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CONFIRMATION HEARING ON THE NOMINATIONS OF LESLIE SOUTHWICK, TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT; JANET T. NEFF, TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN; AND LIAM O'GRADY, TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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NOMINATIONS OF LESLIE SOUTHWICK, TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT; JANET T. NEFF, TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN; AND LIAM O'GRADY, TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

THURSDAY, MAY 10, 2007

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

The Committee met, Pursuant to notice, at 10:16 a.m., in room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, presiding.

Present: Senators Kennedy, Feingold, Durbin, Hatch, Brownback, and Coburn.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. The Committee will come to order.

We have, today, three nominees to the Federal bench who we will hear from: Judge Leslie Southwick has been nominated to the U.S. Court of Appeals for the Fifth Circuit; Judge Janet Theresa Neff has been nominated to the U.S. District Court for the Western District of Michigan, and Judge Liam O'Grady has been nominated to the U.S. District Court for the Eastern District of Virginia.

The hearing will proceed as follows: I will deliver brief opening remarks, then turn to Senator Hatch, who is the Ranking Member for this hearing, to deliver brief opening remarks. Then the nominees will be introduced by their home State Senators in the order of seniority. The first two, of course, are Senators Cochran and Senator Warner, both of whom are here.

I would like to welcome each of the nominees, their families and friends, to the U.S. Senate; of course, welcome, Senator Cochran and Senator Warner.

As my colleagues know, voting to confirm an individual to the Federal bench is one of the most important and lasting decisions that a Senator can make. Not only do Federal judges make daily decisions about life, liberty and property, not only do they serve as an independent check on the executive and legislative branches, but they do so with a lifetime appointment in our Federal system. In this way, their work is meant to be independent of the ephem-

eral political disputes, what Alexander Hamilton called "the ill humors of the political day."

Our system of government has had what one observer called "the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions to the cool, dry atmosphere of judicial determination." Maintaining this "cool, dry atmosphere" is an enormous responsibility for judges.

This hearing is an opportunity, the first and last opportunity, really, for Senators and the American people to consider whether the nominees are deserving of that responsibility. It is an opportunity to explore their qualifications, their judicial philosophy, their judicial temperament, and their commitment to equal justice.

On the subject of opportunities, I would like to take a moment to express my appreciation to our Chairman, Pat Leahy, for giving me the opportunity to chair this important hearing.

I would also like to take a moment and commend his leadership in confirming judicial nominations during this Congress. So far this year, the Senate has confirmed 17 judicial nominations. To put that number in context, it equals the number of judges confirmed during the entire 1996 session of Congress, another time of divided government. As the President sends nominees to the Senate for confirmation, I am sure that we will consider them as carefully and as expeditiously as possible.

To conclude, I look forward to the opening statements of my colleagues in the Senate and of the nominees, and the answers to our questions from each of the nominees.

I now turn to Ranking Member Hatch.

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

Senator HATCH. Well, thank you, Senator Whitehouse. I appreciate that.

I want to welcome all of our nominees here today, and of course the Senators who are appearing on their behalf. I will be very short. I want to congratulate each of you for your nomination to the Federal bench.

I also want to thank Chairman Leahy for scheduling this hearing. Some far-left groups have criticized Chairman Leahy for moving too fast, particularly on Judge Southwick's nomination.

Along with Judge Neff, he appeared before this Committee nearly 8 months ago when he was nominated to the District Court. The same record is before us now for his nomination to the Fifth Circuit.

As I understand it, Judge Southwick has provided the Committee with nearly 10,000 pages of documents, including both published and unpublished opinions. We have had his detailed answers to the Committee questionnaire for nearly 3 months, and those are essentially the same as what he provided almost a year ago. So I think the criticism of Chairman Leahy's scheduling of this hearing is offbase, and I want to thank Chairman Leahy for moving it along.

The position to which Judge Southwick has been nominated is a judicial emergency. It needs to be filled. He is an excellent nominee who has the highest rating from the American Bar Association, unanimously.

I certainly hope that we can proceed with dispatch on all three of these judges, if we can, today. Thanks, Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Senator.

If I may, I will now call on Senator Cochran for his introduction of Judge Southwick.

PRESENTATION OF LESLIE SOUTHWICK, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH DISTRICT, BY HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, thank you very much for inviting me to be present today to introduce Judge Leslie Southwick to the committee. I am very pleased to have this opportunity to introduce my friend and recommend him for service in the Federal judiciary.

In my opinion, he should be confirmed to serve on the U.S. Court of Appeals for the Fifth Circuit. I have known Leslie for about 30 years. In my opinion, he is exceptionally well-qualified for this responsibility. It is a very important position in our Federal judiciary, but he has the background, the proven intellectual competence, and a sense of fairness that well equip him for service on this important court.

He graduated cum laude from Rice University in 1972, and then went to the University of Texas School of Law, where he graduated 3 years later. After law school he clerked for the Chief Judge of the Texas Court of Criminal Appeals. He then came to Jackson, Mississippi, where I was practicing law, in 1977.

He joined the firm of Bernini, Grantham, Grauer & Hughes, a very well-respected and outstanding law firm in our State, one of our most prestigious firms, as a matter of fact. He became widely respected immediately as someone who had good judgment, who worked hard, who had good common sense. He was a very capable lawyer.

He has since served as a Deputy Assistant Attorney General in the Civil Division of the U.S. Department of Justice. He supervised about 125 lawyers of the Federal Programs branch. He also supervised the Office of Consumer Litigation.

In November 1994, Leslie Southwick was elected to serve on the newly created Mississippi Court of Appeals. From August of 2004 to January of 2006, he served as the Staff Judge Advocate for the 155th Brigade Combat Team in Iraq.

I recall communicating with him during his time when that unit was deployed as part of our military force in Iraq. They were mobilized in support of Operation Iraqi Freedom. He was out in the desert with the troops and providing leadership and advice on legal matters to the brigade.

He is currently serving as a Professor of Law at Mississippi College School of Law. He teaches courses in administrative law, consumer law, evidence, statutory interpretation, and judicial history. He has also served as an instructor at the U.S. military academy at West Point.

He has written several legal and historical articles and publications for the Mississippi Law Journal, the Mississippi College Law Review, and others. He is the author of a book, Presidential Also-

Rans and Running Mates, which won an American Library Association "Best Reference Work of the Year" award in 1985.

As you can see from his accomplishments and his experience, Leslie Southwick has had a distinguished career as a public servant and as a private lawyer in one of the best law firms in our State.

He is respected for his honesty and integrity, his pleasing personality, and I am confident he will reflect great credit on the Federal judiciary if he is confirmed by the Senate to serve on the Fifth Circuit Court of Appeals.

Thank you.

Senator WHITEHOUSE. Thank you, Senator Cochran.

The next Senator I will call then, going by order of seniority, is Senator Warner of Virginia, to speak on behalf of Magistrate Judge O'Grady.

Senator WARNER. Thank you, Mr. Chairman. Might I suggest that my distinguished Leader, Mr. Lott, please go ahead.

Senator WHITEHOUSE. Senator Lott, please proceed.

PRESENTATION OF LESLIE SOUTHWICK, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH DISTRICT, BY HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator LOTT. Well, let me just say to my two more senior colleagues, I appreciate this. But since we are on Judge Southwick, maybe it would make some good sense to have us both make our comments and then yield to our other colleagues. Thank you, Senator Warner and Senator Levin.

Thank you very much, Senator Whitehouse, for being here and chairing this subcommittee. Thank you, Senator Hatch, for doing your diligent duty, as always. I do want to extend my appreciation to Chairman Leahy for going forward with this hearing and arranging for Senator Whitehouse to chair it, and to Senator Reid for his work with Senator McConnell to see that we move forward in a fair process with regard to these nominees.

It is not an easy task. It is an important task. I think, obviously, quality is every bit as important—maybe more so—than quantity.

I will not repeat what my senior colleague has said in his comments here this morning in support of Judge Leslie Southwick. He obviously has an outstanding record. I was just writing down here what an outstanding life he has had. He is well-educated. He was an outstanding student, graduating cum laude from Rice University, an outstanding university in Texas, the Texas Law School.

He clerked in two different, very important courts, for the presiding judge of the Texas Court of Criminal Appeals, and he moved to Mississippi and clerked for one of the most outstanding people I have ever known in my life, let alone the fact that he was the chief judge of the Fifth Circuit Court of Appeals, Charles Clark from Mississippi. So he has been an outstanding student, he has had outstanding experience as a clerk for very fine judges in critical positions.

He has a distinguished military career, having taken leave from the Court of Appeals to go to Iraq, as Senator Cochran just pointed out, as a Judge Advocate for the 155th infantry unit out of Mississippi.

He is an author and has been recognized for that. He is a law school professor. He has been affiliated with one of the very best law firms in the State. But I think, most importantly of all, he himself has served as a judge, an appellate court judge, in Mississippi, where he has participated in deciding over 7,000 cases and he authored the most opinions in 8 of his 10 years on the appellate court.

He received the "Judicial Excellence" award from the Mississippi State Bar Association. He has been broadly and widely acclaimed as an excellent choice to serve on the Federal judiciary, including by the local newspaper, the paper in our State's capital, the Clarion Legend, a Gannett newspaper, not known for just endorsing any Republican nominations for anything.

But they had this to say about Judge Southwick: "...is an outstanding nomination for the bench, with no hint of any reason for disqualification. The U.S. Senate should confirm the nomination."

He has one other distinction here. He probably is getting close to having a record for how long he has been pending before this Senate for a Federal judicial appointment, first the Southern District, but then was moved up and recommended for the Fifth Circuit Court of Appeals.

I, like Senator Cochran, have known him for a long time personally. I have nothing but the highest admiration. He has everything you are looking for here in terms of education, history of public service, reputation for fairness, and stellar judicial temperament. I urge the Subcommittee to expeditiously move forward on this nomination of Judge Leslie Southwick.

Thank you very much, Mr. Chairman, and my colleagues.

Senator WHITEHOUSE. Thank you, Senator Lott.

We will now return to the regular order of seniority. I call on Senator Warner to speak on behalf of Magistrate Judge O'Grady.

PRESENTATION OF LIAM O'GRADY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. May I say to you that we have had some connection and knowledge with each other for many, many years, and I am very impressed with your ability to take strong reigns and grasp the responsibilities of chairing a Committee of the U.S. Senate in such a short time after your election to this august body.

Senator WHITEHOUSE. Thank you, sir.

Senator WARNER. I wish you well.

Senator WHITEHOUSE. Thank you, sir.

Senator WARNER. And I thank the Chairman who sent you, Patrick Leahy, whose friendship and work I have shared in my 29 years with my colleague—and indeed mentor—who is not listening to me, Senator Hatch. He fostered my career from the very beginning in the U.S. Senate. Thank you, both of you, for coming here today and having this hearing.

Mr. Chairman, Senator Hatch, other members of the committee, I would like to read from the opening paragraph of a statement

and endorsement by my colleague, Jim Webb, who is unable to be here this morning.

He states as follows: "Today it is my distinct pleasure to offer my support, along with my colleague Senator Warner, for the nomination of Magistrate Judge O'Grady to be a judge on the U.S. District Court for the Eastern District of Virginia."

I ask unanimous consent that his statement follow my statement in the record of today's proceedings.

Senator WHITEHOUSE. Without objection, that will be done.

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

Senator WARNER. And at this time, Mr. Chairman, I would ask the Chair to invite Magistrate O'Grady to introduce his wife and children.

Judge O'Grady. Thank you, Senator. This is my wife, Grace McPherson O'Grady, who is no stranger to these proceedings. She worked for Senator Hecklin after college, and then Senator Nunn on the Permanent Subcommittee on Investigations after getting a graduate degree. With us also are my two youngest children: Wynn, who is nine, and Tatum, who is five. Thank you, Senator.

Senator WARNER. Well, we welcome Wynn and Tatum to the proceedings. Mrs. O'Grady, it is good to have you back under such happy circumstances.

Thank you, Mr. Chairman. I would ask unanimous consent that my full statement be made a part of the record.

Senator WHITEHOUSE. Without objection.

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

Senator WARNER. I should like to draw to the attention of the members of the Committee certain aspects of this.

Mr. Chairman, there is an old saying in the Senate, some Senators are proud to point that they came up through the chairs to become a U.S. Senator, meaning that they served in the State legislatures of their respective States, they often came from there either to the Governorship or, indeed, the House of Representatives, and finally to the U.S. Senate.

Well, this outstanding nominee by our President has really come up through the chairs of the legal profession. Judge O'Grady, who has been nominated to fill this seat, has been a member of the Virginia Bar since 1978.

He has worked as a sole practitioner, as an Assistant Commonwealth Attorney, as an Assistant U.S. Attorney, as a partner in an international law firm, and for the last 4 years he's worked with the Eastern District of Virginia as a magistrate judge.

In his career, he has had a wide array of experience. As a sole practitioner, he worked as a court-appointed criminal defense lawyer. As an Assistant Commonwealth Attorney, he tried upwards of 100 jury trials. As an Assistant U.S. Attorney, he focused on narcotics and organized crime cases.

As a partner in the well-known law firm that he was associated with, he worked extensively on patent and trademark cases, and for the last 4 years as a magistrate judge, of course, he had a full spectrum of so many of the responsibilities on that court.

Equally impressive, though, despite the rigors of his career, he has always found time to give back to the community. He has helped teach law at both George Washington University here in the Nation's capital, and George Mason in Northern Virginia. While at the firm, he set up a pro bono legal clinic and took court-appointed cases involving those in need. Most recently, he has been a dedicated volunteer youth soccer and youth hockey coach.

Together with his family, I think they are exemplary persons for continuing in public service. He has the skills and qualifications, in my judgment, to become a U.S. District Court judge. I do hope that this Committee will see fit to confirm him.

I thank the Chair and the Ranking Member.

Senator WHITEHOUSE. Thank you, Senator Warner.

We will now proceed to hear from Senator Levin, who is here to speak on behalf of Judge Janet Theresa Neff.

PRESENTATION OF JANET T. NEFF, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN, BY HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, forgive me for that pause. Thank you so much, Chairman Whitehouse, members of the committee, for holding this hearing today on Janet Neff.

I am here with Senator Stabenow and am pleased to support all three Michigan nominees that are pending before this Committee for the Western District of Michigan: Robert Yonker, Paul Maloney, and Janet Neff.

They have been nominated by the President to the Western District. We worked with the White House on these nominations. They received a hearing last year. They were unanimously reported out of the Committee last year.

Unfortunately, the nominations were held up at the last session of the last Congress, so they were not confirmed. I hope very, very fervently that the three nominees will be approved by this Committee and that they will be promptly confirmed by the Senate.

A hearing on one of the nominees, Janet Neff, is being held today. I want to welcome her and her family to the hearing.

She graduated with honors from the University of Pittsburgh in 1967, then from Wayne State University Law School in 1970. She has had a distinguished legal career. After law school, Judge Neff served as an estate and gift tax examiner for the Internal Revenue Service, and then a research attorney for the Michigan Court of Appeals before becoming an Assistant City Attorney for the city of Grand Rapids.

Judge Neff has also worked in private practice. She served as a Commissioner for the Michigan Supreme Court, and then as an Assistant U.S. Attorney. Judge Neff currently serves on the Michigan Court of Appeals, and she has been granted numerous awards and honors, including "Outstanding Member for 2006" of the Women Lawyer's Association of Michigan.

Her hallmarks on the Court of Appeals in Michigan have been integrity, decency and hard work. We are fortunate to have Judge Neff devoted to public service. I hope we can all work together to

move all three of these Western District Court nominees promptly through the Senate.

I will keep this statement briefer than perhaps I would ordinarily do because of the lengthier statement which I made when her first hearing occurred. But I just want to assure this Committee of her qualifications, both legally and of character, her objectivity, her fairness, her open-mindedness on the bench.

She has strong support in her community, both the legal community and the broader community. She is extraordinarily well-qualified to be a District Court judge, and I commend her highly to this committee.

Senator WHITEHOUSE. Thank you, Senator Levin.

Senator Stabenow, would you like to add your statement now?

Senator STABENOW. I would.

Senator WHITEHOUSE. Please proceed.

PRESENTATION OF JANET T. NEFF, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN, BY HON. DEBBIE STABENOW, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator STABENOW. Thank you so much, Mr. Chairman, for holding this hearing, and distinguished members of the committee.

This is a wonderful opportunity for us to once again speak of strong support for Judge Janet Neff, as well as, as Senator Levin said, for the other two nominees for the Western District. All three of the nominees are supported by both of us, and we are very pleased that they were reported unanimously last year from the committee.

This is, in fact, as you know, the second hearing for Judge Neff. I wonder if I might as well, seeing Judge Neff and her family here, just take a moment and give her the opportunity to introduce her family, who I know she is very proud of as well.

Senator WHITEHOUSE. Please. We would be delighted for that to happen.

Judge NEFF. Thank you, Senator. This is my husband of 35 years, David Neff, and our daughter, Genevieve Dorment, who has just finished her second year of law school at Fordham University in New York City.

Senator WHITEHOUSE. Well, congratulations, and welcome to the Committee on this happy occasion.

Senator STABENOW. In addition to all of the qualifications that Senator Levin has spoken about and I have been pleased to join in speaking about at the first hearing, Mr. Chairman, I want to stress today that it is very important that the Committee move quickly to confirm Judge Neff, as well as the other two nominees. Currently, the Western District has only one full-time judge hearing cases and the Judicial Conference has declared it a judicial emergency.

Even when the bench is full, this district represents logistical challenges because it covers communities all over Michigan, from the upper peninsula, if you are familiar with Michigan, all the way down to Benton Harbor and St. Joseph.

So, it is a very large area and it is extremely challenging right now, which is the reason we have been working hard with the White House, together, to get these vacancies filled.

However, I am very pleased that her confirmation process is continuing and I hope that she will be confirmed before the Memorial Day recess, again, along with the other two pending nominations for the U.S. District Court for the Western District of Michigan.

These nominees all bring very distinguished legal careers to the Federal bench. Judge Neff has served as a judge on the Court of Appeals for the Third District of Michigan for almost 17 years. I cannot stress enough, Mr. Chairman, how much she is respected, not only for her legal mind, her balance and objectivity, but for her personal integrity.

In addition to her distinguished career on the bench, Judge Neff has been an active leader in Grand Rapids, Michigan, including serving as the first woman president of the Grand Rapids Bar Association.

So, I commend her to you and ask that the Committee move as quickly as possible to allow us to fill all three vacancies in the Western District.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Stabenow.

I have a statement from Chairman Leahy that I will add to the record. He has asked me to add it to the record of this proceeding.

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

Senator WHITEHOUSE. If there is no further business, we will proceed to the nominees. Thank you, Senator Levin and Senator Stabenow.

Senator LEVIN. Thank you.

Senator WHITEHOUSE. May I call Judge Leslie Southwick forward to be sworn, please?

[Whereupon, the witness was duly sworn.]

Senator WHITEHOUSE. Please be seated.

Judge SOUTHWICK. Thank you.

Senator WHITEHOUSE. Do you have a statement or opening remarks you would care to present to us?

Judge SOUTHWICK. I have a very important opening statement.

Senator WHITEHOUSE. Please.

STATEMENT OF LESLIE SOUTHWICK, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Judge SOUTHWICK. Which is to introduce my wife, who has joined me for this hearing today, Sharon Southwick. Would you mind standing? Sharon and I have two children. Our son, Phillip, who is married, his wife, Mary, living in Austin. Our daughter Cathy is grown as well, living in Houston. They could not join us today, but I think in spirit they are here as well. Thank you, Mr. Chairman.

[The biographical information of Judge Southwick follows:]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Leslie Harburd Southwick

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

   United States Court of Appeals for the Fifth Circuit

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

   Mississippi College School of Law
   151 East Griffith Street
   Jackson, MS 39201

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

   1950, Edinburg, Texas

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   Wife: Sharon Elaine Polasek Southwick
   Marketing Assistant
   W.S.Quinn CLU
   405 Briarwood Drive, Suite 104B
   Jackson, Mississippi 39206

   Two children (No longer dependent children)

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

   University of Texas School of Law, 1972-75; J.D. May 1975
   Rice University, 1968-72; B.A. May 1972

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

   2007-present; Mississippi College School of Law; visiting professor

   1995 – 2006; Mississippi Court of Appeals; Judge

   1998 – 2006, 1985 – 1989; Mississippi College School of Law; Adjunct Professor

   2004-2006; United States Army; Deputy Staff Judge Advocate, Staff Judge Advocate

   1989 – 1993; United States Department of Justice, Civil Division; Deputy Assistant Attorney General

   1977 – 1989; Brunini, Grantham, Grower & Hewes, PLLC; Associate (1977-1983) Partner (1983-1989)

   1976 – 1977; United States Court of Appeals for the Fifth Circuit; Law Clerk to the Honorable Charles Clark

   1975 – 1976; Texas Court of Criminal Appeals; Law Clerk to the Honorable John F. Onion, Jr.

   1974 – 1975; University of Texas School of Law, Teaching Quizmaster (instructor of legal research and writing for one section of first-year law students).

   1974; United States Attorney's Office, Eastern District of Texas; summer law clerk

   1973; International Paper Company; box assembler, summer

   1972; Polasek Air Conditioning; central heat and air installer, summer

   Charles Clark American Inns of Court, president, 2006

   Jackson Servant Leadership Corps: President 2001-2003, Member 1998-2003.

   Hinds County Mental Health Association: President 1981-82.

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

Judge Advocate General's Corps, U.S. Army Reserves (1992-1997), Mississippi National Guard (1997-present). Lieutenant Colonel, Deputy Staff Judge Advocate (August 2004-July 2005), then Staff Judge Advocate (July-Dec. 2005), 155th Brigade Combat Team, mobilized in support of Operation Iraqi Freedom, August 2004; served in Iraq, January-December 2005; released from active duty January 2006. Currently assigned to Joint Forces Headquarters, Jackson.

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

   Judicial Excellence Award, Mississippi State Bar, 2004.
   American Library Association "Best Reference Work of the Year" award in 1985, for PRESIDENTIAL ALSO-RANS & RUNNING MATES, 1788-1980 (first edition 1984, revised 1998)
   Volunteer of Year, Jackson Mental Association, 1981 & 1985.
   Usual military awards, including Meritorious Service Medal in 2005.

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

    Texas State Bar, 1975-1980
    Mississippi State Bar 1977-present
    Charles Clark American Inns of Court: President, 2006-; Program chairman, 2003-2004; Bencher, 1995-.
    Criminal Code Revision Group, Miss. Judicial Advisory Study Committee, 1996-present; Citizens Task Force for Correctional Reform (faith-based prison initiative), 1998-2000; Curriculum Committee, American Bar Association's Section on Legal Education, 1998-2002.
    American Law Institute, 2001- .
    Federalist Society, 1990-approx.1998.

11. **Bar and Court Admission**:

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

       Texas State Bar, 1975-1980, dropped membership because was remaining in Mississippi.

       Mississippi State Bar, 1977-present

    b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse

in membership. Give the same information for administrative bodies that require special admission to practice.

Texas Supreme Court, 1975. After dropped membership in Texas Bar, my admission to practice before the Texas Supreme Court may have lapsed.

Mississippi Supreme Court, 1977-present.

Mississippi circuit and chancery courts, 1977-present.

U.S. Court of Appeals, Fifth Circuit 1977-2003, lapsed because had not updated my address and clerk's office could not locate me when periodic renewal notice was sent.

U.S. District Court, Southern District of Mississippi 1978-1992, lapsed when re-registration occurred in May 1992 and the mailing was sent to my former law firm; I was in Washington, D.C. at DOJ in 1992.

U.S. Army Court of Military Review (now Army Court of Criminal Appeals) June 1994 - present.

U.S. District Court, D.C. Practiced there from 1989-93 while at DOJ. The court's records list me as a government attorney authorized to appear but not formally admitted.

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Jackson Roman Catholic Diocese Fitness Review Committee, and Fitness Review Administrator, 2001-2004.
Jackson Servant Leadership Corps: President 2001-2003, Member 1998-2003.
Hinds County Mental Health Association: President 1981-82, Member 1978-84.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical

implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I have not belonged to any organization that discriminates in these ways.

13. **Published Writings and Public Statements**:

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

Legal Writings

1. *Separation of Powers at the State Level, Part II: Service in Civilian Public Office and in the National Guard,* 74 MISS. L. J. 47 (2004).

2. *Recent Trends in Mississippi Judicial Rule Making: Court Power, Recusals, and Expert Testimony,* 23 MISS. C.L.REV. 1 (2003).

3. *Separation of Powers at the State Level [Part I]: Interpretations and Challenges in Mississippi*, 72 MISS. L.J. 927 (2003).

4. *Military Justice for Terrorists and the National Guard: Comparisons and a Mississippi Case Study*, 72 MISS. L.J. 781 (2002).

5. *The Least of Evils for Judicial Selection*, 21 MISS. C.L.REV. 209 (2002).

6. *A Modest Proposal For Clarity in Compensation Law*, 14 MISS. C. WORKERS' COMPENSATION SEMINAR (2002).

7-9. Three chapters for the ENCYCLOPEDIA OF MISSISSIPPI LAW: *Administrative Law, Statutory Interpretation*, and *Unemployment Compensation* (West Pub. 2001-2002).

10. *The Big Case on Appeal*, XLV MISS. LAWYER 24 (1999).

11. *Mississippi Supreme Court Elections: A Historical Perspective 1916-1996*, 18 MISS. C. L. REV. 115 (1998).

12. *The Mississippi Court of Appeals: History, Procedures, & First Year's Jurisprudence*, 65 MISS. L.J. 593 (1996).

13. *A Tribute to Chief Judge Charles Clark,* 12 MISS. C.L.REV. 355 (1992).

14. *Methods of Constitutional Revision: Which Way Mississippi?*,56 MISS. L.J. 17 (1986).

15. *State Constitution Revision: Mississippi & the South,* XXXII MISS. LAWYER 21 (1985).

Historical Writings

1. *Presidential Also-Rans and Running Mates, 1788-1996* (McFarland & Co.: Jefferson, N.C. 1998, first edition 1984; supplement for 2000 election published in 2004 by GREEN BAG JOURNAL OF LAW).

2. *The Colonel, the Judge, & the Bartender: The Presidential Election of 1904*, XXVI (no. 2) THEODORE ROOSEVELT ASSN JOURNAL 3 (2004).

3. *A Judge Runs for President: Alton Parker's Road to Oblivion*, 5 GREEN BAG JOURNAL OF LAW 2D 37 (2001).

4-6. Articles on Kenneth Anderson, Peter Grayson, and Robert Wilson published in THE NEW HANDBOOK OF TEXAS (1996).

7-9. "Robert Wilson & the Texas Election of 1838," "James Collinsworth," and "Peter W. Grayson," all published in the HOUSTON REVIEW (1991-1992).

10. "Kenneth L. Anderson: Last Vice President, Almost First Governor of Texas," published in the EAST TEXAS HISTORICAL JOURNAL (1989).

Newspaper and newsletter articles and columns

1. "Speak No Evil, Spend no Fortune, and Win: First Amendment Issues in Judicial Elections," PROFESSIONAL RESPONSIBILITY NEWS (Federalist Society) (Fall 2000).

2. "Separation of Powers: Three Recent Challenges in Mississippi," HINDS COUNTY BAR ASS'N (newsletter) (Aug. 2000).

3. "In Case Some Forgot, George Bush Did a 'Superb' Job in Many Ways," (Jackson, Miss.) CLARION-LEDGER (Oct. 18, 1993), at 7A.

4. "'Spare Tires' of the Past Got Kicked as Much as Quayle," WALL STREET JOURNAL (Nov. 1, 1988), at A30.

5. "The 1988 Republican National Convention," HINDS COUNTY BAR ASS'N NEWS Oct. 1988.

6. *"A New Constitution?"* JACKSON YOUNG LAWYERS ASS'N NEWSLETTER Jan. 1987.

7. "Don't Fight Constitution's Rising Tide," (Jackson, Miss.) CLARION-LEDGER (Jan. 25, 1987), at 1-H.

8. "Reforming Constitution Path to Righting Power Imbalance," (Jackson, Miss.). CLARION-LEDGER (Sept. 2, 1986), at 7A.

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

I have not made any such reports or other statements.

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

While at the Department of Justice in 1989-93, I testified at least four times before congressional committees. I do not have copies of any prepared statements that were submitted with the one exception noted below.

1) *House Committee on the Judiciary, Subcommittee on Crime*, on May 17, 1990, I was scheduled as a witness about the Anabolic Steroids Control Act of 1990, H.R. 4658. As I recall, my prepared statement was delivered late to the subcommittee and I was not allowed to testify.

2) *House Committee on the Judiciary, Subcommittee on Criminal Justice*, on July 11, 1990, on a panel with James G. Richmond, Special Counsel for Financial Institutions, U.S. Department of Justice; and Paul L. Maloney, Deputy Assistant Attorney General, Criminal Division. We discussed DOJ's efforts to combat financial institution fraud.

3) *Senate Committee on Appropriations, Subcommittee on Treasury, Postal Service, and General Government*, on February 19, 1991, testified on the implementation of the Federal Employee Drug Testing program, along with several other witnesses from the Administration. I do not recall the specific issues addressed at the hearing.

4) *Senate Judiciary Committee, Subcommittee on the Constitution*, on July 30, 1991, testified at a hearing that examined First Amendment implications of the Supreme Court's then-recent decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld regulations forbidding recipients of Federal funding for family planning services from encouraging or promoting abortion. A primary area of interest for the subcommittee was whether *Rust* was precedent for Congress's imposing other limits on the speech that it funded, such as of libraries and art. I stated the Administration's initial position that *Rust* was support for such limits. I have a copy of my prepared statement.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and

readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

1980-89. I would participate as a presenter at occasional seminars on oil and gas law and on other subjects, but I have no record of any of those presentations. My specific recollection is solely of a seminar at which four members of my firm made presentations. We were presented a plaque, which allowed me to obtain this information from the lawyer who retained it: Mississippi Oil and Gas Law: What The Landman Needs To Know, March 2, 1989, sponsored by Baton Rouge Association of Petroleum Landmen. Any materials from the session are lost.

Different dates. I have occasionally been called upon to give a talk on my book, *Presidential Also-Rans & Running Mates, 1788-1996.* I have spoken to church groups, civic clubs, and others. I have included a copy of typed remarks from one occasion, and a print-out of power-point slides that I used in 2002.

April 18, 1982, St. Luke's Methodist Church, church fellowship hall, Jackson. I moderated a panel discussion on abortion, between a physician and a chaplain. I do not now have and probably did not present prepared remarks.

1982, Mississippi State Bar Annual Convention, Broadwater Beach Hotel, Biloxi. I spoke on Oil, Gas, and Coal Leasing on Sixteenth Section [school] Lands." I do not have a copy of my remarks.

1988 George Bush campaign. I gave a few campaign addresses in support of Bush, but I do not have any record of my remarks nor do I remember many details, other than one address was on the back of a trailer at the campus of Mississippi College in Clinton.

November 11, 1988, Mississippi Youth Legislature banquest speaker, Holiday Inn, Jackson. I spoke on the two-party system in Mississippi, with the chairman or director of the state Democratic Party having equal time. I do not have any record of my remarks.

November 13, 1989, U.S. Attorneys conference, Northern District of Mississippi, in Oxford, University Student Union. I spoke on U.S. attorneys offices from the perspective of "Main Justice" and specifically the Civil Division. I do not have a copy of my remarks.

August 19, 1990, Southaven, Miss. Police Station dedication. I was the principal speaker at the dedication, and spoke about the importance of law enforcement. My outline is attached.

September 5, 1990, Partners Against Drug Abuse, National Seminar and Exhibition, Arlington, Va. I was on a four-person panel that discussed drug testing of employees. I do not have a copy of my remarks.

September 10, 1990, Executive Office, U.S. Attorneys, Financial Litigation Conference, San Francisco. I gave an overview of DOJ's tools and efforts. I do not have a copy of my remarks.

February 27, 1991, Interagency (OTS, RTC, FDIC) Bank Fraud Conference, Atlanta, Georgia. I believe I spoke as a substitute for the Assistant Attorney General on the issue of Civil Money Penalty Actions. I do not have a copy of my remarks.

May 22, 1991, U.S. Attorneys' Offices, Iowa, Clients' Conference, Des Moines. I spoke on resolving conflicts among agencies affected by litigation. I do not have my outline.

August 30, 1991, Executive Office of U.S. Attorneys Financial Institution Fraud Training Seminar, Boston. I spoke on civil penalties. A copy of my outline is attached.

September 12, 1991, Federal Attorneys Conference, KeeslerAir Force Base, Biloxi, Miss. I spoke on ethics in federal litigation. I have attached a copy of my hand-written remarks..

October 15, 1991, Practicing Law Institute Civil and Criminal Liability of Officers, Directors, and Professionals., Mayflower Hotel, Washington. I have attached a copy of my outline.

November 1991, U.S. Attorneys Conference, perhaps conducted by the Executive Office of U.S. Attorneys, held in Savannah, Georgia. I spoke on then-recent amendments to the Rules of Civil Procedure. I do not have a copy of my remarks.

June 5, 1992, Mississippi Association of Legal Assistants, spring seminar, Ramada Renaissance, Jackson. I spoke on the activities of the U.S. Department of Justice. A copy of my notes is attached.

1994. I have a copy of only one address from my first election to the Court of Appeals. It was given in Natchez on an unknown date, discussing the campaign and the needs of the court system. Copy of my remarks attached. I have included press stories of other campaign events. On most occasions I spoke without notes and have no record of my remarks.

January 20, 1995, Jackson Young Lawyers' (JYL) monthly luncheon. I talked about the previous year's judicial campaign. Copy of outline attached.

January 26, 1995, Mississippi Association of Legal Assistants monthly meeting, Capital City Petroleum Club. The same remarks as for the JYL luncheon on Jan. 20 were used.

March 10, 1995, Mississippi Trial Lawyers' Association. I was on a panel with other Court of Appeals judges to discuss our court. A handwritten outline is enclosed.

April 10, 1995, Jones County bar luncheon. I spoke about the Court. A copy of my hand-written outline is attached.

August 3, 1995, Tylertown Rotary luncheon. I spoke about the Court. A copy of my outline is attached.

October 10, 1995, Jackson Legal Secretaries Association Court Observance Day, Primos Northgate Restaurant, Jackson. I spoke about the Court. A copy of my outline is attached.

December 1995. Sponsored by the Krieble Institute, I went to St. Petersburg, Volgograd, and Maloyaroslavets (south of Moscow) to give talks about democracy to candidates and citizens a few weeks before the1996 Duma elections. I cannot find copies of my remarks. I spoke through a translator at each location.

January 18, 1996, Mississippi Oil and Gas Lawyers' Association monthly dinner, Capital Club, Jackson. I spoke on the operation of the Court of Appeals. A copy of my outline is attached.

January 22, 1996, Charles Clark Chapter, American Inns of Court, bimonthly program. I discussed the different options for structuring an intermediate appeals court, the option the Miss. legislature selected, and some pros and cons of the choices. Copy of my notes attached.

1996-present. As a member of the JAG Corps, I have frequently given briefings to soldiers on military law, including a set of briefings required annually on military discipline, ethics, and employment rights of Reservists and National Guardsmen. The briefings were largely based on powerpoint slides and other materials provided by others. I have not attached any remarks since the materials are not really of my creation.

March 20, 1996, Lee County Bar luncheon, Morrison's Cafeteria meeting room, Tupelo. I discussed my experiences in Russia. A copy of my remarks is attached.

March 29, 1996, Rankin County Rotary luncheon, Brandon restaurant. I spoke on my experiences visiting Russia in late 1995. A copy of an outline of my remarks is attached.

August 2, 1996, Jones County Bar/Legal Secretaries Asscociation conference. My topic was "Statutes and Rules Relating to the Court of Appeals." A copy of my hand-out is attached.

February 11, 1997, Christian Legal Society luncheon, Jackson, Mississippi College School of Law. I spoke on the faith of different American public figures. A copy of my talk is attached.

April 18, 1997, Hinds County Bar court practice seminar. I was on a panel that discussed the work of the court. Our joint hand-out is attached.

May 16, 1997, Mississippi Association of Legal Assistants spring seminar. I spoke on the work of the Court. My hand-out is attached.

October 23, 1997, Fall Conference for Court Administrators and Legal Research Assistants, Harvey Hotel, Jackson, Miss. I spoke about pro se litigants and on the work of the Court of Appeals. A copy of my outline is attached.

December 17, 1997, Supreme Court reception room, on retirement of Chief Justice Dan Lee. A copy of the remarks that I have on behalf of the Court of Appeals is attached.

January 6, 1998, Pascagoula, Miss. Kiwanis Club luncheon. I spoke on the need for truth and other virtues in judges. Copy of notes of talk attached.

April 13, 1998, Jones County Bar Association luncheon. I discussed the Court of Appeals. A copy of my notes is attached.

May 1, 1998, Hinds County Bar Association Seminar on Court Practice, University Center, Jackson. I was on a three-judge panel to discuss the Court of Appeals. Copies of the outline for my remarks included.

February 23, 1999, North Jackson Rotary Club luncehon, Primos Northgate Restaurant. Lessons of Life. Some rather elliptical, ambiguous notes are attached.

January 21, 2000, Jackson, Miss., Jackson Young Lawyer's monthly luncheon. I had been a guest on Brian Lamb's C-SPAN program on Christmas Eve morning, 1999. I spoke about my experience. Copy of notes attached.

February 18, 2000, Mississippi College Law School AnnualLabor & Employment Law seminar, Sports Hall of Fame. I was on a panel with two other judges. I do not remember the questions. A copy of the program is attached.

May 10, 2000, Fifth Circuit Judicial Conference, Hyatt Regency Riverwalk, San Antonio, Tex. I was on a three-person panel whose topic was "Evolving Federalism – What's Ahead." Then-Texas Attorney General John Cornyn and Professor Cheney Joseph (LSU) were the other panelists. Copy of prepared remarks attached.

January 16, 2002, Clinton (Miss.) Rotary Club luncheon. Talked about judicial ethics. My outline, which is confusing now even to me, is attached.

October 17, 2002, Library Building, New Albany, Miss. I spoke to a monthly lunch meeting about my book on presidential also-rans. A copy of my power-point slides is attached.

June 13, 2002, American Legion Boy's State annual convention, Delta State University auditorium. Spoke on virtue and achievement in life. Copy of notes attached.

June 6, 2003, Mississippi Bar, Young Lawyers Division, Videoconference, at Eagle Ridge Conference Center, Raymond, Miss. I spoke on "Recent Mississippi Appellate Decisions and Revisions to Court Rules." Copy of hand-out attached.

2003. At some point I gave a talk to a Sunday morning class at my church on C.S. Lewis, but I do have copies of any notes nor do I recall exactly when it was.

February 24, 2004, annual dinner of Jackson Legal Professionals Association, meeting room of Steam Room Grille, Jackson. I spoke on the court, judicial elections, and judges generally. A copy of my outline is attached.

June 2, 2004, CLE seminar at Mississippi College School of Law. I spoke on the military ethics rules. Copy of hand-out attached.

August 2, 2004, swearing-in of new law clerks, Mississippi Court of Appeals courtroom. On behalf of the assembled judges, I spoke to the new clerks about the importance and honor of their new duties. Copy of prepared remarks attached.

March 2006, St. Richard Catholic Church, Jackson, "Timely Topics" adult Sunday morning class. I presented a talk on my experiences in Iraq, using powerpoint slides that consisted solely of photographs from Iraq. I have not printed those for this submission to the Committee, as other than an occasional caption to a photo, only pictures would be seen.

May 9, 2006, Hinds County Bar Annual Dinner Honoring the Judiciary, Old Capitol Inn, Jackson, Miss. Talked on experiences in Iraq. Copy of speech attached.

August 2006. Swearing-in of new law clerks, Mississippi Court of Appeals courtroom. My remarks are attached.

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Clippings and other materials included. These are the general categories:

(1) One transcript is from my work at the Department of Justice. I spoke at a press briefing about the deposition of former President Reagan in the prosecution of Admiral Poindexter.

(2) Political campaigns of George H.W. Bush. I served as state campaign coordinator in 1980 and state steering committee chairman in 1988.

(3) Candidate for judicial office, 1994 and 1996.

(4) Interviews about my book *Presidential Also-Rans & Running Mates*.

(5) A few miscellaneous stories.

(6) I participated in three television interviews. One interview was by Brian Lamb on C-Span on December 24, 1999; the subject was the *Also-Ran* book and a poll I had conducted of historians. The second was with a local television news anchor about the 1988 Bush campaign. The final is from the summer of 2004 when I was interviewed about my departure on active military duty.

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.

Judge, Mississippi Court of Appeals (1995-2006, with leave of absence Aug. 2004-Jan. 2006). Elected 1994 for initial 4-year term; re-elected 1998 for 8-year term. Did not run for re-election in 2006. This is a general jurisdiction intermediate appellate court.

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

a. citations for all opinions you have written (including concurrences and dissents).

Lists are attached to the questionnaire. The list of published opinions was generated through a Westlaw search and is in reverse chronological order. The separately-compiled list that refers to unpublished opinions is in standard chronological order.

b. a list of cases in which certiorari has been requested or granted.

The lists that respond to the previous question contain references to grants of certiorari.

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings.

1. *Johnson v. State*, 924 So. 2d 527 (Miss. Ct. App. 2004), rev'd 925 So. 2d 86 (Miss. 2006). The Supreme Court sought in its decision to resolve a multi-year ambiguity regarding whether prior felons could upon a subsequent conviction receive a suspended sentence despite a statute that prohibited "probation" in sentencing prior felons. The Court of Appeals for several years had interpreted two statutes as being consistent and as prohibiting probation or its equivalent from being available. The Supreme Court in *Johnson* determined that the later of the two statutes was trying to restore what the previous statute had prohibited but by using a different name. The Court overruled one of its precedents that it stated was the origin of the confusion.

2. *Crider v. Crider*, 905 So. 2d 706 (Miss. Ct. App. 2004), rev'd 904 So. 2d 142 (Miss. 2005). This was a divorce action in which joint custody was awarded the parents without a joint request. For years, this Court of Appeals had interpreted the relevant statute as requiring a joint request. Finally the Supreme Court ruled, holding in what it called "an issue of first impression" that the statute should not be interpreted to require a joint request.

3. *Barber Seafood, Inc. v. Smith*, 906 So.2d 1 (Miss. Ct. App. 2004), rev'd 911 So. 2d 454 (Miss. 2005). In this workers compensation case, I interpreted the commission's decision as concluding that the worker had not reached maximum medical improvement and that his partial disability continued. The Supreme Court disagreed with my interpretation of this part of the commission order and concluded that permanent disability benefits were appropriate.

4. *Rankin v. Clements Cadillac, Inc.* 905 So.2d 710 (Miss. Ct. App. 2004), rev'd 903 So. 2d 749 (Miss. 2005). This involved the interpretation of a settlement agreement in earlier litigation. I found that the settlement covered the claims involved in this subsequent litigation and also discussed another issue at some length. The Supreme Court found that I had "concentrated on the question of whether Rankin was bound by the settlement agreement, rather than the dispositive question of whether the settlement agreement reached the claims in Rankin's separate litigation against Clements." Maybe my concentration waned, but I addressed what the Supreme Court found to be controlling and reached a different conclusion than did the higher court.

5. *Sanderson v. State,* 881 So.2d 878 (Miss. Ct. App.), rev'd 883 So.2d 558 (Miss. 2004). This criminal case had a two-count indictment. I wrote to affirm on the conviction on the first count of aggravated assault but found that the second count on conspiracy to be fatally defective because it did not name any victim against whom the conspiracy was to operate. The Supreme Court disagreed with my interpretation of precedents and said that the two counts of the indictment did not need to be self-contained, and the victim's name from the first count could be implied as the victim of the conspiracy in the second count.

6. *Watson v. State,* 841 So.2d 218 (Miss.Ct. App. 2003); *Harris v. State*, 826 So.2d 765 (Miss. Ct. App. 2002); *Badger v. State*, 826 So.2d 777 (Miss. Ct. App. 2002). In these cases, I applied the Court of Appeals position that Miss. Rule of Appellate Procedure 4 limited the right of a trial judge to grant an out-of-time appeal to 180 days. After 180 days, a criminal defendant was limited to bringing post-conviction relief. The Supreme Court held in 2004 that despite the reference to 180 days in the rule, the trial judge had discretion that was not limited in time. I wrote on the remand of that decision and cited our precedents – including these three that I wrote – that should be considered overruled by the Supreme Court's holding. *DeLoach v. State*, 890 So.2d 934 (Miss. Ct. App. 2004).

7. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 852 So.2d 641 (Miss. Ct. App. 2003), rev'd 880 So. 2d 336 (Miss. 2004). This summary judgment appeal concerned notice that must be given an insurer regarding a claim. I found a factual issue regarding prejudice to the insurer, and also interpreted a Supreme Court precedent about the date for accrual of a cause of action against an insurer for underinsured motorist benefits. I found accrual was when plaintiffs knew or reasonably should have known that the damages suffered exceeded the limits of insurance available from alleged tortfeasor. The Supreme Court found no factual issues on prejudice and disagreed as to when the cause of action accrued.

8. *Morrison v. Mississippi Dept. of Human Services,* 852 So.2d 578 (Miss.Ct. App. 2002), rev'd 863 So. 2d 948 (Miss. 2004). This was a collateral attack on a six-year old contempt and child support modification order. I affirmed the trial court's judgment, but the Supreme Court found that proper notice of the hearing had not been given the father.

9. *Estate of Law v. Law,* 852 So.2d 33 (Miss.Ct. App. 2002), rev'd 869 So. 2d 1027 (Miss. 2004). For the Court, I wrote to reverse a finding that a deed was procured by fraud. I did not find the substantial evidence needed for such a ruling though the facts of the case were suspicious. The Supreme Court reversed, saying that there was sufficient evidence.

10. *Estate of Temple*, 1998-CA-01190 (Miss. Ct. App. Mar. 28, 2000), rev'd 780 So. 2d 639 (Miss. 2001). Issue was the ownership of a certificate of deposit after the death of the person who had obtained it. I found that a change in ownership during the lifetime of the initial owner, if made consistent with the bank's rules, could alter the ownership even if the certificate of deposit itself had not been reissued. The original certificate was lost, but a copy was provided. The Supreme Court found that the name on the face of the certificate controlled.

11. *Harrison v. State,* No. 1998-KA-01278 (Miss. Ct. App. Feb. 8, 2000), aff'd after rejecting my reasoning, 800 So. 2d 1184 (Miss. 2001). I had found that a new statute increasing the penalty for speeding in a work zone when workers were present did not abolish the right of the Department of Transportation to mandate slower speeds even when workers were not present; the Supreme Court disagreed but affirmed on alternative grounds.

12. *Grant v. Martin,* 744 So.2d 817 (Miss. Ct. App. 1999), rev'd 757 So.2d 264 (Miss. 2000). I wrote to reverse and render on an issue of custody of a minor child. The Supreme Court found that a remand would have been appropriate under the standard that I was applying; that was correct. In addition, though, the Supreme Court adopted a new standard that would apply to decisions in which a parent had previously relinquished custody of a minor child and was now trying to regain custody.

13. *Carter v. State*, No. 98-CP-00303 (Miss. Ct. App. Apr. 20, 1999), rev'd, 754 So. 2d 1207 (Miss. 2000). After our opinion, the Supreme Court reversed a precedent on which we relied regarding whether to consider the length of probation when determining the maximum sentence to be given a defendant after conviction.

14. *Bennett v. State*, 738 So.2d 300 (Miss. Ct. App. 1999). The Supreme Court cited this opinion in a list in which it overruled several opinions of their own as well as of the Court of Appeals, regarding the nature of the convictions that were usable as impeachment under Rule of Evidence 609. *White v. State*, 785 So.2d 1059 (Miss. 2001).

15. *Soileau v. Mississippi Coast Coliseum Com'n,* 730 So.2d 101 (Miss. Ct. App. 1998). At the time of this opinion, the Supreme Court's latest holdings were that there must be strict compliance with the statute that required notice prior to a tort suit against a governmental agency. Later, the Court changed the standard to one of substantial compliance and listed this opinion as one of those that was overruled. *Williams v. Clay County*, 861 So.2d 953 (Miss. 2003).

16. *McRee v. State*, 723 So.2d 1247 (Table) (Miss. Ct. App. May 5,1998), rev'd, *McRee v. State*, 732 So. 2d 246 (Miss. 1999). The Supreme Court found that there was insufficient circumstantial evidence to link the accused to the burglary.

17. *Ricks v. Mississippi State Department Health*, No. 95-CC-00908 (Miss. Ct. App. Nov. 18, 1997), rev'd 719 So. 2d 173 (Miss. 1998). The nurse licensing board barred from further employment a nurse who had negligently let a patient fall. I found that the statutory word "neglect" as a basis for barring employment could not be mere negligence but required a consciously indifferent act. On rehearing, the Department presented evidence that a relevant federal agency interpreted neglect to be simple negligence. I found that inconclusive on the issue

of what the Miss. legislature did when it adopted the statute prior to the federal events. In interpreting the state statute, the Supreme Court gave what it called "deference" to the federal agency view of "neglect" and reversed.

18. *Turnbough v. Ladner*, 1998 WL 881776 (Miss. Ct. App. Dec. 18, 1998), rev'd 754 So. 2d 467 (Miss. 1999). In this personal injury action, I found that a waiver signed by a deep sea diver prior to being taken on a dive was binding; the Supreme Court (5-4) found that it did not contain sufficiently clear and express language to be enforceable.

19. *Nicholson v. State*, 691 So.2d 1046 (Table) (Miss.Ct.App. Jan 28, 1997) (NO. 93-KA-01378-COA), rev'd, 704 So. 2d 81 (Miss. 1997). I found that accused, when he denied ever abusing a child, had opened door to cross-examination about sexual acts with child other than victim of the indicted crime. Supreme Court reversed.

20. *Hickson v. State*, 691 So.2d 1035 (Table), Miss.App., Aug 20, 1996 (NO. 92-KA-00976-COA), rev'd *Hickson v. State*, 707 So.2d 536 (Miss. 1997). I found that pre-trial publicity had not been so severe as to require a change of venue; the Supreme Court disagreed and reversed for a new trial.

21. *Jones v. Estate of Richardson*, 691 So.2d 1034 (Table), Miss.App., Aug 06, 1996 (NO. 94-CA-00163-COA); rev'd, *Matter of Estate of Richardson*, 695 So.2d 587 (Miss. 1997). I had found that the language of the statute for determining heirship denied standing to an executor when none of the deceased's property passed by intestacy; instead, an heir would need to bring the action. The Supreme Court disagreed.

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings.

   The list and citations to these opinions are in the list in response to question 15.c. above; copies are also provided on a disk.

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

   From 1995 until mid-1997, none of the Court of Appeals opinions were published. From the latter date until November 1998, very few opinions were published. The unpublished opinions are kept by the court. I have provided a digital copy of all my unpublished opinions. For completeness, and since I maintained them in annual electronic files that I printed out and bound in book form for my clerks as a memento of their service and for myself, I have provided a digital copy of all my opinions from 1995-2004 and for 2006.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

The Mississippi Court of Appeals decides all cases *en banc*. The initial consideration of a case is by a three-judge panel, but the remaining seven judges on the court eventually receive the panel opinion(s) and vote on them, as well as write separately if desired. The court decided about 600 cases per year during my service from 1995-2006 (with a leave of absence from August 2004 until January 2006). If the desire is to have a citation to all of the court's opinions on which I voted but did not write, that is a cite to perhaps 7,000 cases resolved by the court during my service, except for those in which I did not participate. I identified about 80 cases in which I did not participate. The published opinions of course can be accessed on the standard internet search services. The unpublished opinions on which I voted but did not write are kept at the court. I have provided digital copies of all unpublished opinions which I wrote.

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    In an appendix to this response, I have included a list of all formal recusals and also all cases in which I did not participate. There are about 80 cases total. Of those, I had a record or could reconstruct only three in which there was a motion for recusal. One of those was after I left the court, another I denied, and the third was granted. The decision not to participate in the remainder of the cases was on my own initiative.

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    Each relevant case in the appendix indicates the reasons for the decision.

    c. the procedure you followed in determining whether or not to recuse yourself;

    Shortly after a case was assigned by the state supreme court to the court of appeals, it would be included on a list circulated to all judges of the latest assignments, including the parties and the lawyers. I would examine those for possible conflicts. General familiarity with a lawyer or even friendship was not sufficient, though a recent and significant association in some organization or otherwise would cause recusal. I recused when a close friend or neighbor was a party, or in one case, when a zoning issue regarding property near my home was raised.

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

In the appendix listing, there is an explanation of my decision for each of the cases in which I decided not to participate or in which I ruled on an actual recusal motion.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Appointed by governor to Mississippi Constitution Study Commission, 1985-86.
Defeated for Mississippi Supreme Court 1996
Defeated in Mississippi primary as delegate from Fourth Congressional District to 1980 Republican National Convention on George Bush slate

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

1970: Volunteer, George Bush for U.S. Senate, 1970.
1977: Volunteer, Doug Shanks for Jackson (Miss.) Mayor
1978: Volunteer, Thad Cochran for U.S. Senate; John Hampton Stennis for Congress
1979: Volunteer, Gil Carmichael for Governor, Charles Pickering for Attorney General
1980 Mississippi Campaign Manager, George Bush presidential campaign.
1982: Member, state steering committee, Haley Barbour for U.S. Senate
1983: Volunteer, Leon Bramlett for Governor campaign
1984: State campaign committee member, Reagan-Bush
1984-88 Member and officer, Capital Area Republican Club
1987: Hinds County chairman and state steering committee member, Jack Reed for Governor
1988: Chairman, Mississippi Steering Committee, Bush Presidential Campaign.
1988-89: Mississippi Republican Executive Committee; Hinds County Republican Executive Committee

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

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

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

I served as a Briefing Attorney (law clerk) for Presiding Judge John F. Onion, Jr., 1975-76, Texas Court of Criminal Appeals, in Austin.

I also served as a Law clerk for Judge Charles Clark, U.S. Court of Appeals, Fifth Circuit, 1976-77, in Jackson, Miss.

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

I have never practiced alone.

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

Associate 1977-83, partner 1983-89, at Brunini, Grantham, Grower, & Hewes, in Jackson, Miss. P.O. Box 119, Jackson, MS 39205

Deputy Assistant Attorney General, Civil Division, U. S. Department of Justice, 1989-1993; 950 Pennsylvania Avenue, N.W., Washington, D.C.; supervised Federal Programs Branch and Office of Consumer Litigation.

Judge, Mississippi Court of Appeals, 1995-Present; 656 North State Street, Jackson, MS.

b. Describe:

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

1977-1989, primarily worked for oil and gas clients. Performed title work for explorations, defended some suits against these clients, negotiated oil and gas leases with public bodies, and prepared contracts. Also worked for school districts on general contract issues, such as disputes with builders. Handled two divorces, helped form a few corporations, and did a small amount of lobbying on school issues.

1989-93. Work at Department of Justice was in Civil Division. Supervised Federal Programs Branch (125 lawyers; defended suits brought

against the U.S. and its agencies) and Office of Consumer Litigation (25 lawyers; civil and criminal enforcement of federal consumer laws).

ii. your typical clients and the areas, if any, in which you have specialized.

Oil and gas companies were almost all multi-state corporations such as Shell Oil, Conoco, and Inexco. I worked for such companies as United Gas Pipeline and Transco Pipeline on their natural gas contract issues. Jackson School District was my principal client for school work.

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

I appeared occasionally in court. Motion practice both in private law firm and at the Department of Justice. At the firm, I handled three appeals to the state supreme court and one to the Fifth Circuit. A small number, but won them all. Throughout 1977-1989, I was involved in some litigation at the firm though it was about twenty percent of my work. At the Justice Department, the vast majority of my work was involved with litigation, with occasional court appearances.

i. Indicate the percentage of your practice in:
   1. federal courts: 50%
   2. state courts of record: 50%;
   3. other courts: none.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 70%;
   2. criminal proceedings: 30%.

d. 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.

From 1977-1989, I estimate that I was involved in six cases that were tried to judgment. I was chief counsel in two, sole counsel in one, and associate in three.

i. What percentage of these trials were:
   1. jury: zero percent;
   2. non-jury: one hundred percent.

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

No practice before Supreme Court.

19. **Litigation**: Describe the ten (10) 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. *Queen Esther Wooten v. Consolidated Coal Co.*, Cause # 7533, Chancery Court, Kemper County, Miss., decree May 9, 1979. Lessor sued through next friend to cancel lease saying that she was incompetent to execute it. Bench trial resulted in judgment for plaintiff. I was lead counsel, presented evidence and argument, with a senior partner in attendance. No appeal taken.
Trial judge: John Clark Love, Kemper County Chancery Court (662-289-3862).
Opposing counsel: Laurel Weir and James R. Allen, Philadelphia, Miss., both deceased.
Co-Counsel: Newt Harrison, Brunini Grantham Grower & Hewes (now retired), 601-948-3101.

2. *Damson Oil Corp. v. Southeastern Oil Co.,* 370 So.2d 225 (Miss. 1979) (associate counsel). My client was Damson Oil. The parties had competing claims before the state Oil and Gas Board for drilling permits. Our client's permit was sustained on appeal.
Trial court: Wayne County Circuit Judge Lester Williamson, now deceased; trial in 1977.
Opposing counsel, Luther Thompson, Armstrong Allen firm, 2525 Lakewood Drive, Suite 200, Jackson, MS 39216. 601-713-1192
Co-Counsel: John Grower, Brunini Grantham Grower & Hewes (retired), 601-948-3101

3. *Berry v. United Gas Pipe Line Co.,* 370 So.2d 235 (Miss. 1979) (associate counsel; made Supreme Court argument). My client was UGPL. The company had laid a pipeline without getting a valid easement. In the condemnation action, the landowner argued that the pipeline was now his property since we had trespassed, and we must buy it from him as well as pay for the easement. We prevailed on the trespass issue and only had to pay the fair market value of the easement.
Trial court: Jefferson Davis County Circuit Judge R. I. Prichard, tried in 1977-78.
Opposing counsel, Michael Eubanks, now a state Circuit Judge, P.O. Box 488, Purvis, MS 39475. 601-794-6035
Co-Counsel: Newt Harrison, Brunini Grantham Grower & Hewes, 601-948-3101

4. *Continental Oil Co. v. Blair,* 397 So.2d 538 (Miss. 1981) (associate counsel). The suit concerned whether our client, Continental, when developing an oil field had to protect small tract royalty owners or only protect the entire lease from drainage of oil. Our client prevailed on the need simply to protect the original leasehold.
Trial Court: Wayne County Chancery Judge Howard Pigford, now deceased.
Opposing Counsel, Walker Watters, now at Brunini Grantham Grower & Hewes, P.O. Box 119, Jackson, MS 39205, 601-948-3101.
Co-counsel: John Grower, Brunini Grantham Grower & Hewes (now retired).

5. *Phyfer v. San Gabriel Development Corp.,*884 F.2d 235 (5th Cir. 1989). (sole counsel). I represented Jim Ling, owner of San Gabriel. Our oil and gas lessor filed suit claiming that the lease had terminated due to a breach. Both the district and the circuit court held that the lessor waived his claim of forfeiture
Trial judge: William Barbour, U.S.District Court, S. D. Miss. Now on senior status.
Fifth Circuit panel: Writing Judge Rubin, panel of Wisdom and King
Original opposing counsel, Mike Earwood, Earwood & Childers, 403 Towne Center Blvd, Suite D-2, Ridgeland, MS 39157. 601-898-8080
Later opposing counsel (conducted Fifth Circuit argument, though Earwood's name appears on report of case): Glen W. Hall, 745 Carlisle Street, Jackson, MS 39202, 601-948-7300
Co-counsel: John Grower, Brunini Grantham Grower & Hewes (now retired), 601-948-3101.

My time at DOJ involved some work on briefs and some arguments at motion hearings. I was not the primary attorney for any entire case, but only worked on some part that seemed to benefit from the involvement of a policy-level person. Cases in which I presented the argument included these:

6. *Doe v. Sullivan,* 756 F. Supp. 12 (D.D.C.), affirmed 938 F.2d 1370 (D.C. Cir. 1991). The plaintiff sought an injunction to prevent DOD from requiring troops to be administered certain drugs as they were deploying to the Persian Gulf as part of Desert Shield/Desert Storm. I presented the argument at the District Court, but did not participate in the appeal. Circuit Judge Clarence Thomas dissented on appeal, finding the issues moot.
Trial judge: Stanley S. Harris, U.S. District Court, D.D.C.
Opposing counsel. Alan B. Morrison, Michael Tankersley, Public Citizen Litigation Group, Washington, D.C.
Co-counsel: David Anderson, Mona Alderson, Patricia Russotto, all with Federal Programs Branch, Civil Division, U.S. Department of Justice

7. *United States v. Poindexter,* 951 F.2d 369 (D.C. Cir 1991) (reversal of conviction). I was the lead DOJ counsel at February 16-17, 1990 deposition of former President Reagan in Los Angeles courtroom, who gave a videotaped deposition in the independent counsel prosecution of President Reagan's former National Security Adviser, Admiral (ret.) John Poindexter. The deposition was presided over by District Judge Harold Greene, U.S. District Court, D.D.C.

Other counsel: Theodore B. Olson, counsel for President Reagan. Gibson Dunn & Crutcher,1050 Connecticut Avenue N.W. Washington, D.C. 20036 T: (202) 955-8668 Associate Independent Counsel Dan K. Webb, Winston & Strawn LLP. 35 West Wacker Drive. Chicago, Illinois 60601.312-558-5600.
Co-Counsel: David Anderson, U.S. Department of Justice.

8. *Long Island Savings Bank, FSB v. Federal Savings & Loan Ins. Corp.*, No. CV-89-2699 (E.D. NY 1989). I presented the case in December 1989 on Government's motion to dismiss and for summary judgment under the new Financial Institution Reform and Recovery Enforcement Act. The U.S. argued that Long Island was undercapitalized because of the proper elimination of supervisory good will as a permissible asset. This was one of the first cases under FIRREA and could have been the vehicle for determining the constitutionality of the tightening of accounting regulations on S&L's against attacks that it constituted a takings and breached the contract between the S&L and the FSLIC. The trial judge never entered a decision. Later the Savings Bank brought suit in the Court of Federal Claims regarding damages arising from the change in accounting rules. *Long Island Savings Bank v. United States*, 60 Fed. Cl. 80 (2004).
Trial judge: Raymond Dearie, U.S. District Court, E.D. N.Y..
Opposing counsel, Lloyd Cutler, Washington, D.C., now deceased. Cutler's co-counsel: Michael Chepiga, Simpson Thacher & Bartlett, 425 Lexington Avenue, NY, NY10017-3954 (202)-455-2598
Co-Counsel: Brook Hedge (now a D.C. Superior Court judge); Ted Hirt (still with Civil Division), Robin Ball, Jerome Epstein, and Paul Herrup.

9. *American Federation of Government Employees v. Cheney* CA No. CV-92-PT-2453-E (N.D. Ala. Dec. 21, 1992). This was a challenge to the Defense Department's decision to realign the activities at Anniston Army Depot and to move tactical missile maintenance to Letterkenny Army Depot, Pennsylvania. I presented the government's case at an evidentiary hearing and prevailed.
Trial judge: Robert Propst, U.S. District Judge, N.D.Ala.
Opposing Counsel: Tom Stewart, Gorham & Waldrep, Suite 700, 2101 6th Avenue North, Birmingham, Alabama 35203. Tel: 205-254-3216
Co-counsel: Federal Programs Branch: David Anderson (retired), Jennifer Rivera.

10. *Mackie v. Bush*, 809 F. Supp. 144 (D.D.C.), order vacated as moot 10 F.3d 13 (D.C. Cir 1993). This suit was brought by a majority of the Board of Governors of U.S. Postal Service to enjoin the President from removing some of them from office due to a dispute regarding a postal rate increase. The T.R.O. hearing was scheduled for the day after the suit was filed. I prepared the brief overnight and presented the government's position on the T.R.O. Additional proceedings occurred after I left DOJ.
Trial judge: U.S. District Judge Oberdorfer, D. D.C., (202) 354-3270
Opposing counsel: Kenneth S. Geller, Mayer, Brown & Platt, 1909 K Street, N.W., Washington, DC 20006-1101 Tel: 202-263-3225
Co-counsel: Douglas Letter, Civil Division, U.S. Department of Justice

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

My duties at DOJ involved supervision of the Federal Programs and Consumer Litigation branches of the Civil Division. Policy-level decisions on suits in those branches were largely my responsibility, though higher-level officials would be involved in the most significant cases. Litigation regarding the 1990 census, many suits involving financial institution fraud, litigation arising from the President's use of troops in the Persian Gulf, and settlement of a class action involving Social Security disability payments for children, and an environmental group's attempt to enjoin a shuttle launch, were among the most important and contentious.

While in private practice, I recall quite infrequently appearing before the state legislature to encourage passage of legislation. I believe most involved issues for the Jackson Municipal Separate School District. The only specific legislation I recall concerned an amendment to the state constitution to make it clear that a school oil and gas lease could be treated as leases on private lands insofar as the lease term could continue until production ceased. Such an amendment ultimately was adopted, several years after my efforts. Miss. Const. Art. 8, Sec. 211 (amended 1992).

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

All the following courses were taught at Mississippi College School of Law

1. Real Estate Finance & Development, Spring 1985, summer 1986, spring 1989. The course concerned financing and security issues, as well as development variations such as condominiums, planned unit developments, etc. I no longer have a syllabus.

2. Oil & Gas Law, summer 1985. This was the introductory course. I do not have a syllabus.

[I left Jackson, Miss. to join the Civil Division, U.S. Department of Justice, in August 1989. I did not again apply to be an adjunct professor until 1997.]

3. Legislation, spring 1998, fall 1999, fall 2000. The course concerned the creation and interpretation of statutes. One semester I prepared handouts for each class instead of using a text. The disk that I have supplied contains those materials: "MCSOLlegis Handouts"

4. Consumer Law, spring 1999, spring 2000. This course primarily concerned federal consumer statutes, such as the Fair Debt Collection Practices Act.

5. Administrative Law, spring 2001, fall 2001, fall 2003. This was the introductory course.

6. Judicial Administration, Mississippi College School of Law. Fall 2002. Using this heading, I taught a course on important judges. I used a text entitled *American Judicial Tradition* written by Professor Edward White of the University of Virginia, and also discussed some Mississippi judges. The handouts are on the disk, "JudAdmin Handouts"

7. Evidence Law, Mississippi College School of Law, Fall 2006. This was the introductory course to the subject, structured around the Federal Rules of Evidence.

8. Professional Responsibility & Ethics, Mississippi College School of Law, Spring 2007. This is the introductory ethics course.

9. Trial Practice, Mississippi College School of Law, Spring 2007. This is a seminar-size practical skills course, with students required throughout the semester to conduct parts of a trial, then at semester's end to put on an entire trial. I have a co-teacher, Robert Gibbs, a former state trial judge who is now a litigation partner at one of Jackson's largest law firms.

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

None.

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

If confirmed, I would like occasionally to continue my teaching at Mississippi College School of Law. My service in the National Guard will continue for a short time. I will follow all guidelines in the Code of Conduct for United States Judges and obtain necessary approvals prior to engaging in any outside employment.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, 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.

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

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, 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. Explain how you would address any such conflict if it were to arise.

    Because of my lengthy service on the state appellate court, followed in the spring 2007 by teaching at a law school I do not anticipate any of these potential conflicts.

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

    My stock portfolio is almost entirely through a 401(k). I do not have significant other investments other than in real property. There is one rather valuable stock ownership that I inherited from my mother, being two shares of Berkshire Hathaway - A. I also have some valuable stock in a bank. My family recently sold two parcels of land and I have substantial cash resulting from the sales. Investments decision need to be made regarding those funds. I cannot identify likely conflicts arising from the as-yet undefined investments. I plan to follow the Code of Conduct for United States Judges, applicable statutes and guidance from the Committee on Codes of Conduct on maintaining vigilance regarding investments and the court's docket.

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

In private practice, I served for one year on a pro bono project in Jackson, spending time periodically at the pro bono center fielding phone calls for legal information.

I have served on civic boards earlier mentioned. For about five years I served on the Hinds County Mental Health Association board, with a year as president. This non-profit association, funded through grants and donations, had a full-time director as its only paid employee. We provided a half-way house for some of those who had left the state

hospital outside of Jackson and were being re-integrated into the community. This took considerable effort in acquiring funding from a community development block grant. We worked with the legislature during my tenure on getting amendments to the state Vulnerable Adult Act. We provided information in various ways to the general public on mental health, including sponsoring preparation of a gallery of photographs called "Images of Madness." That was first put on display at sites around the state and now is on long-term exhibit at the state mental hospital.

I was a board member and then president of the Jackson Servant Leadership Corps. That provided a home for about five recent college graduates who worked for a year with local non-profit organizations, such as a food bank, or Habitat for Humanity, or a halfway house. We provided leadership training and religious support as well as the housing. Many of our members received a stipend from AmeriCorps. The idea was to create a cadre of experienced, committed, and young leaders in the community, many of whom would not remain full-time in charitable work but would apply their skills and interests in whatever career they pursued. We also conducted a work project every Martin Luther King Day, in which we synchronized more than a hundred volunteers with different charitable organizations and churches to provide a day of service. There was a ceremony to start the day, then one to close it out at night.

Annually since 1993 I have been a volunteer for Habitat for Humanity, though not in 2005-6. One year I spent a week working on a house that our church was sponsoring. Others years I have given a day and sometimes two days to the construction.

28. **Selection Process**:

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

    I am not aware of any selection commission or committee. I had been recommended by Mississippi's two U.S. Senators for a vacancy on the U.S. District Court in early 2004, and then at the end of that year for a vacancy for the Court of Appeals for the Fifth Circuit. I went to the White House Counsel's office in January and then in December 2004 to interview with associate counsels and, at the later time, also with the outgoing and incoming White House Counsel. Another person was chosen for each of those positions. While home on leave from Iraq in May 2005, I made contact with Senator Cochran and asked to be considered for a new vacancy on the U.S. District Court. The incumbent judge had announced that month that he would retire. No further interview was

conducted. I underwent a background investigation after my return to the U.S. My nomination was submitted to the Senate on June 6, 2006. My nomination was returned to the President on December 9, 2006 when the 109th Congress adjourned.

My nomination to be a United States District Court Judge was not resubmitted. On January 9, 2007, I was nominated to be a judge on the United States Court of Appeals for the Fifth Circuit.

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

No one has asked any such questions or made such statements.

AO-10 Rev. 1/2004	FINANCIAL DISCLOSURE REPORT Calendar Year 2006	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
Southwick, Leslie H	Fifth Circuit Court of Appeals	01/12/2007
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 01/09/2007 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 01/01/2006 to 12/31/2006
7. Chambers or Office Address Mississippi College Law School 151 E. Griffith Street Jackson, MS 39201	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.

☐ NONE

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Judge	Mississippi Court of Appeals
2.	Adjunct Professor	Mississippi College School of Law
3.	Commissioned Officer	United States Army
4.	Commissioned Officer	Mississippi National Guard
5.	Visiting Professor	Mississippi College School of Law

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
	Southwick, Leslie H	01/12/2007

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2005	United States Army - salary	$73, 400
2.	2006	Mississippi National Guard – drill pay	$4,000
3.	2006	Mississippi Court of Appeals - salary	$101, 500
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.	2006	W.S. Quinn CLU - salary
2.		

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

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Southwick, Leslie H	01/12/2007

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 22-34 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
Southwick, Leslie H	01/12/2007

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. Berkshire-Hathaway - A common		None	M	T	exempt				
2. First National Bank Group, Inc. common	C	Dividend	M	T					
3. Parcel # 1, Mineral Interest, 2001 appraisal		None	J	Q					
4. Parcel # 2, Mineral interest, 2001 appraisal		None	J	Q					
5. Parcel # 3, Hidalgo County, Tex., 2001 appraisal		None	M	Q					
6. Citizens National Bank account and CD	C	Interest	N	T					
7. State Bank & Trust account and CD's	B	Interest	M	T					
8. MetLife Bank Account	D	Interest	M	T					
9. Jackson National Beneficiary Account	A	Interest	J	T					
10. Prudential Financial Variable Life: Conservative Balanced		None	J	T					
11. Prudential Financial Variable Life: Flexible Managed		None	J	T					
12. Prudential Financial Variable Life: Equity		None	K	T					
13. Prudential Financial Variable Life: Diversified Bond		None	J	T					
14. Prudential Financial Variable Life: Jennison		None	J	T					
15. Prudential Financial Variable Life: Small Cap Stocl		None	J	T					
16. Trustmark National Bank account and CD	A	Interest	M	T					
17. Bancorp South CD	B	Interest	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	Name of Person Reporting	Date of Report
	Southwick, Leslie H	01/12/2007

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Southwick, Leslie H	01/12/2007

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 Leslie H Southwick Date 14 Jan 07

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	1	010	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		747	179	Notes payable to relatives			
Unlisted securities--add schedule		229	140	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		3	000
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		555	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		105	000				
Cash value-life insurance		49	356				
Other assets itemize:							
				Total liabilities		3	000
				Net Worth	2	692	675
Total Assets	2	695	675	Total liabilities and net worth	2	695	675
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	
Principal Investors Fund Portfolio	$ 521,115
Berkshire Hathaway Class A Common	217,000
Prudential Financial	9,064
Total Listed Securities	$ 747,179
Unlisted Securities	
First National Bank	$229,140
Real Estate Owned	
Personal residence	$ 375,000
¼ interest, Texas farmland	180,000
Total Real Estate Owned	555,000

AFFIDAVIT

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

26 Jan 2007
(DATE)

Leslie H Southwick
(NAME)

Bobbie R. Cole
(NOTARY)

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: Oct 23, 2010
BONDED THRU NOTARY PUBLIC UNDERWRITERS

Judge SOUTHWICK. I will ask for clarification. You are chairing today. Should I refer to you in that way?

Senator WHITEHOUSE. You know, this is my first go at it, so I'm not entirely sure. But let's give it a try.

Judge SOUTHWICK. I certainly shall.

Senator WHITEHOUSE. Very good. Well, you come to us with some impressive qualifications: as the Deputy Assistant Attorney General of the United States, as a member of the Mississippi Court of Appeals, and as an individual who has been unanimously ranked as "Well Qualified" by the American Bar Association. So, I congratulate you on the career that has brought you to this point.

If I may proceed with a few questions. In this building we spend quite a lot of time thinking about the political dynamics of the country. As I indicated in my opening statement, I'm a deep believer in the phrase that James Bryce used in his wonderful book about our country, The American Commonwealth, in which he pointed out that the particularly passionate fights of the day are, in many cases, transferred to what he described as the "cool, dry atmosphere of judicial determination." It is a vital part of our country's political structure that determinations, particularly where passions run high, continue to be made in that cool, dry atmosphere.

We are, of course, involved in many, many discussions about how the separation of powers principle plays itself out, concerns about the unitary executive and the effects, if any, of signing statements on laws.

I would like to hear your views on the role of separation of powers in our country's political structure, the importance of it, the judiciary's role in it, and how you would make decisions as a judge on the Circuit Court of Appeals.

Judge SOUTHWICK. Certainly. Mr. Chairman, I am interested in separation of powers in the need of judges to stay within their "lane"—maybe that is a military term—within their role. The three branches of government—I am not telling anything new here—each are assigned a State level. I was assigned, and if fortunate enough to be on the Fifth Circuit, would be assigned, a limited role.

I am concerned about staying within the boundaries assigned to me on the State Court of Appeals. I was conscious of that, dealt with issues dealing with the proper role of the legislature—Congress, here, certainly—what is their obligation, what is their area of responsibility, to what extent do their statutes control what we are doing, to what extent is the independent judicial function involved?

So, I believe separation of powers if vital. It's part of how this country is structured, how this country's government has been organized. That premise applies at the State level, and I've tried to apply it, and certainly will be conscious of it if fortunate enough to serve on the Fifth Circuit.

Senator WHITEHOUSE. There has been some controversy about a decision that you did not author, but signed onto, both in the main opinion and the concurring opinion, *S.B.* v. *L.W.* that involved a woman who was gay and who was seeking custody of her daughter. Because that has been a matter of some controversy, I looked at the decision myself.

The thing that struck me about it, was that it used a particular phrase. It used the phrase: "homosexual lifestyle". For those engaged in political debate, my experience is that that particular phrase—it's not exactly at the level of fighting words, but it's a defining term in the political combat of the debate over the rights of gay people in America. It is a term that is highly associated with a particular point of view that is not particularly favorable to gay rights.

It would be, in my estimation, a little bit like, if for some reason the question of the Iraq conflict came up and a judge were deciding a matter related to it and used the phrase "cut-and-run", which has become a charged political piece of terminology.

Again, I know you did not write those opinions, but in the context of a country in which everybody is entitled to equal justice before the law, how do you feel about the use of a term like that that is charged on one side of the debate?

A gay person coming before a judge who uses that term on a regular basis to describe their sexual orientation would, I think, reasonably conclude that the judge had pretty strong opinions on that subject that were adverse to that individual, and it seems like it is unnecessary terminology to use, not really judicial terminology.

I am interested, going forward. Again, you did not write that opinion, but I would ask you to react to those thoughts because I think it is important that we all understand that you are a person who will give everybody a completely fair shake and see things right down the middle, particularly in this country of ours where we encourage people of all different persuasions to be active in our political and civic life.

Judge SOUTHWICK. Thank you, Senator. That is an important question and I appreciate your pointing out several times, I was not the author. Obviously, I did join the opinion.

As you discussed, that opinion dealt with child custody. The trial court had decided that the father, as opposed to the mother, was entitled to custody. Among the factors that are required to be considered under Mississippi controlling precedent is the moral—morality—moral issues that may arise as to both parents.

And at that time, 2001, I believe is the date of the opinion, *Bowers* v. *Hardwick* was still the law of the land. I think it was cited, at least in the concurrence, perhaps in the majority opinion. *Lawrence* v. *Texas*, 4 years ago, perhaps.

Both the concurring opinion and the majority discussed case law and the concurring opinion statutes that state the policy—public policy in Mississippi at that time regarding homosexuality. That was relevant to the decisionmaking on whether the trial judge had abused his discretion in deciding which parent ought to get custody of that child.

You have asked more generally, sir, about the need to treat all people that come before the court with respect. I'm paraphrasing, but I take that to be what you've asked.

Senator WHITEHOUSE. A fair paraphrase.

Judge SOUTHWICK. Thank you. And I feel that's vital. Senator Lott was kind enough to mention an award that I received 3 years ago from the State Bar as the person who received the "Judicial Excellence" award that year.

One of the reasons that was said, of course, I was a judge, and things are said about judges by lawyers that maybe have to be taken with a grain of salt but I hope they meant this, that among the reasons I was commended that year was for the sense that I was fair to all who came before me, in oral arguments, in the writing of my opinions.

And that's what I tell my clerks, that's what I tell my staff. Whatever we do with a case, however we write it, we treat each person, a criminal defendant, maybe one of the least appealing—not trying—it depends on the defendant—but the least disfavored that comes before us. Treat those people with respect, all the participants in the case.

So I would not have used that phrase. I did join it. I thought her opinion—Judge Payne—both the concurring opinion—it was useful that she added the legislature's view on the issue. The majority had just talked about what courts had said about the issue. But in 2001, before *Lawrence* v. *Texas*, that was the law of Mississippi. Where it is today would have to be decided today.

Senator WHITEHOUSE. Senator Hatch?

Senator HATCH. Well, thank you.

Judge, is your microphone on?

Judge SOUTHWICK. Well, if you tell me it's not, I bet you're right.

Senator HATCH. No, I think it is.

Judge SOUTHWICK. Maybe I'm not speaking loudly enough.

Senator HATCH. I think it is. I just wanted to double check.

Well, first, let me thank you for your service to our country and to your community. You took a military leave of absence from your service on the Mississippi Court of Appeals to serve in Iraq as a Judge Advocate for the 155th Brigade combat team of the Mississippi National Guard, and you volunteered for Habitat for Humanity, a fine organization, doing the Lord's work for nearly 15 years, and I want to thank you for that service as well.

Now, Judge, it's my understanding, in nearly a dozen years on the Mississippi Court of Appeals, that you participated in more than 7,000 cases. Is that correct?

Judge SOUTHWICK. That is an estimate I made, sir. I did not go back to the court to see exactly.

Senator HATCH. Approximately.

Judge SOUTHWICK. But approximately.

Senator HATCH. And you authored upwards of approximately 1,000 opinions.

Judge SOUTHWICK. Total, including my separate opinions. Probably for the court, an average of 80 a year, 800. I was off the court for a year and a half, so—I can't do the math too well in my head, but using 10 years, about 800, 850 opinions for the court.

Senator HATCH. Well, the American Bar Association, which does the most exhaustive examination of judicial nominees, their record and their temperament, looked at everything and unanimously concluded that you deserved the highest rating of "Well Qualified", and it was unanimous.

The ABA says that this conclusion means that you have qualities such as, and I'm quoting here from their published criteria, "compassion, open-mindedness, freedom from bias, and commitment to equal justice under law."

Now, no one has ever, to my knowledge, accused the ABA of having a conservative bias. So when the most exhaustive evaluation of your record shows that you are open-minded, free from bias, and committed to equal justice, I am baffled by some of the more far-left groups who look at just a few cases and consider only the result of those few cases, and then pronounce that you are controversial and your record is troubling, or that you favor certain interests over others.

Now, that conclusion, in my opinion, has no credibility because the approach leading to that conclusion is illegitimate. You've had a dozen years of experience as a member of the Court of Appeals, as an appeals court judge.

Did you decide cases based on the identity of the parties or the political interests at stake, or did you apply the law to the facts, no matter which side would come out the winner?

Judge SOUTHWICK. Senator, I did my best to treat each case impartially without regard for the characteristics that you stated.

Senator HATCH. Now, Senator Whitehouse brought up the particular case of *S.B.* v. *L.W.*, which was a domestic relations case, as I recall.

Judge SOUTHWICK. Child custody, domestic relations.

Senator HATCH. OK. Now, your court decided that the trial judge was not manifestly wrong to award custody based on the factors outlined by the Mississippi Supreme Court, including a sexual relationship outside of marriage.

Now, you joined a concurrence which further discussed the public policy in the area, as reflected in State legislation at the time. And certain political groups might not like the result in the case, but they suggest that judges should disregard the law and decide cases so that certain parties or certain political interests prevail or win. Now, as I understand it, this issue of homosexuality was only one of the issues in deciding this case.

Judge SOUTHWICK. Yes, Senator. I believe there were 5 factors, as I recall, in the trial judge's opinion, 5 out of the 10 that ought to be applied, that the trial judge determined/weighed in favor of the father getting custody. The moral issue was one of them, which was the rule in Mississippi at that time, and remains, that the morality of each party should be considered.

Senator HATCH. To which you were bound.

Judge SOUTHWICK. Say again, sir?

Senator HATCH. To which you were bound.

Judge SOUTHWICK. I was bound. I was bound. And I think to some extent what Senator Whitehouse was saying on separation of powers, the legislature had spoken to this as well and that was the policy they had announced, on adoption, on marriage, and the criminal statute, as was mentioned.

Senator HATCH. Do you have any prejudice against gay people?

Judge SOUTHWICK. I do not, sir.

Senator HATCH. Some of your critics looked at just two of your decisions and decided that you, in their words, "may lack the commitment to social justice progress to which Americans are entitled from those seeking a lifetime appointment to the Federal bench."

Is that how you see your role as an Appeals Court judge? Are you there to bring about social justice, or social justice progress, or are you there to decide cases based on the law?

Judge SOUTHWICK. I am there to provide justice, as measured by a reasonable interpretation and depth, hardworking gathering of the facts on the record, applying it fairly to the law that applies in that particular area.

That, I think, is the definition of justice for an appellate judge, is to understand the facts, work hard to understand the law—understanding both, work hard at that, and come up with your conclusion that results from that. That's—the symbolism is sort of mixed about "Blind Justice" holding the scales with a blindfold on.

But I think, for this purpose, that is correct, that who is before you, the outcome does not drive the analysis, the analysis of the facts and the law leads to an outcome.

Senator HATCH. OK.

Now, let me ask you about another case, *Richmond* v. *Mississippi Department of Human Services*. This is one of the two cases that have been used by some of the groups to say that all of your experience, all of your high rating by the ABA and high acclaim from almost everybody who knows you is irrelevant.

In this case, a social worker was fired for using a racial slur at a work-related conference. Now, you joined the majority of the State Appeals Court, which upheld the State Employee Appeals Court decision that she was wrongfully terminated.

Now, I have two questions about this case. Let me ask the first one. First, what was the role of your court, the Court of Appeals, in this case? In other words, what standard of review did you have to apply?

Judge SOUTHWICK. OK. To explain that role I think I need to explain the role of the agency you just mentioned. The Department of Human Services, I believe, was her employer, determined that she needed to be terminated.

Senator HATCH. Let me ask that part of the question, too, and that will be my second point.

Judge SOUTHWICK. Oh.

Senator HATCH. Even though the Mississippi Supreme Court reversed for another reason, didn't the court agree with you that this employee was wrongfully terminated?

Judge SOUTHWICK. Correct. Both courts, applying the standard of review of an administrative agency, which is to look for substantial evidence to support the decision reached by that agency to see if they were arbitrary and capricious, there are also constitutional and statutory violation review standards that did not apply here.

The Employee Appeals Board looked at this issue and they are to determine—to make consistent the employment decisions made throughout Mississippi government agencies. And they looked at what was determined at this particular employing agency and decided there was not enough to terminate the employee for that.

There were factors that they looked at, evidence that they relied on regarding the effect of that slur, the mind-set, whatever. But the Employee Appeals Board had that role. Our role on the Appellate Court was to decide, was that within—was there evidence to

support that—was it arbitrary and capricious? The court I was on, the majority said we could sustain that decision.

The Supreme Court said, yes, the decision not to terminate—overturning the decision to terminate could be sustained, but we remanded it to the agency for further review to see if an intermediate punishment of some sort would be appropriate.

They did not think they applied the standards that the Employee Appeals Board—statutory standards—were supposed to apply quite correctly and wanted further findings before they would sustain not giving any punishment at all, is my understanding now of what the Supreme Court did.

Senator HATCH. OK.

Now, some far-left groups have criticized you in the case that we just discussed because the State Supreme Court reversed it, and then they turn around and they attack you for another case, *Dubard* v. *Biloxi*, in which the State Supreme Court agreed with you. Once again, I think an illegitimate approach leads to the wrong conclusion.

In the *Dubard* case, you dissented from your court's decision to allow an employment suit to go forward, even though the employment relationship is what we call "at will". What was the basis for your dissent, and is it true that the Mississippi Supreme Court unanimously reversed and vindicated your legal conclusion?

Judge SOUTHWICK. So I don't forget, I will answer that last part. Yes, they did unanimously reverse. Employment at will has been the doctrine in Mississippi for non-contract, non-union, no other governing principle employment in Mississippi for over 100 years.

Under employment at will, there is a right to leave a job at any time, which is less significant for the employee, and a right for an employer to fire at any time. It is said to be a balance; whether it is or not, that is the policy behind it, as I understand it.

This individual was terminated after being given a job offer. The job offer was withdrawn before the person started. The court was relatively new at the time. 1999, I believe, is the date of that opinion. The majority in the court, I thought, had taken a position totally contrary to many years of settled jurisprudence about how employment at will worked.

I wrote a dissent and tried to explain it, as how employment at will worked. I have been wrong at times and they have had to explain to me. This time, the Supreme Court agreed with me, which was nice. I will admit here, they have not always agreed with me. It could be, when they reversed me, they were incorrect. It could also, unfortunately, be that when they affirmed me, they were incorrect. So, I never know what to make of that.

But, nonetheless, the Supreme Court did agree that employment at will did not acknowledge any cause of action for this plaintiff, so I was applying what I thought was established law.

One thing I would say about the *Dubard* opinion, though. As part of my analysis after describing the balance and acknowledging the balance of the right of employee and the right of employer may not exactly be equal, I then said that this was reasonable, or may have even said that this was the best approach for the usual non-contract, non-union kind of situation.

That was stating a policy position which, in hindsight at years later, I probably should not have done. Policy should not be put into an opinion. Personal opinion should not be put into an opinion.

But, nonetheless, I was vindicated, to use your word, I believe, sir, by the Supreme Court unanimously in a fairly short opinion. There really—that time I was right. There really wasn't much, I think, to dispute what my dissent said, but I may have added a sentence that I now wish I had not.

Senator HATCH. Well, thanks, Mr. Chairman. My time is up.

Senator WHITEHOUSE. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

And welcome, Judge Southwick.

Judge SOUTHWICK. Thank you.

Senator FEINGOLD. What, in your view, does joining a concurrence or dissent written by another judge signify?

Judge SOUTHWICK. If I may, I don't want to pull my answer, but if I could explain, because it will elaborate on how I answer. Our court is the only appeals court in the State. The court I was on. I'm not saying I'm still on it. I left December 31st.

All cases, appeals from trial courts, initially go to the Supreme Court, and they decide which cases to keep and which to send to the State Court of Appeals. The term of art is "deflective". We're a 10-judge court, but we hear cases initially as 3-judge panels. Those are the only judges that get all the briefs, those are the only judges that get the record.

Once the three-judge panel makes a decision, unanimous or otherwise, those opinions, or opinion, go to the full court. So I will say there's a distinction in answering your question whether I'm on the original panel or whether I'm on the full court, because I will have a lot more information if I was on the original panel.

Senator FEINGOLD. But you have the option of writing your own dissent or concurrence if you don't agree with the reasoning or the language used by the judge who's writing the opinion for the court, isn't that correct?

Judge SOUTHWICK. If I'm one of the seven judges who was not on the panel, I am entitled to write a separate opinion when it goes to the full court, just as I would be if I were on the original panel and a majority of the panel, two other judges, didn't agree with my position.

If I join in the opinion, it at least means I agree with the outcome. If I join in the opinion I may have worked with the writing judge to alter language, and I often do, to get back to Chairman Whitehouse's case he was talking about earlier and the language in the child custody case.

Would language like that or language I found was inappropriate—would I go to a judge and talk to him about it? I should. Often I would. I don't recall that phrase right now from when it circulated in 2001 and what my initial reaction to it was.

Senator FEINGOLD. But as a general matter, obviously—

Judge SOUTHWICK. But as a general matter—

Senator FEINGOLD.—you have the option to write your own concurring opinion if you don't agree with the language or the reasoning of the majority opinion. Is that correct?

Judge SOUTHWICK. Absolutely.

Senator FEINGOLD. All right.

Let me ask you a bit about this same case that Senator Hatch was talking about, the *Richmond* case. One thing I'm troubled by, is that your court accepted, pretty much without comment, the conclusion of the hearing officer in the Employee Appeals Board that the employee's use of the racially offense term was, in the court's words, "not motivated by racial hatred or animosity". But the dissent gives a much more complete rendition of what the hearing officer said, and it's very troubling.

The hearing officer said, for example, that the offensive term "is somewhat derogatory, but the term has not been used in recent years in the conversation that it was used in my youth, and at that point at that time it was a derogatory remark. I think that in this context, I just don't find it was racial discrimination." Now, to me, that's a pretty shocking bit of analysis.

And I just wonder—and I know you were trying to address this a minute ago and I want to get back to it. I just wonder whether it crossed your mind, as an appellate judge, that the judgment of this particular trier of fact might not be the best to rely on.

Judge SOUTHWICK. I do not—and I don't think you're asking me this. I cannot recall exactly what went through my mind at that time, but looking at it now, as you ask me about it now, it would seem to me that we are always looking at whether the analysis done by whoever the fact finder is we are entitled or obligated to give deference to, whether it is arbitrary or capricious, if it's an administrative agency.

That particular analysis that you read does not sound convincing to me as the best way to explain why this would not have had an adverse impact on the workplace, or whatever the other issues were for the Employee Appeal Board.

You started this as kind of a lead-in to it, whether—what would drive me to write a separate opinion? Not being satisfied with the analysis of the majority in a significant way, and I could not get the writing judge to shift enough to agree, might cause me to write a separate opinion. It did not in this case, and that particular analysis that the dissent focused more on, or that language, didn't cause me to write either, obviously. But that's part of it.

To me, that case was about the review standard and the deference that is given to administrative agencies. It was a tough case. Let me assure you and this committee, since it's maybe a question, that everyone took that case very seriously. I think, obviously, the employing agency did because they terminated her. The Employee Appeal Board, at least, acknowledged the significant unacceptability of that phrase.

The hearing officer may not have looked at it the way you and I would prefer that it had of been phrased, but I think the issue in that case is, was the agency that made the decision that she should not have been terminated for this word within its range of discretion in doing that?

That is the agency that the legislature gave the authority to make these decisions, subject to review on the arbitrary and capricious substantial evidence standard. Based on that, I thought the majority opinion had said enough.

Senator FEINGOLD. Thank you for those answers.

Now on the custody case that we're talking about, the concurrence that you joined in also states, "I do recognize that any adult may choose any activity in which to engage, however, I also am aware that such person is not thereby relieved of the consequences of his or her choices. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice."

Do you think that a person's sexual orientation is a choice?

Judge SOUTHWICK. I think that is an issue of debate. I don't want to take a position as to what the best indication of science is. I know that is a highly controversial point, that it is solely a matter of choice. But I think what she said, Judge Payne, in her opinion, and I'm trying to recall exactly what you read, and I've read it recently, that it may have been taking—starting the relationship with this other woman was the choice, but I could be correct—incorrect. The woman moving in. But in the context of 2001, is all I want to return to.

When that opinion was written, the law in the State of Mississippi that I was obligated to apply, and the rest of us on the court was as well, that that was a legitimate factor for a chancellor, who makes decisions like this, the trial judge on custody, to consider. It was not an abuse of his discretion, I decided, for him to have considered that.

Senator FEINGOLD. Do you believe that one of the consequences of having a same-sex relationship should be to risk losing custody of your own child?

Judge SOUTHWICK. I think, if the law I'm supposed to apply says that, then my hands are tied. If you're talking to me generally as a policy matter, I don't think that's my realm.

But I will say—and you know this, and I've said this already—the legal landscape in 2001 was *Bowers* v. *Hardwick*, which says there was no privacy interest, liberty interest in even private homosexual relations. In 2003, there became such a recognized right and that changes the analysis, at least, and may well change the outcome.

Senator FEINGOLD. Well, why then did you believe it was necessary to join the concurrence, which I think you'll admit takes a much harsher stand on the question of the mother's gay relationship than even the majority opinion does. Because you were explaining that you were applying the law, but, you know, you have a choice about what reasoning you go along with here.

Judge SOUTHWICK. I joined the concurring opinion because it added something about policy from the legislature. The first part of her opinion, Judge Payne's opinion, is talking about three different statutes which showed the legislature itself quite recently, the Mississippi legislature, had taken the position consistent with what we were talking about, again, not recognizing the change in law that would be coming.

All the majority talked about, if I recall correctly, were Supreme Court precedents. And I thought the fact that the policy, which really needs to be set by the legislative branch, had mirrored, was consistent with what the Supreme Court authority had meant as well.

Senator FEINGOLD. Do you believe that gay, lesbian, bisexual, and transgendered Americans are entitled to equal protection of the laws?

Judge SOUTHWICK. Well, I think everyone is entitled to be treated fairly. If you are talking about, as a fundamental right, I think the law is evolving as to where the fundamental rights regarding gay relationship exist. And I will apply the law rationally, reasonably, and the fairest reasoning and reading that I can make of the precedents that control.

Senator FEINGOLD. But isn't it the case that all Americans, regardless of this issue, are entitled to equal protection of the law?

Judge SOUTHWICK. I'm sorry. I cut you off. All people—

Senator FEINGOLD. Isn't it the case that all people, all Americans are entitled to equal protection of the law, that it's not just a question of fairness, but they're specifically entitled to equal protection?

Judge SOUTHWICK. All people are entitled to equal protection. I was just trying to make the point that what the level of this protection is, the level of scrutiny on various kinds of limitations that might be imposed, has not yet been fully explained.

Senator FEINGOLD. Judge, do you stand by the majority opinion you joined in *Richmond* and the concurrence you joined in *S.R.* v. *L.W.*?

Judge SOUTHWICK. Stand by them. I believe the *Richmond* opinion was correct. I didn't write it. I joined the concurrence. I believe, whatever the reasons were that I joined at the time, that it did add, at least in talking about the statutes, very important additional policy considerations, which is that the legislature has spoken. If you say I'm endorsing everything in an opinion that I did not write every word, every phrase, I do not.

Senator FEINGOLD. You're not disassociating yourself from either opinion?

Judge SOUTHWICK. I agreed with them at the time. I agree with the outcome at that time as being correct. But all I'm saying is, I didn't write them. The precise language is not necessarily what I would have chosen. I would have to—I haven't gone through my mind of how I would have written such a thing.

Senator FEINGOLD. Well, I appreciate it.

There's certainly nothing the judge has said that suggests that he's separating himself from his agreement with those opinions at this point. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Senator Coburn?

Senator COBURN. Just a short followup from Senator Feingold. If I'm a homosexual male and I'm in front of your court, will I have the same access to your court as anybody else?

Judge SOUTHWICK. Absolutely.

Senator COBURN. Will I have the same treatment as anyone else?

Judge SOUTHWICK. You will.

Senator COBURN. Will the law apply to me equally, as it does to anyone else?

Judge SOUTHWICK. It will.

Senator COBURN. Thank you. I have no other questions.

Senator WHITEHOUSE. Senator Kennedy?

Senator KENNEDY. Thank you. Thank you, Mr. Chairman. I regret I was not here earlier for the presentation.

I congratulate you on the nomination. The Fifth Circuit, as you know, has played an extraordinary role in the history of this country. I was fortunate to be here at the times where some of the great giants of the judicial system were really awakening the conscience of the Nation with regards to issues on race. They had a very, very powerful impact in terms of the Nation itself and development of various legislation.

We were always mindful that there's a large minority population that this Fifth Circuit deals with, and issues of fairness, protection of equal rights, and civil rights are obviously matters of enormous importance. They are important in any place, but obviously with the make-up of the particular population, has additional kinds of relevancy, I think, with regards to those who are going to serve on the court.

And I know you responded to Senator Feingold with regard to the Richmond case. I listened to his questioning you about your view, still, which you have signed on for that opinion, and I listened carefully to your answer.

I was just wondering why you would not say, well, certainly in retrospect, I wish I'd had a separate opinion, I wish I'd wrote a separate opinion on this, because even in retrospect, having listened to the dialog, the concerns—maybe you missed that in the first part, although it's very difficult to understand, particularly when that word is used, that people—the degree of offensiveness and the degree that they are concerned, or worried, or upset, and trying to measure that is fairly obviously obnoxious word under any kind of set of circumstances.

But I was just listening to the response to Senator Feingold when asked if you still would have signed on to that part, and you're telling us here today that you would have. Not that you ought to change just because you are here before the committee, but I think many of us would say, well, given all of the kinds of concern about this—all of us alter and change our positions, you know. When we're asked about it, to try and sound noble, we quote Lincoln, you know. But, you know, there are important changes in life and people do change their mind and people learn. I mean, this is a terrific process.

But it is troublesome, when you're asked about whether now, given all of the kinds of considerations on this, whether you wouldn't have said, look, I did it at the time, but, you know, knowing what I know now, I wish I had written a separate opinion on that part.

Judge SOUTHWICK. Well, Lincoln has too many things to quote, Senator. But one that strikes me right now is, "Don't change horses in midstream." I think when I got on the majority opinion horse I relied that—I looked at it very hard. The person—the judge who wrote it was an extraordinarily able judge. I think the opinion is carefully written and it's written to give deference to the agency that's supposed to make the decisions about the kinds of things you're talking about, Senator.

What is the proper reaction to something that's totally inappropriate as this in the workplace? That's certainly to take every step to make the employee realize that that is unacceptable, cannot be done. But where to go from there? You have an employee who

made a mistake, a serious mistake. What does the agency need to do about it? The Employee Appeals Board made its decision, and we, at the appellate level, were applying our review standard to that.

If you're saying, in light of all of the criticism today do I wish I had written a separate opinion or whatever else, I just can't go back on the analysis that I did there. If I had the same case in front of me in the future, should I be fortunate enough to be a judge to have a case like that, I would certainly evaluate.

I mean, the important thing for all of us is constantly to be aware of how what we do as judges affects people. I have tried to do that, and every day is a learning experience, I hate to admit, of new things that I need to take into consideration.

So in the future, in a case like that I would certainly consider what has happened, if I'm in a position to make decisions in the future.

Senator KENNEDY. Well, I appreciate it. Lincoln, of course—"Ralph Waldo Emerson" said "consistency is the hobgoblin of little minds" as well, so we can go around. But the real issue on this thing is, that word, whether there's any way that anybody can understand it in any other kind of framework, that it was derogatory and always offensive.

Let me go to the issues on consumer and workers' rights, the protecting of workers that you had on—I think you're familiar with the *Canon MidSouth X-Ray Company*. You're familiar with that case. You had an individual who was—some of your decisions—just in looking through the workers' rights case, some of your decisions seem to bend over backward in favor of the larger corporation at the expense of individual Americans.

The dissent in the *Canon* case denied the claims of a darkroom technician who became ill, suffered severe seizures, headaches, nausea, being forced to handle toxic chemicals at work without proper safety precautions.

The employer had ordered her supervisor not to tell her that the darkrooms were dangerous, not to take any safety precautions. After many years, she finally found a doctor who diagnosed her illness as caused by toxic chemicals at her job.

Seven of your colleagues on the court ruled that she was entitled to a trial to hold the company accountable for the damage to her health, but you have denied the claim, arguing the statute of limitations had run out. She should have figured it out on her own, even before the doctor made the diagnosis that her illness was related to her work.

The majority opinion stated that she lacked any specialized training and was, just by all accounts, a darkroom technician who cannot reasonably be expected to diagnose a disease on which the scientific community has yet to reach an agreement. Why did you think it was reasonable to require her to figure out that her illness was work-related?

Judge SOUTHWICK. Senator, I don't think I was deciding that. It was my interpretation, from controlling case law and the general statute of limitations in Mississippi that we were applying, that that had already been decided.

There were two statutes of limitation that were being discussed, and we all agreed on which one applied. This was not medical malpractice. It was not in any of the other specific areas of claims where different statute of limitations would apply, so it was the general 3-year statute of limitations, 6-year at one point. I don't remember now where in the change of that statute this particular case arose.

And the statute simply said that, within 6 years—or 3 years—of the injury the claim had to be brought, and there was case law as to what that meant. I talked about a medical malpractice statute of limitation as a comparison.

Under that statute, the cause of the injury—I don't think that's the phrase of the statute, but the causation—must be known, or reasonably known, before the statute of limitations begin.

When this came up—when this issue came up in the last few days, a colleague of mine looked at the developments of the law since this case. In 2005, when I was gone, the State Court of Appeals, the best I can tell, agreed with my interpretation without signing it, that that is the way the statute of limitations is to be interpreted, and the Supreme Court, in February, just a few months ago, agreed on the basic point that it's the knowledge of the injury and not the knowledge of the causation.

Now, sir, I agree with you 100 percent that that is a very harsh case for a lot of plaintiffs, and what they need to do and how all that works is a difficult matter for them to figure out.

But my duty as a Court of Appeals judge is to apply the statutes passed by the legislative bodies, to apply them and to apply the interpretations that controlling legal authority does—has come up with. And that will lead to harsh results. And I—it's not my purpose in being an appellate judge to lead to harsh results, but if that's where the legal analysis takes me, I feel obligated to go there.

Senator KENNEDY. Well, it seems that your view would give the company a free ride on this, even though it tried to hide the truth from the victim. You had concerns that we have—in private practice, you had a large portion of your work involving defending oil and gas companies, so we've got to try and find out whether that's your practice on it. Let me ask you about—oh. Is my time up?

Senator WHITEHOUSE. We'll probably have a second round.

Senator KENNEDY. OK. All right. Fine. I thank you. I apologize.

Senator WHITEHOUSE. Senator Durbin?

Senator DURBIN. Judge Southwick, thank you for joining us today.

I think it is very clear that the context of your nomination is a big part of our deliberation, and I think you must understand that from some of the questions that have been asked of you. It is my understanding that President Bush has submitted 10 nominees for the Federal bench in Mississippi, 7 at the District level, 3 at the Fifth Circuit, and not one has been an African-American.

Mississippi being a State with more than a third of the population African-American, you can understand why the African-American population feels that this is a recurring pattern which does not indicate an effort to find balance on the court when it

comes to racial composition, or even to give African-Americans a chance in this situation.

But having said that, I believe you have the right to be judged on your own merits in terms of your own nomination, and I'd like to ask you a couple of questions, if I can.

Now that we're going through this whole inquiry about the dismissal of U.S. Attorneys, we are finding that there's been an involvement of the White House in a lot of decisionmaking at the Department of Justice. One of the things that seems to be recurring is this theme that membership in the Federalist Society is a good box to check if you want to be viewed favorably by the Bush administration.

You were a member of the Federalist Society and wrote articles for the Federalist Society. Could you describe to me why you joined the organization and what you think it represents?

Judge SOUTHWICK. I may be forgetting, Senator. I think I wrote one article. But you're absolutely right, I did write something for one of their newsletters on judicial elections and the First Amendment.

I joined when I was here in the Department of Justice in 1989 to 1993. I don't remember when, exactly. The meetings were convenient. The Assistant Attorney General, who was in charge of the division I was in—I was a Deputy Assistant—a Deputy Assistant—went to them.

I found them intellectually challenging. Some very impressive intellects were there, talking about issues that, in my practice in Mississippi, had not been particularly front burner.

And I saw it as a—not to be too obvious—a conservative legal organization trying to provide its members, similar-thinking individuals, an opportunity to work on ideas and work on different policy, and different ways to implement that policy.

Senator DURBIN. Was this considered a good professional move for a young Republican attorney to be part of the Federalist Society, to have that on the resume?

Judge SOUTHWICK. It probably was. I'm not saying that that would have been one of the factors that I would have considered, but I'm not saying that that's—that I didn't have some interest in finding out what it was about. And so it wasn't just to be pleasant and supportive to my friend, Stewart Gerson, who was Assistant Attorney General. He invited me. It was interesting, and I went to it.

Senator DURBIN. About 8 years you were a member, is that correct?

Judge SOUTHWICK. I really have not checked. I guess I could ask the Federalist Society when I got out. But I stayed. There really was an organization for a while in Mississippi. I remember going to a talk occasionally. I wasn't nearly as active, with all due respect for those who were running it, in Mississippi as I was up here.

Senator DURBIN. I do not want to paint a sinister picture of the Federalist Society, but it is an amazing coincidence that so many nominees have that in their background.

In the history of civil rights in the South, which I'm sure you're more aware of than I am, there have been some interesting heroes, and one of them was Judge Frank Johnson in Alabama.

Congressman John Lewis credits Judge Johnson and his courage with allowing the Selma march to take place and really giving an opportunity for that movement to evolve. Had he not shown that courage, at great personal and professional expense, John Lewis and others think it might have taken many more years to reach the achievements that they reached.

So when you look back at your career in public service, can you point to an example of something that you have done, on the bench or otherwise, where you really stepped out and subjected yourself to criticism for taking an unpopular view on behalf of the dispossessed, or minorities, or poor people where it may have subjected you to criticism for showing courage in trying to side with a position that you thought was right and might not have been popular?

Judge SOUTHWICK. I wish those came readily to mind. Perhaps I just didn't keep enough of a catalog of experiences. You mentioned Frank Johnson, a conservative Republican, but probably never a member of the Federalist Society.

Senator DURBIN. An Eisenhower Republican. Yes.

Judge SOUTHWICK. Alabama Republican. And I—not because of this hearing, or not because of anything else, but judges, and Federal judges, and Fifth Circuit judges fascinate me.

I read Taming the Storm by Jack Bass on Judge Johnson just a few months ago. His career is an inspiration to anyone who wants, no matter their political background, no matter what they have done before arriving at the bench, to apply the law even-handedly and imaginatively to the issues that come before him. I don't want to get into analogies of former colleagues of yours, U.S. Senators. I'm no Frank Johnson, I know that.

Senator DURBIN. None of us are. But can you think of a time in your life or career where you did bend in that direction, to take an unpopular point of view on behalf of those who were voiceless or powerless and needed someone to stand up for their rights when it wasn't a popular position?

Judge SOUTHWICK. I hope that a careful look—and the answer is, no, I cannot think of something now. But if I can give you this answer. I cannot recall my opinions, and I don't think of them in those terms.

I think of them in terms of not considering the reaction, not looking at the result and working backward, but following through and, no matter how popular or unpopular the decision may be, to come to the conclusion that I think is compelled by controlling authority.

Senator DURBIN. I hear that often and it's certainly a reasonable answer. But I find many times, when it comes to legislation, and I think when it comes to ruling on court cases, you really have a chance to make a judgment. It isn't so clearly one way or the other, it's a matter of deciding what the compelling situation or values are that are at stake. I think that's what I was looking for in that question.

May I ask you about this *Richmond* case just for a moment? The Supreme Court, even the most conservative members of our U.S. Supreme Court, when they considered a case not long ago involving cross burning, said, really, this is a symbol that everyone understands. It goes way beyond an expression, way beyond free speech,

and clearly is so inherently evil in the minds of so many Americans, that it has to be treated differently.

As you reflect now on the *Richmond* case and the use of the "N" word, can you draw any conclusions from our reaction to it and the fact that your participation in that case leads people to conclude that you were insensitive?

Judge SOUTHWICK. I certainly see that. I certainly see that as being the reaction from some quarters. There was press coverage of the case when it was handed down. And that's part, I think—that's part of what judges need to do, though, is to look at cases and decide them fairly, honestly, and not worry about public reaction.

Now, you're raising a slightly different point, and I will accept that. You're saying the public reaction, in itself, is a sign of the error, that this is a more fatal word than we gave it credit.

And I will say that there is no worst word. I think the majority opinion for the Supreme Court of Mississippi used some words they could come up with which would be the worst for other races and then compare to using that word that was the subject of that case. And it is unique, I suppose. I hope it's unique. I can't think of anything else right now. Cross burning, maybe.

What the factual issue, to some extent, in that case was, the Employee Appeals Board that we were reviewing, who has the authority by State law to make these decisions, was clearly in error to say that it was not so damaging that this woman needed to be fired, that she had no further employment life after that, that she couldn't in some way survive having used that word, no matter the context and whatever else.

And it could be that that word is so serious that every workplace is permanently damaged insofar as that worker is concerned. I didn't see that evidence in the record. You're saying, should I have been more aware of it myself? I have certainly seen this again.

But I do want to emphasize that everyone in this case took it extraordinarily seriously, including the writing judge for the Mississippi Court of Appeals, who I think treated the issue well.

Senator DURBIN. Thank you very much, Judge.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. I would like to ask you to do me one favor, and then if Senator Hatch would like to close before we excuse this witness. I assume you have access to Google?

Judge SOUTHWICK. Oh, yes. I think I have heard of that.

Senator WHITEHOUSE. Do me a favor and Google the phrase "homosexual lifestyle" and take a look at the context in which the top, I don't know, 50 or 60 hits come back to it. And the record will be open for a week. I'd love you to get back to me with your thoughts about that, and in particular whether, having seen the context in which that phrase is used, having seen the loaded nature of it, I'd love to urge you to never use that phrase in an opinion written on behalf of the Fifth Circuit Court of Appeals of the United States of America.

Judge SOUTHWICK. Senator, I thank you for that suggestion as a more loaded phrase than I must have given it weight 6 years ago.

Senator WHITEHOUSE. I appreciate that.

Senator Hatch, would you like to say something in conclusion?

Senator HATCH. Well, the only thing I would add is, you're clearly highly qualified. You're clearly a very good person. You're clearly a person who applies the law, regardless of public opinion, which is what an appellate judge should do. You're clearly a person who's learned in the law and you have the backing of the whole American Bar Association.

Now, I hope that, around here, being a member of the Federalist Society is not a disqualification because it is not a political organization. It basically stays out of politics.

The prime function of the Federalist Society, as I view it—as a member of the board of advisors, by the way—is to hold conferences where they bring people from all points of view, from the left to the right, to discuss majors issues in the law. And they've done a pretty good job throughout the country.

Naturally, since it's considered more of a conservative society than a liberal society, then naturally, I suppose, the Republican administrations have always looked to the Federalist Society for some of their leading lights in law, most all of whom are Law Review graduates from major law schools or from law schools around the country.

So I hope that, by implication, some of these comments don't denigrate the Federalist Society, which I think does a very, very good job of helping to discuss the various ramifications of some of the most important decisions and laws today.

Now, you've made it very clear that you're not here to defend the Federalist Society and that you had a limited relationship there. I think the important thing here is that you've demonstrated here today an adherence to the law, even sometimes when it's difficult to adhere to.

And should you ever get on the Supreme Court of the United States of America, maybe you can make some of those ultimate fine decisions that have to be made. But until then, you pretty well have to abide by the law, even if you would like to change the law, unless there is some give and take where you can change it.

So this is important. I think you've handled yourself very well here today.

Judge SOUTHWICK. Thank you, Senator.

Senator HATCH. You have the backing of two great Senators and, I would suggest, a whole lot of other very fine Senators who would love to see you serve in the judicial branch of this Government from a Federal standpoint.

I want to commend you for the life you've lived, the work you've done, the background you have, the intelligence that you've displayed, and the willingness to serve in these positions.

One of the things we've got to do, Mr. Chairman, is we've got to elevate judicial salaries so that we can keep the best and the brightest coming to the court. And you're clearly one of the best and the brightest.

But we're seeing a shift right now, where some of the best and brightest are not willing to serve in the Federal courts any more because Law Review graduates make more than they do right out of law school. And when you have a Law Review graduate starting at $200,000 a year, plus a signing bonus of another $200,000, you can see why that's kind of not the way to treat the Supreme Court

Justices, and certainly the Chief Justice, of the United States of America.

So I'm counting on you, Senator, to help us to change that salary structure, even though it may mean placing the Federal judiciary above ourselves.

Senator WHITEHOUSE. Point taken, Senator Hatch.

Senator HATCH. All right. I'm counting on you. From here on in I'm going to hold you to that.

Senator WHITEHOUSE. Just point taken.

[Laughter.]

Senator HATCH. That's great. That's great. Well, I just want to personally thank you for being willing to serve. As you know, we're all concerned about justice, equality, and equal treatment under the law, just to mention three very important aspects. And I have every knowledge of your background, that you're as committed to doing right in those areas as anybody we've ever seen here. So, I'm grateful that you're willing to serve.

Thank you.

Judge SOUTHWICK. Thank you for your comments, sir.

Senator WHITEHOUSE. Judge Southwick, thank you for your testimony today. You are excused. But the record of this proceeding will remain open for a week for anyone who wishes to fill in with further information.

Senator HATCH. Mr. Chairman, I have to leave, but I want to say that I certainly support the other two nominees. I will do everything in my power to make sure that we get all three of you through as quickly as possible. I am, again, expressing my gratitude to Senator Leahy for being willing to go ahead with these hearings and to push these nominees. That means a lot and I appreciate that.

Senator WHITEHOUSE. I appreciate that, Senator Hatch. And as everybody knows, he is a very distinguished former Chairman of this committee, so his words to that effect are very significant and carry great weight.

Would Judge Neff and Magistrate Judge O'Grady come forward to be sworn, please?

[Whereupon, the witnesses were duly sworn.]

Senator WHITEHOUSE. Please be seated. Welcome.

Do either of you have a statement of any kind you would like to make?

STATEMENT OF JANET T. NEFF, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN

Judge NEFF. I just would like to thank you, Senator Whitehouse, for your chairing of this committee, and for the Committee itself, for holding this hearing. Special thanks to Senators Levin and Stabenow for their kind remarks in introducing me, and in forwarding my name to President Bush. And thank you to President Bush for his nomination to serve on the Western District of Michigan. It's a great honor to be here and to be a nominee.

Thank you.

[The biographical information of Judge Neff follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Janet Theresa Neff

   Former Names: Janet Theresa Hunt, Janet Theresa Nebiolo

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

   U.S. District Court Judge for the Western District of Michigan

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

   Office: 333 Ionia Ave., N.W., Suite 201
   Grand Rapids, MI 49503

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

   1945, Wilkinsburg, PA

5. **Marital Status: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.**

   Married to David Askins Neff, Attorney, Retired

   No dependent children.

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

   Wayne State University Law School 1968-70, J.D. 1970

   University of Pittsburgh School of Law 1967-68, no degree
   (left to transfer to Wayne State University Law School)

   University of Pittsburgh 1963-67, B.A., cum laude 1967

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

1989-Present	Michigan Court of Appeals - Judge 330 Ionia N.W, Suite 201 Grand Rapids, MI 49503
1980-88	William G. Reamon, P.C. - Associate 161 Ottawa N.W., Suite 200-C Grand Rapids, MI 49503 (Firm no longer in existence)
1980	Office of the U.S. Attorney - Assistant U. S. Attorney Department of Justice P.O. Box 208 Grand Rapids, MI 49501-0208
1978-80	Michigan Supreme Court - Commissioner 525 W. Ottawa G. Mennen Williams Building Lansing, MI 48909
1973-78	VanderVeen, Freihofer & Cook - Associate, Partner 950 Union Bank Bldg. Grand Rapids, MI 49503 (Firm no longer in existence)
1971-73	City of Grand Rapids - Assistant City Attorney 300 Monroe N.W. Grand Rapids, MI 49503
1970-71	Michigan Court of Appeals - Research Attorney Washington Square Bldg. 109 West Michigan Ave. Lansing, MI 48909
1970	Internal Revenue Service - Tax examiner Detroit, MI

8. **<u>Military Service and Draft Status</u>: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.**

None.

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

I graduated cum laude from the University of Pittsburgh where I was elected to Omicron Delta Epsilon, an Economics Honorary Society.

Recipient of the "Law Enforcement" award for 1998 by the Order Sons of Italy in America, Grand Lodge of Michigan

Recipient, Outstanding Member 2006, Women Lawyers Association of Michigan, Western Region

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

State Bar of Michigan
Commissioner 1980-1984

Grand Rapids Bar Association
Treasurer 1985-87
Vice-President 1987-88
President-Elect 1988-1989
President 1989-90

Michigan Trial Lawyers Association

Women Lawyers Association of Michigan

Women Lawyers Association of Michigan, Western Region

Association of Trial Lawyers of America

American Bar Association

Member and Chair, State Bar of Michigan Character and Fitness Subcommittee

Member, U.S. District Court Professional Review Committee

Trustee, Kent Medical Society

Trustee, Grand Rapids Bar Association Professional Relations Committee

Member, State Bar of Michigan Task Force on Racial, Ethnic and Gender Issues in the Courts and Legal Profession

Member, State Bar of Michigan Open Justice Committee

Member, Grand Rapids Area Legislative Business Forum

Member, Grand Rapids Bar Association Access to Justice Center Committee

Member, Grand Rapids Bar Association Diversity Committee

11. **Bar and Court Admission**:

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

February 8, 1971 - State Bar of Michigan

No lapses in membership.

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

Michigan Supreme Court, 1971:
Michigan Supreme Court
Michigan Court of Appeals
1st through 57th Circuit Courts
Recorder's Court, Detroit
Court of Claims
1st through 98th District Courts
Michigan Probate Courts
Michigan Municipal Courts
Michigan Administrative Agencies

United States District Court for the Eastern District of Michigan, 1971

United States District Court for the Western District of Michigan, 1973

United States Court of Appeals for the Sixth Circuit, 1986

12. **Memberships**:

a. **List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.**

Order, Sons of Italy in America 1990 (approximately) - Present

Progressive Women's Alliance of Grand Rapids 2000 (approximately) – Present

American Constitution Society 2005 - Present

b. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.**

No.

13. **Published Writings and Public Statements**:

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

Grand Rapids Bar Association Newsletters, President's Letters, July 1989 thru July 1990

Grand Rapids Business Journal, Letter to the Editor, 11/13/89

Letter to Grand Rapids Bar Association Members, Pro Bono Program of Western Michigan, 11/89

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

A View from the Appellate Bench – What Every Lawyer Should Know, ICLE Conference, November 2005

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

None.

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

I have one transcript of a speech given at my swearing-in ceremony, December 28, 1988. I do not speak from prepared texts. I usually speak from handwritten notes on 4x6 index cards, and occasionally from typewritten notes. I do not usually retain such notes, although occasionally over the years I have done so.

May 19, 2006 – Women Lawyer's Association of Michigan annual meeting

November 23, 2005 – Grand Rapids Bar Association admission ceremony

November 3, 2001 – Retirement ceremony for Lana Boldi

January 17, 2001 – William G. Reamon memorial service

November 2, 2000 – Lake Shore Chapter of MEA retirees

Speech Re: Habitat for Humanity:
September 25, 1995 – Furniture City High Twelve Club
October 25, 1995 – Grand Rapids Breakfast Club
November 9, 1995 – Grand Rapids Association of Legal Professionals

November 29, 1994 – Grand Rapids Bar Association admission ceremony

June 7, 1994 – Grand Rapids Bar Association minority clerkship program

March 28, 1994 – Furniture City High Twelve Club

April 23, 1993 – Michigan Association of Bar Executives

September 13, 1990 – Women Lawyers Association of Michigan annual meeting

April 10, 1990 – Kent County Medical Society

e. **Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.**

G.R. Law, Women attorneys are racking up records – April 1987

Janet Neff to lead GR Bar Association – April 1987

Janet Neff Bar Tender – May 1989

On the Bench – 1994

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.**

1/1/89–Present - Judge, Michigan Court of Appeals, Elected

The Michigan Court of Appeals has statewide general civil and criminal jurisdiction over appeals from all state trial courts and state administrative agencies. The Court's jurisdiction is primarily non-discretionary. Under the 1963 Michigan Constitution, which created the Court of Appeals, litigants have a right of appeal to the Court of Appeals, whereas Michigan Supreme Court's jurisdiction is primarily discretionary. In the vast majority of litigated and appealed cases, the Court of Appeals is the court of last resort in Michigan. The per judge case load and disposition rate both rank consistently among the highest of U.S. state intermediate appellate courts.

Twenty-eight elected judges currently serve on the Court of Appeals and hear cases in three-judge panels. Our dockets are approximately evenly divided between criminal and civil appeals. A decision of any panel of the Court is controlling throughout the state and is reviewable by the Michigan Supreme Court on leave granted.

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

a. **citations for all opinions you have written (including concurrences and dissents);**

A list of citations for all opinions I have written is attached.

b. **a list of cases in which certiorari has been requested or granted;**

People v Walker, 265 Mich App 530; 697 NW2d 159 (2005), vacated and remanded 477 Mich 856 (2006), on remand 273 Mich App 56; ___ NW2d ___ (2006).

Lash v City of Traverse City, 271 Mich App 207; 720 NW2d 760 (2006).

ER Zeiler Excavating, Inc v Valenti Trobec Chandler, Inc, 270 Mich App 639; 717 NW2d 370 (2006).

Drake v Citizens Ins Co of America, 270 Mich App 22; 715 NW2d 387 (2006).

Saffian v Simmons, 267 Mich App 297; 704 NW2d 722 (2005).

c. **a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;**

1. Ameriquest Mortgage Co v Alton, 271 Mich App 660; 726 NW2d 424, vacated in part and special panel convened, 271 Mich App 801 (2006), aff'd 273 Mich App 84; ___ NW2d ___ (2006).

SUMMARY: Trial court decision that held that a company, whose loan proceeds were used to pay off the first mortgage, had priority over an intervening loan by an individual was reversed, but only because *Washington Mut Bank v Shorebank Corp*, 267 Mich App 111; 703 NW2d 486 (2005) held that the doctrine of equitable subrogation did not apply to new mortgages that arose out of refinance. The Court requested that a conflict panel be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Washington Mut Bank.* The conflict panel subsequently affirmed the reversal by the earlier panel, upholding the decision in *Washington Mut Bank.*

2. People v Walker, 265 Mich App 530; 697 NW2d 159 (2005), vacated and remanded 477 Mich 856 (2006), on remand 273 Mich App 56; ___ NW2d ___ (2006).

SUMMARY: Written statement of the victim's account of an alleged assault and her statements in response to questioning by police were testimonial in nature; therefore, admission of the statements without opportunity for cross-examination of the victim violated defendant's Confrontation Clause rights, and defendant's convictions were reversed and remanded.

3. Mazumder v Univ of Michigan Bd of Regents, 270 Mich App 42; 715 NW2d 96 (2006), vacated in part and special panel convened, *Ward v Siano*, 270 Mich App 801 (2006), affirmed, *Ward v Siano*, 272 Mich App 715; ___ NW2d ___ (2006).

SUMMARY: Personal representative of estate of deceased patient filed medical negligence action against various medical providers. Providers moved for summary judgment on the grounds that representative's action was time-barred. The Court affirmed the trial court's denial of providers' motion. While under *Waltz*, tolling period of MCL 600.5856 would not be applicable in representative's wrongful death medical malpractice action, principles of equity required denial of defendants' motion for summary judgment because representative's "untimely"

filing was not due to her miscalculation of the applicable limitation period. The conflict panel reversed the *Mazumder* panel, and upheld the decision in *Ward v Siano*, 270 Mich App 584; 718 NW2d 371 (2006).

4. Braverman v Garden City Hosp, 272 Mich App 72; 724 NW2d 285 (2006), vacated in part and special panel convened, 272 Mich App 801 (2006).

SUMMARY: Although a personal representative timely filed a medical malpractice action within two years of his appointment pursuant to MCL 600.5852, the representative was not the same person who filed the notice of intent under MCL 600.2912b(1) as required by *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc,* 270 Mich App 383; 715 NW2d 72 (2006). The Court reversed an order denying defendants' motions for summary disposition of a successor personal representative's medical malpractice action and remanded the case to determine whether it should be dismissed with prejudice, but requested that a conflict panel be convened. The Court subsequently ordered that part III of the opinion, which addresses the notice of intent to sue before a successor personal representative may commence a medical malpractice action, was vacated, and that a special panel be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Verbrugghe*.

5. People v Westman, 262 Mich App 184; 685 NW2d 423 (2004), overruled by *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006).

SUMMARY: Offense to which defendant pleaded guilty, felony failure to pay child support, was a continuing offense that straddled old and new versions of law that criminalized failure to pay. Statute's application did not violate Ex Post Facto Clauses.

6. Langrill v Stingers Lounge, 261 Mich App 698; 683 NW2d 225 (2004), vacated and remanded 471 Mich 926, 689 NW2d 228 (2004).

SUMMARY: A grant of summary disposition in favor of the lounge was improper where the individual's action was not time barred because she originally retained her attorney for the purpose of an auto negligence claim, not a dramshop action.

7. Elezovic v Ford Motor Co, 259 Mich App 187; 673 NW2d 776 (2003), affirmed in part, reversed in part and remanded 472 Mich 408; 697 NW2d 851 (2005).

SUMMARY: In a hostile work environment claim, notice to employer was insufficient where worker reported incident but asked for confidentiality. Court

disagreed with, but followed, caselaw disallowing claim against supervisor who created hostile environment.

8. Thomason v Contour Fabricators, Inc, 255 Mich App 121; 662 NW2d 51 (2003), modified in part and remanded 469 Mich 960, 671 NW2d 41 (2003).

SUMMARY: Where employee was injured while having blood drawn at her place of employment for employment provided insurance, employee's injury arose in the course of employment and employee was entitled to workers' compensation benefits.

9. Sekulov v City of Warren, 251 Mich App 333; 650 NW2d 397 (2002), vacated and remanded 468 Mich 863, 659 NW2d 229 (2003).

SUMMARY: Summary disposition was reversed when county had jurisdiction over location of automobile accident. New case law would have only prospective application, and full retroactive effect was unjust and unwarranted.

10. Sweatt v Dep't of Corrections, 247 Mich App 555; 637 NW2d 811 (2001), reversed and remanded 468 Mich 172; 661 NW2d 201 (2003).

SUMMARY: Where a corrections officer suffered a work-related injury and was then incarcerated, he was entitled to reinstatement of disability payments upon his release even though his employer, the DOC, was prohibited by statute from hiring him back.

11. Corley v Detroit Bd of Education, 246 Mich App 15; 632 NW2d 147 (2000), reversed 470 Mich 274; 681 NW2d 342 (2004).

SUMMARY: Plaintiff established a genuine issue concerning whether the alleged adverse actions were factors in decisions affecting her employment; thus, granting summary disposition to defendants was improper.

12. People v Ross, 242 Mich App 241; 618 NW2d 774 (2000), vacated and affirmed on alternative grounds 465 Mich 909; 638 NW2d 746 (2001).

SUMMARY: Assault with intent to rob while unarmed constituted predicate felony, as essentially attempted robbery, for purposes of felony murder statute, so trial court's reduction of conviction to second-degree murder was reversed.

13. Bingham Twp v RLTD Railroad Corp, 237 Mich App 538; 603 NW2d 795 (1999), reversed 463 Mich 634; 624 NW2d 725 (2001).

SUMMARY: Reference in the Michigan Trailways Act to local ordinances did not mean that plaintiff's local zoning ordinances should control the development of defendants' bike-and-commuter trailway over the statute.

14. Crego v Coleman, 232 Mich App 284; 591 NW2d 277 (1998), reversed 463 Mich 248, 615 NW2d 218 (2000).

SUMMARY: A state statute's denial of right to modify child support for illegitimate child, but that did not deny such right to legitimate children, was unconstitutional because such statute violated equal protection right of child born outside marriage.

15. In re Forfeiture of $275, 227 Mich App 462; 576 NW2d 431 (1998), reversed 457 Mich 864; 581 NW2d 732 (1998).

SUMMARY: A trial court erred in ordering the forfeiture of currency where there was insufficient evidence under Michigan law to connect the claimant's possession of the currency with another individual's possession of large amounts of cocaine.

16. People v Brownridge, 225 Mich Ap. 291; 570 NW2d 672 (1997), affirmed in part and reversed in part 459 Mich 456, 591 NW2d 26 (1999), amended 459 Mich 1276, 595 NW2d 856 (1999).

SUMMARY: Defendant should have been allowed to admit testimony of an officer related to investigating officer's credibility and truthfulness where it had significant probative value and omission may have affected outcome of trial.

17. Haberl v Rose, 225 Mich App 254; 570 NW2d 664 (1997), abrobated by *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999).

SUMMARY: Governmental employee, who was acting in scope of her employment and driving her own car when the accident occurred, was liable under the civil liability statute as an owner even though she was immune from common law negligence as driver.

18. Bieszck v Avis Rent-A-Car System, Inc, 224 Mich App 295; 568 NW2d 401 (1997), reversed 459 Mich 9, 583 NW2d 691 (1998).

SUMMARY: In personal injury action, husband and wife were entitled to new trial where trial court erroneously submitted issue of rental company's consent to

underage driver to jury. Car lease provision was insufficient to overcome presumption of consent.

19. People v Harris, 219 Mich App 184; 555 NW2d 891 (1996), vacated and remanded for reconsideration in light of *People v Mitchell,* 454 Mich 145; 560 NW2d 600 (1997), 455 Mich 864, 567 NW2d 251 (1997).

SUMMARY: Defendant's adjudications for sexual conduct and felonious assault improperly were scored under the Michigan Sentencing Guidelines as prior convictions; they were supplemental dispositions that Michigan Court Rules treated as probation violations.

20. People v Mack, 218 Mich App 359; 554 NW2d 324 (1996), appeal denied; ordered not precedential 455 Mich 865, 567 NW2d 251 (1997).

SUMMARY: A trial court erred in failing to provide a defendant with various discovery material requested by him, but the errors were harmless when overwhelming evidence existed to convict the defendant, including his own admission.

21. Shurlow v Bonthuis, 218 Mich App 142; 553 NW2d 366 (1996), affirmed in part and reversed in part 456 Mich 730; 576 NW2d 159 (1998).

SUMMARY: After obtaining judgment of possession and money judgment, landlords brought action against tenant and guarantor of commercial lease contracts for additional damages. Although action was stayed when tenant and guarantor filed bankruptcy petitions, stay was lifted after guarantor withdrew bankruptcy petition following rejection of landlords' claim in bankruptcy court. The trial court granted motion for summary disposition by guarantor.

22. Berrien Co Probate Judges v Michigan AFSCME Council 25, AFL-CIO, 217 Mich App 205; 550 NW2d 859 (1996), appeal denied; ordered not precedential, 454 Mich 908; 564 NW2d 46 (1997).

SUMMARY: The probate court and the county were not joint employers and could not implicitly agree to act as joint employers by sharing services and waive the legal rights of employees because this would violate the separation of powers doctrine.

23. People v Baker, 216 Mich App. 687; 551 NW2d 195 (1996), reversed by *People v Goecke*, 457 Mich 442, 579 NW2d 868 (1998).

SUMMARY: A finding that defendant was driving drunk, without more, was insufficient to warrant an inference of malice to support a conviction for first degree murder.

24. Volkema v Dep't of Natural Resources, 214 Mich App 66; 542 NW2d 282 (1995), affirmed in part and disapproved in part 457 Mich 886; 586 NW2d 231 (1998).

SUMMARY: Denial of property owner's inverse condemnation claim was proper because the mere diminution on the value of the property was not compensable and because the trial court considered how the land-use regulation affected the property as a whole.

25. Nelson v American Sterilizer Co, 212 Mich App 589; 538 NW2d 80 (1995), vacated in part and remanded 453 Mich 946; 554 NW2d 898 (1996).

SUMMARY: Injured person was entitled to present her expert's testimony for the jury's consideration in her case for damages incurred as a result of exposure to ethylene oxide because that method was the appropriate way to challenge the expert's opinions.

26. Feaster v Portage Pub Schools, 210 Mich App 643; 534 NW2d 242 (1995), reversed 451 Mich 351; 547 NW2d 328 (1996).

SUMMARY: The school district's policy of requiring proof of residency to enroll children in the public schools was rationally related to their policy of collecting tuition from out of state students.

27. Nalepa v Plymouth-Canton Community School Dist, 207 Mich App 580; 525 NW2d 897 (1994), affirmed on other grounds 450 Mich 934; 548 NW2d 625 (1995).

SUMMARY: School district, board of education, and school superintendent had absolute governmental immunity from liability for wrongful death of second grader who hung himself after his school showed a video in which a boy attempted suicide by hanging.

28. Local 1064, RWDSU, AFL-CIO v Ernst & Young, 204 Mich App 445; 516 NW2d 492 (1994), affirmed in part and reversed in part 449 Mich 322; 535 NW2d 187 (1995).

SUMMARY: A client's breach of contract claim against an accounting firm was not governed by the two-year statute of limitations for malpractice suits, but

rather by one of several other sections that ranged from three to six years and did not bar the suit.

29. People v Paul, 203 Mich App 55; 512 NW2d 20 (1993), reversed 444 Mich 949, 511 NW2d 434 (1994).

SUMMARY: A trial court properly suppressed evidence that was seized pursuant to a search warrant that was improperly issued by a district court magistrate because no specific authorization was obtained from a district court judge to issue the warrant.

30. People v Lemcool, 200 Mich App 77; 504 NW2d 7 (1993), reversed 445 Mich 491; 518 NW2d 437 (1994).

SUMMARY: It was error for the trial court to grant reciprocal discovery to prosecution. The trial court was required to exercise judicial restraint and refuse to permit prosecutorial discovery in the absence of statute or court rule.

31. Schippers v SPX Corp, 194 Mich App 52; 486 NW2d 89 (1992), reversed 444 Mich 107; 507 NW2d 591 (1993).

SUMMARY: Because a question of fact existed concerning whether an employee had a reasonable belief that he could be fired only for cause, it was for the jury to determine the facts and circumstances that actually occurred.

32. People v Cobbs, 188 Mich App 324; 469 NW2d 47 (1991), reversed 443 Mich 276; 505 NW2d 208 (Mich. Aug 17, 1993).

SUMMARY: Defendant was improperly sentenced following guilty plea for kidnapping and felonious assault where the trial judge improperly negotiated a sentence agreement with defendant, over the prosecutor's objections; thus, the sentences imposed were invalid.

33. Schippers v SPX Corp, 186 Mich App 595; 465 NW2d 34 (1990), vacated and remanded 439 Mich 895; 478 NW2d 439 (1991).

SUMMARY: An employer's handbook, stating that disciplinary action including discharge might result from the violation of certain rules, raised a genuine issue of fact as to whether a contract of employment providing termination only for just cause existed.

34. Rouch v Enquirer & News of Battle Creek, 184 Mich App 19; 457 NW2d 74 (1990), vacated and remanded 440 Mich 238; 487 NW2d 205 (1992).

SUMMARY: An individual was entitled to damages in its libel action where he met his burden of proving that a newspaper incorrectly reported that he was charged with sexual assault and that the identification was by his own children.

35. People v Williams, 179 Mich App 15; 445 NW2d 170 (1989) reversed 434 Mich 894; 453 NW2d 675 (1990).

SUMMARY: Because it urged jurors to do their civic duty by supporting the police, the prosecutor's argument was highly prejudicial. It had the effect of improperly converting the presumption of innocence into one of guilt and constituted reversible error.

36. Krisfalusi v Krisfalusi, 178 Mich App 458; 444 NW2d 196 (1989), reversed 434 Mich 916; 456 NW2d 236 (1990).

SUMMARY: Michigan's usury statute did not apply to property divisions in a divorce. Thus, in an ex-wife's petition to enforce a divorce judgment the circuit court properly ordered the ex-husband to pay the nine percent interest specified in the settlement.

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

Michigan Court of Appeals opinions are issued as per curiam opinions and therefore do not have attribution of authorship for purposes of identifying reversals or criticized unpublished decisions.

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

Approximately 85% of the cases assigned to me are decided by unpublished opinions; however, as noted above, these decisions are issued as per curiam opinions.

All unpublished opinions are filed with the Clerk of the Court of the Michigan Court of Appeals. From 1989-June 1996, unpublished opinions are filed and/or stored in hard copy. From July 1996 to the present date, unpublished opinions are filed and/or stored electronically.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

None

16. **Recusal: If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:**

The Michigan Court of Appeals employs an "automatic" recusal system. The Court has a computerized system in place whereby a judge enters all instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The judge has been consulted or employed as an attorney in the matter in controversy.

(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;
(b) is acting as a lawyer in the proceeding;
(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
(d) is to the judge's knowledge likely to be a material witness in the proceeding.

A list of cases from which I have been automatically disqualified under our system because an attorney or party is on my disqualification list is attached.

a. **whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;**

To the best of my knowledge, my recusal has never been requested by motion or other suggestion by a litigant, party, or other person. All recusals have been sua sponte due to the Michigan Court of Appeals automatic recusal system.

b. **a brief description of the asserted conflict of interest or other ground for recusal;**

Jonathan S. Damon – My husband and I are very close personal friends of Jon and Linda Damon, and I added Jon to my disqualification list to avoid any potential appearance of impropriety.

David A. Neff – My husband.

Janet T. Neff

Lea L. Nabkey – Now deceased. A former legal secretary in the Grand Rapids community who was very litigious over a long period of time. I had continuing or ongoing personal knowledge of disputed evidentiary facts concerning this individual, including having worked on one of her appellate files while a commissioner with the Michigan Supreme Court.

James W. Zerrenner – A former law partner of my husband with whom we retain a social relationship. When his personal divorce was appealed to the Court of Appeals, I recused myself from the case because I was familiar with disputed evidentiary facts and was familiar with both parties. His name was added to my general list of disqualifications, probably in error because my intent was only to recuse from the individual case.

Barbara A. Ruga – My closest personal friend in the Grand Rapids legal community and campaign manager of my first campaign for the Michigan Court of Appeals whose name I added to the disqualification list to avoid the potential appearance of impropriety.

Patricia A. Gardner – A close personal friend who served as the treasurer of my first and second campaigns for the Michigan Court of Appeals whose name I added to the disqualification list to avoid the potential appearance of impropriety.

Robert J. Jonker – One of two other pending nominees to the U.S. District Court for the Western District of Michigan.

Paul L. Maloney – One of two other pending nominees to the U.S. District Court for the Western District of Michigan.

David E. Bevins – A former law clerk with whom I have retained a close personal relationship; I added his name to the disqualification list to avoid the potential appearance of impropriety.

Kathleen Geiger – My current law clerk.

James Azzar v Peter R Tolley – I was familiar with specific facts of this case.

People v Maurice Carter – I was familiar with specific facts of this case.

Thomas M George v Senate Democratic Fund – My husband contributed money to the Senate Democratic Fund.

c. **the procedure you followed in determining whether or not to recuse yourself;**

I followed the procedures outlined in the Michigan Court Rules.

d. **your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.**

To the best of my recollection, no litigant or party has ever requested that I recuse myself. All recusals have been in accordance with the Michigan Court Rules.

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

a. **List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.**

I was an unsuccessful candidate for the Michigan Court of Appeals in 1986.

In 2006, I was nominated to a seat on the U.S. District Court for the Western District of Michigan. The Senate Committee on the Judiciary reported the nomination out of committee with approval to the Senate. The nomination lapsed when the 109th Congress adjourned without taking action on it.

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

I have never had any formal role in a political campaign. I have occasionally supported judicial candidates in nonpartisan campaigns.

18. <u>Legal Career:</u> Please answer each part separately.

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

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

I did not serve as a clerk.

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

I have not practiced alone.

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

1970 Internal Revenue Service
Cadillac Square Building
Detroit, MI 48226
Position: Estate and Gift Tax Examiner

1970-71 Michigan Court of Appeals
Washington Square Building
109 West Michigan Ave.
Lansing, MI 48909-7522
Position: Prehearing Research Attorney

1971-73 City of Grand Rapids
300 Monroe N.W.
Grand Rapids, MI 49503
Position: Assistant City Attorney

1973-78 VanderVeen, Freihofer & Cook
950 Union Bank Building
Grand Rapids, MI 49503
Position: Associate and Partner

1978-80 Michigan Supreme Court
525 W. Ottawa
G. Mennen Williams Building
Lansing, MI 48933
Position: Commissioner

1980 Office of the U.S. Attorney
Department of Justice
P.O. Box 208
Grand Rapids, MI 49501-0208
Position: Assistant U.S. Attorney

1980-88 William G. Reamon, P.C.
161 Ottawa, N.W., Suite 200-C
Grand Rapids, MI 49503
Position: Associate

1989-Present Michigan Court of Appeals
5 Lyon, N.W., Suite 624
Grand Rapids, MI 49503
Position: Judge

b. Describe:

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

After graduation from law school in 1970, I was briefly an Estate and Gift Tax Examiner for the IRS. This position involved review and audit of federal estate and gift tax returns.

1970 - 1971 — I was a Prehearing Research Attorney for the Michigan Court of Appeals. This was a central legal staff position in which I reviewed briefs and lower court records and conducted independent research of cases on appeal, drafting reports for the Court's judges and, often, proposed per curiam opinions.

1971 - 1973 — I was an Assistant City Attorney for the City of Grand Rapids, assigned to the Ordinance Enforcement Division. I prosecuted all manner of ordinance violations, including drunk driving, misdemeanor assaults, housing and zoning violations, and similar cases. I was in the courtroom daily and tried scores of jury and non-jury cases.

1973 - 1978 — I was an associate, and later a partner at Vander Veen, Freihofer and Cook, then one of the largest firms in west Michigan. I was in the litigation group of the firm, which was a general trial practice. My practice included insurance defense, criminal defense, domestic relations, commercial litigation (primarily construction bond defense), products liability defense, bankruptcy and the representation of numerous municipal governments, including Kent County, as well as city and township governments throughout west Michigan. While at the firm, I was appointed a Special Assistant Attorney General and defended two state worker's compensation funds, the Second Injury Fund, and the Silicosis & Dust Disease Fund.

1978 - 1980 — I was a Commissioner of the Michigan Supreme Court. As a staff attorney to the Court, I conducted independent research and review of applications for leave to appeal, motions and administrative matters, writing reports for the Justices and, on request, drafting proposed per curiam opinions. I also was one of two staff attorneys who drafted the comprehensive staff report to the Court which resulted in the publication and adoption of the total revision of the Michigan Court Rules, effective 3/1/85.

1980 — I joined the U.S. Attorney's Office in the Western District of Michigan where I represented the federal government in both criminal and civil cases, working closely with various investigative agencies such as the FBI, the DEA, and the Postal Service. I left to take a position in private practice.

Late 1980 - 1988 — I was with a small personal injury law firm, William G. Reamon, P.C. Our practice was exclusively in the plaintiff's personal injury area. My primary areas of practice were medical malpractice and automobile negligence and no-fault, although I also undertook some product liability and worker's compensation cases.

ii. your typical clients and the areas, if any, in which you have specialized.

1973-78 — My typical clients during this period included insurance companies, municipal governments, criminal defendants, creditors, debtors, business owners, and individuals.

1980-88 — My typical clients during this period included injured individuals who were mostly working people. This was exclusively a plaintiff's personal injury practice and I concentrated my work in medical malpractice, automobile negligence and no-fault, although I also handled other types of liability cases.

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

Approximately 100 percent of my practice was in litigation. I appeared in court regularly during most of my practice before joining the bench in 1988.

i. Indicate the percentage of your practice in:

1. **federal courts;** 20%
2. **state courts of record;** 80%
3. **other courts.**

ii. **Indicate the percentage of your practice in:**
   1. **civil proceedings;** 80%
   2. **criminal proceedings.** 20%

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

I estimate that I tried nearly 300 cases to verdict. In most, I was sole counsel. In a few, I was chief counsel or associate counsel.

i. **What percentage of these trials were:**
   1. **jury;** 70%
   2. **non-jury.** 30%

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

None.

19. **Litigation: Describe the ten (10) 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.**

My litigation practice ended in 1988 when I was elected to the Michigan Court of Appeals; however, following are five significant matters I personally handled during my practice.

1. *Anderson v Volkswagen of America,* unpublished opinion per curiam of the Court of Appeals, issued 10/19/78 (Docket No. 31240).

The plaintiffs were driving a Volkswagen bus when it was struck, head-on by an oncoming car. The driver was killed and the passenger seriously injured. The driver and passenger were an elderly couple. Plaintiffs sued the van manufacturer, Volkswagen of

America, on a theory of crash worthiness because the blunt, front end of the van had no built-in protection for occupants in a head-on collision. The van front collapsed on the occupants from the force of the collision, causing their injuries. This was, to the best of my knowledge, the first case in Michigan tried on a theory of crash worthiness and the first to go to appellate decision. I was co-counsel for defendant, the manufacturer, Volkswagen of America. My responsibilities included drafting all pleadings, briefs, and jury instructions at trial and on appeal. I also handled motion arguments and some trial testimony. Jury verdict for plaintiffs: $150,000. Affirmed on appeal.

a) Dates of trial: 11/19/76
b) Name of the court and judge: Muskegon Circuit Court,
Honorable John H. Piercey
c) Name, address, telephone numbers of counsel and co-counsel:

Co-counsel:
Peter R. Tolley
1700 E. Beltline Ave., N.E., Suite 200
Grand Rapids, MI 49525
(616) 447-1800

Plaintiffs' counsel:
Robert J. Van Leuven
410 Ruddiman Dr.
N. Muskegon, MI 49445
(800) 255-5066

2. *Rush v County of Ionia*, not reported, Ionia Circuit Court, Docket #84-B-9075-NZ.

Plaintiffs purchased property in rural Ionia County. The property provided them with a bluff overlooking a trout stream where they built their home. After completion of the house, the stream below the house became a swamp when a downstream owner built a dam to generate electricity pursuant to a reservation of flowage rights. The abstract of title obtained by the plaintiffs before they purchased the property did not disclose the reservation of flowage rights, which permitted construction of the dam. The cause of action was for negligent preparation of the abstract of title, a novel legal theory in Michigan law. I represented the plaintiffs landowners. I tried the case to jury verdict. Co-counsel drafted pleadings, briefs and instructions. Jury verdict for plaintiffs in the amount of $75,000 which was the exact amount I requested during final argument.

a) Dates of trial: November 1988
b) Name of the court and judge: Ionia Circuit Court, Visiting Judge Paul
O'Connell
c) Name, address, telephone numbers of counsel and co-counsel:

Co-counsel:
Sharon M. Hanlon
Zelman & Hanlon

5633 Naples Blvd.
Naples, FL 34109
(239) 598-3222 (W) (239) 592-6353 (H)

Counsel for Defendants:
William A. Brengle
1700 E. Beltline Ave., N.E., Suite 200
Grand Rapids, MI 49525
(616) 447-1800, ext 467

Robert E. Attmore
13404 Lime Lake Dr.
Sparta, MI 49345
(616) 696-6096

3. *Atlanta Int'l Ins. Co. v Faulkner*, 821 F2d 649 (CA6, 1987) (unpublished decision).

This was a declaratory judgment action by the insurance company on an insurance policy issued to Faulkner, an independent trucker who negligently backed an unlit tractor trailer across a dark rural road. Maria and Gary Schaeffer drove into the unlit trailer positioned across the dark road and were killed instantly. They were survived by three young children. In addition to issues of coverage under the insurance policy, plaintiff claimed that the ICC rules and regulations did not apply, an argument which was rejected by the trial and appellate courts. I represented the personal representative of the decedents' estates. I argued the motion for summary judgment and the appeal in the U.S. Court of Appeals for the Sixth Circuit. I was the primary author of the pleadings and briefs. The U.S. District Court for the Western District of Michigan denied plaintiff's request for declaratory judgment. The U.S. Court of Appeals for the Sixth Circuit affirmed the District Court.

a) Dates of trial: 1985

b) Name of the court and judge: U.S. District Court for the Western District of Michigan, The Honorable Benjamin Gibson, U.S. Court of Appeals for the Sixth Circuit, before Merritt and Martin, Circuit Judges, and Brown, Senior Circuit Judge

c) Name, address, telephone numbers of counsel and co-counsel:

Co-counsel:
Sharon M. Hanlon
Zelman & Hanlon
5633 Naples Blvd.
Naples, FL 34109
(239) 598-3222 (W) (239) 592-6353 (H)

Plaintiff's Counsel:
Arthur W. Brill

151 S. Rose St., Suite 850
Kalamazoo, MI 49007
(269) 343-1338

4. *Beaton & Jackman v Mecosta County General Hosp*, not reported, Mecosta Circuit Court, Docket #85-5817-NM.

Malpractice and assault and battery arising out of actions by registered nurse anesthetist during surgery. Plaintiffs alleged that the individual defendant sexually assaulted them. The facts supporting the theories of recovery were unusual and proofs were difficult because defendant's actions occurred as plaintiffs were being anesthetized. I represented the plaintiffs. I handled all document drafting and court appearances.

a) Dates of trial: The case settled before trial.

b) Name of the court and judge: Mecosta Circuit Court, Honorable Lawrence Root

c) Name, address, telephone numbers of counsel and co-counsel:

Defense Counsel:
Richard B. Gustafson
28 Mallard Cove Ct.
Saginaw, MI 48603
Telephone Unlisted

5. *Saldibar v Community Med Clinic, PC*, not reported, Allegan Circuit Court, Docket #86-8753-NM.

This was a medical malpractice case in which the decedent's cancer went undetected in spite of numerous abnormal PAP smear reports and the presence of cervical polyps. Mrs. Saldibar was survived by her husband and eight children. This was one of a number of obstetrical/gynecological medical malpractice cases I handled. In the 1980's, cases based on medical malpractice in general, and ob/gyn claims in particular, were not commonplace. Experts who were willing to testify for plaintiffs were not readily available. Because of the number of health care providers involved, the delay in detecting the abnormal pap smears and diagnosing the cancer, and the lack of adequate record keeping, it was very difficult to trace responsibility for the medical negligence. The defendants included physicians, a pathology lab, and a non-profit gynecological health care agency, which provided services for low-income women. I represented the plaintiff. Until my election in 1988, I was primary counsel for the plaintiff, drafting pleadings/briefs, conducting discovery and appearing in court for motion hearings and conferences.

a) Dates of trial: Settled by co-counsel after I joined the bench.

b) Name of the court and judge: Allegan Circuit Court, The Honorable George Corsiglia

c) Name, address, telephone numbers of counsel and co-counsel

Co-counsel:

William G. Reamon, Sr. (Deceased)
Sharon M. Hanlon
Zelman & Hanlon
5633 Naples Blvd.
Naples, FL 34109
(239) 598-3222 (W) (239) 592-6353 (H)

Defense counsel:

Thomas R. Fette
720 State St.
St. Joseph, MI 49085
(269) 983-0755

Lester J. Tooman
314 Trowbridge St.
Allegan, MI 49010-0239
(269) 673-2136

Donald Souter
2637 Littlefield Dr., N.E.
Grand Rapids, MI 49506
(616) 949-9373

Peter R. Tolley
1700 E. Beltline N.E., Suite 200
Grand Rapids, MI 49525
(616) 447-1800

William F. Mills
50 Monroe N.W., Suite 700w
Grand Rapids, MI 49503
(616) 235-5500

Richard G. Leonard
161 Ottawa N.W., Suite 600
Grand Rapids, MI 49503
(616) 235-3500

Paul M. Oleniczak
250 Monroe N.W., Suite 200
Grand Rapids, MI 49503
(616) 458-5461

20. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)**

While an associate at VanderVeen, Freihofer & Cook, I drafted the first affirmative action policy for Kent County.

Because my legal practice before I was elected to the Michigan Court of Appeals was almost exclusively trial/litigation oriented, I cannot point to other significant matters that did not involve litigation. Since my election in 1988, all of my work has involved review of litigated matters.

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

None.

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

None.

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

No.

24. **Sources of Income: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, 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.

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

    See attached Net Worth Statement.

26. **Potential Conflicts of Interest:**

    a. **Identify the parties, 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. Explain how you would address any such conflict if it were to arise.**

    As a Judge on the Michigan Court of Appeals, I maintain a list that is used to avoid actual or potential conflicts of interest. This list identifies parties who are related, close personal friends, attorneys, and financial interests. I follow the procedures established by the Michigan Court of Appeals regarding recusal and avoiding conflicts. (See Question 16). I do not anticipate any additional parties, categories of litigation, or financial arrangements that are likely to present potential conflicts-of-interest during my initial services as a United States District Judge, should I be confirmed.

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

    In resolving any conflicts of interest, I will comply with the Ethics Reform Act of 1989, 28 USC 455, and 28 USC 144, addressing the disqualification of judges, the Code of Conduct for United States Judges, and all other applicable requirements.

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

For a number of years, when my children were in elementary and middle school, my primary volunteer work involved their school and sports activities. I continued these activities after they entered high school, but was also able to resume other pro bono and community volunteer activities.

I have participated several times as a panelist on "Ask the Lawyers" a public interest TV program sponsored by the Grand Rapids Bar Association and was an organizer and participant in a program called "The Peoples' Law School", also sponsored by the Grand Rapids Bar Association.

I have served on numerous bar association committees, task forces, and groups, both formal and informal. For instance, in 1988 I was very active in the activities of the Grand

Rapids Bar Association to support a ballot proposal to build a new Kent County jail. I am an annual contributor to the Grand Rapids Bar Association Pro Bono program, which supports the provision of free legal services throughout Kent County.

I have served on the Boards of Directors of the Easter Seal Society, the Women's Resource Center, Junior Achievement and the United Way of Kent County as well as on the Board of Trustees of the Winchester Scholarship Fund. I have been a member of the YWCA Nominating Committee and the Committee of Visitors of the Wayne State University Law School.

From 1988-91, I was a faculty member of the Federal Trial Skills Work Shop, Federal Bar Association, Western District of Michigan.

In 1995, I co-chaired Women Building the Dream, a committee of Habitat for Humanity of Kent County, which constructed Michigan's first house built entirely by women. I worked on the construction of the house and several others. In 1996, our group constructed a second house built entirely by women, and in 2000, participated in the Kent County "First Lady's Build", a project of Habitat for Humanity which resulted in construction of a house in each of the 50 states under the sponsorship of women governors and first ladies.

I was a member of the Board of Governors of the Grand Rapids Masonic Children's Learning Center, which provides one-on-one tutoring for dyslexic children at no cost to them or their parents/guardians. This is a national program in which the Masonic order has opened centers around the country to address dyslexia, a serious learning disability.

I am not a mason or member of a related order.

I am currently a member of the Grand Rapids Bar Association's Diversity Committee which seeks to attract and maintain a diverse legal community of attorneys, paralegals, legal secretaries, and support staff in the Greater Grand Rapids area.

28. **Selection Process:**

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

There is no selection commission that I am aware of and none that recommended me for this nomination. When I learned of a potential compromise between the

current administration and Michigan's two senators to make progress in filling current vacancies on the district court, I contacted Senator Levin and Senator Stabenow to express my interest in the nomination. They decided to submit my name to the White House Counsel's office for consideration, and on 4/27/06, I sat for an interview with members of the White House Counsel's office and the Department of Justice. Since then I have had numerous contacts with members of the Department of Justice's Office of Legal Policy, and with members of the White House Counsel's Office regarding the completion of nomination paperwork and the nomination process. I have also spoken briefly with Senator Levin. A hearing on my nomination was held on September 19, 2006. My nomination was returned to the President on December 19, 2006. I was renominated on March 19, 2007.

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

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) Neff, Janet T	2. Court or Organization US Dist Ct Western Dist of MI	3. Date of Report 3/19/2007
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge, Nominee	5. ReportType (check appropriate type) (●) Nomination, Date 3/19/2007 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2006 to 2/28/2007
7. Chambers or Office Address 330 Ionia Ave., N.W., Ste 201 Grand Rapids, MI 49503	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.	Successor Trustee	Trust I
2.		

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1989	Michigan Judges Retirement System-Pension upon Retirement from Michigan Court of Appeals

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Neff, Janet T	3/19/2007

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.	2005	State of Michigan	$153,211
2.	2006	State of Michigan	$153,993
3.	2007	State of Michigan (to 2/22/07)	$28,298
4.	2005	Trust #1	$30,000
5.	2006	Trust #1	$48,000
6.	2005	American Investors Life	$14,119
7.	2005	Transamerica	$13,470
8.	2005	Hartford Life Insurance	$3,800

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	State of Michigan Pension
2.	2007	State of Michigan Pension

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Neff, Janet T	3/19/2007

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
	Neff, Janet T	3/19/2007

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
Neff, Janet T	3/19/2007

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. U.S. Treasury Bonds	A	Interest	L	T	Exempt				
2. 401 K - Dodge & Cox, Columbia Acorn, Europacific Growth	A	Dividend	O	T	Exempt				
3. 401 K - Continued - STI Small Cap Value Fund									
4. 457	A	Dividend	L	T	Exempt				
5. Trust #1	A	Distribution	L	T	Exempt				

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 = $250,001-$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 = Above 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
	Neff, Janet T	3/19/2007

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Neff, Janet T	3/19/2007

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 Janet T Neff Date 3/20/07

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		6	000	Notes payable to banks-secured			
U.S. Government securities-add schedule		70	000	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		20	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		280	041
Real estate owned-add schedule		450	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		125	000				
Cash value-life insurance							
Other assets itemize:							
401K		538	877				
457 Account		58	278				
Individual Retirement Account				Total liabilities		300	041
				Net Worth		948	114
Total Assets	1	248	155	Total liabilities and net worth	1	248	155
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

U.S. Government Securities Series EE Bonds	$ 70,000
Real Estate Owned Personal residence	$ 450,000
Real Estate Mortgages Payable Personal residence	$ 280,041

AFFIDAVIT

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

4/17/07
(DATE)

(NAME)

Joyce L. Conatser, Notary Public
State of Michigan, County of Ottawa
My Commission Expires 5/26/2011
Acting in the County of Kent

(NOTARY)

Senator WHITEHOUSE. Thank you.

Judge O'Grady? Before you say anything, I want you to know that I've done a little bit of homework on you.

Judge O'GRADY. You have?

Senator WHITEHOUSE. You were an Assistant U.S. Attorney in the Eastern District of Virginia.

Judge O'GRADY. I was.

Senator WHITEHOUSE. And you served at the time that I served as U.S. Attorney for Rhode Island.

Judge O'GRADY. And I knew that about you, Mr. Chairman.

Senator WHITEHOUSE. So I know your former boss, Helen Feahy.

Judge O'GRADY. All right.

Senator WHITEHOUSE. And as part of my due diligence as the Chairman of this committee, this panel, I gave her a call yesterday to check you out. Her reaction was quite impressive. She essentially burst out, saying, "Oh, he'd be a wonderful judge." And then she went on to say how conscientious you had been as Assistant U.S. Attorney, how hardworking you had been, what an asset you had been to the office, how valuable you were as a member of her staff.

And in addition, she also said that you were one of the nicest people she'd had the occasion to work with in a position where being nice isn't always part of the job description, and that you were viewed with great affection by your colleagues as a very kind and thoughtful person. So, it was a wonderful series of accolades and I thought I should pass those on to you now where they can be a part of the record of this proceeding.

Judge O'GRADY. Well, I'm very thankful that you made that call.

Senator WHITEHOUSE. Glad it worked out that way.

STATEMENT OF LIAM O'GRADY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Judge O'GRADY. I happen to feel the same way about Ms. Feahy. She was a wonderful U.S. Attorney. We were Assistant Commonwealth Attorneys together in Arlington County, and then followed and supported each other during our careers. I very much believe the way that she practiced law was an appropriate way to practice law. So, we are both in each other's camps, and have been for many, many years.

I'd like to thank you, sir, and other members of the committee, Senator Brownback, for graciously granting me the opportunity to come here today. I know that your staffers have worked very hard as well. As Judge Neff has said, it's a wonderful honor to get this far and to be here today. It's a privilege.

I realize that you take your jobs very seriously, and it's extremely important to you and to the entire Senate that you choose the right people for these very important positions. Again, I thank you for the opportunity to appear here today.

[The biographical information of Judge O'Grady follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Liam O'Grady

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

   United States District Judge, Eastern District of Virginia

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

   401 Courthouse Square
   Alexandria, VA 22314

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

   1950, Newark, NJ

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   Grace McPhearson O'Grady
   Homemaker
   4 dependent children

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

   George Mason University School of Law, 1973-1977, J.D. 1977

   Franklin & Marshall College, 1968-1973, B.A. 1973

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee

since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

02/03 – Present
U.S. District Court, Eastern District of Virginia, 401 Courthouse Square, Alexandria, VA 22314, U.S. Magistrate Judge

10/92 – 02/03
Finnegan, Henderson, Farabow, Garrett, & Dunner, LLP, 901 New York Ave, NW, Washington, DC 20001, Partner

06/86 – 10/92
Department of Justice, U.S. Attorneys Office, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, VA 22314, Assistant U.S. Attorney

1986 – 1994
George Washington University, Columbia Graduate School, 2121 Eye Street, NW, Washington, DC 20052, Adjunct Professor

06/82 – 06/86
Office of the Commonwealth's Attorney, 1425 North Courthouse Road, Suite 5200, Arlington, Virginia 22201, Assistant Commonwealth's Attorney

09/79 – 06/82
Private Practice, 2055 15th Street North and 3426 North Worthington Blvd., Suite 200, Arlington, Virginia 22201, General Practitioner

1976 - 09/79
Department of Interior/Department of Labor, 800 K St., NW, Suite 400 North, Washington, DC 20001, Attorney Advisor and Law Clerk to Administrative Law Judge George Koutras

02/75 – 08/75
Charles C. Parsons & Associates Law Firm, 126 C Street, NW, Washington, DC 20001, Part-Time Law Clerk

12/73 – 02/75
United Mine Workers of America, 8315 Lee Highway, Fairfax, VA 22031, Welfare & Retirement Fund, Pension Examiner

12/73 – 12/74
University Legal Services/Catholic Community Services, 924 G Street, NW, Washington, DC 20001, Part-Time Law Student Advisor

06/73 – 08/73
Headings, Inc. (formerly Headings & Schroeder), R.R. #1, Manheim, PA 17545, Tree Trimmer

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

   None

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

   None

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

    American Bar Association, Federal Bar Association, George Mason Inns of Court, American Intellectual Property Law Association (AIPLA), Virginia State Bar, District of Columbia Bar and Arlington County Bar Association

11. **Bar and Court Admission**:

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

       Virginia State Bar, 1978.

       District of Columbia Bar, 2001.

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

       Commonwealth of Virginia, 1978; Fourth Circuit Court of Appeals, 1986; District of Columbia, 2001; District of Columbia Court of Appeals, 1999; admitted *pro hac vice* to the following courts; N.D. California, 1995; E.D. Tennessee, 1993; S.D. New York, 1996; S.D. Florida, 1998; E.D. Texas, 1997.

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

McLean Youth Soccer, Coach, 2002 to Present
Reston Raider Youth Hockey Club, Volunteer, 2004 to Present
St. James Catholic Church, Falls Church, VA, Parishioner, 1982 to Present
Catholic Information Center, Washington, D.C., Parishioner, 1996-2003
Washington Golf and Country Club, 2003 to Present
Chesterbrook Swim Club, 2002 to Present

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I do not and have not ever belonged to an organization that discriminates on the basis of race, sex or religion.

13. **Published Writings and Public Statements**:

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

"A Whirlwind Ride on the Rocket Docket" *1995 issue* Annual Litigation Supplement of *Managing Intellectual Property*

(2) Federal Rules of Evidence publications for Attorney General Advocacy Institute, Department of Justice, circa 1989-1990

No copies were located.

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If

you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I have reviewed and contributed legal text to bar associations CLE's, but all have been drafted by other participants. None involved policy statements, but instead were limited to various discovery and patent issues.

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

None

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

University of Virginia School of Law, Trial Advocacy Institute, January 2001-2003; 2007

S. Lefkowitz Federal Circuit Moot Court Competition Judge, March 2003, 2004, 2005, 2006

Federal Bar Association, Discovery CLE, May 2003

Alexandria Bar Association, Federal Practice CLE, September 2003, 2004, 2005

Eastern District of Virginia Judges Conference, Panel Discussion, October 2003

Asian Pacific American Bar Association Intellectual Property Seminar, October 2003

International Judicial Academy, Intellectual Property Seminar, March 2004, May 2004, December 2005

Fairfax Bar Association, TRO/Preliminary Injunction CLE, April 2004
American Law Institute-American Bar Association, Trial of a Patent Case, September 2004, 2005, 2006

Virginia State Bar, Intellectual Property CLE, October 2004

ITC Trial Lawyers Association, Panel Discussion, November 2004

Howard University School of Law, Intellectual Property Seminar, October 2005

Waseda Institute for Corporate Law and Society, Patent Law Presentation, October 2005

Korean Electronics Association, Patent Law Presentation, October 2005

Patent Strategies Incorporated Conference, Panel Discussion, March 2006

Moot Court Judge, George Mason University School of Law, 2005-2006

Moot Court Judge, Georgetown University Law Center, 2006

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

None

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.

February 2003 – Present
United States Magistrate Judge, United States District Court, Eastern District of Virginia, Alexandria Division
Appointed by District Judges, Recommended by Merit Selection Panel

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

a. citations for all opinions you have written (including concurrences and dissents);

None

b. a list of cases in which certiorari has been requested or granted;

None

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

None

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

In the Matter of the Extradition of Wilmer Yarleque Ordinola, Case No. 1:04mg315

I was reversed by U.S. District Judge Gerald B. Lee in the above-styled extradition. Judge Lee disagreed with my finding that political offense exception did not apply to the facts of the case. The case is pending before the 4th Circuit Court of Appeals at this time.

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

None

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

None

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

None

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None

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

I acted as a volunteer and back-up surrogate speaker for Senator John Warner during his 1984 Senatorial Campaign and Arlington County Commonwealth Attorney Henry E. Hudson during his 1984 Re-Election Campaign.

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

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

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

I served as a student law clerk and attorney advisor to Administrative Law Judge George Koutras in the Department of Interior/Department of Labor from 1976 to September 1979.

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

I practiced alone from 09/79 to 06/82.
2055 15th Street North and 3246 North Washington Blvd., Suite 200, Arlington, VA 22201

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

02/75 – 08/75
Charles C. Parsons & Associates Law Firm, 126 C Street, NW, Washington, DC 20001, Part-Time Law Clerk

06/82 – 06/86
Office of the Commonwealth's Attorney, 1425 North Courthouse Road, Suite 5200, Arlington, Virginia 22201, Assistant Commonwealth's Attorney

06/86 – 10/92
Department of Justice, U.S. Attorneys Office, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, VA 22314, Assistant U.S. Attorney

10/92 – 02/03
Finnegan, Henderson, Farabow, Garrett, & Dunner, LLP, 901 New York Ave, NW, Washington, DC 20001, Partner

02/03 – Present
U.S. District Court, Eastern District of Virginia, 401 Courthouse Square, Alexandria, VA 22314, U.S. Magistrate Judge

b. Describe:

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

02/75 – 08/75
Law Clerk – I reviewed pleadings, performed research and wrote memorandum for the Charles C. Parsons & Associates Law Firm while going to law school at night.

1976 – 09/79
Attorney Advisor and Law Clerk - I went to night school and worked as a Law Clerk and then Attorney Advisor for Administrative Law Judge George Koutras full-time. Judge Koutras handled coal mine safety issues for the Department of Interior and the Department of Labor, and I reviewed pleadings, performed research, attended hearings, wrote memorandum, and drafted decisions.

09/79 – 06/82
Private Practice – I entered private practice as a sole practitioner and shared office space with several other new attorneys. I took criminal cases appointed to me by the Arlington County Court as well as civil cases from the Lawyer Referral Service. While in private practice I did domestic

relation cases, real estate closings, bankruptcy proceedings, a full-range of criminal cases and general civil disputes.

06/82 – 06/86
Assistant Commonwealth's Attorney – I was the liaison to the Robbery/Homicide squad at the police department, and handled many of the homicide cases brought. I also tried several serial rapist cases as well as many narcotics cases. I had upwards of one hundred jury trials and untold non jury trials. During my last year I was one of two Deputies with supervisory authority.

06/86 – 10/92
Assistant U.S. Attorney - I was Chief of the Narcotics Section and Organized Crime Drug Task Force for four years and Acting Chief of the Criminal Division for one year. I tried many cases, including large drug conspiracies with drug related homicides, and supervised a section with ten Assistant U.S. Attorneys also working on drug cases. I also supervised the Washington Metropolitan Drug Task Force and the Crack Task Force. As acting Chief I supervised the criminal cases for the whole district.

10/92 – 02/203
Partner, Finnegan, Henderson - I was a first chair litigator at this large Intellectual Property firm, and handled patent, trademark, copyright, and trade secret cases for Fortune 500 clients in courts around the country, and in foreign countries as well. I was also one of three hiring partners, where I concentrated on lateral hires.

ii. your typical clients and the areas, if any, in which you have specialized.

As mentioned above, during my early years in private practice my clients included indigent and non-indigent defendants charged with criminal offenses in state and federal courts, and members of the community with general civil disputes, domestic relations disputes and bankruptcy and real estate matters.

As an Assistant Commonwealth's attorney and an Assistant U.S. Attorney I represented the victims of crime, whether individual victims of crime or crimes against the Commonwealth and the U.S. These crimes included murder, sexual assault, robberies, burglaries, narcotics trafficking, racketeering, white collar crime and fraud.

While at Finnegan, Henderson, my clients were predominantly Fortune 500 Companies such as Sony Corporation, Goodyear Corporation, Elan Corporation, Genzyme Corporation, Hyundai Electronic Corporation, SmithKline Beechem Corporation, Bauer

Corporation, and Northern Telecom Corporation. I specialized in Patent, Trademark, Copyright and Trade Secret cases.

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

I appeared in court continually from 1979 through 1992 on almost a daily basis. I have handled well over 100 criminal and civil jury trials as first chair, and have tried countless non-jury cases. From 1993 to 2003, while at the law firm of Finnegan, Henderson, I appeared in court every few weeks, with my longest trial taking six weeks.

i. Indicate the percentage of your practice in:
   1. federal courts; 50%
   2. state courts of record; 50%
   3. other courts.

ii. Indicate the percentage of your practice in:
   1. civil proceedings; 50%
   2. criminal proceedings. 50%

d. 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 over 100 cases before a jury to verdict as lead counsel, the vast majority as sole counsel. I have served both as associate counsel and lead counsel in 5-10 complex patent cases that went through trial, and many more that settled.

i. What percentage of these trials were:
   1. jury; 90%
   2. non-jury. 10%

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

None

19. **Litigation**: Describe the ten (10) 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) *U.S. v. Akkaya, et al.* Case No. 1:90-cr-00139-Hon. Claude M. Hilton (E.D. Va.)

In this case, after a lengthy investigation by the FBI, eight defendants were indicted for conspiracy to import and distribute as much as one hundred kilograms of heroin. I was lead counsel for the U.S. during the investigation and tried and convicted the lead defendant, Bekir Vural on all counts, and he received a sentence of twenty-five years in the penitentiary. Counsel for the defendant was John Rand, 221 South Fayette Street, Alexandria, VA 22314, 703/548-7480.

2) *U.S.A. v. Tabar* Case No. 1:89-cr-00085-Claude M. Hilton (E.D. Va.)

I was lead counsel for the U.S. in this investigation where 16 defendants were convicted of conspiracy to import and distribute hundreds of kilograms of cocaine into the EDVA. This investigation was conducted by a DEA lead joint task force of local and federal enforcement officers and employed court approved wire traps as a well as undercover operatives. Three defendants were convicted under the Career Criminal Enterprise statute and received twenty years or greater length sentences to serve. I was lead counsel for the trial of the one defendant who did not plead guilty, and he was found guilty.

3) *Genzyme Corporation, et al. v. Atrium Medical Corporation*
Case No. 00-958-RRM (D. Del.)

I was lead counsel in this patent infringement lawsuit brought by Genzyme against Atrium. The lawsuit involved medical devices protected by six Genzyme patents, and whether a competitor infringed them by manufacturing and selling competing medical devices. After a significant period of discovery, where I deposed many of the key witnesses and handled pretrial motions including the claim construction hearing, the case was tried to a jury in a three week trial. I was lead counsel at trial, making the opening and closing arguments and questioning and cross-examining many of the witnesses. The jury ruled against Genzyme, and the dispute was settled while the case was on appeal. Atrium was represented by William F. Lee of WilmerHale, 60 State Street, Boston, MA 02109, 617/526-6556.

4) *Drexler Technology Corporation v. Sony Corporation, et al.*
Case No. C98-02936 MMC (N.D. Cal.)

I was lead counsel for Sony in the defense of a patent infringement lawsuit filed by Drexler. The technology concerned the "SDDS" sound system used by Sony in synchronizing the audio and visual features of a movie recording for use in the Sony movie theatres. I was heavily involved in the discovery process and successfully argued both the claim construction hearing and then the granted Summary Judgment Motion before the court. The case settled while on appeal. Drexler was represented by Ronald J. Schutz of Robbins, Kaplan, Miller & Ciresi, LLP, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402, 612/349-8500.

5) *Elan Corporation, PLC v. Andrx Pharmaceuticals, Inc.*
Case Nos. 98-7164-CIV-JORDAN; 00-7057-CIV-JORDAN (S.D. Fla.)

I was lead counsel in this lawsuit filed by Elan to prevent a generic manufacturer from entering the market with a competing extended release ibuprofen product before Elan's patent had lapsed. I was involved in discovery, pretrial hearings and the almost four week trial. The trial judge ruled that the patent was unenforceable, but was reversed by the Court of Appeals for the Federal Circuit. The case was remanded and is still pending before the court.

6) *U.S.A. v. Murrell, et al.* Case No. 1:90-cr-00102-Hon. Claude M. Hilton (E.D. Va.)

In 1989 the Alexandria Police Department SWAT team responded to a report that a gunman was holding hostages in a townhouse complex. Although the hostages escaped unharmed, the gunman killed one police officer at the scene and seriously wounded another, before being killed himself. An investigation revealed that the gunman had been sent to collect a drug debt or kill the inhabitants of the townhouse, who were selling crack cocaine from the residence. Four defendants were indicted on drug distribution, firearms violations and racketeering charges for supplying the townhouse with crack cocaine and sending the gunman into the house to collect the outstanding drug debt. I was lead counsel during the investigation and trial of the one defendant who did not plead guilty. Mr. Henderson was convicted of almost all counts by the jury and received eight life sentences. Counsel for Mr. Henderson was James C. Clark of Land, Clark, Carroll, Mendelson & Blair, PC, 524 King St., P.O. Box 19888, Alexandria, VA 22320-0888, 703-836-1000.

7) *U.S.A. v. Fuentes, et al.* Case No. 1:89-cr-156-Hon. T.S. Ellis, III (E.D. Va.);
U.S.A. v. Tanner, et al. Case No. 1:89-cr-184-Hon. T.S. Ellis, III (E.D. Va.)

This case involved a large cocaine conspiracy in the Northern Virginia Metropolitan area. After a lengthy investigation by DEA and a multi-agency task force, sixteen defendants were indicted on narcotics and money laundering offenses. The organization was responsible for distributing over 500 kilograms of cocaine and laundering millions of dollars. After many pre and post indictment pleas, nine defendants went to trial by jury and all were convicted of the most serious offenses. Two defendants, Alfredo Martinez-Cabre, the South American supplier of the cocaine, and Roberto Fuentes, head of the distribution organization in the DC

metropolitan area, were convicted of the Career Criminal Enterprise counts and received twenty year penitentiary sentences. This case was one of the first to employ money laundering statutes in a narcotics conspiracy. I was lead counsel in the investigation and trial with co-counsel Jay Apperson heavily involved in all aspects of the investigation and also trial. Lead defense counsel was Jack S. Rhodes of Cake & Rhoades, PC, 120 North Alfred Street, Alexandria, VA 22314, 703/549-8181.

8) *Hyundai Electronics Industries Co., Ltd., et al. v. Siemens Aktiengesellschaft, et al.* Case No. C-99-20860 JW (PVT) (N.D. Cal.); *Hyundai Electronics Industries Co., Ltd., et al. v. Siemens AG, et al.* Case No. 1:00-cv-00396-Hon. Leonie M. Brinkema (E.D. Va.)

This patent dispute literally covered the globe, with civil suits filed in the ED Va., N.D. Cal., Italy, Germany, England and Korea. The disputes centered around patent rights to the method of manufacturing and the composition of memory chips (DRAMS and SDRAMS) for computers and other electronics. I was lead counsel for Hyundai in the cases in N.D. Cal. and E.D. Va., where twenty–three patents were asserted collectively by the parties. I worked with over twenty able co-counsel and two other law firms in the U.S. actions. The E.D. Va. Case became the center of activity, as trial would take place first there, and the case was aggressively litigated by the parties, with weekly contested hearings taking place for many months. A very favorable global resolution for Hyundai was reached by the parties on the eve of the E.D. Va. Trial. Siemens was represented by John M. Desmarais of Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, NY 10022, 212/446-4739.

9) *Commonwealth v. James Leon Johnson,* Case No. C-22171-74 Arlington County Circuit Court, Hon. William L. Winston

This defendant was indicted for the murder and robbery of a young adult female English citizen working in downtown Washington, D.C. The victim was found strangled in her bathtub many hours after the crimes were committed, hampering the investigation. I was the lead counsel on the case, and after a lengthy jury trial, the defendant was convicted and received two life sentences. The defendant was not eligible for the death penalty at that time for these crimes. The evidence was circumstantial, based on recent possession of jewelry taken from the victim, as well as hair comparisons and rug fibers analyzed, with forensic experts testifying for both sides. Defense counsel was Carl Womack, now retired.

10) *U.S.A. v. Harold J. Nicholson* Case No. 1:96-cr-00448-Hon. James C. Cacheris (E.D. Va.)

I represented Harold Nicholson, the highest ranking CIA agent ever accused of espionage, along with co-counsel Jonathan Shapiro, in this case. Mr. Nicholson was indicted for turning over National security classified information to the Russians. This case required the review of many highly classified documents and there were a significant number of pretrial hearings. Mr. Nicholson plead guilty to espionage after

the government and the Court agreed to a twenty-two year penitentiary sentence. The U.S. was represented by U.S. Attorney Helen Fahey, now Chairperson of Virginia Parole Board, 703/528-1741 and Assistant U.S. Attorney Robert C. Chesnut, now V.P. and Deputy General Counsel with ebay, Inc., 408-712-0192.

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Other than representing the members of my community to the best of my ability during my career, my most significant legal activity and my avocation has been teaching the law to forensic science students, and mentoring other lawyers. After my own stumbling start to my legal career, where I lacked a mentor and failed to properly represent some of my clients, I made it a goal to help as many other young lawyers as I could. As a prosecutor I mentored many young lawyers in the EDVA and taught several courses for several years at the Attorney General's Advocacy Institute. I am very proud that an annual award given to the Assistant U.S. Attorney in the EDVA who devotes the most time to mentoring fellow Assistant U.S. Attorneys bears my name. While at Finnegan, Henderson, I continued to mentor young lawyers on virtually a daily basis.

I also enjoyed immensely the opportunity to teach courses in Criminal Law and Procedure, Rules of Evidence and Trial Advocacy, to hundreds of students over more than eight years at the George Washington University Columbia Graduate School for Forensic Sciences.

The opportunity to educate students with science backgrounds on how their scientific knowledge could be used responsibly and ethically in a legal setting within the criminal justice system was very rewarding. Our final exam in the Trial Advocacy Class required the students to qualify and testify as experts in a field of forensic science in a courtroom with a judge presiding. These judges, who included many magistrate judges, district judges and even the late Chief Justice Rehnquist, would always end our "exam" by discussing the importance of the role of an expert in our system of justice, and how critical it was for the students to remain honest, independent, and ethically responsible.

I have also lectured on several occasions, including last week, at the National Trial Advocacy College at the University of Virginia, a course held annually in early January at the University of Virginia School of Law, while its own law students are on break. It is an eight day intensive trial advocacy course of national renown devoted to training both inexperienced and experienced lawyers. Through teaching, demonstrating and practicing, the course develops the trial skills of the students at an amazing pace, through the extraordinary work of the accomplished lawyers, professors and judges who freely devote their time and experience to the school and the students.

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

    George Washington University Graduate School of Forensic Science, 1985 to 1995
    Assistant Professorial Lecturer in Evidence, Criminal Law and Procedure, and Trial Advocacy

    University of Virginia Trial Advocacy Institute, 2001 to Present

    George Mason University School of Law
    Guest Lecturer, Criminal Procedure, Trial Advocacy and Patent Trial Practice

    Frequent lecturer to Federal Bar Association, American Law Institute-American Bar Association courses, George Mason University School of Law and Howard University School of Law on federal procedure and patent issues

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

    None

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

    None

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

    Please see attached Financial Disclosure Report

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

    Please see attached Net Worth Statement

26. **Potential Conflicts of Interest**:

a. Identify the parties, 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. Explain how you would address any such conflict if it were to arise.

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

During the last three years as a Magistrate Judge, I have adopted the multi-tiered conflict check procedures recommended by the Administrative Office. First, conflicts are checked when a case is filed by the Clerk's Office personnel using a list of stocks held by me and my immediate family. Then an automated system for conflicts check is run by my judicial assistant. I also personally check each case assigned to me once the parties file their individual ownership disclosures, which I receive in chambers. If a conflict is presented to me, I recuse myself and the case is reassigned. I do not believe there are any remaining categories of litigation or financial arrangements that would present a potential conflict of interest.

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

I have been involved in serving the disadvantaged at many stages in my career. I began by spending a year at University Legal Services, now Catholic Community Services, as a volunteer law student, where I assisted needy D.C. residents in a number of ways including drafting wills and contracts, representation in Landlord and Tenant Court, and Small Claims Court. The representation of tenants at hearings before the Landlord and Tenant Court was most rewarding. I believe I worked twelve to fifteen hours per week during the law school year.

While in private practice from 1979 to 1982, I represented many indigent defendants in Northern Virginia courts, state and federal. While I was compensated by the Commonwealth of Virginia for these criminal cases, the payment was far below my normal hourly rate, and I did the work to assist the needy in the community while also gaining courtroom experience. I also handled civil matters through the Arlington County Legal Referral Service. Many if not most of those represented in these civil matters were unable to afford counsel and, as a result, much of this work was done on a pro bono or severely reduced fee

basis. These criminal and civil cases represented perhaps half of my caseload during these three years.

While an Assistant Commonwealth's Attorney from 1982 to 1986, I spoke regularly with members of Arlington's low income communities about how law enforcement and the Commonwealth's Attorney Office could assist them with a myriad of problems, including victims' rights. I do not recall how regularly these community meetings were held but they certainly occurred quarterly.

While an Assistant U.S. Attorney, I continued to meet with Northern Virginia low income communities as just related. I also participated as an invited speaker at several Close Up Foundation educational seminars during my years as an Assistant U.S. Attorney, and have scheduled a lecture with Close Up this Spring.

I began setting up a pro bono clinic at Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, soon after arriving in 1992. At first, I took court-appointed cases myself and invited young lawyers to assist in these representations without petitioning for fees. This served the dual purpose of mentoring young lawyers and helping the needy. After several years, I was instrumental in bringing on a full-time lawyer to run a pro bono clinic at the firm, and thereafter helped only in an out of court mentorship role for many of the participants.

While at Finnegan, Henderson and also up to today, I have volunteered my non-legal services and contributed significant amounts of money to several organizations assisting the needy, including S.O.M.E., D.C. Central Kitchen, Children's Hospital, Capital Area Food Bank, Catholic Information Center, St. James Church and Habitat for Humanity.

27. **Selection Process**:

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

Senators Warner and Allen requested that all candidates wishing to be considered for this district judgeship be rated by the state and local bar associations. Nine bar groups came forward, including the Virginia State Bar, the Virginia Bar Association, the Virginia Association of Defense Attorneys, the Virginia Trial Lawyers Association, the Northern Virginia Black Bar Association, the Old Dominion Bar Association, the Hispanic Bar Association, the Pacific-Asian Bar

Association, and the Alexandria Bar Association, and each required questionnaires be filled out and conducted personal interviews. I received the highest recommendation handed out by each of these bar associations.

The Senators reviewed the bar recommendations, conducted independent investigations, and interviewed each of the candidates. The names of five candidates were then forwarded by the Senators to the White House and Department of Justice, which conducted its own investigations and interviewed each candidate. I was selected from that group.

Following a background investigation, my name was submitted to the Senate by the President on August 2, 2006. My nomination was returned to the President on December 9, 2006. I was renominated on January 9, 2007.

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

No

AO 10
Rev. 1/2006

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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

1. Person Reporting (last name, first, middle initial)	2. Court or Organization	3. Date of Report
O'Grady, Liam	U.S. District Court, EDVA	01/11/2007
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5a. Report Type (check appropriate type)	6. Reporting Period
District Judge Full-Time	[X] Nomination, Date 01/09/2007 [ ] Initial [ ] Annual [ ] Final 5b. [ ] Amended Report	01/01/2006 to 12/31/2006
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. Reviewing Officer_____ Date_____	
401 Courthouse Square Alexandria, VA 22314		

***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.)*

[X] NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

[X] NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 12	Name of Person Reporting O'Grady, Liam	Date of Report 01/11/2007

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

A. Filer's Non-Investment Income

[X] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			
5.			

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

[X] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		
5.		

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

[ ] NONE *(No reportable reimbursements.)*

	SOURCE	DESCRIPTION
1.	EXEMPT	
2.		
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT Page 3 of 12	Name of Person Reporting O'Grady, Liam	Date of Report 01/11/2007

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

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	
2.			
3.			
4.			
5.			

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

☒ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 12

Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 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)	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)
1. Suntrust Money Market	A	Interest	J	T	Exempt				
2. Suntrust IRA	A	Interest	J	T					
3. Wachovia IRA	A	Interest	J	T					
4. The Vanguard Group	D	None	M	T					
5. Angevine & Partners Hedge Fund	D	Interest/ Div	L	T					
6. Brokerage Account #1:									
7. Aflac Inc. Stock	A	Dividend	K	T					
8. Abbott Labs Stock	A	Dividend	J	T					
9. American Express Stock	A	Dividend	J	T					
10. AIG Stock	A	Dividend	J	T					
11. Anheuser Busch Stock	A	Dividend	J	T					
12. ADP Inc.	A	Dividend	J	T					
13. Alberto Culver Stock	A	Dividend	K	T					
14. Alcoa Inc.		None	J	T					
15. Cintas Corp. Stock	A	Dividend	K	T					
16. Citigroup Stock	A	Dividend	J	T					
17. Colgate Stock	A	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 =$250,001 - $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
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Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 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)	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)
18. Dover Corp. Stock	A	Dividend	J	T					
19. Raymond James & Associates Money Market	A	Interest	K	T					
20. Exxon Mobil Stock	A	Dividend	J	T					
21. Exxon Mobil Stock	A	Dividend	J	T					
22. Fedex Corp. Stock	A	Dividend	J	T					
23. Gannett Corp Stock	A	Dividend	J	T					
24. General Dynamics Stock	A	Dividend	J	T					
25. General Electric Stock	A	Dividend	J	T					
26. Home Depot Stock	A	Dividend	J	T					
27. Intel Corp Stock	A	Dividend	K	T					
28. IBM Stock	A	Dividend	J	T					
29. Johnson & Johnson Stock	A	Dividend	J	T					
30. Biomet Inc. Stock	A	Dividend	J	T					
31. Lowes Companies Stock	A	Dividend	K	T					
32. MBNA Stock	A	Dividend	J	T					
33. Marriott Intl Stock	A	Dividend	J	T					
34. McGraw-Hill Stock	A	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 =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	P3 =$25,000,001 - $50,000,000	R =Cost (Real Estate Only)	P4 =More than $50,000,000	T =Cash Market	
	Q =Appraisal	V =Other	S =Assessment		
	U =Book Value		W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 12	Name of Person Reporting O'Grady, Liam	Date of Report 01/11/2007

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

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from 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)
35. Medtronic Inc Stock	A	Dividend	K	T					
36. Illinois Tool Works Stock	A	Dividend	K	T					
37. First Data Corp Stock	A	Dividend	J	T					
38. Omnicom Group Stock	A	Dividend	J	T					
39. Pepsico Stock	A	Dividend	K	T					
40. Pfizer Inc.	A	Dividend	J	T					
41. Royal Dutch Shell PLC	A	Dividend	K	T					
42. Schlumberger Stock	A	Dividend	K	T					
43. Stryker Stock	A	Dividend	J	T					
44. Staples, Inc.	A	Dividend	J	T					
45. Sysco Stock	A	Dividend	J	T					
46. Wal-Mart Stock	A	Dividend	J	T					
47. Texas Instruments	A	Dividend	J	T					
48. Bed Bath & Beyond Stock		None	J	T					
49. CDW Computer Stock		None	K	T					
50. Cisco Systems Stock		None	J	T					
51. Computer Sciences Corp. Stock		None	K	T					

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

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Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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

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)
52. United Technologies Stock	A	Dividend	J	T					
53. Costco Wholesale Stock	A	Dividend	K	T					
54. Amgen Stock		None	K	T					
55. Brinker Int Stock	A	Dividend	J	T					
56. Fortune Brands Stock	A	Dividend	J	T					
57. Microsoft Stock	A	Dividend	J	T					
58. Synovus Finl Stock	A	Dividend	J	T					
59. Int'l Flavors & Fragrance Stock	A	Dividend	K	T					
60. Proctor & Gamble Stock	A	Dividend	K	T					
61. Dow Chemical Stock	A	Dividend	K	T					
62. Walgreen Stock	A	Dividend	J	T					
63. Brokerage Account #2:									
64. Raymond James & Associates Money Market	A	Interest	J	T					
65. Franklin VA Tax Free Fund	A	Interest							
66. Brokerage Account #3:									
67. Merrill Lynch CMA Money Fund	A	Interest	J	T					
68. Avaya Stock		None	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 =$250,001 - $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	
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Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Place "(X)" after each asset exempt from prior disclosure	(1) Amount Code 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)	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)
69. AT&T Corp Stock	A	Dividend	J	T					
70. Agere Systems Stock		None	J	T					
71. Baxter Intl Stock	A	Dividend	J	T					
72. Comcast Corp Stock		None	J	T					
73. Computer Assoc Stock	A	Dividend	J	T					
74. Home Depot Stock	A	Dividend	K	T					
75. Ingersoll Rand Stock	A	Dividend	K	T					
76. Lucent Technologies		None	J	T					
77. Eli Lilly Stock	A	Dividend	J	T					
78. NCR Corp Stock		None	J	T					
79. Southern Company Stock	A	Dividend	J	T					
80. Deutsche Frcm Worldwide Stock	A	Dividend	J	T					
81. Jefferson Pilot Ins Policy	A	Interest	J	W					
82. Trust #1	B	Interest/ Div/ Cap Gain	O	T					
83. AmSouth Small Cap Fund									
84. AmSouth Capital Growth Fund									
85. AmSouth Int'l Equity Fund									

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
2. Value Codes (See Columns C1 and D3)	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
	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	
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Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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

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)
86. AmSouth Value Fund									
87. AmSouth Muni Bond Fund									
88. AmSouth Master Money Market									
89. Life Insurance - Dixie Nat'l									
90. Life Insurance - Liberty Nat'l									
91. Pioneer Oakridge Large Cap									
92. Pioneer Growth Opp Fund									
93. Pioneer Value Fund/Loss Y									
94. Pioneer Tax Free Inc Fund									
95. Pioneer Int'l Core Eq									
96. Wachovia Bank - Checking & Money Market	A	Interest	J	T					
97. United Security Bancshares	D	Dividend	M	T					
98. Wachovia Securities 529 Plan	A	Interest	K	T					
99. Wachovia Securities 529 Plan	A	Interest	J	T					
100. IRA - Riggs Bank CD	A	Interest	J	T					
101. Undivided Int Timberland Choctaw County, AL	F	Rent	P1	W					
102. Undivided Int Timberland Wayne County, MS	C	Rent	O	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	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 =$250,001 - $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	
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Name of Person Reporting	Date of Report
O'Grady, Liam	01/11/2007

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

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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				
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103. Undivided Mineral Interest Choctaw County, AL	C	Royalty	L	W					
104. Undivided Mineral Interest Clark & Wayne County, MS	D	Royalty	L	W					
105. Undivided Mineral Interest Mobile County, AL	A	Royalty	J	W					
106. Ryan Beck CD	B	Interest			Matured Acct				

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

FINANCIAL DISCLOSURE REPORT Page 11 of 12	Name of Person Reporting O'Grady, Liam	Date of Report 01/11/2007

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

Not included elsewhere - Annual Salary of U.S. Magistrate Judge: $151,984.00.

FINANCIAL DISCLOSURE REPORT Page 12 of 12	Name of Person Reporting O'Grady, Liam	Date of Report 01/11/2007

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 1-11-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks		73	000	Notes payable to banks-secured		30	000
U.S. Government securities-add schedule		20	000	Notes payable to banks-unsecured			
Listed securities-add schedule	1	725	775	Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule	5	600	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		252	800				
Cash value-life insurance		24	688				
Other assets itemize:							
529 Accounts		50	600				
IRA		40	000				
401(k) account		231	435	Total liabilities		35	000
				Net Worth	7	983	298
Total Assets	8	018	298	Total liabilities and net worth	8	018	298
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

U.S. Government Securities	
Bonds	$ 20,000
Listed Securities	
Harbor Financial Services	$797,894
Merrill Lynch	103,082
SuntTrust CD	2,600
Angevine & Partners	76,510
AmSouth	745,689
Total Listed Securities	1,725,775
Real Estate Owned	
Personal residence	$ 1,600,000
Residence 2	400,000
Beach home	600,000
Timberland	3,000,000
Total Real Estate Owned	5,600,000

AFFIDAVIT

I, Liam O'Grady, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

February 6, 2007
(DATE)

(NAME)

(NOTARY)

My Commission Expires June 30, 2007

Senator WHITEHOUSE. Well, you are both very welcome here. The fact that you are here today speaks very highly of the accomplishments that you have achieved in your professional lives, it also speaks very highly of the way you have served your communities and the standing that you have in your communities, that you've risen to the point where you have become a nominee for these positions.

And certainly the extremely kind words that Senator Levin and Senator Stabenow had to say about Judge Neff, and that Senator Warner had to say about you, and the kind words that I know Senator Webb put into the record because he could not be here today about you, Judge O'Grady, are a testament to lives well lived, and we appreciate that you are here.

Senator Brownback?

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

Welcome, both. Congratulations on being here at this nomination. Judge Neff, I think I chaired the hearing last year with you being here.

Judge NEFF. You did.

Senator BROWNBACK. There's been a series of things that have happened since that time period, and I want to go just a little bit into those. Then I want to ask some factual setting questions, and I want to ask some legal opinion questions, if I could, of you.

As you know, I chaired the hearing with several people from the Western District of Michigan that were up. I then was traveling in Michigan, and a number of people raised an issue with me that I did not know about prior to the hearing taking place. Then we were past the hearing phase and it was going to the floor and there wasn't a chance to get your comments on the record, and I wanted to get those on the record. We weren't able to do it last year.

I'm very pleased you're willing to come up this year to answer these questions. These are a series of factual questions, a series of legal questions I would like to ask you about.

I reviewed your resume at length and wanted to go through this set of questions because of its bearing on a current set of legal controversies that are pending in front of the court. That's the issue. These are active legal matters.

We need to be sure that, when judges go on the bench, that they are able to hear cases fairly and in an unbiased fashion. There are things sometimes that show up in the background that you ask questions, can they be fair and unbiased on a series of cases that would come up? So, that's what I want to ask you about.

This surrounds something that was reported in the New York Times. And what I'd like to do is give you a chance to explain, factually, the setting that took place. It was reported in the New York Times that you, to use their terms "led the ceremony of a same-sex commitment ceremony in Massachusetts in 2002." I'd like to get your statement. Is that accurate of what the New York Times reported, and what is it, factually, that took place there in Massachusetts in 2002?

Judge NEFF. Well, let me say, first, Senator, that I appreciate the opportunity to appear and to clear the air for whatever concerns you may have. As you probably are aware, I did not author the an-

nouncement that appeared in the New York Times and had nothing to do with the language that was used there.

I did not, in fact, lead the ceremony. I was there, really, in two capacities. My family and I were there as guests, and I also participated as the homilist in the formal ceremony itself. And to give you a little factual context for our attendance at the ceremony, the Neff and Curtain families lived side by side, sharing a common driveway, for 26 years. We were, and are, a part of each other's extended families. The Curtains have two daughters, who were about 8 and 10 years older than the Neff daughters. They were baby-sitters for us.

They were, in practicality and in spirit, older sisters for the Neff girls. Our families grew to be close friends. We still, to this day—even though the Curtains have moved to a condominium nearby, we still celebrate Christmas Eve together as families, and whatever kids are home for the holidays are part of that.

Whenever our parents were still alive and came to visit on Christmas or other holidays, they were part of that whole extended family, and it's still true. Colleen Curtain's mom is still alive and we still see her for holidays.

When my daughter Jenny, who's here today, was married last fall, Colleen hosted a bridal shower for her. Colleen's mom came over from Flint, Michigan to be part of that bridal shower. So we were there as a family, celebrating with another family, a very important event in Mary Curtain's life.

Mary is someone who is important to us and whom we love. And when—it was a foregone conclusion that we would be invited and that we would attend. And when she and Karen, her partner, invited me to deliver the homily, I was pleased to do that. So that's the factual context of our appearance and participation on September 21, 2002.

Senator BROWNBACK. What was the event?

Judge NEFF. Well, it was really a two-part event. The first part of it was a commitment ceremony, for want of a better description, that was, in fact, led by a minister of the United Church of Christ, I believe. It was very brief, I think probably not more than 20 minutes in total.

But preceding it was—the night before there was a rehearsal party for every—for all of the guests, because everybody was from someplace else. The Curtains hosted a lovely dinner at a hotel there in western Massachusetts.

On the day of the ceremony, before the ceremony itself, there was a cocktail party. And after the brief ceremony, there was a dinner and a band and dancing, and it was a wonderful party.

Senator BROWNBACK. But the ceremony itself you classify as what you would call a "commitment ceremony"?

Judge NEFF. It was—that is, I think, what it was called at the time. Yes.

Senator BROWNBACK. Was it a marriage ceremony?

Judge NEFF. It was not.

Senator BROWNBACK. OK.

And your part was as a homilist?

Judge NEFF. That's correct.

Senator BROWNBACK. Did anybody else give a homily at the ceremony?

Judge NEFF. I really don't remember for certain. There were other people who spoke and the minister who led the ceremony spoke. Whether what she said could be described as a homily, I really don't recall.

Senator BROWNBACK. The reason I want to ask this is because of the legal issues surrounding the question, by the court's interpretation, of what the Constitution requires in guaranteeing whether or not the country must give same-sex unions equal force and authority as marriage has been given between a man and a woman. This is an active legal issue, as I'm sure you're familiar with, at the present time.

Senator WHITEHOUSE. May I ask the Senator a question? Would you yield just a second?

Senator BROWNBACK. Sure.

Senator WHITEHOUSE. The court that you're referring to, just so the record is clear and so that I can follow the discussion, is which court?

Senator BROWNBACK. Both Federal and State courts. This is an active issue in the Federal courts and I believe Nebraska has ruled on this. It's gone up to the circuit courts there, and it's been an active issue in States.

Senator WHITEHOUSE. OK. Not a specific court or a specific court proceeding at this point.

Senator BROWNBACK. It's an active legal issue around the country.

Senator WHITEHOUSE. OK. Thank you. I'm sorry to interrupt.

Senator BROWNBACK. No problem.

If I could ask you a series of legal questions. Do you believe the Constitution creates a right to same-sex marriage for the citizens of Michigan?

Judge NEFF. I think that that is a question of, as you indicate, Senator, continuing legal controversy. It is a question which may very well come before me as a Court of Appeals judge in the State of Michigan, because I think, as you are aware, in Michigan we have both statutory rulings on that and we have a constitutional amendment that was passed in 2004 dealing with that.

And because of that, I think that it is improper for me, unethical for me, to speak to whether I believe or don't believe the legal effect of that, because that is, as you say in your terms, an active legal issue, both in the Federal and the State courts and one to which I simply cannot offer an opinion that would indicate any prejudgment on my part should that issue come before me, and it may very well.

Senator BROWNBACK. What is your understanding of the current state of the law in this regard in Michigan?

Judge NEFF. Well, it's not entirely settled. There are at least two cases of which I am aware that are currently pending in the Court of Appeals dealing with the amendment that was passed in 2004, and I do not know whether either of them has reached decision. I don't believe that they have. So, again, the issue is, it's one that is not settled yet. We have—we obviously have a constitutional

amendment and that has not yet been—made its way through the courts.

Senator BROWNBACK. A constitutional amendment passed by the people of Michigan?

Judge NEFF. That's correct. Reached the bell via referendum, I believe.

Senator BROWNBACK. And the text of which reads—are you roughly familiar with the text of that?

Judge NEFF. Very roughly.

Senator BROWNBACK. Could you describe what that is?

Judge NEFF. It has to do with language that indicates that marriage is between a man and a woman. And if I am not mistaken, it also deals with the benefits of marriage, the kinds of mutual benefits, such as health insurance and so forth. Those are the kinds of issues that are currently pending in the courts.

Senator BROWNBACK. And Michigan also has a statutory defense of marriage law. Is that correct?

Judge NEFF. Yes, that's correct.

Senator BROWNBACK. What's your understanding of what that law provides?

Judge NEFF. I really don't have an understanding of it. I have never had the occasion to review it and have no opinion with regard to it.

Senator BROWNBACK. With the understanding, though, of the constitutional amendment in Michigan, if a family member or close friend asked you today to participate in a same-sex marriage ceremony in Michigan, would you do so?

Judge NEFF. My understanding of the law in Michigan is that there is no such thing permissible as same-sex marriage. It does not exist as a legal entity. And so to participate—my answer is, no, I wouldn't participate. I don't see how I could.

Senator WHITEHOUSE. Senator, your time has considerably expired and I'm just wondering what your plans are.

Senator BROWNBACK. I'd like to ask two more questions, if I could. If you want to bounce back to me for another round, I'd be happy to do that.

Senator WHITEHOUSE. If you'd do two more questions, then conclude. I know that Judge O'Grady's children are here, very patiently, and I'm sure they're eager to move on.

Senator BROWNBACK. I wouldn't take the committee's time on this, but this has been an issue that there's been a series of real questions about what factually took place, and what's the judge's view, potential Federal judge's view, of the law and whether the judge could fairly interpret that. This is—

Senator WHITEHOUSE. Well, since it's just the two of us, why don't we go ahead and proceed to the two remaining questions, with due regard for the well-tried patience of the O'Grady children.

Senator BROWNBACK. And I apologize to you for that. I wish this were not the case. It's just, this has been something that's bounced around for some period of time, and this is the chance, really, for all parties to put forward what it is that we ought to know, the judge's view of the law, and factually. So that's why I was taking that, and I apologize to the family for this.

Would you acknowledge that neither the U.S. Supreme Court, nor the Sixth Circuit Court of Appeals has recognized a right to same-sex marriage?

Judge NEFF. I believe that's correct.

Senator BROWNBACK. Judge Neff, do you believe you can apply the law of the State of Michigan, which does not allow unions of same-sex couples, without regard to your personal views on the subject?

Judge NEFF. Senator, unequivocally, I do. I have spent the last 18 and a half years of my life demonstrating that I can apply the law fairly and impartially in each and every individual case that comes before me. My job as a judge is to level the playing field, not to play in the game, and to enforce the rules, not to make them. I am reminded of that regularly.

Whatever the issue, I recognize that I have to park my personal views, whatever they are, at the door of the courthouse before I walk in. And I think that 18 and a half years of deciding cases, from 174 Michigan appeals reports, to 274 Michigan appeals reports, demonstrate that.

Senator BROWNBACK. Thank you.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Good. Well, we certainly thank the witnesses for attending. We wish you well as the nomination process goes to its conclusion.

The record of these proceedings will remain open for a week in case anybody wishes to supplement the record, but other than that, both nominees are excused and the Committee will stand in recess.

Thank you.

[Whereupon, at 12:01 p.m. the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Leslie Southwick
Mississippi College School of Law
151 East Griffith Street
Jackson, Mississippi 39201
601-925-7176

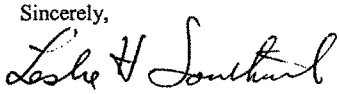
May 22, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to your written questions, as well as to those that were presented by Senator Kennedy and Senator Durbin. I am also providing my response to the Hearing question from Senator Whitehouse.

Sincerely,



Leslie H. Southwick

cc:
The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Patrick J. Leahy

1. As a judge on the Mississippi Court of Appeals, you joined the majority in a troubling 5-4 decision in *Richmond v. Mississippi Department of Human Services* (1998) that reinstated a white state social worker, Bonnie Richmond, who had been fired for using a heinous racial epithet in referring to an African American co-worker during a meeting with high level company officials. The epithet she used to describe her co-worker has been called by one Fifth Circuit opinion "a universally recognized opprobrium, stigmatizing African-Americans because of their race." Yet, the hearing officer at Ms. Richmond's appeal before the state Employee Appeals Board, opined that her use of the racial slur "was in effect calling the individual a 'teacher's pet.'" The opinion you joined upheld the hearing officer's conclusion, finding that the racial slur was "not motivated out of racial hatred or animosity directed at her co-worker or toward blacks in general, but was, rather, intended to be a shorthand description of her perception of the relationship existing between the [co-]worker and [a] DHS supervisor." Your opinion also found that there was no violation of law because the record was devoid "of any credible proof that Richmond's remark was causing widespread consternation among DHS employees."

A. In dissent, two judges criticized the opinion you joined for presenting a "sanitized version" of the facts and for suggesting that "absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal." The dissent found that this racial epithet, is "inherently offensive, and [its] use establishes the intent to offend." Why did you disagree with the dissent? Do you still believe you made the right decision?

Response: I agree that the use of this word is inherently offensive. My conclusions as to the effect of the use of so offensive a word was controlled by the statutory role of a judge in this sort of appeal. Richmond had been an employee of the Department of Human Services (DHS). After her employment was terminated for using this racial slur, Richmond appealed to the Mississippi Employee Appeals Board (EAB), a state agency whose function is to review state employee discipline decisions. An EAB hearing officer, after taking testimony, determined that her employment should not have been terminated. DHS then appealed to the EAB itself. The EAB, *en banc*, reviewed the record and affirmed the outcome, although it did not adopt the hearing officer's specific comments. The almost unique procedure for an employing agency to receive judicial review of an unfavorable EAB decision on discipline is described in *Richmond* (slip. op. p. 2). The employing agency (DHS here) does not have a right to appeal. Instead, it must seek a writ of certiorari. Review is limited to errors of law apparent on the face of the record and to arguing that there is no evidence to support the decision. By contrast, an employee complaining about an EAB decision has the usual right to an appeal.

It is difficult to imagine facts in which the use of this slur was not intended to demean or belittle the target of the word. That said, the issue in the case was whether there was any record evidence supporting the EAB's conclusion that the events were not so disruptive that continuing Richmond's employment would constitute negligence. Five of us believed that the record

contained such evidence. After granting certiorari, the Mississippi Supreme Court agreed that Richmond's use of the phrase had not created a hostile work environment. The majority in the Court of Appeals did not reach the issue of what showing of disruption would have permitted reversal, contrary to the argument of the dissent. We simply upheld the EAB's exercise of judgment that more was needed than was shown here.

As to whether I still believe I made the right decision, what I can say is that I always decided a case based on my best efforts to understand the law and the facts. I would continue to do so if confirmed as a federal judge.

B. **The Mississippi Supreme Court did, in fact, find that the Employee Appeals Board had erred and unanimously reversed your decision. Do you believe the Supreme Court made the correct decision? Do you believe that epithet in was used in the workplace in a way that should not have subjected Ms. Richmond to discipline?**

Response: The Supreme Court agreed with the opinion I joined that termination of Richmond's employment was properly set aside by the EAB. The higher court also decided, though, that before it could sustain the decision not to impose any penalty at all, there would need to be further fact-finding by the EAB. It therefore remanded to that agency.

The case presented to the Court of Appeals was solely about the validity of the termination of employment, not about other discipline. The Department of Human Services as employer did not argue in the alternative for a remand to consider lesser discipline if the EAB's decision to deny termination was sustained. To me the question was whether the EAB decision could be sustained under the applicable standard of review. Having decided that it could, I also decided that a remand to have the EAB reconsider the possibility of lesser punishment was little more than a veiled ordering of a lesser penalty. Since I did not think it was appropriate to overrule the EAB and directly order lesser punishment, I also decided we should not do so indirectly. In my view, intermediate courts of appeal need to exercise caution in ordering relief that no one requested.

On the other hand, I do not disagree with the Mississippi Supreme Court's decision to order the EAB to explain its ruling. An argument to remand for better findings was not made at the Court of Appeals. None of the three precedents cited by the Supreme Court to support the requirement of specific findings by the EAB had, in my reading of them, actually created such a duty. *Richmond*, 745 So. 2d 254, 258 (¶16) (Miss. 1999). In *Richmond*, the Supreme Court did not just order reconsideration but was usefully creating an obligation for the EAB to explain fully whenever it rejected the discipline that an employer had imposed.

As to whether I personally believe that Richmond did not deserve discipline for her use of the word, it was not my role to make that evaluation. Instead, under the applicable standard of review, the court should affirm unless there was no evidence to support the EAB's decision not to impose punishment. Based on there being some evidence in the record to support the EAB's decision, I thought that upholding that decision was the correct decision for an intermediate appellate court.

C. **Mississippi, where you have been a judge and where you would sit if confirmed to the Fifth Circuit, has the highest percentage of African-Americans in the country. Yet, the state has had only one African-American**

judge on the federal bench in its history, and has never had an African-American federal appellate court judge. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their race?

Response: I took an oath upon becoming an appeals court judge in 1995 to "administer justice without respect to persons, and to do equal right to the poor and to the rich . . . ." I embraced that duty and would have done so even without the oath. Impartiality is at the core of my sense of what it means to be a judge. Regardless of who a litigant might be, no matter how sympathetic or unsympathetic the individual or the claim appears to be, I would evaluate the facts and law fairly, "without respect to persons," and regardless of race.

I tried to be faithful to that oath on the Court of Appeals. I would renew my commitment to administer justice fairly if fortunate enough to return to the bench. All litigants, regardless of race or background, whether involved in a criminal or civil case, can be assured of that.

2. **You joined an opinion in a 2001 Mississippi Court of Appeals case, *S.B. v. L.W.*, upholding a chancellor's decision taking an 8 year old child away from her bisexual mother and awarding custody of the child to the father, primarily due to her mother's sexual orientation and the fact that she was living with her female partner. Over a dissenting opinion holding that sexual orientation has no bearing on child custody decisions, the opinion you joined found that sexual orientation could be *a factor* among many weighing in favor of giving custody to the father. You also joined Judge Payne's concurring opinion that suggested that a trial judge should not only consider the sexual orientation of a parent as a factor in determining suitability for custody, but also, in doing so, should consider Mississippi's "public policy position relating to particular rights of homosexuals in domestic relations settings." The concurrence you joined opined that sexual orientation is an individual "choice," and an individual must accept that losing the right of custody over their own child as one of the "consequences flowing from the free exercise of such choice."**

   A. **What assurances can you give that you would rule fairly and impartially in cases involving the civil rights of gays and lesbians?**

Response: Each judge can do no more than assure any litigant that he or she will strive to follow the law after a diligent effort to understand the facts of a case, regardless of the parties before the court. I offer that assurance, should I one day serve as a federal judge. The recognition of legal rights of gays and lesbians has been evolving, as much since the 2001 decision as at any other period in American history. The 2001 decision relied on now-overruled United States Supreme Court precedent. If confirmed as a federal judge, my future decisions would reflect that evolution as well as my commitment to equal justice for all under the law.

   B. **The concurrence you joined relied on "the principles of federalism" to justify reliance on Mississippi's public policy determinations "regarding rights of homosexuals in domestic situations." Do you believe that "principles of**

federalism" allow for a state to subject people to different legal tests or penalties or levels of protection based on their sexual orientation?

Response: Principles of federalism that were referenced in the concurring opinion cannot override rights such as those recognized in *Lawrence v. Texas*. One state could not choose a less-protected interpretation of liberty interests than that announced by the Supreme Court.

C. How is the position taken in the concurrence you joined that individuals can be treated differently for legal purposes on the basis of their sexual orientation consistent with the Equal Protection Clause of the 14th Amendment, which states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

Response: Equal protection arguments involving sexual orientation likely would have been analyzed in 2001 under the rational basis test. At least two precedents cited in the majority opinion found it valid to consider sexual orientation as one factor in deciding the custody of a child. Any equal protection analysis undertaken today, however, would have to be conducted in light of *Lawrence*.

D. The Senate this year is considering the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007. The House has already passed a version of this bill, which makes it easier for federal authorities to investigate and prosecute crimes based on sexual orientation and gender identity, among other factors. Given your joining of Judge Payne's concurrence and your reaffirming at your hearing of the appropriateness of looking to sexual orientation in the context of evaluating "morality" in certain legal contexts, how can you assure us that as a judge you would uphold and apply a hate crimes law, if passed, that would protect people from crimes committed based upon their sexual orientation?

Response: I do not consider the majority and concurring opinions in *S.B. v. L.W.* to be valid analyses of the law as it exists today. I can assure all who would come before me if I am confirmed, that I will consider everyone's claim "without respect to persons," and use my best efforts to understand then-applicable law.

E. Congress this year is also considering the Employment Non-Discrimination Act of 2007, which would prohibit discrimination against employees based on sexual orientation or gender identity. Given your joining of Judge Payne's concurrence and your statements at your hearing, how can you assure us that as a judge you would uphold this bill protecting people from employment discrimination based on sexual orientation, if it is passed into law?

Response: I would apply this bill if enacted just as I would apply any other Congressional enactment. In doing so, I would give full weight to the words of the statute, with a presumption

of constitutionality. Congress has broad rights to legislate change to law. Absent constitutional infirmity in the statute, a judge's responsibility is to apply the new law.

The fact that I voted a certain way in a 2001 state case when controlling precedents seemed to me to require one result, would in no way inhibit me from giving full effect to this statute if it were applicable in a case that came before me. My appellate function would always be to apply current law, no matter what the law might earlier have been when I decided a case in a related context.

F. Congress this year is also consider the Uniting American Families Act of 2007, which would allow permanent partners of United States citizens and permanent residents to obtain lawful permanent resident status in the same manner as spouses of U.S. citizens and permanent residents. Given your joining of Judge Payne's concurrence and your statements at your hearing, how can you assure us that as a judge you would uphold and apply this bill giving immigration rights to gay couples if it is passed into law?

Response: Should Congress enact this statute, its effect may be to displace a contrary former statute, to overrule caselaw, or otherwise to create new rules of law. Each time the legislative branch performs its constitutional function by enacting legislation, it is for the judicial branch to perform its constitutional function by applying that law to the facts before the court. I assure this Committee that I would diligently uphold that duty.

3. Notwithstanding that *S.B. v. L.W* involved a biological mother who had been the child's parent since birth, the concurrence you joined relied in part on the state's statutory restrictions blocking gay men and lesbians from becoming adoptive parents, as well as the state's restrictions on marriage of same-sex couples, as justifications for why the state should consider a parent's sexual orientation as a negative factor in a custody dispute. However, five years before your concurrence in *S.B.*, the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), found that a state law that can be explained by antigay animus violates the Equal Protection Clause.

A. How is the position taken in the concurrence you joined in *S.B. v. L.W.* consistent with the Supreme Court's decision in *Romer*?

Response: The Colorado citizens' initiative that was set aside in *Romer* was a blanket prohibition against any laws that would prohibit discrimination on the basis of sexual orientation. At the time we decided the 2001 case, however, *Bowers v. Hardwick* was also the law. The 2001 decision reflected what the majority in good faith thought to be the law. Regardless of whether *Romer* is seen as being clarified by *Lawrence v. Texas*, or instead that *Lawrence* extended *Romer*, any analysis of these issues in the future must reflect *Lawrence* and potentially still more judicial and legislative developments.

B. The principle Supreme Court case cited in the concurrence you joined, *Bowers v. Hardwick*, 478 U.S. 186 (1986), since overturned, held that state sodomy laws criminalizing same sex conduct were constitutional. But *Romer*,

which upheld civil laws protecting the rights of gay Americans had also already been decided. In light of *Romer,* why did the concurrence you joined not exclude antigay civil laws from the universe of factors a trial judge should consider in determining the public policy of the state on same sex custody matters?

Response: *Romer* was not discussed in any of the opinions, not even the dissent. Moreover, a review of the briefs submitted to the Court of Appeals reveals that only Mississippi authorities were cited, not *Romer* (or *Bowers*). No one argued that *Romer* affected the state caselaw on child custody.

C. The concurrence you joined in *S.B. v. L.W.*, which involves the rights of a mother with a bisexual sexual orientation to have custody over her own biological child, does not even mention *Romer*. Do you agree with *Romer* that the state's ability to prohibit the choice of particular sexual practices does not implicitly sanction "exclusion from . . . ordinary civic life in a free society" for those people who might be presumed to prefer those practices?

Response: Yes, I agree with that statement.

D. If confirmed, how can you assure us that you would follow the precedent established in *Romer* that a law that can be explained only by anti-gay animus violates the equal protection clause?

Response: If confirmed, I will always strive to understand the current law and apply it to the facts presented in the case. I can also assure the Senate that I would always faithfully apply the precedents of the Supreme Court. *Romer, Lawrence*, new statutes that may be passed, and any other developments in the law must be applied by a judge in cases in which they are relevant.

4. As Deputy Assistant Attorney General in the Civil Division of the Department of Justice, you worked on the Iran-Contra case of former National Security Adviser John Poindexter, who was later pardoned by the first President Bush. At a Justice Department briefing on February 5, 1990, you were questioned about the case and the scope of executive privilege. In response to a question about whether a president can invoke executive privilege to conceal or cover up a criminal act, you said, "you must balance the interest of the presidency against whatever the other interests are."

Were you suggesting that there are circumstances under which a president could invoke executive privilege to conceal, cover up, or disguise the fact that he or she broke the law? Do you still believe that to be the case?

Response: If confirmed, I would apply controlling precedents in this area. The Supreme Court has indicated that evidence clearly relevant for criminal proceedings is in a category that is the least protected by executive privilege. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized the privilege as an inherent attribute of executive authority, but there is not immunity

under all circumstances. The Court stated that a need for evidence "demonstrably relevant in a criminal trial" would "outweigh the privilege." Where exactly that balance is to be struck will depend, as it did in *Nixon*, on the facts of each case.

5. In recent years, legislative history has played an important role in courts' interpretation of federal anti-discrimination statutes, including Title IX and the Family and Medical Leave Act. In the chapter on statutory interpretation that you wrote for the Encyclopedia of Mississippi Law, you wrote that "There are significant concerns often expressed in federal jurisprudence about the reliability of statements in congressional records, as perhaps such statements are a conscious effort to pass legislation by other means when the constitutional process of agreement by both houses and presentment to the executive have failed." You then cited a concurring opinion by then-D.C. Circuit Judge Scalia, who wrote, "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."

A. **What role do you believe legislative history should play in the courts' interpretation of federal statutes, such as the Family and Medical Leave Act, where court decisions have focused on Congressional intent to address gender discrimination by state employers?**

Response: My review of different methods of statutory interpretation for the *Encyclopedia* chapter was meant to include all approaches found in Mississippi caselaw. My own judicial opinions sought to follow the principle that if the words of the statute were clear, as illuminated by standard canons of construction, then there was no need to go further. When there was ambiguity, I looked to such matters as the history of amendments to the statute through the years, in order to understand what part of a current statute was language added to a prior statute, and what language had been deleted. *Lattimore v. Sparkman*, 858 So. 2d 936 (Miss. Ct. App. 2003). There is no meaningful history in Mississippi legislative records, no committee reports or the like, but I have looked at the process of enactment, from the language of an initial bill, to the amendments, to the final act. *Dawson v. Townsend & Sons*, 735 So. 2d 1131 (Miss. Ct. App. 1999). The one recurring place in which the state legislature indicates its intent is in the caption that is part of the bill, but which is not codified. I may have been the only recent judge on either Mississippi appellate court to go to the legislative records and seek the language of the caption. *See Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (¶22) (Miss. Ct. App. 2006).

Legislative history is an important factor to consider in determining the meaning of an ambiguous statute and to help determine the intent of Congress in enacting that statute.

B. **One of this Committee's principle accomplishments last Congress was the reauthorization of the expiring provisions of the Voting Rights Act. As we heard in nine hearings in our Committee and in thousands of pages of testimony and reports, the VRA remains a cornerstone of our inclusive Democracy, protecting the rights of all Americans to vote free from discrimination and to have their votes counted. The almost 500 members of**

Congress who voted to reauthorize the VRA and the President who signed it realized the continued importance of this landmark civil rights law.

If you are confirmed to the Fifth Circuit, you may well be called upon to consider provisions of the newly reauthorized voting rights act, as applied to specific situations and perhaps even for their constitutionality. What assurances can you provide that as a circuit court judge you would interpret and apply the Voting Rights Act in accordance with its plain language and Congressional intent? What weight would you give to the extensive record established by Congress before reauthorizing?

Response: Should I be confirmed as a United States Circuit judge and subsequently be in a position to interpret the Voting Rights Act, I would conscientiously apply my understanding of the Act to the facts before the court. My starting point in interpreting statutes has been to seek meaning in the words themselves, and to interpret an unambiguous statute based on its language. As shown in the cases cited in my response to the preceding part of the question, if there is ambiguity, I examined other relevant evidence of meaning. If there is legislative history, that would be examined as well. The referenced Congressional record could well be a useful factor in determining the intent and meaning of the Act.

6. **The central question for me with any judicial nominee is whether he or she will act as a check and balance on the other branches of government. We are at a pivotal moment in American history, faced with a President making sweeping claims to nearly unchecked executive power. You have written a number of articles calling for a new constitution for the State of Mississippi that would strengthen the office of the governor.**

   Do your arguments for the need for a strong executive in Mississippi apply to the federal government as well? What is your view on the proper balance of power in the federal system?

Response: The Mississippi Constitution has by almost all commentators been considered to have created one of the weakest executive offices of any state. In promoting a new state constitution in the 1980s, I saw a reordering of the balance between the branches as one of the advantages of a new state charter.

The federal Constitution does not have these flaws that I thought were in my state's constitution. My sense is that the United States Constitution has the balance right, with three truly coequal, independent branches, interacting through appropriate checks and balances. The judiciary's role in enforcing checks and balances includes an equal obligation to check excesses of the executive branch as of the legislative one – as well as to restrain itself.

7. **One of the central questions I have for any judicial nominee is whether he or she understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the**

famous footnote 4 in United States v. Carolene Products (1938). In that footnote, the Supreme Court held that : "[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

Can you discuss the importance of the Supreme Court's responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Response: Footnote four in *Carolene Products* is surely one of the most important and influential texts ever buried at the bottom of any page of a Supreme Court opinion. It was the herald of developments in Supreme Court jurisprudence that led to different standards of judicial scrutiny that are to be applied depending on the nature of the rights or the categories of people that were affected by governmental action. The footnote suggested that "discrete and insular minorities" needed greater protection from discriminatory legislation because those minorities are less able to protect their own interests through the political process. Identifying a level of scrutiny is often outcome-determinative. The difference between the justifications that can uphold actions that are subject only to the rational basis test, for example, and those that must withstand strict scrutiny, is enormous.

The *Carolene Products* approach has had a momentous effect on providing constitutional protection to groups who are less influential politically than other groups. The consequences of not finding protection in the courts for these "insular minorities," is that they often would not find protection anywhere.

Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Edward M. Kennedy

1. **In 1998, as a member of the Mississippi Court of Appeals, you joined a 5-4 decision in Richmond v. Mississippi Department of Human Services, which upheld reinstatement of a white worker who used a racial slur in referring to a colleague. The Board's hearing officer who reviewed the case claimed that the employee's use of the "N-word" was only "somewhat derogatory" and that the employer had "overreacted." You voted to uphold the officer's decision. The opinion you joined was unanimously overturned by the Mississippi Supreme Court.**

I was troubled to see that the opinion you joined claimed that this shameful racial slur was "not motivated out of racial hatred or animosity directed at her co-worker or toward blacks in general, but was, rather, intended to be a shorthand description of her perception of the relationship existing between the [co]-worker and [a] supervisor." The opinion seemed to accept uncritically the claims of the worker who used the slur, even though she had the burden of proof. Two of your colleagues dissented, stating that the "N-word" "is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend."

a. Do you agree with the dissent that this particular racial slur is always offensive?

Response: The use of any racial slur, and particularly this one, is always offensive.

b. If so, why did you accept the employee's claim that it was not derogatory?

Response: The word *is* derogatory. My decision to join the majority in *Richmond* was not approval of the use of any racial slurs. Instead, I joined the opinion because I found that after consideration of all the evidence, under the proper standard of review, the Court should defer to the Employee Appeals Board's (EAB) determination that the employee's actions did not have such a substantially disruptive effect that "to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees."

The Court of Appeals' role was not one of evaluating the relative plausibility of any factual assertion. The Mississippi Legislature has charged the EAB with conducting the *de novo* review of a state agency's decision to discipline a state employee. Here, Richmond's employer, the Department of Human Services (DHS), fired her. She was entitled to have an evidentiary hearing on the discipline at the EAB. A hearing officer took testimony and reached a decision that termination was improper. The entire record was then reviewed by the EAB and affirmed.

To understand the importance of the EAB's decision, mention needs to be made of the standard of judicial review applicable to complaints about EAB decisions brought by the employing agency. That standard is perhaps unique in Mississippi administrative law. As *Richmond* pointed out (slip. op. p. 2), the employing agency does not have a right to appeal an unfavorable EAB decision, though an employee does have appeal rights. Instead, the employer must seek a writ of certiorari. Judicial review when the writ is granted is limited to errors of law apparent on the face of the record and to arguments that there is no evidence to support the decision. I accepted that based on this record, even though Richmond had certainly used the words to belittle, there was some evidence that she had not been motivated by hatred or by animosity to an entire race. That was Richmond's testimony, and I found the EAB's conclusion to have some evidence to support it. There was also some evidence that there was not a disruption at the agency. Under the applicable review standard, that led me to believe we should affirm.

2. **The opinion you joined in Richmond also stated that the African American worker who was referred to in this way was not offended. But the testimony shows that she clearly was offended but did not want to make an issue of it in the workplace. She stated:**

"I guess it could have been a real big problem as far as I was concerned, but it's not how I deal with things." She went on to say, "I tend to withdraw from things of that nature and I really don't take issue with them, and I have a hard time being overtly ugly to anybody even when . . . my feelings have been hurt."

How could you have assumed that this worker, who said her feelings had been hurt by a racial slur, was not offended?

Response: I assumed that the African American employee was in fact offended by Richmond's use of the slur. The majority opinion that I joined recounted evidence presented by Richmond to the EAB as part of her efforts to demonstrate that her statement was not *motivated* by a desire to offend. Under my reading of the opinion, though, the Court of Appeals never stated that the African American employee was not actually offended. I joined the majority opinion, agreeing with it that the racial slur is offensive, but also agreeing that there was evidence in the record to support the EAB's decision that Richmond's employment did not have to be terminated.

3. **When the Mississippi Supreme Court rejected your view in the Richmond case, it held that that the employee who used the racial slur should at least receive some form of discipline, even if she is not fired. Several of the justices would have gone further and allowed her termination. You voted to give her back her job, without imposing any discipline for using a racial slur about a colleague. Even if you did not think a worker should be fired for using a racial slur – why not at least let the employer impose some form of discipline?**

Response: The Mississippi Supreme Court determined as a procedural matter that it could not yet uphold the EAB's decision that no punishment short of termination should be imposed on Richmond. Instead, the high court made this holding: "We therefore remand the present case to the EAB in order for the board to impose an appropriate penalty less than dismissal, or to make detailed findings as to why no penalty should be imposed." *Richmond v. MDHS*, 745 So. 2d 254, 258 (Miss. 1999).

I considered the possibility of a remand to have the EAB consider lesser discipline than termination. A number of reasons kept me from agreeing with the approach. Neither party requested that any punishment other than termination be considered. DHS sought only to have termination reinstated; Richmond wanted the EAB decision to be sustained. For the Court of Appeals to grant a remand to consider relief no one requested, raised questions to me of the proper role of judges. I also believed that the EAB reasonably would interpret that remand to be nothing more than an implied ordering of lesser punishment. Instead of ordering reconsideration by the EAB, the appellate court should decide whether lesser punishment was required under the applicable standard of review. Since I concluded that the EAB had made a decision that could be sustained on the record under our deferential review obligation, it was not for the Court to rule indirectly in a manner that I did not find we should do directly.

On the other hand, I do not disagree with the Mississippi Supreme Court's decision to order the EAB to explain its ruling. An argument to remand for better findings was not made at the Court of Appeals. None of the three precedents cited by the Supreme Court to support the requirement of specific findings by the EAB had, in my reading of them, actually created such a duty. *Richmond*, 745 So. 2d 254, 258 (¶16) (Miss. 1999). In *Richmond*, the Supreme Court did not just order reconsideration but was usefully creating or at least clarifying an obligation for the EAB to explain fully whenever it rejected the discipline that an employer had imposed.

4. In the 2001 case S.B. v. L.W., you joined a decision upholding a chancellor's removal of an eight-year-old girl from the custody of her biological mother, who was her primary care-giver. The majority opinion you joined made clear that the mother's parental rights were denied in large part because of her sexual orientation. You also joined a concurring opinion noting that the Mississippi legislature had "made clear its public policy position relating to particular rights of homosexuals in domestic relations settings."

> **a. You testified that you joined the concurrence because it "added something about policy from the legislature." You also stated that on the issues involved in the case, "the policy. . . really needs to be set by the legislative branch . . . ." A parent's ability to maintain custody of her child obviously involves fundamental rights. Did you mean to suggest that legislative policy should always trump those rights?**

Response: Legislative policy may not override an individual's fundamental constitutional rights. At the time that *S.B. v. L.W.* was decided, a state legislature's ability to enact policies governing the activities of homosexual individuals was supported by precedent from the United States Supreme Court. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The

legislative policy referenced in Judge Payne's opinion would not control over a fundamental right. Any argument that a state legislature has an ability to govern the private activities of an individual based solely on sexual orientation will in the future have to be assessed in light of the overruling of *Bowers* by *Lawrence v. Texas*, 539 U.S. 558 (2003).

b. Since other factors were involved in the decision, why did you believe it was necessary to focus on the mother's sexual orientation?

Response: Controlling Mississippi Supreme Court precedent required the trial judge in ruling on a child custody matter to consider, among other factors, the "moral fitness" of the parents. See *Albright v. Albright*, 437 So. 2d 1003 (1983). This factor had been interpreted to include the sexual relations and activity of unmarried parents, regardless of the parent's sexual orientation. Thus, under Mississippi law, consideration of an extra-marital relationship was appropriate under the moral fitness factor, whether that relationship was homosexual or heterosexual in nature. Since the mother specifically challenged the custody decision on the basis that her sexual orientation had overridden every other factor, the writers of all the court's opinions determined that an analysis was required in order to do justice to her appeal.

The trial judge, as he was required by law to do, considered among numerous other factors the extra-marital sexual relations of both parents when reaching his decision. *S.B. v. L.W.*, 793 So. 2d at 658 ("The chancellor noted that the mother had two live-in lovers since the child was born."). The mother's sexual orientation was not the controlling factor for the Court of Appeals. As one of the opinions I joined noted, "[e]ven barring the whole sexual preference discussion, I would agree with the majority that ample evidence existed to support the chancellor's decision." *S.B. v. L.W.*, 793 So. 2d at 664 (Payne, J., concurring).

5. In the concurring opinion, you tried to justify your decision by pointing to Mississippi laws that discriminate against same-sex couples in adoption and criminalize same-sex relationships. The concurrence concluded that "[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations." The dissent disagreed, noting that there was no indication that remaining with her mother would harm the child.

a. The right to raise your own children is one of the most fundamental rights of any individual. It's troubling that you would rely on "states' rights" to deny a mother the custody of her eight-year-old child. The states' rights argument was long used to justify discrimination against African Americans and other groups. No one should be denied basic constitutional rights simply because of who they are. How do you answer those who – after reading this case – are concerned that you will not be able to rule impartially in cases involving issues of sexual orientation?

Response: I offer my assurance that, if fortunate enough to be confirmed as a judge for the United States Court of Appeals for the Fifth Circuit, I will faithfully defend the rights provided to all citizens by the United States Constitution. I will decide all matters impartially and will discharge my judicial duties without bias or prejudice on any basis, including sexual orientation.

b. As you noted in your testimony, in 2003, the Supreme Court decided Lawrence v. Texas, striking down the kinds of laws against same-sex relationships mentioned in your concurrence. In discussing the Fourteenth Amendment's guarantee of Equal Protection, the Court stated that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Now that the Supreme Court has ruled in Lawrence v. Texas, would you decide the case of S.B. v. L.W. differently today?

Response: It is evident that the analysis would have to be different in light of *Lawrence v. Texas*, though that analysis might not have changed the final result since this issue was only one of several that the trial court used to decide the case.

6. At your nomination hearing before the Senate Judiciary Committee on May 10, you said that you review moral issues when determining whether a bisexual parent should be granted child custody. You insisted that of the factors you applied in this custody case, "The moral issue was one of them, which was the rule in Mississippi at that time, and remains, that morality of each party should be considered." Do you believe that as a matter of law, sexual orientation is in and of itself, a moral factor?

Response: At the hearing, my answer that referred to "moral issues" was using the terminology that was used in Mississippi caselaw at the time of the 2001 decision. Today, any issue of whether sexual orientation could be considered in weighing these factors would be guided by the Supreme Court's opinion in *Lawrence v. Texas*.

7. In Goode v. Synergy Corporation, you dissented from a decision granting a new trial to the parents and grandparents of a girl killed in a fire. The fire had been caused by a defective repair to a water heater that allowed propane gas to escape. The family tried to hold accountable the propane gas company that maintained the water heater, but during pre-trial discovery, the company failed to disclose that its worker had been responsible for the defective repair. That fact was only discovered after trial, when an employee of the company admitted working on the family's water heater. Seven members of the Supreme Court held that the family should have a new trial.

You argued that the victim's family wasn't entitled to a new trial, despite the gas company's failure to provide this critical piece of evidence. You said the family had not been diligent in trying to discover the missing information before trial. But the

family deposed everyone they could identify who might know about the leak. They even directly asked the company whether it had performed any maintenance on the water heater before the fire. Under oath, the company responded that it had not.

a. If the company itself didn't even know about the repair, how can you claim the family should have found this evidence before trial?

Response: Under Mississippi law, the granting of a new trial is extraordinary relief. The Court of Appeals was required to review the trial judge's decision not to grant a new trial under the highly deferential "abuse of discretion" standard. At the time, I was persuaded by the dissent that the trial judge was in the best position to evaluate the issue when he determined that the plaintiffs could have done more than submitting interrogatories to discover who had made repairs to the water heater. A party's need to go beyond submitting discovery to the adversary was a point made in a federal court precedent cited in the dissent. Whether sufficient efforts had been undertaken to discover evidence before trial is a fact issue largely for the trial judge. I was convinced that no abuse of discretion in evaluating the evidence had occurred.

b. In private practice, a large portion of your work was defending oil and gas companies like the one sued in the Goode case. Can you assure us that you no longer see yourself as an advocate for those companies, and, if confirmed, you would rule fairly in cases seeking to hold such companies accountable for breaking the law?

Response: I say unequivocally that I have not been and would not be an advocate for any litigant. I had the honor to be a judge for twelve years. I did my best to treat all litigants with impartiality and respect. If confirmed to the United States Court of Appeals for the Fifth Circuit, I would discharge my duties without bias, prejudice, or partiality.

8. In the chapter on statutory interpretation that you wrote for the Encyclopedia of Mississippi Law, you stated that "advocates of rigorous analysis such as New Textualism frequently have crossed swords with those who basically find that any available source of information is usable such as legislative history or background considerations." In light of this statement about what you termed "the battle over theories . . . at the federal level," please explain how you view the significance of legislative history in statutory interpretation, and whether you believe that legislative history and other background considerations should be considered when interpreting federal statutes.

Response: In the chapter of the Encyclopedia of Mississippi Law entitled "Theories of Statutory Interpretation," I sought to collect cases on significant theories. I did not take a position as to whether any given theory was superior to another. I believe that when interpreting a statute, a judge should consider all materials that are helpful to explain the statute's meaning. There are some generally recognized and accepted steps in interpreting statutes and I have used these steps as a guide when called upon to interpret a statute. First, I believe a judge should look at the language of the statute in context.

Canons of construction should be used as an aid where they would be helpful. If a statute's language is ambiguous, a judge should then turn to a variety of sources to aid in its interpretation. Legislative history can certainly be relevant to the proper interpretation of a statute. Though there is not much legislative history for Mississippi statutes, I have looked at what is available to explain ambiguity. The one recurring place in which the legislature indicates its intent is in the caption that is part of the bill, but which is not codified. I may have been the only recent judge on either Mississippi appellate court to go to the legislative records and seek the language of the caption. *See Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (¶22) (Miss. Ct. App. 2006).

9. Legislative history had a key role in the Supreme Court's 2005 ruling in Jackson v. Birmingham Board of Education, recognizing that Title IX allows suits by persons who suffer retaliation for opposing sex discrimination made unlawful by the statute. The Supreme Court in Jackson recognized that Title IX was passed three years after the Court's decision in Sullivan v. Little Hunting Park, Inc., which held that the general prohibition against race discrimination in Section 1982 provides a right of action for those who suffer retaliation because they stood up against discrimination. Writing for the Court, Justice O'Connor used language from the Court's decision in Cannon v. University of Chicago: "It is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [Sullivan] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]."

a. Do you think that the Court appropriately considered the fact that Sullivan was decided prior to the passage of Title IX in concluding in Jackson that there is a cause of action for retaliation under Title IX?

Response: Congress certainly has the authority and sometimes does enact legislation in response to specific decisions by the United States Supreme Court. Congress also, as a general proposition, may be presumed to be aware of recent high court opinions when it adopts related legislation. As I read Justice O'Connor's opinion in *Jackson v. Birmingham Board of Education*, the sequence and temporal proximity of the *Sullivan* decision and the enactment of Title IX was one factor in the Court's decision. Other considerations were the previous interpretations of the term "discrimination" and the remedial purpose of Title IX. Five justices agreed with the opinion in *Jackson*, and that makes it law. I note that one of my opinions earlier mentioned also used as part of the analysis of a statutory amendment, that it may have been adopted to overrule a Mississippi Supreme Court opinion from a few years earlier. *See Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (¶20) (Miss. Ct. App. 2006). Such background considerations are quite relevant in statutory analysis.

b. If not, do you agree with Justice Thomas' dissent, which states that the holding is "contrary to the plain terms of Title IX," which does not explicitly state that retaliation is discrimination on the basis of sex?

Response: As I stated above, the Court's decision in *Jackson* is binding precedent as to the interpretation and application of Title IX.

10. You also wrote in your chapter in the Encyclopedia of Mississippi Law that "There are significant concerns often expressed in federal jurisprudence about the reliability of statements in congressional records, as perhaps such statements are a conscious effort to pass legislation by other means when the constitutional process of agreement by both houses and presentment to the executive have failed." On this point, you cited a concurring opinion in Hirschey v. F.E.R.C, 777 F.2d 1 (D.C. Cir. 1985) in which then-D.C. Circuit Judge Scalia said, "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."

a. Do you agree with this statement by then Judge Scalia? Please explain the basis for your response.

Response: Legislative history can be of great utility. However, when considering any evidence of the meaning of a statute, just as considering evidence of any other matter, a judge should give to it the weight and credibility that the circumstances suggest it deserves. For example, the context for some statements about the intent of a bill will demonstrate those views were not broadly shared or even known. If Justice Scalia is suggesting that such evidence should not be considered no matter how reliably it appears to reflect the Congressional purpose, then I do not agree with him.

b. Please describe in detail the approach you would take in determining what elements of legislative history are reliable indications of Congressional intent, and the reasons for your approach.

Response: I would answer this by reference to my response to Question #8. The most reliable indicator of Congressional intent is the language of the statute itself. If that language proves to be ambiguous, legislative history may well be an important factor in interpreting the statute. However, as discussed in my answer to Question #10(a), the usefulness of individual forms of legislative history can only be determined on a case-by-case basis.

Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Dick Durbin

1. In the case *Richmond v. Mississippi Department of Human Services*, you joined a 5-4 ruling to reinstate and give back pay to a white state employee who had been fired for calling an African-American co-worker a "good ole nigger." The opinion you signed on to stated that the white employee who used the "n-word" in this case "was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general."

Please explain why you believe that a white employee who calls a black employee the "n-word" is "not motivated out of racial hatred or racial animosity."

Response: Without question, this racial slur is offensive and at least has the purpose of demeaning or belittling. To understand the constraints under which the Court of Appeals operated in *Richmond* on whether it was motivated by racial hatred or animosity, mention needs to be made of the applicable standard of judicial review. Review of the state agency's decision on her discipline was limited to errors of law apparent on the face of the record and to arguments that there was no evidence to support the decision.

To be more specific, the decision we reviewed was made by the state agency authorized to make final executive branch determinations as to state employee discipline. That agency, the Employee Appeals Board (EAB), first considered the case through a hearing examiner. He took testimony offered by the Department of Human Services (DHS), which had terminated the employment of Bonnie Richmond, and from Richmond, who had appealed the termination to the EAB. Briefly, the findings were that Richmond had used the phrase in conversation with two co-workers to describe an absent African American worker; one of the other two workers later told the target of the word. Richmond apologized. At the hearing she said she used the three-word phrase to characterize the relation between an African American employee and that employee's supervisor. The target of the word was offended but also said that she accepted the apology; she testified that "it was not like there was any real big problem associated with the incident. [It could have been], but it's not how I deal with things." Some phone calls were received at the DHS regarding the incident, but there was no testimony about details of those calls.

The examiner decided that DHS's firing of Richmond for the one-time use of the word was not justified. On appeal within the agency, the EAB, sitting *en banc*, agreed.

However, Richmond's testimony was largely accepted by the agency whose decision we were reviewing, that her use of the word did not reveal racial hatred or animosity. The EAB also decided that there was no meaningful evidence that the event had caused disruption at the agency, which was the relevant legal standard in the case.

Measuring this evidence against the review standard, I joined the majority because I believed that there was some evidence to support the EAB's decision that Richmond should not be terminated from her employment.

2. The dissent in the *Richmond* case wrote: "The word 'nigger' is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term.

There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend."

Do you agree with this statement in the *Richmond* dissent? If so, why did you vote with the majority in this case? If not, please indicate those instances in which the use of the "n-word" to describe an African American does not establish the intent to offend.

Response: Use of this word is wrong, improper, and should offend everyone regardless of the speaker's intent. The majority opinion criticized the use of the word and found the word inflammatory and always inappropriate, but also found the EAB's decision that the statement had not sufficiently affected the workplace as to require her termination from DHS to be supported by some evidence. Under the applicable review standard, that meant that the decision should be sustained.

3. In the factual context of the *Richmond* case, the hearing officer concluded that the use of the "n-word" was equivalent to calling the black employee a "teacher's pet." The hearing officer also said the use of the "n-word" was similar to the use of the terms "good old boy or Uncle Tom or chubby or fat or slim."

Do you agree with these conclusions of the hearing officer? If not, why did you conclude that the hearing officer's determinations were supported by substantial evidence and not arbitrary and capricious?

Response: There was a casualness in some of the hearing officer's statements about this word that was troubling. It was the EAB's decision, though, not that of the hearing officer, that was subject to our analysis under the limited review standard. The EAB's order said that after "reviewing the pleadings, transcript and briefs of counsel, the Board is of the opinion that the Order of November 29, 1994, should be and the same is hereby affirmed." The EAB did not state that it adopted the hearing officer's characterizations. The Court of Appeals clearly did not adopt them, as the Court's opinion stated that the word is inflammatory and derogatory. Instead of simply adopting the findings and phrasing of the hearing officer, the EAB looked at the entire record, considered the arguments, and based on its review, affirmed the decision not to terminate.

The issue for judicial review was whether there was no evidence to support the EAB's decision that however inappropriate the racial slur clearly was, the events had not so affected the workplace as to require termination. There was some evidence, so the Court affirmed.

4. The Mississippi NAACP has written a letter to the Senate Judiciary Committee opposing your nomination. They wrote: "The opinion endorsed by Southwick makes outrageous conclusions about the use of the term 'nigger' in the workplace.... The civil rights record of Judge Southwick on the Mississippi Court of Appeals gives us great pause."
Does it trouble you that the leading civil rights organization in your home state has come out in opposition to your nomination?

Response: I am greatly saddened that the NAACP would make this criticism. I do not believe the *Richmond* opinion makes outrageous conclusions about the use of racial slurs in state

employment. Instead, it reached conclusions about the EAB's decision regarding the effect of this use by this employee among these employees. Under the applicable standard of review, as set out in my response to question 1, I believed the court should affirm the exercise of that judgment by the agency, based on the evidence in the record.

I have always tried to be fair, to apply my understanding of the facts to my best interpretation of the law, and not let other considerations alter the result. I believe my opinions reflect that approach.

5. In their letter of opposition to your nomination, the Mississippi NAACP wrote: "Additionally, we are disturbed by Judge Southwick's rulings on race discrimination in jury selection. Dozens of such cases reveal a pattern by which Southwick rejects claims that the prosecution was racially motivated in striking African-American jurors while upholding claims that the defense struck white jurors on the basis of their race. In Bumphis v. State, an appellate colleague accused Southwick of 'establishing one level of obligation for the State, and a higher one for defendants on an identical issue.'"

What is your response to this criticism?

Response: I am convinced that an impartial jury is an essential element of our justice system. Judges and attorneys must be vigilant in their efforts to expose discrimination in the jury selection process. There are only a handful of cases in which the Court of Appeals was not unanimous in resolving peremptory challenges issues under *Batson v. Kentucky*. Whatever pattern can be found in dozens of cases, it is a pattern that applies to all the judges on the court.

During my service on the Mississippi Court of Appeals, I participated in fifty-five published opinions involving African American criminal defendants' claims that the prosecution had improperly exercised peremptory challenges to strike one or more African American jurors. Fifty-two of these challenges were found to be insufficient and denied by the Court of Appeals. Forty-seven of these challenges were unanimously denied by the Court of Appeals. Only five affirmances were not unanimous. One of those five had a 5-4 vote. In the others, the split on the court was either 8-2 or 9-1.

In three of the fifty-five appeals, a majority of the Court voted to reverse on the basis of a *Batson* violation involving the prosecution's striking of African American jurors. I voted with the majority to reverse in every one of these cases. *Bogan v. State*, 811 So. 2d 286 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943 (Miss. Ct. App. 2000); *Pearson v. State*, 746 So. 2d 867 (Miss. Ct. App. 1998). I also joined a dissent that would have reversed because an African American criminal defendant had not been allowed to exercise peremptory challenges against two white jurors; I agreed that the defense attorney had presented sufficient race-neutral reasons. *Perry v. State*, 949 So. 2d 764 (Miss. Ct. App. 2006) (Irving, J., dissenting).

During my tenure on the Court, I authored eleven majority opinions in cases involving *Batson* challenges. In ten, the Court found that the *Batson* challenge was insufficient to permit reversal; the result in each case was unanimous. In only one of the ten did another judge write separately. *Lard v. State*, 749 So. 2d 276 (Miss. Ct. App. 1999) (Irving, J., concurring) ("I concur with the majority in finding no *Batson* violation. But even though I find no *Batson* violation, I think strikes based on a juror's employment and marital status may well in certain instances be nothing more than a surrogate for race . . . ." Judge Irving agreed that I was following controlling Mississippi Supreme Court authority). In the eleventh case, I wrote that

reversal and a new trial was required by the combination of insufficient fact-findings regarding both the prosecution's and the defendant's peremptory challenges, and an erroneous jury instruction. *Robinson v. State*, 858 So. 2d 887 (Miss. Ct. App. 2003). The court split 6-4.

Twice while I served on the Court of Appeals, we confronted a *Batson* challenge raised by a civil defendant against a plaintiff's peremptory strike of white jurors. I voted with the majority to affirm the verdict in both cases, finding that the plaintiff's reasons for striking white jurors were permissible. *Kroger Co. v. Scott*, 809 So. 2d 679 (Miss. Ct. App. 2001); *K.M. Leasing, Inc. v. Butler ex rel. Butler*, 749 So. 2d 310 (Miss. Ct. App. 1999).

The specific appeal referenced by the NAACP was in 1996, before the court's opinions were published. In the first opinion in the case, I found sufficient merit in the argument that the State had used its peremptory challenge in a racially discriminatory manner to require a remand and a hearing in which findings would be made as to whether the State's reasons were pretextual. *Bumphis v. State*, 93-KA-01157 (Miss. Ct. App. March 12, 1996)(unpublished; copy of this and later opinion included in my submissions to the Committee). After the findings of the trial court hearing were certified to us, I wrote for a 7-3 court that race-neutral reasons were offered. *Bumphis* (July 2, 1996)(decision after remand). A dissent had been written to the March opinion, and then that dissent was reissued when the July majority opinion was handed down. The dissent disagreed with remanding for a hearing, saying the procedure does not "result in a faithful reconstruction of the process." Remanding for such hearings, however, was the approach taken by the Mississippi Supreme Court. The dissent was also concerned that more had been required of the defendant than of the State. After the State had explained its peremptory challenges, the trial court required the defense to allege whether any were pretexts. The trial judge, on the other hand, had injected himself into some of defense peremptory challenges and just declared them pretexts. My view was that regardless of how the evidence of a *prima facie* case of discrimination was raised, that a non-discriminatory explanation needed to be offered. I did not believe, nor do I now, that the opinion created different rules for the defense and the prosecution.

6. As a member of the Mississippi Court of Appeals for 10 years, you took part in over 7,000 decisions.

Have you ever voted on the side of a plaintiff in a civil rights case that was not a unanimous decision, or have you ever authored a dissenting opinion on behalf of a civil rights plaintiff? If so, please provide the name and citation of the case(s), as well as a summary. If you cite to a case that is unpublished, please provide a copy of the decision, regardless of whether you authored it.

Response: In Mississippi, most of what would be considered civil rights cases are handled in federal courts. I do not recall, nor did I find in research, many traditional civil rights cases. In only a very few cases was racial discrimination alleged, but I did not find examples of non-unanimous decisions. *E.g., Clary v. Lee*, 763 So. 2d 921 (Miss. Ct. App. 2000)(prison inmate alleged racial discrimination when he lost a prison job; court unanimously rejected claim). I was the presiding judge for the panel and joined an opinion that upheld workers' compensation benefits for a person who alleged a mental injury, in part caused by racial slurs directed against her at work. *Mid-Delta Home Health, Inc. v. Robertson*, 749 So. 2d 379 (Miss. Ct. App. 1999).

7. In the case *S.B. v. L.W.*, you joined a ruling that denied custody of an 8-year-old girl to her mother in part because the mother was involved in a lesbian relationship and was living with another woman. However, there were other factors in this case to indicate that the father would be a better parent than the mother. He was more financially stable and had a household income of over $100,000. He was more emotionally stable. And he lived in a large house in an excellent public school district. The mother, by contrast, was in between jobs, could barely make her car payments, and was planning to move to another city.

In your view, why didn't these factors constitute enough of a basis to award custody to the father?

Response: Under controlling precedent, a trial judge was to consider ten factors in making a decision on child custody. The appellate function was to review the decisions on each factor through an abuse of discretion lens. The majority and the concurring opinions both addressed each of the relevant factors (some of the ten were not contested), and both opinions found that other factors were sufficient to sustain the custody decision. However, given that the mother argued that consideration of her sexual orientation had skewed the decision by the trial judge, it was the court's obligation to address that argument.

8. As you stated at your nomination hearing, Mississippi Supreme Court case law requires that the moral fitness of parents be considered in child custody disputes. However, Mississippi case law does not require that sexual orientation be considered as an element of the morality analysis.

A. Since Mississippi case law permits but does not require the consideration of sexual orientation, why did you feel the need to consider the mother's sexual orientation in the *S.B.* case?

Response: The mother argued that the factor had been so important to the trial judge that it had overwhelmed other considerations in her favor. The nature of appellate review is to consider all the relevant issues. The writers of all the opinions thought it necessary to address her argument.

B. Why did you reject the dissent's theory that sexual orientation is to be considered in the morality analysis only when there is evidence that the parent's sexual orientation had an adverse impact on the child?

Response: The majority and concurring opinions discussed that all the custody factors focus on the child's best interest. The precedents that were binding on our court accepted that sexual orientation could be a factor, along with others, in deciding custody. In one case cited by both the majority and concurrence, the Supreme Court upheld a custody award despite the argument by the lesbian mother that her sexual orientation had not be shown to be detrimental to the child. *S.B. v. L.W.*, 793 So. 2d 656 (¶23) (quoting *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990)). On the other hand, the dissent in *S.B. v. L.W.* relied in large part on cases cited in the dissent in *White*.

9. You not only signed on to the majority opinion in the *S.B.* case, you went much further. You were the only judge to join a concurring opinion which uses the term "homosexual lifestyle" and other language that expresses a moral condemnation of homosexuality.

In your concurrence, you concluded that sexual orientation was a valid factor in making custody decisions in part because of a Mississippi statute which states: "Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."

A. Is it your belief that gay and lesbian relationships are crimes against nature that are equivalent to bestiality?

Response: I would not make that equivalence.

B. If you had been a member of the U.S. Supreme Court in 2003, would you have voted with the majority or the dissent in *Lawrence v. Texas*?

Response: *Lawrence v. Texas* is controlling authority, and I would be bound to follow it if confirmed to the Fifth Circuit. I will faithfully apply the law in this area and all others.

10. A report released by an organization called the Alliance for Justice alleges that you have a bias against workers and consumers. The report states:

"[I]n 160 out of 180 published decisions involving state employment law and torts cases in which at least one judge dissented, Judge Southwick voted against the injured party and in favor of business interests, such as corporations or insurance companies, in whole or in part. Thus, Judge Southwick has an 89 percent record of voting against workers, consumers and other victims in divided decisions."

The report also states that you received the highest rating among all Mississippi Court of Appeals judges from a business group in March 2004 based on your pro-business voting record.

What can you say to assure workers and consumers that they would receive a fair shake in your courtroom?

Response: I did my best faithfully to consider the arguments of workers, consumers, and all other parties. I followed controlling precedents, no matter where they took me. I have always done my best to examine each case solely on the basis of the facts and law, without regard to the nature or characteristics of any party. The percentages that are referenced in the question are not something that I can verify. An examination of the methodology might reveal a somewhat different perspective on the point being made. Since unanimous opinions were ignored, the total rulings in favor of plaintiffs or defendants are not reflected.

Just looking at my last year on the court, among the unanimous opinions I wrote in favor of plaintiffs -- and therefore not reflected in the cited percentage -- was one that reversed and

remanded for a new trial the denial of any recovery to the victim of an automobile accident. *Fleming v. Floyd*, 2006 WL 2807173 (Miss. Ct. App., Oct. 3, 2006). I found that the plaintiff's unchallenged expert testimony could not properly have been rejected by the jury when it reached a defense verdict. I ruled for landowners against a timber company, reversing the trial judge who had found that the claimants were barred from recovery. *Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (Miss. Ct. App. 2006). I reversed a trial court's summary judgment as to claims by a homeowner against former owners and the builder, finding that the wrong limitation statute had been applied, and for other reasons. *Estes v. Bradley*, 2006 WL 3593451 (Miss. Ct. App. Dec. 12, 2006).

A recent example of a decision that was not unanimous, and in which I joined the dissenters who sought to uphold an award of workers' compensation benefits, was *Total Transp., Inc. of Mississippi v. Shores*, 2006 WL 3361833 (Miss. Ct. App. Nov. 21, 2006).

A final example was an opinion in a strongly contested case, in which I wrote as a matter of first impression that one party to a vehicle accident could receive an assignment of another party's bad faith claim against that second party's insurance company for denial of coverage. *Kaplan v. Harco Nat'l Ins. Co.*, 716 So. 2d 673 (Miss. Ct. App. 1998).

11. You served as a political appointee in the U.S. Department of Justice under President George H.W. Bush. In this capacity, you testified before the Senate Judiciary Committee in 1991 about a Supreme Court case, *Rust v. Sullivan*, that upheld regulations banning recipients of federal funding from encouraging or promoting abortion.

A. In the *Rust v. Sullivan* case, the Justice Department urged the Supreme Court to overturn *Roe v. Wade* and stated in its brief: "We continue to believe that *Roe* was wrongly decided and should be overruled." Do you agree with this language in the Justice Department's brief? Did you in 1991?

Response: I was not involved in the preparation of the 1991 brief. Both *Roe v. Wade* and *Rust v. Sullivan* are binding precedents of the Supreme Court. If confirmed, I would apply the controlling law on abortion or any other issue, as it exists at the time of any ruling.

B. In its *Rust v. Sullivan* brief, the Justice Department also wrote: "the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal life throughout pregnancy find no support in the text, structure, or history of the Constitution." Do you agree with this language in the Justice Department's brief? Did you in 1991?

Response: I was not involved in preparation of this brief. *Roe v. Wade* and *Rust v. Sullivan* are precedents of the Supreme Court. If confirmed, I would be bound to follow them.

C. An August 16, 2005 article in the *Washington Post* contained a quote from a former colleague of yours at the Justice Department, Bruce Fein, who said the following about John Roberts: "I know he thought *Roe* was totally ill-reasoned and extra-constitutional. Everyone in the department did." As a political appointee in the Justice Department at that time, Judge Southwick, did you agree that *Roe* was "totally ill-reasoned and extra-constitutional"?

Response: Part of my role as a political appointee in the Department of Justice was to assist in presenting the views of the Administration in ways that were fair in explaining precedent and, when relevant, candid in explaining that a precedent was contrary to the position taken and should be overruled. I was never involved in preparing an argument that sought to overturn *Roe v. Wade*. If I am fortunate enough to be confirmed as a federal circuit judge, my personal views concerning the correctness of any decision of the United States Supreme Court, including *Roe*, would not cause me to apply that decision unreasonably broadly or narrowly. I would faithfully and reasonably apply all controlling precedents.

D. In your Senate questionnaire, you indicated you once moderated a panel discussion entitled the "Moral Implications of Abortion" in Jackson, Mississippi. What remarks did you make at that panel discussion about the *Roe v. Wade* opinion?

Response: That panel discussion at my church was in 1982. I have almost no recollection of the event, and I have no record of any remarks. My role, as set out in the brief newspaper notice of the panel discussion that I provided the Committee, was to moderate a debate between two other people. My assumption is that I gave a summary of the opinions in *Roe*, introduced the debaters, and let them present the opposing views on the validity of the decision.

12. In a 1997 speech you gave to the Christian Legal Society at Mississippi College, you stated: "What is needed by people in all walks of life is 'muscular Christianity.'" You also stated: "It is not just leaders, of course, but the citizenry itself whose Christianity is critical for the future of this country." And you expressed agreement with a quote from John Adams: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

A. Why do you believe our Constitution was made only for religious people?

Response: To explain my understanding of the John Adams quotation, I should set out the context. While Adams was president, he opined that government was not "armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net." It was immediately after those observations that he said that the Constitution was adequate "only for a moral and religious people." That may in part have been what Benjamin Franklin implied when he said, after the Constitution was drafted, that we now had a republic, "if we can keep it." What both men were presenting, it seems to me, is that by leaving behind the tradition of European monarchies, America was also freeing itself from the inherent restrictions on conduct that arise from autocratic rule. Adams was positing that because of the strength of human passions, a measure of self-control is needed when state control is removed.

A theory about what makes government and society most productive, and the assumptions about society that the founders made when drafting the constitution, are what my quotations were addressing. As a matter of law, however, the Constitution protects all people irrespective of faith.

B. How would your belief that our Constitution was made only for religious people affect your ability, as a federal judge, to carry out the First Amendment doctrine of the separation of church and state?

Response: My quotation of John Adams does not imply an endorsement of any particular view of the relation between church and state. His point was that genuinely moral people can use the freedoms of democracy with less harm to other citizens than would be the case if there were no morality or religion. He analyzed the premises for what would make the Constitution work best, not who was within the protections of the Constitution. In his view, morality and religion were foundations for success of the Constitution. But the observations he made are not constitutional law. I would diligently seek to apply controlling First Amendment precedents, and would not be affected by my reference to John Adams in any First Amendment case that came before me if I were confirmed.

C. Do you believe Christianity is the only religion that is critical for the future of the United States? Do you believe that people who practice Judaism, Islam, other religions, or no religion at all, are critical for the future of this country?

Response: The future of this country, perhaps even more than has its past, will be benefited by the contributions of people of good will of many faiths or of no faith. This diversity will enrich our society and culture. All people of different faiths, or of none at all, are equally protected by the Constitution.

Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Hearing Question of Senator Sheldon Whitehouse

1. **Would you please do me a favor and "Google" the phrase "homosexual lifestyle" and take a look at the context in which the top, I don't know, 50 or 60 hits come back to it. And the record will be open for a week. I'd love you to get back to me with your thoughts about that, and in particular whether, having seen the context in which that phrase is used, having seen the loaded nature of it, I'd love to urge you to never use that phrase in an opinion written on behalf of the Fifth Circuit Court of Appeals of the United States of America.**

Response: A search on the Google website was conducted on May 17, 2007. The first website returned under the phrase "homosexual lifestyle" was http://www.whatyouknowmightnotbeso.com/gaystudy.html. The fiftieth website returned was http://www.evangelsociety.org/francisco/gaychange.html.

The websites discovered by this search include content that might be characterized as propagandistic and fear-mongering, and also political or religious advocacy of a strongly-held moral position. The great majority of the first fifty discovered websites express a viewpoint generally opposed to "homosexuality and homosexual acts," recount personal stories of a decision to leave the "homosexual lifestyle," or describe "dangers" allegedly associated with a "homosexual lifestyle." A few of the websites sought to present an overview of the issue (*e.g.*, http://www.religioustolerance.org/hom_fixe.htm) and others attempted to respond to intolerance of homosexual individuals (*e.g.*, http://www.splcenter.org/intel/intelreport/ article.jsp?aid=538).

It seems clear from this review that the intent of some who refer to a "lifestyle" is to suggest "promiscuous homosexual conduct" with numerous partners and to express dismay about a perceived decline in moral values. The reaction of many others to the phrase is that it reveals ignorance of what it means to be homosexual.

Regardless of the position taken by any given website, the search confirms Senator Whitehouse's suggestion that "homosexual lifestyle" is not a neutral phrase but is used with negative or demeaning connotations.

As I testified before the Committee, I joined in a concurrence to the Court of Appeals' judgment in *S.B. v. L.W.* That concurring opinion quoted the phrase "homosexual lifestye" as part of passage taken from another state's opinion. The majority opinion also used the phrase one time. Should I be fortunate enough to be confirmed as a United States Circuit Judge for the Fifth Circuit, I will be mindful of the connotations highlighted by this internet search. I also pledge to treat with respect all who come before me as a judge.

Leslie Southwick
Mississippi College School of Law
151 East Griffith Street
Jackson, Mississippi 39201
601-925-7176

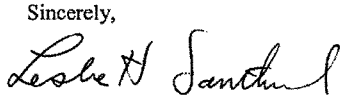
May 22, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached is my response to the written questions presented by Senator Feingold.

Sincerely,



Leslie H. Southwick

cc:
The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Russ Feingold

1. The majority opinion in the Richmond case, which we discussed at your hearing, made much of the fact that the African-American employee who heard the racial slur when it was uttered by Ms. Richmond had indicated that she was not shocked by the use of that phrase in that context and explained her lack of negative reaction as follows: "Because I felt as if she was describing the actions of a person, I at that time didn't allow myself to feel anything other than what I felt she was doing and I allowed her that leeway to describe her." Do you think it was reasonable for the court to draw the conclusion it did from that testimony?

Response: The majority opinion fairly characterized the testimony of the witness. At the hearing, the witness was reminded what Richmond had said in front of her, and then was asked, "that didn't shock you?" The witness answered "no." The quotation that is in your question was in response to the second question following the one about being shocked, and it explained why she was not.

2. Do you believe that the use in the workplace of the racial slur at issue in the *Richmond* case can ever be just "somewhat derogatory"?

Response: The use of this word is inherently and highly derogatory. The use of any racial slur, particularly this one, is offensive.

3. In the *S.B. v. L.W.* custody case, the majority of the court decided to give custody of a child to the father, who had never married the mother. The opinion makes it clear that the fact that the mother was bisexual and at the time was living with another woman was a significant factor in the court's decision. You joined the majority opinion and also joined a concurrence by Judge Payne that argued that by prohibiting gay couples from adopting children and from marrying, and by criminalizing sodomy, which at the time was still constitutionally permissible, "the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality."

a. How was the state's policy on adoption relevant to the question of whether a court should take away custody from a child's natural mother?

Response: The statutes cited in the concurring opinion reflected the legislature's policy judgments in a number of subject areas, judgments that were consistent in approach to the caselaw that was cited in the majority opinion and therefore relevant as analogies.

b. Do you believe that the "public policy of our State with regard to the practice of homosexuality" justifies finding against a gay American in any case in which the morality of that individual is at issue? If not, what distinguished the custody case from other cases where such a conclusion would not be warranted?

Response: I find no Mississippi caselaw that explicitly permitted a finding against a gay American, based on nothing more than the fact the person is gay, in cases in which morality was an issue. As the *S.B. v. L.W.* opinions stated, even in 2001 the controlling Mississippi precedents indicated that sexual orientation or extra-marital relations (whether heterosexual or homosexual), would not by themselves usually be sufficient to affect the custody decision. What suggestions there were in two precedents cited in *S.B. v. L.W.* were not explicit holdings to that effect. The public policy that was reflected in those precedents and the cited statutes will now have to be judged in light of such developments in the law as *Lawrence v. Texas*.

4. What was the public policy in your state at the time this case was decided on whether individuals who were in homosexual relationships should be able to retain custody of their own naturally born children?

Response: I am not aware of any expression of public policy on that question beyond the caselaw that was cited in the majority opinion. In some of the child custody opinions cited by the Court of Appeals majority, the Mississippi Supreme Court had approved consideration of whether a parent was involved in extra-marital relations, whether of a homosexual or a heterosexual nature. As the majority stated, evidence of such relations could not be the sole basis on which to deny custody without a showing that the relations caused harm to the child. *S.B. v. L.W.*, 793 So. 2d 656 (¶ 18) (Miss. Ct. App. 2001).

5. As we discussed at the hearing, the concurrence that you joined states:

> **"I do recognize that any adult may choose any activity in which to engage; however, I also am aware that such person is not thereby relieved of the consequences of his or her choice. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice. As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted."**

a. Do you believe today that one of the consequences of having a same-sex relationship should be to risk losing custody of your own child?

Response: Under controlling precedent, a trial judge was to consider ten factors in making a decision on child custody. The appellate function was to review the decisions on each factor through an abuse of discretion lens. The precedents that were binding on our court accepted that sexual orientation could be a factor, along with others, in deciding custody. As the majority stated in *S.B. v. L.W.*, evidence of such relations could not be the sole basis on which to deny custody without a showing that the relations caused harm to the child. The prior caselaw that made extra-marital relations of any kind an issue in custody decisions, and in some cases also approved consideration of sexual orientation, will have to be re-analyzed in light of *Lawrence*.

b. If the answer to question (a) is no, what about the *S.B. v. L.W.* case led you to conclude that custody should be denied to this particular mother?

Response: The appellate court was to search for an abuse of discretion in the decisions of a trial judge on each factor that was relevant to custody. The majority and the concurring opinions both addressed each of the relevant factors (some of the ten were not contested), and both opinions found that other factors were sufficient to sustain the custody decision. However, given that the mother argued that consideration of her sexual orientation had skewed the decision by the trial judge, the court also addressed that argument.

c. Why did you join an opinion that suggests that the decision to participate in a same-sex relationship may have a significant impact on an individual's rights to custody of his or her own child?

Response: I joined these opinions because of my analysis that both opinions were applying controlling law in Mississippi at the time of the decision.

6. Do you understand why some gay Americans, based on the *S.R. v. L.W* case, may have doubts about your ability to treat them fairly as a judge on a federal appellate court?

Response: I regret that some may react that way to the decision. I have always tried to be fair, to apply my understanding of the facts to my best interpretation of the law, and not let other considerations alter the result. I believe my opinions reflect that approach.

7. At your hearing, you stated in answer to questions from Sen. Coburn that you would treat gay Americans who come before you the same as everyone else. What in your record can you point to that you think ought to reassure gay Americans and those of us who are deeply concerned about discrimination against them that concerns about your ability to do that are misplaced?

Response: Each judge can do no more than assure any litigant that he or she will strive to follow the law after a diligent effort to understand the facts of a case, regardless of the parties before the court. I offer that assurance, should I one day serve as a federal judge. The recognition of legal rights of gays and lesbians has been evolving, as much since the 2001 decision as at any other period in American history. The 2001 decision relied on now-overruled United States Supreme Court precedent. If confirmed as a federal judge, my future decisions would reflect that evolution as well as my commitment to equal justice for all under the law.

SUBMISSIONS FOR THE RECORD

May 9, 2007

VIA FACSIMILE

The Honorable Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

As you and your colleagues prepare for the upcoming judicial nominations hearing tomorrow, Lambda Legal urges the members of the Senate Judiciary Committee to pay close attention to the past record of former Mississippi Court of Appeals Judge Leslie Southwick, a nominee for a seat on the United States Court of Appeals of the Fifth Circuit. As the nation's oldest and largest national impact litigation organization committed to achieving the full recognition of the civil rights of lesbians, gay men, bisexuals and transgender people and those with HIV, we respectfully offer our legal expertise to the members of the Committee on Judge Southwick's record in deciding civil rights cases.

When Judge Southwick served on the Mississippi appellate bench, he joined two opinions that warrant particularly close scrutiny by the Senate Judiciary Committee. In *S.B. v. L.W.*, 793 So.2d 656 (Miss. Ct. App. 2001), Judge Southwick joined a concurring opinion that described the mother's sexual orientation as a "choice" that he felt carried with it "significant consequences" for her custody rights. Notwithstanding that the case involved a biological mother who had been the child's parent since birth, Judge Southwick relied in part on the state's statutory restrictions blocking gay men and lesbians from becoming adoptive parents, as well as the state's restrictions on marriage of same-sex couples, as justifications for why the state should consider a parent's sexual orientation as a negative factor in a custody dispute.

We recognize, though, that there have been many legal shifts since Judge Southwick joined this opinion in 2001. These include the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the decision our organization secured that overturned all remaining state laws that had criminalized private sexual activity between consenting adults, and *Hollon v. Hollon*, 784 So.2d 943 (Miss. 2001), a Mississippi Supreme Court ruling barring excessive emphasis on a parent's sexual orientation in custody determinations.

Given such changes, we ask that the Senate Judiciary Committee pose the following questions to Judge Southwick to determine his ability to be a fair and impartial jurist – one who will follow legal precedent when hearing cases involving lesbian, gay, bisexual and transgender people, and treat them with the same evenhanded treatment to which all litigants are entitled:

- Are you able to rule fairly and impartially in cases involving gay, lesbian, bisexual and transgender litigants?
- Are you able to follow legal precedent established in *Lawrence v. Texas*, that, under our Constitution, religious beliefs about homosexuality and the "traditional family" cannot be the sole basis for the enactment and enforcement of criminal laws (539 U.S. at 571)?
- Are you able to follow legal precedent established in *Lawrence v. Texas*, that those in same-sex relationships are entitled under the U.S. Constitution's protections of liberty and equality to the

National Headquarters 120 Wall Street, Suite 1500 . New York, NY 10005 . t. 212-809-8585 f. 212-809-0055

same autonomy as heterosexuals in making personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education (539 U.S. at 574)?

- The concurrence you joined in *S.B. v. L.W.* asserts that "[u]nder principles of federalism, each state is permitted to set forth its own policy guidelines through legislative enactments and through judicial renderings." (793 So.2d at 664.) Under your judicial philosophy, do those principles of federalism require that a state's policy guidelines be consistent with, and not violate, the guarantees of liberty, due process and equality under the U.S. Constitution?
- Are you able to follow legal precedent established in *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996), that a law that can be explained only by anti-gay animus violates the equal protection clause?

The second opinion joined by Judge Southwick that merits the Senate Judiciary Committee's close examination is *Richmond v. Mississippi Dept. of Human Servs.*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *reversed*, *Richmond v. Mississippi Dept. of Human Servs.*, 745 So.2d 254 (Miss. 1999). Judge Southwick joined a 5-4 majority ruling in that case that upheld the reinstatement of a white state employee who had been fired for referring to an African American co-worker as "a good ole nigger." The opinion joined by Judge Southwick found the use of that epithet too inconsequential to serve as a basis for the white employee's dismissal, relying in part for this conclusion on the assertion that the epithet allegedly was not motivated out of racial hatred or animosity, but was "intended to be a shorthand description of her perception of the relationship existing between the worker and a ... supervisor" equivalent to calling her a "teacher's pet" and on the African American co-employee's lack of outrage at the remark. In response, the justices who dissented at the Court of Appeal expressed that the view that use of the epithet was inherently offensive and to find it inconsequential "requires a level of myopia inconsistent with the facts or reason." (1998 Miss. App. LEXIS at *28) (King, J., dissenting).

In light of this opinion, we ask that the Senate Judiciary Committee also pose the following additional question to Judge Southwick to determine his ability to be a fair and impartial jurist:

- Are you able to rule fairly and impartially in cases involving the rights of employees under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967 to a workplace free from discrimination based on race, religion, national origin, sex, disability or age?

As the nation's oldest and largest national impact litigation organization committed to achieving the full recognition of the civil rights of LGBT people and those with HIV, we are ever aware of the importance of access to justice for all people, with judges who will decide the cases that come before them based on evidence and precedent. We urge you to scrutinize Judge Southwick's record closely and to ask and require answers from him to pertinent questions about his ability to be a fair and impartial jurist.

Very truly yours,

Kevin M. Cathcart
Executive Director

CC: Senator Sheldon Whitehouse (via facsimile)

Leadership Conference on Civil Rights

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Asian American Justice Center
PRESIDENT & CEO
Wade J. Henderson

May 9, 2007

The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our serious concerns with the nomination of Judge Leslie H. Southwick, of Mississippi, to the United States Court of Appeals for the Fifth Circuit. The limited judicial and other relevant records Judge Southwick has made available to the Committee reveal troubling questions about his commitment to social justice and equality, questions that we urge the Committee to very carefully scrutinize before taking further action on his nomination.

Of the records that we have been able to review thus far, we are troubled by his involvement in several decisions in particular:

In *Richmond v. Mississippi Dep't of Human Services*,[1] Judge Southwick joined a 5-4 ruling upholding the reinstatement of a white state social worker who had been fired for calling an African-American co-worker "a good ole nigger." The ruling he joined had declared that, taken in context, this slur was an insufficient ground to terminate the white plaintiff's employment in part because it "was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general."

The reasoning offered by Judge Southwick and his colleagues in the majority is nothing short of baffling, and it was fortunately unanimously reversed by the Supreme Court of Mississippi. As two dissenters in the 5-4 decision rightfully pointed out, though:

> The word 'nigger' is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend.

[1] 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), *rev'd* 745 So. 2d 254 (Miss. 1999).

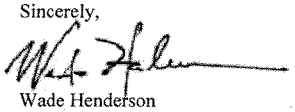
In another case, *S.B. v. L.W.*,[2] Judge Southwick joined a ruling that upheld the removal of an eight-year-old girl from the custody of her bisexual mother. In addition to joining the majority opinion, he was the only other judge in the majority to join a gratuitously anti-gay concurring opinion. The concurrence argued that the "choice" to engage in homosexuality comes with consequences, up to and including the consideration of "the homosexual lifestyle" as a determining factor in child custody cases. The views expressed in the concurring opinion raise doubts about Judge Southwick's interest in ruling fairly and impartially in cases that involve the civil rights of gays and lesbians.

Finally, in *Dubard v. Biloxi, H.M.A.*,[3] Judge Southwick wrote a dissenting opinion in which he extolled the virtues of employment-at-will, a doctrine which provides that employers should be able to fire employees for virtually any reason, even though his analysis was not relevant to reaching a decision in the case. He wrote that "I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification for employment at will." His gratuitous comments raise questions about his ability to separate his own views from his duty to follow the law in labor and employment cases.

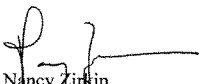
LCCR strongly believes that given the tremendous impact that federal judges have on civil rights and liberties, and because of the lifetime nature of federal judgeships, no judge should be confirmed by the Senate unless he or she demonstrates a solid commitment to protecting the rights of all Americans. As such, it is critical that the Committee carefully scrutinize Judge Southwick's full record, determine the full extent of his jurisprudential views and legal philosophy, and satisfactorily resolve the troubling questions raised to date about his record, before taking any further action on his nomination beyond today's confirmation hearing.

Thank you for your consideration. If you have any questions, please contact Nancy Zirkin, LCCR Director of Public Policy, at 202-263-2880.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Vice President / Director of Public Policy

[2] 793 So. 2d 656 (Miss. App. Ct. 2001).
[3] 1999 Miss. App. LEXIS 468 (Miss. App. Ct. 1999), *rev'd* 778 So. 2d 113, 114 (Miss. 2000).

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee,
On Judicial Confirmation Hearing
May 10, 2007

Today, the Committee will hear from three more nominees for lifetime appointments to the federal courts – Leslie Southwick to the United States Court of Appeals for the Fifth Circuit, Janet Neff to the District Court for the Western District of Michigan, and Liam O'Grady to the District Court for the Eastern District of Virginia. I thank Senator Whitehouse for agreeing to chair this important hearing.

All three of these nominees have the support of their home-state Senators. I appreciate Senators Cochran, Warner, Levin, Lott, Stabenow appearing and submitting statements on these nominees and I commend Senator Webb for working so quickly upon his arrival in the Senate to review the nomination from Virginia.

In my view, it is unfortunate that Judge Neff is here before us once, again, rather than already on the bench in the Western District of Michigan helping to ease the inexcusable backlog of cases in that district. That backlog is being borne by dedicated but severely overburdened senior judges.

Judge Neff, along with two other nominees for longstanding vacancies in the Western District of Michigan, was reported out of Committee last fall, but was left pending on the Senate's Executive Calendar when some on the other side of aisle blocked her nomination. All three Western District of Michigan nominations are for vacancies that are judicial emergency vacancies – three in one federal district.

The Senators from Michigan had worked with the White House on the President's nomination of three nominees to fill those emergency vacancies. Those nominees were considered and reported by this Committee last Congress. Working with then-Chairman Specter, the Democratic Members of the Committee cooperated to expedite their consideration. On September 19th, we held a confirmation hearing for those three nominees on an expedited basis, and they were favorably reported to the Senate on September 29th.

Regrettably, rather than consider these and other judicial nominations toward the end of the last session, they stalled. After the last working session of the last Congress in October, I learned that several Republicans were objecting to Senate votes on some of President Bush's judicial nominees. According to press accounts, Senator Brownback had placed a hold on Judge Neff's nomination, even though he raised no objection to her nomination at her hearing, which he chaired, and later when she was unanimously reported out of Judiciary Committee. Later, without going through the Committee, Senator Brownback sent questions to Judge Neff about her attendance at a commitment ceremony held by some family friends several years ago in Massachusetts. Senator Brownback spoke of these matters and his concerns on one of the Sunday morning talk shows.

I wondered at the end of the last Congress whether it could really be that Judge Neff's attendance at a commitment ceremony of a family friend failed some Republican litmus test of ideological purity, that her lifetime of achievement and qualifications were to be ignored, and that her nomination was to be pocket filibustered by Republicans.

When this Congress began and the President sent over his first set of nominees, he inexplicably failed to re-nominate Judge Neff or the other two Western District of Michigan nominees. Those three nominees were not re-nominated until March 19th of this year. I then hoped to move forward without a hearing, since they had a hearing late last year. As I had with the other re-nominations I wrote each Member of the Committee asking whether they were prepared to move forward or would request a hearing. No Member requested a hearing on any of the other district court nominees re-nominated who had previously had a hearing and who had been considered and favorably reported by the Committee. With respect to Judge Neff, Senator Brownback requested another hearing. That is his right. That is why she is appearing, again, today.

The approach to nominations we saw from the President and Republicans in the Senate, of using nominations to score political points rather than filling vacancies and administering justice, has led to a dire situation in the Western District of Michigan. Judge Robert Holmes Bell, Chief Judge of the Western District, wrote to me and to others about the situation in that district, where several judges on senior status -- one over 90 years old -- continue to carry heavy caseloads to ensure that justice is administered in that district. Judge Bell is the only active judge. If not for Republican objections, three vacancies would have been filled many months ago.

The Committee today also considers the nomination of Leslie Southwick to the Fifth Circuit. With this nomination, I understand the disappointment of members of the African-American and civil rights communities that this Administration continues to renege on a reported commitment to appoint an African American to the Mississippi federal bench. In six years, President Bush has nominated only 19 African-American judges to the federal bench, compared to 53 African-American judges appointed by President Clinton in his first six years in office.

With an ever-growing pool of outstanding African-American lawyers in Mississippi, the State with the highest percentage of African Americans in the country, it is not as if there is a dearth of qualified candidates. Nonetheless, President Bush has now submitted 10 nominees to the federal bench in Mississippi, seven at the district level and three to the United States Court of Appeals for the Fifth Circuit, and none of these nominees has been African American. Our nation's diversity is one of its greatest strengths, and I am disappointed that the President has missed yet another opportunity to reflect this great strength in our federal courts.

A review of Judge Southwick's decisions on the Mississippi Court of Appeals has also revealed decisions on workplace racial discrimination and same-sex custody that raise

questions in the minds of many. Today's hearing gives Judge Southwick an opportunity to address those concerns.

In 1999, the first year of the last Congress of the Clinton Administration, a year situated much like this, the Republican majority refused to hold a single hearing or consider a single judicial nominee until well into June. I know how much Republicans like to point to historical precedent for how we should now proceed with this President's judicial nominees.

I have not followed that path of total resistance. Instead, we have already held a number of confirmation hearings for judicial nominees. The Committee has already reported 21 judicial nominees favorably to the Senate and 18 judicial nominees have been confirmed. That is more judicial nominees and includes more Circuit Court nominees than were confirmed during the entire 1996 session when a Republican majority was stalling and began to pocket filibuster President Clinton's moderate and qualified judicial nominees. I do not intend to follow their model and do not intend to pocket filibuster more than 60 of this President's judicial nominees as they did with President Clinton's.

The Senate has confirmed 20 Circuit Court nominations and 118 total judicial nominations, while I have served as Chairman of the Judiciary Committee for a total of less than 22 months. It is an overlooked fact that during the more than six years of the Bush Presidency, more Circuit judges, more District judges and more total judges have been confirmed, in less time, while I served as Judiciary Chairman than during the tenures of either of the two Republican Chairmen working with Republican Senate majorities.

The Administrative Office of the U.S. Courts lists 47 judicial vacancies, yet the President has sent us only 24 nominations for these vacancies. Twenty-three of these vacancies – almost half – have no nominee. Of the 15 vacancies deemed by the Administrative Office to be judicial emergencies, the President has yet to send us nominees for six of them. That means more than a third of the judicial emergency vacancies are without a nominee.

With the cooperation of the President and with the cooperation of the Committee and the Senate, we can continue to make progress.

# # # # #

STATEMENT OF SENATOR CARL LEVIN ON THE NOMINATION OF JUDGE JANET NEFF TO THE FEDERAL BENCH OF THE WESTERN DISTRICT OF MICHIGAN

May 10, 2007

I am pleased to support all three Michigan nominees pending before this Committee - Robert Jonker, Paul Maloney, and Janet Neff - whom the President has renominated to the federal bench in the Western District of Michigan. Senator Stabenow and I worked with the White House on these nominations, they received a hearing last year and were unanimously reported out of this Committee. Unfortunately the nominations were held up on the floor and we did not confirm them during the last Congress. I am hopeful that all three will be approved by this Committee, and promptly confirmed by the Senate.

A hearing on one of these nominees, Janet Neff, is being held today before this Committee. I would like to welcome Judge Neff, her husband David and daughter Genevieve Dorment. Judge Neff graduated with honors from the University of Pittsburg in 1967, then graduated from Wayne State University Law School in 1970. Judge Neff has had a distinguished legal career. After law school, Judge Neff served as an estate and gift tax examiner for the Internal Revenue Service and then a research attorney for the Michigan Court of Appeals, before becoming an assistant city attorney for the City of Grand Rapids. Judge Neff has also worked in private practice, served as a commissioner for the Michigan Supreme Court and then as an assistant United States attorney. Judge Neff currently serves on the Michigan Court of Appeals. She has been granted numerous awards and honors, including the Outstanding Member for 2006 of the

Women Lawyers Association of Michigan.

We are fortunate to have Judge Neff devoted to public service. I look forward to working with my colleagues to move all three Western District nominations promptly through the Senate.

Statement of United States Senator Trent Lott

Hearing
On the Nomination of Judge Leslie Southwick
To the Fifth Circuit Court of Appeals

May 10, 2007

Mr. Chairman, it is my pleasure to introduce Judge Leslie Southwick to this committee. I am delighted that the President has seen fit to nominate Judge Southwick to the 5th Circuit Court of Appeals. As a well-respected judge, his professionalism, wisdom, and judgment make it clear that he is an excellent choice to serve in the Federal Judiciary.

Judge Southwick was last before this Committee in September of last year, when the President nominated him to be a District Court Judge for the Southern District of Mississippi. As I stated at that hearing, Judge Southwick's nomination has received bipartisan support and praise throughout Mississippi.

[The following biographical information will likely be covered by Senator Cochran before you have an opportunity to speak.]

Judge Southwick is a graduated cum laude from Rice University and later graduated from the University of Texas School of Law. After graduating from law school in 1975, Judge Southwick clerked for the Presiding Judge of the Texas Court of Criminal Appeals. He then moved to Mississippi to serve as a clerk for Judge Charles Clark on the Fifth Circuit Court of Appeals.

Judge Southwick – in his infinite wisdom – has resided in Mississippi ever since. He joined the Jackson based firm of Brunini, Grantham, Grower, & Hewes,

where he became a partner. He left private practice in 1989 to serve for four years in the US Department of Justice as Deputy Assistant Attorney General in the Civil Division.

Judge Southwick recently concluded a 12-year stint on the Mississippi Court of Appeals, where he was Presiding Judge from February of 1999 until 2004. During his time on the court, Judge Southwick participated in deciding over 7,000 cases and had the distinction of authoring the most opinions in 8 of his first 10 years. In 2004, Judge Southwick was even awarded the Judicial Excellence Award from the Mississippi State Bar.

In 1992, Judge Southwick joined the Judge Advocate General's Corp in the US Army Reserves. Eventually he transferred his service to the Mississippi National Guard which led to an 18 month, military leave of absence from the Court of Appeals beginning in August of 2004. While in Iraq, Judge Southwick was known as Lieutenant Colonel Southwick. He was the Staff Judge Advocate, for the 155th Brigade Combat Team, mobilized in support of Operation Iraqi Freedom.

Since being nominated for the federal bench – first for the Southern District Court of Mississippi and now for the 5th Circuit Court of Appeals – Judge Southwick has worked as a law professor at the Mississippi College School of Law.

In addition to his lengthy career in public service, Judge Southwick is also a nationally recognized author. He has written legal and historical articles which have been published nationally, and was awarded the American Library Association's award for "Best Reference Work of the Year" in 1985 for his book titled Presidential Also-Rans and Running Mates.

[End of General Biographical information.]

While serving on the Mississippi Court of Appeals, Judge Southwick had the distinction of authoring the most opinions in 8 of his first 10 years. By his own estimate, he took part in deciding roughly 7,000 cases in his time on the Mississippi Court of Appeals.

Judge Southwick has now been a nominee for the federal bench since June 6, 2006 (that's 11 months, 4 days). There has been ample opportunity to review his record and to make a determination based on that review. In fact, this Committee positively referred his nomination to the District Court by Unanimous Consent just last September.

When he was nominated for this seat on the 5th Circuit, The Clarion-Ledger, Mississippi's capital city newspaper, said, "Southwick [...] is an outstanding nomination for the bench, with no hint of any reason for disqualification. [...] The U.S. Senate should confirm the nomination."

Mr. Chairman, Judge Southwick's nomination should come as no surprise given his education, history of public service, reputation for fairness, and stellar judicial temperament. I look forward to the committee's swift approval of this fine nominee, and to quick confirmation by the full Senate.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
MISSISSIPPI STATE CONFERENCE

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May 9, 2007

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

The Mississippi State Conference of the NAACP is strongly opposed to the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals.

As you are well aware, previous nominations to this particular seat on the Fifth Circuit have raised serious civil rights problems. In reviewing this history, we cannot help but conclude that this Administration is determined to place a person hostile to civil rights in the Mississippi seat on the Fifth Circuit. Judge Charles Pickering was nominated in 2001. The Senate refused to confirm him, largely based on his civil rights record. President Bush then nominated Michael Wallace to the same seat. The American Bar Association found Mr. Wallace to be "unqualified," due to his judicial temperament regarding civil rights issues. Wallace withdrew his nomination at the end of 2006. Now, President Bush has named yet a third nominee with a troubling civil rights record.

We note that the Southwick nomination does nothing to ameliorate the egregious problem with the lack of diversity on Mississippi's federal bench. Mississippi has the highest African-American population of any state (36%). Yet there has never been an African American appointed to represent Mississippi on the Fifth Circuit. African-American representation on the federal district court in Mississippi has been limited to one judge, Judge Henry Wingate, appointed over twenty years ago. In his two terms, President Bush has made ten nominations to the federal bench in Mississippi—district and appellate. None were African American. This is extremely disturbing to many Mississippians, who believe the State should be fairly represented on the federal bench.

The civil rights record of Judge Southwick on the Mississippi Court of Appeals gives us great pause. We are deeply troubled by his rulings on race discrimination in the areas of employment and jury selection.

1072 West Lynch Street • Suite 10 • Jackson, Mississippi 39203 • (601) 353-6916 • 1-800-80NAACP • FAX (601) 352-1565

Judge Southwick participated in a truly stunning decision, *Richmond v. Mississippi Dept. of Human Services*. He joined a ruling that a Mississippi state agency could not terminate an employee for using the word "nigger" toward an African-American coworker. At a business conference, the white employee had called the black employee "a good ole nigger," and then used the same term toward the employee the next day at the office. The state agency fired the white employee. But a hearing officer reinstated the employee, finding that calling the employee "a good ole nigger" was equivalent to calling her "teacher's pet." Southwick upheld the reinstatement.

The opinion endorsed by Southwick makes outrageous conclusions about the use of the term "nigger" in the workplace. The opinion states: "[The white employee] presented proof that her remark, though undoubtedly ill-advised and indicative of a rather remarkable insensitivity on her part, was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general." Astonishingly, the court credited the white employee's testimony that her remark was intended to be "a shorthand description" of the relationship between an employee and a supervisor.

Two of Southwick's colleagues strongly dissented. They stated that it "strains credulity" to compare calling the employee "a good ole nigger" with "teacher's pet." The dissent wrote: "The word 'nigger' is, and has always been offensive. ... There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend. ... The character of these terms is so inherently offensive that it is not altered by the use of modifiers such as 'good ole.' ... [The rulings] seem to suggest that absent evidence of a neat racist, the remark is too inconsequential to serve as a basis for dismissal. Such a view requires a level of myopia inconsistent with the facts and reason." Indeed, the Mississippi Supreme Court *unanimously* reversed the ruling joined by Southwick to uphold the reinstatement of the white employee.

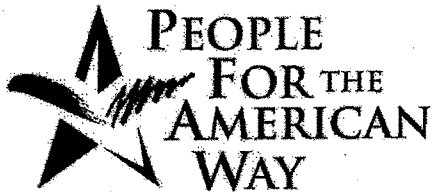
Additionally, we are disturbed by Judge Southwick's rulings on race discrimination in jury selection. Dozens of such cases reveal a pattern by which Southwick rejects claims that the prosecution was racially motivated in striking African-American jurors while upholding claims that the defense struck white jurors on the basis of their race. In *Bumphis v. State*, an appellate colleague accused Southwick of "establishing one level of obligation for the State, and a higher one for defendants on an identical issue."

Finally, on issues affecting workers, consumers and personal injury victims, Judge Southwick rules overwhelmingly in favor of employers and corporations. We question his ability to be a fair and impartial decision-maker in these cases as well. Mississippians need to be confident that they will receive equal justice before the federal courts.

Respectfully yours,

Derrick Johnson, President

HUMAN RIGHTS CAMPAIGN



May 8, 2007

Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Hon. Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Leslie Southwick

Dear Senator Leahy and Senator Specter:

We are writing on behalf of People For the American Way and the Human Rights Campaign and our combined grassroots force of more than 1,700,000 members and other supporters nationwide to express our serious concerns regarding the nomination of Mississippi lawyer and former state court judge Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. As you know, Judge Southwick has been nominated by President Bush to fill a seat on the Fifth Circuit that the President has previously attempted to fill with Charles Pickering and then with Michael Wallace, both of whose nominations were met with substantial opposition, in large measure because of their disturbing records on civil rights.[1] Now, with Judge Southwick, President Bush once again appears to have chosen a nominee for this seat who has a problematic record on civil rights, as further discussed below. And once again the President has passed over qualified African Americans in a state with a significant African American population that has never had an African American judge on the Fifth Circuit.

At the outset, we are constrained to note that there are significant concerns regarding the insufficient time provided to the Judiciary Committee to consider Judge Southwick's

[1] President Bush temporarily filled the vacancy through his highly controversial recess appointment of Pickering in January 2004, after Pickering failed to win Senate confirmation.

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record in the careful manner required by the Senate's constitutional responsibilities in the confirmation process, as well as concerns raised by the fact that Judge Southwick's complete record does not appear to have been provided to the Committee. The confirmation hearing for Judge Southwick was scheduled with only a week's notice to the Committee, providing insufficient preparation time for the consideration of a controversial appellate court nominee. In addition, there has not been sufficient time since Judge Southwick submitted his responses to the Committee's questionnaire, in late February, for his entire judicial record to be reviewed; indeed, it appears that some of his record has not yet even been provided to the Committee.

Leslie Southwick served as a judge on the Mississippi Court of Appeals from 1995-2006.[2] The number of cases in which he participated during that time is voluminous, well in excess of 7,000 by his own estimation.[3] Moreover, according to Judge Southwick, many of the court's decisions during that time were not published at all (including *all* of the court's rulings -- some 600 cases a year according to Southwick -- issued over a period of approximately two and a half years during his tenure). While Judge Southwick in late February provided to the Committee a compact disc containing thousands of pages of his own unpublished opinions, to the best of our knowledge he has not provided copies of the court's unpublished opinions as to which he voted but that he did not write. As the cases discussed below underscore, it is critical that the Committee examine those rulings as well, for the opinions that a judge chooses to join, or elects not to, can be just as revealing of his judicial philosophy as those that he writes.

In addition, and to our knowledge, the Committee also has not been provided with Department of Justice records relevant to Southwick's tenure as a Deputy Assistant Attorney General during the administration of the first President Bush. These records would shed additional light on Southwick's legal philosophy and views, particularly on federal law issues that simply did not come before him while he served on the Mississippi Court of Appeals but that likely would if he were confirmed to a federal Court of Appeals.[4] It is axiomatic that the

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[2] After post-law school clerkships, Southwick spent the first 12 years of his legal career (1977-1989) in private practice at a law firm in Mississippi, where, by his own description, he "primarily worked for oil and gas clients." *See* Answers to Judiciary Committee Questionnaire, at 19. In response to the Committee's written question asking him to describe how he has fulfilled his *pro bono* obligations during his career, Southwick did not identify a single case that he handled on a *pro bono* basis during his entire 12 years in private practice. *Id.* at 26-27. From 1989-1993, during the administration of the first President Bush, Southwick served as a Deputy Assistant Attorney General in the Civil Division of the Department of Justice. *Id.* at 19. According to Southwick, he was a member of the Federalist Society from 1990 until approximately 1998. *Id.* at 3.

[3] According to Judge Southwick, during his tenure on the court he voted in approximately 7,000 cases in which he personally did not write an opinion, and voted and wrote opinions in an unspecified number of additional cases. *See* Answers to Judiciary Committee Questionnaire, at 17.

[4] For example, Southwick was interviewed in 1990 concerning the Iran-Contra scandal, and seemed reluctant to say that a President could not "invoke executive privilege to conceal or cover up a criminal act." *See* Transcript, Regular Justice Department Briefing (Feb. 5,

Committee should not consider any judicial nominee without the nominee's full record or adequate time in which to review it.

Apart from these significant procedural issues, a preliminary review of Judge Southwick's record raises serious concerns about his record on civil rights. As an intermediate state appellate court, the Mississippi Court of Appeals hears appeals in state law criminal cases and typical state law civil cases such as contract disputes, tort claims, workers compensation matters, trusts and estates matters, and the like. It does not routinely consider the types of federal constitutional and civil rights matters that would shed a great deal of light on a judge's legal philosophy concerning these critical issues. Nonetheless, Judge Southwick's positions in two cases before that court during his tenure raising matters of individual rights are highly disturbing, and strongly suggest that Southwick may lack the commitment to social justice progress to which Americans are entitled from those seeking a lifetime appointment to the federal bench. We discuss each of these cases below.

- *Richmond v. Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *reversed*, 745 So. 2d 254 (Miss. 1999)

In *Richmond*, Judge Southwick joined a 5-4 ruling upholding the reinstatement of a white state social worker, Bonnie Richmond, who had been fired for referring to an African American co-worker as "a good ole nigger" at an employment-related conference. Richmond worked for the Mississippi Department of Human Services ("DHS"), which terminated her employment after other employees raised concerns about her use of the racial slur. The ruling that Southwick joined was unanimously *reversed* by the Supreme Court of Mississippi. The facts are as follows.

After she was fired, Richmond appealed her termination to the state Employee Appeals Board ("EAB"), which ordered her reinstatement. The hearing officer opined that Richmond's use of the racial slur "was in effect calling the individual a 'teachers pet'." 1998 Miss. App. LEXIS 637, at *19. He considered the word "nigger" only "somewhat derogatory," felt that DHS had "overreacted," and was concerned that other employees might seek relief if they were called "a honkie or a good old boy or Uncle Tom or chubby or fat or slim." *Id.* at *22-23.

The opinion that Southwick joined upheld the EAB's reinstatement of Richmond, essentially ratifying the astonishing findings and conclusions of the hearing officer. Moreover, the opinion that Southwick joined accepted without any skepticism Richmond's testimony that her use of the racial slur was "not motivated out of racial hatred or animosity directed at her co-worker or toward blacks in general, but was, rather, *intended to be a*

1990) (provided by Judge Southwick along with his answers to the Committee's questionnaire), at Third Add. Particularly given the abuses of executive power by the current Administration, it is critical that Judge Southwick's record and legal philosophy on these matters be thoroughly probed.

shorthand description of her perception of the relationship existing between the [co]-worker and [a] DHS supervisor." *Id.* at *9-10 (emphasis added).

There was a strong dissent by two judges who were obviously appalled by the hearing officer's findings and opinion. Unlike the majority, they openly criticized the hearing examiner's findings and also criticized the majority for presenting a "sanitized version of [those] findings." *Id.* at *29. According to the dissenters,

> The hearing officer's ruling that calling [the co-worker] a 'good ole nigger' was equivalent to calling her 'teacher's pet' strains credulity . . . The word 'nigger' is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend.

Id. at *26.

The dissenters would have held that the EAB's actions were not supported by substantial evidence, and would have upheld the decision by DHS to fire Richmond. Another judge wrote a separate dissent, joined by two other judges, in which he would have remanded the case to the EAB so that *some* penalty could be imposed on Richmond, or detailed findings made as to why no penalty was appropriate.

DHS appealed the ruling of Southwick's court to the Mississippi Supreme Court, which *unanimously reversed.* The Supreme Court majority ordered that the case be sent back to the EAB to impose a penalty other than termination or to make detailed findings as to why no penalty should be imposed. Some of the justices on the court would have gone even further and reinstated the decision by DHS to fire Richmond. But all of the Supreme Court justices rejected the view of the Court of Appeals majority (which included Southwick) that the EAB had not erred in ordering Richmond's reinstatement.

- *S.B. v. L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001)

In this case, Judge Southwick joined a decision by the Mississippi Court of Appeals, upholding -- over a strong dissent -- a chancellor's ruling taking an eight-year-old girl away from her bisexual mother and awarding custody of the child to her father (who had never married her mother). The mother was living at the time with another woman, and in awarding custody to the father, the chancellor was plainly influenced by the mother's sexual orientation and his obvious concern about having the girl continue to live in what he called "a lesbian home." Judge Southwick not only joined the majority opinion upholding the chancellor's ruling, but *alone among all the other judges in the majority*, he joined a concurrence by Judge Payne that was not only gratuitous, but gratuitously anti-gay.

In taking the girl away from her mother (with whom she lived), the chancellor cited a number of factors that he claimed weighed in favor of the father, but it is clear that he was heavily influenced by the mother's sexual orientation. For example, the chancellor stated that the factor of "[s]tability of the home environment" weighed in favor of the father,

because "he is in a heterosexual environment. Has a home there that is an average American home." 793 So. 2d at 666. Meanwhile, the chancellor said, "[t]o place the child with [the mother], the child would be reared in a lesbian home, which is not the common home of today. To place a child with [the father], the child would be reared in a home which is considered more common today." *Id.*

The mother appealed to the Court of Appeals which, as noted above, upheld the chancellor's ruling taking her daughter away from her. The majority opinion, which Southwick joined, held that the chancellor had not erred in taking the mother's sexual orientation into consideration as what it viewed as one factor in his ruling. In addition to the disturbing substance of the majority's ruling, its language is also troubling, and refers repeatedly to what it calls the mother's "homosexual lifestyle" and her "lesbian lifestyle."

Not only did Southwick sign on to the majority opinion, but he *also* made an affirmative decision to join a concurrence by Judge Payne that was gratuitously anti-gay -- *and was the only other judge in the majority to do so.* The concurrence appears to have been written for the sole purpose of underscoring and defending Mississippi's hostility toward gay people and what it calls "the practice of homosexuality" (*id.* at 662), in response to the position of the dissenters (see below) that the chancellor had erred. (The word gay is not used; the concurrence refers repeatedly to "homosexuals" and "homosexual persons.") The concurrence begins by stating that the Mississippi legislature has "made clear its public policy position relating to particular rights of homosexuals in domestic relations settings." *Id.* at 662. It then proceeds to note that Mississippi law prohibits same-sex couples from adopting children -- although this law had nothing to do with the case, since the mother was the birth mother -- and also notes that state law makes "'the detestable and abominable crime against nature'" -- which it says includes "homosexual acts" -- a ten-year felony. *Id.*

Finally, the concurrence takes a huge and troubling states' rights turn, claiming that "[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations." *Id.* at 664. In other words, according to the separate concurrence that Southwick chose to join, federalism gives Mississippi the right to treat gay people as second-class citizens and criminals. The views expressed in this concurrence strongly suggest that Judge Southwick is hostile to the notion that gay men and lesbians are entitled to equal treatment under the law.

Two judges dissented, and in particular noted that there had been no finding that there was any conduct harmful to the child, and that "it is the modern trend across the United States of America to reject legal rules that deny homosexual parents the fundamental constitutional right to parent a child." *Id.* at 668.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process,

nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law," but also a "commitment to protecting the rights of ordinary Americans," and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."[5]

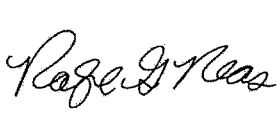
The burden is on Judge Southwick to demonstrate that he satisfies these important criteria for confirmation. In addition to addressing the serious concerns raised by the matters discussed herein and those that have been raised by others, Judge Southwick must also make his full record available, and the Committee must have a reasonable opportunity to examine it. Because the Supreme Court hears so few cases, the Courts of Appeals really are the courts of last resort in most cases and for most Americans. It is therefore imperative that the Committee not engage in a rush to judgment over anyone seeking a lifetime seat on a federal appellate court, and that it insist upon being provided with the nominee's complete legal record.[6]

It is critical that the Committee closely scrutinize Judge Southwick's full record and his jurisprudential views and legal philosophy, particularly with respect to matters critical to individual rights and freedoms. Until the Committee has the opportunity to do that, and unless the significant questions raised to date by Judge Southwick's record are resolved satisfactorily, the Committee should not proceed with consideration of Judge Southwick's nomination.

Sincerely,

Joe Solmonese
President
Human Rights Campaign

Sincerely,



Ralph G. Neas
President
People For the American Way

cc: All Members, Senate Judiciary Committee

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[5] *See* Law Professors' Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.

[6] The failure to do so can result in the Committee's inability to consider highly relevant information, with significant consequences. In recent years, for example, America has seen controversial Bush nominee Jay Bybee confirmed for life to the Ninth Circuit, only to learn from the disclosure of government records *after* Bybee's confirmation of the disturbing memorandum that he wrote taking the position that the President has almost unlimited power to order the torture of suspected terrorists. *See, e.g.*, Adam Liptak, "The Reach of War: Legal Advice," *New York Times* (June 24, 2004).

SENATOR WARNER'S STATEMENT TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF LIAM O'GRADY TO SERVE AS A U.S. DISTRICT JUDGE FOR THE E.D. OF VIRGINIA MAY 10, 2007

Chairman Leahy, Senator Specter, and my other distinguished colleagues on the Senate Judiciary Committee, I thank you for holding this important confirmation hearing.

Senator Webb and I join together in introducing to the Committee an outstanding nominee, Magistrate Judge Liam O'Grady, who has been nominated by our President to serve as an Article III judge on the United States District Court for the Eastern District of Virginia.

Judge O'Grady is joined here today by his wife, Grace; his son, Wynn - age 9; and his daughter, Tatum - age 5. Judge O'Grady's two older daughters, Maura and Emma, are in college finishing exams and were unable to attend.

Judge O'Grady has been nominated to fill the seat that was vacated by Judge Claude Hilton. For more than 20 years Judge Hilton served with distinction as an active judge on the court. Today, we are fortunate that he is continuing his service on the court in senior status.

In my view, we are equally fortunate to have a nominee like Liam O'Grady who is willing to continue his public service on the federal bench. I give him my highest personal recommendation.

In addition, I note that the American Bar Association gave Judge O'Grady its highest rating - unanimously well qualified. This rating was echoed by the many bar associations in Virginia who gave us the courtesy of their recommendations.

Liam O'Grady has been a member of the Virginia Bar since 1978. Since that time he has worked as a sole practitioner, as an assistant Commonwealth's attorney, as an assistant United States attorney, as a partner in the international law firm of Finnegan, Henderson, Farabow, Garrett, & Dunner, LLP, and for the last four years he has worked with the Eastern District of Virginia bench as a Magistrate Judge.

In his career, he has had a wide array of experience. As a solo practitioner, he worked as a court appointed criminal defense lawyer. As an assistant Commonwealth's attorney, he tried upwards of 100 jury trials. As an assistant United States Attorney, he focused on narcotics and organized crime cases. As a partner at a well known law firm he worked extensively on patent and trademark cases for major corporations. And, for the last four years as a Magistrate Judge for the Eastern District of Virginia, Liam O'Grady has seen first-hand the wide array of cases that come before the court.

Equally impressive, though, is that despite the rigors of his career, Judge O'Grady has always found time to give back to the community. Throughout his career, he has helped teach law at both George Washington University and George Mason. While at Finnegan, Henderson, he set up a pro bono legal clinic at his law firm and took court appointed cases serving those in need. And, most recently, he has been a dedicated volunteer youth soccer and youth hockey coach.

Judge O'Grady is obviously well qualified and highly prepared to serve as a district judge. I thank the Committee for holding today's hearing, and I look forward to supporting this exceptional Virginian when his nomination comes before the full Senate.

Statement of Senator Jim Webb
On the Nomination of Liam O'Grady to be a Judge on the
U.S. District Court for the Eastern District of Virginia

Before the Senate Committee on the Judiciary
May 10, 2007

Chairman Leahy, Senator Specter, members of the Judiciary Committee, thank you for inviting me today to speak before the Judiciary Committee. Today, it is my distinct pleasure to offer my support – along with my colleague Sen. Warner -- for the nomination of Magistrate Judge Liam O'Grady to be a judge on the United States District Court for the Eastern District of Virginia.

Since graduating from law school, Judge O'Grady's career has been as expansive as it has been distinguished. Judge O'Grady currently serves as a Magistrate Judge in the U.S. District Court for the Eastern District of Virginia, where he has sat since 2003. Prior to taking the bench, Judge O'Grady was a partner at the law firm of Finnegan, Henderson, Farabow, Garrett, & Dunner, LLP (1992-2003), an Assistant U.S. Attorney in the Eastern District of Virginia (1986-1992), and an Assistant Commonwealth Attorney for the Commonwealth of Virginia. Judge O'Grady began his career as a law clerk to an administrative law judge for the Department of Labor and the Department of the Interior (1976-1979) and was subsequently a sole practitioner (1979-1982).

Judge O'Grady has spent equal time in federal and state courts and has spent equal time handling criminal and civil matters. Judge O' Grady has tried more than 100 cases before a jury. Moreover, he has authored and published several scholarly articles and he has devoted countless hours in pro bono work for low-income and indigent clients. Judge O'Grady was unanimously rated "Well Qualified" by the American Bar Association.

Judge O'Grady is married to Grace McPhearson O'Grady and has four children. He resides in McLean, Virginia. Judge O'Grady received a B.A. from Franklin & Marshall College (1973) and a J.D. from George Mason University School of Law (1977).

As I have previously noted, the Constitution assigns a pivotal role to the Senate in the advice and consent process related to Federal judges. These judgeships are lifetime appointments, and Virginians expect me to take very seriously my constitutional duties. In my mind, it matters not whether a nominee is a Republican or a Democrat, but rather whether the nominee will be respectful of the Constitution, and impartial, balanced, and fair-minded to those appearing before him. After careful deliberation, including conferring with Senator Warner, I believe that Judge O'Grady meets these high standards.

I want to thank Chairman Leahy for his kind invitation to introduce Judge O'Grady today, and for the expeditious way he has moved this nomination through the process during the 110th Congress. Again, it is with pride that I join Senator Warner in recommending this nominee to members of the Judiciary Committee, and to each of my colleagues in the United States Senate.

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