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NOMINATIONS OF DALE CABANISS, CRAIG S. ISCOE, AND BRIAN F. HOLEMAN

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON THE

NOMINATIONS OF DALE CABANISS TO BE CHAIRMAN, FEDERAL LABOR RELATIONS AUTHORITY; CRAIG S. ISCOE AND BRIAN F. HOLEMAN TO BE ASSOCIATE JUDGES OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

SEPTEMBER 30, 2003

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NOMINATIONS OF DALE CABANISS, CRAIG S. ISCOE, AND BRIAN F. HOLEMAN

TUESDAY, SEPTEMBER 30, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:02 a.m., in room SD–342, Dirksen Senate Office Building, Hon. George V. Voinovich, presiding.

Present: Senators Voinovich and Stevens.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The Committee will come to order.

Good morning, and thank you all for coming. Today, the Governmental Affairs Committee meets to discuss the nominations of Dale Cabaniss for Chairman of the Federal Labor Relations Authority, and Brian Holeman and Craig Iscoe for Associate Judges of the District of Columbia Superior Court.

We are going to begin our hearing this morning with the FLRA nomination, and I would like to extend my greetings to Ms. Cabaniss and her family, and I would like to also welcome my colleague, Senator Stevens, who is going to be introducing Ms. Cabaniss.

Senator Stevens, I know you are a very busy Senator, and we look forward to your words.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Thank you very much, Mr. Chairman. I am pleased to be here. I think this is the third time I have been here to introduce Dale Cabaniss to this Committee.

Dale worked for our Alaska delegation, first for Senator Frank Murkowski, and then for me, for 13 years. She was the person who served as my adviser and counsel to the Governmental Affairs Subcommittee on Post Office and Civil Service, and she was also an important member of our professional staff for the Senate Appropriations Committee on the Subcommittee on Labor, Health and Human Services.

Her Alaska roots are very deep, Mr. Chairman. Her husband, Mitch, who is here, Mitch Rose, was my chief of staff, and Dale is the mother of three children: Ben, and twin girls, Haley and Shelby. Her father-in-law is one of my close friends, and I know that family means a lot to Dale and to Mitch. We are also pleased that Dale's brother, Major Christian Cabaniss, a Marine officer, is with us today.

Dale's father-in-law is the former director of the Alaska Permanent Fund. Some of you may wonder about the Permanent Fund, but that is the fund from which we get our Alaska dividends. It is a very important function of our State.

Dale is part of a public service family. Her commitment to government service is obvious, and she has a great deal of experience. Dale's extensive experience goes beyond the Congress, Mr. Chairman. She was a member of the Federal Labor Relations Authority in several capacities. She was originally appointed a member of the FLRA by President Clinton in 1997 as a minority member then of the Board. In March 2001, she served as chairman of that agency, and she has been nominated now for another 5-year term as a member of the FLRA, and I am here this morning to strongly support her nomination and urge that she be reported to the floor.

Dale has been an advocate of an effective bipartisan voice on civil service on public and private sector labor issues. She serves as a member of the FLRA's three-member panel that adjudicates cases and makes over 1,000 decisions a year. These disputes are often contentious, and Dale has earned the reputation as a fair and balanced arbitrator.

She has also had extensive experience with the Federal labor-management relations statute and the Federal budget and appropriations process. She understands the challenges that Federal agencies and employees face, and her own experiences with government, both in the Congress and the Executive Branch, give her a unique perspective when it comes to resolving disputes that come before her agency. I know, and hope the Committee will agree, that this type of experience is valuable for all of us on the FLRA.

Since 2001, Dale has fulfilled the role of administrative CEO for the entire FLRA. She has adeptly spread out her responsibilities, which include managing human capital, steering the agency through the budget and appropriations process, and dealing with all the issues related to agency planning and performance.

In short, I am really happy to be here to present to you a public servant with a distinguished background who really deserves early approval by this Committee. I am pleased to serve with you on this and hope we can quickly move her nomination for another 5-year term on the FLRA. I appreciate very much your courtesy.

Senator VOINOVICH. Thank you, Senator Stevens. I know that you would like to remain for the rest of the hearing, but you have other things to do. Again, thank you for being here.

Senator STEVENS. I am sure we all are going to leave rather soon. We have two votes in just a few minutes.

Senator VOINOVICH. I understand.

Senator STEVENS. I thank you for your courtesy, Mr. Chairman.

Senator VOINOVICH. You are more than welcome.

Ms. Cabaniss, I think you know that I have a special interest in the Federal personnel issues and will be watching your progress as Chairman with great interest. Even though the FLRA is a small independent agency, its mission is vital to the entire Federal service system. The FLRA provides leadership, establishes policies, offers guidance relating to Federal labor-management relations. The FLRA also resolves disputes under and ensures compliance with the Federal service labor-management relations statute.

As the current chairman, you have had the opportunity to gain an insider's perspective on the past, present, and future of labor relations, and I would be very interested in your opinion and observations regarding the current state of Federal labor relations. I also look forward to hearing how you will continue to ensure that the Federal labor relations statute remains an integral part of our civil service system.

Ms. Cabaniss, you have filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee, and you have had your financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made a part of the hearing record, with the exception of the financial data, which will be on file and available for public inspection at the Committee offices.

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath. Therefore, I ask you to please stand and raise your hand.

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

Ms. CABANISS. I do.

Senator VOINOVICH. Let the record note that the nominee has responded in the affirmative.

You have some family members here with you this morning, and I thought I would give you an opportunity to introduce those members.

TESTIMONY OF DALE CABANISS,[1] TO BE CHAIRMAN, FEDERAL LABOR RELATIONS AUTHORITY

Ms. CABANISS. My husband, Mitch Rose, is here, as Senator Stevens mentioned, and my brother, Major Christian Cabaniss.

Senator VOINOVICH. Well, we welcome them this morning, and I know they are very proud of your service, and I am sure your husband should be thanked for the sacrifice that he makes of his time so that you can do the job that you have been doing for our country.

I will start with some standard questions we ask all nominees. Is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. CABANISS. No.

Senator VOINOVICH. Do you know of anything personal or otherwise that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Ms. CABANISS. No.

Senator VOINOVICH. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of Congress if you are confirmed?

Ms. CABANISS. Yes.

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[1] The biographical and professional information for Ms. Cabaniss appears in the Appendix on page 15.

Pre-hearing questionnaire for Ms. Cabaniss appears in the Appendix on page 23.

Post-hearing questions and responses for Ms. Cabaniss appears in the Appendix on page 47.

Senator VOINOVICH. I have some questions that I would like to ask, and I know we have got some votes coming up here this morning. What I am going to try and do, quite frankly, is continue this hearing as we move along, and then I will have to excuse myself to go down and then come back, and we will continue with our other nominees that are here this morning.

What can you do to help the Executive Branch address its human capital challenges? Where I am coming from is this: That there is some real concern about labor relations between the administration and the members of the unions, the Federal unions. What role do you think you can play to help make this a better relationship?

Ms. CABANISS. Well, I think we do things right now to help better relationships because I think all good relationships are dependent upon communication, appropriate behavior, respect for each other. I think we address those issues in a number of ways.

Through the decisions of the three-member Authority decisional component, we try to make sure that the parties who come to us understand their rights and responsibilities under the statute, that we have well-reasoned decisions that help people not only resolve the particular dispute that they came to us for resolution, but they can take something from those decisions that can help guide their future behavior.

More importantly, though, I think sometimes the best thing is for us to be able to help people learn how to interact with each other effectively before they resort to litigation. We have a lot of different kinds of ADR programs. We have several training programs. We do outreach, teaching people interest-based bargaining techniques, ways for parties to learn to work with each other.

I was very happy to see the other day we got a training request from an agency that has had contentious contract negotiations with its union since the previous administration. I was very happy to see that they are resuming talks, and they were actually asking first for training before they started negotiations and trying to figure out how they could work together instead of waiting until they are in an adversarial stance, people have hardened their positions, and all they come to us to do is to decide their dispute.

Senator VOINOVICH. So, in effect, you are reaching out. Can you initiate that or do they have to come to you for it?

Ms. CABANISS. We have certain places where we offer services as part of our process. When people come to our General Counsel's Office and they are seeking to file a ULP, there is outreach that is made there. Do you really want to go this route? Can we help you work on your relationship?

When you file a negotiability appeal with the three-member Authority decisional component, we have pre-conferences with the parties; we offer again our services.

In some ways, though, it is like anyone with a problem. We know where our high filers are, where agencies and unions have difficulties. But in some ways, the best way for these kind of services to work is when the parties are voluntarily coming to us and seeking our assistance.

Senator VOINOVICH. Are you involved at all in the negotiations or provide any training for the people that are involved in negoti-

ating new personnel practices with the newly created Department of Homeland Security?

Ms. CABANISS. The only involvement we've had in that is the design team asked for some training this summer to be provided. For some of our career staff to give some training on certain bargaining techniques.

Senator VOINOVICH. Where do you get your——

Ms. CABANISS. That was provided.

Senator VOINOVICH. I should know this, but where does your budget come from?

Ms. CABANISS. Treasury—I was going to say Treasury, Postal. It's now Transportation, Treasury.

Senator VOINOVICH. Is it adequate? Do you have an adequate budget to get the job done?

Ms. CABANISS. I think it's sufficient. We're fairly small. We've got approximately $30 million, 215 FTEs. But I don't think the budget's really so much the issue, and like I said, we have a lot of really talented employees who have a lot of skills that I think people could benefit from. But I think in a lot of ways there are systemic problems that I've seen since I've been a member of the Authority, not really particular to this administration, where you continue to see problems, difficult relationships in the same agencies, in the same facilities, over and over and over again. If we see those or we think it would probably be in the best interest of those agencies, they've got to know where they have problem facilities, too, to go in and provide training perhaps to their managers and their employees, how to more effectively manage their conflicts as opposed to—here we have another case again from X particular place.

Senator VOINOVICH. Well, you have these observations, and you share them with the Secretaries of the Departments?

Ms. CABANISS. To be honest, we don't really have that role as an independent adjudicator.

Senator VOINOVICH. Because I know that Clay Johnson has now taken over the management part of OMB.

Ms. CABANISS. Well, I think that's exactly the place to—I think in the past couple of years, this Committee has been very active in emphasizing the M in OMB rather than just the dollars. And I think probably most of that leadership role for the agencies would be more appropriately coming from OMB.

Senator VOINOVICH. He seems to be very conscientious, and I like his attitude. He gets it. And, if it is appropriate, I think it would be very good if you folks could share some of your observations with him so that perhaps those agencies where we have had some real problems could get the kind of training that they need so that it will improve the relationships there.

Ms. CABANISS. Well, and it's not just training from us. I think, frankly, sometimes just because you make someone a manager they don't automatically have that skill set. And, we have fewer managers than we used to have in the Federal Government. We've reduced the layers of middle management, and I think in a lot of ways managers are burdened with a lot of responsibilities. And I think when everyone's trying to meet program needs, reach mission goals, I don't know that agencies necessarily always have the time or the money to think, now, what do we need to do as far as train-

ing our managers in how to manage conflict, how to deal with issues before—regardless of the FLRA, the MSPB, EEOC, any formal process they might resort to, what can you do within the agencies, whether it's in-house ADR, employee ombudsman programs, ways to manage conflicts before they reach the level that you're coming to someone like us.

Senator VOINOVICH. Do you have any kind of publication that says these are fundamentals that you ought to have?

Ms. CABANISS. No, we haven't done that. That is actually really much more, I think, MSPB's role in the studies that they do. We haven't had that responsibility under our statute. But it's certainly something that we're interested in, and we've tried to put out, I think, through our ADR services and our training conferences, to try and help people build relationships and understand that they're in it for the long haul and that the conflict not only costs the people who are involved in the conflict, but the agencies and the American public ultimately.

Senator VOINOVICH. Well, I've got some more questions, and I am going to submit them to you in writing. I think that we may have an oversight hearing one of these days with you so we can spend more time talking about what you do and what the relationships are, because I am really committed to try and improve the relationships with labor and this administration. And so often, as you have already pointed out, a lot of it has to do with giving the folks the training that they need so that they are more capable of dealing with some of these issues that come up.

So thank you very much for being here, and I hope that the Committee will move your nomination very fast. Thanks very much for being here, and we thank your husband and your brother for showing up this morning.

Ms. CABANISS. Thank you.

Senator VOINOVICH. Now I would like to ask Mr. Holeman and Mr. Iscoe to come forward. Mr. Holeman and Mr. Iscoe are nominated to serve 15-year terms on the District of Columbia Superior Court. This Committee takes its oversight responsibility seriously, and I welcome today's opportunity to discuss the Superior Court with you.

Confirming qualified nominees to the court is critical to ensuring public safety in our Nation's capital. Let me state for the record that Mr. Holeman and Mr. Iscoe have been subjected to a very thorough screening process. They were recommended for this position by the District's Judicial Nomination Committee. They both have been subjected to an FBI background investigation and nominated by the President after careful scrutiny. Since the nomination was received, Committee staff also has conducted a separate background check and interviewed Mr. Holeman and Mr. Iscoe.

I would now like to welcome my colleague, Eleanor Holmes Norton from the District of Columbia, who is here to offer a few words of introduction for our nominees. Eleanor, it is so nice to see you, and thank you for coming.

TESTIMONY OF HON. ELEANOR HOLMES NORTON, A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. My pleasure, Mr. Chairman, and may I thank you again for your good works for the District of Columbia.

The President has nominated two well-qualified candidates to be Association Judges of the Superior Court of the District of Columbia.

Brian Holeman has extensive experience in private practice in the District of Columbia, Maryland, Pennsylvania, and Los Angeles. He has his degrees from the University of Michigan Law School and his bachelor's from Princeton University.

Craig Iscoe has spent his career as a prosecutor, a trial attorney with administrative agencies, and a law professor. He is now on detail from our U.S. Attorney's Office for the District of Columbia to the SEC, where he is conducting securities litigation. He has also worked as a trial attorney early in his career for the FTC. His work in the U.S. Attorney's Office has been especially extensive: jury trials in major criminal cases, in public corruption, major transnational crimes. He has worked at Main Justice in intelligence, national security, white-collar matters. He has been in private practice here in the District of Columbia at Arent, Fox, and has been a clinical law professor at Vanderbilt and Georgetown Law Schools. We are pleased that he has worked in our local community as an Advisory Neighborhood Commissioner. He has his law degree from Stanford, his LLM from Georgetown, and he is a Phi Beta Kappa graduate of the University of Texas at Austin.

We are very pleased that you are holding hearings for both these candidates, whom we also consider well qualified to be judges on our Superior Court.

Senator VOINOVICH. As you know, you are welcome to remain for the rest of the hearing, but I suspect you have other appointments this morning. We thank you for coming over and look forward to seeing you again.

Ms. NORTON. Thank you very much, Mr. Chairman.

Senator VOINOVICH. As I mentioned before, it is the custom of this Committee to swear in all our witnesses, and, therefore, I ask both of you to please stand and raise your right hand. Do you swear the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ISCOE. I do.

Mr. HOLEMAN. I do.

Senator VOINOVICH. Let the record show they have answered in the affirmative.

I understand that you may have some family members here today, Mr. Iscoe. I suspect that your wife and two children are behind you, if you want to introduce them.

TESTIMONY OF CRAIG S. ISCOE,[1] TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Mr. ISCOE. Quite correct, Mr. Chairman. Thank you. I'd like to introduce my wife, Rosemary Hart, and my two sons, David and Mark.

Senator VOINOVICH. We are very happy to have you here today, and I have studied your husband and your father's resume over the years, and he has chosen to serve his country in various capacities over the years rather than opt for a large law firm and make a whole bunch of money. As one who has been in this business for almost 37 years, I admire the fact that you have been willing to sacrifice so that your husband and father can serve his country.

The only comment I have is that I hope there is somebody at the SEC to take your place because there is some serious work that needs to be done by the SEC to take care of some folks that have not done what they are supposed to do in their corporate responsibilities.

Mr. Holeman, do you have any family here that you would like to introduce?

TESTIMONY OF BRIAN F. HOLEMAN,[2] TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Mr. HOLEMAN. Thank you, Mr. Chairman. I am accompanied today by my wife, Susan Dunnings Holeman, who is a well-respected lawyer here in the city in her own right. She is Deputy General Counsel for Employee Relations with National Public Radio. We decided to spare the Committee our 18-month-old, Jonathan Taylor Holeman. He's teething now, and we probably would not be able to get through this proceeding.

I'd like to mention as well, Mr. Chairman, that not present but certainly here in spirit are my mother, Joan Holeman, and my father-in-law, Stuart John Dunnings, Jr.

Senator VOINOVICH. We thank you also for your service. I notice from your background that you have had a distinguished career, but have chosen the private practice. As one who did that for about 14 years, I also understand that, and you have got a very distinguished background in litigation and trial work, and we are very happy that you are here today.

Mr. HOLEMAN. Thank you, sir.

Senator VOINOVICH. I have questions that I have to ask all of you. First of all, is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. ISCOE. No, sir, there's not.

Mr. HOLEMAN. No, sir.

Senator VOINOVICH. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

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[1] The biographical and professional information and pre-hearing questions for Mr. Iscoe appear in the Appendix on page 50.

[2] The biographical and professional information and pre-hearing questions for Mr. Holeman appear in the Appendix on page 84.

Mr. ISCOE. No, sir, I do not.

Mr. HOLEMAN. No, sir.

Senator VOINOVICH. And last, but not least, do you know of any reason, personal or otherwise, that would in any way prevent you from serving the full term for the office to which you have been nominated?

Mr. ISCOE. No, I do not.

Mr. HOLEMAN. No, sir.

Senator VOINOVICH. This is a question for both of you. You both have had a chance to observe a variety of judicial temperaments, and I would like each of you to kind of discuss what you believe to be the appropriate temperament and approach of a judge not only in dealing with attorneys before you, but in dealing with clients and witnesses appearing before the bench?

Mr. ISCOE. Mr. Chairman, I believe a judge has to be civil and polite at all times, and from having appeared in court, I can tell you that makes a difference not only to the lawyers who are appearing in front of the judge, but also to the witnesses and to the entire court process.

In addition, a good judge has to be extremely well prepared to have done his or her homework, to have read the pleadings, not just well enough to have said he's been through them, but to have full command of them so that at the time that the lawyers are appearing in front of the judge, the judge can ask incisive, probing questions. That does a couple of things: It facilitates the process, and it also lets the lawyers know that they should be well prepared and ready to argue legal and factual issues.

A judge also should create an aura of fairness, an absolute feeling in the courtroom that both the litigants and all of the witnesses and everybody in front of the proceedings is being treated fairly and their arguments are being considered. Of course, their arguments won't always be accepted, but it's quite important that they know that when they appear in front of the judge, the judge is treating them fairly, considering their arguments very carefully, and making the best decisions possible.

I could go on, but I want to let Mr. Holeman respond as well.

Senator VOINOVICH. Mr. Holeman.

Mr. HOLEMAN. Mr. Chairman, I believe that a judge must have the ability to defuse the adversarial nature of the proceedings while at the same time allowing counsel the latitude to do their respective jobs, which are, frankly, the zealous representation of their clients. It's a balancing act.

I think that judges must be considerate in their handling of matters, but at the same time, they must be firm and certain in their rulings.

I think a judge has to be collegial in his leading of counsel through the required work, yet serious in the dispensation of justice, which is the reason that litigants come to court in the first place.

There are other qualities that I think that a judge must have. A judge must be patient with litigants and with their counsel. A judge must always, always uphold the dignity of the position, must be fair in his or her respect for each individual who appears before

him or her, because, frankly, a lot of our litigants are underserved otherwise in society, and they look to the courts for fairness.

A judge must always be well prepared. It's very difficult for a judge to demand preparation of the counsel who appear before him or her yet fail to be prepared him- or herself.

And, finally, Mr. Chairman, I believe that a judge must always, always remember the service aspect of the job. My belief is that if that is remembered and is placed in a position of prominence, then no one will have a question about "robe-itis," as it's called. It is a service position, and there are people who will appear with varying levels of intellect, varying economic status, and they must all be served by the judiciary.

Senator VOINOVICH. Thank you very much.

We may have some other questions that we will be submitting to you in writing, but I would like to thank you both for coming here today. I again want to emphasize that you have been through the Maginot Line, both of you. You have been interviewed and investigated. I have spent time with the counsel for the White House going over your backgrounds. And I think that we are fortunate that we have two fine individuals that have been nominated, and hopefully this Committee will be voting on your nominations sometime in the very near future.

Again, I would like to thank you for your willingness to serve your country, and thank your family for the sacrifice that they are going to be making so that you can fulfill those responsibilities.

Thank you very much for being here.

Mr. HOLEMAN. Thank you, Mr. Chairman, for your kind remarks.

Mr. ISCOE. Thank you, Mr. Chairman.

[Whereupon, at 9:32 a.m., the Committee was adjourned.]

APPENDIX

U.S. SENATOR PAUL STRAUSS
DISTRICT OF COLUMBIA (SHADOW)

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Statement of

Paul Strauss

United States Senator

District of Columbia

Before the Committee on Governmental Affairs

United States Senate

On the Nominations of:

Craig Steven Iscoe, to be an Associate Judge
of the Superior Court of the District of Columbia;

Brian Ferandeez Holeman, to be an Associate Judge
of the Superior Court of the District of Columbia.

Tuesday, September 30, 2003

Dirksen Senate Office Building

Room 342

Chairman Voinovich and Members of the Senate Committee on Governmental Affairs, I am Paul Strauss, a United States Senator elected by the voters of the District of Columbia, a position sometimes referred to as the Shadow Senator. I am also an attorney practicing in our local courts. In each of these capacities, I appreciate the opportunity to provide this statement on behalf of my constituents in the District of Columbia. I wish to express my full support toward both of President George Bush's nominees to be Associate Judges of the Superior Court of the District of Columbia. The individuals which are the subject of today's Confirmation Hearing are Craig Iscoe and Brian Holeman. I have taken the time over the past several days to familiarize myself with the record of these individuals, and spent some time with them personally on an individual basis. As a result of these efforts, I am confident that each of these individuals are extremely well-qualified candidates that would be excellent additions to the District of Columbia Superior Court bench. I would like to take this opportunity to address the specific qualifications of each of the individual nominees.

Mr. Craig S. Iscoe, Esquire

The first nominee for an Associate Judgeship on the District of Columbia Superior Court is Craig Steven Iscoe. Mr. Iscoe has an impressive record of public service, starting with the position of trial attorney and then assistant to the Director in the Bureau of Consumer Protection of the Federal Trade Commission from1980 to 1982; Assistant United States Attorney, Criminal Division, from 1992 to 1997, in the offices of the United States attorney for the District of Columbia; Associate Deputy Attorney General in the Office of the Deputy Attorney in the Department of Justice from 1997 to 2001; Assistant United States Attorney – Criminal Division, in the Office of the united States Attorney for the District of Columbia from 2001 to 2002 and, now, as an Acting Assistant Chief Litigation Counsel – Trial Unit, Division of Enforcement, from 2002 to present.

Mr. Iscoe's published works include; "The Investigation and Prosecution of Terrorism Offenses" (1995), "The Investigation and Prosecution of Public Corruption Offenses" (1995, updated 2002), "The Child Mental Health Professional as Expert

Witness" (1994, co-author with Barry Nurcombe and David Partlett) and "2003 Federal Rules of Criminal Procedure. Summary Reference Guide" (2003).

Mr. Iscoe was a Research Assistant at Stanford University. From 1978 to 1979, he was a Graduate Fellow at Georgetown University Law Center, where, while obtaining an LL.M. degree, he also supervised students and taught seminar, as well as drafted pleadings and briefs. Mr. Iscoe directed Vanderbilt Law School's trial advocacy program and its clinical program in juvenile law. As an assistant professor, he also taught a course on Children and the Law.

In addition to his distinguished legal career, Mr. Iscoe is a wonderful member of the District of Columbia community. His children have attended our local public schools and he and his wife have been active parents in the various PTA's. He is a Boy Scout troop leader and proud member of his synagogue, Temple Sinai. When his schedule permitted, he has tutored young people, and taught Trial Advocacy at a prestigious law school. His overall career embodies the very spirit of public service and community involvement.

Mr. Brian Ferandeez Holeman, Esquire

I am particularly pleased to support the nomination of Mr. Holeman. Unlike, the prior nominee, Mr. Holeman's route to the judiciary is not government service, but that of a private practitioner. Yet, it is precisely for this reason that I consider his potential service as a Judge to be so uniquely valuable. Not only does he come from the private sector, he will be one of the very few Judges who comes from a small law firm. Unlike the many former government attorneys who have gone on to the bench, Mr. Holeman's background is more typical for most of the practitioner's in DC Superior Court, where the reality of limited resources and it's impact on the administration of justice are more apparent.

Mr. Holeman's professional work experience makes him a rounded, well-qualified candidate for the position of Associate Judge. He is a member of eight bar associations and admitted to practice before six different courts, including two courts of appeals (District of Columbia and Maryland).

Mr. Holeman graduated from one of the most prestigious law schools in the country, the University of Michigan Law School, in 1982. After working for a few years for various insurance companies as a senior claims supervisor and a claim representative, he began a continuously extensive legal practice. His focus has been primarily on civil litigation, especially the defense of individuals.

Starting in 1988 with the defense of energy and transportation enterprises in general liability litigation, the nominee continued defending insured entities and individuals in automobile, general liability and products liability cases. In 1989, his specialty became medical malpractice defense. As time progressed, his career focus shifted towards handling still primarily medical malpractice cases, but this time, on behalf of plaintiffs.

His ability to be comfortable at either side of the Counsel table is just one of the reasons why I am deeply convinced that Mr. Holeman is perfectly suited for the position of Associate Judge. He has demonstrated that he is both fair minded and flexible, in a way that suggests that he is free from bias or prejudices. His record suggests that the law is a true passion of his, because of how forcefully and convincingly he has given effect to the law from either side of the bar. I suggest that he be allowed to continue this passion from the other side of the bench.

CONCLUSION

In conclusion, I would like to thank Michelle D. Poyer, a member of my legislative staff, for all her efforts in coordinating the meetings with the nominees. Upon examining the information made available to my office, and having the opportunity to meet each candidate personally, I am confident each will uphold the honor of our justice system. I look forward to their prompt investiture on the Court.

While there is no doubt that if anyone is deserving of the prestige that comes from a Presidential appointment and Senate confirmation, it is these nominees. Yet, I am obligated by the very nature of the proceedings here today to point out all the honor that comes with the ceremony of federal oversight the fact that these nominees and all residents of the District of Columbia lack the autonomy over our judiciary diminishes our collective dignity. As am I not seated with the full rights and privileges of a U.S. Senator, I am not able to cast a vote in favor of any of the nominations. Today I ask that you extend to me a degree of Senatorial courtesy and cast your vote in support of these nominees for the residents of the District of Columbia who do not have anyone in this body who may cast a vote on their behalf.

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.) Virginia Dale Cabaniss,

2. **Position to which nominated:** Member, Federal Labor Relations Authority.

3. **Date of nomination:** September 3, 2002.

4. **Address:** (List current place of residence and office addresses).
Office: 607 14th Street, NW, Washington, D.C. 20024.

5. **Date and place of birth:** Spartanburg, South Carolina, 12/20/61

6. **Marital status:** married; Mitchell Franklin Rose.

7. **Name and ages of children:**

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted: Tucker High School, Tucker, GA, 8/74/ to 6/79, high school diploma 6/29; University of Georgia, 8/79 to 5/83, BA received May, 1983; Catholic University of America, Columbus School of Law, 8/89 to 5/93, J.D. May, 1993

9. **Employment Record:** List all jobs held since college, including title or description of job, name of employer, location of work, and dates of employment.

See attachment 1.

10. **Government Experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above?

None

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

None

ATTACHMENT

9. **Employment Record:** List all jobs held since college, including title or description of job, name of employer, location of work, and dates of employment.

7/83 to 12/83	Administrative Assistant, Kay Shirley 3500 Peachtree Road, NE, Suite 212 Atlanta, GA 30305
12/83 to 1/84	Administrative Assistant, Equity Programs Investment Corporation. Skyline Center, Leesburg Pike, Falls Church, VA
1/84 to 7/84	Receptionist, Congressman Mickey Edwards U.S. House of Representatives Washington, D.C. 20515
8/84 to 1/87	Legislative Staff Assistant, Senator Frank Murkowski, United States Senate Washington, D.C. 20510
1/87 to 7/92	Legislative Assistant, Senator Frank Murkowski, United States Senate Washington, D.C. 20510
7/92 to 1/93	Legislative Director, Senator Frank Murkowski, United States Senate Washington, D.C. 20510
1/93 to 1/97	Chief Counsel, Senate Governmental Affairs Committee Subcommittee on the Post Office and Civil Service/Senator Ted Stevens United States Senate Washington, D.C. 20510
1/97 to 11/97	Professional Staff Member, Senate Appropriations Subcommittee on Labor, HHS, Education and Related Agencies/Senator Ted Stevens, United States Senate Washington, D.C. 20510
11/97 to 3/2001	Member, Federal Labor Relations Authority 607 14th Street, NW Washington, D.C. 20024
3/2001 to present	Chairman, Federal Labor Relations Authority, 607 14th Street, NW Washington, D.C. 20024

12. **Memberships: List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.**

Formerly member of board of Senate Employees Child Care Center while son attended center. Member of Zeta Tau Alpha fraternity while in college.

13. **Political Affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during last 10 years.

None.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years.

$1,000 to the President's club of RNC in 2001.
$250 to Murkowski for Governor in 2002.

14. **Honors and Awards**: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals or any other special recognition for outstanding service or achievements.

None

15. **Published writings**: List the titles, publishers, and dates or books, articles, reports, and other published materials which you have written.

The only published writings I have are the decisions of the Federal Labor Relations Authority that I have participated in since December 1997.

16. **Speeches**: Provide the committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies for and are on topics relevant to the position for which you have been nominated.

None.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I believe I was nominated to be a member of the Federal Labor Relations Authority (FLRA) because I have eighteen years of experience with civil service and labor issues. My work as a member of the FLRA and as staff of the Senate Governmental Affairs Committee and the Senate Appropriations Committee has provided me with both legal and legislative perspectives and experience that will aid my effectiveness in executing this responsibility. As a member of the Authority I have participated in the adjudication of nearly 800 cases involving arbitration, questions concerning representation, and unfair labor practice charges. Since March of 2002, I have provided agency-wide leadership as the Agency's chief executive officer.

I think my demonstrated experience working as a member and now chairman of the Agency qualifies me to be a member of the FLRA. As the Agency's chief executive officer, my responsibilities include providing administrative leadership, oversight and direction for the Agency's three operating components. Specific organizational initiatives I have started include institutionalizing agency-wide accountability and planning for agency managers by incorporating specific goals and requirements directly linked to the achievement of Agency goals identified in the Agency's strategic plan into the work plans of career Senior Executive Service managers; creating an Information Resources Management Governance Board structure to address current and future information technology issues; consolidating agency-wide communications, legislative and external affairs operations to improve and promote responsiveness to Agency customers; promoting enhanced ethics knowledge and awareness among employees through expanded training and information dissemination via an Intranet site; and shifting the component focus among career managers to an agency-wide, mission-oriented focus for allocating both fiscal and human resources based on performance and results, and responsiveness to customers.

Concurrent with my administrative responsibilities, I have served as an active member of the Authority component, authoring or participating in written decisions on arbitration, representation, negotiability, and unfair labor practice cases. During my tenure as chairman I have also continued to focus on improving internal management efforts to increase the Authority's case handling efficiency by reducing case backlogs, and promoting Internet publication of decisions. I have also promoted outreach training efforts to educate parties that appear before the FLRA, encouraging parties to understand their rights and responsibilities under the Statute and to improve their ability to resolve their own disputes without resort to litigation.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate.

Yes

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

No

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

No

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.

None

3. Do you agree to have the written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No

2. To your knowledge, have you every been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendre) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

No

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in

interest in any administrative agency proceeding or civil litigation? If so, provide details?

I have been involved in four cases and have only been referenced in those in my official capacity as either the Agency Head or a Member of the FLRA. None of the suits included any allegations of personal impropriety.

The cases in which I have been named in my official capacity (all of which are closed) are *Rhode Island National Guard v. Segal, Wasserman, & Cabaniss; Texas National Guard v. Segal, Wasserman, & Cabaniss; Illustre v. Cabaniss; Krall v. Cabaniss*. *The Illustre* case involved an allegation of failure to promote based on discrimination. In the district court proceeding, the individual challenged the FLRA's decision not to promote the individual based on discrimination. The appeals court affirmed the district court's dismissal of the complaint February 5, 2002. Although I was named in my capacity as Agency head, this action was initiated during the tenure of the previous chairman of the Agency. The *Krall* case concerned alleged discrimination based on the FLRA's failure to interview and select an individual for a job in one of the regional offices of the FLRA General Counsel. The case was dismissed by the district *court August 3, 2001*. *The Rhode Island and Texas National Guard* cases were both litigation under the Federal Service Labor-Management Relations Statute which named the three members of the Federal Labor Relations Authority, rather than FLRA, as is customary.

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

I have no additional information to provide.

FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents.

1. Please provide a personal financial statement which identifies and states the value of all assets of $1,000 or more and liabilities of $10,000 or more. If the aggregate of your consumer debts exceeds $10,000, please include the total as a liability.

AFFIDAVIT

Virginia Del Colmenares being duly sworn, hereby states that He/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this 20th day of September 2002.

Notary Public

My Commission Expires August 14, 2003

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the Nomination of
Dale Cabaniss to be Chairman of the
Federal Labor Relations Authority

I. Nomination Process and Conflicts of Interest

1. **Why do you believe the President nominated you to serve as Chairman of the Federal Labor Relations Authority (FLRA)?**

I believe the President nominated me for a second term due to my broad ranging experience with the issues under the jurisdiction of the Federal Labor-Management Relations Statute. Since November of 1997, I have served as member of the Authority decisional component of the FLRA participating in more than 900 published FLRA decisions. In addition, in March of 2001, the President designated me as chairman of the FLRA, a role in which I continue to serve. Prior to joining the FLRA, I spent over 13 years as Senate staff, serving in a variety of roles including legislative assistant and legislative director in a Senator's personal office; subcommittee counsel on the Senate Governmental Affairs Committee; and finally, as professional staff on the Senate Appropriations Subcommittee on Labor, Health and Human Services (HHS), and Education and principal legal advisor for the Chairman of the Committee, Senator Ted Stevens, on federal and private sector labor issues. Through my time on the Hill, I gained extensive experience in civil service issues and issues involving both federal and private sector labor law. As chief counsel for what was then the Governmental Affairs Committee Subcommittee on the Post Office and Civil Service, I worked on a daily basis on issues impacting federal agencies, employees, and their representatives. In my role as a professional staff member on the Senate Appropriations Subcommittee on Labor, HHS, I gained unique experience and knowledge of the federal budget and appropriations process handling the accounts of several labor-related agencies including the National Labor Relations Board, the National Mediation Board, and the Department of Labor.

1. **Were any conditions, expressed or implied, attached to your nomination? If so, please explain.**

No.

2. **What specific background and experience affirmatively qualifies you to be Chairman of the FLRA?**

I believe my qualifications are reflected in my substantive knowledge of and experience with the Federal Labor-Management Relations Statute; my knowledge and

experience of the federal budget and appropriations process and the statutory and regulatory framework that federal agencies work within; and my experience serving as Chairman. As I have mentioned, as an Authority member I have participated in over 900 published decisions. Prior to that, as an attorney working in the Legislative Branch, I was actively involved in civil service and private and federal sector labor law issues, including drafting and analyzing legislation as well as working with various stakeholders to try to reach consensus on issues. For example, during my experience on Governmental Affairs I worked with committee staff, the Senate Budget Committee, and representatives of federal unions to craft the Committee's section of the 1995 Omnibus Budget Reconciliation Act. As the head of an independent federal agency for the past two years, with responsibility for oversight of all administrative operations, I have gained a great deal of understanding of the challenges and opportunities confronting federal agencies.

3. **Have you made any commitments with respect to the policies and principles you will attempt to implement as Chairman of the FLRA? If so, what are they and to whom have the commitments been made?**

No.

4. **If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.**

I am not aware of any such issues.

II. Role and Responsibilities of Chairman of the FLRA

1. **What is, in your view, the role of chairman of the FLRA? How have your roles as FLRA member and chair informed these views?**

The role of the chairman of the FLRA is multifaceted. Under the Federal Service Labor Management Relations Statute, the Chairman is the chief executive and administrative officer of the Authority [5 U.S.C. 7104 (b)]. Therefore, the Chairman has responsibility for the administrative operation of the agency which includes all of its major components, the Authority, the Federal Services Impasses Panel, and the Office of the General Counsel with its seven regional offices and two subregional offices. This includes responsibility for oversight of day to day, agency-wide operations including the agency budget and finance, information resources management, human resources and administrative services divisions,

as well as agency planning and performance and congressional and governmental relations. Although as chairman, I serve as the administrative CEO of the Agency, I also concurrently serve as a member of the three-person Authority decisional component. The responsibilities of a member of the Authority require that I serve as an impartial, objective decision-maker, adjudicating disputes arising under the Federal Service Labor-Management Statute. Finally, as chairman, I also serve as chairman of the Foreign Service Labor Relations Board and appoint the chairman and members of the Foreign Service Impasse Disputes Panel. The jurisdiction of these two groups involves adjudication of disputes among parties subject to the Foreign Service Act.

2. **In your view, what are the major internal and external challenges facing the FLRA? What do you plan to do, specifically, to address these challenges?**

Even though the FLRA is a small, independent agency, the major internal and external challenges that we face are similar to those challenges that nearly all Federal Departments and Agencies face. Namely, the primary internal challenges are to address the five areas identified in the *President's Management Agenda* and similar issues raised through various other reports, such as the GAO High Risk list. These challenges include issues of human capital, E-government, financial accountability, integration of performance and budgeting, and matters related to competitive sourcing. The primary external challenge is to provide quality service in a timely fashion to our customer-base, Federal agencies and employees and their exclusive representatives, whether through our decision-making process or through training the parties on their rights and obligations under our Statute.

I believe the FLRA must seek to address each of these challenges, to the extent possible, in ways that will best demonstrate direct results for our customers. Because each of these areas is not simply an internal or external challenge, success in addressing one area requires a certain degree of overlap into other areas. Therefore, one of the first things I have done is to ensure that our agency is organizationally positioned to address the overlap of these challenges. Last year, I asked the Agency's inspector general to conduct an internal workforce review to provide an independent assessment of positions within the agency. I worked with the FLRA's Executive Resource Board to create a senior position for policy, planning and performance management to help better integrate the administrative and program aspects of the agency to ensure that the entire organization is more focused on our improving service to our customers.

Human capital issues are clearly at the top of the list of the FLRA's internal challenges. As a labor-intensive agency, the FLRA is composed primarily of legal or other professional staff, as well as administrative support staff. A significant percentage of our workforce is already eligible for retirement or will be eligible in the next few years. Many of these employees have been with the agency since its inception in 1979. Therefore it is my view

that the FLRA needs to identify and take advantage of recruitment and training attract and retain new employees; to enhance career opportunities for current employees where feasible; to capture valuable institutional knowledge; and to ensure that we are providing our senior executives and managers the tools they need to be successful in leading efforts to achieve the Agency's goals. As a follow-on to the inspector general's workforce assessment, I have designated one of the Agency executives as the FLRA's Chief Human Capital Officer. Although we are not yet required to have such a position, I believe the importance of addressing human capital issues requires a recognition of this role in our agency planning and accountability functions. In addition, I initiated the revision of performance expectations for career SES employees under my direction to ensure that agency SES transition to a focus that is results driven and clearly targeted to accomplishing the agency's mission and goals.

As vacancies have occurred during the past two years, I have sought to bolster the agency's capacity, particularly in the areas of budget formulation, financial management, and information resources management. By seeking and bringing to the FLRA professionals with diverse backgrounds and experiences, I am working to ensure that our management ranks are being strengthened in their ability to face change successfully. As noted previously, because the FLRA is a labor-intensive agency, during FY 2002, 76.2% of the annual budget was taken up in personnel costs, specifically salaries and expenses associated with 215 FTE's. In addition, we have ongoing mandatory costs such as rent for the Agency's headquarters, seven regional offices and two subregional offices. As an important initial step in improving financial management, I've brought in a new budget director to focus on identifying opportunities for instituting agency-wide efficiencies, and at the same time, to work with agency operational and planning executives to enable our agency to begin developing the infrastructure for activity-based budgeting.

With such mandatory statutory initiatives as the Government Paperwork Elimination Act (GPEA), GISRA, and others, it my view that the FLRA needs to undertake the necessary actions to address statutory mandates, but with a clear focus to ensure such actions are results-oriented, rather than process-oriented and with an eye towards ensuring that dollars committed for various projects result in a tangible return on investment for our customers whenever possible. Before the agency commits to the implementation of new initiatives, especially technology-related initiatives, managers should be able to articulate how a particular initiative will directly benefit our customers, whether internal or external. To address this challenge, based upon findings and recommendations from an external assessment of the agency's information technology structure, I created an Information Resources Governance Board, composed of career senior executives representing the major components and programs, whose charge is to evaluate major technology-related issues and ensure that our technology innovations are integrated with and support program mission goals. In addition, I established the Agency's first Chief Information Officer position to provide oversight of contracted activities related to GPEA and other mandates, including

planning and recommending technology-related policies and purchases related to building an information technology enterprise that serves not only internal staff, but most importantly, our external customers.

All of these activities are inherent in my overall goal of ensuring that the FLRA is cognizant of the challenges facing federal agencies and employees and well prepared to serve our customers and contribute to an effective federal government. For example, many agency and union practitioners are retiring or undergoing changes in their jobs. Therefore, for the FLRA to address the changing needs of its customers, our legal and professional staff must be prepared to provide ongoing and meaningful training to the parties regarding their rights and responsibilities under the Statute. As technology becomes more widespread and used within our community, I believe it is essential that the FLRA be able to serve its customers in ways that are convenient for the customer, through e-filing or other online service delivery systems. To address these issues, the FLRA is currently in the process of planning a government-wide training conference to be presented later this year or early next year. In addition, we routinely send professional staff to labor-management training conferences and professional meetings to serve as trainers, to provide updates, and to interact with our customers. Again, as we seek to address the internal challenges discussed above, I am firm in my commitment to ensure that we do so always with the overriding goal of improving our service and results to the customer.

2. **What will be your long-term priorities as FLRA chairman?**

In my capacity as a voting member of the Authority decisional component, my long-term priorities remain the same as when I joined the FLRA in 1997 – to serve as an impartial decision maker striving to ensure that our decisions are clear and well-reasoned so that parties understand their rights and responsibilities under the statute. As CEO and chief administrative officer of the agency my long-term priorities are to address the challenges I have previously identified in a manner that reflects responsible stewardship of taxpayer dollars and helps position the Agency for the future. Human capital and financial resources must be appropriately managed and the agency's budget and performance goals must be integrated so that the Agency can more efficiently meet its program goals. The FLRA's separate components will need to work together in recognition of the cross-cutting initiatives that support achievement of the Agency's mission and overall goals. In addition, the administrative functions of the agency need to be truly integrated with the Agency's overall program mission to ensure that administrative decisions are made in a manner which supports the overall Agency mission. Improving recruitment and retention, providing training, and perhaps reshaping our workforce all must be considered. Recruitment represents a unique challenge, given that our program focuses on a very specialized area of the law, which can, in turn, limit career opportunities outside of agency employment. Recruitment efforts must also continue to be expanded so that attorneys with different

experiences, but without significant background in our law, can be brought in and not only succeed in, but also actually enhance and even improve our program and, thus, the Agency.

4. **How do you view FLRA's role and yours as Chairman in communicating and working with Congress?**

Having spent over 13 years on the Hill working in both Senators' personal offices and on committee staffs, I have a deep respect for the role of the Congress in our system of government. I am firmly committed to being responsive to Congress and will personally be available to Members, staff and committees, as needed, to provide information or input, as requested. In addition to personal contact, I believe the FLRA should communicate with Congress through the Agency's written reports, including the annual report, performance and strategic plans, and annual budget submissions.

III. Policy Questions

1. **FLRA's strategic plan lists four goals for the agency:**

- **To provide high quality services that timely resolve disputes in the Federal labor-management relations community;**
- **To use and promote alternative methods of resolving and avoiding disputes and to provide services to enhance labor-management relationships;**
- **To develop, manage, and utilize the FLRA's internal systems and processes to meet program needs; and**
- **To develop, manage, and utilize the FLRA's human resources to meet program needs.**

What is your assessment of how well FLRA is meeting each of these goals? Assuming that more progress is appropriate for the goals, what more do you believe FLRA should do in relation to each goal? What role do you see for yourself in helping FLRA achieve these goals?

In my assessment, the FLRA, like many federal agencies, is in a transitional phase. On the one hand, we are addressing each of these goals, as currently presented. On the other hand, we are working to incorporate revisions to our agency planning and performance measurement activities to reflect the Administration's vision for government reform and accountability. As a member of the Governmental Affairs Committee staff during the Committee's instrumental role in enacting GPRA, I am mindful that the FLRA's strategic plan is not an end in and of itself. Rather, the plan serves as a guide for directing our

deployment of resources, not only fiscal resources, but also human resources, to achieve the Agency's mission to serve our customers.

The first two goals relate directly to program activities designed to achieve our mission of promoting constructive labor relations which contribute to a more effective government. Although we are currently using and, if I am confirmed, will continue to use and to promote alternative methods of resolving and avoiding disputes whenever possible, I believe we can and should strive to improve the timeliness in which our services are delivered to customers. The latter two goals support program activities. Although we are currently working to improve internal systems and to align program support activities to be able to identify and to measure the extent to which such activities actually result in improved program services to our customers, it is within these two goal areas that most revision to our strategic plan needs to occur in term of setting and measuring outputs and identifying and establishing appropriate outcomes.

Regarding my role in helping the FLRA to achieve its goals, I see it as two-fold. First as a member of the Authority decisional component, my role is to participate in the timely resolution of cases that come before the Authority and to continue to strive for the highest quality work-product possible, including ensuring that my career senior executives have the appropriate tools to provide the necessary leadership so that cases are processed efficiently and in a well-reasoned manner. Second, as chairman of the FLRA, my role as CEO and chief administrative officer is to provide Agency-wide direction and leadership both in terms of policy and planning, as well as in terms of operations and implementation.

Therefore, with respect to the first two goals, I believe that in order to promote stable, ' constructive labor-relations that contribute to a more effective government, the FLRA must continually seek ways to improve case processing and consider issues of timeliness in each component where a case may reside. As the first phase of this effort, I directed our inspector general to conduct an informal assessment of case processing within the Authority decisional component with an eye towards identifying bottlenecks in processing cases. The next steps in this effort will include an in-depth, external assessment, including surveying our customers. This information will provide necessary baseline data upon which we may then target our improvement efforts directly to meeting the needs of our customers, rather than targeting our improvements from only internal perspectives or anecdotal information. In addition, as mentioned previously, I have, and if confirmed, will continue to take necessary steps to create a culture of achievement and results for our career senior managers so that they are able to provide the leadership to ensure that cases are not only legally sound, but processed efficiently.

In addition, I am focusing direct attention on our training programs –we will continue to actively seek opportunities to train our customers, either as speakers at other government-

wide conferences or on a targeted basis with discrete groups of our customers in addition to delivering our own government-wide conference. With respect to the latter two goals, to assist the FLRA in accomplishing necessary changes, I will continue to promote opportunities to bolster the agency's capacity, particularly in the areas of budget formulation, financial management, and information resources management

2. **According to FLRA's fiscal year 2001 performance report (issued in March 2002), the Office of Administrative Law Judges did not meet goals for conducting hearings and issuing decisions in a timely manner. The report identified some factors affecting the ability of the Office to meet its goals. Among these were increasing case intake. Given your experience, what factors do you believe account for the increase in the number of cases coming before administrative law judges? What, if anything, is being done to deal with underlying causes? Inadequate staffing was also cited as a reason for the Office of Administrative Law Judges for not meeting goals for conducting hearings and issuing decisions in a timely manner. How is FLRA addressing this matter?**

The Office of the Administrative Law Judges (OALJ) did not meet is performance goals during FY 2001for a number of reasons including those cited: increased workload and significant vacancies. Of the two, the loss of three employees (50%) of the professional staff to retirement, including the Chief Administrative Law Judge, appeared to have, by far, the greatest impact of case processing during this time, particularly since most of this staff had been with the Agency since it's creation in 1979 and were well-versed in FLRA law and precedent. While recruiting to fill these positions, we attempted to offset the personnel losses by redeploying other legal staff to assist with activities related to reducing the backlog. Fortunately, because fewer of our decisions were being challenged through the courts than in prior years, I was able to assign staff from our Solicitor's Office to assist the Judges. In addition to the retirements of the judges, the OALJ also had a new staff member handling the settlement judge role, a position that seeks to encourage voluntary settlements of cases earlier in the process thus avoiding costs of litigation, rather than on the "courthouse steps" at which point all parties to a proceeding have already spent significant time and resources preparing to litigate a case. In addition, I approved adding an additional support position to the OALJ beginning in FY 2002. Currently the OALJ is fully staffed. Nearly all of the judges, however, are eligible for retirement. Should the need to hire arise, given the freeze on OPM's ALJ hiring list, we are, at present, limited to hiring ALJ's from other federal agencies who generally do not have background in our statute and precedent. Although I am also considering options relating to providing additional legal support to the OALJ, the inability to "grow judges" through training and experience is a challenge that agencies are facing government wide. Why more cases are coming before the Judges is not entirely clear, since the number of unfair labor allegations filed with the Office of the General Counsel has remained relatively flat. In addition to staffing, some of the factors that have affected the

OALJ's ability to meet its goals include: 1) a carryover of cases to be written that were heard in FY 2001 by a depleted OALJ professional staff; 2) requests for continuances after hearing dates were established, 3) availability of the parties and the ALJ's to participate in and coordinate hearings, and 4) the extent of settlement negotiations. In some cases, the parties are in serious settlement negotiations and ask to postpone the hearing. This situation at times may extend the median age of some cases and affect other cases on the same calendar schedule.

3. **There has been increased use of alternative dispute resolution (ADR) to deal with disputes in the federal workplace, including those arising under the Federal Service Labor-Management Relations Statute. Some have pointed to the success of ADR in bringing about resolutions based on satisfying the underlying interests of the parties while reducing the adversarial nature of the process and improving relations between labor and management. Others have said that although ADR is a useful tool, an emphasis on the use of ADR could create undue pressures to reach settlements. What are your views on the use of ADR to resolve federal workplace disputes?**

ADR certainly can be useful in resolving federal workplace disputes. The FLRA offers a variety of ADR programs, including the Collaborative and Alternative Dispute Program which provides services related to pending unfair labor practice, negotiability, representation and impasse bargaining disputes; the OGC's FITE (Facilitation, Intervention, Training and Education) program; the OALJ's settlement judge program; and, dispute mediation handled by the Federal Services Impasses Panel. All of these programs give parties to a collective bargaining relationship opportunities to reach voluntary settlement of their disputes rather than resorting to lengthy administrative proceedings followed by potential litigation. Since the programs of this agency are not mandatory I do not believe there is undue pressure to reach settlement, but that instead parties are afforded the opportunity to learn the necessary skills to resolve their disputes in the manner that best meets their needs and work environment.

4. **Describe your vision of what the relationship should be between the FLRA and other agencies with government-wide employee-related responsibilities -- the Office of Personnel Management, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Office of Special Counsel. In your view, do the current relationships between the FLRA and these agencies reflect your vision? If not, what would you seek to do to change the current relationships?**

Because each of the agencies mentioned serves the Federal workforce, albeit in different capacities and under different statutory authorities, my view is that the agencies

should seek opportunities to work together where possible without overstepping statutory boundaries. The statutory charge of the FLRA is labor law. Conversely, the statutory charge of the OPM, MSPB, and OSC involves employment law. Although overlap exists, the two types of law are distinct. Given that the population served by these agencies is similar and given the statutory independence between prosecution and adjudication that exists within and between these agencies, I believe one way to work together is through exploring joint training of customers and through each agency having knowledge of other agencies' missions. Additionally, each agency should ensure that customers have the ability to be directed to another agency for assistance, if appropriate, both by promoting internal training so that individual agency staff have a specific baseline of knowledge of the mission of these agencies as staff interact with customers, as well as through developing website links to each of the other agencies on every agency's homepage.

The FLRA interacts with each of these agencies as set forth in statute. For instance, with respect to the OPM, under 5 U.S.C. 7105(i), the FLRA Authority decisional component may request and does request advisory opinions from the Director of OPM when the Authority determines, during the adjudication of a case, that a conflict exists concerning the interpretation of OPM regulations. As is the case with the other agencies, the OPM may appear as a party before the FLRA or may seek to intervene in a case or file an amicus curiae brief on an issue of importance to the broader labor-management community in response to an FLRA-issued Federal Register Notice.

With respect to jurisdictional overlap among the agencies, Federal laws are such that employees are essentially precluded from filing a complaint with both the FLRA and another agency concurrently. In addition, the FLRA regulations and policies prevent dispute resolution in more than one forum. There are two exceptions to this , one involving the negotiated grievance procedure and protected class discrimination in cases not involving adverse actions – which creates potential overlap between the FLRA and EEOC; and, the other involving unfair labor practices and prohibited personnel practices – which creates potential overlap between the FLRA and MSPB. These situations arise very rarely.

5. What is your assessment of the current state of federal labor-management relations?

I believe the current state of federal management relations generally reflects the challenges occurring throughout the federal workforce -- opportunity in the face of change. With the creation of new departments and subsequent consolidation of previously separate workforces, there will be both challenges, as well as opportunities for labor and management to develop new relationships or strengthen existing ones. In my estimation, the key to success for labor-management relations remains the same as the key to any relationship, and that is to establish and maintain good communication, honesty, and respect among all parties. Since I joined the FLRA in 1997, the overall caseload has generally stayed the same or even

gone down in some cases. One key indicator is the number of unfair labor practice allegations that are brought to the FLRA's regional offices by labor organizations, agencies and individuals. The number of these filings have declined over the past two years. In fiscal year 2001, 6167 unfair labor practice charges were filed with the regional offices. The number declined to 5716 in fiscal year 2002 and based on filings through April of this fiscal year, the projected figure for fiscal year 2003 is 5301. The issues are, for the most part, relatively the same. In agencies or local offices that have good relationships, the number of case filings has remained low. In instances in which relationships between labor and management have historically been strained, case filings have tended to remain constant.

Given the human capital issues that federal departments and agencies are presently facing, particularly with respect to shrinking numbers of employees and managers with skills and knowledge in labor relations or alternative dispute resolution, even historically strong relationships will need attention to ensure continuity of cooperation. In many agencies, the traditional "labor relations" specialist, once charged with understanding and administering primarily the federal service labor-management relations statute, is being charged with broader-ranging responsibilities including EEO, Fair Labor Standards Act, employee performance and conduct matters, health and safety matters, etc. While administration of all of these laws, rules, and regulations is very important, the increasing lack of expertise or even familiarity with particular requirements can and does lead to misunderstandings and disputes. Often parties' conduct and their resulting relationships are not guided by a good grounding in each side's respective rights and responsibilities. As a result, the guidance given by the law only comes into play after a problem has been created. In this regard, I believe it is important not only for parties to maintain good levels of communication, but also, for agencies that administer the various employment statutes to ensure new employee and labor relations professionals have the tools they need to develop and maintain cooperative relationships.

6. **What improvements, if any, can and should be made to the Federal Service Labor-Management Relations Statute?**

Because the role of the FLRA is to administer the statute, Congress is in the best position to determine whether the statute needs to be revised. Additionally, I believe the parties to whom the statute applies are better suited to suggest any particular changes or improvements. As a member of the Authority decisional component and thus an impartial decision-maker, I could not specify substantive changes. Short of suggesting statutory changes, the FLRA has, during my tenure with the Authority, undertaken a number of regulatory revisions, such as revisions to the Agency's representation regulations and those governing the adjudication of negotiability disputes. In recognition of our responsibility to our customers, we must continue to look at reducing the time it takes all of the Agency's

components to act on matters before us and consider simplifying and streamlining our processes.

7. **The landscape of the federal workforce has changed over the last decade. More federal jobs have been contracted out or privatized, with federal and contract workers often working side-by-side. What have been the effects, if any, of this trend on federal labor-management relations?**

While this issue has certainly been central to some labor-management disputes that have come before the Authority decisional component during my tenure at the FLRA, the issue has not been predominant in the types of cases we received.

8. **In July 2000, the Authority convened a focus group of customers to provide their views on the quality of the Authority's written legal decisions, and the measures that can be used to assess that quality. In addition, the Authority solicited written comments on these issues. What was learned from these initiatives, and what actions has the Authority taken to improve the quality of and the measures used to assess FLRA legal decisions? Have there been subsequent initiatives by FLRA to assess the quality of customer services? If so, what were the results?**

Although I was not serving as chairman during the time this focus group was held, I was a member of the Authority decisional component. I supported the efforts of our then chairman to solicit the views of our customers, because I believe it is important that we, as an agency, never lose sight of whom it is we serve. As a member of an independent body, I was particularly pleased that the comments on quality reflected a consensus that Authority decisions are considered to be fair; that the parties use our decisions for guidance; and that some of our formatting changes were viewed as helpful in that they were allowing the parties to locate the specific information the parties were looking for in a decision without necessarily having to read everything.

On the other hand, since becoming Chairman, I have tried to pay particular attention to the fact that a consistent thread throughout the comments was that our customers said that what they especially wanted is for our decisions to be meaningful - - to educate them on their rights and responsibilities, to provide guidance for future behavior, and, most importantly, to do so in a timely manner, so that both sides have an answer, one way or another, to direct their next steps.

Consistent with my firm commitment to putting the customer first, as Chairman, responsible for administrative functions of the agency, I have instituted a bottom-up review

of case-processing to identify bottlenecks and opportunities to issue cases more quickly. This review, however, is not limited to just the Authority decisional component. To truly address the issue, we must consider issues of timeliness in each component in which a case may reside. The first phase of this review has involved my directing our Inspector General to conduct an informal assessment of case processing within the Authority decisional component of the FLRA with an eye towards identifying bottlenecks in processing cases. If I am confirmed, the next steps in this effort will include an in-depth, external assessment, including surveying our customers to ensure that our baseline does still reflect our customers' expectations. This information will provide necessary data upon which we may then target our internal process-oriented improvement efforts directly to meeting the outcome of improved timeliness that our customers seek, rather than targeting our improvements from internal perspectives or anecdotal information.

In taking a holistic approach in order to achieve the best result for our customers, I believe we must also explore opportunities for on-going feedback from our customers. Towards this end, we will be looking at developing and instituting regular customer survey instruments, on our website and through other avenues, to assist us in measuring whether we are meeting the customers' expectations over time. As we further develop and refine our web services, we are also looking at improving the format and presentation of information, including perhaps flagging decisions that are pending in litigation.

9. **GAO has designated strategic human capital management as a high-risk area governmentwide. In this regard, agencies face challenges in four key areas:**

- **Addressing human capital and related organizational transformation needs.**
- **Integrating human capital planning efforts with mission and critical goals.**
- **Acquiring, developing, and retaining talent.**
- **Having organizational cultures that promote high performance and accountability and empower and include employees in setting and accomplishing programmatic goals.**

Can you describe the extent to which and how FLRA is addressing each of these challenges for its own workforce?

I believe that human capital issues must be given the highest level of attention and support to ensure a strong organization. I agree with GAO that the problem is not federal employees; but rather, a lack of commitment to a strategic and consistent approach to managing and maintaining a quality workforce. Because our agency is labor-intensive and consists primarily of professionals, I believe we must focus additional efforts towards not only recruiting the best and the brightest wherever possible, but also, to retention and development of our existing core employees who choose to make FLRA their career.

As I noted in a previous question, I have sought the assistance of the agency's inspector general in conducting an initial workforce assessment. When vacancies in key positions have occurred, I have actively sought to attract individuals who have both strong skills, as well as new ideas. I have been pleased with the fact that, in some cases, the best and the brightest have been right here in the agency. On a related note, I have promoted upward mobility as an option for development, where possible, in order to provide high-performing employees challenges and opportunities for personal and professional growth, while affording the agency the benefit of retaining quality workers. In addition, although not statutorily mandated, I have followed the spirit of the provisions within the Department of Homeland Security Act by assigning the role of Chief Human Capital Officer to my director of policy, planning, and performance management in order to ensure an integration of policy and strategic planning with budget decisions.

Should I be confirmed, I will also continue my efforts of building capacity among and between the various components, through staff and manager interactions and training. Since being named chairman, each of the past two years, I have sent teams of senior executives and senior managers to government-wide conferences sponsored by the National Association of Public Administration and Government Executive, so that they may not only become and remain aware of changes in the Federal community, but also to provide opportunities for networking with one another and with their peers in other agencies and for bringing back fresh ideas and perspectives to our agency. I have supported an active internal "events" program, planned and implemented entirely by employees, that brings everyone together at least once a month to recognize and celebrate our diversity and accomplishments.

10. **In the response to the Biographical Questionnaire which you recently submitted to the Committee on Governmental Affairs, you stated that during your tenure as Chairman of the FLRA you focused on improving internal management efforts to increase the Authority"s case handling efficiency by reducing case backlogs. Please describe specifically what you have done and the results of those efforts.**

I am committed to improving case handling efficiency. A significant part of this effort is trying to incorporate a culture of achievement and results and an understanding of

our responsibility to our customers. I have taken significant steps to move this agency toward performance management, requiring accountability on the part of senior managers. Managers have been provided training on a performance management and performance based budgeting in an effort to enhance their understanding of how their own performance and that of the employees they supervise must be integrated with the overall agency performance. In the past, as with many agencies, the SES performance appraisal system has not been sufficiently tied to achievement of agency performance goals. I have instituted accountability for senior managers that report to me through clear expectations, specific work plans and frequent communication and feedback. I have also enlisted the assistance of the agency's Inspector General in performing work analyses for all positions in the agency, as well as a program review of cases processing in Authority to build upon a previous review of the Authority's case control office. In addition, I have brought in new senior management to help evaluate and implement ways to speed up processing times.

11. **You listed your highest priorities at the FLRA in response to questions from the Committee on Governmental Affairs in connection with your initial appointment to the Federal Labor Relations Authority. These included:**

> **. . . to ensure that the FLRA fulfills its statutory mission to promote stable and constructive labor-management relations that contribute to an efficient and effective government. . . . I would strive to ensure that the decisions of the agency maximize the clarity and stability of the law to allow parties to understand and be guided by their respective rights and responsibilities.**

In your view, during your tenure at FLRA, has FLRA effectively fulfilled its mission to promote stable and constructive labor-management relations? Please explain. What remains to be done?

We are continuing to strive to fulfill that mission through a number of avenues, through the issuance well-reasoned decisions and by providing training to enhance parties' understanding of their rights and responsibilities under the statute. Given the diminishing expertise in the area of labor relations in the Federal government and turnover in those positions, we should continue to provide more training and education for parties.

What role have you personally had in ensuring that the decisions of the agency maximize the clarity and stability of the law? Please give examples.

As a member of the Authority, I have worked to ensure that our decisions are well-reasoned and legally sound, while providing insight and guidance not only to the parties but the labor relations community at large. For example, in one case the Authority issued a decision which attempted to provide an alternative meaning to a term. I disagreed with the majority and filed a dissent, as I believed the term had been sufficiently defined by statute. Upon review, the 9th Circuit Court of Appeals overturned the majority's decision, agreeing that the definition of the term was provided by statute. Eisinger and FLRA, 218 F3d. 1097 (2000)

In another example, again in which I was in dissent, the majority adopted a position which upon appeal was rejected by the court. The Court of Appeals for the D.C. Circuit (in U.S. Department of the Air Force, 315th Airlift Wing and FLRA, 294 F.3d 192 (2002)) overturned Dep't of the Air Force 315 Airlift Wing, Charleston Air Force Base, 57 FLRA 80 (2001). In stating that the Authority's interpretation of its "flagrant misconduct" standard was not reasonable, the court reminded the FLRA "merely applying unreasonable statutory interpretation for several years cannot transform it into a reasonable interpretation."

12. **Another priority you identified in response to the Committee"s questions at the time of your initial appointment was the following:**

> **Over the past several years, the FLRA has begun to reach out to federal agencies and employees, by providing training about the Federal Service Labor-Management Relations Statute and offering to intervene and work to settle disputes. I intend to help the Authority further these efforts to improve the understanding of the law and the agency"s procedures; and to encourage parties to collaboratively resolve their disputes.**

What role have you played in efforts to improve the understanding of the law and the agency"s procedures and in encouraging parties to collaboratively resolve their disputes? How successful were these efforts? On what do you base that evaluation?

I have encouraged and supported training and education and alternative methods for voluntary settlement through several agency programs including the CADRO program, the FITE program, the settlement judge program and the mediation efforts of the Federal Services Impasses Panel. These efforts include providing agency staff for training at government-wide conferences, responding to agency and union requests for training and assistance, responding to requests of professional organization and the planning and participation in Agency sponsored training conferences. My own staff, in my capacity as an Authority member, actively participates in the CADRO program and the conferences which are associated with the filing of any negotiability dispute. I have also established a training policy in which program managers coordinate training requests from parties so that each

component can better target their efforts by being aware of which parties are in need of training.

13. **The Homeland Security Act of 2002 provides that existing bargaining units or subdivisions of transferred agencies will continue to be recognized, with exceptions. (Pub. L.107-296, Sec. 842 (a)(1)). One such exception applies only if, among other things, the mission and responsibilities of the unit ""materially change."" Has the FLRA established standards for determining whether or not the mission and responsibility of a unit or subdivision has ""materially changed?"" If so, what are the standards? If no such standards have been established, how will you establish such standards?**

The Authority has not had the opportunity to apply the language of §842 (a)(1) of the Homeland Security Act of 2002, nor am I aware of Authority precedent applying any analogous concepts under the Statute. Therefore there are no established standards for determining whether a unit's mission and responsibility have "materially changed." If a case comes before the Authority requiring the application of §842(a)(1), the Authority will establish standards as required to resolve the case, consistent with the Act's language, legislative history and other indicia of congressional intent. Also pertinent to this inquiry would be application of similar language in other statutory contexts. Additionally, because the parties to cases before the Authority have the opportunity to fully brief relevant issues, the Authority would have the benefit of the views of the agency and employee representatives of the entities that would be directly affected by the Authority's final determination of the issue.

14. **What is your philosophy regarding changing long-settled precedent established by FLRA decisions?**

Stakeholders in the Federal sector labor relations program should be able, as a general rule, to rely on Authority precedent to guide their conduct. In some instances however, the Authority may have precedent that is not internally consistent with other Authority precedent, law, rule, or regulations or the clarity of a particular area of the law may have eroded over time. As the U.S. Court of Appeals for the D.C. Circuit noted in U.S. Department of the Air Force, 315th Airlift Wing and FLRA, 294 F.3d 192 (2002)) overturning a decision of the FLRA, (Dep't of the Air Force, 315 Airlift Wing, Charleston Air Force Base, 57 FLRA 80 (2001), "merely applying unreasonable statutory interpretation for several years cannot transform it into a reasonable interpretation." 253 F.3d at 26. In those limited cases where the Authority has recently modified precedent, we have provided a reasoned explanation for doing so. See e.g., Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga., 962 F.2d 48,56 (D.C. Cir. 1992) (citing AFGE, Local 32, 853 F.2d at 991). "Where an agency departs from its prior cases, it must offer a reasoned explanation for its change in view".

15. **You joined in the decision in U.S. Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, OK. and American Federation of Government Employees, Local 171, 58 F.L.R.A. No. 21 (2002), a case concerning the standard that an arbitrator should apply when considering whether to enforce a contract provision that the agency argues impermissibly interferes with its management rights. Some who disagree with your decision contend that it overturns 12 years of precedent governing review of arbitration awards involving the exercise of management rights. They argue that the FLRA had long held that arbitrators should examine whether the provision ""abrogates"" a management right, but this decision established a new test of ""excessive interference."" How do you respond to those who say that the decision failed to provide a rationale for overturning longstanding precedent and that it ""tilts the playing field,"" not only in arbitration but also at the bargaining table, by permitting agencies to gain concessions from unions by agreeing to provisions that the agencies will later claim in arbitration ""excessively interfere"" with its rights?**

In this decision, the Authority did not establish a new test of "excessive interference." In asking arbitrators to examine whether a provision excessively interferes with the exercise of a management right, rather than determining whether or not that provision completes abrogates that right, the Authority has returned to its previous test used in arbitration cases and the same analysis that is now used in negotiability disputes. Under the previous standard, the Authority applied the excessive interference analysis to negotiability disputes (whether or not an Agency is obligated to negotiate over proposals which impact management rights provided for by the statute) and to cases where an agency excepted to an arbitration award enforcing a particular agreement provision. See, e.g., The Washington Plate Printers Union, Local No. 2,I.P.D.E.U., 31 FLRA1250, 1255-57 (1988).

Both my concurrence in 58 FLRA No. 21 (2002) and my earlier opinions challenging the abrogation standard (see, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, Metro. Detention Ctr. Guaynabo, P.R., 57 FLRA 331 (2001)) pointed out the legal problems inherent with the use of one §7106 (b)(3) "appropriate arrangement" legal standard for the negotiation of collective bargaining agreements (which must not "excessively interfere" with §7106(a) management rights established by the statute), and a different §7106(b)(3) "appropriate arrangement" legal standard for the interpretation of those same collective bargaining agreements (which must not "abrogate" §7106(a) management rights).

As to whether the Authority's return to its previous test "tilts the playing" field, I would note that inherent in the Authority's application of the "excessive interference" standard is a balancing test which weighs the benefits accruing to employees from the provision in question (and now from the award of the arbitrator) against the degree to which it interferes

with management rights. Further, the intent of applying the "excessive interference" standard in arbitration cases is not to permit agencies to agree to provisions only later to disclaim them as interfering with management rights. Rather, it prohibits arbitrators from interpreting contract provisions in a manner that excessively interferes with management rights, *i.e.*, an interpretation that would have been non-negotiable.

16. **In your dissenting opinion in American Federation of Government Employees, Local 987 and U.S. Department of the Air Force, Air Force Materiel Command, Robins Air Force Base, 57 F.L.R.A. No. 97 (2001), you disagreed with the finding that complaints of violations of the Privacy Act fall under the definition of ""grievance"" contained in Sec. 7103(a)(9)(C)(ii) of the Federal Service Labor-Management Relations Statute. However, some who disagree with your opinion contend that your position is inconsistent with extensive FLRA precedent on the merits of grievances alleging violations of the Privacy Act. What is your response to this argument? If federal employees cannot bring grievances before the FLRA for violations of the Privacy Act, what remedies are available to them for violations?**

I do not believe that any of the prior decisions addressed the issue of whether the Privacy Act constituted a law, rule or regulation affecting conditions of employment (5 U.S.C. 7103(a)(9)). My dissent in this case was based on the D.C. Circuit's decision in United States Customs Serv. v. FLRA, 43 F.3d 683 (D.C. Cir. 1994) (Customs Service). The court in Customs Service, in resolving the issue of whether statues properly fell within the purview of §7103(a)(9), noted that "[a]bsolutely any law could under some circumstances have some adverse consequences on the working conditions of one or more employees," but being "somehow aggrieved by its application" was not enough. Believing that Congress intended §7103(a)(9) to have some limiting principle, the court held that §7103(a)(9) was meant "to confine greivances to alleged violations of statue or regulation that can be said to have been issued for the very purpose of affecting working conditions of employees–not one that merely incidentally does so." 43 F.3d. At 689. Having so concluded, the court noted that "it becomes apparent that a 'grievance' predicated on a claim of violation of law that is not directed toward employee working conditions is outside both the arbitrator's and the FLRA's jurisdiction."Id.

In my view, the Privacy Act is not a law issued for the purpose of regulating working conditions. Unlike statutes such as the Fair Labor Standards Act, which expressly regulates the payment of wages between employers and employees, and which is clearly directed towards employee working conditions, the Privacy Act (5 U.S.C. 552(a)) regulates the conduct between agencies and "individuals," i.e., "citizen of the United States or alien lawfully admitted for permanent residence." 5 U.S.C. 552a(a)(2). In line with analysis set out in Customs Services, I concluded that Privacy Act was not "issued for the very purpose of

affecting the working conditions of employees" and that the Authority had no jurisdiction in the case.

Even if the Authority lacks jurisdiction in Privacy Act cases, employee still have access to the same remedies as all other individuals under the Privacy Act (5 U.S.C. Section 552a(g)(1).

17. **In American Federation of Government Employees, Local 701, Council of Prison Locals 33 and U. S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Pekin, Illinois, 58 F.L.R.A. No. 24 (2002), you joined a decision finding a provision non-negotiable which addressed the assignment of employees to cover weekend shifts so that employees in the Reserves and National Guard could attend weekend military drills without having to take leave. You concluded the provision, quoted in part below, was contrary to law:**

> **Supervisors will, to the greatest extent possible, make the effort to grant military reservists requests for work schedule adjustments to attend weekend military drills. Supervisory decisions shall be fair and equitable. As the ""Model Employer,"" every effort shall be made to insure reservists do not need to use annual leave and leave without pay to attend drill. . . .**

Your position was that this provision was outside of the duty to bargain because of its interference with the agency"s right to assign work. You stated: ""[t]he Authority has consistently found to be outside the duty to bargain those proposals/provisions that guarantee an employee the right to not be assigned work on a certain day."" In addition, you were concerned that it would affect the agency's ability to determine the timing of work to be done by military reservist employees and their coworkers.

The dissent by FLRA Member Pope made the following points: 1) while the provision required attempts to change the schedules of employees assigned to military drills, nothing required the agency to make changes in the schedules of other employees; 2) 38 U.S.C. Sec. 2024(d) requires an agency to grant an employee"s leave of absence to attend military drills, and that, therefore, the agency would in any event be faced with the prospect of finding other qualified employees on drill days; and 3) the provision did not impose a requirement that employee requests be granted in all instances and thus does not apply without regard to whether there are qualified employees available.

How do you respond to the points made by the dissent regarding this provision, a provision which its proponents argue was intended to ease the hardship on the men and women who defend our country?

38 U.S.C. 4316 does guarantee members of the Reserve the right to be in Leave Without Pay (LWOP) status when gone for reserve duty (38 U.S.C. Sec. 2024(d) was repealed in 1994). And 5 U.S.C. 6323 provides, with ceratin exceptions, that federal employees are entitled to 15 days of paid leave (military leave) per year in order to participate in military training. The provision here concerns adjustments to an employee's weekday work schedules, not to the granting of time-off to attend weekend drills.

What the union was seeking in this case, as stated in the Post-Petition Conference Record, was an alternative to the accommodations provided by Congress in 38 U.S.C. 2024(d) (a mistake in the correct citation) and 5 U.S.C. 6323 (a) concerning scheduling adjustments for unit employees who are military reservists required to attend weekend military drills. According to the Union in this case, the proposal was intended to require the supervisor, to the greatest extent possible, to adjust the employee's schedule so the employee could attend weekend drill without using annual leave or LWOP. In its Statement of Position, and in the Post-Petition Conference, the Agency argued that supervisors would be required to do whatever it took to accommodate a reservist's request, including canceling other employees' leave. Thus the proposal required that the agency modify work schedules, an interference with the right to assign work.

18. **In your dissent in <u>U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base and American Federation of Government Employees, Local 1709</u>, 57 F.R.L.A. No. 65 (2001), you took the position that unions did not have the right to have representatives present at Equal Employment Opportunity (EEO) mediation sessions. Some unions argue that their interests are often affected by negotiated resolutions of EEO mediation sessions and they would be most likely to know if a negotiated resolution were permissible under the collective bargaining agreement governing the parties. Do you agree that unions" legitimate interests can be affected by a negotiated resolution that may or may not be permissible under the collective bargaining agreement? Generally, what institutional or other interests of unions do you believe may be affected by the negotiated resolution of EEO complaints, and through what means do you believe unions should be able to monitor and protect those interests?**

My dissent in Dover Air Force Base concerned only the specific question of whether meetings between representatives of an agency and bargaining unit employees regarding statutory discrimination complaints are "formal discussions" within the scope of §7114(b)(4) of the Statute. I maintained that unions were not entitled to attend such meetings because to do so would be inconsistent with the regulations of the EEOC and because statutory discrimination complaints are not "grievances" within the meaning of the Statute. My position is consistent with a recent unpublished determination of the United States Court of

Appeals for the 9th Circuit. I did not, however, state that unions, in their capacity of representing the entire bargaining unit, have no interest in the settlement of discrimination complaints filed by bargaining unit members. To the contrary and in that regard, I joined in Dep't of the Air Force, March Air Reserve Base, Ca., 57 FLRA 392 (2001), where the Authority held that where an EEO settlement impacted bargaining unit employees other than the complainant, the agency was obligated to bargain that impact with the union. In my view, such impact and implementation bargaining adequately protects the union's institutional interests in cases involving the negotiated resolution of EEO complaints.

In U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forest City, Arkansas and American Federation of Government Employees, Local 0922, 57 F.L.R.A. No. 179 (2002), you joined a decision concluding that a union seeking information about disciplinary and adverse actions for unit employees had not met the ""particularized need"" test for information required under 5 U.S.C. Sec. 7114. (The FLRA has said that a union must establish a ""particularized need"" for requested information showing the uses to which it will put the information and the connection of those uses with its representation responsibilities.) Although the decision supported the union in requiring a response to certain other requests, it did not require a response to a request for information (which would be sanitized of personal identifiers such as names and social security numbers) about disciplinary and adverse actions for unit employees and supervisors. The union requested the information to evaluate the fairness of discipline imposed on a unit employee believed to be a victim of disparate treatment. The request was revised twice in response to denials by the agency. Those who disagree with the FLRA"s decision contend that, on this point, the decision imposes an insurmountable burden on the party requesting the information, and will encourage agencies to stonewall a union"s request for information that a union needs to adequately represent the interests of employees in the unit. How do you respond to this criticism?

The union's request for disciplinary action information in that case was overly broad. Rather than asking for disciplinary information in cases similar to the one at issue, the request was for copies of "all" disciplinary and adverse action files of employees at the correctional center. Relying on established precedent, the majority held that the union must establish a connection between the broad scope of information requested and the particular matter referenced in the request. The majority further ruled that the union had failed to establish such a connection. This decision stands only for the proposition that a union's information request must be specifically tailored to the purpose of the request; or if the request is broader than appears necessary, the request must articulate why the request's broader scope is necessary for the union's purposes.

III. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

IV. Relations with Congress

1. **Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?**

   Yes

2. **Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?**

   Yes

V. Assistance

1. **Are these answers your own? Have you consulted with FLRA or any interested parties? If so, please indicate which entities.**

   These answers are my own. I have consulted FLRA staff to ensure factual accuracy.

AFFIDAVIT

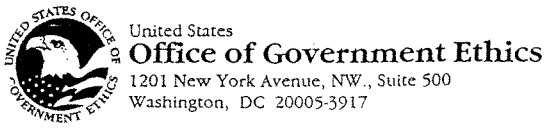
I, Dale Cabaniss, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Dale Cabaniss

Subscribed and sworn before me this 12th day of June, 2003.

Helen Brown
Notary Public

My Commission Expires August 14, 2003



September 10, 2002

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Virginia Dale Cabaniss, who has been nominated by President Bush for the position of Member, Federal Labor Relations Authority.

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

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

Sincerely,

Amy L. Comstock
Director

Enclosure

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424-0001

October 1, 2003

The Honorable George V. Voinovich
Chairman
Subcommittee on Oversight of Government
Management, Restructuring, and the District of Columbia
Dirksen Office Building, Room 342
Washington, D.C.

Dear Senator Voinovich:

I am pleased to have the opportunity to answer the following questions that you submitted to me after my nomination hearing yesterday to be a member of the Federal Labor Relations Authority:

1. **Can you please describe the accomplishments that you are most proud of during your first term at FLRA? What goals have you outlined for your term as Chairman?**

My First Term

As a member of the Authority decisional component of the FLRA, I have been proud of my accomplishments in relation to our published decisions. My efforts have been two-fold. First, I've sought to ensure that all of the decisions in which I took part provided guidance and insight both to the parties specifically involved, as well as to the labor-management community at large, so that Agencies, employees and their representatives fully understand their rights and responsibilities under our statute. Given the changes in labor relations roles within the Federal government, including diminishing expertise and added responsibilities, I believe Authority members have a larger responsibility than simply resolving the issue at hand. We must also seek to educate and guide those who read our decisions. Equally as important has been my goal to ensure that our decisions were well-reasoned and legally sound, improving the clarity and stability of our case law. I have been gratified to see that the decisions I participated in and the separate opinions I have written have received favorable review by the courts.

Other accomplishments during my first term that I am particularly proud of include my success in recruiting several new attorneys who not only have federal labor law

experience, but also have broad general experience with government-wide rules and regulations, experience working in labor-relations within agencies, and experience in state and private sector environments. My recruiting efforts have helped to strengthen the quality of the decisions in my office, adding hands-on experience with the challenges facing agencies and unions. During my first term, I was also pleased to promote education and training for our customers - - the Federal labor relations community. I supported and continue to expand our efforts to assist parties in learning techniques they can apply to resolving their own differences rather than resorting to a formal adversarial process. I have encouraged members of my staff to become involved in conducting training and to share with me ideas that they may have regarding ways to improve communications with our customers.

Goals as Chairman

As Chairman, I have identified two categories of goals, consistent with the two roles of the position. First, as a member of the Authority decisional component, my role is to continue to participate in the timely resolution of cases that come before the Authority and to continue to strive for the highest quality work-product possible, similar to what I have done during my first term. Second, as chairman of the agency, my role as CEO and chief administrative officer is to provide agency-wide direction and leadership, both in terms of operations, as well as in terms of policy and planning.

With respect to my administrative role as agency-head, I have begun a number of initiatives that I would seek to continue in order to improve both the internal operations of our agency, as well as contributing to constructive labor-relations government-wide. With respect to internal operations, we will continue focusing on improving the timeliness of our case-processing activities, including reducing the time to publish our decisions on our website. We will continue to implement the *President's Management Agenda* initiatives to the extent practicable for our agency's size and mission.

To continue promoting constructive labor relations externally, we will continue providing various forms of voluntary dispute resolution initiatives and training to individual parties. In addition, our agency will be sponsoring a government-wide training conference in April 2003, here in Washington, D.C. We expect this conference to be widely attended, given the many changes impacting the labor-management community during the past two years.

2. As you know, the federal government faces some very serious human capital challenges. As Chairman of the FLRA, you are responsible for ensuring that the agency has the workforce to accomplish its mission. I was wondering what human capital strategies you have instituted at the agency to ensure that the FLRA has the right people with the right skills?

During my time as chairman, to date, I have sought to initiate a number of efforts to provide a baseline upon which we can construct a strategic plan for addressing our human capital challenges. For instance, I asked our inspector general to conduct an internal workforce analysis and, later, to review our case-processing activities to identify current deployment of human capital resources in relation to need. With an eye toward assessing the Agency's future human capital needs, I have considered preliminary data regarding employees eligible for retirement and their positions. Consistent with other agencies, our

agency must to take steps to ensure we do not face a gap in institutional knowledge or skills if these employees choose to retire when they become eligible.

To begin addressing our human capital challenges, this year, I established a first-ever, career-SES position entitled Director of Policy, Planning, & Performance Management. This position exists alongside the Executive Director position, which focuses primarily on operations and implementation of policy. I have designated my director of policy & planning as the FLRA Chief Human Capital Officer (CHCO), to reflect the spirit of the *Chief Human Capital Act*, even though, as an independent agency, we are not required to name such an individual. During the next year, we will continue our ongoing review of options in light of pending retirements, strengthening our recruitment plans and expanding our mentoring efforts. At my direction, our human resources division will continue its review of our procedures and policies with an eye towards incorporating flexibilities and streamlining such processes as vacancy announcements and recruitment and hiring - - particularly those that can be accomplished through e-government initiatives. We will also be conducting various skills gap analyses, to identify cross/training activities to improve career development of professional staff and upward mobility programs for administrative or support staff. To ensure that our managers are prepared to provide the leadership necessary to meet Agency goals, we will be providing agency-wide manager training in such areas as coaching employees, resolving conflict, and establishing meaningful workplans and conducting performance appraisals.

Another important goal for me is to continue promoting a "single-agency" culture. The FLRA is comprised of three separate components, brought together under the *Civil Service Reform Act of 1978*. During my time here, I have found that the FLRA, in a number of respects, still fosters three separate organizational cultures. One of my goals is to continue to work to ensure that all of the FLRA's components are cognizant of the interdependence of their efforts and the need to work together to achieve Agency goals and improve service to our customers. I believe that my efforts relating to strategic planning activities, cross-training and employee development, and agency-wide manager training will move us forward in this regard.

Finally, the future of our agency will only be as strong as its leaders. I will also be working with our CHCO to ensure that our SES appraisal process reflects and rewards performance that is tied to our agency's strategic goals and that we have mechanisms in place to develop future leaders.

Senator, thank you for the opportunity to respond to these questions. If you have questions or would like additional information, I am willing and ready to respond.

Sincerely,

Dale Cabaniss
Chairman

QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS
COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION

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

My full name is Craig Steven Iscoe. I have never used other names.

2. **Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).**

I am a United States citizen.

3. **Current office address and telephone number.**

Securities and Exchange Commission
450 5th St., NW; Room 9508
Washington, DC 20549

(202) 924-4752

4. **Date and place of birth.**

May 10, 1953 in Austin, Texas, United States of America.

5. **Marital status (if married, include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

My spouse is Rosemary Anne Hart. She is an attorney and is employed by the Department of Justice as a Senior Counsel in the Office of Legal Counsel. Her address is:

Rosemary Hart
Senior Counsel
Office of Legal Counsel
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202) 514-2027

6. **Names and ages of children. List occupation and employer's name if appropriate.**

My wife and I have two children:

7. **Education. List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and date each degree was received. Please list dating back from most recent to earliest.**

Georgetown University Law Center, LL.M. 1979
Stanford Law School, J.D. 1978
University of Texas at Austin, B.A. 1974 (Dec.)
Stephen F. Austin High School, Diploma 1971

8. **Employment record. List all jobs held since college, other than legal experience covered in question 16, including the dates of employment, job title or description of job, and name and address of employer. Please list dating back from most recent to earliest. If you have served in the US military, please list dates of service, rank or rate, serial number, and type of discharge received.**

SECURITIES AND EXCHANGE COMMISSION (on detail from the U.S. Attorney's Office)
450 5TH St., NW
Washington, DC 20549

Acting Assistant Chief Litigation Counsel – Trial Unit, Division of Enforcement
November 2002 to present.

Conduct securities litigation for the SEC.

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20580

Assistant United States Attorney - Criminal Division
January 16, 2001 to November 2002

Public Corruption/Fraud Section: Investigate and prosecute cases involving all types of financial fraud, embezzlement, housing fraud, computer hacking and related offenses.

DEPARTMENT OF JUSTICE - OFFICE OF THE DEPUTY ATTORNEY GENERAL (on detail from the U.S. Attorney's Office)
950 Pennsylvania Avenue, NW
Washington, DC 20530

Associate Deputy Attorney General
February 1997 to January 2001

Advised the Deputy Attorney General on intelligence, national security, public corruption, and white collar criminal issues. Helped inform Congress on campaign

financing, international crime, technology export, encryption, electronic commerce, and other matters. Represented the Department in policy discussions with the National Security Council, State Department and other government agencies on national security, export, encryption, and related issues. Reviewed Criminal Division cases and investigations.

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20530

Assistant United States Attorney - Criminal Division
Sept. 1992 to Jan. 1997 (on detail to the Office of the Deputy Attorney General from January 1997 to January 2001)

Public Corruption/Government Fraud Section (1992 - 1997): Investigated and prosecuted cases involving public corruption, government fraud and related federal offenses.

Transnational/Major Crimes Section (1989 - 1991):
Investigated and prosecuted export fraud, terrorism, espionage and Presidential threats cases.

Felony Trial, Misdemeanor Trial, Appellate, Special Proceedings and Grand Jury Sections (1986 - 1989): Conducted jury trials for "street crimes" such as homicide, armed robbery and drug distribution. Wrote appellate briefs and argued appeals. Handled mental health commitment hearings. Wrote oppositions to collateral attack motions and examined witnesses at hearings. Handled mental health issues and civil commitments.

VANDERBILT LAW SCHOOL
Vanderbilt University
Nashville, Tennessee 37240

Assistant Professor
July 1991 through August 1992

Directed Vanderbilt's trial advocacy program and its clinical program in juvenile law. Organized and presented trial technique demonstrations. Supervised students in court. Taught a course on Children and the Law.

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20530

Assistant United States Attorney - Criminal Division
June 1986 through June 1991

Transnational/Major Crimes Section (1990 - 1991):

Investigated and prosecuted export fraud, terrorism, espionage and Presidential threats cases.

Felony Trial, Misdemeanor Trial, Appellate, Special Proceedings and Grand Jury Sections (1986 - 1989):
Conducted numerous jury trials for "street crimes" such as homicide, armed robbery and drug distribution; Conducted non-jury trials; Wrote appellate briefs and argued appeals; Handled mental health commitment hearings. Wrote oppositions to collateral attack motions and examined witnesses at hearings.

GEORGETOWN UNIVERSITY LAW CENTER - Washington, D.C.
600 New Jersey Avenue, NW
Washington, DC 20001

Visiting Professor - January through May 1986

Taught a clinical program in administrative law at the Institute for Public Representation. Duties included teaching seminars and supervising students preparing appellate briefs, civil motions and rulemaking comments.

ARENT, FOX, KINTNER, PLOTKIN AND KAHN - Washington, D.C.
1050 Connecticut Avenue, NW
Washington, DC 20036

Associate - June 1982 through December 1985

Communications and litigation practice before the federal courts and administrative agencies. Wrote briefs, motions and rulemaking comments. Conducted trials and took depositions.

FEDERAL TRADE COMMISSION - Washington, D.C.
BUREAU OF CONSUMER PROTECTION
600 Pennsylvania Avenue, NW
Washington, DC 20580

Assistant to the Director - April 1981 through May 1982

Formulated and implemented legal and policy positions for Bureau. Evaluated staff proposals for litigation, rulemaking and enforcement actions.

Trial Attorney - January 1980 through March 1981
Division of Advertising Practices

Researched and developed legal theories in an investigation of cigarette advertising. Selected and prepared witnesses for testimony and hearings.

CITIZENS COMMUNICATIONS CENTER - Washington, D.C.
Now located at Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, DC 20001

Staff Attorney and Clinical Instructor
September 1979 through December 1979

Wrote federal appellate briefs and motions on communications and First Amendment issues.

GEORGETOWN UNIVERSITY LAW CENTER - Washington, D.C.
600 New Jersey Avenue, NW
Washington, DC 20001

Graduate Fellow - August 1978 through July 1979

Supervised Georgetown University Law School students and taught seminars. Wrote appellate briefs and administrative pleadings. Prepared petitions to regulatory agencies and comments on proposed regulations.

NATURAL RESOURCES DEFENSE COUNSEL
Palo Alto, California

Legal Intern - June through July 1977

Conducted legal research.

GRAVES, DOUGHERTY, HEARON & MOODY
515 Congress Avenue, Suite 2300
Austin, Texas 78701

Legal Intern – June through July 1976

Conducted legal research.

STANFORD LAW SCHOOL
Stanford University
Stanford, California 94305

Research Assistant - Jan. through May 1976; Sept. 1976 through July 1977

Conducted research and drafted material for Stanford professors.

TEXAS OFFICE OF STATE/FEDERAL RELATIONS
1019 19th Street, NW
Washington, DC 20036

Research Assistant/Legislative Analyst – January 1975 through July 1975

Conducted research and analyzed budget legislation.

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

I received Special Achievement Awards from the United States Attorneys Office in 2002, 1996, and 1995.

In addition, during my tenure as an Assistant United States Attorney, I have received various awards from the FBI, Metropolitan Police Department, Office of Inspector General of the Department of the Interior, Office of the Inspector General of the Department of Housing and Urban Development, and other law enforcement organizations.

In addition, for activities outside of work, I have received awards or recognition from the Boy Scouts of America and from my local Advisory Neighborhood Commission.

I also received academic awards in college, was elected to Phi Beta Kappa, and graduated with High Honors.

10. **Business relationships. List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporatión, company, firm, partnership, or other business enterprise, or educational or other institution.**

None.

11. **Bar associations. List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.**

District of Columbia Bar. 1993 to present. Member No. 252486.
United States District Court for the District of Columbia Bar. 1993 to present.
United States Court of Appeals for the District of Columbia Circuit Bar. 1993 to present.
Court of Appeals for the District of Columbia Bar. 1993 to present.
United States Supreme Court Bar. 1993 to present.
State Bar of Tennessee. 1991 to 1993 or 1994 (resigned after I left Tennessee).
American Bar Association. About 1983 – 1985 and 1993 – 1996.
Federal Communications Bar Association. 1982 – 1985.
Washington Council of Lawyers. Member 1980 – 1991; Board and/or Executive Committee Member 1983-1986; Chair, Pro Bono Forum Organizing Committee 1983-1984.

12. **Other memberships. List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other organizations, other than those listed in response to Question 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.**

Following is a list of organizations in which I have, or have had, an active roll through leadership positions or attendance. None of these organizations, to the best of my knowledge, presently discriminates or formerly discriminated on the basis of race, sex, or religion.

Parent/Teacher and other school associations:

Woodrow Wilson Senior High School Parent, Teacher & Student Association (Washington, D.C). September 2002 to present.
Alice Deal Junior High School Parent/Teacher Association (Washington, D.C.). September 1999 to June 2001.
Lafayette Elementary School Home and School Association (Washington, D.C.). September 1992 to June 1999.
Sidwell Friends Parent/Teacher Association (Washington, D.C.). September 1999 to present.

Boy Scouts of America:

Scoutmaster, Boy Scout Troop 52, National Capital Area Council. June 2000 to present.
Venture Advisor, Venture Crew 52, National Capital Area Council. June 2001 to present.
Assistant Scoutmaster, March 2000 to June 2000.
Deputy Committee Chair, Troop 52, National Capital Area Council. June 1999 to March 2000.
Leadership Committee Chair, Cub Scout Pack 52. June 1998 to June 1999.
Badgewalla (adult who awards badges), Cub Scout Pack 52. June 1996 to June 1998.

Temple Sinai:

Member. 1993 to present. No formal position, but occasional usher, chaperone, and parent volunteer.

Swimming and outdoor organizations

Northwest Branch Pool (Silver Spring, MD). June to August, 1993 to present.
Sycamore Island Canoe Club (Montgomery County, Maryland). Member since July 2003.

Organizations that may list me as a "member" because of financial contributions, generally of less than $100 annually, but in which I have played no active role:

Stanford University Alumni Association. 1978 to present.
Stanford Law School Alumni Association. 1978 to present.

University of Texas Ex-Student's Association. 1977 to present.
Friends of Lafayette Park. About 1998 to present.
WAMU radio. Intermittently from about 1981 to present.
WETA television. Intermittently from about 1982 to 2001.
World Jewish Federation. Intermittently from about 1995 to 2002.
Nature Conservancy. Intermittently from about 1995 to 1998.
Sierra Club. Intermittently from about 1986 to present.
World Wildlife Federation. Intermittently from about 1995 to 2001.
Chesapeake Bay Foundation. Intermittently from about 1994 to 2001.
Common Cause, approximately 1980 –1991.
Natural Resources Defense Counsel. 1983 – 1985.
Southern Poverty Law Center. 1981 –1984.

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

Superior Court for the District of Columbia; Admitted, 1978
Court of Appeals for the District of Columbia; Admitted, 1978
U.S. District Court for the District of Columbia; Admitted, 1979
U.S. Court of Appeals for the District of Columbia Circuit; Admitted, 1979
Supreme Court of the United States; Admitted, 1983
Supreme Court of Tennessee 1992 to 1993 or 1994 (resigned after I left Tennessee).

14. **Published writings. List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.**

"2003 Federal Rules of Criminal Procedure. *Summary Reference Guide*" Elex Publishers. St. Petersburg, FL. 12 pgs. (2003). Also author of 1993 – 2002 editions.

"The Child Mental Health Professional as Expert Witness." Co-author with Barry Nurcombe and David Partlett. Work appears as Chapter 11 (46 pgs.) of Child Mental Health and the Law, Nurcombe and Partlett. The Free Press – MacMillan, Inc. New York, NY. 628 pgs. (1994).

"The Investigation and Prosecution of Public Corruption Offenses." Written for the Department of Justice and American Bar Association's Central and Eastern European Law Initiative ("CEELI"). Written in 1995 and updated in 2002.

"The Investigation and Prosecution of Terrorism Offenses." Written for the Department of Justice and American Bar Association's Central and Eastern European Law Initiative ("CEELI"). Written in 1995.

15. **Speeches. List the titles of any formal speeches you have delivered during the last five (5) years and the date and place where they were delivered. Please provide the Committee with four (4) copies of any of these speeches.**

During the last five years, I have given the speeches and made the presentations listed. Because

I was not certain whether these speeches would be considered as "formal" within the meaning of Question 15, I have included them in this list. I made all speeches and presentations from rough outlines and do not have finished or formal copies of the speeches and presentations.

"How the Department of Justice Can Bring Stand-Alone SEC Cases." Criminal Coordination Conference run by the Securities and Exchange Commission's Division of Enforcement. Washington, D.C. February 24, 2003. (The audience consisted of Assistant U.S. Attorneys and SEC attorneys.)

"Investigating and Prosecuting Corruption and Organized Crime Cases." (This was a series of presentations over three days that I gave together with an FBI Special Agent and another Assistant United States Attorney as part of a Department of Justice program operated in conjunction with the American Bar Association's Central and East European Law Initiative ("CEELI").) Bratislava, Slovakia. October 14 – 16, 2002. (The audience consisted of Slovak judges, prosecutors, and investigators, and other government officials.)

"Prosecuting Corporate Criminal Offenses." (This was a presentation sponsored by the U.S. Department of State.) Zagreb, Croatia. October 8, 2002. (The audience consisted of Croatian judges, prosecutors, investigators, and other government officials.)

"Corporate Criminal Liability in the Post-Enron World." (I was the discussion moderator and did not give a formal presentation.) Edward Bennett Williams Inn of Court. Washington, D.C. September 19, 2002. (The audience consisted of federal judges, Department of Justice attorneys, Assistant United States Attorneys, and members of the private bar.)

"Investigating and Prosecuting Corporate Criminal Offenses." (This was a series of presentations over two days that I gave as part of a Department of Justice program operated in conjunction with the ABA CEELI program.) Bratislava, Slovakia. May 2002. (The audience consisted of Slovak judges, prosecutors, investigators, and other government officials.)

16. Legal career.

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

(1) Whether you served as a law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;

I did not serve as a judicial law clerk.

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

I have never practiced law alone.

(3) The dates, names, and address of law firms, companies, or governmental agencies with which you have been employed.

SECURITIES AND EXCHANGE COMMISSION (on detail from the U.S. Attorney's Office)
450 5TH St., NW
Washington, DC 20549

Acting Assistant Chief Litigation Counsel – Trial Unit, Division of Enforcement
November 2002 – present.

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20580

Assistant United States Attorney - Criminal Division, Public Corruption/Fraud Section
January 16, 2001 to present (on detail to the SEC since November 2002)

Public Corruption/Fraud Section: Investigate and prosecute cases involving all types of financial fraud, embezzlement, housing fraud, computer hacking and related offenses.

DEPARTMENT OF JUSTICE - OFFICE OF THE DEPUTY ATTORNEY GENERAL (on detail from the U.S. Attorney's Office)
950 Pennsylvania Avenue, NW
Washington, DC 20530

Associate Deputy Attorney General
February 1997 to January 2001

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20530

Assistant United States Attorney - Criminal Division
Sept. 1992 to Jan. 1997 (on detail to the Office of the Deputy Attorney General from January 1997 to January 2001).

Public Corruption/Government Fraud Section (1992 - 1997):
Transnational/Major Crimes Section (1989 - 1991)
Felony Trial, Misdemeanor Trial, Appellate, Special Proceedings and Grand Jury Sections (1986 - 1989).

VANDERBILT LAW SCHOOL
Vanderbilt University
Nashville, Tennessee 37240

Assistant Professor
July 1991 through August 1992

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th St., NW
Washington, DC 20530

Assistant United States Attorney - Criminal Division
June 1986 through June 1991

Transnational/Major Crimes Section (1990 - 1991):

Felony Trial, Misdemeanor Trial, Appellate, Special Proceedings and Grand Jury Sections (1986 - 1989)

GEORGETOWN UNIVERSITY LAW CENTER - Washington, D.C.
600 New Jersey Avenue, NW
Washington, DC 20001

Visiting Professor - January through May 1986

ARENT, FOX, KINTNER, PLOTKIN AND KAHN - Washington, D.C.
1050 Connecticut Avenue, NW
Washington, DC 20036

Associate - June 1982 through December 1985

FEDERAL TRADE COMMISSION - Washington, D.C.
BUREAU OF CONSUMER PROTECTION
600 Pennsylvania Avenue, NW
Washington, DC 20580

Assistant to the Director (Timothy Muris, preceded by James Sneed) - April 1981 through May 1982.
Trial Attorney - January 1980 through March 1981
Division of Advertising Practices

CITIZENS COMMUNICATIONS CENTER - Washington, D.C.
Now located at Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Staff Attorney and Clinical Instructor
September 1979 through December 1979

GEORGETOWN UNIVERSITY LAW CENTER - Washington, D.C.
600 New Jersey Avenue, NW
Washington, DC 20001

Graduate Fellow - August 1978 through July 1979

B. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

My law practice has been devoted primarily to public service and a substantial part of that practice has been serving as an Assistant United States Attorney.

My practice may be divided into the following periods and dates:

September 1991 to present and June 1986 through July 1991:

Serving as an Assistant United States Attorney or Department of Justice Attorney. As noted above, I am presently serving on a detail to the Securities and Exchange Commission where I am handling the civil aspects of securities fraud matters.

June 1982 through December 1985:

Private practice of law at Arent, Fox, Kintner, Plotkin, and Kahn.

January through May 1986; September 1991 through July 1992; September 1978 – June 1979:

Teaching law at Vanderbilt or teaching and working at clinical programs at Georgetown University Law Center.

January 1980 through May 1982:

Government practice at the Federal Trade Commission.

September through December 1979:

Legal practice at Citizens Communications Center.

C. Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.

During my many years at the Office of the United States Attorney for the District of Columbia, my clients have been the United States and residents of the District of Columbia and the victims of crimes committed in the District against persons in the District and throughout the United States. When I worked in the Office of the Deputy Attorney General, the SEC and the Federal Trade Commission, my client was the United States and its citizens.

When I was in private practice, my clients were generally corporations or individuals

who held or wanted to obtain communications licenses from the Federal Communications Commission or who owned communications entities.

When I taught at Vanderbilt, my clients were juveniles charged with offenses in Tennessee and persons who were seeking to obtain or retain custody of their children.

When I was working at a clinic at Georgetown University Law Center, my clients were primarily various groups who represented persons with physical disabilities. My clients at Citizens Communications Center were groups who were concerned with access to and the content of the media.

D. Describe the general nature of your litigation experience, including:

(1) Whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your court appearances has varied over time, please describe in detail each such variance and give applicable dates.

September 1978 through May 1982:

I rarely appeared in court, but handled a wide variety of civil, appellate, and administrative matters.

June 1982 through December 1985:

I appeared in court on an occasional basis. I served as an associate counsel in a two-week federal civil jury trial in the Eastern District of Virginia. In addition, I tried four television or radio licensing hearings before a Federal Communications Commission Administrative Law Judge. In two hearings I was lead counsel and in the other two I was associate counsel. I also occasionally argued motions in the Superior Court for the District of Columbia or United States District Court.

January through May 1986:

I did not appear in court.

May 1986 through June 1991:

I appeared in the Superior Court of the District of Columbia and the United States District Court for the District of Columbia frequently. I tried nearly 50 cases to verdict in the Superior Court and also tried a large number of collateral attack and probable cause hearings to judgment. I

also tried five cases to jury verdicts in the United States District Court and argued several appellate cases before the Court of Appeals of the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.

August 1991 through July 1992:

I appeared frequently in the Juvenile Court for Davidson County, Tennessee as a clinical professor supervising students at Vanderbilt Law School.

September 1992 to January 1997:

I appeared frequently in United States District Court, trying several cases to jury verdicts. I also regularly appeared in court to handle a wide variety of matters, including plea hearings, sentencing hearings, and motions arguments.

January 1997 to January 2001:

I was on a detail during this time and occasionally appeared in court to handle issues in cases that I had developed before beginning the detail.

January 2001 to November 2002:

I regularly appeared in court to handle a wide variety of matters, including plea hearings, sentencing hearings, motions arguments, and other matters.

November 2002 to present:

I regularly appeared in court to serve as co-counsel for the SEC's Division of Enforcement and Office of Chief Accountant in a hearing that lasted for more than three weeks.

(2) **What percentage of these appearances was in:**

(a) **Federal courts (including Federal courts in D.C.);**

20% (estimate based on number of cases)

(b) **State courts of record (excluding D.C. courts);**

0%

(c) **D.C. courts (Superior Court and D.C. Court of Appeals only);**

75% (estimate based on number of cases)

(d) **Other courts and administrative bodies.**

5% (estimate based on number of cases)

(3) **What percentage of your litigation has been:**

(a) **Civil**

5%

(b) Criminal
95%

(4) **What is the total number of cases in courts of record you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately). Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.**

More than 65. I was sole counsel in all but about five of these cases. In those I was lead counsel or co-lead counsel in two cases and associate counsel in the remaining three.

(5) **What percentage of these trials was to**

(a) **a jury;**

Approximately 80%

(b) **the court (include cases decided on motion but tabulate them separately).**

Approximately 20%

17. **Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties you represented and 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 court and the name of the judge or judges before whom the case was litigated; and (c) the name(s) and address(es) and, telephone number(s) of co-counsel and of the principal counsel for the other parties.

Based on my understanding of the Committee's needs, I have omitted from this list some significant cases I have handled because I have been unable to find contact information for opposing counsel. Five of the most significant litigated matters meeting the criteria in Question 17 that I have personally handled include:

1. *United States v. Jennifer Gatling and Cheryl Walker* **(and related cases)**
   96 F.3d 1511 (D.C. Cir. 1996)
   Cr. No. 94-0167 (SS)

Capsule Summary:

The convictions of Jennifer Gatling and Cheryl Walker for conspiring to accept bribes (in violation of 18 U.S.C § 371) and other offenses marked the successful completion of a lengthy investigation of corruption at the District of Columbia Department of Public and Assisted Housing ("DPAH"). In addition to serving as chief counsel at the six-week long trial of Ms. Gatling and Ms. Walker, I supervised the investigation that led to the arrests of five DPAH employees for accepting bribes in return for awarding federally-funded Section 8 housing subsidies to persons who were not entitled to receive them. Two of those employees pleaded guilty to felony bribery offenses, a third, who was less culpable than the others, resigned in lieu of prosecution and Ms. Gatling and Ms. Walker were convicted after jury trial. In addition, three persons who aided and abetted the DPAH employees pleaded guilty and the jury that convicted Ms. Walker and Ms. Gatling acquitted two others who were charged with aiding and abetting. Ms. Walker was sentenced to incarceration for 40 months and Ms. Gatling to incarceration for 41 months. Both sentences were near the top of the applicable ranges under the United States Sentencing Guidelines.

Importance

This case is important for several reasons. First, the investigation and prosecutions removed from public office corrupt officials who, instead of serving the public by fairly administering housing subsidy programs, were demanding bribes from persons who were in desperate need of affordable housing. The successful prosecutions helped lead to a complete restructuring of DPAH that is intended to make it more difficult for corruption to take place. (Note: DPAH has changed its name to the D.C. Housing Authority.) Next, the convictions of Ms. Gatling and Ms. Walker led to significant advances (from the government's viewpoint) in the legal standards regarding conspiracies. In affirming the convictions, the United States Court of Appeals clarified the distinctions between single and multiple conspiracies and the standards for proving each. (For a detailed discussion of the conspiracy and related evidentiary issues, *see*

United States v. Gatling and Walker at 96 F.3d 1511 at 1518 – 1523 (D.C. Cir. 1996). Finally, the investigation that led to the convictions is significant because it involved close cooperation between local and federal law enforcement agencies, the Metropolitan Police Department ("MPD") and the Federal Bureau of Investigation ("FBI"), and the Inspector General of the Department of Housing and Urban Development ("HUD"). Such cooperation is all too rare but, in this case, substantially contributed to the successful results.

Discussion

The investigation that led to convictions of four DPAH employees and three others began when an agent for the HUD Inspector General informed me of rumors that high-level DPAH employees were taking bribes in return for placing persons at the top of the DPAH wait list for Section 8 and Tenant Assistance Program ("TAP") housing subsidies. The DPAH Section 8 program provided federally-funded monthly subsidies of as much as $1,000 to District residents who could not afford adequate housing. The TAP program used District funds to provide somewhat smaller subsidies. Both subsidy programs were quite popular because subsidy recipients did not have to live in housing projects but, instead, could live anywhere in the District that the landlord would accept the subsidies.

The demand for the programs was so great that DPAH maintained waiting lists of applicants who met the income requirements and divided the list into several different levels of need, based on the applicant's present housing situation. The lists were so long that applicants often remained on the lists for as long as five years without ever coming to the top. Both rumors and statistical analysis suggested that applicants who paid bribes moved immediately to the top of the list, while those who played by the rules remained mired in the middle or bottom of the lists in horrible housing situations.

After the HUD IG Agent brought this problem to my attention, I learned that the Metropolitan Police Department had recently attempted to investigate this problem by having an undercover officer pose as a Section 8 applicant. That attempt had failed when, for still undetermined reasons, DPAH employees learned that MPD was conducting the supposedly secret investigation. I decided to initiate a joint MPD/HUD investigation, and later added the FBI. One of my biggest challenges was ensuring that the three agencies worked together effectively. After I was able to resolve the inevitable tensions, these investigators did an outstanding job of locating persons who appeared to have received Section 8 or TAP subsidies before they were eligible and then persuading them to tell how they had obtained the subsidies.

As the prosecutor in charge of the investigation, I met with each of these potential witnesses, often in their subsidized apartments, in order to assess their credibility and effectiveness as witnesses. Many of them acknowledged paying bribes of $500 to $1,000, often with their entire public assistance check or borrowed money, to various DPAH employees in return for receiving subsidies. Early on in the investigation, I had to decide whether to prosecute persons who admitted to paying bribes to obtain subsidies. After consultation with my

supervisors, I concluded that the persons who paid the bribes were in many ways the victims of extortion and, even though they had paid bribes, should not be prosecuted. Upon winning the trust of these witnesses, I was able to present a strong case to the grand jury, which returned the indictments.

Although five defendants pleaded guilty, the highest level one, Cheryl Walker, and her close friend, Jennifer Gatling, did not. Ms. Walker was the Chief of the Section 8 Division and Acting Chief of the Subsidized Housing Administration and Ms. Gatling was a senior Housing Program Specialist. The trial before Judge Stanley Sporkin was hotly contested. The defendants challenged the credibility of the witnesses, each of whom had committed an illegal act in paying a bribe. Moreover, Ms. Walker had taken great care to have others act as intermediaries for her, so it was difficult to link her directly to the acceptance of bribes.

I was the chief counsel at trial and was assisted by AUSA Shanlon Wu, who did not play an active speaking role at trial but was invaluable in assisting in the smooth presentation of hundreds of exhibits constituting thousands of pages. The trial also presented numerous complex evidentiary issues, particularly concerning single and multiple conspiracies and the admissibility of conspiracy evidence, that slowed the presentation of witnesses. In addition, poor record keeping at DPAH made it more difficult to present the government's case. Despite these problems, the jury ultimately convicted both Ms. Gatling and Ms. Walker of the lead charge against them, conspiracy to accept bribes.

(a.) The date of the representation:

I began working on the investigation that led to this trial in 1993. The trial took place in December 1994 and January 1995. Sentencing took place in June of 1995.

(b.) The court and the name of the judge or judges before whom the case was litigated.

This case was litigated in the United States District Court for the District of Columbia before United States District Judge Stanley S. Sporkin.

(c) The name(s) and address(es), and telephone number(s) of co-counsel and of the principal counsel for the other parties.

I was lead counsel and tried this case with the capable assistance of Assistant United States Attorney Shanlon Wu, who is now in private practice and may be contacted at:

Telephone Number: (202) 326-7922
Address: Kellog, Huber, Hansen, Todd, & Evans
1615 M St., NW, Suite 400
Washington, DC 20036

Defense Counsel were:

Shawn Moore (Counsel for Jennifer Gatling):

Telephone Number: (202) 208-7500
Address: Federal Defender Service
625 Indiana Avenue, NW
Washington, D.C. 20004

Thomas Abbenante (Counsel for Darnell Jackson)

Telephone Numbers: (202) 223-6539 or (202) 812-0590
Address: 1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20036

Robert Mance (Counsel for Joyce Pierce):

Telephone Number: (202) 223-1254
Address: Could not locate

Marvin Clemons (Counsel for Cheryl Walker):

I could not locate an address or phone number for Mr. Clemons.

2. ***U.S. v. Cloyd Marshall, Herbert Augustus, and Tyrone Williams***
(Crim. No. 01-209-01-03 (JR))

and

U.S. v. Reginald Lowe, Travis Lemar Montgomery, and Willie James Montgomery
(Crim. No. 02-089-01-03 (JR))

Capsule Summary:

In 2001 and 2002, I initiated a series of prosecutions of telemarketers who targeted the elderly. The organizers of this scheme obtained several hundred thousand dollars from victims throughout the United States, including almost $300,000 from an elderly District resident. All of the victims were elderly and many lived on fixed incomes. Many lost their life savings as a result of the telemarketing fraud.

These prosecutions led to six defendants pleading guilty to conspiring to commit money laundering (in violation of 18 U.S.C § 1956(h)). Three defendants have been sentenced: Travis

Williams was sentenced to incarceration for 24 months. Cloyd Marshall was sentenced to incarceration for 12 months and Herbert Augustus was sentenced to incarceration for 36 months. The Judge reduced the sentences of both Mr. Marshall and Mr. Augustus to less than they otherwise would have been under the United States Sentencing Guidelines in consideration of the assistance they provided the prosecution. That assistance led the remaining three defendants to plead guilty. They are cooperating in the ongoing investigation and will be sentenced after they have completed their cooperation.

The telemarketing scheme worked in the following manner. The organizers of the scheme, called "talkers," operated out of Fresno, California and Las Vegas, Nevada and would telephone persons in the District of Columbia and elsewhere and tell them that they had won a large amount of cash, often about $500,000 or more. The talkers would then tell victims that in order to claim their prizes they would first have to wire a sum of cash, usually about $3,000, to a "registered agent" in order to cover processing fees or taxes.

The registered agents were actually persons who worked for the talkers and were called "runners." When a victim wired the funds to the talker, he would collect the wired money from a Western Union or Money Gram outlet and would give about 90% of the funds to the talker, keeping the remaining 10% for himself. After receiving the money, the talker would call the victim again and again, each time giving reasons why the victim had to send additional money. The talker would stop calling only after the victim stopped sending money.

Using this system, the talkers were able to obtain almost $300,000 from an elderly District resident who was losing her memory. This victim, "T.B.," who had worked as a licensed practical nurse for almost 50 years, had saved her money carefully and had obtained additional assets from her sister, who had bequeathed a row house to her. Now, as a result of the telemarketer's actions, she must live on her Social Security income. After I became involved in the case, we were able to have a guardian and a conservator appointed for T.B.

Importance:

This case was significant for several reasons. First, it showed how a multi-step prosecution can be effective. I planned the case so that we first focused on the runners, whose names we obtained from Western Union and Money Gram records. We then obtained arrest warrants for three runners. They agreed to plead guilty to conspiring to launder money and to cooperate with the investigation. Through their cooperation, we were able to obtain evidence against the three talkers, who were the organizers of the fraud scheme. Based on the evidence against them, all three talkers agreed to plead guilty to conspiring to launder money. In addition, the case showed the effectiveness of searching nationwide for victims of telemarketing fraud, even when the fraud in any one jurisdiction might not be sufficient to lead to a prosecution in that jurisdiction.

(a) Date of representation.

I began working on this matter in about January of 2001 and continued working on it actively until October of 2003, when I began my detail at the Securities and Exchange Commission.

(b) The court and the name of the judge or judges before whom the case was litigated.

These cases were litigated in the United States District Court for the District of Columbia before Judge James Robertson.

(c) The name(s) and address(es), and telephone number(s) of co-counsel and of the principal counsel for the other parties.

I was sole counsel for the government. Defense counsel were:
Valencia Rainey - Federal Defender Service (Counsel for Herbert Augustus):

Telephone Number: (202) 208-7500 (Ms. Rainey is on detail to the Administrative Office of the U.S. Courts, but will retrieve messages.)

Address: Federal Defender Service
625 Indiana Avenue, NW
Washington, D.C. 20004.

Clark U. Fleckinger, Esq. (Counsel for Cloyd Marshall):

Telephone Number: (301) 294-7301
Address: Rockville Metro Plaza 1
111 Rockville Pike, Suite 980
Rockville, MD 20850

Joseph McCarthy (Counsel for Tyrone Williams):

Telephone Numbers: (703) 549-9701 or (571) 331-1740
Address: Delaney, McCarthy, and Colton, P.C.
510 King Street, Suite 400
Alexandria, VA 22314

Thomas Abbenante (Counsel for Reginald Lowe):

Telephone Numbers: (202) 223-6539 or (202) 812-0590
Address: 1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20036

Alan Bayles (Counsel for Willie Montgomery):

Telephone Numbers: (202) 973-0187 or (301) 529-6249
Address: 1717 K Street, NW, Suite 600
Washington, DC 20036

Nathan I. Silver, Esq. (Counsel for Travis Montgomery):

Telephone Numbers: (301) 229-0189 or (240) 441-1199
Address: P.O. Box 5757
Bethesda, MD 20814

3. ***In the Matter of Ernst & Young, L.L.P.***
Securities and Exchange Commission File No. 3-1093

Capsule Summary:

This case was tried in March and early April of 2003. I was co-counsel with an attorney from the SEC's Trial Unit in the Division of Enforcement. The Securities and Exchange Commission charged the accounting firm Ernst & Young ("E&Y") with violating the SEC's auditor independence rules in forming business relationships with its audit client, PeopleSoft, Inc. The allegations against E&Y were based on the application of complex accounting and auditing regulations. The SEC presented about 15 fact witnesses at trial, many of whom were present or former E&Y employees who were openly hostile to the SEC's case. In addition, the SEC presented almost 35,000 pages of documents and called two expert witnesses.

E&Y was represented by the law firm of Arnold and Porter. Five lawyers from that firm and one from E&Y were present throughout the trial. The outcome of the trial will not be known until the judge issues her opinion, which will be some time after the submission of the final post-trial pleading on July 17.

Importance:

This case was important because it involved the application of auditor independence regulations to a large accounting firm's interactions with one of its audit clients. The issues raised in the case are complex, but of great importance to ensuring that accounting firms conduct audits that are truly independent and do not become involved in prohibited business relationships with their audit clients.

(a) Date of representation.

I began working on this matter in about November of 2002 and am continuing to work on it at present.

(b) The court and the name of the judge or judges before whom the case was litigated.

This case is being litigated before the Chief Administrative Law Judge of the Securities and Exchange Commission, Brenda Murray.

(c) The name(s) and address(es), and telephone number(s) of co-counsel and of the principal counsel for the other parties.

Larry P. Ellsworth is the lead co-counsel for the Securities and Exchange Commision:

Telephone Number: (202) 942-4596
Address: Securities and Exchange Commission
Division of Enforcement, Trial Unit
450 5th St., NW
Washington, DC 20549

Stephen M. Sacks is the lead counsel for the Defendant, Ernst & Young:

Telephone Number: (202) 942-5681
Address: Arnold and Porter
555 Twelfth Street, NW
Washington, DC 20004

4. ***United States v. Paul Grundy***
Case No. 94-M-857-1 (PJA)

Capsule Summary:

Dr. Paul Grundy was the State Department's Chief Medical Officer for the United States Embassies in Russia and the newly independent Soviet States. The wife of an employee at the U.S. Embassy in Russia suffered a cerebral hemorrhage and died several days after Dr. Grundy had performed a quick physical examination based on her complaints of recurring headaches. The State Department then began an investigation to see whether Dr. Grundy had provided proper medical care to the patient. That investigation led the State Department to refer the matter to the Office of the U.S. Attorney for the District of Columbia for possible criminal prosecution.

After I received the referral, I worked closely with the State Department's Office of the

Inspector General to investigate a number of different matters involving Dr. Grundy. We conducted interviews of several physicians and nurses who worked with Dr. Grundy as well as with others who had professional or personal contact with him. We learned that some had concerns about Dr. Grundy's skills and other issues, but that he also had strong support at high levels. Although I cannot discuss the details of the evidence we obtained, I can say that we determined that it would be better for the United States Embassy employees in Russia and the newly independent States if Dr. Grundy left the Department of State and no longer provided medical services to them. After we located a medical document related to the deceased patient that we could prove Dr. Grundy had falsified, he agreed to plead guilty to creating a false document (in violation of 18 U.S.C. § 1018) and agreed to waive his civil service protections and to resign from the Department of State. He was sentenced to one year of probation.

Importance:

This matter was important because it involved the health and safety of United States employees. I crafted a plea that focused on quickly protecting those employees rather than on obtaining the maximum punishment for Dr. Grundy but possibly placing employees at continued risk. The plea also enabled the United States to avoid potentially protracted litigation to remove Dr. Grundy from his position.

(a) Date of representation.

I began working on this matter in early 1994 and concluded the case in December of 1994.

(b) The court and the name of the judge or judges before whom the case was litigated.

This case was litigated before United States Magistrate Judge Patrick Attridge of the United States District Court for the District of Columbia.

(c) The name(s) and address(es), and telephone number(s) of co-counsel and of the principal counsel for the other parties.

I was the sole counsel for the government. Dr. Grundy's counsel were:

William Hundley:

Telephone Number: (202) 887-4325
Address: Akin, Gump, Strauss, Hauer, and Feld
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Larry Gondelman:

Telephone Number: (202) 466-6550
Address: Powers, Pyles, Sutter, & Verville
1875 Eye St., NW; 12th Floor
Washington, DC 20006

5. ***United States v. Gregory Keith Mitchell***
Cr. No. 98-63-1 (JGP)

Capsule Summary:

Gregory Keith Mitchell became the Director of the Community for Creative Non-Violence ("CCNV") following the death of its founder, Mitch Snyder. CCNV operates a large homeless shelter on 3rd Street, N.W. and is funded by private contributions of money, clothing and other goods and by federal grants and payments. After the Department of Housing and Urban Development received complaints of financial improprieties at CCNV, I worked with the HUD agent to develop sources who would provide us enough information to obtain a search warrant. (HUD had jurisdiction because it provided federal funds to CCNV.) A judge subsequently authorized a search of Mr. Mitchell's room at CCNV, CCNV computers, and an expensive townhouse on Capitol Hill that Mr. Mitchell was leasing. Analysis of the computers, seized documents, and other materials revealed that Mr. Mitchell had decided to take the money that was intended to help the homeless and instead to use it to improve his own lifestyle. In addition to using CCNV funds to lease the townhouse on Capitol Hill, he used the money to buy computers, fancy clothing, meals at expensive restaurants, nursing school tuition for his wife, and a wide variety of other items that were completely unrelated to serving the homeless.

After we had completed the investigation and confronted Mr. Mitchell and his attorney with the evidence against him, Mr. Mitchell agreed to resign from CCNV, and to plead guilty to the theft of money from a program receiving federal funds and to making false statements (in violation of 18 U.S.C. §§ 666 and 1001). He was sentenced to make restitution of $65,000, serve five months of home detention, and to serve three years of supervised release.

Importance:

This case was important because it quickly remedied an escalating problem of financial impropriety at CCNV. By obtaining a search warrant expeditiously, we were able to stop the on-going fraud. Then by working quickly to complete the investigation and bring charges, we were able to persuade Mr. Mitchell to plead guilty and leave CCNV. This enabled the CCNV board to reassure contributors and to make sure that CCNV continued to serve the homeless.

(a) Date of representation.

I began working on this matter in the fall of 1996 and continued to handle it through sentencing in August of 1998.

(b) The court and the name of the judge or judges before whom the case was litigated.

This case was litigated before United States District Judge John Garrett Penn of the United States District Court for the District of Columbia.

(c) The name(s) and address(es), and telephone number(s) of co-counsel and of the principal counsel for the other parties.

I was the sole counsel for the government. Mr. Mitchell's counsel was:

Larry Gondelman:

Telephone Number: (202) 466-6550
Address: Powers, Pyles, Sutter, & Verville
1875 Eye St., NW; 12th Floor
Washington, DC 20006

18. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Although I have devoted most of legal career to investigating and prosecuting criminal cases, I have also performed a significant amount of non-litigation legal work. For example, in the mid-1980s, after the Drug Enforcement Administration (DEA) became unable to promptly analyze all of the large number of illegal drugs seized by law enforcement officials, I researched and drafted a memorandum for the United States Attorney to send to the Chief Judge of the Superior Court proposing a new policy, based on an analysis of the cases related to attempted offenses, that would enable Superior Courts Judges to accept guilty pleas without the DEA first having to test the seized substance. After the Superior Court adopted this approach, the policy change helped speed the prosecution of cases that went to trial and conserved DEA, U.S. Attorney, and judicial resources.

I also assisted in law enforcement from a non-litigation perspective when I served as a non-political Associate Deputy Attorney General. From 1998 to 2001, for example, in the area of encryption of computer communications and data, I coordinated the

Department's discussions with the Departments of Commerce, State, and Defense, as well as with the National Security Agency and the National Security Council. Because the Department of Justice/FBI position was sometimes were substantially different from those of some of these other entities, I had to present the Department's proposals in a manner that recognized the internal and external factors that influenced each entity's approach to the issues.

Moreover, I worked with various federal, state, and local law enforcement agencies to develop a coalition that would support and advocate the Department's positions. I also worked with congressional committees and private industry groups to identify particular areas of agreement so that we would have a basis for continued discussions. By holding meetings with top officials of major corporations, we were able to reach resolutions that benefited both sides.

In addition, I was responsible for representing the United States at international meetings on encryption. In late 1998, I led the United States Delegation to Germany for bilateral conferences on law enforcement issues related to encryption issues. I have also represented the United States at a multilateral conference on encryption held in Paris and at a bilateral conference with Japan that preceded the multilateral meeting. At these meetings, I advocated the law enforcement community's interest in encryption policy and the necessity of United States law enforcement and national security agencies being able to obtain access to decrypted information in order to fight international fraud schemes.

In addition, as an ADAG, I chaired or co-chaired two working groups of top level officials that proposed significant revisions in Justice Department policies regarding the sharing of criminal information, the handling of classified information, and other sensitive and important issues. These proposals were intended to make it easier for law enforcement officials and prosecutors to obtain access to classified information that was related to possible criminal activity.

19. **Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.**

I have never held judicial office.

A. **List all court decisions you have made which were reversed or otherwise criticized on appeal.**

Does not apply.

20. **Have you ever been a candidate for elective, judicial, or any other public office? If**

so, please give the details, including the date(s) of the election, the office(s) sought, and the results of the election(s).

I have never been a candidate for elective, judicial, or other public office.

21. **Political activities and affiliations.**

    a. **List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.**

    None.

    b. **List all memberships and offices held in and services rendered to any political party or election committee during the last ten (10) years.**

    None.

    c. **Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last five (5) years of $50 or more.**

    None.

22. **To your knowledge, have you ever been investigated, arrested, charged, or convicted (include pleas of guilty or nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county, or municipal law, other than for a minor traffic offense? If so, please provide details.**

    No.

23. **Have you or any business of which you are or were a officer, director or owner ever been a party or otherwise involved as a party in any other legal or administrative proceedings? If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.**

    No.

24. **Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details.**

    No.

II. POTENTIAL CONFLICTS OF INTEREST

1. **Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?**

   Yes.

2. **Describe all financial arrangements, deferred compensation agreements, or other continuing dealings with your law firm, business associates, or clients.**

   I have no such arrangements.

3. **Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.**

   None.

4. **Describe any business relationship, dealing, or financial transaction which you have had in the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest other than while in a federal government capacity.**

   None.

5. **Describe any activity during the last ten (10) years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of legislation or affecting the administration and execution of law or public policy other than while as a federal government employee.**

   None.

6. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.**

   No.

7. **Explain how you will resolve any potential conflicts of interest, including any that may have been disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.**

   I am aware of no conflicts of interest, but if any arise, I will immediately take the steps necessary to resolve the conflict.

8. **If confirmed, do you expect to serve out your full term?**

   Yes. I intend to serve the full 15-year term.

III. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code Section I I - 150 1 (b), as amended.

1. **Are you a citizen of the United States?**

   Yes.

2. **Are you a member of the bar of the District of Columbia?**

   Yes.

3. **Have you been a member of the bar of the District of Columbia for at least five (5) years? Please provide the date you were admitted to practice in the District of Columbia.**

   Yes. I was admitted to practice in the District of Columbia in December 1978.

4. **If the answer to Question 3 is "no" --**

   A. **Are you a professor of law in a law school in the District of Columbia?**

   B. **Are you a lawyer employed in the District of Columbia by the United States or the District of Columbia?**

   C. **Have you been eligible for membership in the bar of the District of Columbia for at least five (5) years?**

   D. **Upon what grounds is that eligibility based?**

5. **Are you a bona fide resident of the District of Columbia?**

   Yes.

6. **Have you maintained an actual place of abode in the greater Washington, D.C. area for at least five (5) years? Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.**

   For the last five years, my wife, children, and I have lived at the home we own at We have owned that home since 1984 and

have lived in it continuously, with the exception of when we lived in Nashville from July 1991 to July 1992.

7. Are you a member of the District of Columbia Commission on Judicial Disabilities and **Tenure or the District of Columbia Judicial Nominating Commission?**

No.

8. **Have you been a member of either of these Commissions within the last 12 months?**

No.

9. **Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination commission questionnaire.**

The requested copies are attached.

AFFIDAVIT

CRAIG Steven ISCOE **being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.**

Craig Iscoe

SUBSCRIBED and SWORN TO before me this 18th **day of** July **20**03**.**

Carolyn D. Parrio
Notary Public

My Commission Expires July 14, 2004

Craig Iscoe
3505 Legation St., NW
Washington, D.C. 20015
(202) 942-4752 (work)
(202) 244-5967 (home)

July 30, 2003

The Honorable Susan Collins, Chairman
Committee on Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Collins:

This is to amend the responses to Questions 11, 14, and 24 that I provided on the Questionnaire for Nominees to the District of Columbia Courts and submitted to the Committee on Friday, July 18, 2003.

Question 11.

After the Committee's staff interviewed me on July 24, 2003, a staff member brought to my attention that, in my responses to Question 11, I had listed certain bar memberships as beginning in 1993 rather than the correct dates of 1978 or 1979. I believe that I made this error because I had transferred ("cut and pasted") that response from another document that had asked about my bar memberships for the previous ten years and then did not correct the dates so that they responded to the Committee's Question 11, which asked for the dates beginning with initial admission to various bars or courts.

Amended response to Question 11:

(The dates for all other memberships listed in the initial response to Question 11 remain the same.)

District of Columbia Bar. 1978 to present. Member No. 252486.
United States District Court for the District of Columbia. 1979 to present.
United States Court of Appeals for the District of Columbia Circuit. 1979 to present.
Court of Appeals for the District of Columbia. 1978 to present.
United States Supreme Court. 1983 to present.

Question 14.

On reviewing my responses to the Questionnaire earlier this week, I recalled that I had not included a one-page humor piece that I wrote in 1994. When I was completing the Questionnaire, I relied on my resume, which lists substantive writing, and did not think of this article.

Amended response to Question 14.

"You Bet Your Life: New Developments in Criminal Law." [Title assigned by *Legal Times*]. *Legal Times* (Washington, DC.) Vol. XVII, No. 12 (August 8, 1994). P. 25. (This is a humorous article, not substantive legal analysis.)

Question 24.

This Question asks: "Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details." My response to the first part of that question remains the same, because I have never been disciplined or cited for a breach of ethics by any entity.

On Friday, July 25, 2003, I learned that the Department of Justice's Office of Professional Responsibility ("OPR") had in 1995 considered and dismissed a matter without contacting me, and that information reminded me that, in 1999, I had self-reported a matter to OPR where there had been no complaint and where OPR found no wrong-doing. Because there was no complaint against me and no finding of a breach of ethics, I did not think of this self-report when I previously answered Question 24. Regarding the 1995 matter, I do not recall previously knowing that OPR had been involved and it is my understanding that OPR's records contain no indication that I was aware that it played any role in the matter. As discussed in the amended response below, in both matters OPR found no breach of ethics on my part.

Amended response to Question 24:

I have never been disciplined or cited for a breach of ethics for unprofessional conduct by any court, administrative agency, bar or professional association, disciplinary committee, or other professional group.

The Department of Justice's Office of Professional Responsibility has records of two matters, occurring in 1995 and 1999, in which my name is listed. In both instances, OPR found no breach of ethics on my part. To my understanding, neither of these matters was initiated by a "complaint" and therefore it may not be necessary to include them in response to Question 24, but I am bringing them to the Committee's attention so that its records will be complete.

The 1995 matter was based on an FBI report that was sent to OPR in 1995 after $80 in evidence (the money had been paid as a bribe by a Metropolitan Police Department Officer) was apparently taken from a box of evidence that I had left in my office for an FBI Special Agent to pick up while I was out of town. The box contained many audiotapes, some videotapes, photographs, transcripts of undercover audiotapes, and other items, and I had either not realized or not focused on the fact that the box also apparently contained the $80. To my knowledge, it was standard practice for law

enforcement agents not to leave money, drugs, or weapons in the possession of Assistant United States Attorneys.

When the FBI Special Agent discovered that the envelope was missing, he sent a missing evidence report to the FBI and I submitted some information on the matter. The FBI apparently later filed a routine referral to OPR, which never contacted me about the matter and found no breach of ethics.

The second matter is one that I self-reported to OPR in July of 1999, immediately after I discovered that, in telefaxing some documents to this Committee in June of 1999, either I or my secretary had inadvertently included a sensitive internal Department of Justice document. The Office of Professional Responsibility found:

> Based on the results of our investigation, we concluded that you did not engage in professional misconduct or exercise poor judgment with respect to the disclosure of the document. We concluded that the document was inadvertently sent to the committee as the result of a mistake.

Please include these amended responses with my completed Questionnaire.

Sincerely yours,

Craig Isoe

Craig Isoe

QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS
COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION

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

   Brian Ferandeez Holeman

2. **Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).**

   United States of America

3. **Current office address and telephone number.**

   Primary office address:
   1801 McCormick Drive
   Suite 160
   Largo, Maryland 20774

   Telephone Number: (301) 925-2000

4. **Date and place of birth.**

   Date of Birth: June 13, 1957

   Place of Birth: Durham, North Carolina

5. **Marital status (if married, include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   I am married.

   Date of Marriage: July 3, 1988

   Wife's Maiden Name: Susan Elizabeth Dunnings

   Wife's Occupation: Deputy General Counsel for Employee Relations

   Wife's Employer: National Public Radio
   635 Massachusetts Avenue
   Washington, D.C. 20001

6. **Names and ages of children. List occupation and employer's name if appropriate.**

One son:

Occupation: I am a lawyer, employed by my professional corporation, Brian F. Holeman, P.C. My professional corporation and the professional corporation of Gregory K. Wells, P.A. constitute the law firm of Wells & Holeman, LLC.

7. **Education. List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and date each degree was received. Please list dating back from most recent to earliest.**

Law School: The University of Michigan Law School
Dates of Attendance: August 1979 - May 1982
Degree Awarded: Juris Doctor

College: Princeton University
Dates of Attendance: September 1975 - June 1979
Degree Awarded: Bachelor of Arts

Secondary School: Phillips Exeter Academy
Dates of Attendance: January 1974 - June 1975
Degree Awarded: English Diploma

Secondary School: Durham Academy
Dates of Attendance: June 1969 - January 1974

8. **Employment record. List all jobs held since college, other than legal experience covered in question 16, including the dates of employment, job title or description of job, and name and address of employer. Please list dating back from most recent to earliest. If you have served in the US military, please list dates of service, rank or rate, serial number, and type of discharge received.**

Senior Claims Supervisor, Fireman's Fund Insurance Companies,
Los Angeles, California (1987)

Claim Representative, State Farm Fire & Casualty Company,
Los Angeles, California (1984-1986)

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.**

W. M. Tencher Prize Book - Phillips Exeter Academy

John Parker Compton Memorial Scholarship - Phillips Exeter Academy

Edward Lane Shea, Class of 1916, Memorial Scholarship - Princeton University

10. **Business relationships. List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, or educational or other institution.**

Co-Founder and Managing Director, Wells & Holeman, LLC

President, Brian F. Holeman, P.C.

Sole Proprietor, Brian F. Holeman, Attorney at Law

Of Counsel, Gregory K. Wells & Associates, P.A.

Of Counsel, Eaton & McClellan, Attorneys at Law

Partner, Eaton & McClellan, Attorneys at Law

Shareholder, Wharton, Levin, Ehrmantraut, Klein & Nash, P.A.

Senior Claims Supervisor, Fireman's Fund Insurance Companies

Claim Representative, State Farm Fire & Casualty Company

11. **Bar associations. List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.**

District of Columbia Bar

American Bar Association

National Bar Association

Washington Bar Association

Philadelphia Bar Association

Maryland State Bar Association

Association of Trial Lawyers of America

Maryland Trial Lawyers Association

12. **Other memberships. List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other organizations, other than those listed in response to Question 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.**

NAACP

Peoples Congregational United Church of Christ
-Diaconate Board
-Church Growth and Development Steering Committee
Chair, Subcommittee on Young Adult Evangelism

Neither of these organizations formerly discriminated nor currently discriminates on the basis of race, sex, or religion.

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

Pennsylvania Supreme Court, May 18, 1987

United States District Court for the Eastern District of Pennsylvania, July 13, 1988

United States District Court of Appeals for the Third Circuit, November 14, 1988

District of Columbia Court of Appeals, November 28, 1989

United States District Court for the District of Columbia, April 2, 1990

Court of Appeals of Maryland, December 15, 1997

14. **Published writings. List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.**

I have neither written nor edited published material.

15. **Speeches. List the titles of any formal speeches you have delivered during the last five (5) years and the date and place where they were delivered. Please provide the Committee with four (4) copies of any of these speeches.**

I have delivered no formal speeches.

16. **Legal career.**

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

(1) **Whether you served as a law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;**

I have not served a clerkship.

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

I practiced alone from June 6, 1999 to January 15, 2003 as Brian F. Holeman, Attorney at Law, 1801 McCormick Drive, Suite 160 Largo, Maryland 20774.

(3) **The dates, names, and address of law firms, companies, or governmental agencies with which you have been employed.**

Wells & Holeman, LLC
1801 McCormick Drive, Suite 160
Largo, Maryland 20774 (2003)
Brian F. Holeman, P.C. (employer)

Solo Practice, Brian F. Holeman, Attorney at Law
1801 McCormick Drive, Suite 160
Largo, Maryland 20774 (1999 - 2002)

Of Counsel, Gregory K. Wells & Associates, P.A.
1801 McCormick Drive, Suite 160
Largo, Maryland 20774 (2001 - 2002)

Of Counsel, Eaton & McClellan, Attorneys at Law
230 South Broad Street, Third Floor
Philadelphia, Pennsylvania 19102 (1999 - 2003)

and

1111 - 14th Street, N.W., Suite 777
Washington, D.C. 20005

Partner, Eaton & McClellan, Attorneys at Law
Washington, D.C. and Philadelphia, Pennsylvania (1998 - 1999)

Shareholder, Wharton, Levin, Ehrmantraut, Klein & Nash, P.A.
7200 Wisconsin Avenue, Suite 308
Bethesda, Maryland 20814
(1995-1997); Associate (1992-1994)

Associate, Montedonico, Hamilton, Altman & Nash, P.C.
5301 Wisconsin Avenue, N.W., Suite 400
Washington, D.C. 20015 (1991-1992)

Associate, Montedonico & Mason, Chartered
110 North Washington Street, Suite 500
Rockville, Maryland 20850 (1989-1991)

Associate, Bennett, Bricklin & Saltzburg, Attorneys at Law
1700 Market Street, Suite 1800
Philadelphia, Pennsylvania 19103 (1988 - 1989)

Associate, Phillips & Phelan, Attorneys at Law
121 S. Broad Street, Suite 1600
Philadelphia, Pennsylvania 19107 (1988)

Associate, Spray, Gould & Bowers, Attorneys at Law
Los Angeles, California (1982-1984)

B. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

The general character of my practice has been civil litigation, with predominant training and expertise in the defense of individuals as well as insured and self-insured entities. My work for Phillips & Phelan in 1988 included defense of energy and transportation enterprises in general liability litigation. This included defense of Exxon and Mobil Oil in premises liability cases. This work also included the defense of Consolidated Railways and Southeastern Pennsylvania Transit Authority, particularly in cases where sovereign immunity made legal action against the Commonwealth difficult and unsustainable. During that time, I

also had the opportunity to handle two criminal matters, including an assault and battery involving two first-time offenders for whom probation and restitution were negotiated. I also negotiated probation and drug rehabilitation for a first-time offender charged with solicitation and possession of an ounce of cocaine.

In 1988-1989, while at Bennett, Bricklin & Saltzburg, I defended insured entities and individuals in automobile, general liability and products liability cases. Significantly, each lawyer, regardless of experience, maintained responsibility for his or her own case load, handling cases from inception to resolution. I handled numerous cases with value of $25,000.00 or less in mandatory arbitration. Two other cases I resolved by mediation and by trial, respectively, both in the United States District Court for the Eastern District of Pennsylvania.

In 1989, I began to specialize in medical malpractice defense. Montedonico & Mason, Chartered, progeny of Donahue & Ehrmantraut, was a premiere medical malpractice defense firm in the Washington Metropolitan area. During the period 1989 through 1991, the firm operated via the team concept wherein cases where developed from discovery through pretrial by the assigned associate and tried by lead counsel partner and associate counsel. During my tenure, in addition to my responsibilities as an associate, I was responsible for distribution of assignments to law clerks and paralegals. I also served as a member of the Ethics Committee, which reviewed and advised in matters of professional responsibility submitted by firm attorneys.

In 1992, I continued handling medical malpractice cases, almost exclusively, at Wharton, Levin, Ehrmantraut, Klein & Nash, managing my own case load from inception through trial. I was elected a Shareholder in 1994, effective January, 1995 and remained in that position until February, 1998.

In February, 1998, after having spent my entire career as a defense lawyer, I joined Eaton & McClellan as a partner, handling medical malpractice cases on behalf of plaintiffs. I continue to serve of counsel to the Philadelphia office of Eaton & McClellan in plaintiffs' cases of medical malpractice and major personal injury. In my work as a solo practitioner between June, 1999 and January, 2003, and in my current practice, I have continued to handle predominantly medical malpractice cases on behalf of plaintiffs, while also handling a limited number of defense cases on behalf of physicians whom I have previously represented. A minority of my caseload includes contract and employment issues.

C. **Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.**

Please see my answer to subpart B., immediately above.

D. **Describe the general nature of your litigation experience, including:**

(1) **Whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your court appearances has varied over time, please describe in detail each such variance and give applicable dates.**

During the period 1990 through 1995, I appeared in court with greater regularity due to a constantly higher inventory of cases. During that time, I handled 75 cases.

During the years 1996 through 2002, I appeared in court occasionally. In my opinion, this was due to the fact that my practice is 100% civil litigation, I was a solo practitioner from June, 1999 through December, 2002 and I am currently, for the most part, a plaintiff's attorney. On the latter issue, the inventory of cases on a continuous basis was far greater during my years as a defense lawyer. The institutional clients, both self-insured entities and insurance carriers designating counsel for their policyholders, provided a steady source of cases which translates into a higher number of appearances in court. In addition, with experience in case selection, I have been able to limit motions practice generally, and motions requiring a hearing in particular. Consequently, the opportunities for appearance in court and related proceedings prior to trial typically consist of the Initial Conference, mandatory alternative dispute resolution and the Pretrial Conference.

The above-referenced factors manifest with greatest clarity in February, 1998, as that is the time when I left defense practice to become a plaintiff's lawyer. Between 1996 and 1998, I handled 34 cases. Between February, 1998 and December 2002, I handled 25 cases. This represents a 50% increase in time yet a 30% reduction in case load.

(2) **What percentage of these appearances was in:**

(a) **Federal courts (including Federal courts in D.C.);** 5.8%
(b) **State courts of record (excluding D.C. courts);** 14%
(c) **D.C. courts (Superior Court and D.C. Court of Appeals only);** 78.7%
(d) **Other courts and administrative bodies.** 1.5%

(3) **What percentage of your litigation has been:**
(a) **civil;** 100%
(b) **criminal.** 0%

(4) **What is the total number of cases in courts of record you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately). Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.**

During the period 1987 through 1989, I tried one case to verdict. It was a federal civil jury trial. I was sole counsel.

Of the 75 cases I handled from 1990 through 1995, seven of these cases went to trial through verdict. An additional two cases were resolved via directed verdict and settlement, respectively, following presentation of evidence but prior to jury deliberations. In all cases I was associate counsel, with responsibility for pretrial work-up and direct and cross-examination of fact and expert witnesses at trial. In two of seven, the duties were expanded to include opening statements and closing argument.

Of the 59 cases that I handled between 1996 and 2002, four went to trial. In three of these I was sole counsel. In the fourth, I was chief counsel, performing all phases of pretrial and trial work through verdict.

(5) **What percentage of these trials was to**
(a) **a jury;** 100%
(b) **the court (include cases decided on motion but tabulate them separately).** 0%

17. **Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties you represented and 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 court and the name of the judge or judges before whom the case was litigated; and (c) the name(s) and address(es) and, telephone number(s) of co-counsel and of the principal counsel for the other parties.**

Case No. 1.

Case Caption:	*Passman & Kaplan, P.C. v. Emma McCoy*
Court:	Superior Court of the District of Columbia
Judge:	The Honorable Joan Zeldon
Civil Action No.:	99-CA-5421

Opposing Counsel: Michael Spekter, Esquire
1090 Vermont Avenue, NW
Suite 920
Washington, D.C. 20005
(202) 223-8112

Disposition: Settlement, with no further payment beyond that made prior to suit.

I served as sole counsel from filing of the Answer on behalf of Defendant Emma McCoy through and including preparation of the Settlement Agreement and Full and Final Release.

Emma McCoy is a 70 year-old school teacher for the United States Government, currently assigned to post at Okinawa, Japan. She was discharged from her job in 1994 on a novel claim of inadequate performance. Ms. McCoy engaged the services of the firm of Passman & Kaplan, P.C. to represent her in a case against her employer, the Department of Defense, Office of Dependents' Education, founded upon age, race and gender discrimination, retaliation and constructive discharge. Under the fee agreement with the firm, Ms. McCoy was to provide an initial retainer against which hourly billings would be applied to exhaustion, after which payment based upon periodic bills at hourly rates would apply.

When the firm determined that Ms. McCoy would not be able to make the third installment payment on the retainer when due, it proposed a contingent fee agreement including, among other things, terms of one-third of any recovery exclusive of an award of attorney's fees. The agreement also proposed that all "appeals" would be handled on a 40% contingent fee basis of the amount recovered. Significantly, the proposed fee agreement granted the firm recovered attorney's fees *in addition to* the percentage of the *gross* recovery as previously stated.

Following a hearing on June 26, 1995, an EEOC Administrative Law Judge issued a recommended decision concluding, in effect, that the evidence supported findings of age discrimination, retaliation and wrongful discharge. The Department of Defense rejected the findings and conclusions of the Administrative Law Judge and refused to accept them. This final decision of the agency necessitated an *appeal* to the EEOC. On October 31, 1997, the EEOC issued its Order effectively upholding the Administrative Law Judge's findings, awarding back pay, interest and attorney's fees. The Memorandum Re Back Pay Settlement, dated March 17, 1998, delineated a "gross back pay award" of $329,203.09. There was a reduction for a retirement annuity in the amount of $175,274.65. There were additional withholdings for retirement, taxes, medicare and health benefits, leaving a "net back pay" award of $19,111.99. To the net back pay award was added "interest" in the amount of $48,420.74. Thus, the amount that Ms. McCoy actually pocketed, listed as the "total back pay" award, was $67,532.73.

In addition, there was an award of attorney's fees. Payment on the award required a verified statement of fees submitted by Passman & Kaplan to the Department of Defense as mandatory documentation prior to reimbursement. Payment was made by the Department of Defense in the amount of $56,771.19. Thus, the firm held this amount plus $10,000 in retainer previously paid by Ms. McCoy. The firm then sought payment of the putative additional attorney's fees owed pursuant to the contingent fee agreement. The initial demand was for $16,532.42. Ms. McCoy rejected the demand, stated concerns of fairness given the statutory fee award and further refused to consent to arbitration. Passman & Kaplan then made a demand of $25,000.00 in addition to the retainer already paid. Ms. McCoy again refused. On July 30, 1999, Passman & Kaplan filed a lawsuit for damages in the amount of $151,049.53.

At the Initial Conference held on February 4, 2000, Ms. McCoy appeared in court *pro se* and was directed by Judge Zeldon to retain counsel. Ms. McCoy's efforts to obtain counsel, complicated by her assignment to Japan, resulted in no one willing to take her case, due to either lack of interest or conflicts of interest. Consequently, no timely Answer was filed on her behalf and Passman & Kaplan filed a Motion for Entry of Default Judgment. This motion was initially denied on technical grounds and the amended version was pending at the time that I accepted the case. I had no conflict of interest, having had no prior personal or professional relationship with Passman & Kaplan or any of its attorneys.

I took the case because I felt strongly that someone who had given more than 40 years in service to our Federal Government deserved representation irrespective of the overwhelming obstacles. This latter description does not overstate the case in that both the contract language, which Ms. McCoy approved and signed, and the case authority, were adverse to Ms. McCoy's position. In *Venegas v. Mitchell*, 495 U.S. 82, 110 Sup. Ct. 1679 (1990), the Court addressed the issue whether a contingent fee agreement of the type entered by Ms. McCoy was enforceable. In that case, there was a judgment of $2.08 million and an attorney's fee award of $117,000.00. The law firm's demand was for 40% of the judgment in addition to the award of attorney's fees. The Court held, essentially, that it was in no position to impair a person's right to enter contracts of his or her choice. The Court acknowledged that a person might be willing to bargain away certain rights in order to pursue claims which, without a contingent fee agreement, the person would not be in a financial position to pursue.

I felt that there were several reasons that this case would survive summary judgment and receive jury consideration. First, even though the retainer agreement was signed by Ms. McCoy, there was no meeting of the minds as to the fee that would ultimately be paid to Passman & Kaplan, nor the calculation thereof. Second, *Venegas* was a case of false arrest, conspiracy and civil rights violations. The monetary award was not subject to reduction by income taxes or withholdings as was Ms. McCoy's award for back pay. Therefore, there was never agreement as to the definitions of "gross" and "total" as these

terms applied to the back pay award granted Ms. McCoy. Third, it was not clear that the law firm disclosed during its application for the award of attorney's fees that there was also a contingent fee agreement in place at the time that application was made. That fact may have entered prominently into the agency determination of the firm's "increased risk" in undertaking the case. Fourth, on the basic principle of fairness, I felt that the fee as calculated and set forth in the Complaint was excessive and violative of the enumerated factors under the Rules of Professional Conduct, Rule 1.5. I believed that my position was tenable given the ruling in *Connelly v. Swick and Shapiro, P.C.*, 749 A.2d 1264 (D.C. 2000), wherein the court held that the determination whether such a complicated fee agreement, as a matter of law, may be construed as reasonable would require significant instructions to the jury as to how the terms of the agreement should be considered. Frankly, I was convinced that a jury would not favorably view a 70 year-old school teacher being sued by a law firm that had already received significant attorney's fees.

The case was ultimately resolved for the amount that the firm had previously received from Ms. McCoy as a retainer plus the attorney's fee award. Since both of these amounts were held in escrow by the law firm, Ms. McCoy did not have to pay the firm for additional fees or costs.

Case No. 2.

Case Caption:	*John M. Hayes, M.D. v. D.C. Chartered Health Plan, et. al.*
Court:	United Stated District Court for the District of Columbia
Judge:	The Honorable Richard J. Leon
Civil Action No.:	1:01CV01188
Opposing Counsel:	Charles A. Jones, Esquire Ross, Dixon & Bell, L.L.P. 2001 K. Street, N.W. Washington, D.C. 20006-1040 (202) 662-2074 David T. Shapiro, Esquire Mintz, Levin, Cohn, Ferris, Glovsky & Popeo 701 Pennsylvania Avenue, N.W. Suite 900 Washington, D.C. 20004-2608 (202) 434-7300

Steven L. Neal, Jr., Esquire
Manatt, Phelps & Phillips, L.L.P.
1501 M. Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 463-4300

Allan A. Noble, Esquire
Budow & Noble
Suite 600, Bethesda Gateway Building
7201 Wisconsin Avenue
Bethesda, Maryland 20814
(301) 654-0896

David F. Grimaldi, Esquire
Martell, Donnelly, Grimaldi & Gallagher
1815 H Street, N.W.
Suite 420
Washington, D.C. 20006
(202) 293-0830

Alan S. Block, Esquire
Bonner Kiernan Trebach & Crociata
1250 Eye Street, N.W.
Sixth Floor
Washington, D.C. 20005
(202) 712-7000

Charles B. Molster, III
Winston and Strawn
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700

Disposition: The matter is pending.

I am sole counsel for Plaintiff Dr. Hayes. An understanding of the magnitude of this case requires a brief discussion of the companion case. *Artulies Smith v. John M. Hayes, M.D., et. al.*, Superior Court of the District of Columbia, Civil Action No.: 6602-99, is an action for medical negligence. I represent Dr. Hayes as a defendant in that case. Plaintiffs in that action are represented by noted civil trial attorney Jack H. Olender and the *ad damnum* is for $25,000,000.00. It is alleged that the minor Plaintiff sustained injuries at birth caused by the care of Dr. Hayes, his former practice group and the

hospital where birth occurred, Columbia Hospital for Women. Dr. Hayes tendered the matter to his employer, Chartered Health Plan, for processing in accord with the requirements of Dr. Hayes' medical malpractice insurance policy. Coverage was denied, and Chartered Health Plan took no steps to rectify that issue.

The case against Dr. Hayes in *Smith* has been stayed pending the resolution of Dr. Hayes' insurance coverage issues. Trial of the case against Co-Defendant Columbia Hospital for Women commenced before Judge Stephanie Duncan-Peters on November 13, 2002. The verdict was in excess of $20 million, reduced to a judgment of $5,500.00.

Hayes is an action for declaratory relief, breach of contract, breach of fiduciary duty, fraud, negligence and bad faith insurance practices as against Chartered Health Plan, Chartered Health Plan's former President and Chairman who negotiated the terms of Dr. Hayes' employment contract and the insurance brokers and insurance companies that provided insurance coverage to Dr. Hayes during his tenure as an employee physician of Chartered Health Plan.

This case is complicated by the fact that all defendants have denied that any duty was owed to Dr. Hayes. In addition, an agent providing management services for Chartered Health Plan is bankrupt, and the insurance carrier believed to be the last line of available insurance coverage has been forced into liquidation proceedings by the Insurance Commissioner of the Commonwealth of Pennsylvania.

This case is significant for the financial exposure of Dr. Hayes in *Smith*. He has paid out-of-pocket the fees and costs associated with the defense in *Smith* and currently must do so in *Hayes*. In the absence of a victory in *Hayes*, he stands personally exposed on a potential multi-million dollar verdict in *Smith* and possible bankruptcy due to the fees and costs of litigation.

Case No. 3.

Case Caption:	*Hoa Burke v. David H. Bachhuber, et. al.*
Court:	Superior Court of the District of Columbia
Judge:	The Honorable Steffen W. Graae
Civil Action No.:	93-CA09340
Other Counsel:	John W. Karr, Esquire 1920 N Street, N.W. Suite 300 Washington, D.C. 20036 (202) 737-3544

Ralph Temple, Esquire
150 Myer Creek Road
Ashland, Oregon 97520
(541) 482-9868

Stephen L. Altman, Esquire
10306 Eaton Place
Suite 100
Fairfax, VA 22030
(703) 591-9700

Gary W. Brown, Esquire
11350 Random Hills Road
Suite 500
Fairfax, VA 22030-7429
(703) 943-1188

Disposition: Defense verdict.

I was associate counsel in defense of Dr. Bachhuber, a surgeon, in this lawsuit for failure to diagnose pancreatic cancer. I conducted all pretrial discovery, preparation of the pretrial statement, voir dire and jury instructions, opening statements, the majority of fact and expert witnesses and closing arguments at trial. The insurance carrier required that my partner sit in and watch me try the case. The case was significant for jury appeal from a plaintiff's perspective, given the prolonged period of pain and suffering endured by the decedent and the fact that he left behind a family with whom the jury could easily empathize.

In addition, the case turned on the perceived diagnostic quality of a CT scan which depicted an "x" in the area of the pancreas, purportedly as an identification mark of the suspected tumor. Although multiple experts in surgery, oncology, gastroenterology and economics were called, one and one-half days were spent obtaining testimony from Plaintiff's expert in radiology to establish the validity of the CT scan. Further, given the 50 year-old decedent's diplomatic status and commensurate income, the loss of earnings projection was measured in millions of dollars.

The case was also significant in that a near mistrial occurred when a fact witness physician employee of a named defendant collapsed inches away from the jury box and had to be removed via stretcher. A day was spent arguing the mistrial motion and determining, via voir dire, whether any of the jurors felt that they could not be fair and impartial after having observed the collapse of a defendant's employee whose care directly related to the claim of substandard treatment.

In closing, I argued to the jury that pancreatic cancer is a disease whose predominant symptom, once manifest, is excruciating abdominal pain. The decedent denied pain at the time of the diagnostic treatment from which the lawsuit arose, yet alleged experiencing pain at the time of his video deposition shortly before his death. Thus, there was a gross disparity between the report of symptoms contained in the medical records and the testimony under oath by the patient concerning the same period of time. I argued that the most likely scenario was that the decedent chose to conceal his symptoms of abdominal pain, motivated by the fact that disclosure of these symptoms would likely have resulted in the loss of his medical clearance to travel overseas for his impending diplomatic assignment.

Judge Graae commended the presentation of the case as he addressed the jury during final instructions.

Case No. 4.

Case Caption:	*Arthur Jackson v. Jorge Garcia, M.D., et. al.*
Court:	Superior Court of the District of Columbia
Judges:	The Honorable Richard S. Saltzman The Honorable Richard A. Levie
Civil Action No.:	89-09954
Other Counsel:	Richard J. Mudd, Esquire 2319 Pennsylvania Avenue, S.E. Washington, D.C. 20020 (703) 360-4514 J. Joseph Barse, Esquire 6807 Rannoch Road Bethesda, Maryland 20817-5426 (301) 229-2040 David A. Levin, Esquire P.O. Box 551 Annapolis, Maryland 21404-0551 (410) 263-5900
Disposition:	Summary judgment, dismissals with prejudice.

This is one of four cases I handled on behalf of physicians who served as peer reviewers, evaluators of the quality of care, of defendant Richard N. Scott, M.D. My responsibility was to vigorously pursue dismissal/summary judgment. The other three cases involved in this litigation were *Wendell Taliaferro, et. al. v. Richard N. Scott, M.D., et. al.*, CA10508-

89, *Eleanor M. Fortkiewicz v. Richard N. Scott, M.D., et. al.*, 90-CA11124, and *Ethel O. Kidd v. Richard M. Scott, M.D., et. al.* 90-CA12666

My clients were named as defendants in those cases, not as a consequence of any improper treatment rendered to the deceased patients, rather due to their participation in medical staff review committees which evaluated the surgical performance of the lead defendant physician. Each of the patients involved died, it was alleged, due to the substandard surgical performance of Dr. Scott. It was also alleged that there had been a "cover-up" by the hospital in that certain pertinent medical records had been lost or destroyed in an effort to hide the substandard care. The cases, collectively, were given significant coverage in the Washington Post. (*See* October 26, 1988 @ A1, October 6, 1989 @ A50.) *Jackson* proceeded with full discovery, including designation of expert witnesses, prior to ruling on the Motion to Dismiss/for Summary Judgment.

It is significant that at the time of these lawsuits in 1989 and 1990, D.C. Code Title 32 § 32-501 et seq. (now Title 44 § 44-801 et seq.) provided a *qualified* privilege for disclosure of information obtained through the peer review process. By definition, the privilege was not absolute. A plaintiff could, theoretically, obtain access to the otherwise privileged material upon a showing of "extraordinary necessity." In *Jackson* and the companion cases, plaintiffs contended that destruction of hospital records occurred in order to protect the hospital and Dr. Scott, thus creating an incomplete record of care which effectively precluded plaintiffs from establishing factual support for their claims of malpractice. This extraordinary circumstance, plaintiffs argued, warranted disclosure of the peer review records to obtain the factual data which otherwise would have been contained in the destroyed medical records. The motions I filed on behalf of the reviewing physicians included a discussion of the manner in which each of the 50 states handled such claims, whether by statute or common law. At the time, there was a paucity of authority in this jurisdiction. Due in significant part to the rulings in these cases, the pertinent peer review statute underwent a legislative change in 1993 from qualified privilege to absolute privilege.

The opinion rendered by Judge Saltzman at 118 D.W.L.R. 1293 (June, 1990) is substantially derived from memoranda of law I prepared.

Case No. 5.

Case Caption:	*In the Matter of Lucio S. Villa-Real, M.D.*
Court:	(Administrative) Government of the District of Columbia Board of Medicine
Judge:	An Ad Hoc Administrative Panel of the Board of Medicine Headed by William Brown, M.D.
Opposing Counsel:	James Harmon, Esquire Office of Corporation Counsel

450 - 5th Street, N.W.
Judiciary Plaza, South Office Lobby
Eighth Floor, Room 8-I-52
Washington, D.C. 20001

NOTE: This was the address as provided during the pendency of this matter in 1990-1991. Current address information for Mr. Harmon is believed to be 941 North Capitol Street, N.E., Suite 9100, Washington, D.C. 20002.
(202) 442-8171

Disposition: Physician's license retained.

In July, 1985, Dr. Villa-Real requested a one year leave of absence from the Medical Staff of Greater Southeast Community Hospital. He terminated his private practice in general surgery to spend one year of active duty in the United States Air Force. Thus, he formally resigned his positions as Member-At-Large of the Executive Committee of the Medical Staff and member of the Tissue and Surgical Audit and Nutrition Committees. The leave of absence was granted. In August, 1986, Dr. Villa-Real requested a one-year extension of his leave of absence for one year. The leave of absence was granted. In June, 1987, Dr. Villa-Real contacted the Medical Staff Coordinator for Greater Southeast Community Hospital to indicate that he was leaving military service and wanted to withdraw his leave of absence status. Dr. Villa-Real's request for reinstatement was ultimately rejected due to, Greater Southeast alleged, the failure to provide the Medical Staff with a request for reinstatement at least 45 days prior to termination of the leave *in 1986*.

This denial placed Dr. Villa-Real in the position of having to *apply anew* for Medical Staff privileges, an involved and protracted process of information gathering, rather than *reinstatement*, a process that merely involves completion of a questionnaire. One aspect of the reappointment process involved inquiry into Dr. Villa-Real's surgical practice during the two-year period of military service. This inquiry was performed by the new Chairman of the Department of Surgery, with whom Dr. Villa-Real had had a stormy relationship.

The reappointment process included a review of Dr. Villa-Real's credentials by the Credentials Committee, which recommended approval of privileges to the Executive Committee, which also approved the recommendation. Dr. Villa-Real's handling of surgical cases at Greater Southeast was reviewed by an Ad Hoc Committee which determined that none of the cases reviewed warranted the denial of privileges. Nevertheless, the Board of Directors denied Dr. Villa-Real's reappointment.

As a consequence of this denial, the District of Columbia Board of Medicine issued a

Notice to Dr. Villa-Real proposing to revoke his license to practice medicine in the District of Columbia if he did not appear before the Board and demonstrate that the proposed action should not be taken. I was associate counsel in this case. In that capacity, I handled the response to the Notice, obtained discovery, including the videotape deposition of a military physician with whom Dr. Villa-Real worked, and presented evidence, including the testimony of two past Presidents of the Medical Staff at Greater Southeast.

The matter was defended on grounds that the denial of reappointment to the Medical Staff was founded upon reasons of bias, not upon Dr. Villa-Real's surgical competence and clinical judgment. Further, the basis of the Board's action was not the mismanagement of cases while in the military, rather was Dr. Villa-Real's alleged improper handling of 10 cases at Greater Southeast which *preceded* his leave of absence.

The military fact witness testified that Dr. Villa-Real's military course was made difficult by the Base Commander who had been a prisoner of war in Vietnam. Dr. Villa-Real is of Philippine extraction. The witness discredited any contention that Dr. Villa-Real had failed to comply with surgical standards of care so as to warrant revocation of his license. This was also the testimony of the two past Presidents of Greater Southeast and of the Member of the Ad Hoc Committee that had reviewed Dr. Villa-Real's performance.

The Board ultimately found that Dr. Villa-Real could retain his license provided that he either discontinue surgical practice or submit to remedial instruction.

18. **Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).**

Matter No. 1.

Case Number:	A-472-02
Court:	Superior Court of the District of Columbia
Judge:	The Honorable Nan R. Shuker
Other Counsel:	Liz Lyons, Esquire Chambers of Judge Shuker Superior Court of the District of Columbia 500 Indiana Avenue, N.W. Chambers Suite 3430 Washington, D.C. 20001-2131 (202) 879-1207

Abigail Freso, Esquire
Domestic Programs Attorney
Adoptions Together, Inc.
10230 New Hampshire Avenue
Suite 200
Silver Spring, Maryland 20903
(301) 439-2900

The single most significant legal matter that I have ever handled is probably the one that requires the least discussion. By default, I handled our son's adoption; counsel we had engaged did not bring the sense of urgency and passion to the process that I felt was needed. The case was complicated by its interstate aspects, our son was born in Georgia, triggering compliance with the Interstate Compact on the Placement of Children ("ICPC"). The ICPC is a uniform law enacted by the 50 states, the District of Columbia and the U.S. Virgin Islands, designed to establish orderly procedures, and imposition of responsibility, for those involved in the interstate placement of children. My function regarding ICPC compliance was to become knowledgeable in the text and regulations of ICPC and ensure that we complied with the procedural requirements of both Georgia and the District of Columbia.

Finalization of the adoption required that I know the procedural and substantive law of the District of Columbia. I had never handled an adoption case, and handling of my son's adoption was at once fraught with asphyxiating pressures and the exhilaration of personal reward; I wanted more than any other case to get every component right. The work included preparation of a series of documents, among which were the Petition, Compliance with Order of Reference and Final Decree. I was congratulated by Judge Shuker's chambers on the quality of the work product. No compliment on my legal work has meant more to me as a lawyer. No other matter has given me the personal or professional satisfaction.

Matter No. 1.

Case Caption:	Lorie R. Cutick v. Wharton, Levin, Ehrmantraut, Klein & Nash Charge No. 120931153
Venue:	United States Equal Employment Opportunity Commission
District Director:	Issie L. Jenkins (410) 962-3932
Investigator:	Dianne Shaw, Unit T-1 (410) 962-6608

On April 28, 1993, Lori R. Cutick, a paralegal employed by Wharton, Levin,

Ehrmantraut, Klein & Nash, filed a Notice of Charge of Discrimination with the Baltimore District Office of the Equal Employment Opportunity Commission. The charge was ostensibly founded upon gender-based harassment in violation of Title VII of the Civil Rights Act of 1964 (Ms. Cutick is a white female) as well as an alleged violation of the Americans with Disabilities Act of 1990 (Ms. Cutick purportedly suffers from attention deficit disorder). The Notice of Charge bore identification number 120931153. I was identified as the discriminating employee.

On behalf of the firm, I prepared the Response to the Notice of Charge, documenting, *inter alia*, that no gender-based harassment had occurred and that reasonable accommodation had been made regarding Ms. Cutick's alleged disability. The Response was filed on June 9, 1993.

During the next many months, the EEOC investigated, including interviews of employees and requests for documents from the firm. The firm complied with all requests.

On September 22, 1994, the District Director of the EEOC issued the Determination, holding that "*[e]xamination of the evidence does not indicate that Charging Party was subjected to gender-based harassment. The record shows that Charging Party had no similarly situated male comparatives, and the testimonial evidence does not support her allegation.*" (Emphasis added).

Similarly, as regards the alleged violation of the ADA, the District Director held, "*[t]he record shows that Respondent attempted to accommodate Charging Party but terminated her employment when her performance did not improve. Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.*" (Emphasis added).

Accordingly, the Charge was dismissed. Ms. Cutick made no further pursuit, with her right to sue having been extinguished 90 days from the date of the Determination.

Matter No. 3.

Client:	The Prince George's County Citizen Complaint Oversight Panel
Chairperson:	Jervie S. Petty (301) 753-1753
Member:	William Stagg (301) 292-6616

The firm Gregory K. Wells & Associates, P.A., and later Wells & Holeman, LLC, served as Administrator to The Prince George's County Citizen Complaint Oversight Panel (hereinafter referred to as "CCOP" or "The Panel"). I serviced the contract. CCOP is an independent county agency, established by legislation CB-25-1990. The original intent of

the legislation, and the mission of CCOP, was to strengthen procedures for handling, and to provide citizen participation in, complaints of alleged police misconduct. Since its initial efforts began in January, 1991, through 2001, CCOP reviewed only citizen complaints of excessive force, harassment and abusive language against members of the Prince George's County Police Department. Review was limited to the written record, typically consisting of an Internal Affairs Division Report of Investigation.

Legislation CB-59-2001, effective January 10, 2002, increased the jurisdiction of CCOP to include all complaints, whether lodged by citizens or by law enforcement officers or anyone else, regarding the conduct of Police Department personnel. CCOP is empowered to conduct its own investigations independent from those of Internal Affairs Division. Further, CCOP is authorized to obtain testimony and production of documents via subpoena.

As Administrator, the firm's statutory mandate was to advise the Panel on all legal issues, including rules of evidence and confidentiality of information. The work required understanding of the interrelationship of Maryland criminal law and procedure, the Police General Orders Manual and the Law Enforcement Officer's Bill of Rights. The Panel was routinely confronted with complaints of harassment and conflicts of interest, since field commanders are allowed to investigate charges against subordinates while concomitantly receiving incentives for being complaint free. Further, because numerous complaints resulted in Panel findings of statements by officers which lacked candor, counseling the Panel on the law pertaining to Fifth Amendment, obstruction of justice, false statements and material misrepresentations was necessary and ongoing. Ultimately, it was my role to draft recommendations to the Chief of Police on behalf of the Chairperson, particularly in cases where the Panel believed the findings to be contrary to the reported conclusions of the Internal Affairs Division investigation or where further investigation was needed.

I served in this capacity from August 2002 through February 2003. The election of a new County Executive resulted in replacement of panel members and the Administrator.

19. **Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.**

I have never held judicial office.

A. **List all court decisions you have made which were reversed or otherwise criticized on appeal.**

Not applicable.

20. **Have you ever been a candidate for elective, judicial, or any other public office? If so, please give the details, including the date(s) of the election, the office(s) sought, and the results of the election(s).**

I have never been a candidate for elective, judicial, or any other public office.

21. **Political activities and affiliations.**

a. **List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.**

I have neither held nor sought public office.

b. **List all memberships and offices held in and services rendered to any political party or election committee during the last ten (10) years.**

I have been a registered Democrat since 1975. I have never rendered services to any political party or election committee.

c. **Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last five (5) years of $50 or more.**

I contributed $500.00 to the campaign for reelection of District of Columbia Council member Adrian Fenty and $500.00 to Barbara Mikulski for U.S. Senate.

22. **To your knowledge, have you ever been investigated, arrested, charged, or convicted (include pleas of guilty or nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county, or municipal law, other than for a minor traffic offense? If so, please provide details.**

To my knowledge, I have never been under federal, state or local investigation for possible violation of a criminal statute.

23. **Have you or any business of which you are or were a officer, director or owner ever been a party or otherwise involved as a party in any other legal or administrative proceedings? If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.**

In 1986, I was the plaintiff in a premises liability lawsuit venued in the Superior Court of

California, County of Los Angeles. The matter was settled prior to trial.

In 1999, I was the plaintiff in an action arising from automobile property damage venued in the Superior Court of North Carolina, Guilford County. The matter was settled prior to trial.

In 2001, I was the plaintiff in an action arising from an automobile accident venued in the Superior Court of the District of Columbia. The matter was settled prior to trial.

24. **Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details.**

I have never been disciplined or cited for a breach of ethics for unprofessional conduct.

II. POTENTIAL CONFLICTS OF INTEREST

1. **Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?**

I will sever all such connections if confirmed.

2. **Describe all financial arrangements, deferred compensation agreements, or other continuing dealings with your law firm, business associates, or clients.**

I am of Counsel to the firm of Eaton & McClellan. I have an agreement to a 50% share in any contingent fees accruing in 2 cases for which I am lead counsel.

As of this date, I have reached no other agreements as to financial disposition of cases or business assets.

3. **Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.**

I am of Counsel to the firm of Eaton & McClellan. My current business partner is Gregory K. Wells, Esquire. My wife's employer is National Public Radio. Other than these relationships, I can think of no investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.

4. **Describe any business relationship, dealing, or financial transaction which you have had in the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest other than while in a federal government capacity.**

I have had no business relationship, dealing, or financial transaction as described here that could constitute or result in a possible conflict of interest.

5. **Describe any activity during the last ten (10) years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of legislation or affecting the administration and execution of law or public policy other than while as a federal government employee been engaged in activity.**

I have not engaged in activity during the last ten (10) years for the purpose of directly or indirectly influencing the passage, defeat, or modification of legislation or affecting the administration and execution of law or public policy.

6. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.**

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service as a judge.

7. **Explain how you will resolve any potential conflicts of interest, including any that may have been disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.**

Generally, my efforts to resolve potential conflicts of interest will be to scrutinize each case at the outset to determine whether my relationship with the parties or personal stake in the outcome warrants recusal.

More specifically, I intend to deliver to the Chief Judge and the Clerk of the Superior Court a listing of former clients, entities and individuals upon whose cases I cannot immediately sit. I also intend to seek, to the extent possible and acceptable, the counsel of the person who, to my knowledge, is the ethics advisor to the District of Columbia Commission on Judicial Disabilities and Tenure and that of any internal committees on ethics established by the District of Columbia courts.

8. **If confirmed, do you expect to serve out your full term?**

If confirmed, I expect to serve out my full term.

III. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code Section I I - 150 1 (b), as amended.

1. **Are you a citizen of the United States?**

   I am a citizen of the United States.

2. **Are you a member of the bar of the District of Columbia?**

   I am a member of the bar of the District of Columbia.

3. **Have you been a member of the bar of the District of Columbia for at least five (5) years? Please provide the date you were admitted to practice in the District of Columbia.**

   I have been a member of the bar of the District of Columbia for 13 ½ years. I was admitted to practice in the District of Columbia on November 28, 1989.

4. **If the answer to Question 3 is "no"** – NOT APPLICABLE

   A. **Are you a professor of law in a law school in the District of Columbia?**

   B. **Are you a lawyer employed in the District of Columbia by the United States or the District of Columbia?**

   C. **Have you been eligible for membership in the bar of the District of Columbia for at least five (5) years?**

   D. **Upon what grounds is that eligibility based?**

5. **Are you a bona fide resident of the District of Columbia?**

   I am a bona fide resident of the District of Columbia.

6. **Have you maintained an actual place of abode in the greater Washington, D.C. area for at least five (5) years? Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.**

   I have maintained an actual place of abode in the greater Washington, D.C. area for 14 years. For the past 11¾ years I have lived at .

7. **Are you a member of the District of Columbia Commission on Judicial Disabilities and Tenure or the District of Columbia Judicial Nominating Commission?**

   I am a member of neither the District of Columbia Commission on Judicial Disabilities and Tenure nor the District of Columbia Judicial Nominating Commission.

8. **Have you been a member of either of these Commissions within the last 12 months?**

   I have never been a member of either of these Commissions.

9. **Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination commission questionnaire.**

   Four (4) copies each of the Initial Judicial Nomination Commission Questionnaire, dated December 13, 2001, and supplements dated December 4, 2002 and March 4, 2003, are submitted herewith.

AFFIDAVIT

Brian F. Holeman, being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

SUBSCRIBED and SWORN TO before me this 10th day of June 2008

Notary Public