORT
age 1 of 3

Name of Person Reporting	Date of Report
Baker, Valerie L	5/5/2006

II. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A -H)	(2) Type (e.g. div. rent. or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
American Funds:					Exempt				
- The Cash Management Trust of America	A	Dividend	J	T					
- The Growth Fund of America (IRA)	A	Dividend	L	T					
- The Bond Fund of America (IRA)	B	Dividend	K	T					
- Capital World Growth & Income Fund (IRA)	A	Dividend	J	T					
Bank of America (Checking Account)	A	Interest	J	T					
County of Los Angeles Savings Plan Funds (Retirement):									
- Conservative Pre-Assembled Portfolio	A	Interest	K	T					
- MFS Instl. Intl. Equity	A	Interest	K	T					
). - ICM Small Company	A	Interest	K	T					
1. - T.Rowe Price New Horizen	A	Interest	K	T					
2. - Bernstein US Diversified Value Fund	A	Interest	K	T					
3. - ICAP Equity Portfolio	A	Interest	K	T					
4. - SSGA S&P Flagship Series Fund C	A	Interest	K	T					
5. - TCW Concentrated Core Equities Fund	B	Interest	K	T					
6. - Dodge & Cox Balanced Fund	A	Interest	K	T					
7. - City National Bank Fund	A	Interest	L	T					
8. - Stable Value Fund	A	Interest	K	T					

1. Income/Gain Codes: (See Columns B1 and D4)
A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000

2. Value Codes: (See Columns C1 and D3)
J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000;
N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000;
P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000

3. Value Method Codes: (See Column C2)
Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market;
U = Book Value; V = Other; W = Estimated

INANCIAL DISCLOSURE REPORT
age 2 of 3

Name of Person Reporting	Date of Report
Baker, Valerie L	5/5/2006

II. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A -H)	(2) Type (e.g. div. rent. or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
County of Los Angeles Deferred Comp. & Thrift Plan (Retmt):					Exempt				
- Pre-Assembled Portfolio A	A	Interest	J	T					
- Pre-Assembled Portfolio B	A	Interest	J	T					
- Pre-Assembled Portfolio D	A	Interest	J	T					
- Capital Guardian International (Non-US)	A	Interest	J	T					
- Causeway International Value Equity Fund	A	Interest	J	T					
- Small Cap Equity Managed by Brandy Wine	A	Interest	J	T					
- DIA Medium Size Company Fund	A	Interest	J	T					
- SSGA S&P 500 Flagship Services - Fund C	A	Interest	J	T					
- PIMCO High Yield Fund	A	Interest	J	T					
- Washington Mututal Bank Fund	A	Interest	J	T					
- LA County State Income Fund	A	Interest	L	T					
Morgan Stanley:									
- Cisco System Incorporated (Common Stock)		None							
- Intel Corporation (Common Stock)	A	Dividend							
- Microsoft Corporation (Common Stock)	A	Dividend							
- Pepsi Bottling Group, Inc. (Common Stock)	A	Dividend							
- The Technology Sel Sec Spdr Fd (Common Stock)	A	Dividend							

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M1 = $100,001-$250,000	
	N = $250,001-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

INANCIAL DISCLOSURE REPORT
age 3 of 3

Name of Person Reporting	Date of Report
Baker, Valerie L	5/5/2006

II. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure									
7. - Wyeth (Common Stock)	A	Dividend			Exempt				
8. - Yahoo Inc. (Common Stock)	A	Dividend							
9. - Qualcom Inc. (Common Stock)	A	Dividend							
0. - Total Fina Elf SIA (Common Stock)	A	Dividend							
1. Spouse's Investments and Trusts:									
2. Bank of America (Checking Accounts)	B	Interest	M	T					
3. Bank of America Certificates of Deposit	A	Interest	E	T					
4. Schwab Accounts:									
5. - Schwab Money Market	B	Dividend	O	T					
6. - Capital One Financial Corporation (Common Stock)		None	O	T					
7. - Trimble Navigational Limited (Common Stock)		None	M	T					
8. - Hoover Apartments (Menlo Park, CA)	B	Dividend	N	W					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G1 = $100,001-$1,000,000	H1 = $1,000,001-$2,000,000	G2 = More than $5,000,000	H2 = More than $2,000,000
2. Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	N = $250,001-$500,000
	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	P3 = $25,000,001-$50,000,000	P4 = More than $50,000,000
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	U = Book Value
	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Baker, Valerie L	5/5/2006

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

1. Part VII, page 2, line 31 - page 3, line 40 - filer's individual stocks have all been sold as of 2/17/06.

2. In December 2005, filer's spouse acquired through inheritance the following asset: his parents' retirement plan funds in TIAA-CREF, estimated value $251,420. In 2006, filer's spouse expects to receive as part of the inheritance the following asset: approximately $500,000 of additional stock (mostly Capital One Financial stock).

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Baker, Valerie L	5/5/2006

X. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if ny) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld ecause 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 eported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

ignature Valerie L. Baker Date May 8, 2006

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY 3E 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		10	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		129	131
Real estate owned-add schedule	1	700	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		45	000				
Cash value-life insurance							
Other assets itemize:							
IRA Account		91	366				
County of Los Angeles Deferred Compensation & Thrift Plan		122	901				
County of Los Angeles Savings Plan		408	927	Total liabilities		129	131
				Net Worth	2	249	063
Total Assets	2	378	194	Total liabilities and net worth	2	378	194
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		
On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$ 1,700,000
Real Estate Mortgages Payable	
Personal residence	$ 129,131

III. GENERAL (PUBLIC)

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

As a Judge, I have tried to involve myself in serving the disadvantaged to the extent such service is not inconsistent with my duties as a judge. These include the duty to uphold the independence of the judiciary; to perform the duties of judicial office impartially and diligently and maintain the appearance of such; and to minimize the risk of conflict with judicial obligations . (See California Code of Judicial Ethics, Canons One through Five)

In 1987, I participated in the "Judge in the Camp" Program sponsored by the Constitutional Rights Foundation ("CRF"). I visited juvenile detention centers in Los Angeles County, presided over mock trials and talked to the detainees. I received a commendation for this participation from the CRF. As a judge presiding over juvenile delinquency cases, I also made a point of visiting juvenile halls, conferring with staff and the juveniles.

From 1993 through 1995, I served on the Board of Directors of My Friends Place, a non-profit shelter for homeless teenagers in Los Angeles. I attended Board meetings and functions for My Friends Place.

From 1997 through 1999, I was on the Board of Directors of the University of California, Los Angeles, School of Law Alumni Association. I served as chair of the Recruitment Committee which had the goal of attracting qualified minority students to the Law School.

From about 2001 through 2003, I served on the Board of Directors of The Braille Institute in Los Angeles, a non-profit organization to serve the blind. In 1999 and 2000, I was a member of the Los Angeles Auxiliary of The Braille Institute. In both positions, I attended meetings to determine how to improve vision care for the poor and improve services to adults and children with impaired vision.

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

No. I do not belong and have never belonged to any organization that discriminates through either formal membership requirements or the practical implementation of membership policies.

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

There is a bipartisan selection committee in my jurisdiction to recommend candidates for nomination to the federal courts. After submitting a lengthy written application to the committee, I was interviewed by its six members. I was then interviewed by Gerry Parsky and Eric George in Los Angeles and by White House Counsel in Washington D.C.. After completing all nomination paperwork and after a background investigation, I was notified that my nomination would be submitted to the Senate. I was nominated on May 4, 2006.

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

No.

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

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

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

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

In my opinion, "judicial activism," as defined in subparts a through e of this question, is inimical to our system of law and government in this country. A judge who engages in activism is behaving contrary to the law.

In my career as a judge, I bristle when I hear someone say "You are a judge – you can do what you want." I strongly disagree with and in fact deplore such sentiments. In my opinion, judges must always be modest and disciplined in their demeanor and decision making and must recognize the limitations of their authority. If a judge fails to follow the law, if a judge is an activist, the judge's decisions become unpredictable, unfair and unjust. They usurp the role of duly elected officials. They erode respect for the law which is so necessary for a peaceful, prosperous, free society.

I have always explained to jurors that as a trial judge, my role is to act as a referee of the law. Part of our country's greatness is that we are all governed by the rule of law. I became a judge and have remained dedicated to that position because of my deep commitment to the rule of law, and my belief in the important, but limited role of our courts.

As a state court trial judge since 1986, I have worked to strictly adhere to the law set forth in the Constitution, legislation and precedent established by the rulings of higher courts. I am not a problem solver. I strive to resolve disputes in accordance with the law.

My commitment to the rule of law is reflected in my rulings which recognize the importance of procedure and jurisdictional requirements. The court, for example, must respect requirements of standing and ripeness. In each case, I determine what the law is from a study of the statute and legal precedent, determine what the facts are from the evidence and then apply the law to the facts presented, without regard for my personal beliefs. I hold parties to their burden of proof, exclude evidence offered by the parties which lacks a proper foundation under the rules of evidence, and require that the parties comply with procedures set forth in statutes. I have declined to ignore, modify or expand the law. I have, for example, dismissed cases where the Plaintiff's theory is unsupported by law. Similarly, I have excluded defenses not recognized by law.

AFFIDAVIT

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

May 8, 2006 (DATE) Valerie Lynn Baker (NAME)

JURAT

State/Commonwealth of California
County of Los Angeles } ss.

Subscribed and sworn to (or affirmed) before me this 8th (Date) day of May (Month), 2006 (Year), by

(1) Valerie Lynn Baker (Name of Signer #1)

(2) _____ (Name of Signer #2)

TALIN KALFAYAN
Commission # 1397444
Notary Public - California
Los Angeles County
My Comm. Expires Feb 1, 2007

Signature of Notary Public

Place Notary Seal and/or Any Stamp Above

Other Required Information (Printed Name of Notary, Residence, etc.)

OPTIONAL

Though the information in this section is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Senate questionnaire

Document Date: 5-8-2006 Number of Pages: 37

Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT OF SIGNER #1	RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here	Top of thumb here

© 2002 National Notary Association • 9350 De Soto Ave., P.O. Box 2402 • Chatsworth, CA 91313-2402 Item #5914 Reorder: Call Toll-Free 1-800 US NOTARY (1-800-876-6827)

Senator CORNYN. Thank you very much.

Mr. Besosa?

STATEMENT OF FRANCISCO AUGUSTO BESOSA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF PUERTO RICO

Mr. BESOSA. Thank you, Mr. Chairman. I am here with my wife, Enid Martinez, who is a Superior Court Judge in Puerto Rico; my son, Francisco, who is following in my footsteps and will be a senior at Brown University next month; and also, my cousins from Pennsylvania, Lita Feather, her brother Edwin, and Edwin's wife, Mayleen.

I also want to thank the President and the committee, and Representative Fortuño for submitting my name to the White House for this important post.

Present also are some very close friends of mine: Wanda Rubianes, who worked with me at the U.S. Attorney's Office in Puerto Rico, who now works here in Washington; Flavio Cumpiano, who clerked at one of the law firms that I worked with and who works with the Puerto Rico Affairs Office in Puerto Rico. And I do not know if he is still here, but Mr. Eduardo Batia, who is head of the Puerto Rico Federal Affairs Office. I surely thank them for being here with me.

[The biographical information of Mr. Besosa follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Francisco Augusto Besosa. I am also known as Frank.

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

Residence: Guaynabo, Puerto Rico

Office: Adsuar Muñiz Goyco & Besosa, P.S.C.
Westernbank World Plaza, Suite 1400
268 Muñoz Rivera Avenue
San Juan, PR 00918

3. **Date and place of birth.**

October 26, 1949, San Juan, Puerto Rico

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

I am married to Enid I. Martínez-Moya.

She is a Superior Court Judge, employed by the General Court of Justice of the Commonwealth of Puerto Rico.

Her office is at: Arecibo Judicial Center
Courtroom 403
553 Rotarios Avenue
Arecibo, PR 00613

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

Georgetown University Law Center; August 1976 to May 1979; J.D. awarded May 1979

Brown University; September 1967 to June 1971; A.B. awarded June 1971

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations,**

nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

March 1994–Present; Partner/Shareholder; Adsuar Muñiz Goyco & Besosa, PSC

1990–March 1994; Partner; Goldman Antonetti Córdova & Axtmayer

August 1987–1990; Partner; Ferraiuoli Axtmayer & Hertell (In 1990, this Firm merged with Goldman & Antonetti to form Goldman Antonetti Córdova & Axtmayer)

November 1986–August 1987; Associate Attorney; Sweeting González & Cestero

February 1983–November 1986; Assistant US Attorney; US Department of Justice

June 1980–January 1983; Partner; Bobonis, Besosa & Rodríguez Poventud

October 1979–June 1980; Associate Attorney; O'Neill & Borges

Summer Months, 1977 and 1978; Summer Associate; O'Neill & Borges

August 1971–April 1977; United States Army

June 1999–Present; President/Treasurer; Filial Amor Corporation (a family-held corporation)

Approximately 1988--Present; Partner, FAHBU, S.E. (a limited partnership)

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

I was in the Active US Army from August 1971 to July 1976 and in the Inactive Reserve until April 1977. In April 1972, I was commissioned in the Military Intelligence Branch after completing Basic Combat Training and Infantry Officer Candidate School. I also completed the Counterintelligence Officer Course and the Personnel Security Adjudication Course at the US Army Military Intelligence School. I completed Active Duty as Captain in July 1976 and was honorably discharged from the Inactive Reserve in April 1977. I was awarded the Meritorious Service Medal.

My significant duties in the US Army were:
1972 to 1974, Counterintelligence Officer (Second Lieutenant); Okinawa, Japan

1974 to 1976, Intelligence and Security Officer (First Lieutenant/Captain); Hunter Army Airfield, Savannah, Georgia 31409

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

In 1998, I received an Alumni Service Award from Brown University for serving since 1980 as the Area Chair for Puerto Rico and the US Virgin Islands of the Brown Alumni Schools Program.

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

Bar Associations:

Puerto Rico Bar Association, 1979 to Present

Federal Bar Association, 1983 to Present
Offices held in the Puerto Rico Chapter
Director 1994-1999
President-Elect 1999
Vice President 1998
Secretary 1997
Treasurer 1996

American Bar Association, 1980 to Present

District of Columbia Bar Association, 1985 to Present

Hispanic National Bar Association

Judicial Committees:

Puerto Rico Bar Examination Review Board, Supreme Court of Puerto Rico, 1997

Evaluator, Early Neutral Evaluation Program
United States District Court, District of Puerto Rico, 1993

United States Magistrate Judge Merit Selection Panel
United States District Court, District of Puerto Rico, 1993

Committee to Revise the Local Court Rules
United States District Court, District of Puerto Rico, 1993-2003

10. <u>Other Memberships</u>: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong nor have I ever belonged to any organization active in lobbying before public bodies.

I am a member of the following organizations:

Caparra Country Club
The Plantation Club
Palmas del Mar Country Club
The Bankers Club of Puerto Rico
Brown University Sports Foundation
Friends of Brown Basketball
Brown University Alumni Schools Program

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

Puerto Rico (1979)
District of Columbia (1985)
Supreme Court of the United States (1983)
United States Court of Appeals for the First Circuit (1980)
United States Court of Appeals for the Federal Circuit (1983)
United States Court of Appeals for the Armed Forces (1983)
United States District Court of the District of Puerto Rico (1979)
United States Court of International Trade (1983)
United States Claims Court (1983)
United States Tax Court (1984)

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

None

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

The current state of my health is excellent. My last physical examination was in February 2006.

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

I have never held any judicial office.

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

I have never been a judge.

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

Assistant US Attorney
District of Puerto Rico
1983 to 1986
Appointed by the United States Attorney

17. **Legal Career:**

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

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

I have not served as a clerk for a judge.

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

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1994-Present	Founding Partner/Shareholder, Adsuar Muñiz Goyco & Besosa, PSC (formerly known as Axtmayer Adsuar Muñiz & Goyco, PSC) Westernbank World Plaza, Suite 1400 268 Muñoz Rivera Avenue San Juan, PR 00918 Director, Litigation and Trial Practice Department, 1994-Present Chairman, Recruiting Committee, 1994-1999; 2002- Present
1987-1994	Partner, Goldman Antonetti Córdova & Axtmayer Law Firm (and predecessor firm, Ferraiuoli Axtmayer & Hertell) AIG Plaza, Suite 1400 250 Muñoz Rivera Avenue San Juan, PR 00918 Member, Executive Committee, 1992-1994 Director, Litigation and Trial Practice Department, 1987-1990; 1992-1994 Chairman, Recruiting Committee, 1987-1994 Member, Compensation Committee, 1992-1994
1986-1987	Attorney, Sweeting González & Cestero Law Firm 221 Ponce de León Avenue San Juan, PR 00917
1983-1986	Assistant United States Attorney, District of Puerto Rico Chardón Tower, 12th Floor 350 Chardón Avenue San Juan, PR 00918
1980-1983	Partner, Bobonis, Besosa & Rodríguez Poventud Law Firm 129 de Diego Avenue San Juan, PR

1979-1980 Attorney, O'Neill & Borges Law Firm
AIG Plaza, Suite 800
250 Muñoz Rivera Avenue
San Juan, PR 00918

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My private practice can be characterized generally as civil and commercial litigation before Commonwealth and Federal courts and Commonwealth administrative agencies. Its character has not changed, except that since I became the director of litigation and trial practice departments of the Firms of which I have been a member, I have had additional responsibilities including mentoring and supervising attorneys and paralegals in the department, client development, dealing with clients and some administrative duties.

As an Assistant US Attorney I had one client–the United States. My practice as an Assistant US Attorney was completely civil in nature, representing the United States in affirmative and defensive litigation before federal courts.

In both private practice and as an Assistant US Attorney I also practiced appellate advocacy.

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

My clients in my private practice were mostly corporate clients and some individuals. My entire practice was devoted to federal and Commonwealth court litigation. I specialized in all types of civil and commercial litigation. Practice areas include General Civil Litigation with concentration in Commercial Litigation in Puerto Rico Commonwealth Courts and United States District Court and United States Court of Appeals; Bankruptcy and Creditors' Rights; Banking and Lenders Liability Law; Securities Regulation; Admiralty; Insurance Law; Torts; Personal Injury; Medical Malpractice; Products Liability; Telecommunications Law; Copyright and Intellectual Property; Administrative Law; Mortgage Law; Franchising (Law 75); Health Law; Alternate Dispute Resolution; Complex Litigation and Appellate Practice.

My client as an Assistant US Attorney was the United States. I represented the United States of America in all types of civil litigation, affirmative and defensive, before Federal Courts. I also had an appellate practice before Federal Courts.

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

While in private practice, I have appeared in federal and Commonwealth courts occasionally. As an Assistant US Attorney, I appeared in federal court frequently, almost daily.

2. **What percentage of these appearances was in:**
   - **(a) federal courts:** approximately 70%
   - **(b) state courts of record:** approximately 30%
   - **(c) other courts.**

3. **What percentage of your litigation was:**
   - **(a) civil:** 100%
   - **(b) criminal.**

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

I have tried eleven cases to verdict or judgment. I was sole counsel in two cases, chief counsel in six cases and associate counsel in three cases.

5. **What percentage of these trials was:**
   - **(a) jury:** 82%
   - **(b) non-jury:** 18%

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

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

1. In re Rio Piedras Explosion Litigation
   No. 96-2443(CCC) (Consolidated cases)
   (U.S.D.C., D. Puerto Rico)
   (Carmen Consuelo Cerezo, U.S.D.J.)

The Río Piedras Explosion Litigation concerned a gas explosion in Río Piedras, Puerto Rico which destroyed the Humberto Vidal Building and caused dozens of deaths, thousands of injuries and millions of dollars in property damage. It involved many cases filed in both the United States District Court and the Commonwealth Superior Court, including thousands of individual and business plaintiffs. My Firm, among others, was retained to represent the main defendants, San Juan Gas Co. and its parent corporation, Enron Corp. I participated in all aspects of both the federal and Commonwealth cases, including the declaration of both as complex litigation, preparing the draft orders that guided the cases procedurally, preparing all types of written discovery, preparing witnesses (including experts) for their depositions and eventually for trial and taking and defending depositions. Eventually, a Visiting Judge, Senior District Judge Robert J. Ward, of the Southern District of New York (now deceased), became the presiding judge in the federal court cases and ordered that the consolidated cases be tried individually, *seriatim*. Ten cases were selected to be the first "phase" of cases to be tried. I was lead counsel in four or five of them. Pretrial orders, jury instructions, etc. were drafted and witnesses and experts were prepared. As the date of trial approached, some cases were settled. The cases were not tried, however, because of Enron Corp.'s bankruptcy in 2001. Eventually, all cases were settled.

Because the National Transportation Safety Board investigated the explosion, I assisted in preparing witnesses to testify at hearings held before the Board in Puerto Rico.

Co-counsel at my Firm were Danilo M. Eboli and Lourdes I. Morera-Ledón. Their address is Adsuar Muñiz Goyco & Besosa, P.S.C., Westernbank World Plaza, Suite 1400, 268 Muñoz Rivera Avenue, San Juan, PR 00918, tel. (787) 756-9000. Other co-counsel were Neal S. Manne, Susman Godfrey, 1000 Louisiana, Houston, TX 77002, tel. (713) 653-7827; Eric A. Tulla, Rivera, Tulla & Ferrer, 50 Quisqueya Street, San Juan, PR 00917, tel. (787) 753-0438; Ramón E. Bauzá, Jr., 1612 Ponce de León Avenue, Suite 302, San Juan, PR 00909, Tel. (787) 721-8080; and Raúl Dávila Rivera, 351 Tetuán Street, San Juan, PR 00901, Tel. (787) 723-0025.

Principal counsel for plaintiffs (members of the Plaintiffs' Steering Committee established for the case) were Francisco G. Bruno, McConnell Valdés, 270 Muñoz Rivera Avenue, Suite 900, San Juan, PR 00918, Tel. (787) 759-9292; Stephen J. Lausell, Jiménez Graffam & Lausell, Midtown Building, Suite 505, 421 Muñoz Rivera Avenue, San Juan, PR 00918, Tel. (787) 767-1030; and Alvaro Calderón, Jr., Euskalduna Building, Suite 201, Corner of Navarro and Peñuelas Streets, San Juan, PR 00918, Tel. (787) 753-5050.

2. Buenrostro v. Collazo, et al.
No. 89-0384 (JAF) (U.S.D.C., D. Puerto Rico)
(José A. Fusté, U.S.D.J.) 777 F.Supp. 128
(D.P.R. 1992), aff'd 973 F.2d 30 (1st Cir. 1992)

This action was filed by my Firm pursuant to 42 U.S.C. §1983 and the Puerto Rico tort statute, Laws of P.R. Ann. tit. 31, §5141 on behalf of Mr. Buenrostro, a Dominican national with

permanent U.S. residency, his wife and family. Mr. Buenrostro was arrested by the extradition office of the Police of Puerto Rico based on an arrest warrant issued in New York and received in Puerto Rico by fax. Mr. Buenrostro protested that he had never been in New York and that he was not the person wanted in New York. The Police booked him anyway and he was remanded to prison because he was unable to post bail. Because he claimed he was not the person wanted in New York, he refused to waive extradition. Consequently, he spent 30 days in jail, where he suffered abuse by other prisoners. The formal extradition paperwork which was eventually received by the Puerto Rico Police contained a picture of the person wanted in New York, which was definitely not Mr. Buenrostro, and Mr. Buenrostro was released. During pretrial discovery, however, it was discovered that had the Police in Puerto Rico compared the fingerprints they took of Mr. Buenrostro when he was booked with those which the Police had received in numerical code by fax from New York, the Police would have immediately known that Mr. Buenrostro was not the person wanted in New York.

I participated in all pre-trial aspects of the case, including opposing a motion to dismiss based on qualified immunity, see 777 F.Supp. 926 (D.P.R.991), aff'd 973 F.2d 30 (1st Cir. 1992), and the trial, which was held in December, 2000. The case was settled just before closing arguments were heard after a trial which lasted approximately two weeks.

Co-counsel at my Firm during the pre-trial period was Juan H. Saavedra, whose current address is Banco Popular Building, Suite 703, 206 Tetuán Street, San Juan, PR 00901, Tel. (787)722-7741. During trial, I was assisted by José E. Arroyo, a law clerk at my Firm who at the time of trial had just passed the Puerto Rico Bar Examination, but had yet to be sworn in as an attorney. His current address is Wal-Mart, State Road #1, Km 28.7, Barrio Río Cañas, Caguas, PR 00725, Tel. (787) 653-7891.

Representing the defendants was Kenneth R. Colón, then the Director of the Federal Litigation Division of the Puerto Rico Department of Justice. Mr. Colón's current address is Westernbank World Plaza, Suite 1500, 268 Muñoz Rivera Avenue, San Juan, PR 00918, Tel. (787) 756-0059.

3. Lipsett v. University of Puerto Rico, et al.
No. 83-1516 (CCC) (U.S.D.C., D. Puerto Rico)
(Carmen Consuelo Cerezo, U.S.D.J.)

Ms. Lipsett was a surgery resident at the University of Puerto Rico Medical School. She filed this suit alleging sexual harassment by other interns in the surgery residency program, and that the physicians in charge of the surgery residency program knew about the harassment but ignored it. My client was the then Assistant Chief of Surgery at the San Juan Veterans Hospital. Because the Veterans Hospital is a teaching hospital, U.P.R. medical and surgery residents "rotate" through the VA Hospital as part of their residency training. Because my client was a federal employee, he requested defense from the US Department of Justice; as an Assistant US Attorney I was assigned to represent him. Ms. Lipsett alleged that my client made unwanted sexual advances toward her, even while operating. I participated in all pre-trial aspects of the

case, including drafting and filing a motion for summary judgment which was granted by the district court. At that time, I left the US Attorney's Office to go into private practice. After I had left the US Attorneys office, the US Court of Appeals for the First Circuit reversed, however, and remanded the case for trial before a different district judge. See 637 F.Supp. 789 (D.P.R. 986), reversed and remanded, 864 F.2d 881 (1st Cir. 1988). Trial was held and my client was found not liable.

Co-counsel in the case, representing the University of Puerto Rico and other physicians, were Rubén T. Nigaglioni, 255 Recinto Sur Street, San Juan, PR 00901, Tel. (787) 765-9966; James D. Noel, McConnell Valdés, 270 Muñoz Rivera Avenue, Suite 900, San Juan, PR 00918, Tel. (778) 759-9292; and Edgardo Colón Arrarás, Goldman Antonetti & Córdova, P.S.C., 250 Muñoz Rivera Avenue, Suite 1400, San Juan, PR 00818, Tel. (787) 759-8000.

Ms. Lipsett was represented by Judith Berkan, Esther Vicente and Charles Hey Maestre. Ms. Berkan's address is G-11 O'Neill Street, San Juan, PR 00918, Tel. (787) 764-0814. I do not know Ms. Vicente's or Mr. Hey's addresses or telephone numbers.

4. Navarro de Cosme v. Díaz Carazo, et al.
No. 88-0438 (JAF)(U.S.D.C., D. Puerto Rico)
(José A. Fusté, U.S.D.J.)
922 F.2d 926 (1st Cir. 1991)

This was a medical malpractice action. Ms. Navarro was some 36 or 38 weeks pregnant and went to Hospital Pavía complaining of chest pains. She was diagnosed by the ER physician as suffering from costochondritis, given acetaminophen for her pain and discharged. She returned to the Hospital later that evening, however, still complaining of chest pains. Because she was in pain and very anxious, she was admitted to the hospital and administered Demerol for her pain. An external fetal monitor was placed on her. The next morning, no fetal heart beats were heard through the monitor. The fetus had died in the womb. Two or three weeks later, Ms. Navarro gave birth to a still-born child. She sued the hospital, the ER physician who had treated her and her gynecologist, Dr. José Díaz Carazo. She alleged that the baby had died because Ms. Navarro was administered Demerol which, allegedly, was counter-indicated due to her pregnancy.

One month before the trial date, my Firm was retained by Dr. Díaz Carazo's insurance carrier to represent him. His previous attorney had been asked to withdraw from the case. We spent the entire month reviewing the file and preparing for trial. On the date of trial, after the jury was empanelled, the judge determined that the jury venire was conducted improperly, dismissed the jury and set a new date for trial. We were then able to depose some of plaintiff's expert witnesses which had not been previously deposed. Just before and during trial, we were able to exclude two of plaintiff's experts. At trial we demonstrated, through expert witnesses, that the cause of the baby's death was not the administration of Demerol, but that Ms. Navarro had a condition known as velamentous insertion into the placenta of the umbilical cord. This condition consists that the three vessels inside the umbilical void are not protected by skin or

gelatinous substance when attached to the placenta. It is called velamentous because the unprotected vessels resemble a veil. Death of the fetus was caused by a constriction of one or more of the exposed vessels due to the baby's movement inside the womb, which impeded the flow of blood (and therefore oxygen) from the mother to the child. After a trial of at least four weeks, the jury issued a verdict for defendants which was affirmed by the court of appeals.

Co-counsel for Dr. Díaz Carazo were Gregory T. Usera, Polo Norte Building, 261 Tetuán Street, San Juan, PR 00901, Tel. (787) 725-8080; and José A. Axtmayer, Torre de la Reina, Ground Floor, 450 Constitution Avenue, San Juan, PR 00901, Tel (787) 777-4040. Counsel for Hospital Pavía was Jorge Galva, 315 Hawkeye Drive, Iowa City, IA 52246, Tel. (319) 353-5152.

Counsel for plaintiffs were David Efrón, Norfe Building, Suite 201, 714 65th Infantry Avenue, San Juan, PR 00924, Tel. (787) 753-6455; and Alfonso Miranda Cárdenas, Banco Popular Building, Suite 702, 206 Tetuán Street, San Juan, PR 00901, Tel. (787) 721-3208.

5. Vega et al. v. Ponce Federal Bank, F.S.B.
No. 88-0369 (JAF) (U.S.D.C., D. Puerto Rico)
(José A. Fusté, U.S.D.J.)

In this lenders liability action, Mr. Vega alleged that the defendant bank took control of a residential project Mr. Vega was developing on his property, causing him damages. Throughout the pre-trial phase of the case and for two weeks after the trial started, the bank was represented by other attorneys. Because the bank was not satisfied with those attorneys, its President called me and requested that my Firm assume the bank's representation two weeks into the trial. On a Thursday afternoon, one of my partners and I went to see the presiding judge to inform him that the bank had retained us. The judge allowed the substitution of counsel and instructed us to be ready to proceed with the trial that following Tuesday.

We spent from Thursday evening to Tuesday morning, almost non-stop, meeting with the bank's officers, reviewing evidence and preparing witnesses. When trial resumed, Mr. Vega completed his direct testimony in the morning; he was cross-examined for the next six days. The trial lasted over six weeks during which much technical and financial testimony was presented by the bank's officers. My participation in the case included preparing witnesses, reviewing evidence and presenting and cross-examining witnesses. At the end of the trial, the jury issued a $2,000,000 verdict against the bank. I prepared a motion to set aside the verdict, the motion was granted by the judge, who ordered a new trial, stating that the verdict "shocked the conscience." While preparing for the new trial, the case was settled for an amount less than the verdict.

Co-counsel for the bank were Gregory T. Usera, Polo Norte Building, 261 Tetuán Street, San Juan, PR 00901, Tel. (787) 725-8080; and José A. Axtmayer, Torre de la Reina, Ground Floor, 450 Constitution Avenue, San Juan, PR 00901, Tel (787) 777-4040.

Counsel for the plaintiff was Harry Anduze, 1454 Fernández Juncos Avenue, San Juan, PR 00909, Tel. (787) 723-7171.

6. Martínez Vázquez v. Hospital Dr. Pila, et al.
No. 88-1106 (PG) (U.S.D.C., D. Puerto Rico)
(Juan M. Pérez Giménez, U.S.D.J.)

This was a medical malpractice case. Ms. Martínez Vázquez was riding a tandem bicycle with her common-law husband and were run-over by a drunk driver. Ms. Martínez Vázquez's common-law husband was killed; Ms. Martínez-Vázquez was taken to Hospital Dr. Pila with multiple fractures and trauma. The ER physician ordered a series of X-rays to be taken from Ms. Martínez Vázquez's head to her feet. Once stabilized, she was transferred to a hospital room. Some two days later she was administered a pregnancy test which showed she was approximately eight weeks pregnant. Her child, a girl, was born without legs, one was missing from below the knee; the other from above the knee. The allegations against defendants, including the hospital, the ER physician and a radiologist, was that Ms. Martínez Vázquez should have been protected with lead aprons during the X-rays, even though she was unconscious. Protocol calls for all women of child-bearing age who are unconscious to be assumed to be pregnant and be covered with lead aprons when x-rayed to protect the developing fetus.

My Firm and I were retained to represent the hospital and its insurance carrier to try the case; pretrial procedures and discovery had concluded with previous legal representation. The trial lasted eight weeks; I was lead counsel. By the time the trial was held, the baby girl was five years old and in school. She wore prosthetics on both her legs. I conducted direct examination of defendants' witnesses, including the physicians who had treated Ms. Martínez Vázquez and of defendants' experts, which included a psychologist, a radiologist and a gynecologist. I also cross-examined plaintiffs' witnesses, including the five-year-old girl, and expert witnesses.

We were able to prove, through expert testimony, that the series of X-rays taken of Ms. Martínez Vázquez were not the cause of her daughter's skeletal damages. We showed that for skeletal damage to occur to a developing fetus because of X-ray radiation, the X-rays must have been therapeutic, such as those given to cancer patients, and that the fetus' Central Nervous System would have had been affected, also. In other words, if the radiation from the X-rays caused the daughter's skeletal damage, she would have had to be in a vegetative state. It was proven that the skeletal damage to the daughter's legs was due to a failure of the legs to develop properly in the womb.

The verdict came down for defendants. No appeal was filed by the plaintiff.

Co-counsel representing the other defendants were Carlos Martínez Texidor, 77 Comercio Street, Ponce, PR 00731, Tel. (787) 840-1180, Efrén T. Irizarry, PO Box 1844, Arecibo, PR 00613, Tel. (787) 878-0442 and Thomas Doran, 400 Calaf Street, Suite 60, San Juan, PR 00918, Tel. (787) 272-4206.

Plaintiff was represented by Raúl Dávila Rivera, 351 Tetuán Street, San Juan, PR 00901, Tel. (787) 723-0025.

7. Ponce Federal Bank, F.S.B. v. The Vessel "Lady Abby" et al.
No. 90-1093 (PG) (U.S.D.C., D. Puerto Rico)
(Juan M. Pérez Giménez, U.S.D.J.)
No. 92-1413 (U.S.C.A., 1st Cir.)
Stephen Breyer (U.S.C.J.)
780 F.Supp. 878 (D.P.R.), affirmed 980 F.2d 56 (1st Cir. 1992)

This was an action in rem in admiralty to foreclose on a mortgage on a vessel, the "Lady Abby." The action also included an action in personam under Puerto Rico law against Cristóbal Burgos, to whom the original owners had sold the vessel, and against the original owners as a deficiency claim.

The Bank had loaned money to the vessel's original owners, Israel Santiago and Abigail Rodríguez (the Borrowers), to purchase the "Lady Abby." The Borrowers signed a promissory note payable in monthly installments, and executed and delivered to the Bank a first preferred ship mortgage to secure payment of the amount of the promissory note. The ship mortgage was duly filed with the U.S. Coast Guard.

The Borrowers then sold the "Lady Abby" to Burgos, who agreed to pay three past due installments, to be responsible for the payment of the balance of the note and to obtain from the Bank a transfer of the note and a release in favor of the Borrowers.

When Burgos failed to make the installment payments to the Bank, the Bank filed an in rem action against the vessel in federal court, alleging federal question jurisdiction because it was a claim in admiralty. The Bank also sued Burgos and the Borrowers in personam under Puerto Rico law, alleging pendant jurisdiction.

The district court granted summary judgment in favor of the Bank and against Burgos and the Borrowers. It first held that the court had jurisdiction over the case under the Ship Mortgage Act and entered judgment against Borrowers, finding that the Bank had not consented to Burgos' assumption of the debt, and against Burgos because the Bank was a third-party beneficiary due to the agreement between Burgos and the Borrowers. The court also held that it had jurisdiction over the Borrower's cross-claim for reimbursement against Burgos because the cross-claim related to the property that was the subject matter of the original action-the vessel.

On appeal by Burgos, the court of appeals affirmed the district court's deficiency judgment against Burgos and its judgment in favor of the Borrowers for reimbursement. Burgos alleged that the district court did not have jurisdiction over him because the Bank's action was in rem against the vessel. The court of appeals found that the district court had original jurisdiction over the case in admiralty, that the district court, though sitting in admiralty, had "pendant party" jurisdiction to hear the closely related in personam claim, even thought it was a state-law claim, because it arose out of a common nucleus of operative facts with the admiralty claim and the resolution of those related claims would conserve judicial resources and be fair to the parties.

In this case I met with the Bank officials, designed a case strategy and recommended it to the Bank, drafted and filed the complaint, gathered and analyzed the documentation necessary to file a motion for summary judgment and drafted the motion for summary judgment. For the appeal, I drafted the Bank's brief and argued the case before the court of appeals. Co-counsel in the case was Miguel Juan Rodríguez Marxuach, now at Rodríguez Marxuach & Gierbolini, P.S.C., Hato Rey Center, Suite 524, 268 Ponce de León Avenue, San Juan, PR 00918, Tel. (787) 754-9898; Counsel for defendants were John M. García, García & Fernández, 33 Bolivia Street, San Juan, PR 00917, Tel. (787) 764-1932 and Miguel E. Miranda, 22 Mayagüez Street, San Juan, PR 00917, Tel. (787) 282-0022.

8. In re Benlate Fungicide Litigation
No. 92-2371 (JAF) (Consolidated Cases)
(U.S.D.C., D. Puerto Rico)
(José A. Fusté, U.S.D.J.)

This was a products liability case brought by growers of ornamental flowers in Puerto Rico against E.I. DuPont de Nemours, Inc., the manufacturers of Benlate, a fungicide used primarily on ornamental plants. Similar cases were filed in Florida and Texas. My Firm represented several ornamental growers; two other firms represented other growers. I was lead counsel for those cases filed by my firm. I participated in and coordinated all pre-trial aspects of the cases, interviewing clients, coordinating the experts, reviewing their reports for completeness, conducting discovery, including taking and defending depositions and negotiating settlement. DuPont first settled with all plaintiffs represented by my Firm.

Co-counsel which represented other growers were Gregory T. Usera, Polo Norte Building, 261 Tetuán Street, San Juan, PR 00901, Tel. (787) 725-8080 and Stephen J. Lausell, Jiménez Graffam & Lausell, Midtown Building, Suite 505, 421 Muñoz Rivera Avenue, San Juan, PR 00918, Tel. (787) 767-1030.

Counsel for defendant DuPont were Eric A. Tulla, Rivera Tulla & Ferrer, 50 Quisqueya Street, San Juan, PR 00917, Tel. (787) 753-0438 and J. Kennard Neal, Alston & Bird, One Atlantic Center, 1201 West Peachtree Street, Atlanta, GA 30309, Tel. (404) 881-7000.

9. Cabot LNG Corp. v. Puerto Rico Electric Power Authority, et al.
No. 94-2036 (DRD) 922 F.Supp. 707 (D.P.R. 1996)
(U.S.D.C., D. Puerto Rico)
(Daniel R. Domínguez, U.S.D.J.)
(922 F.Supp. 707 (D.P.R. 1996)

This case involved the selection of a joint venture between my Firm's client, Enron Corp. and another entity by the Puerto Rico Electric Power Authority to build and operate a co-generation plant in Peñuelas, Puerto Rico and to sell electricity to the Authority. Cabot LNG Corp. had also submitted a request for proposal to build the plant and sell the electricity it generated, but Cabot was not selected. It then filed a suit requesting injunctive relief alleging

that the selection process was flawed because there was no competitive bidding. On cross-motions for summary judgment, the court granted defendants' motion for summary judgment and denied the plaintiff's motion for summary judgment. I participated in the factual investigation and legal research for, and the drafting of, the defendants' motion for summary judgment and presented part of oral argument.

My co-counsel was Lynn R. Coleman, Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, NW, Washington, DC 20005, Tel. (202) 371-7000; Counsel for Enron Corp.'s partner in the joint venture was Jay A. García Gregory, currently a US District Court Judge in Puerto Rico, Clemente Ruiz Nazario US Courthouse, 150 Chardón Avenue, Hato Rey, PR 00918, Tel. (787) 772-3170. Counsel for the Electric Power Authority was Mr. Pedro Santiago, now deceased.

Counsel for plaintiff were Robert S. Frank, Jr., Choate, Hall & Stewart, Two International Place, Boston, MA 02110, Tel. (617) 248-5000, and Roberto Quiñones, now at McConnell Valdés, 270 Muñoz Rivera Avenue, Suite 900, San Juan, PR 00918, Tel. (787) 759-9292.

10. Tradewinds Marketing, Inc. v. General Accident Insurance Company of Puerto Rico, Ltd.
No.86-0055 (RLA) (U.S.D.C., D. Puerto Rico)
665 F.Supp. 104 (D.P.R. 1987)
(Raymond L. Acosta, U.S.D.J.)

This admiralty case was my first assignment in private practice after leaving my job as an Assistant U.S. Attorney. Discovery was completed and trial had been scheduled. I was requested to draft a motion for summary judgment opposing an allegation based on the admiralty concept of barratry, and to request that trial be postponed until the motion for summary judgment was ruled upon. I read the file, including depositions and written discovery, and conducted the necessary research. Based on the facts gleaned from the file, and the research I conducted, I determined that no barratry occurred and that the case was ripe to be dismissed summarily.

The plaintiff had hired a vessel to pick up cargo in the Dominican Republic and bring it to Puerto Rico for delivery to its owner, the plaintiff, upon payment of the freight charges. Three days after the vessel arrived in Puerto Rico with its cargo, the plaintiff paid 20 percent of the freight cost and informed the vessel's Master that he was having difficulties in obtaining money from banks to pay the balance due. After waiting another day without receiving payment, and faced with increasing harbor costs, the Master of the vessel left port and sold half the cargo on St. Martin, French West Indies to recover the money owed to him, as permitted by the charter party between the owner of the cargo and the vessel's Master. The plaintiff argued that the Master's actions constituted barratry. The court disagreed and dismissed the case.

Counsel for the plaintiff was Harry Segarra, 42 Isabel Street, Ponce, PR 00731, Telephone (787) 848-8113.

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

During my legal career, I have been an active member of the Puerto Rico Chapter of the Federal Bar Association since 1983. From 1994 to 1999 I held the positions of Director, Treasurer, Secretary, Vice President and President-Elect.

In 1997, I was appointed by the Supreme Court of Puerto Rico to the Puerto Rico Bar Examination Board. With another attorney, I corrected the question on the bar exam having to do with civil procedure. I noticed that the answer provided as the correction guide was incorrect and brought it to the attention of the Associate Justice with responsibility for the bar examination. He agreed with me that the answer given as the question's correction guide was incorrect and revised it according to my recommendation.

In 1993, I was selected by the US District Court to be an Evaluator for the court's Early Neutral Evaluation Program established pursuant to 28 U.S.C. §473 (b)(4) and attended training sessions to prepare me to be an Evaluator. The court decided, however, not to use the Early Neutral Evaluation Program, subsequently deciding to establish a mediation program to meet its ADR requirements.

Also in 1993, I was appointed by the US District Court to the US Magistrate Judge Merit Selection Panel which recommended that Aida Delgado Colón, then an Assistant Public Defender, be appointed as a US Magistrate Judge. From 1993 to 2003 I was a member of the Committee established by the US District Court to revise its local rules.

When I was a partner at the firm of Goldman Antonetti Córdova & Axtmayer, I served as an instructor in a NITA-Type course in civil trial advocacy, using NITA materials, which was given to the firm's associate attorneys.

I have been a lecturer on the US District Court's Local Rules as part of a Seminar on Practice before the US District Court sponsored by the Puerto Rico Chapter of the Federal Bar Association in 1994, a lecturer in a Seminar on Mass Torts sponsored by the Hispanic National Bar Association during its convention in Puerto Rico in 1995, and a lecturer on, and coordinator of, a Seminar on Practice before the US District Court for the District of Puerto Rico sponsored by the Puerto Rico Bar Association during its convention in 1996. The overall coordinator for seminars later informed me that the seminar was the best presented during the convention.

From 1994 to 1999, I was an instructor on the US District Court's Local Rules and on the Federal Rules of Civil Procedure as part of the review course given semi-annually by the Puerto Rico Chapter of the Federal Bar Association as preparation for the US District Court's Bar Examination.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will not receive any amounts from stock, options, or uncompleted contracts. I expect to be paid my partnership share in Adsuar Muñiz Goyco & Besosa, P.S.C. pursuant to the partnership agreement, during the two years immediately after my withdrawal from the Firm. I hold notes guaranteeing advances made to the Firm. Unless the notes are purchased from me by my current partners upon my withdrawal from the Firm, I expect to receive interest income and return of the principal from those notes through May 31, 2009, when the last note becomes due. I also expect to receive deferred income from my deferred income plan and my Money Purchase Plan upon retirement. I expect both to be "rolled over" upon my withdrawal from the firm.

I have a minor partnership interest in a Special Partnership which is the owner of an office building in San Juan, PR. I do not expect to receive compensation from the Special Partnership in the near future.

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

I will resolve potential conflicts of interest on a case-by- case basis pursuant to the Code of Conduct for United States Judges and applicable statutes, including 28 U.S.C. §455. As required by section 455(c), I will maintain myself informed about my personal and fiduciary financial interests and those of my spouse. I do not have any minor children living in my household, but while they remain in my household as adults, I will maintain myself informed of their personal and fiduciary financial interests.

Potential conflicts-of-interest during my initial service in the position to which I have been nominated would include proceeding in which attorneys of my former law firm are appearing. There are no categories of litigation that are likely to present potential conflicts of interest during my initial service as a US District Judge. Other than the liquidation of my shares in the Firm and the payment of notes and my minor share in a Special Partnership, there are no other financial arrangements that are likely to present potential conflicts of interest during my initial service as a US District Judge.

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

   No

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

   See attached Financial Disclosure Report

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

   See attached Net Worth Statement

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

   No

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Calendar Year 2005

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial) Besosa, Francisco A	2. Court or Organization U.S. District Court, P.R.	3. Date of Report 5/16/2006
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge-Nominee	5. Report Type (check appropriate type) (●) Nomination, Date 5/16/2006 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2005 to 4/30/2006
7. Chambers or Office Address 1400 Westernbank World Plaza 268 Muñoz Rivera Ave. San Juan, PR 00918	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.	President-Treasurer	Filial Amor Corp. (Family held corporation)
2.	Partner/ Stockholder	Adsuar, Muñiz, Goyco & Besosa, PSC
3.	Executor	Estates #1, #2, and #3
4.	Partner	FAHBU, S.E.

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	3/1994	Partner/shareholder in Adsuar, Muñiz, Goyco & Besosa PSC. I expect to be paid my partnership share pursuant to the partnership agreement.
2.	1988	Minor partnership in a special partnership known as FAHBU, S.E.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Besosa, Francisco A	5/16/2006

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	GROSS INCOME (yours, not spouse's)
1.	2004	Adsuar, Muñiz, Goyco & Besosa, PSC-salary	142,000
2.	2005	Adsuar, Muñiz, Goyco & Besosa, PSC-salary	142,000
3.	2006	Adsuar, Muñiz, Goyco & Besosa, PSC-salary	50,000
4.			

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

_ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2005	University of Puerto Rico Law School- Associate Professor-salary
2.	2005	Puerto Rico General Court of Justice - Superior Court Judge-salary
3.	2005	Docto Juris, Inc. - Bar review course instructor-salary
4.	2006	Puerto Rico General Court of Justice - Superior Court Judge-salary

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

_ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	EXEMPT	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Besosa, Francisco A	5/16/2006

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	EXEMPT		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
Besosa, Francisco A	5/16/2006

VII. INVESTMENTS and TRUSTS -- income, value, transcations (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
1. Accounts Receivable from Adsuar, Muñiz, Goyco & Besosa, PSC	E	Interest	M	U	exempt				See note in Part VIII
2. Oriental Group- Diversified Growth IRA		None	L	U					
3. Oriental Group - Diversified Growth IRA		None	M	U					
4. Law Firm, Adsuar, Muñiz, Goyco & Besosa, PSC - stock	D	Other	K	U					See note in Part VIII
5. Filial Amor Corp. - common stock		None	K	U					
6. Share in FAHBU, S.E.		None	K	U					
7. Docto Juris, Inc. - common stock	B	Dividend	J	U					
8. Oriental Group- CODA Profit Sharing Plan (401K)		None	N	U					
9. Caribbean Pensions- Money Purchase Plan		None	N	U					
10. Estate #1		None	M	U					
11. Estate #2		None	M	U					
12. Estate #3		None	K	U					
13. Brokerage Account #1- Money Fund	A	Interest	K	U					

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
(See Columns B1 and 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 Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
(See Column C2)	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Besosa, Francisco A	5/16/2006

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

1) The Accounts Receivable consist of advances made to Adsuar, Muñiz, Goyco & Besosa, PSC, at 15% annual interest. (Part VII, Investments and Trusts)

4) Share of net income from Adsuar, Muñiz, Goyco & Besosa, PSC. (Part VII, Investments and Trusts)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Besosa, Francisco A	5/16/2006

IX. CERTIFICATION.

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

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

Signature _____ Date May 16, 2006

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	369	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others		208	282	Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		214	688
Real estate owned-add schedule		800	000	Chattel mortgages and other liens payable		41	843
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		557	090				
Cash value-life insurance							
Other assets itemize:							
See attached schedule	1	304	981				
				Total liabilities		256	531
				Net Worth	2	635	191
Total Assets	2	891	722	Total liabilities and net worth	2	891	722
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			
On leases or contracts				Are you defendant in any suits or legal actions?			
Legal Claims				Have you ever taken bankruptcy?			
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$ 800,000
Other assets	
IRAs	$187,317
Deferred Income Benefits	703,605
Spousal retirement plan	47,247
Shares in Law Firm	17,960
Shares in family held corporation	15,704
Special Partnership interest	25,714
Business interest	6,742
Undivided inheritance interests	300,692
Total Other Assets	$ 1,304,981
Real Estate Mortgages Payable	
Personal residence	$ 214,688

III. GENERAL (PUBLIC)

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

For several years during the early stages of my practice (before becoming an Assistant US Attorney), I represented, free of charge, the elderly father of the domestic housekeeper who had worked for my parents since I was a child. The gentleman lived alone in a crude dwelling without toilet facilities on property belonging to his extended family. He was constantly harassed by his nephews, to the point that once they accused him of breaching the peace and malicious damage to property. I defended him at trial and he was acquitted. Sometime later, his nephews beat him up, and I coordinated with the District Attorney to file assault and battery charges against his nephews. They were found guilty and fined. Most importantly, they stopped harassing their uncle.

Since then, I have assisted his daughter (now in her 70's) obtain public housing and other matters for which she has requested my assistance.

The US District Court once assigned me to represent a social security claimant whose request for benefits had been denied administratively. I prepared and filed a brief with the district court on the claimant's behalf, requesting that the administrative decision be reversed. The district court, however, affirmed the decision of the Social Security Administration. I appealed the district court's decision to the court of appeals, which reversed with instructions that the district court remand the case to the administration for further hearing. I represented the claimant at that administrative hearing, after which the administration determined that the claimant was eligible for benefits, and granted him the benefits he deserved.

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

I do not belong to any organization which discriminates.

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

   There is no selection commission in my jurisdiction to recommend candidates for nomination to the federal courts. Puerto Rico's Resident Commissioner, Representative Luis Fortuño, recommended me to the President as a person qualified to be a United States District Judge. I was interviewed by the Deputy Counsel to the President and an assistant. After completing all nomination paperwork and after a background investigation was conducted, I was notified that that the President would be sending my nomination to the Senate.

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

   No

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

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

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

   a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

   b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

   c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

   d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of a judge must be governed by several principles. First, a judge does not make the law; a judge interprets the law. Otherwise, a judge usurps the prerogative of the legislature and, by doing so, dangerously tilts the delicate balance among the three branches of government which the Framers of the Constitution wisely created to limit the exercise of governmental power and to minimize its potential for abuse by dispersing it among the three branches.

Second, a judge must always be aware that precedent and decisions of higher courts also limit the exercise of the judicial power. Stare decisis gives the law a necessary stability and certainty. It is the rudder which keeps the law on a true course.

Third, a judge's role is limited by what is a "case or controversy" properly before the court, no matter how sympathetic the position of a party may be. If there is no "case or controversy," a judge may not exercise the judicial power.

Fourth, a judge may not promote his or her own causes or social interests or impose his or her own sense of justice on the legal system or on society. A judge is a judge to promote the causes and interests under the law. A judge must be guided by the law, not his or her personal preferences.

Fifth, a judge must not utilize the judicial power to promote political causes or ideals, though often a judge's decision may be perceived as promoting a particular cause or ideal.

Sixth, a judge must not supervise or impose obligations on the other branches of government. This is not to say, however, that the judiciary should always defer to the other branches of government. On the contrary, the judiciary exercises its power to insure that the other branches of government remain true to the Constitution and the laws which have been enacted.

When a judge's decision is perceived as contrary to these principles, the judge is labeled as a "judicial activist" by those who may not agree with the decision. The truth is that a judge's function is complex. If a judge is true to these principles and is thorough and rigorous in his or her analysis of the facts of the controversy before the court and the law to be applied to those facts, then he or she has performed his or her role correctly and has properly exercised the judicial power.

AFFIDAVIT

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

May 15, 2006 (DATE)

(NAME)

Affidávit No. 252

Sworn and subscribed before me by Francisco Augusto Besosa of legal age, married, attorney-at-law and resident of Guaynabo, Puerto Rico, whom I personally know, this 15th day of May, 2006.

MORERA LEDUC LOUR ABOGADA-NOTARIA

(NOTARY)

Senator CORNYN. Thank you, Mr. Besosa.

Judge Gutierrez?

STATEMENT OF PHILIP S. GUTIERREZ, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge GUTIERREZ. First, I would like to thank the President for the nomination. I would like to thank the Chairman for the opportunity at this hearing. I would also like to thank Senators Boxer and Feinstein for the kind introduction.

Unfortunately, I was not able to bring my family, my lovely wife Anna, and my son Connor, who is 12, and my daughter Erin, who is 9. They are back in California. Thank you.

[The biographical information of Judge Gutierrez follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

   Philip Steven Gutierrez

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

   Residence: Claremont, CA

   Office Address: 400 Civic Center Plaza, Pomona, CA 91766

3. **Date and place of birth.**

   October 13, 1959, Los Angeles, CA

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

   Spouse: Anna M. Gutierrez
   Occupation: Elementary School Teacher
   Ontario-Montclair School District
   1525 West Fifth Street
   Ontario, CA 91762

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

   UCLA School of Law
   Dates of Attendance: 8/81 to 6/84
   Degree Received: Juris Doctor (6/15/84)

   University of Notre Dame
   Dates of Attendance: 8/77 to 5/81
   Degree Received: B.A. (English) (5/17/81)

   Saint Patrick's College, Maynoth, Ireland
   Dates of Attendance: 9/78 to 5/79

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

9/12/97 – present; Los Angeles Superior Court; Judge

6/88 to 9/97; Cotkin & Collins; Managing Partner

10/86 to 6/88; Kern & Wooley; Associate

7/86 to 9/86; LaFollette, Johnson DeHaas, Fesler & Ames; Associate

6/82 to 7/86; Wolf, Pocrass & Reyes; Law Clerk and Associate

6/81 to 8/81; Lloyds Bank California; Clerk

2004-2005; ASTAR; Member, Board of Directors

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

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

UCLA School of Law, Rubalcava Scholarship recipient.

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

Los Angeles Superior Court Executive Committee, 2005 – present

California Judges Association, Committee on Judicial Ethics
Chair (2003-2004), Vice-Chair (2002-2003)

California Center for Judicial Education and Research (CJER)
Science and the Law Steering Committee, 2005 – present
CJER, New Judge Education Committee, 2002 – 2005
CJER, Judicial Ethics Education Committee, 2000 – 2003

CJER, Qualifying Judicial Ethics Program I and II,
Team leader/faculty member, 2001 – present
CJER, New Judges' Orientation
Seminar leader and ethics faculty member, 2000 – present

B.E. Witkin California Judicial College; Seminar leader and faculty member, 2004-2005

State Bar Committee on Professional Liability Insurance, 1991-1997

Robert A. Banyard Inn of Court, Barrister, 1993 – 1997

Association of Southern California Defense Counsel
Board Member and Co-chairman of Seminars Committee, 1996 - 1997

American Bar Association, Tort and Insurance Practice
Insurance Coverage Litigation Committee, 1992 - 1997

Orange County Bar Association, 1988 – 1997

Hispanic Bar Association of Orange County; Board member; 1993 - 1995

Westside Legal Services; Board of Directors; 1986 – 1998

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

Rotary Club of Whittier, 1998 – present
From 2001 through 2002, I served as President of the Club. I also served on the Club's Board from 1999 to 2003.

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

(a) State of California; June 11, 1985;
(b) United States District Court for the Central District of California; January 5, 1987;
(c) United States District Court for the Southern District of California; January 22, 1987;
(d) United States District Court for the Eastern District of California; March 21, 1988;
(e) United States Court of Appeals for the Ninth Circuit; August 27, 1991;
(f) United States District Court for the Northern District of California; December 20, 1994.

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

Contributing editor, "Weinstein's Evidence Manual," Matthew Bender, 1991. In the Evidence Manual, I edited a chapter dealing with "Judicial Notice," as delineated in Rule 201 of the Federal Rules of Evidence.

Author, "Walking the Tightrope: Contesting Coverage During the Underlying Case," Litigating the Coverage Claim, American Bar Association, Torts and Insurance Practice Section, 1992. This paper/chapter was presented at the TIPS Annual meeting in Atlanta, Georgia. The paper addressed judicially recognized vehicles for insurance carriers to dispute insurance coverage and discussed methods to avoid bad faith liability.

Authored three articles listed below, published in the Cotkin & Collins newsletter. The first article analyzed accountants' potential liability to non-clients. The later articles reviewed the development of case law relating to the recovery of emotional distress damages in legal malpractice lawsuits.

"Supreme Court Limits Liability for Accountants to Non-Client Investors." C&C's Legal Update, Spring 1993;

"Courts Curtail Recovery of Emotional Distress in Legal Malpractice Actions," C&C's Legal Update, Winter 1994;

"Courts Continue to Narrow Recovery of Emotional Distress Damages in Legal Malpractice Actions," C&C's Legal Update, Summer 1996.

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

My health is excellent. My last physical examination was February 3, 2006.

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

In January of 2000, I was elevated to the Superior Court by court unification. As a Superior Court Judge, my current assignment includes the hearing of felony trials, preliminary hearings, probation violations, and pretrial motions. I also serve as the Assistant Supervising Judge for the East District. Previously, I managed a direct felony court, which included handling felony cases from arraignment to trial. From January

2000 to August 2001, I served as the first Site Judge at the Whittier Branch Court. My responsibilities during that time included not only a direct calendar misdemeanor trial court, but also the personnel and the other administrative matters which arose within the branch during the initial period following court unification.

On August 21, 1997, Governor Pete Wilson appointed me to serve on the Whittier Municipal Court. As a Municipal Court Judge, I presided over misdemeanor matters from arraignment to trial. I also regularly conducted felony arraignments and preliminary hearings. Civil matters were another aspect of my assignment, as I handled small claims, unlawful detainers, and limited jurisdiction litigation. While on the Municipal Court, I was elected Assistant Presiding Judge and served briefly as the Presiding Judge prior to unification.

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

(1) Citations

In my position as a judge assigned to a felony trial court, I have presided over eighty-five felony trials. Previously, while serving on the Municipal Court, I handled approximately eighty misdemeanor trials. On these types of cases, rulings are made orally on the record. Accordingly, I have not authored significant written opinions during felony and misdemeanor trials.

I have summarized seven felony criminal cases in which I presided as the judicial officer. The cases provide a sampling of the types of cases that I have been assigned in the felony trial court.

a. People v. Guy Benjamin James
Los Angeles Superior Court, Case No. KA 057663
Court of Appeal, Second Appellate District, Case No. B165432

Defendant and Jacquelyn James were married, but were in the process of getting a divorce. During an argument, defendant armed himself with a firearm. Defendant confronted Ms. James with the gun and shot her. On the way to the hospital, Ms. James told paramedics that her husband ". . . hit me, then shot me." Ms. James died at the hospital. At trial, defendant testified he pulled the gun out to scare his wife and did not remember pulling the trigger.

The jury was instructed on premeditated first degree murder, second degree murder based

on express or implied malice, voluntary manslaughter based on sudden quarrel or heat of passion, involuntary manslaughter in the commission of an unlawful act not amounting to a felony, and misdemeanor brandishing a firearm. The prosecutor asserted that defendant was guilty of premeditated murder, while the defense insisted the homicide was an involuntary manslaughter.

Defendant was convicted of second degree murder. The jurors also found the defendant personally used, intentionally discharged, and proximately caused death with a firearm. Defendant was sentenced to forty years to life.

b. People v. Jose Juan Pulido
Los Angeles Superior Court, Case No. VA 064489
Court of Appeal, Second Appellate District, Case No. B 161450

Defendant Jose Juan Pulido went to the victim's residence in an attempt to locate an individual named Mercado. When the victim did not tell defendant where to find Mercado, defendant kidnapped the victim, shot him in the knee to induce him to talk, and then shot at him several more times before driving away.

Defendant was found guilty by a jury of torture, aggravated mayhem, kidnapping, and assault with a firearm. The jurors also found true the special allegations that defendant personally used a firearm and inflicted great bodily injury. Mr. Pulido was sentenced to 51 years and 8 months plus life imprisonment.

c. People v. Robert Lee Salazar
Los Angeles Superior Court, Case No. KA 052534

Defendant and coworker Sandra Orellana traveled from Texas to the San Gabriel Valley on a business trip. On the first day of the trip, defendant and Orellana took a business associate out to dinner. After dinner, defendant and Orellana returned to the hotel and were observed drinking and dancing in the hotel's bar. After the bar closed, defendant and Orellana were seen heading to their adjoining rooms on the eighth floor. The next morning, Orellana was found dead outside the hotel on the ground floor. Initially, defendant claimed he did not have any information regarding Orellana's death. Later, defendant asserted that Orellana fell to her death from the eighth floor balcony as the couple engaged in sex.

Given the facts, the case received attention from local and national television networks. After a hearing, cameras were allowed to tape the trial provided that the videotapes were returned to the court each day and would not be released until a final verdict was reached on the case. "48 Hours" agreed to the conditions and filmed the entire trial.
The People charged Salazar with murder and sought a conviction for first degree murder. In turn, the defendant claimed the incident was an accident and sought an acquittal. The jury returned a verdict of not guilty.

d. People v. Eric Macias
Los Angeles Superior Court, Case No. KA 055282
Court Of Appeal, Second Appellate District, Case No. B 171380

Defendant and Ana Gomez ("Gomez") had a stormy 13-year relationship. Gomez decided to attend a Christmas Party with a male co-worker. After the party, Gomez and her friend returned to her home. During the evening, defendant and two friends searched for Gomez and eventually tracked her down at her home. Defendant and his two friends charged the residence to confront Gomez. Ultimately, defendant found the male friend and stabbed him. The male victim was left behind and Gomez was taken from the scene. The victim died at the scene.

A jury convicted defendant of first degree murder, kidnapping, and first degree burglary. Defendant was sentenced to 25 years to life on the murder count, the high term of 8 years for the kidnapping, and the midterm of 4 years on the burglary. The burglary sentence was stayed pursuant to Penal Code section 654. Accordingly, the total sentence was 33 years to life. The judgment was affirmed on appeal.

e. People v. Lester P. Blake
Los Angeles Superior Court, Case No. KA 060776
Court of Appeal, Second Appellate District, Case No. B172042

The victim was the defendant's developmentally disabled biological daughter. However, the defendant had not had any contact with his daughter until she tracked him down and asked him to attend her eighteenth birthday party. Defendant accepted the invitation and was united with his daughter for the first time. After the party, the victim alleged she was raped. Defendant testified he had consensual sex and that he was unaware the victim was his daughter. Under Evidence Code section 1108, the jurors also heard evidence that the defendant sodomized a woman in Hawaii. For that offense, defendant was convicted of sexual assault and attempted sexual assault.

Defendant was convicted of forcible rape, two counts of rape by foreign object, forcible oral copulation, assault with intent to commit sodomy, and incest. Defendant was sentenced to 210 years to life. On appeal, the court reversed in part, affirmed in part and remanded for resentencing. The appellate court determined that the Hawaii convictions for sexual assault did not qualify as strikes under the California "Three Strikes" sentencing scheme. Defendant was resentenced to 33 years.

f. People v. Reynaldo Estrada, Agustin Aceves, and Juan Carlos Topete
Los Angeles Superior Court, Case No. KA 057011
Court of Appeal, Second Appellate District, Case No. B 163217

During the early morning hours, four people gathered at a Diamond Bar apartment to play cards. The game was interrupted by a knock at the door. One of the card players opened the door and was confronted by the three defendants and an unidentified fourth man. Using a

gun, the men forced their way into the apartment. They bound and gagged the card players, ransacked the apartment, and took property from all four victims.

A jury convicted the defendants of robbery and assault with a deadly weapon. In a bench trial, the court found that defendant Aceves suffered prior felony convictions.

Prior to trial, defendant Aceves, facing a maximum term of 64 years, was offered an 18-year term. Defendant Topete was offered 7 years and defendant Estrada was offered 5 years. After trial, the prosecutor requested a 38-year term for Aceves, a 17-year term for Estrada, and a 14-year term for Topete. At the end, Aceves was sentenced to 27 years, while Estrada and Topete were sentenced to 8-year terms. The court of appeal modified and affirmed, finding that one of the assault sentences should have been stayed pursuant to Penal Code section 654.

g. People v. Anna Villa
Los Angeles Superior Court, Case No. KA 062933

This case arose out of a longstanding feud between defendant Anna Villa and decedent Maria Rojas. Defendant Villa and Rojas fought at a bar after exchanging insults on several prior occasions. The fight ended when Rojas threw a glass beer bottle at Villa. The bottle hit and cut Villa's face, leaving a permanent scar. Two months later, Villa drank several beers at a restaurant and decided to confront Rojas about her facial scarring. Villa took a knife from the restaurant and went to a bar frequented by Rojas. Unfortunately, Rojas was at the bar. Villa chased Rojas around the bar and then stabbed her to death.

The information charged one count of murder. Based on heat of passion and sudden quarrel, the defense requested jury instructions on voluntary manslaughter. Given the two month interval between the events, I rejected the request, finding that the facts did not support voluntary manslaughter and that diminished capacity was no longer a viable defense.

The first trial deadlocked 11 to 1 in favor of conviction for first degree murder. The second trial ended in a conviction for first degree murder. Defendant was sentenced to 26 years to life, and the matter was affirmed on appeal.

(2) Reversals

I was reversed in three unpublished opinions: People v. Valenzuela, Case No. B157099, People v. Gonzalez, et al., Case No. B162151, and People v. Mendoza, Case No. B171426.

a. People v. Valenzuela

Defendant appealed from his conviction after a jury trial for attempted second degree robbery, with the court findings that he had four prior serious felony convictions and had served one separate prison term for a felony. In California, Evidence Code section 1291 allows the use of former testimony if the witness is unavailable and the party against whom the former testimony is offered was a party in which the former testimony was given and had the right to cross-examine the now absent witness. Defendant contended and the Court of Appeal agreed that I committed error by permitting the preliminary hearing transcript testimony of the victim to be admitted at trial. Accordingly, the conviction was reversed.

b. People v. Gonzalez, et al.

In this case, defendants plead no contest to grand theft by embezzlement. At the restitution hearing, I ordered the defendants to pay restitution to the victim in the amount of $17,124.50. The Court of Appeal determined that I incorrectly limited the amount of restitution owed to the victim because of my misapplication of People v. Harvey (1979) 25 Cal.3d 754. The matter was remanded and the restitution was recalculated to approximately $22,000.00

c. People v. Mendoza

Defendant appealed from the judgment entered following his conviction, by jury trial, for possession of methamphetamine, with a prior serious felony conviction. Before trial, defendant moved to suppress the drugs found by law enforcement during two searches. The Court of Appeal held that I incorrectly concluded that the defendant did not have standing to challenge the searches and remanded the matter to conduct the motion to suppress.

(3) I have authored no significant opinions on federal or state constitutional issues..

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

None.

17. Legal Career:

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

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

   I did not serve as a clerk to a judge.

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

   I have never practiced alone.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

   6/88 to 9/97, Managing Partner
   Cotkin & Collins
   200 W. Santa Ana Blvd Suite 800
   P.O. Box 22005
   Santa Ana, CA 92702-2005

   10/86 to 6/88, Associate
   Kern & Wooley
   10900 Wilshire Blvd. #1150
   Los Angeles, CA 90024

   7/86 to 9/86, Associate
   LaFollette, Johnson DeHaas, Fesler & Ames
   865 S. Figueroa Street
   Suite 3100
   Los Angeles, CA 90017

   6/82 to 7/86, Law Clerk and Associate
   Wolf, Pocrass & Reyes
   (Dissolved)

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

   1988-1997
   In my position as Managing Partner for the Santa Ana offices of Cotkin & Collins, a mid-size civil litigation firm, I was responsible for the administrative issues that arose as well as the business of

the firm itself. My principal areas of practice included business litigation with a particular emphasis on issues related to professional liability and insurance coverage.

1982-1988
I worked as a law clerk and associate at three law firms. My work included all phases of civil litigation relating to tort liability.

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

For the most part, I represented lawyers in legal malpractice litigation.

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

Since my appointment to the bench 8 years ago in 1997, I appear in court every work day. As an attorney, I appeared frequently in court on a variety of civil litigation matters.

2. **What percentage of these appearances was in:**
   - **(a) federal courts:** 2%
   - **(b) state courts of record:** 98%
   - **(c) other courts.**

3. **What percentage of your litigation was:**
   - **(a) civil:** 100%
   - **(b) criminal.**

   (During the past eight years as a Judge, 98% of my cases have been criminal cases.)

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

While an attorney, I tried four cases as sole counsel and one as associate counsel.

5. **What percentage of these trials was:**
   - **(a) jury:** 40%
   - **(b) non-jury:** 60%

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

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

1. Cotton v. Evergreen Capital, et al.,
   Orange County Superior Court, Case No. 559845

As sole counsel, I successfully represented a lawyer charged with violating California securities law, fraud, and professional negligence. Specifically, plaintiff alleged that defendants approached him for the purpose of soliciting funds to invest in the defendant company and that the company's attorney advised plaintiff it was unnecessary to register or qualify the securities sold to plaintiff. After a three-week jury trial in Orange County, the defendant lawyer received a defense verdict.

Party represented as sole counsel and dates of representation:
Defendant, Marc Tow (December 1991 – November 1992)

Trial Judge: Hon. Thomas N. Thrasher

Principal Counsel for plaintiff:
R. Keith McKellogg
1205 Prospect Street
Suite 400
La Jolla, CA 92037
(858) 459-0581

Principal Counsel for co-defendants, Joseph Acone, George Greenfields, and Evergreen:
Jeffrey M. Howard
1048 Irvine Ave. #456
Newport Beach, CA 92660
(949) 837-3407

2. Alderson v. Burd
   Orange County Superior Court, Case No. 595294

I defended a bankruptcy lawyer charged with malpractice. Plaintiff alleged that defendant attorney filed a Chapter 13 bankruptcy and an adversary complaint on her behalf. Plaintiff stated the purpose of filing the adversary complaint was to set aside a trust deed upon which plaintiff's signature had been forged, and to stop a foreclosure based on the forged trust deed. The plaintiff complained that defendant failed to exercise reasonable care and skill in undertaking to perform legal services and carelessly dismissed the adversarial proceeding without plaintiff's knowledge and consent. However, after plaintiff presented her case in chief, the court granted defendant's motion for judgment pursuant to California Code of Civil Procedure section 631.8.

Party represented as sole counsel and dates of representation:
Defendant, William M. Burd (September 1992 – February 1993)

Trial Judge: Hon. Eileen C. Moore

Counsel for plaintiff:
Victor E. Hobbs
28142 Modjeska Grade Rd.
Silverado, CA 92676
(714) 649-9241

3. Krasner v. Professionals Prototype I Insurance Company
   United States Court of Appeals for the Ninth Circuit, Appeal No. 91-55985;
   United States District Court, Central District of California, Case No. 90-3223

This case arose out of an attorney's attempt to compel his professional liability insurance carrier to defend and/or indemnify him in a civil RICO legal action in which the attorney and 26 others ("the Alliance") were charged with participating in a conspiracy to fraudulently bill insurance companies for legal fees. I was the handling attorney in this case where the Ninth Circuit affirmed the District Court's granting of the insurer's motion for summary judgment, ruling the insurance carrier was not obligated to defend or indemnify the insured attorney against the charges levied against him in the underlying action.

Party represented as lead counsel and dates of representation:
Defendant/appellee, Professionals Prototype I Insurance Company (August 1990 – January 1993)

Trial Judge: Hon. Wm. Matthew Byrne, Jr.

Court of Appeal panel: Hon. Cecil F. Poole, Hon. Ferdinand F. Fernandez, and Hon. Thomas G. Nelson

Counsel for plaintiff/appellant:

Donald B. Marks
10100 Santa Monica Blvd.
Suite 300
Los Angeles, CA 90067
(310) 772-2287

4. Roberts v. Gravett, et al.
   Napa Superior Court, Case No. 66209

Plaintiff asserted intentional and negligent misrepresentation claims against her former husband's divorce lawyer. Specifically, the core of plaintiff's lawsuit against defendant Douglas Smith was that this defendant, an attorney who represented plaintiff's husband in a dissolution of marriage action, allegedly told plaintiff the monies plaintiff would receive pursuant to a divorce settlement agreement with her husband would be "clean" money, untainted by her former husband's questionable business dealings. As a consequence of these representations, plaintiff allegedly entered into the settlement agreement and concluded the dissolution action. Plaintiff claimed she later discovered the settlement money she received was not "clean" after all, and she was obligated to disgorge that money to its true owners to settle a federal court lawsuit in which the participants claimed they were injured by the business activities of plaintiff and her former husband.

The court granted defendant's motion for summary judgment, ruling that even if plaintiff's allegations were true, defendant's communications to plaintiff and her attorney were absolutely privileged by virtue of California Civil Code section 47(b). Eventually, plaintiff dismissed her appeal in exchange for a waiver of costs.

Party represented as lead counsel and dates of representation: Defendant Douglas N. Smith (December 1992 – December 1994)

Trial Judge: Hon. Winton McKibben

Counsel for plaintiff:
Steven A. Ehrlich
P.O. Box 10698
Newport Beach, CA 92658
(949) 476-7095

Counsel for defendant, Charles L. Gravett, III:
Charles L. Gravett, III, In Pro Per
1125 Jefferson Street
Napa, CA 94559
(707) 258-1030

5. Fullerton School District v. Keenan & Associates
   Orange County Superior Court, Case No. 573056

Plaintiff, Fullerton School District, alleged that it retained defendant Keenan & Associates to provide advice in matters relating to employee group health benefits. Plaintiff asserted that defendant breached its fiduciary duties and negligently advised the district with regard to its participation in the Orange County Fringe Benefits Joint Powers Authority. In short, the gravamen of Fullerton's complaint was that defendant, an insurance broker and consultant, negligently placed the school district into a self-insured program. After extensive litigation and settlement negotiations, the parties entered into a confidential settlement agreement.

Parties represented as lead counsel and dates of representation: Defendants, Keenan & Associates and John L. Kuykendall (January 1990 – January 1994)

Trial Judge: Hon. Richard O. Frazee, Sr.

Counsel for plaintiff:
Daniel C. Bowen
801 E. Chapman Ave. #101
Fullerton, CA 92831
(714) 992-2600

6. CPR Equities v. Keller, et al.
   Orange County Superior Court, Case No. 732989

Plaintiff filed a complaint for legal malpractice against defendant attorneys, alleging the attorneys negligently handled a settlement agreement with certain foreclosing parties. Plaintiff contended that as a result of the malpractice they lost at a foreclosure sale real property located in Huntington Beach. However, an arbitrator found in favor of defendants, ruling that the attorneys' conduct did not fall below the standard of care. The arbitration was binding without a right of appeal.

Parties represented as sole counsel and dates of representation: Defendants, Law Offices of Keller, Weber & Dobrott; Coby N. Keller; and James E. Dobrott (September 1994 – April 1996)

Arbitrator: Hon. John L. Flynn, Jr. (Ret.)

Counsel for plaintiff:
Thomas D. Weaver
17671 Irvine Blvd., #120
Tustin, CA 92780
(714) 838-9955

7. Bucher v. Smith
   Orange County Superior Court, Case No. 653465;
   Court of Appeal, Fourth Appellate District, Division Three, Case No. G 012410

In this legal malpractice action, plaintiff retained defendant to represent her in a dissolution action. Plaintiff alleged defendant negligently handled her dissolution, causing her to lose valuable interests in the community property estate.

I had primary responsibility for the proceedings which led to a published opinion in Smith v. Superior Court (1992) 10 Cal.App.4th 1033. In Smith, the court of appeal held that emotional distress damages are not recoverable against an attorney where the tortious conduct has resulted in only economic injury to the plaintiff. As a result, the court of appeal let a preemptory writ issue directing the superior court to vacate its order on petitioner's motion to strike and enter a new and different order striking plaintiff's allegations and prayer for emotional distress, loss of income and punitive damages. Ultimately, on the day of trial, the parties settled the legal malpractice claim by executing a confidential settlement agreement.

Party represented as lead counsel and dates of representation: Defendant John H. Smith, III (December 1991 – May 1995)

Trial Judge: Hon. William F. McDonald

Court of Appeal panel: Justices Henry T. Moore, Jr., David G. Sills, and Edward J. Wallin

Counsel for plaintiff:
Ramon Rossi Lopez
450 Newport Ctr. Dr. #200
Newport Beach, CA 92660
(949) 640-8222

8. Allen v. Nickell
   Orange County Superior Court, Case No. 689982;
   Court of Appeal, Fourth Appellate District, Division Three, Case No. G 015330

Plaintiff filed a complaint for libel against defendant. The complaint alleged that defendant distributed campaign fliers to the voters of the 69th Assembly District and that the campaign fliers were libelous because they represented and/or implied that a judgment had previously been entered against plaintiff for conversion and embezzlement. Defendant filed a motion for summary judgment based on the theory that the statements contained in the campaign flier were true, barring plaintiff's claim for libel as a matter of law. The trial court agreed and judgment was entered in defendant's favor. The court of appeal affirmed.

Party represented as lead counsel and dates of representation: Defendant Virgil L. Nickell (June 1992 – January 1997)

Trial Judge: Hon. C. Robert Jameson

Court of Appeal panel: Justices Sheila Prell Sonenshine, David G. Sills, and Thomas F. Crosby, Jr.

Counsel for Plaintiff:
Clifford J. Meyer
18400 Von Karman Ave., #800
Irvine, CA 92612
(949) 760-1121

9. Cox v. Hall
Orange County Superior Court, Case No. 721132;
Court of Appeal, Fourth Appellate District, Division Three, Case No. G018291

Plaintiff, a retired and defrocked minister, filed a legal malpractice suit against defendant based upon the attorney's defense of plaintiff in a criminal trial. Plaintiff was convicted on 12 of 14 counts of sexual assault against a developmentally disabled minor and was sentenced to prison for 38 years. Plaintiff's appeal and related habeas corpus petition alleged ineffective assistance of counsel. The court of appeal affirmed the conviction but ordered the superior court to conduct an evidentiary hearing on the habeas allegations.

The superior court concluded the attorney did not provide plaintiff with adequate representation because he failed to obtain a handwriting expert to determine whether certain entries in the victim's diary were made by plaintiff as the victim claimed. The court granted the habeas, ordered him released from custody and set the matter for retrial. The Los Angeles District Attorney appealed the granting of the writ petition.

Plaintiff's legal malpractice suit was grounded on the superior court order granting the habeas petition. The complaint alleged the attorney committed malpractice and that the malpractice proximately caused plaintiff's conviction and subsequent imprisonment. During the legal malpractice action, the defendant attorney sought to stay the action pending the final outcome of the criminal proceeding. The trial court denied the stay motion and defendant filed a petition for writ of mandate. The court of appeal issued an alternative writ and heard oral argument. Thereafter, the appellate court granted the petition and ordered the superior court to set aside its order denying the stay request and to enter an order granting the motion to stay all trial proceedings pending the resolution of the habeas corpus appeal.

Ultimately, the habeas appeal failed and the district attorney did not proceed against plaintiff. As a result, the legal malpractice action proceeded. On the eve of trial, plaintiff passed away and the matter was settled for the legal costs incurred in overturning the

conviction.

Party represented as lead counsel and dates of representation: Defendant Dean W. Hall (March 1994 – March 1997)

Trial Judge: Hon. Richard W. Luesebrink

Court of Appeal panel: Justices William F. Rylaarsdam, Thomas F. Crosby, Jr., and Edward J. Wallin

Counsel for plaintiff:
George Rodda, Jr.
359 San Miguel Dr., #202
Newport Beach, CA 92660
(949) 644-2644

10. Treadway v. Rodda
Orange County Superior Court, Case No. 743877

In a binding arbitration, I was retained as an expert by the defendant attorney to express an opinion relating to the legal malpractice issues. Plaintiff alleged that his lawyer negligently handled his personal injury claim at trial. The arbitrator ruled in favor of the defendant and wrote: "attorney Gutierrez . . . had excellent credentials and was a convincing witness. His testimony that the defendant did not commit malpractice had great weight. The reasons for his opinions were thoughtful and based upon a reasonable analysis. The arbitrator accepts his opinion. . . ."

Retained by and dates of representation: Defendant George Rodda, Jr. (February – March 1996)

Arbitrator: Hon. Lloyd E. Blanpied (Ret.)

Counsel for plaintiff:
Marc Vincent
Deceased

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

I was appointed to serve on the Whittier Municipal Court in 1997. Because a Municipal Court Judge was placed in a district close to a community, I was provided a unique opportunity to have a positive impact on a small, defined neighborhood.

As a Municipal Court bench officer, I thrived in the high volume courtroom. I enjoyed working with people to craft solutions to difficult problems. On a daily basis, I encountered defendants struggling to overcome severe drug and alcohol addiction, problems with anger management, and domestic violence. With each defendant, I used multiple tactics to insure that rehabilitative drug, alcohol, anger management, and/or domestic violence programs were completed. Basically, I used persuasion, cajoling, and punishment as tools. At the same time, I was very mindful that my everyday decisions impacted directly the quality of life of the local municipalities and families.

On the Superior Court, I have continued my efforts to serve the public. Not only do I work on the cases that are assigned to me, but I have also devoted significant effort toward improving the court system itself. I believe it is my duty to work to enhance the Los Angeles Superior Court, as well as the statewide trial courts. To this end, I have engaged in statewide committee work and teaching, with a particular emphasis on judicial ethics. As a founding member of the Judicial Ethics Committee, I was charged with developing curriculum and teaching guides for ethics training that would qualify every state judicial officer for defense insurance coverage against actions initiated by the Commission on Judicial Performance. This challenging endeavor resulted in a series of original, interactive ethics programs which my fellow committee members and I presented to more than 2,000 judicial officers over a three-year period. Over these past few years, I have also spent hundreds of hours responding to individual ethics inquiries from judges located throughout the state. Most recently, my work on the Los Angeles Superior Court Executive Committee has afforded me the opportunity to assist in addressing issues that will affect the Court for years to come.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   California Judges' Retirement System II, $ 227,308; County of Los Angeles 401(k) Plan, $ 96,721; and Cotkin, Collins & Ginsburg $ 192, 093. I do not anticipate drawing income from these state and private plans until I reach the age of 65.

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

   I do not have any financial arrangements that would present any conflicts of interest during my potential service as a United States District Court Judge. With regard to any future potential conflicts of interest, I would strictly adhere to the Code of Conduct for United States Judges and applicable statutory law relating to disqualification and disclosure. More specifically, I would avoid off-bench activities that would lead to disqualification. I would decide all matters assigned to me unless otherwise disqualified by law, and I would disclose to the parties and attorneys all matters that a reasonable person would view as relevant to the issue of disqualification.

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

   No.

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

   See attached Financial Disclosure Report

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

   See attached Net Worth Statement

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

No.

AO-10 Rev. 1/2004	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 name, Middle initial)	2. Court or Organization	3. Date of Report
Gutierez, Philip S	Central District of California	4/21/2006
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. ReportType (check appropriate type)	6. Reporting Period
District Court Judge-Nominee	◉ Nomination, Date 4/24/2006 ○ Initial ○ Annual ○ FInal	1/1/2005 to 4/21/2006
7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
400 Civic Center Plaza Pomona, CA 91766	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.	Director	Advanced Science and Technology Adjudication Resource Center

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

☑ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gutierez, Philip S	4/21/2006

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	GROSS INCOME (yours, not spouse's)
1.	2004	Los Angeles Superior Court	$ 153,160.22
2.	2005	Los Angeles Superior Court	$ 158,025.18
3.	2006	Los Angeles Superior Court	$49,720.00

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

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2005	Ontario-Montclair School District-Salary
2.	2006	Ontario-Montclair School District-Salary

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.		EXEMPT

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gutierez, Philip S	4/21/2006

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Bank of America	Credit Card	J
2.	Chase	Credit Card	J
3.	Viewtech Financial Services, Inc	Loan	J
4.	MBNA	Credit Card	K

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Gutierez, Philip S	4/21/2006

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A -H)	(2) Type (e.g div rent or int)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Bank of America	A	Interest	J	T	Exempt				
2. Judicial Retirement System II	D	Interest	M	T					
3. State Teachers Retirement System	B	Interest	L	T					
4. Jackson National TSA Annuity	C	Interest	L	T					
5. Cotkin, Collins & Ginsburg 401(K) Savings Plan, Fidelity Inv	E	Dividend	M	T					
6. -Fid Growth									
7. - Fid Growth Company									
8. - Fid Freedom 2020									
9. - Fid Freedom 2030									
10. - Fid Invest Gr Bd									
11. County of Los Angeles 401(k), Great West	D	Dividend	L	T					
12. -MFS Instl International Equity Fund									
13. - T. Rowe Price New Horizon									
14. - ICAP Equity Portfolio									
15. - TCW Concentrated Core Equities Fund									
16. - Dodge & Cox Balanced Fund									
17. - Stable Value Fund									
18. Ontario-Montclair School Dist. 403(b), Putman Investments	C	Dividend	K	T					

1. Income/Gain Codes. (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting	Date of Report
Gutierez, Philip S	4/21/2006

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 1 (A -H)	(2) Type (e.g. div rent or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date- Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. -Putman Equity Income Fund CI-A									
20. -Putman Growth Opps CI-A									
21. -Putman Int'l Capital Opps CI-A									
22. -Putman Investors Fund CI-A									
23. -Putman New Value Fund CI-A									
24. -Putman Research Fund CI-A									
25. Ontario-Monclair Sch. Dist 403(b), The Best of America IV	A	Dividend	J	T					
26. -AM CENT VP ULTRA FD I									
27. -AM CENT VP VALUE I									
28. -DREY VIF2 APPRECIATION PT IS									
29. -FID VIP 2 ASSET MGR PORT									
30. -FID VIP 2 CONTRAFND PORT									
31. - GARTMORE INVDES MODAGGR III									
32. -GVIT SMALL CAP VALUE I									
33. -OPP GLOBAL SEC FUND/VA III									
34. American Funds, Fundamental Investors-A	A	Dividend	J	T					

1. Income/Gain Codes. (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2 Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gutierez, Philip S	4/21/2006

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gutierez, Philip S	4/21/2006

IX. CERTIFICATION.

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

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

Signature _____ Date 4/25/06

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	700	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured		21	918
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			831
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		293	693
Real estate owned-add schedule		850	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		50	000	Auto loans		16	962
Cash value-life insurance				Viewtech Financial		9	749
Other assets itemize: Annuity		51	154	401(k) loan		22	913
Judicial Retirement System II		227	309				
State Teachers Retirement System		83	783				
401(k) plans		288	814	Total liabilities		366	066
403(b) plans		51	051	Net Worth	1	241	745
Total Assets	1	607	811	Total liabilities and net worth	1	607	811
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

NET WORTH SCHEDULES

Real Estate Owned:	
Personal Residence	$850,000
Real Estate Mortgages:	
Personal Residence	$293,693

401 (k) ACCOUNTS

Fidelity Investments	
Fid Fidelity	$ 43,594
Fid Growth Company	$ 41,216
Fid Freedom 2020	$ 26,439
Fid Freedom 2030	$ 79,432
Fidelity Invst Gr Bd	$ 1,412
Total:	$ 192,093
Great West	
MFS Instl International Equity Fund	$ 5,299
T. Rowe Price New Horizon	$ 6,424
ICAP Equity Portfolio	$ 5,325
TCW Concentrated Core Equities	$ 8,345
Dodge & Cox Balanced Fund	$ 60,083
Stable Value Fund	$ 11,245
Total:	$96,721

403(b) ACCOUNTS

Putman Investments	
Equity Income Fund CI-A	$ 6,423
Growth Opps CI-A	$ 4,492
Int'l Capital Opps CI-A	$ 10,707
Investors Fund CI-A	$ 6,546
New Value Fund CI-A	$ 6,807
Research Fund CI-A	$ 6,501
Total:	$ 41,476

Nationwide (The Best of America)

AM Cent VP Ultra FD I	$ 436
AM Cent VP Value I	$ 909
DreyVif Appreciation PT IS	$ 783
Fed Vip 2 Asset Mgr Port	$ 1,069
Fed Vip 2 Contrafnd Port	$ 2,390
Gartmore Invdes Modaggr II	$ 1,128
GVIT Small Cap Valu I	$ 491
Opp Global Sec FND/VA III	$ 2,369
Total:	$ 9,575

III. GENERAL (PUBLIC)

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

Outside of the courtroom as a Municipal Court Judge, I worked in the community vineyards and enhanced my understanding of the neighborhood I was appointed to serve. As a member of the Whittier Rotary Club, I was privileged to serve as President and as a Board member for 4 years. As a Rotarian, I assisted a variety of nonprofit organizations and volunteered to serve at local schools and at the Whittier Boys' and Girls' Club. In particular, I enjoyed reading to first graders at a Whittier grammar school on a weekly basis for two academic years. Although I saw the children's reading skills progress, I have no doubt that I benefited more from the project than the children. I also always made myself available to students visiting the courthouse.

Additionally, I have participated in numerous career days. I have also spoken to hundreds of children at schools and at the courthouse regarding my background and the law. I also judged several moot court competitions for a Whittier middle school.

Of course, I also participate in my children's activities. For example, I served as head coach for four soccer seasons, supervising children between the ages of six and ten. Most recently, I chaperoned eight eleven-year-old boys during a three-day field trip at Chaparral by the Sea. The trip included multiple day and night nature walks.

For the last eight years, I have been precluded from the practice of law by the Code of Judicial Ethics. However, as an attorney, I was a panelist and speaker for a number of organizations including the Orange County Bar Association Family Law Section, Woman Lawyers of Long Beach, and the Joseph A. Ball, Clarence S. Hunt Inn of Court. I also was a panelist and speaker at the State Bar of California Annual Meeting and Education Institutes. For these organizations, programs addressed prevention of legal malpractice claims and were titled: "Practical Solutions to Avoid Legal Malpractice," "Developing Systems to Prevent Legal Malpractice Claims," and "How to Prevent Malpractice in Family Law." Additionally, I spoke at numerous career days for private and public high schools in East Los Angeles.

During law school, I was a volunteer law clerk for El Centro Legal, a legal aid clinic (later known as Westside Legal Services). After passing the bar, I served on the organization's board for two years.

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

   I am not currently nor have I ever been a member of any such organization.

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

   Yes. On September 26, 2005, I was interviewed by the Judicial Advisory Committee for the Central District. After the interview, it is my understanding that the Committee recommended my nomination. I also interviewed with staff from the White House Counsel's office and Department of Justice. After completing all nomination paperwork and a background investigation, I was informed that my name would be forwarded to the Senate.

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

   No.

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

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

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

   a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

   b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The good trial judge decides cases and controversies that are properly before the court. Cases resolve specific grievances raised by the litigants and not other far reaching problems. The resolution is just and lawful if the trial judge follows precedent established by the appellate courts and the statutes passed by the democratically elected federal and state legislatures.

Further, the good trial judge presumes that statutes are constitutional. The statute's plain meaning is followed and enforced. If the statute's meaning is not clear, the trial judge follows existing precedent interpreting the statute. Absent precedent, the court reviews the statutory scheme to glean the legislative intent. Ultimately, the good trial judge never usurps the power of the legislature by making laws or imposing personal views.

Finally, not only is a good judge not a "judicial activist," public confidence in the judiciary requires a judge to decide each case in a manner that is not only fair but is also perceived to be fair. This means that a judge on the bench treats each lawyer, litigant, and witness with dignity and respect. A good judge affords the parties the right to be heard and is intimately familiar with the facts and the law applicable to each case. A good judge follows the law even though he or she may actually disagree with what the law is. A good judge serves as an example to those in the courtroom by maintaining a dignified demeanor and requires litigants to be respectful of the Court as well.

Off the bench, a good judge conducts his or her private life in a manner that protects the integrity and independence of the judiciary. Because the role of a judge is to decide cases, the good jurist avoids personal, business, and political activities that may later require disqualification on cases. The good judge accepts these limitations on his or her private life without complaint because it is an intrinsic part of the job of judging.

AFFIDAVIT

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

4/26/06
(DATE)

(NAME)

MARGARET ANN RINKE
COMM. # 1404670
NOTARY PUBLIC-CALIFORNIA
LOS ANGELES COUNTY
COMM. EXP. MARCH 31, 2007
MGC-1

Margaret Ann Rinke, Notary Public
(NOTARY)

Senator CORNYN. Well, thanks to each of you for that. I know your family members appreciate their recognition, since they have contributed mightily to your sitting here today before the committee.

Each of you have had distinguished careers in your own right. I might start with the same question that I asked of Mr. Keisler, a question that every prospective employer asks, at least in my experience. That is, why do you want the job? Judge Baker?

Judge BAKER. Like you and others in this room, I have been dedicated to public service much of my career. It has always been a dream to be a Federal judge since I started law practice, as a U.S. Attorney, and as an attorney in private practice, appearing in Federal Court.

I have served as a judge on the State Court for over 20 years now, and I have found that each day and in each case, it is an honor to preside over the trials, to decide cases in accordance with the law, and to ensure that the process, as well as the result, is fair and just to all individuals appearing in the court. I very much appreciate your consideration.

Senator CORNYN. Thank you.

Mr. Besosa?

Mr. BESOSA. Well, I have high regard for people like Judge Baker, who have been in public service for so long. I have not, but I am a firm believer that one has to give some sort of public service. This would be the third time that I have served the Nation.

First, in the Army, as you mentioned; second, as an Assistant U.S. Attorney; now in this job, which is the epitome of every litigator, I think, in the Nation, to become a Federal judge. The opportunity came to me. I did not seek it. I am very grateful to those who approached me and asked me if I were interested in this position. I, of course, was.

Senator CORNYN. Thank you.

Judge Gutierrez?

Judge GUTIERREZ. As Judge Baker started in saying, this is about public service. I have served the people of the State of California for 9 years. I would like to serve the people of the Nation for the rest of my life, if confirmed. As Judge Baker said, being a judge is about providing a fair process, a process that is not only fair, but perceived to be fair by the litigants. Thank you.

Senator CORNYN. Well, I know each one of you have been through an extensive evaluation process before you even got here today. I mentioned that each of you have been reviewed—your credentials, experience, and your record in terms of your professional ethics—by the American Bar Association.

Each of you has had an extensive background investigation by the Federal Bureau of Investigation, so you come here today having been investigated, probed, and prodded in a lot of different ways.

So there is not a whole lot more than we could ask or that I will ask today, and I hope you are not too disappointed that we do not have a full array of members in the Judiciary Committee hearing room today. I assure you, that is good news, not bad news.

[Laughter.]

When everyone is here and ready to go, it can be a rocky ride. But I assure you that that will not be the case with you.

Let me just ask, like Judge Baker and Judge Gutierrez, I served on the State courts in my State of Texas for 13 years, and this was always an issue that lawyers used to talk about in reference to judges.

That is, judges who forget the fact that they started out as a lawyer and that they get, quite honestly, well, a disease that is sometimes called robeitis, otherwise known as "the big head," unapproachable, arrogant, and difficult to deal with.

Of course, the difficulty is, when you have lifetime tenure, when your tenure is not determined by anyone's approval, that you can become detached and perhaps suffer from some of those conditions, more or less.

But let me just ask Judge Baker, Mr. Besosa, and Judge Gutierrez, how do you keep your perspective and how do you keep your humility, given this exalted position that you will soon be confirmed to?

Judge BAKER. I have found, as a State Court judge, and I will find, if considered for the Federal Court and approved, that the responsibilities are very important and very humbling. Every day that I take the bench now as a State Court judge, I am grateful for the opportunity and I feel the responsibility to the litigants.

If confirmed and approved, I would continue with that. I very much appreciated the marks of Chairman Specter. I agree wholeheartedly that courtesy and respect to everyone appearing in the courtroom is paramount.

Senator CORNYN. Mr. Besosa?

Mr. BESOSA. Well, I talked about this with my wife, who is a judge. The way she says it, you just have to be yourself. If you have been a fair-minded and respectful person and you have been brought up like that, there is no reason why putting on a robe will change that. I have come across judges with robe-itis, as you say. I have come across judges with big heads.

Fortunately, they are few and far between. If I continue to be the way I have been for all my life, then it is just a question of being yourself and continuing that respect for both sides, being fair-minded and listening to both sides. But when it comes time to decide, you have to take a position.

Senator CORNYN. Judge Gutierrez? Judge Gutierrez. I think this goes to the heart of what Senator Specter said, and treating people with courtesy. What I have strived to do as a judge for the last 9 years, is to treat each litigant with dignity and respect.

Judge GUTIERREZ. That is what I will continue to do, if confirmed to the Federal bench, and that is, in each proceeding, make sure that each lawyer, each litigant, has been heard in a respectful, dignified, courteous way.

Senator CORNYN. It has been observed many times over many years that cost and delay are as effective an impediment to access to justice as a door with a lock on the front door of the courthouse. I would like to know from each of you, starting with Judge Backer, how you intend to approach your new responsibilities in terms of reducing cost and improving access to justice in your new role.

Judge BAKER. Thank you, Senator. The concerns you raised are extremely important. Fortunately, I have had experience with voluminous criminal and civil calendars on the State Court bench, and

managing calendars, motions, hearings and trials in the most efficient way possible. I try to review all papers before the hearing so I can focus on the attorney's arguments.

Before trials, I prepare and work with the attorneys to make sure trials are prepared efficiently. I believe that the litigants are also entitled to prompt resolution of their dispute, so I work to decide cases promptly.

Senator CORNYN. Mr. Besosa?

Mr. BESOSA. I agree with Judge Baker, Senator, that preparation is the key. If litigants come before you prepared and you as a judge are prepared for that particular case, then justice will flow, the case will flow very quickly and reach a very prompt solution.

I know the court in Puerto Rico is very heavy in a criminal docket, especially multiple defendant cases. It will be my job, if confirmed, to make sure that both criminal and civil cases proceed accordingly and not one case be given any type of short shrift.

Senator CORNYN. Judge Gutierrez?

Judge GUTIERREZ. I do not think there is any more important issue than access to justice and the cost that litigants face in gaining that access. Like my colleagues, I think the things that are important are, again, preparation, that matters are decided promptly, and that delays are minimized.

Senator CORNYN. Well, as I said, each one of your backgrounds has been examined very closely. I know a lot of people have been questioned in terms of your qualifications, your ethics, and your experience, so I will not belabor that here for now.

Let me just say that, on behalf of the Judiciary, thanks to each of you for being here today, and thanks to your family for supporting you.

We will leave the record open for 1 week, until 5 p.m. on Tuesday, August 8 for members to submit any additional written questions. If you do receive written questions, please respond to those as promptly as you can so we can complete our work. That will help in expediting your chances of getting through the Committee and then on the floor, and then in your new positions. But congratulations, again, to each of you.

This hearing is now adjourned.

[Whereupon, at 3:27 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

September 1, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to written questions from Senator Leahy, Senator Kennedy, Senator Biden, Senator Schumer, and Senator Durbin.

Sincerely,

Peter D. Keisler
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member

Responses to Written Questions of Senator Patrick Leahy
Peter D. Keisler, nominated to be a United States Circuit Judge
for the District of Columbia Circuit

1. **You recently wrote a letter to Vermont state officials telling them that Vermont's Department of Public Service should drop its requests for information from telecommunications companies about whether the National Security Agency collected phone records and information pertaining to Vermont residents.**

    a. **Do you believe it is inappropriate for the state of Vermont to attempt to protect the privacy and consumer rights of its citizens and to obtain the information it needs to do so in a meaningful way?**

Response: Please see below response.

    b. **Shouldn't the federal government work with states to address their concerns in a way that does not impact national security, rather than entirely shutting the states out of issues that affect their citizens?**

Response: I agree that the federal government and state governments should work cooperatively together to the greatest extent possible in the many areas in which they have similar or overlapping responsibilities. The Department of Justice has worked closely with state governments on a wide range of legal issues. Within the Civil Division, for example, we have coordinated very closely with state governments in significant health care fraud investigations where state and federal funds were both potentially implicated. Cooperation of that sort is the norm in the vast majority of instances.

The letter cited in your question arises out of one of the comparatively uncommon situations in which a conflict arises between how state and federal policymakers have sought to pursue their respective objectives. The Vermont Department of Public Service ("DPS") asked Verizon whether and to what extent Verizon had provided, or is providing, information to the National Security Agency ("NSA"). The Vermont Public Service Board ("Board") noted the possibility, however, that as a result of the DPS request "Verizon could be subjected to incompatible state and federal obligations," stating that "[i]n general, we wish to avoid imposing any such inconsistent obligation." The Board therefore indicated that it would be "highly desirable" for it to have the views of the federal government on these issues, and in particular on "the nature and extent of Verizon's federal obligations." *See* Procedural Order, Docket Nos. 7183, 7192 (Vermont Public Service Board July 12, 2006) ("Procedural Order") (attached).

The July 28, 2006, letter to the Board was a response to that specific request in the Board's Procedural Order. The letter expressed the federal government's position that compliance with the specific information requests made by the DPS would be

inconsistent with, and preempted by, federal law. The letter stated, for example, that Section 6 of the National Security Act of 1959, Pub. L. No. 96-36, 73 Stat. 63, 64, codified at 50 U.S.C. 402 note, provides that no law "shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof. . . ," and that this provision reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure," *The Founding Church of Scientology of Washington, D.C., Inc.* v. *National Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). The letter further noted that in *Terkel v. AT&T*, the Director of National Intelligence had asserted the state secrets privilege over the same category of information now sought by the DPS, and that the *Terkel* Court, having been "persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the Federal Government could give adversaries of this country valuable insight into the government's intelligence activities," and "adversely affect our national security," held that "such disclosures are barred by the state secrets privilege." *Terkel v. AT&T*, 06-CV-2837 (N.D. Ill. July 25, 2006). The letter further cited statutes and Executive Orders that prohibit the provision of classified information to individuals not authorized to receive it. Thus, in response to the Board's request for information on the applicable federal law, the letter explained that the information sought by the DPS is classified, and subject to those and other legal authorities.

2. **You have also played a central role in invoking the state secrets doctrine in cases against AT&T and other companies for their role in the government's warrantless wiretapping of American citizens.**

   a. **Why have you relied on the state secrets privilege to request that cases be thrown out, rather than working to find a way to allow the program be reviewed in the courts without compromising national security?**

Response: Please see below response to subpart (b).

   b. **How is the Administration's focus on secrecy in these and other cases compatible with our constitutional system of checks and balance and with our nation's focus on access to justice for Americans?**

Response: Cases in which the state secrets privilege is asserted and upheld fall into two categories. In the first category, the information subject to the privilege is simply removed from the case, and the case proceeds to judgment on the merits based on evidence not covered by the privilege. Some of the instances in which the government has asserted the state secrets privilege fall into that category. *See, e.g.*, First Amended Protective Order, *BCG v. Guerrieri*, No. 2004CV395 (District Court, Weld County, Colorado Sept. 9, 2005) (upholding assertion of state secrets privilege and limiting discovery and evidence accordingly). In the second category, where the removal of the privileged information would deprive the plaintiff of the ability to prove the *prima facie*

elements of the claim or deprive the defendant of a defense, or where the very subject matter of the action is a state secret, courts have held that the proper result is to dismiss the claims or the case. *See, e.g., Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998); *Zuckerbraun v. General Dynamics*, 935 F.2d 544 (2d Cir. 1991); *Fitzgerald v. Penthouse*, 776 F.2d 1236 (4th Cir. 1985); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978). The courts in these cases often acknowledge, as subpart (b) of the question observes, that such results limit the ability of a litigant to have his or her claim decided on the merits in court, but conclude that this consequence is necessary where the alternative would be disclosure of information that would harm national security. *See, e.g., Kasza*, 133 F.3d at 1167.

Because of that important cost, the position of the Justice Department has been that, where dismissal is not required for the reasons described above, the information should be protected through a protective order or similar mechanism without the case necessarily being terminated. The Department has sought that more limited relief in appropriate cases. The cases involving the NSA, however, are among those in which, for the reasons explained in the government's briefs, the government's position is that dismissal rather than a protective order is necessary in order to protect classified information.

c. **You represented AT&T as a private attorney. In how many cases involving your former client have you played any role as a government attorney?**

Response: I did represent AT&T while in private practice, prior to joining the Justice Department in 2002. Although the Civil Division has thousands of matters pending at any given time, to the best of my recollection I am aware of only one case involving AT&T in which I participated other than the NSA cases.

d. **Why did you conclude that it was not necessary to recuse yourself from wiretapping cases involving AT&T given your past representation of the company?**

Response: I concluded it was not necessary to recuse myself from the NSA cases because I never represented AT&T on any matter relating to the issues in those cases, and because the Office of Government Ethics regulation that defines the recusal obligation for matters involving an attorney's former clients provides for recusal for a one-year period following the termination of the client representation. I did not become involved with the NSA cases, or the other AT&T matter I recall, until more than one year after I joined the Department.

3. **You argued the case of *Hamdan v. Rumsfeld* at the Circuit Court level. What was the process by which the decision was made that you would argue the case? Did you volunteer to do so at any point, or did you only respond to requests from others that you do so?**

Response: I did not request or volunteer to argue *Hamdan v. Rumsfeld* before the court of appeals. I was asked to argue the case by the Solicitor General.

4. **While working in the Reagan administration, you defended the nomination of Judge Robert Bork to the Supreme Court. You said of Senate questioning at the time, "It's just a bunch of hot air. I think Bork is in the mainstream." Do you still believe that Judge Bork is in the mainstream of American legal thought?**

Response: I do not recall the quote; I was, however, able to locate it online in the August 1, 1987, issue of the *National Journal*. I appreciate the opportunity to clarify that my comment was not about Senate questioning. At that time, the confirmation hearings on Judge Bork's nomination had not yet begun, and they did not begin until more than a month later.

The context for the comment instead was that the *National Journal* was reporting on a specific study by two law students that unfavorably characterized Judge Bork's votes in the cases he had heard while sitting on the court of appeals. The magazine sought a reaction to that study on behalf of the Reagan Administration while I was serving in the White House Counsel's Office. In disputing the study's conclusions, I was quoted by the *National Journal*, immediately after the sentences reproduced above, as explaining that "He [Judge Bork] has been in the majority in 94% of the cases he's heard." The reference to the "mainstream" reflected the observation that he had not been an especially frequent dissenter as a judge on the court of appeals, and, to the contrary, was in agreement with his colleagues on the proper disposition of a substantial majority of the cases that came before him.

5. **The Federal Law Enforcement Officers Association has written to me to express "concerns" about your nomination based on your involvement in the case of *Adams v. United States* in the Court of Federal Claims. They are concerned about the rejection by the Civil Division of the Department of Justice of a settlement negotiated by the line attorney in the case for a group of the federal law enforcement officers still waiting for a resolution to this decades-old case. They are also concerned that Civil Division officials refused to meet with plaintiffs' attorneys in the case. You told me at your hearing that you were not involved in the decision to reject the settlement except for a brief conversation and that you had not been personally asked to meet with plaintiffs' attorneys. Are you now taking any steps to inform yourself further about the case and to ensure that federal law enforcement officers receive those benefits to which they are entitled in a timely fashion?**

Response: I have attached an August 3, 2006, letter sent to plaintiffs' counsel by the Deputy Assistant Attorney General (DAAG) who is overseeing this case, which reflects the current status of discussions. In that letter, the DAAG explains his own concerns about FLEOA's settlement proposal, requests further information from plaintiffs' counsel on the rationale for their proposed settlement, and offers to meet with them in person on the subject. The letter further states that, while I had not previously been made aware of their request to meet, the DAAG would inform me if they would like my personal participation at the meeting. My understanding is that a meeting is being arranged at which I will participate.

6. **You referred at your hearing to a review by the Department of Justice's Office of Professional Responsibility of the Department's decision to dramatically reduce the government's damage requests in the government's tobacco lawsuit, *United States v. Philip Morris*, a decision with which you said you agreed.**

    a. **Why did the Office of Professional Responsibility commence an investigation into that decision?**

Response: My understanding is that the Office of Professional Responsibility ("OPR") commenced its investigation in response to a letter sent to the Department by Members of Congress requesting that an investigation be conducted.

    b. **Were you either a subject or a witness in the Office of Professional Responsibility's investigation?**

Response: I was both a subject and a witness in the investigation. OPR concluded that there was no improper political influence and no professional misconduct in connection with the decision on remedies, and that the decision instead reflected a good-faith effort to obtain remedies from the district court that would be sustainable on appeal.

    c. **A former Department of Justice attorney who worked on the case said publicly last month that a Department of Justice official misled Congress about whether the White House influenced any aspect of the case and about a judge's position in the case. Given these statements, as well as emails which the attorney says support her allegations, do you believe it would be appropriate for the Office of Professional Responsibility to further investigate this matter?**

Response: The determination whether any additional investigation should be conducted on any aspect of this matter would be one for OPR to make independently, based on its established criteria for such decisions.

Responses to Written Questions of Senator Edward M. Kennedy
Peter D. Keisler, nominated to be a United States Circuit Judge
for the District of Columbia Circuit

1. In 2005, the Department of Justice reversed course in the tobacco litigation (*United States of America v. Philip Morris USA Inc., et al.*), sharply reducing its demand for an industry-funded smoking cessation program from $130 billion to $10 billion.

(a) Did you approve the initial demand for a $130 billion program? Was it your belief at the time that it was appropriate and lawful to ask for the $130 billion program?

Response: The proposal for a $130 billion cessation program was first discussed in the expert report of Dr. Michael Fiore. That report was not sent to me for review prior to being filed. The proposal was also discussed in a May 12, 2005, filing with the district court that likewise was not sent to me for review prior to being filed. Nor was there any other occasion in which I gave approval for the government to request that proposal as a remedy.

(b) Did you have any involvement whatsoever in the decision to reduce the government's demand? If so, please explain why you thought the amount should be reduced and set out your involvement in detail.

Response: In the civil RICO case against the major tobacco companies, the government initially sought a monetary remedy of approximately $280 billion, in the form of disgorgement by the defendants of ill-gotten gains that were the product of fraud. The government's position that a disgorgement remedy is available under civil RICO was contested by the defendants. The district court ruled in the government's favor on that legal issue, and held that a disgorgement remedy is available under RICO.

On February 4, 2005, however, the court of appeals reversed that decision, *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir. 2005), in an opinion the district court soon after described as having "struck a body blow to the Government's case," *United States v. Philip Morris*, Order 886 (D.D.C. Feb. 28, 2005) ("Order 886"). The court of appeals held that a disgorgement remedy is not authorized under RICO. The court of appeals held that RICO's statutory language, under which equitable remedies are limited to those that "prevent and restrain" RICO violations, limits courts to ordering "forward looking remedies that are aimed at future violations." It held that no disgorgement remedy, including the government's proposed $280 billion disgorgement remedy, could be ordered because disgorgement is instead "a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo," would be "awarded without respect to whether the defendant will act unlawfully in the future," and was "both aimed at and measured by *past* conduct." *Philip Morris*, 395 F.3d at 1198 (emphasis in original).

Our response to this adverse decision followed two separate tracks simultaneously. First, we tried to get the decision reversed so that the $280 billion disgorgement remedy could again be

sought. The government thus sought rehearing *en banc* from the D.C. Circuit, and when that petition was denied, filed a petition for certiorari with the Supreme Court. (The Supreme Court declined to hear the case.) Reversing that decision was our principal objective, because it would have restored the ability to seek the full remedy originally proposed.

Second, at the same time we were seeking *vacatur* and reversal of this adverse decision, we recognized that the government had the responsibility to comply with it unless and until the full court of appeals or the Supreme Court set it aside, and that this responsibility required revising the remedies case. That responsibility was starkly emphasized by the district court in Order 886 on February 28, 2005, approximately three weeks after the adverse decision by the court of appeals. In addition to stating that the court of appeals had "struck a body blow" to the government's case, the district court in Order 886 criticized a filing made by the government with the district court very soon after the court of appeals had issued its decision – a filing that, the district court said, "reads as if Judge Sentelle [the author of the court of appeals decision] had never written his Opinion. While the Court is aware that the Government is pursuing *en banc* reconsideration by the Court of Appeals, and that it may at some point seek *certiorari* from the Supreme Court, as of now, this Court is bound by the existing 2-1 Opinion written by Judge Sentelle."

The court further stated its understanding that the reasoning of the court of appeals affected the availability of both disgorgement remedies and non-disgorgement remedies:

> Judge Sentelle's Opinion, as this Court reads it, simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO. Rather, this Court's 'jurisdiction is limited to forward-looking remedies that are aimed at future violations' of RICO. *United States v. Philip Morris USA Inc., et al.*, 2005 WL 267948, *7 (D.C. Cir. February 4, 2005). In fashioning its remedies testimony, the Government must be mindful of the plain, explicit language of Judge Sentelle's 2-1 Opinion.

Order 886.

The Organized Crime and Racketeering Section (OCRS) of the Criminal Division was concerned that a court would conclude that Dr. Fiore's cessation proposal (referred to in subpart (a) above) was inconsistent with the legal standard adopted by the court of appeals, and therefore recommended against seeking it. *See* "Behind the Justice Department's Shift on Tobacco," Letter to the Editor by Frank J. Marine, Senior Litigation Counsel, Organized Crime and Racketeering Section of the Criminal Division, Department of Justice, *Washington Post* (June 15, 2005) (attached). Dr. Fiore's proposed cessation program was designed to give addicted smokers an opportunity to participate in a cessation program. Critically for these legal issues, that opportunity would be available to smokers who had already become addicted as a result of prior acts of fraud by the defendants, and would be afforded without regard to whether defendants committed such violations in the future. OCRS was concerned that such a remedy would not be adopted insofar as a court would conclude, in the language quoted above, that such a remedy would be improperly "focused on remedying the effects of past conduct," "awarded without respect to whether the defendant will act unlawfully in the future," and designed to "prevent and restrain the effects of past violations of RICO."

OCRS is a section of career prosecutors in the Justice Department's Criminal Division, which is assigned by regulation with overall responsibility within the Department for both criminal and civil RICO. Its Senior Litigation Counsel was involved with the case against the tobacco companies from its inception, served on the trial team, and delivered part of the opening statement at trial. The Associate Attorney General agreed with OCRS' concerns and decided that the government should not seek the remedy described by Dr. Fiore, but should instead seek a modified cessation remedy that would be tied to future rather than past violations by the defendants and would therefore be consistent with the legal standard established by the court of appeals. I agreed with and supported that decision. I did not believe it would advance the government's objectives in the case to propose a remedy, however otherwise desirable, that the court of appeals (or the district court) would not permit to be granted. I note that the Office of Professional Responsibility, an office that likewise consists of career Department attorneys, conducted an investigation of this matter at the request of members of Congress and concluded that the decisions on remedies "were not influenced by any political considerations, but rather were based on good faith efforts to obtain remedies from the district court that would be sustainable on appeal."

On August 17, 2006, the district court issued its decision. Final Opinion, *United States v. Philip Morris* (D.D.C. Aug. 17, 2006) ("Final Opinion"). It found the defendants liable under RICO, and imposed various remedies. The district court held, however, that – as a result of the adverse decision from the court of appeals – it was "precluded from considering other remedies proposed by the Government, such as a comprehensive smoker cessation program to help those addicted to nicotine fight their habit. . . ." Final Opinion at 3. The district court had permitted a group of intervenors to participate in the case and argue for a cessation remedy similar to the one originally proposed by Dr. Fiore, so the court had before it both that proposal and the modified cessation proposal made by the government. But it held that, while adoption of a smoking cessation program would "unquestionably serve the public interest, . . . under the narrow standard for [RICO] remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy . . . ." *Id.* at 1646. The court further stated that Dr. Fiore "testified about remedies which this Court could not consider on the merits under the Court of Appeals decision. . . ." *Id.* at 8.

(c) On December 1, 2005, *The Washington Post* quoted Sharon Eubanks, a lead Department of Justice attorney on the tobacco case, as saying, "my current supervisors, in particular Dan Meron, Pete Keisler and Robert McCallum, have been somewhat less than supportive of the [tobacco litigation] team's efforts." Please set out in detail whether and to what extent you supported the tobacco litigation team's efforts to retain the $130 billion demand, and please comment on what conduct of yours you believe would have led Ms. Eubanks to make this statement,

Response: I would not want to speculate on the reasons for another person's statement. Insofar as the statement is a reflection of the fact that I did not support seeking Dr. Fiore's $130 billion proposal as a remedy in the case in light of the adverse court of appeals decision, however, my reasons for not doing so were those detailed above. I supported the litigation and its objectives not only by seeking the strongest possible remedy that I believed could be sustained by the court

under the adverse decision in *Philip Morris*, but also by seeking vigorously to have that decision reversed so that the government could renew its effort to obtain the full $280 billion disgorgement remedy originally sought.

2. According to your answers to the Committee's questionnaire, you spent approximately 13 years in private practice at a large, prestigious law firm. At your nomination hearing on August 1, 2006, you spoke at length about one pro bono case on which you worked on behalf of Dr. al-Hadi Omar Abdul-Halim. However, according to your answers, you personally handled (sometimes as part of a "team") only four pro bono cases during this time in private practice. Did you engage in significantly more pro bono work than is reflected in your answers? If not, please explain why you did not devote more time to pro bono work.

Response: In addition to the specific matters listed in my response in which I was directly handling the case or was part of the team doing so, I made myself available to others in my law firm involved in *pro bono* matters and frequently consulted on such matters by, for example, reviewing and commenting on draft filings, participating in moot courts, and discussing strategy. I also made financial contributions to legal services organizations. Moreover, I joined the Department of Justice in 2002, and have served there since, in significant part because of the opportunity to focus my professional work on public service.

3. In 1982, you were a founding member of the Federalist Society.

(a) Please describe in detail how you came to be a co-founder of the Federalist Society and why you felt it necessary or advisable to help create this organization.

Response: While I was not a "founder" in the sense of having created or conceived of the organization, I was one of the first members of its Board of Directors after it was created and as a result I have been referred to as a "Founding Director."

The purpose of the Federalist Society was to expand the range of debate and discussion at law schools. There was some feeling among those who became involved with the organization that the range of discussion at law schools had become narrower than the range of discussion in the law and the country more generally, and the principal function of the organization was to sponsor events and bring speakers to law school campuses that would broaden that discussion. (As the organization grew and the people involved graduated from law school, it began sponsoring similar events geared to the profession as a whole rather than exclusively to law students.) Consistent with that purpose, two guiding principles became important. First, the organization did not endorse or oppose legislation, engage in litigation, or require as a condition of membership any particular set of positions or beliefs. Second, it did not limit its events to any particular point of view, but instead, wherever possible, invited speakers of broadly differing positions. I became involved with the organization because I believed it could make a substantial and interesting contribution to law school life.

(b) After helping to found the Federalist Society, you continued to play a key role in the organization, serving as an officer of the Society until 2000. Please describe your various roles in the Society, from its founding through the present.

Response: I served as a member of the Board from 1983-2000, and also as its Secretary. The Board provided general direction for the organization and approved broad policies relating to its activities. As Secretary, I also had the responsibility to prepare the minutes of Board meetings. Since leaving the Board in 2000, I have had no role in the organization, but I have continued from time to time to attend public events it sponsors.

(c) Please provide the Committee with copies of all speeches, published or unpublished, that you have given before the Federalist Society or at any event sponsored by the Federalist Society, and all articles, published or unpublished, that you have written in connection with your Federalist Society membership.

Response: I do not recall writing any articles in connection with my Federalist Society membership, and do not have copies of any remarks made at past Federalist Society events.

4. You have repeatedly praised the efforts of whistleblowers in situations where the government has allegedly been defrauded by private companies:

- **Regarding a $150.8 million settlement from GlaxoSmithKline in response to charges that it overcharged Medicaid and Medicare, you said, "This agreement marks another in a series of cases in which a pharmaceutical manufacturer has settled claims that its fraudulent drug pricing cost federal health-care programs and taxpayers millions of dollars." (*Philadelphia Inquirer*, 9/21/2005)**
- **Regarding a $130 million settlement in a federal government case against Mario Gabelli, who allegedly used sham small business fronts to participate in government auctions of wireless spectrum to small businesses, you said, "The FCC and all government agencies should be able to trust companies which certify information about eligibility to participate in government programs. This settlement is an example of the government's determination to ensure that valuable federal resources are protected from fraud and abuse." (*Washington Post*, 7/14/2006)**
- **Regarding a $40 million settlement of a case against Medtronic, which allegedly paid millions of dollars in kickbacks to doctors in exchange for promoting its spinal implants, you said that kickbacks to doctors "are incompatible with a properly functioning health care system. They corrupt physicians' medical judgment and they cause overutilization and misallocation of vital health care resources." (*New York Times*, 7/19/2006)**

However, you criticized a proposal to increase protections for federal whistleblowers, saying, "The bill would convert every federal employee into a potential whistleblower and every minor workplace dispute with a supervisor into a potential whistleblower case." (*New York Times*, 10/3/2004)

a) **It seems that you support whistleblowers when the wrongdoers are in the private sector but not when government officials may be committing illegal acts. Do you think this distinction is appropriate? If so, why is it more important to protect against wrongdoing in the private sector than in government?**

Response: It is important to protect against wrongdoing in both the private sector and in government. Indeed, government abuses can create especially grave public harms. The law on whistleblower protection is somewhat different in the private sector and the public sector, but often in ways that make legal protections for public sector whistleblowing more rather than less robust than protections for private sector whistleblowing. Public sector whistleblowers, for example, have recourse to the Merit Systems Protection Board, the Office of Special Counsel, and Inspectors General.

b) **Do you believe that government employees should have any protections as whistleblowers when exposing the potential wrongdoing of government? If so, what protections should they have? If not, why not?**

Response: Government employees do have important legal protections when exposing government wrongdoing. Those protections include, among other things, a prohibition against retaliation, an independent administrative and judicial process to enforce that prohibition, available remedies to compensate and correct such retaliation, and discipline for managers that engage in retaliation. Courts play an important role in ensuring that those legal protections are enforced.

c) **If confirmed to the D.C. Circuit, you would likely preside over a number of cases in which national security concerns may be involved. In such cases, what is the best way for government employees to provide transparency into illegal acts by government officials? Does the current system, including the Classified Information Procedures Act, provide an appropriate way to maintain national security and prevent abuse of governmental power? If not, please explain why and suggest an alternative way to accomplish both goals.**

Response: With respect to criminal cases, the Classified Information Procedures Act, to my understanding, has struck a careful balance among the important values of protecting defendants' rights, preventing the disclosure of classified information, and enabling the prosecution of wrongdoing. With respect to civil cases, most lawsuits challenging the lawfulness of government action in the national security area can proceed to a decision on the merits without raising any substantial issue regarding the review or disclosure of classified information. In some other instances, Congress has established, or courts have approved, procedures under which classified information can be reviewed by courts *in camera*. For example, Congress provided for such a procedure in amendments to the International Emergency Economic Powers Act, 50 U.S.C. 1702(c), relating to designations of foreign terrorist organizations, *see, e.g.*, *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003), *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (D.C. Cir. 2002), and the court of appeals has

followed a similar procedure for reviewing whether non-resident pilots are properly denied airmen certificates for security reasons, *see Jifry v. FAA*, 370 F.2d 1174, 1181-1182 (D.C. Cir. 2004). Although the Supreme Court has held that courts in some cases will not be able to reach the merits of the claims because of concerns about disclosure of classified information, *see, e.g., Totten v. United States*, 92 U.S. 105 (1876); *Tenet v. Doe*, 544 U.S. 1 (2005); *see also Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), the number of cases to which that principle applies is extremely small. If confirmed, should any cases involving such issues come before me, I would look to these and other applicable precedents.

Responses to Written Questions of Senator Joseph Biden
Peter D. Keisler, nominated to be a United States Circuit Judge
for the District of Columbia Circuit

On July 27, 2006, I received a letter from the Federal Law Enforcement Officers Association who have expressed concern that as Assistant Attorney General for the Civil Division you were unwilling or unable to work in good faith with many of its members with respect to a settlement reached in the case of Adams v. United States. I have worked my entire career with federal, state, local and tribal law enforcement officers, and I believe that their service and sacrifice on behalf of the American people is second to none. As such, I take their concerns very seriously and the questions that they have very troubling.

As you know, back on December 1, 2004, Judge Lynn Bush ruled that GS-13 criminal investigators were FSLA non-exempt and were entitled to back pay. Since that time, the plaintiffs – some 6,000 law enforcement officers from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the United States Customs Service, the Drug Enforcement Agency, the Internal Revenue Service, and the United States Secret Service – have worked with the U.S. Government to reach a settlement. Ultimately, a settlement was reached, and this agreement was submitted to the Department of Justice back in March 2006 with a recommendation to approve from the trial counsel.

The Department of Justice ultimately rejected the settlement proposal. According to FLEOA, you and other officials at the Department of Justice refused to meet with plaintiffs to discuss the proposed settlement.

A resolution to this matter is long overdue as many of these claims date back to 1974, and many of the plaintiffs have died in the line of duty, including in the Oklahoma City bombing and the attacks of September 11, 2001. Unbelievably, their heirs are currently arguing about fair compensation from the same government that they sacrificed their lives to protect.

Question #1: What was the rationale behind rejecting the settlement proposal negotiated between the plaintiffs and the trial counsel?

Response: Please see below response.

Question #2: Did you or other members of the Department meet with the Attorneys for the plaintiff to discuss the proposed settlement? If no, why not?

Response: Please see below response.

Question #3: Has the Department come forward with an alternative settlement proposal to the one that was rejected that could be accepted by all of the parties?

Response: Please see below response.

Question #4: Does further delay in settling this case ultimately increase the government's liability for back pay?

Response: Please see below response.

Question #5: In your view, what steps do the parties need to take in order to reach an agreement acceptable to the Department of Justice?

Response: Please see below response.

Question #6: What do you make of the Federal Law Enforcement Officers Associations concerns about your good faith in your dealings with them?

Response: On July 28, I was advised that an officer of FLEOA had sent the Attorney General a letter that stated that I had declined to meet with FLEOA's attorneys to discuss a settlement proposal – the same concern reported in your question. I was taken aback when I learned of this letter, because I had never before even heard about – much less declined – any request to meet with FLEOA's counsel on this proposal. (I had previously met with the same attorneys on other aspects of the case, and we have previously settled other aspects of the case.) I have since learned that, while there was some communication between FLEOA's counsel and attorneys in the Civil Division about FLEOA's interest in a meeting, the Civil Division attorneys did not understand FLEOA's counsel to be requesting my attendance and participation at that meeting, and so I was not informed of that request. That misunderstanding appears to be the basis for the mistaken concern expressed in FLEOA's letter about my good faith.

I had not reviewed or rejected FLEOA's settlement proposal. I have attached an August 3, 2006, letter sent to plaintiffs' counsel by the Deputy Assistant Attorney General (DAAG) who is overseeing this case, which reflects the current status of discussions. In that letter, the DAAG explains his own concerns about FLEOA's settlement proposal, requests further information from plaintiffs' counsel on the rationale for their proposed settlement, and offers to meet with them in person on the subject. The letter further states that, while I had not previously been made aware of their request to meet, the DAAG would inform me if they would like my personal participation at the meeting. My understanding is that a meeting is being arranged at which I will participate.

I am told that the time period for the back pay covered by the settlement proposal closed several years ago, so delay does not increase the number of days for which back pay might ultimately have to be paid. In all events, as noted in the preceding paragraph, the parties are proceeding with settlement discussions. I cannot predict in advance what the outcome of those discussions will be, but I and others at the Civil Division will certainly listen to plaintiffs' counsel carefully, consider their proposal with an open mind, candidly discuss the issues with plaintiffs' counsel, and deal with plaintiffs and their counsel in complete good faith.

Responses to Written Questions of Senator Richard Durbin
Peter D. Keisler, nominated to be a United States Circuit Judge
for the District of Columbia Circuit

1. **During your service in the Reagan White House, you worked on the nomination of Judge Robert Bork to the Supreme Court. In response to criticism by Senators of Judge Bork in 1987, you told the *National Journal*: "It's just a bunch of hot air. I think Bork is in the mainstream." Reflecting upon the defeat of the Bork nomination, you told the *New York Times*: "It was unpleasant, the kind of thing that makes you hit the wall some nights. It was extremely frustrating to see ideas that had previously been considered part of a reasonable debate excommunicated and defined as extreme by the Senate."**

   A. **Please provide three examples of ideas you believe were "excommunicated and defined as extreme by the Senate," and explain the basis for your belief.**

Response: I do not recall the *National Journal* quote; I was, however, able to locate it online in the August 1, 1987 issue. I appreciate the opportunity to clarify that my comment was not responding to statements by Senators. The context for the comment instead was that the *National Journal* was reporting on a specific study by two law students that unfavorably characterized Judge Bork's votes in the cases he had heard while sitting on the court of appeals. The magazine sought a reaction to that study on behalf of the Reagan Administration while I was serving in the White House Counsel's office. In disputing the study's conclusions, I was quoted by the *National Journal*, immediately after the sentences reproduced above, as explaining that "He [Judge Bork] has been in the majority in 94% of the cases he's heard." The reference to the "mainstream" reflected the observation that he had not been an especially frequent dissenter as a judge on the court of appeals, and, to the contrary, was in agreement with his colleagues on the proper disposition of a substantial majority of the cases that came before him. It was also the case, if I remember correctly, that as of the date of that article none of the court of appeals opinions Judge Bork had authored had ever been reversed by the Supreme Court.

My description of Judge Bork as in the "mainstream" would have been meant to convey the fact that, on the court of appeals, his rulings and decisions had been within the range of the normal give and take on that Court, rather than being at odds with an otherwise unanimous consensus of his colleagues. In particular, I regarded all of the judges sitting on the court of appeals, and all of the justices sitting on the Supreme Court, as within the mainstream even though they might disagree with one another. Therefore, the sense in which I believe I would have used the term "mainstream" was a broad one that would include a substantial range of potentially differing views on particular cases, rather than being limited to a single set of "correct" answers to each.

Similarly, I do not recall the comment to the *New York Times* to have related to any specific position on a particular issue or set of issues. It instead reflected a more general reaction to the rejection of Judge Bork's Supreme Court nomination in light of the fact that he had earlier been confirmed unanimously for the court of appeals, and during his service there had functioned

within, not outside of, the range of normal give and take on that court, was largely in agreement with his fellow judges, and had not provoked reversals by the Supreme Court.

B. You stated "I think Bork is in the mainstream," yet one of his ideas was that there is no constitutional right to privacy. Do you believe that Judge Bork's views on privacy are in the mainstream? Please explain.

Response: The proposition that "there is no constitutional right to privacy" is contrary to my understanding of the law. The Constitution protects individual privacy in many ways, including as an aspect of liberty protected by the due process clause.

C. Do you believe that Judge Bork's views on the use of original intent in interpreting the Constitution are in the mainstream? Please explain.

Response: Please see below response to subpart (D).

D. Do you share Judge Bork's views on original intent? Please explain.

Response: With respect to original intent, I understand examining the intention underlying the adoption of a particular constitutional provision to be an important step in construing and applying that provision. But while I understand original intent to be an important source of interpretive guidance, I do not understand it to be the exclusive source of interpretive guidance. In many important and controlling constitutional decisions, the Supreme Court's holdings and reasoning have explicitly relied upon interpretive methods other than, or in addition to, original intent, and require courts to go beyond the specific understandings that prevailed at the time the Constitution was established. If confirmed, I would follow those precedents and the principles they adopt.

E. Do you personally disagree with any of the ideas or beliefs Judge Bork has advanced in his writings or at his Supreme Court nomination hearing? If so, please explain which of Judge Bork's ideas and beliefs you disagree with.

Response: Judge Bork has been a particularly prolific writer and speaker, and I cannot begin to catalogue all of his positions on issues for purposes of identifying which ones I agree with and which ones I do not. I have, however, addressed above the specific issues mentioned in (B), (C), and (D).

F. Please describe the role you played in recommending that Judge Bork be nominated to the Supreme Court, and in preparing Judge Bork for his nomination hearing before the Senate Judiciary Committee.

Response: I do not recall playing a role in recommending that Judge Bork be nominated to the Supreme Court. (At the time, I was a junior lawyer in the office and my recommendation was not generally sought on matters of that profile.) After Judge Bork was nominated, I was part of the team, which included individuals from both the White House and the Department of Justice, that assisted Judge Bork in his preparation for confirmation hearings.

2. **When he ran for president in 2000, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.**

   A. **How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**

Response: Please see below response to subpart (B).

   B. **Do you consider yourself to be a strict constructionist? Why or why not?**

Response: I have not used the term "strict constructionist" to characterize judges or judicial decisions, in part because I do not think there is a common understanding of what such broad labels mean and in part because, however one may define such labels, they tend to oversimplify the process by which a judge decides a case. I would not think it appropriate for me, as a nominee to a lower court, to characterize the views of particular justices for purposes of endorsing or criticizing those views. With respect to my own judicial philosophy, however, I believe most fundamentally that a judge should observe the distinction between applying the law and setting policy, and should recognize that his or her role is limited to the former. It is precisely because a judge is confined to applying the law based on neutral principles of interpretation, rather than setting policy based on his or her personal opinions, that judges are unelected and independent of the political process through which policy decisions are properly made. Observing the important but limited role of the judiciary requires a judge to keep that distinction constantly in mind, to recognize that his or her legitimacy depends upon it, and to exercise the self-discipline necessary to maintain it.

I also believe that the judicial process requires both (1) that cases be resolved based on relatively narrow principles that address the particular facts and claims presented, rather than by unnecessarily addressing broader controversies that are not essential to the matters directly at hand, and (2) that precedent be afforded great respect. Those two principles are closely related, because together they enable the law to develop in a stable and incremental way, rather than through sudden shifts that render it less predictable, less reliable, and more idiosyncratic.

Furthermore, for a court of appeals judge, I believe that important constraints on decisionmaking are imposed not only by precedential decisions from the court of appeals and controlling authority from the Supreme Court, but also, in light of limits that apply to the appellate process,

by district court decisions. District courts have substantial latitude in making factual findings, managing cases, and deciding other matters over which the scope of appellate review is limited, and appellate judges must respect those boundaries as well.

Finally, I believe that how a judge conducts himself or herself is as important as the decisions that the judge may reach. Our legal system is appropriately the envy of the world, and the fairness of the process is one of the central reasons for that reputation. A judge upholds both the appearance and the reality of fairness by being well-prepared and efficient, by being genuinely open-minded, able to listen, and comfortable reexamining his or her own assumptions, and by ensuring that everyone involved with the process is treated with the utmost dignity, courtesy, and respect. I regard those principles as aspects of judicial philosophy no less fundamental than the other principles discussed above.

C. Do you believe that *Roe v. Wade, Brown v. Board of Education,* and *Miranda v. Arizona* are consistent with strict constructionism? Why or why not?

Response: As indicated in my response above to subpart (B), "strict constructionism" is not a term I use or one I believe has a commonly understood meaning. The decisions identified in the question are all settled law – indeed, their central holdings have been reaffirmed and applied by the Supreme Court in many subsequent cases. If confirmed, my responsibility as a court of appeals judge would be to apply each of them fully and fairly, and that is a responsibility I strongly believe in and would be committed to fulfilling.

3. **At their nomination hearings, Chief Justice Roberts and Justice Alito testified in opposition to the use of foreign legal opinions by U.S. federal courts. Chief Justice Roberts testified that he opposed the use of foreign law because it "allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution." Justice Alito testified that "I don't think foreign law is helpful in interpreting the Constitution."**

Others, however, have argued that foreign law can indeed be helpful as guidance for U.S. federal judges. Justice Ginsburg has observed: "I will take enlightenment wherever I can get it." The late Chief Justice Rehnquist once said:

> **"When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."**

Which side of this debate do you come down on? Do you agree with the approach of Justices Roberts and Alito or that of Justices Rehnquist and Ginsburg? Please explain.

Response: Questions of foreign law can arise in cases in a variety of quite different contexts. For example, resolution of a commercial case may depend on a point of foreign law when a contract designates the law of a foreign country as controlling. Determinations of foreign law in such circumstances are sufficiently commonplace that there is a specific rule in the Federal Rules of Civil Procedure – Rule 44.1 – setting out the procedural requirements that apply to such determinations.

I understand the statements quoted in this question, however, to address one particular use of foreign law – as an aid to interpreting the Constitution. If confirmed as a lower court judge, I would be equally bound by all Supreme Court decisions, regardless of whether they relied or declined to rely on foreign law, and if the Supreme Court were to reach a holding determining whether and how foreign law should be employed in constitutional cases, I would be bound by that holding as well.

In the absence of such a holding, I would have concerns about the use of foreign law in constitutional interpretation for reasons of both theory and application. As a matter of theory, foreign law, however admirable it might be in particular instances, was not developed under our own constitutional system and may well reflect values different from those adopted by the people of the United States in our own statutes and Constitution. Therefore, there could be significant questions of legitimacy in the use of foreign law to interpret American law. As a matter of application, because of the sheer number of foreign legal systems, and the wide range of different principles they embody, a judge relying on foreign law would need to decide why one foreign country's law should be preferred as guidance over another foreign country's law. There are not, to my knowledge, developed legal principles that would guide that choice and address the significant problem of selectivity.

4. **You served as the director and secretary of the Federalist Society between 1983 and 2000. Please explain your duties and responsibilities when you served in these positions.**

Response: The Board of Directors, of which I was a member, provided general direction for the organization and approved broad policies relating to its activities. As Secretary, I had the additional responsibility of preparing the minutes of Board meetings.

5. **According to your Senate questionnaire, you have not been a member of the Federalist Society since 2000. Are you, in fact, no longer a member of the Federalist**

Society? If not, why did you decide to end your membership in this organization?

Response: While I have not paid dues to the Federalist Society for several years, I receive notices in the mail about conferences and other public events, and attend such events from time to time. In light of this question, I checked with the Federalist Society and was told that I remain on its membership list, even though I have not been paying dues, as a courtesy arising out of my past participation on the Board. I left the Board in 2000 because I concluded that, in light of my increasing personal and professional responsibilities – family and work – I could not devote the necessary time to it.

6. **A *Washington Post* article in 2001 reported that when you worked at Sidley & Austin, "Keisler was instrumental in getting the firm to offer health benefits to the same-sex partners of employees, and his colleagues praise his efforts to improve the recruiting of minorities, women and gays."**

During your time at Sidley's D.C. office, you were the hiring partner of the office from 1995 to 2002. During your time as hiring partner:

A. What percentage of the attorneys hired by Sidley's D.C. office were women, minority, or gay?

Response: Please see below response.

B. What percentage of the attorneys who were considered for partner by Sidley's D.C. office were women, minority, or gay?

Response: Please see below response.

C. What percentage of the attorneys who were made partner by Sidley's D.C. office were women, minority, or gay?

Response: Please see below response.

D. Did Sidley's D.C. office actively recruit potential attorneys from predominately minority law schools? If so, how many attorneys were hired from such law schools?

Response: Please see below response.

E. Did Sidley's D.C. office actively recruit potential attorneys at job fairs organized by the National Black Law Students Association?

Response: During my time as hiring partner, Sidley & Austin's D.C. office sent attorneys to Howard University School of Law and Black Law Students Association job fairs to interview and recruit. I do not have the statistics referenced in subparts (A), (B), (C), or the second question of subpart (D).

7. **During your time at Sidley & Austin, the head of Sidley's appellate group, of which you were a member, represented the state of Colorado in the 1996 Supreme Court case *Romer v. Evans*. In this case, your firm sought to uphold a state referendum that permitted discrimination against gays and lesbians; the Supreme Court ruled against your position.**

   A. What was your involvement in this case?

Response: I had no involvement in Sidley & Austin's representation of the state of Colorado in *Romer v. Evans*.

   B. What is your view of the legal position that was advocated by Colorado?

Response: Colorado's legal position was rejected by the Supreme Court, and the Court's decision is binding law.

   C. To what extent was Sidley's decision to offer health benefits to same-sex partners of employees a response to the controversy surrounding the firm's representation of the state of Colorado?

Response: I was not a member of Sidley & Austin's Management Committee, and therefore cannot address to what extent the publicity surrounding *Romer* ultimately influenced its decision.

8. **Sidley & Austin is currently the defendant in an age discrimination suit filed by the Equal Employment Opportunity Commission because of Sidley's decision to downgrade a number of older partners. One of Sidley's defenses is that law firm partners are not "employees" for the purpose of the Age Discrimination in Employment Act (ADEA).**

   A. What is your view of this defense?

Response: I had no involvement in the underlying decision by the management of the firm. Nor did I work on the case or examine the argument regarding who is an "employee" of the firm. I know that the Seventh Circuit called into serious question the claim that the partners were necessarily employers and could not be employees for purposes of the ADEA. If confirmed, a case involving such issues could come before me. As such, it would not be appropriate for me to

comment on the merits of any particular legal argument.

B. As a former partner of Sidley, are you subject to any personal liability if Sidley is found to have violated ADEA and damages are awarded to those older partners who were downgraded?

Response: I am told that the EEOC's claims are against the law firm only, not individual partners, and that the law firm's exposure is within its insurance coverage.

9. **While serving as the Assistant Attorney General of the Civil Division, have you made any efforts to offer health benefits to same-sex partners of employees, and to improve the recruitment of minority, women, and gay attorneys at the Justice Department? If so, please describe those efforts.**

Response: During my time as Assistant Attorney General of the Civil Division, the Civil Division has sent attorneys to conventions of the National Bar Association, the Hispanic National Bar Association, and the National Asian Pacific American Bar Association in order to recruit minority attorneys. I encouraged all managers within the Civil Division to attend diversity training and attended it myself. And the Civil Division has implemented Department-wide diversity initiatives, including the Student Loan Repayment Program, the Attorney Mentoring Program, and the posting of all attorney and management vacancies. With respect to health benefits, my understanding is that they are dictated for the executive branch by the Office of Personnel Management pursuant to statutory requirements, and that individual components of cabinet departments, like the Civil Division, do not have the authority to modify the program.

10. **As Assistant Attorney General of the Civil Division, you oversee the Justice Department's tobacco litigation. Were you personally involved in any settlement negotiations with the defendants in *United States v. Philip Morris*? If so, what was your role?**

Response: At one point, the district court ordered the case referred to mediation for the purpose of exploring settlement. I was part of a group of Department of Justice attorneys, including career attorneys from the Civil and Criminal Divisions involved with litigating the case, that met with defendants' counsel pursuant to that Order. No settlement resulted from that mediation.

11. **To what extent did the White House influence the positions you advanced in the *United States v. Philip Morris* litigation? Please discuss the role the White House played in the decision to change the government's position on the smoking cessation remedy in this litigation.**

Response: I received no input from the White House on what remedies the Department should seek or what positions we should argue in the case.

Responses to Written Questions of Senator Charles Schumer
Peter D. Keisler, nominated to be a United States Circuit Judge
for the District of Columbia Circuit

1. **Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning. Please discuss the reasons for your criticism.**

Response: I do not believe it would be appropriate for me, as a nominee for judicial office, to agree or disagree with the holdings of particular Supreme Court decisions that are controlling precedents for lower court judges, or to pronounce a personal view of the correctness or incorrectness of the reasoning of such decisions. If confirmed, my obligation as a lower court judge would be to apply all such precedents fully and fairly, and with the recognition that all are equally binding – an obligation I strongly believe in and would be committed to fulfilling. Criticism of a particular Supreme Court precedent by a nominee who is then confirmed could be unfair to a litigant who might in the future need to rely on that same precedent in arguing a point of law before that nominee.

2. **Which two current Supreme Court Justices do you believe have the most divergent judicial philosophies? How would you characterize the judicial philosophies of each (e.g., strict constructionist, originalist, etc.)? Of the two you name, in terms of judicial philosophy, which Justice do you anticipate you will more closely approximate and why?**

Response: I recognize that it is not uncommon for people to characterize Supreme Court Justices with broad philosophical labels, but I think it is generally a mistake to do so. Such labels tend to overgeneralize and oversimplify the process by which a justice decides an individual case, and result in mistaken assumptions about how a justice may resolve the particular facts and legal claims presented by a case. With respect to my own judicial philosophy, I believe most fundamentally that a judge should observe the distinction between applying the law and setting policy, and should recognize that his or her role is limited to the former. It is precisely because a judge is confined to applying the law based on neutral principles of interpretation, rather than setting policy based on his or her personal opinions, that judges are unelected and independent of the political process through which policy decisions are properly made. Observing the important but limited role of the judiciary requires a judge to keep that distinction constantly in mind, to recognize that his or her legitimacy depends upon it, and to exercise the self-discipline necessary to maintain it.

I also believe that the judicial process requires both (1) that cases be resolved based on relatively narrow principles that address the particular facts and claims presented, rather than by unnecessarily addressing broader controversies that are not essential to the matters directly at hand, and (2) that precedent be afforded great respect. Those two

principles are closely related, because together they enable the law to develop in a stable and incremental way, rather than through sudden shifts that render it less predictable, less reliable, and more idiosyncratic.

Furthermore, for a court of appeals judge, I believe that important constraints on decisionmaking are imposed not only by precedential decisions from the court of appeals and controlling authority from the Supreme Court, but also, in light of limits that apply to the appellate process, by district court decisions. District courts have substantial latitude in making factual findings, managing cases, and deciding other matters over which the scope of appellate review is limited, and appellate judges must respect those boundaries as well.

Finally, I believe that how a judge conducts himself or herself is as important as the decisions that the judge may reach. Our legal system is appropriately the envy of the world, and the fairness of the process is one of the central reasons for that reputation. A judge upholds both the appearance and the reality of fairness by being well-prepared and efficient, genuinely open-minded, able to listen, comfortable reexamining his or her own assumptions, and by ensuring that everyone involved with the process is treated with the utmost dignity, courtesy and respect. I regard those principles as aspects of judicial philosophy no less fundamental than the other principles discussed above.

3. **How do you define judicial activism? Please provide us with an example of judicial activism in either a state or federal case that has not been reversed.**

   a. **Was the Supreme Court engaging in judicial activism in any of the following cases?**
   ***Brown v. Board of Education*?**
   ***Miranda v. Arizona*?**
   ***Dred Scott v. Sandford*?**
   ***The Civil Rights Cases* of 1883?**
   ***Lochner v. New York*?**
   ***Furman v. Georgia*?**
   ***Bush v. Gore*?**

Response: I understand the term "judicial activism" to refer to a failure by a judge to respect the distinctions I described in the first paragraph of my response to the preceding question: *i.e.*, the distinctions between applying the law and making policy, and between the values codified into law and those that merely reflect the personal opinions of the judge.

One aspect of the decision of the Supreme Court of Ohio in *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 1212 (Ohio 2002), provides an example. The *Dardinger* Court determined that a substantial portion of a $30 million punitive damages award should not be given to the plaintiff, but should instead be used to establish a cancer

research fund, to be named after the plaintiff's deceased wife, at the James Cancer Hospital and Solove Research Institute at the Ohio State University. This is an area of Ohio state law that I am not especially familiar with, but a selection of one particular charitable recipient for an award over other possible recipients would appear to be a question of pure policy in the absence of an available statute, legal principle, or precedent to guide the court's selection. Indeed, both the majority and the principal dissent in that case observed that other States that adopted similar alternative distribution mechanisms for punitive damage awards did so by enacting legislation, underscoring the generally legislative, not judicial, nature of such determinations.

With respect to Supreme Court cases, as explained in my response to question 1, I do not feel it would generally be appropriate for me to endorse or criticize specific precedential Supreme Court decisions. I would note, however, that *Dred Scott* and *Lochner* do not address issues that will be the subject of litigation in the court of appeals and will obviously not be relied upon by any modern litigant as precedent. Both decisions are rightly regarded as among the lowest points in our nation's constitutional history, and fully earned the disrepute in which they are now held. The language in both opinions strongly suggests that the results were driven by the particular policy views held at the time by the members in the Court that comprised the majority, rather than faithful application of neutral principles of constitutional interpretation, and if so were "activist" in the sense in which I defined the term. But whether or not that accurately describes the particular motivations behind the decisions, there is no question in my mind that they badly misconstrued the law.

4. **In 1987, you once said to the *National Journal*, "I think [Judge] Bork is in the mainstream." Prior to that, Judge Bork had articulated the following position:**

> **"I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons. One is historical and traditional. The Court has never thought constitutional precedent was all that important . . . And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it. . . I don't think precedent is all that important. I think the importance is what the framers were driving at, and to go back to that."**

a. **Do you still believe Judge Bork to be in the judicial mainstream?**

Response: Please see below response.

b. **Do you believe he was in the judicial mainstream at the time of his confirmation hearing in 1987?**

Response: Please see below response.

c. What is your definition of the judicial "mainstream"?

Response: Please see below response.

d. Do you agree or disagree with Judge Bork's views, as expressed in the passage above? What is your own view of the importance of precedent "in the field of constitutional law"? Please do not respond merely by explaining that as a Court of Appeals judge you would necessarily be bound to follow the precedents of the Supreme Court. In order to gain an understanding of your judicial and legal philosophy, I would like to know your view of the proper role of constitutional precedent in the reasoning of Supreme Court justices.

Response: I do not recall the quote; I was, however, able to locate it online in the August 1, 1987, issue of the *National Journal*. In the article in which it appeared, the *National Journal* was reporting on a specific study by two law students that unfavorably characterized Judge Bork's votes in the cases he had heard while sitting on the court of appeals. The magazine sought a reaction to that study on behalf of the Reagan Administration while I was serving in the White House Counsel's Office. In disputing the study's conclusions, I was quoted by the *National Journal*, immediately after the sentence reproduced above, as explaining that "He [Judge Bork] has been in the majority in 94% of the cases he's heard." The reference to the "mainstream" reflected the observation that he had not been an especially frequent dissenter as a judge on the court of appeals, and, to the contrary, was in agreement with his colleagues on the proper disposition of a substantial majority of the appeals that came before him. It was also the case, if I remember correctly, that as of the date of that article none of the court of appeals opinions Judge Bork had authored had ever been reversed by the Supreme Court.

My description of Judge Bork as in the "mainstream" would have been meant to convey the fact that, on the court of appeals, his rulings and decisions had been within the range of the normal give and take on that court, rather than being at odds with an otherwise unanimous consensus of his colleagues. In particular, I regarded all of the judges sitting on the court of appeals, and all of the justices sitting on the Supreme Court, as within the mainstream even though they might disagree with one another. Therefore, the sense in which I believe I would have used the term "mainstream" was a broad one that would include a substantial range of potentially differing views on particular cases, rather than being limited to a single set of "correct" answers to each.

With respect to my own views, I do not believe that constitutional precedent is "[un]important" or should be disregarded simply because a justice disagrees with a prior Supreme Court's interpretation of the law. To the contrary, respect for precedent -- including constitutional precedent -- is important for at least two distinct reasons. First, when a court has carefully considered a matter in the course of the judicial process and rendered a decision, respect for that process and the judgment of one's colleagues and predecessors means that one should not lightly conclude that they erred. Second, stability

and predictability are themselves important values in the law, and would be undermined if each justice felt free to overrule prior decisions whenever that justice would have ruled differently had he or she heard the cases in the first instance.

5. **More recently, in November 2005, in the *National Review Online*, Judge Bork said this:**

> **"[O]verturning *Roe v. Wade* should be the *sine qua non* of a respectable jurisprudence. . . . [M]any justices have made the point that what controls is the Constitution itself, not what the Court has said about it in the past."**

a. **To what extent do you agree or disagree with this statement by Judge Bork?**

Response: I disagree in two respects. With respect to the first sentence, I do not believe that "overturning *Roe v. Wade* should be the *sine qua non* of a respectable jurisprudence." Several of the justices currently on the Supreme Court have taken differing positions on whether *Roe* should be overruled, and I do not regard any of them as lacking a respectable jurisprudence. With respect to the second sentence, for a court of appeals or district court judge, "what the [Supreme] Court has said about" the Constitution in the past does indeed "control[]," even if the judge has a different view of how the Constitution should have been interpreted, and for a Supreme Court Justice, my views are those expressed in my response to the preceding question.

6. **You list *United States v. Bird* as one of the ten most significant cases that you have litigated. In that case, you successfully argued, on behalf of the Administration, in favor of the constitutionality of the Freedom of Access to Clinic Entrances ("FACE") Act.**

a. **Did you have any role in the decision to support the constitutionality of the FACE Act?**

Response: Please see below response.

b. **At the time of your involvement in the *Bird* case, given that the prior Administration had consistently supported the constitutionality of the FACE Act, was there any serious debate about what the Administration's position should be?**

Response: I never considered recommending that the Department decline to defend the constitutionality of the FACE Act. In the absence of such a recommendation or suggestion, there was no need for a formal decisionmaking process on that question.

7. **As described in your questionnaire answers, the District Court in *Bird* held that "FACE was an impermissible federal regulation of state and local activity and therefore violated the Commerce Clause." In so holding, the District Court relied on the Supreme Court's decisions in *Morrison* and *Lopez*.**

   a. **In *Morrison*, a 5-4 Supreme Court held that despite years worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5-$10 billion each year in health care, criminal justice, and other social costs, Congress did not adequately establish the effect of violence against women on interstate commerce to justify the use of Commerce Clause powers. The four Justice minority disagreed, arguing that the Court should show deference to Congress' ample findings and uphold the Violence Against Women Act as a rational response to the national threat posed by gender-motivated violence. Do you agree with the majority's conclusion or the minority's and why?**

Response: Please see below response.

   b. **Do you agree with the Court's decision in *United States v. Lopez*, which struck down the Gun-Free School Zone Act because education is traditionally local? Is there any circumstance under which Congress could regulate activities in and around schools using its Commerce Clause authority?**

Response: Please see below response.

   c. **Do you believe that the more recent case of *Gonzales v. Raich* was correctly decided?**

Response: *Lopez*, *Morrison*, and *Raich* are all binding precedents that are controlling on lower courts, and I would of course adhere to them if confirmed. Moreover, those three cases are only a subset of a broader series of Commerce Clause precedents that likewise continue to be controlling decisions for lower courts. My understanding of *Lopez* and *Morrison* is that, while they invalidated two specific federal statutes, those holdings did not overrule any of the many prior Commerce Clause decisions that have repeatedly upheld the proposition that Congress has broad authority under the Commerce Clause. To the contrary, the Supreme Court in *Raich* emphasized that no single precedent in this area may be "viewed in isolation" and that *Lopez* and *Morrison* had "preserved" the "larger context of modern-era Commerce Clause cases." Indeed, the Court in *Raich* illustrated the vitality of these points by relying extensively for its own holding and reasoning on the Court's seminal decision in *Wickard v. Filburn*. The Court in *Raich* further reaffirmed that "Congress' power to regulate purely local activities that are part of

an economic 'class of activities' that have a substantial effect on interstate commerce is firmly established," and I regard that as the law in this area.

8. Under what circumstances should a court invalidate a law duly passed by the Congress?

a. What amount of deference should the court give to Congressional action?

Response: Please see below response.

b. Should the Court err on the side of upholding a law?

Response: Please see below response.

c. Do certain types of laws deserve greater deference than others? Regulatory laws? Criminal laws?

Response: Please see below response.

d. How closely tied must a law be to an enumerated right of Congress under Article I for it to be upheld?

Response: A decision by a court to declare a congressional enactment unconstitutional is an exceptionally serious matter – in the words of Justice Holmes, "the gravest and most delicate" act a court might perform. That is so for at least two reasons. First, such a decision places a court in conflict with the judgment of a coordinate branch of government. Congress is presumed to have considered the constitutionality of legislation when enacting it, and those judgments are entitled to great respect. Second, the practical effect of such a holding is to set aside a decision reached through the democratic process, and to place certain types of decisions beyond the reach of that process (absent the extraordinary event of a constitutional amendment).

Because of the seriousness of any such determination, if I were confirmed my approach to considering such a claim would reflect several principles that require considerable deference by a court. First, a congressional enactment is presumed to be constitutional, and the burden rests with those challenging its lawfulness to demonstrate otherwise. Second, where a statute is ambiguous and susceptible of more than one interpretation, a court should favor an interpretation, if fairly possible, which would render the statute constitutional. Third, for similar reasons of avoidance, if a claim or case can be fairly resolved on legal grounds that would not require a decision on the constitutionality of legislation, those other grounds should likewise be preferred to a basis for decision that would instead require holding a statute unconstitutional.

When the merits of a constitutional claim do need to be reached, the degree of deference can vary depending on the nature of the particular statute. For example, a statute which makes a classification that involves suspect classes or fundamental rights will receive heightened scrutiny and correspondingly less deference. By contrast, where classifications involve, for example, purely economic regulation subject to rationality review, the highest degree of deference is owed to the legislature's choices.

With respect to the Constitution's enumeration of congressional powers and how "closely tied" legislation must be to such powers: Article I, Section 8, after listing several specific grants of authority, also more generally grants Congress the power to "make all laws which shall be necessary and proper to carry into execution" its other powers. As the Supreme Court held in *McCullough v. Maryland*, that clause, as well as the powers implicit in the Constitution's other grants of authority to Congress, establishes substantial breadth and flexibility for Congress to legislate according to its determination of how best to serve the public interest.

9. **You successfully argued the *Hamdan* case before the D.C. Circuit Court of Appeals, to which you now aspire. The D.C. Circuit's decision, of course, was reversed by the Supreme Court a few weeks ago in a rebuke of the Administration's expansive views of executive power.**

   a. **Please describe your own view of the proper role of the courts in checking executive power and in mediating disputes between the executive branch and Congress.**

Response: The Constitution establishes a structure in which power is distributed among the branches rather than being concentrated in any single branch. That dispersal of power is one of the central mechanisms the Constitution establishes to check government abuses and protect individual liberty. Courts play an important role in that structure, and one aspect of that role is to adjudicate in appropriate cases claims that one branch has exceeded its constitutional or statutory authority.

Youngstown Sheet & Tube Co. v. Sawyer illustrates the practical application of these principles to a claim of unauthorized exercise of power by the executive branch, and in particular the role of the judiciary in our constitutional system when such claims are brought. That case was brought to challenge the President's seizure of most of the nation's steel mills, which was ordered for reasons of national security. In concluding that no statute or constitutional provision authorized the seizure, and in enjoining the Secretary of Commerce from implementing it, the Supreme Court enforced the limits on governmental action established by the Constitution and protected the legal rights of those against whom unauthorized action would otherwise have been taken.

Although the precise holding of *Youngstown* was then, and remains now, of great importance, Justice Jackson's concurring opinion has been even more influential in establishing more generally a framework for courts to use in analyzing claims that the

executive branch has exceeded its authority. That framework recognizes that the extent of executive authority over a particular matter will often depend upon the scope and nature of congressional action on the same matter, and that a President acts with the greatest claim of authority when the executive and legislative branches are aligned and with the least compelling claim of authority when they are in opposition. I regard *Youngstown* as supplying the central starting point for examining claims that the scope of executive power has been exceeded and the analytical structure that should be applied in making such determinations.

b. What role, if any, did you play in the development, implementation, and/or review of the Government's policies and practices that you defended in *Hamdan*?

Response: The President's order establishing military commissions was issued before I joined the Justice Department, and I had no role in its adoption. Nor was I involved in the *Hamdan* litigation when that litigation was in the district court. My involvement in military commission matters has been limited to representing the government's position in the appellate litigation in *Hamdan* and in subsequent district court filings in cases brought by other military commission defendants, and functions incidental to that representation – *i.e.*, communicating with the Department of Defense regarding its implementation of judicial orders, and being on the circulation list for possible modifications of military commission procedures that might impact pending litigation and about which a court would need to be informed.

10. You stated at your hearing that you have been briefed on, and "read into," the NSA surveillance program and that you have been involved in civil litigation, on behalf of the Government, in connecting with that program.

a. As you are surely aware, lawyers with the Office of Professional Responsibility ("OPR") who were properly charged with reviewing the conduct of DOJ lawyers in the development and implementation of that program were not "read into" the program and were denied necessary security clearances. Please explain why you were permitted to be read into the program in December 2005 in order to defend it in court, while OPR lawyers were excluded.

Response: I had no role in any decision on whether OPR should be granted access to such information, and therefore cannot speak to the reasons for any such determination.

b. After *Hamdan* was decided, DOJ responded to my request for an update of the Administration's legal justification with a letter that said, effectively, *Hamdan* changes nothing, even though the Supreme Court made clear that the Administration's view of the scope of the

AUMF was overly broad. Commentators vigorously disagree with that legal assessment. Conservative commentator Andrew McCarthy wrote in the *National Review Online* that the *Hamdan* decision "sounds the death knell for the National Security Agency's Terrorist Surveillance Program." Moreover, a distinguished group of constitutional law scholars and former government officials have stated that the *Hamdan* decision "further refutes" the Administration's legal argument on this issue.

i. Do you continue to believe that the NSA Surveillance Program is legal and Constitutional?

Response: Please see below response.

ii. In light of *Hamdan*, with what degree of confidence do you believe that the program would survive a challenge in the Supreme Court?

Response: With respect to the lawfulness of NSA activities that are the subject of allegations in litigation, I have not expressed a personal view, but am instead serving as litigation counsel and representing the government's position in court. As litigation counsel, it would not be appropriate for me to express a personal view either on the merits of these arguments or on what decision might be issued by the Supreme Court in the future.

11. Last year, during the controversy surrounding the Terri Schiavo case, Congress passed a law specifically creating a federal cause of action for Terri Schiavo's parents. Congress took this action after the claims of Terri Schiavo's parents had been considered and rejected more than a dozen times by state and federal courts. Some have criticized Congress by suggesting, as now-Chief Justice Roberts once did, that "we've gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law."

a. Was the Schiavo case an example of that kind of Congressional overreaching? Was the medical condition of one person the appropriate place for Congress to intervene?

Response: Please see below response to subpart (b).

b. Is it a good idea for Congress to write legislation aimed at a specific case, especially after numerous courts have already issued decisions in the matter?

Response: Legislation that deals by its terms with specific, named persons or entities can raise significant constitutional questions that are less likely to arise when legislation is

crafted at a higher level of generality. For example, very specific legislation may raise potential equal protection or due process concerns, and, to the extent it imposes punishment, could also constitute an unconstitutional bill of attainder. Furthermore, when a statute is addressed to a specific case or class of cases, it can violate separation of powers if, for example, it retroactively reopens final judgments. But specificity alone is not invariably fatal and, as I noted in response to question 8, Congress both has broad authority to address issues in the manner it deems most appropriate and is entitled to considerable deference when its enactments are challenged as unconstitutional. Thus, for example, the Supreme Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act, even though the Act singled out President Nixon by name, because it found he constituted a "legitimate class of one." The result in any individual case is likely to turn on the precise operation of the particular statute in question.

After Congress sent this case back to the 11th Circuit, the court again rejected the claims of Terri Schiavo's parents by a 10-2 vote. And, in a concurring opinion, a Republican-appointed judge criticized President Bush and Congress for acting "in a manner demonstrably at odds with our founding fathers' blueprint for the governance of a free people" by undermining the separation of powers and the independence of the courts.

c. Do you agree with the sentiment expressed in this opinion? In other words, in your view, did this legislation undermine the independence of the courts?

Response: Regardless of how the courts would ultimately have ruled on the constitutionality of the law dealing with Terri Schiavo, and without expressing a view on that question, the resolution of the case indicates that, as a practical matter, the courts remained independent. The statute vested jurisdiction in the federal courts to hear the Schiavo parents' claims, but did not dictate any substantive outcome, and the decisions by the district court and the court of appeals rejecting those claims reflected their independent judgment of the merits.

12. Columnist Robert Novak has reported that your nomination to the D.C. Circuit became possible only after conservatives blocked a more moderate lawyer – Professor Debra Livingston of New York – from becoming the nominee for this seat. As I understand it, she was all set to go, but was pulled back at the last instant.

a. Do you have any understanding of why you were nominated to this seat, rather than Professor Livingston?

Response: Please see below response.

b. To your knowledge, did considerations of judicial philosophy, ideology, or degree of judicial or political conservatism play any role in the Administration's decision to nominate you rather than Professor Livingston to this seat?

Response: I do not know the reasons for the decision to nominate me to the D.C. Circuit, or for the decision to nominate Professor Livingston to the Second Circuit.

SUBMISSIONS FOR THE RECORD

July 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judicial Nomination of Peter Keisler to the United States Court of Appeals for the District of Columbia Circuit

Dear Senators Specter and Leahy:

The undersigned, all of whom are members of the Bar of the District of Columbia, are writing to express our strong support for the nomination of Peter Keisler to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit. Although as individuals we reflect a spectrum of political party affiliations and ideology, we are united in our view that Peter Keisler promises to be an outstanding federal court of appeals judge.

As practitioners, many of us had the opportunity to work with Mr. Keisler -- in some instances as co-counsel, in other instances as opposing counsel -- on a wide range of appellate matters during his time in private practice. In that capacity, he consistently demonstrated extraordinary legal skill in advancing his clients' interests. His appellate briefs were incisive and powerful, and his oral advocacy was magnificent. Of equal importance, he always conducted himself with exceptional professionalism, grace and collegiality. In our experience, he never showed the slightest trace of incivility. And he always displayed exemplary integrity and fair-mindedness. In short, we can say without reservation that Peter Keisler is one of the finest lawyers of his generation.

The Honorable Arlen Specter
The Honorable Patrick J. Leahy
July 28, 2006
Page 2

We are certain that the qualities that distinguished Mr. Keisler in private practice will enable him to be a great jurist. We therefore urge that the Committee on the Judiciary give his nomination prompt and favorable consideration.

Thank you.

Sincerely,

Mark L. Evans, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
Jonathan S. Franklin, Fulbright & Jaworski, L.L.P.
David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
Ian Heath Gershengorn, Jenner & Block LLP
John H. Harwood II, Wilmer Cutler Pickering Hale and Dorr LLP
Michael K. Kellogg, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
William E. Kennard, The Carlyle Group
Jody Manier Kris, Wilmer Cutler Pickering Hale and Dorr LLP
William T. Lake, Wilmer Cutler Pickering Hale and Dorr LLP
Jeffrey A. Lamken, Baker Botts L.L.P.
Christopher Landau, Kirkland & Ellis LLP
Sean A. Lev, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
Robert A. Long, Covington & Burling LLP
Maureen E. Mahoney, Latham & Watkins LLP
Andrew G. McBride, Wiley Rein & Fielding LLP
Glen D. Nager, Jones Day
Jonathan E. Nuechterlein, Wilmer Cutler Pickering Hale and Dorr LLP
David W. Ogden, Wilmer Cutler Pickering Hale and Dorr LLP
Thomas F. O'Neil III, DLA Piper Rudnick Gray Cary US LLP
Michael L. Post, Esq.
John Rogovin, Wilmer Cutler Pickering Hale and Dorr LLP
Peter A. Rohrbach, Hogan & Hartson L.L.P.
Austin C. Schlick, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
Mark D. Schneider, Jenner & Block LLP
Howard M. Shapiro, Wilmer Cutler Pickering Hale and Dorr LLP
Paul M. Smith, Jenner & Block LLP
Richard G. Taranto, Farr & Taranto
John Thorne, Verizon Communications
Donald B. Verrilli, Jr., Jenner & Block LLP
Richard E. Wiley, Wiley Rein & Fielding LLP
Christopher J. Wright, Harris, Wiltshire & Grannis LLP

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

bberenson@sidley.com
(202) 736-8971

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

July 27, 2006

By Facsimile

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy :

I write to support the nomination of Peter D. Keisler to be a judge of the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Keisler for almost 25 years, and there is literally no one I have encountered during those decades whom I could support more wholeheartedly

Some individuals are born to serve in certain roles in life. Mr. Keisler was born to be a judge. He is universally respected by individuals across the political spectrum, and that is so in large measure because he is a person of utmost integrity, complete goodwill, and utter judiciousness It is rare that an individual so talented is also so humble It is rare that an individual so accomplished is also so soft-spoken and respectful It is rare that an individual who has served in high political positions in government is so non-partisan and so non-ideological. Mr. Keisler is all of these things

He also has a professional background ideally suited to the position to which he has been nominated. His entire career before joining the Department of Justice was spent litigating administrative law issues, most often in the District of Columbia Circuit Some of the finest judges that circuit has ever had, including Judge Laurence Silberman and Judge Harry Edwards, had similar backgrounds, yet it has been some time since a true administrative law expert has been appointed to that court. As a new generation of judges takes control of that court, Mr. Keisler's background and experience in these areas would be of undoubted assistance to the court and to the national bar that practices before it

It is only necessary to begin asking questions of attorneys who know Mr. Keisler to confirm that he is of the highest character, temperament, skills, and judgment. I have literally never heard a bad word said about him, professionally or personally. As a general rule, the only individuals who admire and trust Mr Keisler more than his friends and colleagues are those who have been his adversaries in litigation. Fairness, good humor, goodwill -- these are the words

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
SIDLEY

The Honorable Arlen Specter
The Honorable Patrick J. Leahy
July 27, 2006
Page 2

that most easily come to mind when one thinks of Mr. Keisler. In both style and substance, he often reminds one of an earlier, kinder, and more gentlemanly era in the practice of law.

When so much rancor attends so many judicial nominations, a nomination such as this should be an occasion for celebration, as it presents an opportunity for the political system to come together in support of an exemplary individual and lawyer. This is a nomination that fair-minded Senators of both parties ought to be able to support with enthusiasm. Confirming Mr. Keisler to the D.C. Circuit would be a great service to the country, to the law, and to that court. I urge the Committee to act swiftly to report Mr. Keisler's nomination favorably to the Senate, and I urge the Senate to confirm him.

Sincerely,

Bradford A. Berenson

SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

dcarpenter@sidley.com
(312) 853-7237

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

July 28, 2006

Via Facsimile

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Peter Keisler

Dear Chairman Specter and Senator Leahy

I write to offer you my views on the nomination of Peter Keisler to serve on the United States Court of Appeals for the District of Columbia Circuit. To put my views in context, I am a lifelong Democrat. I served as a law clerk to Judge Frank M. Coffin on the First Circuit from August, 1975 to July 1977 and to Justice William J. Brennan Jr. on the Supreme Court from July 1977 to July 1978. I then joined Sidley Austin, where I've specialized in appellate litigation in the federal courts of appeals and on occasions in the Supreme Court. I am a member of our firm's executive committee, and I am the partner responsible for our firm's representation of AT&T. While I am not politically active by any standard, I am a political liberal on social issues and have had involvement in a number of liberal causes as a director of the Brennan Center For Justice At NYU Law School and through similar associations.

I have known Peter Keisler since he joined our firm in early 1989. Over the ensuing 12 years, Peter quickly went from being a valued associate, to my top deputy, and then to the partner who was my most trusted sounding board and confidant and a major figure in the Bar in his own right. During those years, I saw Peter perform all the most significant aspects of the practice of law, and I had innumerable discussions with Peter about not just the particular problems that we addressed together for our clients, but also the major political and legal issues of recent times. Since the time that Peter left our firm and joined the Justice Department nearly five years I ago, I have remained in close contact with Peter and seen him and talked to him regularly. I believe that I understand not only Peter's personal qualities and legal capabilities in general, but also how he thinks and, in particular, what he thinks about the appropriate role of lawyers and judges and how he would perform as an appellate court judge.

To my mind, Peter absolutely epitomizes the kind of lawyer and the kind of person who should be sitting on a federal court of appeals. He has a genuinely outstanding legal mind, is extraordinarily quick and insightful, and is also a very fine writer. But what is far more important are Peter's personal qualities and the ethics that he brings to each problem that he faces in his daily life.

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
SIDLEY

July 28, 2006
Page 2

Peter is personally and intellectually honest, to the very depths of his bones. There have been many occasions in which Peter has refused overtures of others to slant the facts of a case in ways that were favorable to our client and that would, as a practical matter, have been immune from sanction or even detection.

Peter is objective, tolerant, and fair. He is assiduous in trying to see and fully understand both sides of every issue that he thinks about.

Peter is an extraordinarily fine listener. Peter resists forming opinions and even when he does, he will always provide others a fair opportunity to dissuade him. One of the things that most impressed me about Judge Coffin was his willingness, indeed his eagerness, to listen and to give others a chance to persuade him of a position, even when that would involve persuading him that one of his prior opinions had been wrong. Peter has this same quality.

Peter is decent. He is unfailingly courteous to and respectful of the people with whom he deals. While I can think of no one (including Peter) who has Justice Brennan's extraordinary personal warmth and ability to touch people, Peter treats all people with dignity and respect, much as Justice Brennan did.

Peter is wise. He has common sense. He has impeccable judgment. .

Finally, Peter reveres the law. He not only understands but passionately believes that the strength of the law comes from its impartial application. Whatever his personal views on a subject, I know that Peter would work tirelessly to understand what the correct answer is under the precedents and would decide cases on that basis.

In short, I believe without any qualification that Peter would be an outstanding addition to the court of appeals. In fact, if confirmed, I believe Peter will perform his judicial tasks with such integrity, dedication, skill, and grace that he will be a role model for future generations of law students, practitioners, and judges.

Very truly yours,

David W. Carpenter

David W. Carpenter

DWC:dp

JAMES & HOFFMAN
A Professional Corporation
1101 17TH STREET, N.W., SUITE 510
WASHINGTON, D.C. 20036-4748
(202) 496-0500
Facsimile: 202-496-0555
www.jamhoff.com

Edgar N. James
Steven K. Hoffman
Judith A. Scott
Kathy L. Krieger
David P. Dean
Marie Chopra
Amy B. Fettig
Sean G. Bajkowski*
Katie B. Felock

Of Counsel:
Mary Joyce Carlson*
Martha Walfoort
Christy L. Hoffman
* Not Admitted in DC

ejames@jamhoff.com
skhoffman@jamhoff.com
scottj@seiu.org
klkrieger@jamhoff.com
dpdean@jamhoff.com
mchopra@jamhoff.com
abfettig@jamhoff.com
sgbajkowski@jamhoff.com
kbfelock@jamhoff.com

mjcarlson@jamhoff.com
mwalfoort@jamhoff.com
choffman@jamhoff.com

July 27, 2006

VIA FACSIMILE (202) 224-9102

Peter Jensen, Chief Nominations Counsel
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Jensen:

This firm represents the Federal Law Enforcement Officers Association ("FLEOA") which has approximately 23,000 members located throughout the United States in nearly sixty federal agencies. FLEOA has particular concerns about the nomination of Peter D. Keisler to the D.C. Court of Appeals. I attach the letter that FLEOA's President, Art Gordon, sent to Senator Specter two days ago about Mr. Keisler's nomination.

As you know, Mr. Keisler's nomination is scheduled to be considered at the Judiciary Committee's hearing next Tuesday, August 1, 2006. We would appreciate the opportunity to discuss with you the status of the Adams v. United States case, Mr. Keisler's actions in that case, and FLEOA's deep concerns. Ed James and I are available to discuss the matter with you on behalf of FLEOA either at a meeting tomorrow, if you are available, or by telephone.

I would appreciate it if you call me or Ed James at (202) 496-0500 to discuss setting up a meeting.

Sincerely,

Marie Chopra

Marie Chopra, Esq.
FLEOA, Legislative Affairs

Attachment

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION
P.O. Box 326 Lewisberry, PA 17339
www.fleoa.org
(717) 938-2300

presenting Members Of:
GENCY for INTERNATIONAL DEVELOPMENT
GRICULTURE-OIG and FOREST SERVICE
OMMERCE
Export Enforcement, OIG
& NOAA Fisheries Law Enforcement
EFENSE
Air Force - OIG
Army - CID
Defense Criminal Investigative Service
Naval Criminal Investigative Service
OIG
DUCATION - OIG
NERGY -OIG
NVIRONMENTAL PROTECTION AGENCY - CID & OIG
DERAL DEPOSIT INSURANCE CORPORATION - OIG
ENERAL SERVICES ADMIN.-OIG
EALTH & HUMAN SERVICES
Food & Drug Administration & OIG
OMELAND SECURITY
Border Patrol
Coast Guard Investigative Service
Immigration & Customs Enforcement
Federal Air Marshal
Federal Emergency Management Agency
Federal Protective Service
US Secret Service
Transportation Security Administration
OUSING & URBAN DEVELOPMENT - OIG
TERIOR
Bureau of Indian Affairs
Bureau of Land Management
Fish & Wildlife Service
National Park Service
OIG
U.S. Park Police
STICE
Bureau of Alcohol, Tobacco, Firearms & Explosives
Drug Enforcement Administration
Federal Bureau of Investigation
US Marshals Service
OIG
S. Attorney's Office-CI
ABOR- OIG & Racketeering
ATIONAL AERONAUTICS & SPACE ADMIN. - OIG
UCLEAR REGULATORY COMMISSION - OIG
OSTAL SERVICE-OIG & Inspection
AILROAD RETIREMENT BOARD - OIG
ECURITIES & EXCHANGE COMMISSION - OIG
MALL BUSINESS ADMINISTRATION - OIG
OCIAL SECURITY ADMINISTRATION - OIG
ATE DEPARTMENT
Bureau of Diplomatic Security & OIG
RANSPORTATION-OIG
REASURY
FINCEN & OIG
Internal Revenue Service - CI
TIGTA
S. COURTS (JUDICIAL)
Probation, Parole & Pretrial Services
ETERANS AFFAIRS -OIG

ATIONAL OFFICERS
resident
ART GORDON
ecutive Vice-President
JON ADLER
ce President - Operations
JOHN AMAT
ce President – Agency Affairs
STEPHEN QUARTINO
ce President – Membership Benefits
Denis Donovan
cretary
RUSS VIALPANDO
easurer
JAMES OTTEN JR
gislative Director
DUNCAN TEMPLETON
ational Chapters Director
RICHARD GALLO
ational Awards Director
RUDY DE SANTIS
ational Counsel
LAWRENCE BERGER
gislative Counsel
AMES & HOFFMAN
EDGAR N. JAMES

July 25, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

On behalf of the 25,000 members of the Federal Law Enforcement Officers Association (FLEOA), the largest non-partisan professional law enforcement organization that exclusively represents federal law enforcement officers, I am writing to express our concerns regarding the nomination of Peter D. Keisler to the D.C. Court of Appeals. Specifically, we are concerned about the elusive manner demonstrated by Assistant Attorney General Keisler in connection with his rejection of the proposed settlement in Adams v. United States, Fed. Cl. No. 90-162C, and consolidated cases.

On December 1, 2004, Judge Lynn J. Bush ruled in favor of the plaintiffs, approximately 6,000 federal law enforcement officers, stating that they were non-exempt from the Fair Labor Standards Act (FLSA) and therefore entitled to substantial back pay. Since that time, the plaintiff's attorneys twice requested meetings with Mr. Keisler's staff in order to negotiate an equitable settlement. Unfortunately, Mr. Keisler declined to meet with the plaintiff's attorneys, but instead, simply rejected the settlement proposal on July 11th, 2006, in spite of the recommendation of his own trial counsel to accept it.

By failing to meet with the plaintiff's attorneys and negotiate in good faith, Mr.Keisler has postured himself as both unreasonable and indifferent to the additional costs his decision will ultimately bring to the government. His silence also serves as a slap in the face to the brave men and women who serve their country everyday while enforcing the laws of this great nation.

The 25,000 members of FLEOA would like you and the members of your committee to question Mr. Keisler about his conduct once you convene the nomination hearings. Specifically, we ask that you question Mr. Keisler as to why he was disinclined to make a good faith effort to negotiate a proposed settlement that was ruled upon by Judge Bush.

In the interim, members of the FLEOA National Board of Directors and I would like to meet with you and members of your staff to discuss this matter in greater detail. Please let me know what date and time would be convenient for a meeting, and we will ensure our presence. Thank you for your attention to this very serious matter.

Sincerely,

Art Gordon
National President
F.L.E.O.A.
www.fleoa.org

FEDERAL LAW ENFORCMENT OFFICERS ASSOCIATION

COALITION *for a*
FAIR *and* **INDEPENDENT JUDICIARY**

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

July 31, 2006

Dear Chairman Specter:

We are writing to express our strong opposition to the Senate Judiciary Committee's decision to move forward with the August 1 hearing on the nomination of Peter D. Keisler to a lifetime position on the U.S. Court of Appeals for the D.C. Circuit. Mr. Keisler's nomination must not receive a hearing until his record is fully assembled and the Senate Judiciary Committee can meaningfully exercise its advice-and-consent function.

Of the nation's thirteen federal circuit courts, the U.S. Court of Appeals for the D.C. Circuit holds a uniquely important place because of its exclusive or concurrent jurisdiction under many statutes. The D.C. Circuit is either the one stop, or the most influential stop, for judicial review of a broad range of federal policies covering environmental protection, workplace safety, energy regulation, consumer protection, telecommunications, and enemy combatant and terrorist organization designations.[1] And because the Supreme Court reviews the D.C. Circuit's rulings so infrequently, it often has the final word on all of these enormously significant statutory and administrative matters. The importance of the D.C. Circuit cannot be overstated.

Mr. Keisler was nominated to the D.C. Circuit on June 29th, just one month ago. He submitted his Judiciary Questionnaire on July 17th. The American Bar Association, which has rated every nominee for the past half century, has not yet provided its peer-review rating of his nomination. The speed at which this nomination is proceeding alone is reason for serious concern. Of the last seven confirmed nominees to the D.C. Circuit, the least amount of time between an initial nomination and a Senate hearing was 71

[1] The D.C. Circuit has exclusive jurisdiction over sections of many of our nation's most important federal laws, including; the Federal Communications Commission, (47 U.S.C. §402(b)), the Resource Conservation and Recovery Act (42 U.S.C. §6976(a)(1)), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) (42 U.S.C. §9613(a)), national primary drinking water regulations (42 U.S.C. §300j-7(a)(1)), Clean Air Act (42 U.S.C. §7607(b)(1)), designations of "foreign terrorist organizations" (8 U.S.C. §1189(c)(1)), the Federal Energy Regulatory Commission (15 U.S.C. §766(c)), Federal Election Commission determinations as to which presidential candidates are eligible for Federal money (26 U.S.C. §9011(a) and §9041(a)), to name a few.

days.[2] The length of time between nomination and Senate hearing reflects the importance of the D.C. Circuit and the need for the Senate to conduct a thorough investigation when considering nominations to this critical court. It is proposed that Mr. Keisler's hearing take place a mere 33 days from the time of his initial nomination, less than half of the shortest investigation period for any recent D.C. Circuit nominee.

Even more importantly, however, there are critical aspects of Mr. Keisler's record that are not currently available to the Senate for review. In the last several years, Mr. Keisler has served in several high ranking positions at the Department of Justice, including Acting Associate Attorney General. During his tenure, the Department has played a central role in developing controversial Administration positions on a number of issues. Mr. Keisler's role in these matters must be documented and explored. In addition, the Reagan Library index lists hundreds of files containing an unknowable quantity of apparently relevant documents related to Mr. Keisler's three-year tenure in the Reagan White House Counsel's office.[3] The vast majority of these documents are not currently available for scrutiny by senators or anyone else interested in this important nomination. To fulfill its advice-and-consent function in a meaningful fashion, the Committee ought to examine what might be some of the information most relevant to a lifetime appointment to the second most important court in the country.

Rushing a hearing on Mr. Keisler's nomination now, before his record is completely assembled, is particularly inappropriate given the greater workload on other courts where there are pending vacancies. The day before Mr. Keisler was nominated, four other nominees were announced, each to seats designated by the Judicial Conference of the United States as Judicial Emergencies.[4] The seat to which Mr. Keisler has been nominated is not such an emergency. It seems only logical to attend to the *emergencies* first. Indeed, the D.C. Circuit has the lightest caseload of the federal circuit courts. The national average of cases terminated on the merits per judge in 2004 was 432,[5] compared with only 156 cases for the D.C. Circuit.[6]

Mr. Keisler has an extensive and complex record that must be collected and reviewed before a hearing goes forward. Should this hearing proceed at this premature stage, a second hearing may well be required. We therefore strongly oppose any hearing on Mr. Keisler's nomination before his record is assembled and thoroughly reviewed.

---

[2] Judith W. Rogers was nominated to the D.C. Circuit on November 17, 1993. A hearing was held on her nomination by the Senate Committee on the Judiciary on January 27, 1994.
[3] http://www.reagan.utexas.edu/resource/findaid/keisler.htm
[4] http://rpc.senate.gov/_files/July25JudNomRptSD.pdf
[5] http://www.uscourts.gov/cgi-bin/cmsa2004.pl.
[6] http://www.uscourts.gov/cgi-bin/cmsa2004.pl.

COALITION *for a*
FAIR *and* **INDEPENDENT JUDICIARY**

If you have any questions or need further information, please contact Doug Kendall, Community Rights Counsel Executive Director at (202) 296-6889 or Nancy Zirkin, Leadership Conference on Civil Rights (LCCR) Deputy Director at (202) 263-2880.

Sincerely,

ADA Watch/National Coalition for Disability Rights
Alliance for Justice
American Association of University Women
American Federation of Labor - Congress of Industrial Organizations
American Federation of State County and Municipal Employees (AFSCME)
Americans for Democratic Action
Community Rights Counsel
Defenders of Wildlife
Earthjustice
Feminist Majority
Friends of the Earth
Leadership Conference on Civil Rights
Legal Momentum
NAACP Legal Defense & Educational Fund, Inc.
National Council of Jewish Women
National Council on Independent Living
National Employment Lawyers Association
National Gay and Lesbian Task Force
National Partnership for Women & Families
National Senior Citizens Law Center
National Women's Law Center
Olympic Forest Coalition
People For the American Way
Sierra Club

cc: Members of the Senate Judiciary Committee

Mr. James B. Comey
5900 Upton Street
McLean, VA 22101

July 21, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

I write to support the nomination of Peter Keisler for the United States Court of Appeals for the District of Columbia Circuit.

I worked closely with Peter when I was United States Attorney in Manhattan, and again when I became Deputy Attorney General. He is a man of great intellect, judgment, humility, and character. He is fair, honest, and compassionate and I know from personal experience that he treats people without regard to their station in life, showing the same decency and kindness to the man cleaning DOJ's hallways as to the Attorney General.

I also know from personal experience that he is passionately committed to doing what is right, not what is politically expedient. Although I am not free to reveal the details, I will never forget the day he came to my office and asked to see me privately, to tell me that a decision I had made in a high-profile matter had been the wrong one and that I had been poorly advised to make a decision that might be politically popular on our side of the aisle but that was wrong on the merits and bad for the Department. He explained that he was reluctant to criticize the DAG, but that he felt duty-bound to speak with me. After our discussion, I realized that he was right and I reversed the decision I had made. That is the kind of public servant and person you have before you in Peter Keisler. This country needs people like him on the appellate bench.

Sincerely yours,

Jim Comey

James B Comey

cc: Office of Legal Policy

Statement of the Hon. Luis G. Fortuño
Resident Commissioner of Puerto Rico
Hearing of Francisco Augusto Besosa
Committee on the Judiciary
United States Senate
August 1, 2006

Thank you very much Mr. Chairman, and distinguished members of the committee. As the sole representative in Congress of the four million U.S. citizens residing in Puerto Rico, it gives me great pleasure to support the nomination of Francisco Besosa as United States District Judge for the District of Puerto Rico and to request that the Senate confirm him for that august position.

Francisco Besosa's educational background is outstanding. He received his high school diploma from the distinguished Taft School in Watertown, Connecticut. His hard work and academic excellence resulted in his early admission to Brown University, where he obtained a Bachelor's degree in History. His success at Brown led Mr. Besosa to Georgetown University from where he received his Law degree, but not before a successful military tenure. Mr. Besosa not only has excellent academic credentials; he is also fully bilingual, with a command of both the Spanish and English languages.

Between College and Law School, Mr. Besosa served our great nation, and for five years proudly bore the uniform of the U.S. Army. He attended the Infantry Officer Candidate School in Fort Benning, Georgia and was commissioned in the Army's Military Intelligence Branch. Mr. Besosa was then trained as a Counterintelligence Officer and was stationed in Okinawa, Japan and in the states. He was discharged honorably as a Captain and received the Meritorious Service Medal. His service to the nation would continue, however. Mr. Besosa served for almost four years as an Assistant United States Attorney in Puerto Rico, representing the public interest, while planting the seeds for a career as a distinguished jurist.

Working in the private sector, Mr. Besosa has achieved a reputation as one of Puerto Rico's top attorneys. As a member of the Puerto Rico, American, Federal, and District of Columbia Bar Associations, his practice has included a wide range of fields in the civil and commercial areas of the law. His vast experience in these fields demonstrates his profound legal knowledge. His successful legal practice has been instrumental to obtain the endorsements of his nomination by the American, Federal and National Hispanic Bar Associations.

Mr. Besosa has a proven talent for judicial analysis. His unblemished record as a lawyer and public servant, coupled with the dignity and integrity that characterized every step of his professional career, earned Mr. Besosa the American Bar Association's "well qualified" rating, the highest rating bestowed on an attorney nominated for the federal bench.

Mr. Besosa's intellectual and professional qualifications are clearly beyond debate. In my opinion, however, his personal qualities also will make him stand out as a federal judge. Not often will one find a man that is as highly regarded and respected by his peers, whether on the same side of a case or as an opponent, as is Mr. Besosa. His colleagues describe him as an excellent listener with a sound conscience, whose actions speak louder than words, and always praise his analytical skills. He spots the important issues, analyzes them thoroughly, applies the law and always reaches a wise, effective decision. In short, Mr. Besosa possesses the judicial mind and temperament that a federal judge must have.

An individual who is as judicious, highly respected, and accomplished as Mr. Besosa certainly merits confirmation by the Senate for the federal bench. Mr. Besosa deserves this honor all the more because of his moral fiber and integrity.

Mr. Besosa's moral fiber and integrity are also present in his personal life. He has managed to have a truly successful marriage (today is Mr. and Mrs. Besosa's 25th Wedding

Anniversary) and raise two great children. His children feel extremely proud of their father. They firmly believe, like Mr. Besosa's colleagues, that Mr. Besosa is a man of character.

I believe, as I am sure you all do, that serving our nation does not come simply from a sense of duty; it is a privilege that is awarded to responsible and well-intentioned individuals. When considering qualifications for such an important post as a United States District Judge, accomplishments, aptitude, honesty, integrity and character are of great importance. Mr. Besosa encompasses this description of an ideal judge, and I commend the President on an excellent selection. I believe that if confirmed Francisco Besosa will serve with distinction and make our great country proud.

Thank you.

GRAND LODGE
FRATERNAL ORDER OF POLICE®

309 Massachusetts Ave., N. E.
Washington, DC 20002
Phone 202-547-8189 • Fax 202-547-8190

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

1 August 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee to the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy,

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Peter Keisler to serve on the U.S. Court of Appeals for the D.C. Circuit.

Peter has served for the past four years as Assistant Attorney General for the Civil Division at the Department of Justice. In this capacity Peter handled many cases that were of great concern to the law enforcement community. His service has been marked by a strong desire to advance the interests and protect the rights of law enforcement officers.

We have worked with Peter the past four years and we have found him to be knowledgeable, committed, and responsive on a variety of law enforcement issues. One notable example is United States ex rel. Westrick v. Second Chance Body Armor, Inc., et al. DOJ, through the Civil Division, brought, and is vigorously pursuing, a civil fraud case against Second Chance Body Armor and Toyoba Co., which sold bulletproof vests made of Zylon to Federal, State, and local law enforcement. At some point these companies discovered, but did not disclose, that Zylon deteriorates under certain conditions of heat and humidity. Police officers have been seriously wounded because they depended on defective vests from these companies. Thanks to Peter, the lives of a number of our officers will be better protected, and this is but one example of his commitment to the law and to the mission of law enforcement officers. If requested, we would be happy to provide additional examples reflecting Peter's respect for the law and those who enforce it.

On behalf of the more than 324,000 members of the Fraternal Order of Police I have every confidence that Peter Keisler's experience, will, temperament, and leadership will prove him to be an extraordinary Judge on the U.S. Court of Appeals. If I can provide

any f :ther information in support of Peter's nomination, please do not hesitate to contact me o Executive Director Jim Pasco through my Washington office.

Sinc. ely,

Chu. Canterbury
Nati .al President

SIDLEY AUSTIN LLP
1501 K STREET, N W
WASHINGTON, D C 20005
(202) 736 8000
(202) 736 8711 FAX

gjones@sidley com
(202) 736-8158

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

July 17, 2006

By Facsimile

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Peter Keisler-United States Court of Appeals for the District of Columbia Circuit

Dear Chairman Specter:

I am a partner in the law firm of Sidley Austin LLP and a former president of the District of Columbia Bar. I write to you solely in my personal capacity.

The President has nominated my former partner and valued colleague, Peter Keisler, to serve on the United States Court of Appeals for the District of Columbia Circuit. I have known Peter both professionally and socially since he joined my law firm in the mid-1980s. I supervised his work on occasion when he was an associate and worked with him on a number of matters for firm clients in the years after he became a partner. I also worked with him closely on recruiting during the many years he served as hiring partner for the Washington office.

Peter is easily one of the most talented and hardworking lawyers I have ever had the privilege of working with, in or out of government. He is brilliant, thoughtful, and creative. He also has exceptional judgment and patience. Peter is a terrific lawyer, and a wonderful and decent human being. If confirmed, he will serve the people of the United States with honor, humility, and compassion. If confirmed, I believe Peter will prove to be one of the finest judges ever to serve on the D.C Circuit. I make that statement advisedly and with full appreciation of the extraordinary talent of the judges who have served on the D.C. Circuit, but with absolute confidence.

Over the years in which we were colleagues, Peter and I discussed legal and non-legal issues on many occasions from different ends of the political spectrum. I am a life-long Democrat; Peter is not. Yet, there was never an instance in which I thought Peter approached any issue or conversation with a closed mind. He is one of the best listeners I know. Whether we agreed or agreed to disagree, Peter always listened respectfully and with a sincere desire to understand my position, not merely to respond. Peter has the rare capacity and instinct to reserve judgment until he has heard and considered all sides of an argument. Only then does he turn to sifting and synthesizing what he has learned to come to a conclusion or produce advice for a client.

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
SIDLEY

The Honorable Arlen Specter
July 17, 2006
Page 2

I had the privilege of serving in the Office of the Solicitor General of the United States, working first for Judge Wade McCree in the Carter Administration and then for Rex Lee in the first Reagan Administration. I worked closely with lawyers throughout the Department of Justice on appellate matters throughout the country. That experience and my two decades of trial and appellate work since then taught me a great deal about what it takes to be a good judge. Peter has all the personal characteristics and intellectual tools to be an outstanding judge.

I can think of no one more capable than Peter to sit on the D.C. Circuit. Peter's keen intellect allows him to grasp the nuances of any issue, whatever the subject matter. His ability to digest and master enormous quantities of facts will stand him in especially good stead on that court. His ability to listen and learn from others will assure that all sides of every issue are carefully considered before any decision is rendered. Whatever the outcome, every litigant who appears before a panel on which Peter sits will have confidence that he or she has been fully heard. Having worked on more appellate briefs and oral arguments than I can count at this point in my career, I believe that there is nothing more important to an appellate lawyer or a litigant than a judge who listens with an open mind and expends the effort necessary to understand the issues fully before rendering judgment based on the law and facts. Both the reality and the appearance of justice require no less. That is precisely the sort of judge Peter will be, if given the opportunity.

Finally, I would like to comment on my work with Peter as the hiring partner for the Washington office of my law firm. Like many other large law firms, Sidley Austin LLP has actively recruited minority attorneys and women for many years. I have no idea what Peter's views are on affirmative action generally or what he thought of the firm's commitment to engage in affirmative efforts to identify and recruit minority attorneys. Throughout his tenure as hiring partner, however, Peter could not have been any more supportive of the effort than he was. The policy decision was made by the management of the firm, and Peter embraced it using all of his considerable skills to carry it out, because that was his job. In my judgment, if he is confirmed, Peter's ability to put aside personal or political views to decide the cases that come before him based on the law and facts of the particular cases will be every bit as important to his ability to serve with distinction as his extraordinary legal skill.

I hope the Senate will give Peter an opportunity to serve the people of this country in this important new role.

Very truly yours,

George W. Jones, Jr.

cc: Office of Legal Policy (by telecopy) (202) 514-0484

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
August 1, 2006

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

STATEMENT BY SENATOR EDWARD M. KENNEDY ON NOMINATION OF PETER KEISLER TO D.C. CIRCUIT

(AS PREPARED FOR DELIVERY)

Mr. Chairman, I'm concerned that the Committee is proceeding with undue haste on the nomination of Mr. Keisler. There are important unresolved matters that we should consider before we reach a decision.

First, is the issue we raised in the letter we sent you last week, urging the Committee to examine the need to fill the 11th or 12th judgeships on the D.C. Circuit. Republican members of this Committee strongly opposed attempts by the Clinton Administration to fill the 11th seat and they were successful in blocking well-qualified nominees. They argued that the court did not have enough cases to justify that number of judges. Since then, the number of written opinions issued by the court has declined by 17%. The number of cases resolved on the merits per judge is down 21%, and the number of cases filed per judge is down 10%. We should consider these caseload declines carefully before we fill the current vacancy. American taxpayers deserve no less.

In addition, we have had very little time to consider the record of Mr. Keisler. He was nominated only a month ago, and the ABA did not complete its evaluation of him until yesterday. As we all know, the D.C. Circuit is second in importance only to the Supreme Court. We should proceed with particular care in confirming judges to that Court. In fact, among the last seven D.C. Circuit nominees, the shortest period from nomination to hearing was 71 days. We have barely had 30 days for Mr. Keisler. This rush has left very little time to study and, in some instances, even to assemble his record. We know that he has served in high government positions and has had a successful private practice, and has received a well qualified rating by the ABA. But we have had little real opportunity to examine his record.

We know that he worked in the Reagan White House, but we know virtually nothing about what he worked on there. We have not had the opportunity to obtain records from that period of his career. We know that he was a founder and longtime high

ranking officer in the Federalist Society and that he was upset that Judge Bork was not confirmed to the Supreme Court. Indeed, he dismissed criticism of Judge Bork's record, stating: "It's just a bunch of hot air. I think Bork is in the mainstream." And he is reported to have said: "It was extremely frustrating to see ideas that had previously been considered part of a reasonable debate excommunicated and defined as extreme by the Senate." As one who sat on this Committee when Judge Bork was considered, I disagree strongly with those views.

I, therefore, hope that we will have an opportunity to look carefully into all of these issues before we proceed to vote the merits of this nomination.

###

Yale Law School

ANTHONY T. KRONMAN
Sterling Professor of Law

July 17, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I understand that Peter Keisler has been nominated to the Court of Appeals for the District of Columbia. I have known Peter since his first semester in law school and am writing now to express my high regard for his intelligence and character.

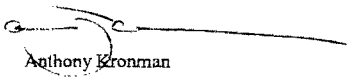
In the fall of 1982, Peter was a student in my contracts class at Yale. I came to admire and like him immediately. Peter was a regular participant in our class discussions and his remarks always possessed an attractive combination of sharpness and generosity. Peter often saw things more quickly and clearly than his classmates and he had a facility for capturing the ideas under discussion in a pointed and articulate way. He was unafraid to take a position and defend it. But at the same time Peter demonstrated, again and again, an open-mindedness toward views other than his own, and a capacity for exploring competing perspectives with sympathy and interest, that was noticeable to all in the class. In the give-and-take of classroom debate, Peter developed his ideas in a calm and methodical way, but was also always open to revision and amendment, and showed a remarkable ability to hear what others were saying and to weigh their views in a balanced and thoughtful manner.

I saw Peter often during his remaining time at the Law School and in his final semester he again took a course of mine, this one on nuclear weapons and national security. During his three years at the Yale Law School, Peter compiled a strong academic record, taking classes from many of the most demanding members of the faculty. In addition, he served as a Note Editor for the Yale Law Journal, an extremely demanding position that would easily have been a full time job in its own right. By the time Peter graduated in the spring of 1985, he had distinguished himself as one of the most intellectually talented members of his class, and won the universal respect of his teachers and classmates for his fair-mindedness and humanity. Peter's wit and natural warmth endeared him to us all, and made as positive an impression as his intellectual gifts and accomplishments.

The judge's job demands brainpower and a talent for clear thinking. Peter possesses these in abundance. But judging also demands sensitivity and fellow-feeling, and only when a judge's intelligence is joined to these qualities of character can he or she achieve real greatness in the craft. Peter possesses these qualities of character as well. He is that rare person in whom great intellectual distinction is joined to common human decency. He will make a wonderful judge--a truly wonderful judge--and the people of the United States will be fortunate to have him wearing a robe.

I urge that his nomination be enthusiastically confirmed.

Sincerely,



Anthony Kronman

ATK/mrc

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Nominations Hearing
August 1, 2006

Today the Committee will hear from four more judicial nominees. I have worked cooperatively with Chairman Specter to move nominees through the Judiciary Committee quickly, when possible. When the President sends qualified, consensus nominees, we have had some success. That seems to be the case with California nominees Valerie Baker and Philip Gutierrez, who have the support of their Democratic home state Senators, and with Francisco Besosa from Puerto Rico.

Unfortunately, the fourth nominee here today, Peter Keisler, who is nominated to the Court of Appeals for the D.C. Circuit, appears to be another example of this White House and the Senate majority pushing to pack important lifetime judicial positions with cronies. I joined all of the other Democratic members on the Committee last week in writing a letter to the Chairman protesting the inclusion of Mr. Keisler in today's hearing. The Coalition for a Fair and Independent Judiciary, which is comprised of a wide range of organizations representing millions of Americans and includes unions, civil rights organizations, environmental organizations and others, likewise has written the Committee expressing strong opposition to proceeding with the Keisler nomination before the record is assembled.

As we said in our letter, we received this nomination only a month ago, we obtained most of the supporting materials much later, and we know little about this nominee. We know that Mr. Keisler served in the White House Counsel's Office under President Reagan, but we really do not know what he did there. The Reagan Library has files for Mr. Keisler about controversial subjects like "Arms Sales," "Contra Aid Laws," and "Signing Statements," but we have not yet had access to those files. We learned a lot reviewing similar files for Justice Alito and Chief Justice Roberts, but in Mr. Keisler's case, we are not being afforded any opportunity to review those records. That is not the proper consideration our system calls for, and it is a disservice to this Committee, this nominee and the Americans we serve.

There are other judicial nominees, including circuit court nominees, whose nominations were received earlier who are being passed over in order to rush consideration of the Keisler nomination. Some of those have bipartisan support. Some are nominations to fill judicial emergency vacancies. The seat to which Mr. Keisler is nominated is not a judicial emergency; in fact, some on both sides of the aisle have questioned whether it needs to be filled at all.

The District of Columbia Circuit is an especially important court in our nation's judicial system. Congress has vested the D.C. Circuit in particular with exclusive or special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes. For example, the D.C. Circuit has exclusive or concurrent jurisdiction in cases involving the National Labor Relations Board, the Occupational

Safety and Health Administration, the Federal Energy Regulatory Commission, the Federal Election Commission, and the Federal Communications Commission. The D.C. Circuit is entrusted with interpreting the Americans with Disability Act, the Endangered Species Act, and the Environmental Protection Agency, and has primary responsibility for ruling on the Resource Conservation and Recovery Act, Superfund, the Clean Water Act, and the Clean Air Act. This court must retain its independence. That underscores the concerns of the many organizations that constitute the Coalition for a Fair and Independent Judiciary.

Regrettably, this Administration's approach to nominations to the D.C. Circuit has threatened this court's judicial independence. Earlier this year, the Republican leadership in the Senate catered to the desire of the extreme right-wing interest groups to force through the nomination of Brett Kavanaugh to the 10th seat on the D.C. Circuit. At his hearing, Judge Kavanaugh demonstrated his commitment to President Bush's Administration, as opposed to the independence needed to judge this Administration's actions. When pressed at his confirmation hearing to provide answers about his qualifications for this lifetime appointment and how he would fulfill his responsibilities as a judge, Mr. Kavanaugh sounded like a spokesman for the Bush-Cheney Administration. Over and over he answered our questions by alluding to what the President would want and what the President would want him to do.

Today we turn to another nominee, a Bush-Cheney insider nominated to the D.C. Circuit. When President Clinton nominated qualified moderates to vacancies on the D.C. Circuit, Republicans refused to proceed. Now, in a total reversal of their practice with President Clinton, they are rushing to confirm a Bush-Cheney Administration insider to the 11th seat on that same court.

Mr. Keisler's nomination is a culmination of the Republicans' decades-long attempt to pack the D.C. Circuit. Dating back to President Clinton's first term, the Republicans have played politics with the D.C. Circuit, blocking President Clinton's nominees to preserve a majority of Republican appointees on that court. Their plan has succeeded. After confirming Brett Kavanaugh this year and two other nominees last year that I strongly opposed -- Janice Rogers Brown and Thomas Griffith -- Republican appointees now comprise a more than two-to-one majority on this important court. This is not a court that needs another rubberstamp for this President's extraordinary exertions of executive power. We need accountability, the rule of law and independence on that court.

The last of two Clinton nominees to the D.C. Circuit was confirmed in 1997, after being nominated in 1995 and stalled through the 1996 session when not a single circuit nominee was confirmed. When the Republican Senate majority stalled the nomination of Merrick Garland to the D.C. Circuit beyond the 1996 election, even Senator Hatch became frustrated and in March 1997 he proclaimed that the way that Republicans were opposing judicial nominees was "playing politics with judges," was "unfair" and that he was "sick of it." Regrettably, he did not follow through. That was the last nominee of President Clinton's that Senator Hatch and the Republican Senate were willing to

consider to this important Circuit. Two highly qualified nominees, Elena Kagan, now Dean of the Harvard Law School, and Allen Snyder, who had served as a clerk to Justice Rehnquist and was an experienced and respected litigator, were left without consideration for years. No questions were raised about their qualifications, as there have been for so many of President Bush's nominations. The fact is that for the rest of President Clinton's second term, Senate Republicans would not consider another nominee to the D.C. Circuit. They were just blocked, pocket filibustered with impunity.

Despite the unwillingness of Senate Republicans to act on President Clinton's nominees to the D.C. Circuit for years, Senate Democrats cooperated in the consideration of the nomination of now-Chief Justice John Roberts to the D.C. Circuit. At the time, John Roberts was Mr. Snyder's junior and his partner at Hogan and Hartson. He was the first judge confirmed to the circuit in six years. The Senate has since confirmed Janice Rogers Brown, Thomas Griffith and Brett Kavanaugh to the D.C. Circuit. Today, judges appointed by Republican Presidents outnumber those appointed by Democratic Presidents seven to three on this pivotal Circuit, even before Mr. Keisler's nomination.

The speed with which the Committee has turned to this hearing on Mr. Keisler's nomination stands in stark contrast to treatment applied by the Republican-controlled Senate to President Clinton's nominees to the D.C. Circuit. Before we allow this President to pack the D.C. Circuit further, we should at least make a careful and deliberate effort to review this nomination to a lifetime appointment. Rushing this hearing does not allow even for that.

The Federal Law Enforcement Officers Association has written to me to express "concerns" about Mr. Keisler's nomination based on his involvement in the case of *Adams v. United States* in the Court of Federal Claims. That case was brought by thousands of federal law enforcement officers seeking substantial back pay and has been stuck in the courts since at least 1990. Federal law enforcement officers and their attorneys say that Mr. Keisler, as Assistant Attorney General in charge of the Justice Department's Civil Division, has strung along a group of officers seeking a settlement after a judge's decision favorable to those officers. They say his office refused to meet with attorneys for the officers and ultimately rejected a proposed settlement that had been approved by the career attorney handling the case and by five federal law enforcement agencies.

My biggest concern with this nomination is that Mr. Keisler, like Brett Kavanaugh before him, will become a rubber stamp for this President's expansive views of Executive power. He has apparently earned this nomination by being a loyal, high-level official in this Administration supporting the Administration's view of the "unitary executive" and virtually unlimited presidential power. He seems to have played a central role in invoking the state secrets doctrine in cases against AT&T and other companies for their role in the government's warrantless wiretapping of American citizens. In doing so, he contributed to this Administration's focus on secrecy and efforts to avoid accountability. Mr. Keisler, in an unusual move for an Assistant Attorney General for the Civil Division, argued the Administration's case in *Hamdan v. Rumsfeld* at the circuit court level. He

apparently went out of his way to argue a case in which he could defend the Administration's detainee policies and its over-expansive view of presidential power. Ultimately, the Supreme Court rejected the Administration's claims and held its practices "illegal." The Supreme Court recognized that even in a time of war, the President does not have the power to disregard the law. No one is above the law. I am concerned that this nominee has been on the wrong side of those fundamental issues and will continue to be as a judge.

This Administration has taken unprecedented steps to expand Executive power. This Republican-led Congress has largely abdicated its responsibilities to act as a check on Executive power. It is particularly important, then, that the courts act to preserve our system of checks and balances and to serve as a check on a runaway executive. Rushing this hearing before a full record can be assembled only adds to that perception of a rubberstamp Republican Congress rushing to confirm rubberstamp judges for this President.

#####

SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

nminow@sidley.com
(312) 853-7555

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

July 27, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Arlen:

One of the very best lawyers in our firm, Peter D. Keisler, left us a few years ago to join the Department of Justice and has now been nominated to become a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. The day he left our firm was a sad one for us because his talent, character and integrity made him an exceptional lawyer and citizen.

Although our politics are different, I have the utmost respect for Peter as a fair, objective and devoted public servant. I urge you to support his nomination. He will bring distinction to the bench, and you will be proud of his contribution to the rule of law.

All good wishes

Newton N. Minow

NNM:ks

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
1501 K STREET, N W
WASHINGTON, D C 20005
(202) 736 8000
(202) 736 8711 FAX

ophillips@sidley.com
(202) 736-8270

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

July 26, 2006

BY FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Fax No: 202-228-1698

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Fax No: 202-224-9516

Dear Chairman Specter and Senator Leahy:

I am writing in support of the nomination of Peter D. Keisler to serve as a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. I cannot imagine anyone who is more qualified based on professional ability, temperament and experience to sit on that Court and I urge both the Judiciary Committee and the Senate to confirm Mr. Keisler's nomination as soon as possible.

Mr. Keisler's resume speaks for itself. He was outstanding at Yale both as an undergraduate and law student; he later clerked for Judge Robert Bork and Justice Anthony Kennedy with distinction. He worked in the White House between his clerkships and it was his performance there that brought him to Justice Kennedy's attention. For the past four years, Mr. Keisler has served as the Principal Deputy Associate Attorney General, Acting Associate Attorney General and Assistant Attorney General in charge of the Civil Division of the Justice Department. His performance in those positions has been exemplary. Because of my practice, I spend a lot of time litigating with and against lawyers in the Department of Justice and I have never heard one lawyer say anything negative about Mr. Keisler, either personally or professionally. He has been precisely the kind of public servant this nation can and should be proud of.

I met Mr. Keisler when he was finishing his clerkship with Justice Kennedy and was considering different job opportunities, including joining my law firm, then known as Sidley & Austin. I count it as one of the happiest and most satisfying days of my tenure in this firm when Mr. Keisler called me to tell me that he was accepting our offer of employment. He came to the firm as an associate in 1989. Mr. Keisler was unanimously and enthusiastically elected to partnership in 1993 and he withdrew from the partnership in 2002 to join the Department of Justice. Although Mr. Keisler has been away from the firm for more than four years, I still miss him and I still think of him as my partner.

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

Mr. Keisler is a rare person. He has astonishing professional talents. I had the pleasure of working with Peter on more than a dozen projects during his tenure with the firm and he never ceased to amaze me with his creativity and energy. His research and writing skills were unmatched by any other lawyer at Sidley. His oral advocacy ability was literally in a class by itself. Mr. Keisler has as close to a photographic memory as anyone whom I have ever known. To watch him stand at the podium and present an oral argument without notes is something to behold. I have argued more than 50 times before the Supreme Court, but felt completely humbled by watching Mr. Keisler argue his first case before that Court in 2001. In sum, his legal skills put him in the most select company in our profession.

What makes Mr. Keisler particularly special, however, is that he is one of the nicest and finest people I have ever known. He has a unique ability to disagree without being disagreeable. He also has a perfect temperament for making hard decisions. He listens carefully, probes the issue incisively, does not make a final judgment until everyone has an opportunity to speak and he is never dismissive. When he makes a decision he articulates his reasons carefully and thoroughly. When I became the Managing Partner of Sidley's D.C. Office, the first action I undertook was to make Mr. Keisler the Hiring Partner in the Office. I selected him because I knew that he is absolutely fair to all people and he would select new lawyers on the basis of their merit. Under Mr. Keisler's leadership, the associate ranks became much more diverse and their quality improved dramatically.

Mr. Keisler's practice during his 13 years gravitated heavily toward telecommunications law, representing the firm's largest client. Only someone with extraordinary professional and personal traits would be asked to take on such a responsibility. Of course, he represented that client and others with remarkable success. The extensive experience that Mr. Keisler acquired during more than a decade of handling matters involving telecommunications law and other regulatory issues before various United States Courts of Appeals, but primarily in the D.C. Circuit, make him more than equipped to become a judge sitting on that Court. I literally believe that there are no more than a handful of lawyers in this country who would be as well suited by experience, temperament and ability to serve on the D.C. Circuit.

When Mr. Keisler left Sidley, it was a very sad day for me personally. I regard him as one of my closest friends and I have assumed for some time that it was very likely that he would succeed me as the Managing Partner at my firm. I have been looking forward to his return since the day he left. If confirmed, Mr. Keisler obviously will not be coming back to Sidley. In writing in support of his confirmation, I am forced to put aside my own selfish interests because clearly Sidley's loss will be both the D.C. Circuit's and the nation's gain.

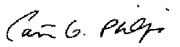
SIDLEY AUSTIN LLP
SIDLEY

The Honorable Arlen Specter
The Honorable Patrick J. Leahy
July 26, 2006
Page 3

President Bush made an outstanding choice when he nominated Mr. Keisler. I urge the Committee and the Senate as a whole to recognize that fact and to confirm him promptly to serve on the United States Court of Appeals for the District of Columbia Circuit.

If you have any questions about Mr. Keisler or anything in my letter, please do not hesitate to contact me.

Sincerely,



Carter G. Phillips

CGP/lt

cc: Office of Legal Policy

WILMER CUTLER PICKERING
HALE AND DORR LLP

Stephen H. Sachs

100 LIGHT STREET
BALTIMORE, MD 21202
+1 410 986 2849
+1 410 986 2828 fax
stephen.sachs@wilmerhale.com

July 11, 2006

The Honorable Arlen Specter

Chairman, Committee on the Judiciary

United States Senate

224 Dirksen Senate Office Building

Washington, D.C. 20510

Re. Peter D. Keisler

Dear Mr Chairman:

I write in enthusiastic support of President Bush's nomination of Peter D. Keisler of Maryland to the United States Court of Appeals for the District of Columbia Circuit.

I have known Mr. Keisler well for over five years. We also have many mutual friends and acquaintances, and I am familiar with his record of accomplishment and his splendid reputation.

Public service and trial and appellate practice, primarily in federal courts, have been the focus of my professional life. After graduation from Yale Law School I clerked on the D.C. Circuit for Judge Henry W. Edgerton. I served as an Assistant United States Attorney for Maryland (1961-'64), United States Attorney (1967-'70) and Maryland's Attorney General (1979-'87). For nearly twenty-five years I was a litigator in private practice, most recently at Wilmer, Cutler, where I am now of counsel. I think I have a thorough appreciation of the qualities of mind and

character essential in a good judge.

I am certain that Peter Keisler possesses those qualities in abundance and is especially well qualified to be an outstanding appellate judge. In fact, if I were asked to select only one from among Peter's many fine qualities (which include a sense of humor---not a bad thing in a judge), I would point to a judiciousness that marks his values, his conversation, even his advocacy. Peter Keisler appreciates balance. He knows that very few issues, legal or otherwise, can be reduced to black and white and that the color of "truth" is often gray

As I had occasion to write to this Committee when it considered Peter's nomination to be an Assistant Attorney General, Peter and I are of different political faiths. I am a lifelong liberal Democrat. Peter... is not. But while we have differing views on some matters of public policy, we share a core belief that judges should have no political agenda and that the political neutrality of judges is essential to citizens' respect for the rule of law.

The nomination of Peter Keisler is a credit to the Administration. But it should be applauded by all, regardless of political persuasion, who appreciate the exceptional significance of the United States Court of Appeals for the District of Columbia Circuit and who desire that its members be exceptionally well qualified by training, by intellectual ability, by temperament and by character.

I hope and trust that the Committee will promptly confirm this exemplary nominee.

Very sincerely yours,

Stephen H. Sachs

cc: The Honorable Patrick J. Leahy

Statement
United States Senate Committee on the Judiciary
Judicial Nominations
August 1, 2006

The Honorable Charles E. Schumer
United States Senator , New York

CES Opening Statement on Peter Keisler, Nominee to D.C. Circuit
August 1, 2006

I want to welcome each of the nominees and their families here today. Appointment to a lifetime post as a federal judge is perhaps the greatest honor that can be bestowed on any lawyer. So I congratulate each of you on your achievement.

Ordinarily, I begin statements like these by thanking the Chairman for holding the hearing.

With respect to the nomination of Peter Keisler, however, I believe this hearing is premature.

Mr. Keisler is, by all accounts, a smart and accomplished lawyer; he has impeccable academic and professional credentials.

But, I must say, we may be putting the cart before the horse here.

It appears we are trying to break the land-speed record for confirming a nominee to the second highest court in the land, for a seat that may not even need filling – when there are other identified "judicial emergencies" that deserve our more immediate attention.

To that effect, all 8 Democrats sent a letter to Chairman Specter last Thursday, urging that we first address some critical threshold issues before holding a hearing on the Keisler nomination. First things first, in other words.

To my knowledge, that letter received no response. So, let me reiterate some of the concerns we expressed about proceeding so hastily on this nomination.

First, we have barely had time to consider this nominee's record. Mr. Keisler was named to this seat only 33 days ago, so we are having this hearing with astonishing – and inexplicable – speed. The average time from nomination to hearing for the last seven nominees to that court is at least several times that long.

Second, we have been hearing for years from our friends across the aisle – in strident and emphatic tones -- that we simply don't need to fill the seat to which Mr. Keisler has been nominated – the 11th seat on the D.C. Circuit.

We have been told repeatedly that to fill this seat would be a waste of taxpayer money and a shameful triumph of big government. Why then are we speeding towards confirmation here?

Here are just some of the statements made by those who in years past have decried the need to fill the 11th seat.

• Senator Sessions: "[The eleventh] judgeship, more than any other judgeship in America, is not

needed." (1997)

• Senator Grassley: "I can confidently conclude that the D.C. Circuit does not need 12 judges or even 11 judges." (1997)

• Senator Kyl: "If . . . another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat -- and, of course, the 12th seat -- unless there is a significant increase in the caseload or some other extraordinary circumstance." (1997)

• More recently, at a hearing on the D.C. Circuit, Senator Sessions, citing the Chief Judge of the D.C. Circuit, reaffirmed his view: "I thought ten was too many. . . I will oppose going above ten unless the caseload is up." (2002)

In making their case, Senators expressed alarm at the thought of spending an estimated $1 million per year in taxpayer funds to finance an unneeded judgeship. Indeed, my friend from Alabama suggested that filling the 11th seat would be "an unjust burden on the taxpayers of America."

At the time, Senators Lott, Ashcroft, Thurmond, Hatch, and Faircloth made similar declarations.

Since these emphatic objections were raised in 1997, the caseload for the D.C. Circuit is down even further. That is true no matter how you slice it.

Here are some statistics from the Administrative Office of the United States Courts:

• as measured by written decisions per active judge, the workload has declined by 17 percent since 1997;

• as measured by number of appeals resolved on the merits per active judge, it has declined by 21 percent;

• as measured by total number of appeals filed, it has declined by 10 percent;

• and as measured by total number of appeals resolved, the caseload has declined by a whopping 37 percent.

So, Mr. Chairman, given the strident statements of my colleagues and the undeniable data from the Administrative Office, I am more than a little surprised that we are rushing so fast here.

I am especially surprised that we are pushing forward, given that the Mr. Keisler is now leapfrogging ahead of several nominees for seats that the non-partisan Judicial Conference has identified as bona fide "judicial emergencies."

Indeed, every other Circuit Court nominee awaiting a hearing in the Committee -- save one -- has been selected for a vacancy that has been deemed a "judicial emergency." Shouldn't they come first?

If and when we determine that there is actually a need to fill the 11th seat; if and when we deal with the identified "judicial emergencies"; and if and when we have had time to receive and review materials relevant to Mr. Keisler, then we can have a proper examination of this nominee's record.

Even at this early stage, though, there are a number of important and legitimate questions that we all

should be asking, before we rubber stamp a nominee to the second highest court in the land.

They are legitimate enough and substantial enough to require some time for exploration. And we should not rush such a nominee through, especially one to such a singularly important court.

For example:

• There are legitimate questions about your judicial philosophy. As Bob Novak reported last week, your nomination became possible only after conservatives blocked a more moderate lawyer – Professor Debra Livingston of New York – from becoming the nominee for this seat. As I understand it, she was all set to go, but was pulled back at the last instant. If true, such maneuvering on the part of the hard right and such capitulation on the part of the President is reminiscent of the treatment Harriet Miers received.
o These circumstances naturally lead us to ask questions about the reasons Ms. Livingston was replaced with you and what this says about your judicial philosophy.

• In the same vein, you once said to the National Journal, "I think [Judge] Bork is in the mainstream." That was in 1987, not long after you clerked for him and not long after you co-founded the Federalist Society. But Judge Bork, in the view of many, is so far outside the mainstream that he can barely see the shoreline. Among other things, he has said, "I don't think that in the field, of constitutional law, precedent is all that important." That's why he was rejected on a bipartisan basis in the Senate.
o Your statements naturally lead us to ask whether you still believe Judge Bork to be in the judicial mainstream. And it leads us to ask what your own definition of judicial mainstream is.

• There are legitimate questions about your activities at the Justice Department. There are questions, for example, about your role in a landmark case where the Government's own experts testified that tobacco companies should pay $130 billion in damages for smoke cessation programs. DOJ political appointees reportedly overruled career lawyers and contradicted their own experts, changing the demand to $10 billion in damages – a fraction of the amount recommended.

One of the lead career attorneys on the tobacco case told the Washington Post that you were among those who were "somewhat less supportive of the [DOJ] team's efforts."
o These reports naturally lead us to ask whether politics trumped the neutral administration of justice in that case.

• Similarly, the Federal Law Enforcement Officers Association has written to the Committee expressing "concerns" about your nomination based on your rejection of a back-pay settlement apparently reached with the career attorney handling the case.
o That letter, too, naturally leads us to ask why a career lawyer was overruled by a political appointee.

• There are legitimate questions about your views of Executive power. You successfully argued the Hamdan case before the D.C. Circuit Court of appeals, whose decision of course was reversed by the Supreme Court a few weeks ago in a rebuke of the Administration's expansive views of executive power.
o That experience naturally leads us to ask about your views of executive power and Congressional power. And it leads us to ask what role you had in determining the Administration's policy in this area, which many of us believe reflects an unprecedented arrogance.

In sum, Mr. Chairman, Mr. Keisler may very well be a moderate, mainstream, non-ideological, and

well-qualified nominee.

But before we can come to that conclusion, there are many, many questions that need answering.

At this particular moment, however, I seem to have more questions for the Committee than I have for the nominee:

• Why are we proceeding so fast here?

• Is there a genuine need to fill this seat?

• Has the workload of the D.C. Circuit gone down?

• Should taxpayers be burdened with the cost of filling that seat?

• Doesn't it make sense – given the passion with which arguments were made only a few years ago – to examine these issues before we proceed?

I sincerely hope, Mr. Chairman, that we can address these vital threshold questions first – and that we will be able to recall Mr. Keisler to answer additional questions about his record if and when we determine that it even makes sense to go forward.

United States Senate

WASHINGTON, DC 20510

July 27, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

We write to request that you postpone next week's proposed confirmation hearing for Peter Keisler, only recently nominated to the D.C. Circuit Court of Appeals. For the reasons set forth below, we believe that Mr. Keisler should under no circumstances be considered – much less confirmed – by this Committee before we first address the very need for that judgeship, receive and review necessary information about the nominee, and deal with the genuine judicial emergencies identified by the Judicial Conference.

First, the Committee should, before turning to the nomination itself, hold a hearing on the necessity of filling the 11th seat on the D.C. Circuit, to which Mr. Keisler has been nominated. There has long been concern – much of it expressed by Republican Members – that the D.C. Circuit's workload does not warrant more than 10 active judges As you may recall, in years past, a number of Senators, including several who still sit on this Committee, have vehemently opposed the filling of the 11th and 12th seats on that court:

- Senator Sessions: "[The eleventh] judgeship, more than any other judgeship in America, is not needed." (1997)
- Senator Grassley: "I can confidently conclude that the D.C. Circuit does not need 12 judges or even 11 judges." (1997)
- Senator Kyl: "If . . . another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat -- and, of course, the 12th seat -- unless there is a significant increase in the caseload or some other extraordinary circumstance." (1997)
- More recently, at a hearing on the D.C. Circuit, Senator Sessions, citing the Chief Judge of the D.C. Circuit, reaffirmed his view that there was no need to fill the 11th seat: "I thought ten was too many. . . I will oppose going above ten unless the caseload is up." (2002)
- In addition, these and other Senators expressed great reluctance to spend the estimated $1 million per year in taxpayer funds to finance a judgeship that could not be justified based on the workload Indeed, Senator Sessions even suggested that filling the 11th seat would be "an unjust burden on the taxpayers of America."

Since these emphatic objections were raised in 1997, by every relevant benchmark, the caseload for that circuit has only dropped further. According to the

Administrative Office of the United States Courts, the Circuit's caseload, as measured by written decisions per active judge, has declined ***17 percent*** since 1997; as measured by number of appeals resolved on the merits per active judge, it declined by ***21 percent***; and as measured by total number of appeals filed, it declined by ***10 percent***. Accordingly, before we rush to consider Mr. Keisler's nomination, we should look closely – as we did in 2002 -- at whether there is even a need for this seat to be filled and at what expense to the taxpayer.

Second, given how quickly the Keisler hearing was scheduled (he was nominated only 28 days ago), the American Bar Association has not yet even completed its evaluation of this nominee. We should not be scheduling hearings for nominees before the Committee has received their ABA ratings. Moreover, in connection with the most recent judicial nominees who, like Mr. Keisler, served in past administrations, Senators appropriately sought and received publicly available documents relevant to their government service. Everyone, we believe, benefited from the review of that material, which assisted Senators in fulfilling their responsibilities of advice and consent. Similarly, the Committee should have the benefit of publicly available information relevant to Mr. Keisler's tenure in the Reagan Administration, some of which may take some time to procure from, among other places, the Reagan Library. As Senator Frist said in an interview on Tuesday, "[T]the DC Circuit. . . after the Supreme Court is the next court in terms of hierarchy, in terms of responsibility, interpretation, and in terms of prioritization." We should therefore perform our due diligence before awarding a lifetime appointment to this uniquely important court.

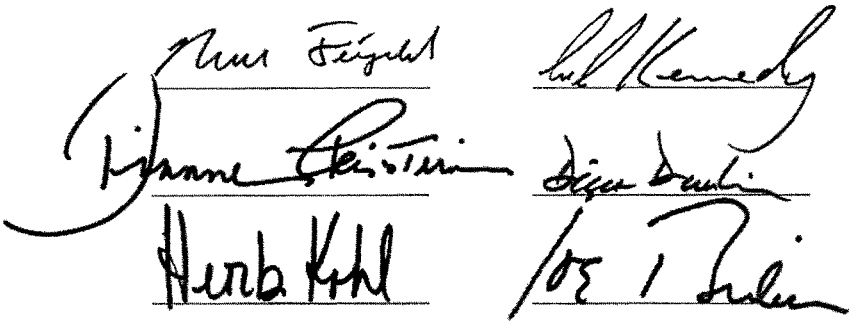
Finally, given the questionable need to fill the 11th seat, we believe that Mr. Keisler should not jump ahead of those who have been nominated for vacant seats identified as judicial emergencies by the non-partisan Judicial Conference. Indeed, every other Circuit Court nominee awaiting a hearing in the Committee, save one, has been selected for a vacancy that has been deemed a "judicial emergency." We should turn to those nominees first; emergency vacancies should clearly take priority over a possibly superfluous one.

Given the singular importance of the D.C. Circuit, we should not proceed hastily and without full information. Only after we reassess the need to fill this seat, perform reasonable due diligence on the nominee, and tend to actual judicial emergencies, should we hold a hearing on Mr. Keisler's nomination.

We thank you for your consideration of this unanimous request of Democratic Senators.

Sincerely,

Patrick Leahy Chuck Schumer



SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

vseitz@sidley.com
(202) 736-8015

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

06 JUL 21 PM 12: 08

July 14, 2006

By U.S. Mail and Facsimile

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Peter Keisler to the United States Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I am writing in strong support of the nomination of my former co-clerk, close friend, and professional colleague Peter Keisler to the United States Court of Appeals for the District of Columbia Circuit. I have known Peter since 1985 when we both served as law clerks on that court. I clerked for Judge Harry Edwards, while Peter clerked for Judge Bork. I continued my close association with Peter through my judicial clerkship with Supreme Court Justice William J. Brennan, Jr., through years of practice as a labor lawyer, and through my service as a Democratic appointee to the Board of Directors of the Office of Congressional Compliance. Starting in 1998, when I joined the law firm of Sidley Austin LLP, Peter and I were partners in that firm until he left to serve in the Department of Justice.

My model of the ideal public servant is my father, the Honorable Collins J. Seitz of the United States Court of Appeals for the Third Circuit and the Chancery Court of Delaware. He always performed work of the highest quality and continuously sought to improve the efficiency and effectiveness of the administration of justice in this country. In addition, he always operated at the highest plain of integrity and with great moral courage. (As Chancellor of Delaware, he was the first judge in the United States to desegregate a public college and school system.) This combination of an ability to perform brilliantly, a willingness to work tirelessly, a deep concern for ethical standards, and substantial moral courage is precisely what all citizens would hope for in a judge.

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
SIDLEY

Honorable Arlen Specter
July 14, 2006
Page 2

My long term professional and personal association with Peter Keisler has demonstrated to me beyond any shadow of a doubt that he possesses that combination of effort, energy, intelligence, and moral courage that makes him ideally suited to serve at the highest levels of our judiciary, including on that most important federal appellate court, the District of Columbia Circuit. It is of critical importance to our system of justice and the continuing integrity of our constitutional scheme that federal judges approach their task of deciding cases and administering the federal judicial system with energy, commitment, intelligence, integrity and a determination to ensure that their decisions comport with and reflect the principles embodied in the Constitution and laws of the United States. Peter approaches every legal task, indeed every task, with this splendid combination of intellectuality and character – a combination that will ensure that his judicial acts reflect thought, humility, and the commands of our laws.

In addition, the personal qualities that make Peter ideally suited to serve as a judge have been substantially enhanced by his professional experience. Peter's D.C. Circuit and Supreme Court clerkships and extensive appellate practice have given him enormous intellectual discipline and understanding, as well as a reverence for and practical appreciation of the federal courts. Peter's administrative responsibilities while in private practice have given him managerial experience and have demonstrated his personal collegiality and his gift for tasks requiring interpersonal skill. Peter's pro bono work (described in his resume) has given him a commitment to an open, diverse and generous society and government. And, finally, Peter's repeated, long term, high quality public service at the White House and the Department of Justice manifest his love of this country and his desire and commitment to ensure that the justice administered here reflects the highest aspirations of our constitutional system.

Peter's political affiliation differs from my own; he is a self-described conservative and a strong believer in limited government. But Peter has a full understanding and respect for the role of a judge in our constitutional framework, and I am utterly and completely confident that he will approach the task of judging with both the desire and the ability to follow the law – that his intellectual and personal integrity will make him a judge without agenda and with a fierce commitment to the ideals of fairness and neutrality so critical to the judicial branch. Finally, Peter will approach the task of judging with humanity. Both his legal practice and his life as a whole reflect his compassionate, thoughtful, open and positive nature. He is an astute, hard working, and considerate professional colleague whose insights and efforts are freely given, even when the pressure of his own work is most intense. His friendships span the political and social spectrum, but share one common aspect – his affection and admiration for people of strong principle. His strong family relationships are the product of his love and affection for his wife and a devotion to his children that finds expression not only in words, but in time and thought.

SIDLEY AUSTIN LLP
SIDLEY

Honorable Arlen Specter
July 14, 2006
Page 3

Peter's entire nature is always accurately reflected in his work, and citizens of all political persuasions will be fortunate that someone like Peter is administering law and justice from the bench.

Please do not hesitate to call me if I can be of any assistance in this matter.

Sincerely yours,

Virginia A. Seitz

VAS/
CC: Office of Legal Policy

○