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S. HRG. 106-399, PT. 1

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

CONFIRMATION OF APPOINTEES TO THE FEDERAL JUDICIARY

JUNE 16; JULY 13; JULY 29; SEPTEMBER 14; OCTOBER 7;
OCTOBER 26, NOVEMBER 10, 1999

Part 1

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NOMINATIONS OF MARSHA S. BERZON AND ROBERT E. KATZMANN (U.S. CIRCUIT JUDGES); KEITH P. ELLISON, GARY ALLEN FEESS, WILLIAM ALLEN PEPPER, JR., KAREN E. SCHREIER, STEFAN R. UNDERHILL, AND T. JOHN WARD (U.S. DISTRICT JUDGES)

WEDNESDAY, JUNE 16, 1999

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

The committee met, pursuant to notice, at 2:59 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Sessions, Smith, Leahy, Kennedy, Feinstein, and Schumer.

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

The CHAIRMAN. We are just a minute early, but I think we will start, anyway. How is that?

Today we are holding a judicial nominations hearing for 8 nominees—that is rather rare—2 circuit nominees and 6 district court nominees. Now, this hearing follows the committee's approval of 2 judges earlier this year, and I note this hearing is approximately 3 months earlier in the year than the first hearing for circuit and district court nominees in 1993, when I was in the minority on this committee. Also, I note that there was only one hearing for circuit and district court nominees in all of 1993.

It is my expectation that the work of the committee will continue at a reasonable pace throughout this year. This is important work and I take it seriously, and we will continue to do our best.

Of course, the committee cannot approve nominees that have not been sent to us by the President. As the Chief Justice noted in his most recent report on the judicial branch: The entire Sentencing Commission is vacant. We have seven seats that are still vacant, and not a single nomination has been made. Without any commissioners, no Sentencing Guidelines can be passed for new criminal statutes, no modifications can be made to existing guidelines to address issues raised by the courts. So I look forward to working with the President and others to ensure that this important Commission can obtain a slate of Commissioners and get back to work this year.

Together, Senator Leahy and I have ensured that the President's nominees receive a fair hearing and that Federal courts are adequately staffed to perform their constitutional function. This committee has been instrumental in the Senate's confirmation of 306 judicial nominees and over 200 other nominees by President Clinton. By conducting thorough but expeditious reviews of nominees and by holding hearings, we should be able to keep the number of vacancies from inhibiting the work of the Federal courts and other bodies.

I am confident that by the end of this session the committee will have done a fair and even-handed job of evaluating and approving judicial nominees just as it has done in previous years. I look forward to working with my colleagues on the committee to accomplish this.

Now, today we have three panels. The first panel will consist of the sponsors of the nominees who will make short statements on behalf of their nominees. The second panel will consist of the two circuit court nominees, and the third panel will consist of the six district court nominees.

So if I could call those who are going to speak for the judges forward. Senator Lott and others, if you will take your seats here, we would appreciate it.

Excuse me. Senator Kennedy is here. We will be glad to turn to him.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. I wanted to express my appreciation for scheduling the hearing, and we look forward to our pending nominees. I am particularly pleased that the nominations of Marsha Berzon and John Ward and Karen Schreier are among those we will be reviewing today.

Ms. Berzon is an outstanding attorney with an impressive record. She has written more than 100 briefs and petitions to Supreme Court, argued several cases there. When she was first nominated last year, she received strong recommendations and had a bipartisan list of supporters, including our former colleague, Senator Jim McClure. Fred Alvarez, a Commissioner on the Equal Employment Opportunity Commission and Assistant Secretary of Labor under President Reagan, supports her. I hope we can move expeditiously on her nomination. It was first received in the committee in January 1998, and she has answered numerous questions on a wide range of topics during a previous hearing and in writing.

John Ward has over 30 years of legal experience, 20 years as a founding and managing partner of his own law firms. He has conducted 150 full trials in Federal and State courts. He has extensive experience in civil jury trials and also as a county prosecutor.

Karen Schreier is a distinguished U.S. attorney for the District of South Dakota, confirmed to that position by the Senate. She has served for 6 years representing the United States as both plaintiff and defendant in Federal court in South Dakota. She manages the U.S. Attorney's Office, supervises a staff of over 20 Federal prosecutors. She has also assisted Congress on numerous occasions, tes-

tifying in House and Senate hearings on important issues involving juvenile crime.

We know the magnitude of the task before us. There are currently 65 vacant judgeships in the Federal judiciary; 12 additional vacancies are likely to open up in the coming months when more and more judges retire from the Federal bench. Of the 65 current vacancies, 28 have now been classified as judicial emergencies by the Judicial Conference of the United States, which means they have been vacant for 18 months or more. In the District of Western Pennsylvania, one position has been vacant since November 1994, 4½ years, inexcusably long by any standard.

So I want to commend you, Mr. Chairman, for having the hearing. I look forward to working with you so we deal effectively with the backlog and meet our constitutional responsibilities in the confirmation process.

I thank the Chair.

The CHAIRMAN. Well, thank you, Senator Kennedy.

I think we will turn to the distinguished Majority Leader first and then Senator Cochran and then, if I could, I will turn to the distinguished Senator from New York. I will try and do this, if I can, on a seniority basis. If Senator Daschle arrives, we will interrupt and allow him to make his speech because we know our leaders have a lot to do in addition to all of us, but we will show that kind of deference.

So, Senator Lott, we are happy to hear from you.

STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman, Senator Kennedy, Senator Leahy, and my colleagues here on the panel. I was just noting to Senator Lieberman and Senator Dodd——

The CHAIRMAN. Senator Lott, if I can interrupt you, the ranking member is here and he wants to make his statement.

Senator LEAHY. No, no. That is all right. I am just very excited to be at our first confirmation hearing this year, the longest the Senate has ever taken to hold a hearing in the 25 years I have been here. I am so excited that I really wanted to be here and see this.

I will submit a statement. I don't want to hold up this distinguished panel, all of whom are good friends.

Senator LOTT. Thank you, Senator Leahy. And, Mr. Chairman, again, I was just saying with this panel, if we could do a little legislative business while we were here, there is no telling what we could get done right here at this table. [Laughter.]

The CHAIRMAN. This is a good bunch to do it with.

Senator LOTT. I appreciate my senior colleague from Mississippi allowing me to go ahead and get started. It is a great honor for me today to be here and introduce to the committee the President's nominee to the U.S. district court in the Northern District of Mississippi, Mr. William Allen Pepper, Jr. He has his wife, Ginger, here with him; his son, William Allen Pepper III; his sister, who is one of his greatest assets, LouAnn Cossar, and her husband. I don't know what your protocol is here, but I am very proud of this

family, and I would like to ask them if they would stand and be recognized. Here they are right here.

The men may not look like much, but the ladies compensate. [Laughter.]

I would ask, Mr. Chairman, that my statement be put in the record.

The CHAIRMAN. Without objection, we will do that.

Senator LOTT. I have known Allen Pepper since 1959. I remember the night we met. We were at the same place as freshmen, and we wound up around the piano singing. And we sang together for the next 4 years in a quartet—a quartet I might say, to your great relief, I am sure, that was better than the singing Senators I now sing with. He became my roommate for 3 years at the University of Mississippi. I have known him over the years to be one of the most honorable men I have ever met in my life. That is the life he lived even in the college days, and that is the one he continues to live in an exemplary way in Cleveland, MS.

He has had quite a distinguished career. After he graduated, he went off and served 2 years in the 101st Airborne in the Army. He returned and got his law degree from the University of Mississippi Law School. He has had a very active practice. In fact, he calls me quite regularly and says, "Well, I am representing another one of your criminal relatives," wanting to know what he should do with them, and I say, "Well, just get them out of jail and do the best you can."

He has practiced as one of those sole practitioners that you don't have a lot of anymore in a small town. He was in this solo practice for 26 years. Yes, Senator Kennedy, he was a trial lawyer. As a matter of fact, he was president of the Mississippi Trials Lawyers Association, but he worked with the Bar Association as a whole, served in a number of positions there, and was actually nominated to be president of the Bar Association. He was the director of the Young Lawyers Group and president of the Mississippi Bar Foundation. He was a leader in the Mississippi pro bono project. He has also been very active with the University at Cleveland, Delta State University.

He served as an elected official. He was elected as a Democrat to be an elections commissioner in Bolivar County. He also served for a number of years, maybe as many as 12 years, as the attorney for the Board of Education in that county.

He has all the usual civic activities and honors, ranging from the Lions Club to Junior Auxiliary activities. Mr. Pepper is the kind of person we need to have serve on the bench. He has had a diverse practice. He has been very much involved in his community and his State, and he is a man of the highest possible integrity. And so even though he has this one blot on his record of being my former roommate and probably the closest friend I have had in my life, I am very proud that President Clinton has selected him as his nominee for this vacancy on the U.S. court in the Northern District of Mississippi.

Thank you for allowing me to be here with my colleague, Senator Cochran.

The CHAIRMAN. Thank you, Mr. Leader. We will certainly turn to Senator Cochran. That is very high praise for Mr. Pepper, and we really appreciate having your testimony here today.

Senator Cochran.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, it is a pleasure to join my colleague in presenting and recommending to this committee Allen Pepper to be a U.S. district judge. He is very well qualified. As a lawyer, he has earned the highest rating that Martindale-Hubbell gives a practicing attorney. He is a person who has shown that he has the respect of the fellow members of the bar with whom he has practiced and worked. He has been chairman of the Lamar Order of the University of Mississippi Law Alumni Association, one of the most prestigious positions in our State.

Senator Lott has also pointed out already that he has been president of the Mississippi Bar Foundation, another position for which he was selected by his fellow lawyers.

He has been one of the most civic-minded attorneys in his hometown of Cleveland, MS. He has served in positions of responsibility, as director of a leading bank in Cleveland. He has headed up charitable fundraising activities. He is looked to for leadership in a number of important activities. In education locally and in local political life of his community, he has been a leader and an influence for good and stable government in that part of our State.

So it is a pleasure for me to recommend him. I can't match the close relationship that my colleague has had. I am glad that Allen has overcome those early relationships that he had at the University of Mississippi. [Laughter.]

Frankly, I did meet him when he was a student there in 1961. I recall meeting him, and he was introduced to me as the brother of LouAnn Pepper. Well, I knew right away he had to be a person of intelligence and ability because she was at that time one of the most popular and visible television stars in Mississippi, a person of great charm and intelligence and great talent. So I knew that Allen Pepper had to be somebody you had to take very seriously, and he turned out to be just that.

So it is a pleasure for us to recommend him to the committee, and we hope that the committee will report him favorably to the Senate for confirmation.

The CHAIRMAN. Thank you, Senator Cochran. You both have things to do. We will be happy to release you at this time, but we will certainly move ahead with this nominee.

Senator LEAHY. We can't ask him a whole lot of questions?

The CHAIRMAN. No, no.

Senator COCHRAN. Ask about the rule in Shelley's case. [Laughter.]

The CHAIRMAN. I said the rule against perpetuities.

Senator LOTT. Let me just say one final point I left out. I have never known a nominee for the Federal bench that had broader breadth of support than I have heard exhibited on behalf of this nominee. It comes from leaders of the Democratic Party, elected officials across the State, across the spectrum, Republican leaders,

and leaders in the African-American community, among others. His selection was met with universal approval and a feeling that he would make an excellent judge. So I just wanted to add that one additional point.

The CHAIRMAN. Thank you, Mr. Leader.

Senator THURMOND. You both favor him.

Senator LOTT. Yes, sir.

Senator THURMOND. We can't turn him down, then.

Senator LOTT. Thank you, Supreme Commander.

The CHAIRMAN. I think that is something——

Senator LEAHY. Don't argue with that, Trent.

The CHAIRMAN. We are proud to have both of you here speaking.

We will turn to Senator Moynihan and then Senator Schumer, and then we will turn to Senator Dodd after that.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Thank you, Mr. Chairman, Senator Leahy, and distinguished members of the committee. I have the honor and great personal pleasure to introduce to this committee a brilliant lawyer and scholar, Prof. Robert A. Katzmann, the Walsh Professor of Government and Professor of Law at Georgetown University. He comes to you as the nominee for the Second Circuit Court of Appeals.

Upon his nomination, I stated that "Robert Katzmann is the finest lawyer/scholar of his generation. He will serve the Court of Learned Hand with honor and distinction."

His distinctions began early, sir. He graduated summa cum laude from Columbia, took his master's and Ph.D. at Harvard in government, and has his juris doctor from Yale Law School, where he was an article editor of the Law Journal. After clerking in the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution and has been there and at Georgetown since.

He is the author of many books. A citation from the University of Oregon captures the spirit of his work. It says: "He has committed himself to interdisciplinary research that is often applied rather than pure academic scholarship. That work seeks to make a 'real world' difference." A principal thrust in his career has been a concern with the practical aspects of the legal system. An example is his involvement over the past 2 decades with the Federal Judicial Center, which asked him to bring to fruition a project on managing appeals in Federal court. The result was "Managing Appeals in Federal Court," the leading study of its kind, as I believe.

A major focus of his career has been a project to enhance the understanding between the judicial and the legislative branches, as explained in his recent book, "Courts and Congress."

Judge Diarmuid O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit described this book as "most timely and insightful", indeed, "must reading."

I believe, sir, you would recall that more than a year ago we met with you and your staff to discuss one of his projects, an effort whereby court opinions identifying perceived problems in statutes are sent from the courts of appeals to Congress for its review. The

project holds the promise of enhancing mutual understanding of each branch's work ways.

May I finally say, sir, apart from his professional accomplishments, on a personal note, I can attest to his unquestioned integrity and fairness. I thank you for your great courtesy.

The CHAIRMAN. Thank you, Senator Moynihan. I appreciate the high praise that you have given.

Senator Schumer, on this nominee.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman, and I would like to take this opportunity to commend you for holding this hearing and add to the introductions and praise for Professor Katzmann as well as Marsha Berzon.

I can hardly hope to match the eloquence of my colleague or the erudition from New York's Senator Moynihan, so I shall not try. I simply want to commend him for recommending the nomination of such a fine candidate for the Second Circuit as Robert Katzmann, and I look forward to working with you, Mr. Chairman, to bring Dr. Katzmann's nomination to the floor and for his eventual confirmation.

Dr. Katzmann's extensive research and writing and works on matters relating to the Federal judiciary are indeed impressive. Senator Moynihan has catalogued some of the works of Dr. Katzmann, although in all modesty he left out my favorite, which was his recent book entitled "Daniel Patrick Moynihan: The Intellectual in Public Life." [Laughter.]

I would also like to join Senators Feinstein and Moynihan in reintroducing you to Marsha Siegel Berzon. Although she is now a Californian and has been nominated to serve on the ninth circuit, Ms. Berzon grew up in a place I know pretty well, Brooklyn, NY, my hometown, and then she moved to Long Island and East Meadow, ultimately graduating from East Meadow High School, and her affiliation with New York also includes study at Columbia University and service as a distinguished practitioner in residence at Cornell University Law School in Ithaca. And we New Yorkers are glad to be able to claim Ms. Berzon as one of our own as well as a Californian because she is an extremely well regarded appellate litigator and scholar. And we also like the idea of putting native New Yorkers on the bench outside our great State. It stands to improve the quality of justice in the country.

Anyway, in the interest of time——

The CHAIRMAN. Don't make it rougher than it is. OK? [Laughter.]

Senator SCHUMER. In the interest of time, I will say no more except to thank you, Mr. Chairman, for the opportunity to testify at this hearing.

The CHAIRMAN. Thank you, Senator Schumer.

Senator MOYNIHAN. Mr. Chairman, may I say I last year introduced Ms. Berzon to the committee, and Senator Feinstein will add a statement I have made at the conclusion of her statement.

The CHAIRMAN. Thank you, and we recognize your strong support. This has been good praise for your nominee, Mr. Katzmann, and for Ms. Berzon. We appreciate it.

We would be glad to release you from the table. We appreciate you taking time from your busy schedules to be here.

Senator Dodd, Senator Lieberman, and then I think we will go to Senator Feinstein and Senator Boxer, and then we will wind up with you, Senator Hutchison.

STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you very much, Mr. Chairman and Senator Leahy and other members of the committee. I want to thank you for scheduling this important set of confirmation hearings. It is a very distinct pleasure to join my colleague, Senator Lieberman, in support of the nomination of Stefan Underhill to be a district judge for the District of Connecticut.

Stefan Underhill, Mr. Chairman, is a distinguished scholar, a superb attorney, and, most importantly, a truly fine human being. I have never been more impressed, Mr. Chairman, with the personal and professional qualifications of a candidate for the bench in Connecticut.

Stefan Underhill is joined today by his wife, Mary Pat, and their four children: Mariah, Mark, Devin, and Kerry. Maybe they would stand up as well and be recognized if that is appropriate, Mr. Chairman, the Underhill family.

The CHAIRMAN. We welcome you all.

Senator DODD. You may not see Kerry. She is 4 years old. There she is. She is recording history by dozing through all of this.

Senator LEAHY. We see her.

Senator DODD. Mr. Chairman, I know that our colleague and resident historian, Senator Byrd, is fond of extolling the unique contributions that the U.S. Senate has made to civilization, and I would not presume to disagree with him on that point. I would, however, add one item to his list of great American contributions to the civilized world, and that is an independent judiciary.

Yesterday, Mr. Chairman, I noted a lead editorial in the New York Times that compared the American with the British legal systems. I found it ironic that the nation that in many ways spawned our common law system 2¼ centuries ago is now struggling with whether to create a truly independent judiciary that is modeled on our very own. The British judicial system is in many respects unfamiliar to us. Its high court consists of 12 law lords. They are members of the House of Lords where they sit on the Judicial Committee. The chairman of that committee is known as Lord Chancellor. He also serves as Speaker of the House of Lords and is a member of the Prime Minister's Cabinet.

Mr. Chairman, were such a person to exist in the U.S. Senate, he or she would simultaneously hold the position of chairman of the Senate Judiciary Committee, Majority Leader of the U.S. Senate, Chief Justice of the Supreme Court, and the Attorney General. I leave it to you, Mr. Chairman, to meditate on that possibility. I am sure that it is not without some appeal to you as well. [Laughter.]

The CHAIRMAN. I am sure that it would be very unappealing to many others.

Senator DODD. I can see you already taking notes on this.

My point, Mr. Chairman, is simply this: Our judiciary is revered throughout the world for the high caliber of justice it has dispensed over time. It is a beacon light of fairness not only because of its independence from the legislative and executive branches, but also because of the qualities of mind and heart possessed by those we confirm to be article III judges.

Mr. Chairman, in my experience as a member of this body, there is no responsibility that we Senators hold more dear than that of advising and consenting to the nominees to our article III courts. History will record that it is a responsibility that the U.S. Senate throughout time has discharged remarkably well. Of some 2,792 judges confirmed by this body, only 7 have been removed from office throughout the history of our Nation. That reflects the extraordinary level of care that this committee and the Senate as a whole has always taken in considering judicial nominees.

Stefan Underhill, Mr. Chairman, represents the very best that the Senate and our legal profession has to offer to the quality of justice in America. He holds outstanding academic credentials: a graduate of the Yale Law School, a Rhodes Scholar, a graduate of the University of Virginia. He clerked for one of the Nation's outstanding appellate court judges, Jon Newman of the second circuit, and since then he has distinguished himself among his peers as an associate and then partner of the Connecticut law firm of Day, Berry & Howard.

It has been said that if you want to know what kind of a judge a person will make, look to what kind of a person he or she is. Stefan Underhill has all the blue-chip credentials a brilliant lawyer can attain. But far more importantly, or as importantly, Mr. Chairman, he is committed to his community and devoted to his family. He is, simply put, a very good and decent man. He provides legal guidance to local nonprofit childcare organizations. He sits on the board of directors of the Connecticut Legal Services Corporation. He is a Cub master of the local Cub Scout pack in his community. Colleagues and friends described him, as "a true family man, bright, insightful, and principled, with a deep respect for the rule of law."

Stefan Underhill's experience as a clerk for Judge Newman kindled his desire to become a judge. He admires Judge Newman not just for his intellect but because he strives to do what is right and because he brings his life experiences to bear when making judicial decisions.

Stefan believes in judicial restraint and having an open mind. In Judge Newman, Stefan found a role model. He has revealed himself to be someone committed to applying the law not creating it, to opening his mind not closing it, and doing justice not ignoring it.

In closing, Mr. Chairman, I note that a few days ago Stefan's 4-year-old daughter, Kerry, who you just met, who is dozing in the back here, was on line with her mother at the post office in Connecticut. She tugged on the skirt of a strange woman standing next to them and asked the woman, "Do you think my daddy should be a judge?" To 4-year-old Kerry, I believe the answer to that question is yes, and I hope that the committee will agree with me, as well, in their consideration of this fine nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Dodd.

Senator Lieberman, we will turn to you.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thank you. Thank you, Lord Hatch. [Laughter.]

Senator LEAHY. Joe, don't do that. It is hard enough living with him on this committee as it is. Don't make it any worse.

Senator DODD. Lord Chancellor Hatch.

The CHAIRMAN. It has taken a long time to get that recognition, is all I can say.

Senator LIEBERMAN. Thanks, Mr. Chairman, for convening this hearing and for moving some of these judicial nominations along and including Mr. Underhill on this list. I am very proud to be joining with Senator Dodd in introducing Stefan Underhill to you as the nominee for the U.S. district court judgeship.

I was moved when Senator Lott described his college roommate. Actually, if I may assume for a moment the role of pro bono counsel, I want to advise Mr. Pepper that he is under no obligation to answer the committee's questions about Senator Lott's conduct while at Ole Miss. [Laughter.]

That is off limits.

But as close as I can get to the same relationship is that Mr. Underhill and I were privileged to go to the same law school, but it ends about there. He was there much more recently and did much better than I did, I assure you, at the law school. He was Articles and Book Reviews editor, one of five members of the Articles Committee, a finalist in the coveted Harlan Fiske Stone Prize Argument, and as Senator Dodd has indicated, has just a first-rate record, clerking for Judge Newman, being one of our State's premier litigators, a partner in one of our State's premier law firms, an outstanding lawyer, a person of genuine judicial temperament, a great citizen of our State. In every regard, I think this is a superb nominee, and I guess I would add that I was particularly struck that he listed on his CV the fact that he is Cub master of Pack 197 in Fairfield, CT, which experience I think will come in handy in dealing with many of the lawyers and litigants who will come before his bench. [Laughter.]

I am very honored to join in Senator Dodd's support of this nominee, and thank you for scheduling him today.

The CHAIRMAN. Well, thank you very much, Senator Lieberman. We appreciate both of you Connecticut Senators being here.

Kay, we are going to hold you until last, if that is all right. You have two nominees, and we will turn to Senator Feinstein next and then Senator Boxer.

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

Senator FEINSTEIN. Thank you very much, Mr. Chairman and members of the committee. I would like to speak on behalf of two people. One is Marsha Berzon and the other is Gary Feess.

Mr. Chairman, I believe it was last July 30, and I believe Senator Sessions and I were the members of the committee that heard Marsha Berzon. I want to pay special tribute to Senator Sessions. He was thorough, he was probing, he was intrepid. I think the hearing went on for just about 2 hours, and virtually I felt at the end of it that this was equal to a hearing that the full committee had for an Associate Justice of the U.S. Supreme Court. Virtually every question I have ever heard at one of those hearings had been asked of Mrs. Berzon, and I want the committee to know how very well she acquitted herself, and I think Senator Sessions would agree with that.

I also want the committee to know, Mr. Chairman, that Marsha Berzon, believe it or not, had a life after Brooklyn, NY. She went West where the major portion of her career began to unfold in California. And she is a highly skilled attorney. She has appeared numerous times before U.S. circuit courts, district courts, and every level of California State courts. She has argued four cases before the U.S. Supreme Court. She has filed dozens of briefs on a wide variety of cases before the Supreme Court.

She was a distinguished student at Boalt Hall, the University of California. She was Order of the Coif, and she was Articles editor for the California Law Review.

Prior to entering private practice, she clerked for U.S. Court of Appeals Judge James Browning and for U.S. Supreme Court Justice William J. Brennan. She has practiced law with the San Francisco law firm of Altshuler, Berzon, Nussbaum, and Rubin since 1978. She has been a partner of the firm since 1990. She has won, in fact, impressive support from Democrats and from Republicans as well as virtually a wide panoply of law enforcement agencies.

Let me read just a couple of samples. Former Republican-appointed Deputy Attorney General and Administrator of the EPA, William Ruckelshaus, says, "Her intelligence and genuine good judgment allow her to transcend partisanship. She would make an excellent addition to the Ninth Circuit Court of Appeals."

J. Dennis McQuaid, an active Republican and partner at the San Francisco law firm of McQuaid, McQuaid, Metzler, McCormick & Van Zandt, writes, "I can recommend Marsha for confirmation without reservation. She enjoys a reputation that is devoid of any remotely partisan agenda and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness, and equanimity."

The National Association of Police Organizations states, "Mrs. Berzon would be fair and impartial to law enforcement officers and open-minded to their concerns. She apparently understands the myriad of problems and difficult situations facing the line patrol officer every day."

Mr. Chairman, I strongly support Marsha Berzon's candidacy, and I am very pleased to be here today to help my colleague, Senator Boxer, and others introduce her to you. And if I might also on behalf of Senator Moynihan submit a statement to the record?

The CHAIRMAN. Without objection, we will place the statement in the record.

[The prepared statement of Senator Moynihan follows:]

PREPARED STATEMENT OF DANIEL P. MOYNIHAN

It is a very special pleasure, Mr. Chairman, to once again introduce to you Marsha Siegel Berzon, who has been nominated for the Ninth Circuit Court of Appeals. She is a native New Yorker and spent her youth in Sheepshead Bay, Brooklyn and East Meadow, Long Island. When she testifies, a learned ear will recognize those origins and, I hope, celebrate them. She was graduated cum laude from Harvard/Radcliffe College and earned her law degree at Boalt Hall School of Law at the University of California. She was law clerk to Justice William J. Brennan, a blessed memory, and before that to Judge James R. Browning of the Ninth Circuit Court of Appeals. She has been a faculty lecturer in the School of Social Welfare at the University of California and a practitioner in residence at New York's Cornell Law School. She is currently a partner at Atshuler, Berzon, Nussbaum, Berzon and Rubin in San Francisco.

Ms. Berzon has argued four cases before the U.S. Supreme Court, and she has filed dozens of briefs in our nation's highest Court. A distinguished candidate, Ms. Berzon would be a splendid addition to the Ninth Circuit Court of Appeals. Thank you for allowing me this opportunity to say so.

Senator FEINSTEIN. Now, Mr. Chairman, I would also like to just quickly introduce Judge Gary Feess, who with his wife is sitting directly behind me, with their two children, David and Tim. Judge Feess is the nominee to the District Court for the Central District of California, the Los Angeles area. Judge Feess has a vast experience as a private attorney and Government service. He has earned distinction as a litigator, an interim U.S. attorney, and a superior court judge in Los Angeles.

He earned his law degree from the University of California at Los Angeles. He also was selected for the Order of the Coif, and in private practice, he joined the U.S. Attorney's Office where he quickly rose up through the ranks, becoming division chief of the major frauds unit in 1984 and assistant chief of the criminal division.

In 1998, he served 6 months as interim U.S. attorney. He returned to the private sector as a litigation partner for Jones, Day, Reavis & Pogue, and later Quinn, Emanuel, Urquhart & Oliver.

In 1997, Governor Pete Wilson appointed him to the Los Angeles County Supreme Court where he has earned rave reviews.

He has also done a considerable amount of civic and public service. He was deputy general counsel for the Christopher Commission, which explored alleged abuses by the Los Angeles Police Department. He also served on the Attorney General's Economic Crime Council and the Los Angeles Coordinating Crime Committee.

He has received a flood of endorsements including endorsements from the Los Angeles District Attorney, former U.S. Attorney Robert Bonner, and Lane R. Phillips, a former U.S. Attorney and Federal judge appointed by Ronald Reagan. The American Bar Association's Judicial Nominations Committee has determined that he is well qualified for the position of district judge.

He was my nominee to the President, and I am very proud to present him to this committee.

The CHAIRMAN. Thank you so much, Senator Feinstein.

I notice the distinguished Minority Leader is here, and I want to accommodate him and his heavy schedule at this time. So if we could, and then I also notice—I think Tim is here. Maybe we should move on your judge then at this time.

STATEMENT OF HON. TOM DASCHLE, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator DASCHLE. Well, Mr. Chairman, I thank you very much for your indulgence and that of my colleagues. I will be very brief.

With you and members of the committee, I am extraordinarily pleased to introduce to the committee someone that I am very proud to have known for a long time. Karen Schreier and her husband, Tim Dougherty, are both here, and I would like them to stand, if they would.

I have known both of their families for a long, long time. I have known Karen's father, know her family, know Tim's family quite well. And I must say they are South Dakota's finest.

Karen has been the U.S. attorney in the State of South Dakota now for about 6 years and has just done an extraordinary job. She has been recognized as one who has worked very effectively with law enforcement agencies, especially on the drug issue. She has reached out to the Native American community as effectively as anybody I know.

I honestly believe that she has been the finest U.S. attorney the State of South Dakota has ever had. So when it came to the opportunity to nominate a new district judge, it was an easy choice for us. We are delighted that she has been willing to take on this additional responsibility. We highly recommend her to you, Mr. Chairman, and to the members of the committee. We know that she will do an outstanding job as our next district judge.

The CHAIRMAN. Thank you, Senator. That is high praise.

I think all of the nominees have been very well praised here today by excellent Senators, and so we are grateful to have you here.

We will be glad to excuse you at this time because I know how busy you are.

Senator DASCHLE. Thank you.

The CHAIRMAN. Tim, if we could go to Senator Boxer first since we can finish those two judges, and then we will come back to you, and then we are going to wind up with Senator Hutchison.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman. I will be very brief, and I would ask unanimous consent that my entire statement be placed in the record.

The CHAIRMAN. Without objection.

Senator BOXER. And I will summarize.

First, I want to associate myself with the comments of Senator Feinstein as it pertains to Judge Feess. I am very proud that he has been recommended. I see that the younger one has dozed off, which is interesting. The kids seem to get to the heart of the matter sometimes. So the rest of us are awake, and we are here for a purpose, and that is to convince you of the value of our nominees.

I have been asked by Marsha Berzon to say a few words about her, and rather than going through my statement, I thought I would just pick out some highlights and first ask if Marsha would stand. She is here with Stephen, her husband, and their daughter,

Allie, and son, Jeremy, who happens to be a newspaper reporter in Riverside, CA.

You have heard about Marsha's qualifications, a woman who has argued cases before so many of the courts, including the Supreme Court. All of her accolades are in my statement, so I thought I would actually close with just a few brief statements from Republicans because I think it is important that we show the broad support that Marsha brings.

Former Republican—well, let me start off with Senator Specter, a longstanding member of this committee, who wrote that he was impressed with Ms. Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and unions." And I thank Senator Specter for those comments.

Former Republican Senator James McClure wrote, "What becomes clear is that Ms. Berzon's intellect, experience, and unquestioned integrity have led to strong bipartisan support for her appointment." And Dennis McQuaid, who was mentioned by Senator Feinstein, I wanted to share with you, he ran against me the first time I ran for the Congress. So we finally found something we agree on, Marsha, Dennis and I. And he wrote wonderful words about Marsha. And W.I. Usery, former Republican Secretary of Labor, said of Marsha, "She has all the qualifications needed, as well as the honest and integrity that we need and deserve in the court system. I know she will be dedicated to the principles of fairness and impartiality."

Charles Curtis, who opposed Marsha in a case, *United Auto Workers* v. *Johnson Controls,* her opposing lawyer, said, "All who have worked with or against her know she is fair, reasonable, respectful toward opposing views."

And, finally, corporate secretary for Chevron, Lydia Beebe, has written that Marsha "has a reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on plaintiff and management side."

So, with that, Mr. Chairman, I hope you will look kindly on these two people. They are good people. They are strong people. They will make great judges.

Thank you very much.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF SENATOR BARBARA BOXER

Mr. Chairman, I am delighted to be here today to introduce Marsha Berzon, once again, to the Committee. Ms. Berzon was nominated by the President last year to be United States Circuit Judge for the Ninth Circuit. She was nominated again in January of this year and I am hopeful we can complete the process this time.

Before I share with you some of Ms. Berzon's background and experiences, let me first acknowledge her family who is with her here today—her husband, Stephen Berzon, their daughter Ali, and son Jeremy who is a reporter in Riverside, California.

Ms. Berzon is eminently qualified to sit on the United States Court of Appeals for the Ninth Circuit. She graduated cum laude from Radcliffe College in 1966 and received her Juris Doctor from the University of California at Berkeley, Boalt Hall School of Law in 1973. After graduating from law school, Ms. Berzon clerked for a Judge on the U.S. Court of Appeals for the Ninth Circuit and for Supreme Court Justice William Brennan. In 1978 she joined a private law practice and is now a partner in that practice.

Ms. Berzon has written dozens of U.S. Supreme Court briefs and has argued 4 cases before the U.S. Supreme Court. She has had extensive experience appearing in federal appeals courts, having argued as counsel in many U.S. District Courts, and at all levels of the California state court system. In addition, over the past 6 years, Ms. Berzon has served as chief counsel for 5 Supreme Court cases and has served as co-counsel in many more.

Let me share with you some of what has been said about Ms. Berzon:

In a July 10, 1998 letter, Senator Specter a longstanding member of this Committee, wrote that he was impressed with Ms. Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and the unions." I thank the Senator from Pennsylvania for his comments.

Former Republican Senator James McClure of Idaho has also written in support of her nomination. Senator McClure said, "What becomes clear is that Ms. Berzon's intellect, experience and unquestioned integrity have led to strong and bipartisan support for her appointment."

J. Dennis McQuaid, a California attorney, who by the way, was the Republican candidate running against me in my 1982 Congressional race, wrote: "Unlike some advocates, she enjoys a reputation that is devoid of any remotely partisan agenda * * * Frankly her presence will enhance the reputation of the Ninth Circuit."

W.I. Usery—former Republican Secretary of Labor—said of Marsha Berzon: "She has all the qualifications needed, as well as the honesty and integrity that we need and deserve in our court system today * * * I know she will be dedicated to the principles of fairness and impartiality in all her judicial activities."

Charles Curtis, opposing counsel in one of Ms. Berzon's cases, *United Auto Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), has said: "all who have worked with or against her know that she is fair, reasonable, and respectful toward opposing views." I believe such a statement, by opposing counsel is quite a testament to Ms. Berzon's qualifications and fitness to serve on the Ninth Circuit.

Finally, the Corporate Secretary for Chevron, Lydia Beebe, has written that Marsha Berzon has a "reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on the plaintiff and management side."

Mr. Chairman, I have provided but a few excerpts of the many letters of support that have been written on behalf of Marsha Berzon. Nonetheless, I think it is clear from the contents of my statement, as well as the statement of the senior Senator from California who sits on this Committee, that Ms. Berzon enjoys broad support from Democrats and Republicans alike, her colleagues, legal opponents, members of the bar and the judiciary, law enforcement, as well as current and former United States Senators.

Mr. Chairman, in closing, let me associate myself with the comments made by my colleague Senator Feinstein with regard to the nomination of Gary Allen Feess to be United States District Judge for the Central District of California. These 2 Californians, Mr. Feess and Ms. Berzon, deserve the confidence and support of this Committee.

Thank you.

The CHAIRMAN. Thank you, Senator Boxer.

Senator Johnson, if you could finish up on your judge.

STATEMENT OF HON. TIM JOHNSON, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator JOHNSON. Yes, thank you, Mr. Chairman, and I will be very brief. I want to associate myself with the remarks of the Minority Leader, Senator Daschle, relative to Karen Schreier and her husband, Tim.

Karen has been a friend and a colleague for many, many years. She was born in Sioux Falls, SD, educated at St. Louis University and St. Louis University School of Law. Her intellect, character, legal skills, and her integrity are all highly regarded by everyone who has known her. She has strong support from my fellow members of the South Dakota Bar. She went on to distinguish herself with a clerkship with the South Dakota Supreme Court, quickly became an associate and partner in Hagen, Wilka, Schreier and Ar-

cher law firm in Sioux Falls, SD, then moved on to become U.S. attorney for South Dakota in 1993, where her performance has been absolutely extraordinary.

Karen has been a leader on issues of juvenile crime and youth violence for a number of years. She has worked closely with me and with my office on methamphetamine problems and drug problems we have in the State of South Dakota. She has been an aggressive U.S. attorney on the side of aggressive enforcement of the law. And for that she has widespread bipartisan respect and admiration from people throughout our State.

I would hope again that your committee will look favorably and with an expeditious manner on the handling of this important nomination. This is a woman who will serve America and South Dakota well as U.S. district judge, the kind of person that we need in public service, the kind of person that we need on the bench.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Johnson. We are happy to excuse you and appreciate the good comments you made.

Senator Hutchison, sorry that you have to be the last one here, but we know that you have two nominees, and I would like to mention that Congressmen Ralph Hall and Max Sandlin have been here in the past. I was hoping they could get back. That is one reason why we delayed until now. But they have been here in support of these two Texas nominees. So we will turn to you at this point, and if the two Congressmen come, I will certainly introduce them.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Good. I would like to ask that Congressman Hall and Congressman Sandlin be allowed to be introduced if they are able to come back. But they did tell me they were here in support, and I would like to introduce first T. John Ward, who is here with his wife, Elizabeth Ward, and I would like to ask them to stand.

The CHAIRMAN. We are happy to welcome you all to the committee. I apologize. If you see the two Congressmen, I apologize. I should have introduced them before, but I thought they would be here.

Senator HUTCHISON. I will tell them.

The CHAIRMAN. They apparently had a vote, and I apologize to them.

Senator HUTCHISON. I will mention to them that you did recognize them.

John is a native of Bonham, TX, and he practices in Longview with the Austin law firm of Brown, McCarroll & Oaks Hartline. He is a graduate of Texas Tech University and Baylor University Law School. Early in his career, he was an assistant district attorney, and he has extensive civil litigation practice both in the State and Federal courts.

I believe John Ward is going to be a commonsense Federal judge. When he was nominated in January, a constituent of mine, one of many who wrote on his behalf, said, "John Ward brings complete preparation, a studied atmosphere, and a balance. He will be a great judge." He is a member of the Board of Governors of the Fifth

Circuit Bar Association, and I just urge that you confirm Mr. Ward to the bench in East Texas.

The second nominee I have is Keith Ellison, who is a resident of Houston, and we are looking at the Southern District bench there. Mr. Ellison is a graduate of Harvard University where he was a Phi Beta Kappa and graduated summa cum laude. He is a Rhodes Scholar. He is a graduate of Yale Law School and was editor of the Yale Law Journal. He was a law clerk to Supreme Court Justice Harry Blackmun and Judge Skelly Wright of the U.S. Court of Appeals in the District of Columbia circuit.

He has also been 20 years in civil litigation. He was a partner in Baker & Botts, and then went out on his own. He serves on the Yale Law School Association Executive Committee, and he wrote to the committee that Senator Gramm and I have that interview all of the judicial candidates that, "By not applying the law, a judge introduces an element of unpredictability that breeds more litigation." I think that is a pretty common-sense approach, too, and I can't think of anyone more qualified and intellectually qualified for the bench than Keith Ellison.

Keith is here with his wife, Kathleen, and I would like to ask them to stand as well.

So, Mr. Chairman, I appreciate your having this hearing. Both of these nominees have been in the pipeline for quite a while, and it is my hope that we can have an early confirmation. I recommend them. Senator Gramm recommends them. They passed with flying colors our bipartisan judicial selection committee that screens all the nominees, and I think you have two very highly qualified individuals and two benches that are in dire need of some help. So I would urge you to confirm.

The CHAIRMAN. Thank you, Senator Hutchison. That is high praise indeed, and we appreciate your taking time to be here. Sorry you were last.

Senator HUTCHISON. That is fine.

The CHAIRMAN. OK.

If I could have all the judgeship nominees stand and be sworn, we will swear you all in. If you could just stand, raise your right hands. Do we have all of you up there? OK. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BERZON. I do.

Mr. KATZMANN. I do.

Mr. ELLISON. I do.

Judge FEESS. I do.

Mr. PEPPER. I do.

Ms. SCHREIER. I do.

Mr. UNDERHILL. I do.

Mr. WARD. I do.

The CHAIRMAN. Thank you very much. I think what we will do, I think we will start with the two circuit nominees: Marsha S. Berzon and Robert A. Katzmann. And then we will go to the district court nominees in the second panel—third panel, rather.

Senator LEAHY. Mr. Chairman, at an appropriate point, I have two statements from Senator Feingold that I want placed in the record.

The CHAIRMAN. Without objection, we will place them in the record. Please take your seats.

[The prepared statements of Senator Feingold follows:]

PREPARED STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Mr. Chairman, I do want to thank you for holding this hearing. Nonetheless, I am greatly troubled by the fact that this is the first hearing on nominations to be held this year. I hope that the pace will pick up immediately and that we can get to many hearings and votes on nominations in the coming weeks.

The Committee has managed to find time this year to hold hearings on the Flag Amendment, the Victims' Rights Amendment and numerous other matters. We have moved major legislation to the floor. But for some reason, we can't find time to fulfill our basic constitutional function of advice and consent on nominations. That is very regrettable.

The Committee's lack of action is preventing the Senate from doing its constitutional duty. The majority is acting like the bully in the school yard. We need to quit hiding the ball from the Senate, and do our job. We have well over 100 judicial vacancies to fill, not to mention Justice Department posts and other administrative positions. We have a lot of work to do. We need to roll up our sleeves and get to the business of strengthening the ranks of our federal judiciary. The majority can't just ignore the issue. Even if the majority ultimately decides to reject a nominee, it is our obligation to go through the process of considering the nominees and giving, or withholding, our consent.

This is not a partisan issue. Even Chief Justice Rehnquist and the Judicial Conference have called on the Senate to fill judicial vacancies without further delay.

With every day that passes, justice is being denied to someone who can't get a hearing or trial date because the judges on courts with multiple vacancies are overworked and over-scheduled. A nomination delayed is justice delayed. As we know, justice delayed is justice denied. A vacancy unfilled is justice unfulfilled.

With every new federal statute creating liability for yet another federal crime, we are burdening our judges even more. What I find particularly troubling is that a majority of the Senate, and this Committee, breathlessly works to enact additional federal criminal legislation. Yet, this same majority refuses to give our courts the resources they need to uphold and enforce the laws just enacted.

Finally, I am very troubled by the fact that a majority of the nominations that have been held up are women and minorities. And once again today, only one of the nominees receiving a first hearing from the committee is a woman and none are people of color. That disturbs me greatly. I encourage my colleagues not to shun or be fearful of placing women and minorities on the federal bench. Just as we have judges with a range of work experiences—from academia to politics to private law practice, judges with diverse life experiences infuse the judicial system with fresh perspectives on decision making and problem solving. In my mind, maintaining the integrity of the judicial system requires that we attempt to create a judiciary that is representative of the depth and complexity of the American people.

I want to urge you, Mr. Chairman, to move forthrightly and begin quickly to hold frequent hearings and move nominations through this Committee. And I want to commend the ranking minority member for his continued efforts to press this issue with you. It's an extremely important one and we need to keep pushing until the Committee gets its job done.

PREPARED STATEMENT OF SENATOR RUSSELL D. FEINGOLD ON BEHALF OF MARSHA BERZON

Mr. Chairman, I hope that you will schedule a vote on Marsha Berzon's nomination as soon as possible. She is a highly qualified nominee, with bipartisan support. Her nomination effectively has been pending for a year and a half and she had a hearing before this Committee almost a year ago. I hope today's second hearing is a sign that the Committee will no longer hold up her nomination. We have kept Ms. Berzon in limbo long enough. The time has come to fulfill our constitutional responsibility and either confirm her or reject her.

Ms. Berzon's record is exemplary. Her legal skills and good judgment are unquestioned. Based on the testimonials we have received from numerous attorneys and groups, including many with strongly Republican leanings, she is exactly the kind of highly respected, fair, and qualified person we should be putting on the bench.

And she is desperately needed on the Ninth Circuit, where there are a number of vacancies.

To those who have problems with Ms. Berzon's record of service as a Board Member of the ACLU or as a union-side labor lawyer, or because she has represented one person on death row in a successful appeal to the California Supreme Court, I say—"Make your arguments to this Committee or on the floor, and then let's vote. Stop holding up the nomination and let the Senate work its will." Fair-minded observers know Ms. Berzon has the ability and the temperament to apply the law fairly and impartially to all litigants. Those qualities—not what groups or causes she has represented in her private practice—should be the key criteria in our deliberations.

I look forward to a favorable vote on Marsha Berzon as soon as possible. The nominee, our system of justice, and our country deserve nothing less.

Senator LEAHY. Mr. Chairman, while I did not give an opening statement, I would put my statement in the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

This afternoon the Judiciary Committee holds its first confirmation hearing for judicial nominees this year. I have looked forward to this hearing for some time, as have the outstanding group of nominees who are with us today, their families and those awaiting justice in the States served by the courts to which they have been nominated.

In spite of our efforts last year in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are, again, topping 70 and the vacancies gap is, again, moving in the wrong direction. We have more federal judicial vacancies extending longer and affecting more people.

Two months ago, the Chairman described this Committee's constitutional responsibilities to consider judicial nominations as a "serious responsibility of this Committee." The Chairman is correct when he says what is important is "the actual performance of our responsibility to examine and take action on the qualified judicial nominees sent to us by the administration" and that the Senate's primary interest must be what is best for the country and the Judicial Branch."

Chairman Hatch noted that "we cannot afford to lose sight of the fact that for each nominations statistic, there is a man or woman whose career has been placed on hold and whose reputation may suffer unwarranted and unintended detriment if we do not perform our duty." I have often said that if this were up to Senator Hatch and me to work out, we could make a good deal of progress very quickly.

The country is now faced with 72 current vacancies. It is now past the middle of June. There are less than 15 weeks left in session this year for the Senate for hearings, Committee consideration and Senate consideration, debate and votes on these nominees and those that continue to be received. Up until this week we have received 42 judicial nominations that are currently pending.

By June 18 last year, the Committee had held seven judicial confirmation hearings and the Senate had confirmed 29 judges. By June 18 in 1991 (President Bush's third year with a Democratic Senate), the Committee had held five hearings and the Senate had confirmed 14 judges. By June 18 in 1987 (President Reagan's third year in his second term with a Democratic Senate), the Committee had held seven hearings and the Senate had confirmed 13 judges. The Committee hearing schedule is behind even the pace of 1996, when the Senate confirmed a record low 17 judges all year and no judges to the Courts of Appeals.

The Committee has found occasion to hold 36 hearings and another 10 business meetings so far this year, for a total of over 45 proceedings. In spite of the fact that the President has been sending us judicial nominations since January 26, this is, regrettably, our first confirmation hearing.

More than a year ago, Chief Justice William Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." The New York Times reported recently how the crushing workload in the federal appellate courts has led to what it calls a "two-tier system" for appeals, skipping oral arguments in more and more cases.

Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These

are not the ways to continue the high quality of decisionmaking for which our federal courts are admired or to engender confidence in our justice system.

The Ninth Circuit, to which Marsha Berzon has been nominated, is a good example. It has had between seven and 10 vacancies on its bench for more than four years. The Judicial Conference recently requested that its numbers be increased by an additional five judges to handle its workload. That means that while Ms. Berzon's nomination has been pending and five other nominations are pending to the Ninth Circuit, that Court has been forced to struggle through its workload with 12 fewer judges than it needs.

When the President and the Chief Justice spoke out, the Senate briefly got about its business of considering judicial nominations last year. Unfortunately, some have returned to the stalling tactics of 1996 and 1997 and judicial vacancies are again growing in both number and duration. Chief Justice Rehnquist wrote at the end of 1997: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down." The Senate is not voting on nominees. The Senate is not defeating judicial nominations in up or down votes on their qualifications but refusing to consider them and killing them through inaction.

The Senate is back to a pace of confirming fewer than one judge a month. That is not acceptable, does not serve the interests of justice and does not fulfill our constitutional responsibilities. For the last several years I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

Marsha Berzon is an outstanding nominee. By all accounts, she is an exceptional lawyer with extensive appellate experience, including scores of cases heard by the Supreme Court. She has the strong support of both California Senators and a well-qualified rating from the American Bar Association.

She was initially nominated in January 1998, almost 17 months ago. This is her second confirmation hearing. Last July she participated in extensive proceedings and answered every question posed by the members of this Committee. Despite that progress, despite the efforts of Senator Feinstein, Senator Kennedy, Senator Specter and myself to have her considered by the Committee, she was not included on an agenda and not voted on during all of 1998.

We are now more than half way through 1999 and she is back having yet another hearing. I urge the Committee to end the delays and favorably report the long-standing nomination of Marsha Berzon to the United States Court of Appeals for the Ninth Circuit. Must this nomination be forced to extend past the two-year time line for the confirmation of Judge Margaret KcKeown to the Ninth Circuit or the 21 months that the nomination of Margaret Morrow to the District Court for the Central District of California was pending before each was overwhelmingly approved by the Senate? Confirmation of this outstanding woman should be delayed no longer.

I also look forward to the Committee completing its consideration of the other nominations included in today's hearing for vacancies in California, Connecticut, Texas, Mississippi and South Dakota, and the remaining vacancy on the Second Circuit. Four have been pending all year and the other three since early March.

During Republican control of the Senate, it has taken two-year periods for the Senate to match the one-year total of 101 judges confirmed in 1994, when we were on course to end the vacancies gap.

What progress we started making last year has been lost and the Senate is again failing even to keep up with normal attrition. Far from closing the vacancies gap, the number of current vacancies has grown from 50, when Congress recessed last year, to 72. Since some like to speak in terms of percentage, I should note that is an increase of over 40 percent in the last eight months. Judicial vacancies now stand at over 8.4 percent of the federal judiciary (72/843). If one considers the 69 additional judges recommended by the judicial conference, the vacancies rate would be over 15.3 percent.

Progress in the reduction of judicial vacancies was reversed in 1996, when Congress adjourned leaving 64 vacancies, and in 1997, when Congress adjourned leaving 80 vacancies and a 9.5 percent rate. No one was happier than I that the Senate was able to make some head way last year toward reducing the vacancies in 1998. I have praised Senator Hatch for his effort. Unfortunately, the vacancies are now growing, again, back up to 72 vacancies and over an 8.4 percent vacancy rate.

Nominees like Marsha Berzon, Justice Ronnie L. White, Judge Richard Paez, and Timothy Dyk deserve to be treated with dignity and dispatch—not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal

judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. They are left to twist in the wind. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

Our independent federal judiciary sets us apart from virtually all others in the world. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence.

The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

Senator LEAHY. I do want to point out again on the hearings that we should not compare this to 1993, the President's first year, as compared to the seventh year of a President's term in office. The first few months of that administration we had a confirmation of a new Attorney General that took four hearings over 3 months. We had 6 days of hearings in May and June of other top Justice Department nominations and a Supreme Court nomination. This year we have not had a hearing on executive branch nominations, and the average time for Senate action on the judges confirmed was about 200 days.

The CHAIRMAN. Let's be glad we are having a hearing now.

Senator LEAHY. I am delighted, and I compliment you on that. I really do. And I mean that most sincerely.

The CHAIRMAN. We are happy to welcome both of you here. We hope you will introduce your family members and friends that you have with you, and if you have any statement you would care to make, we will start with you, Ms. Berzon, and then with you, Mr. Katzmann.

TESTIMONY OF MARSHA S. BERZON, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Ms. BERZON. I do not have any statement. I would like very much to thank you, Mr. Chairman, for holding this hearing. I would like to introduce, in addition to my husband and my children, who were already introduced, my parents, Jack and Sylvia Siegel, who are here from New York. My mother was not able to join us last year at the hearing. I am very pleased that she is here this year. Also, my sister, Mary Berzon, who is from Virginia; my brother, Arthur Siegel, who is an accountant in New York; and my long-time law partner and friend, Fred Altshuler, who is here as well.

Finally, I would like to say that my sister, Beth Siegel, from Massachusetts was not able to be here today, and my mother-in-law, Ethel Spitzen, from Boca Raton, FL, was also not able to be here today because of her health.

The CHAIRMAN. We are happy to welcome your family and your friends and relatives here, and we are grateful we finally have you here for this second hearing, really, and we are going to try and move ahead as quickly as we can.

Do you have any further statement to make, Ms. Berzon?

Ms. BERZON. No, I don't. Thank you very much, Mr. Chairman.

The CHAIRMAN. Mr. Katzmann, we will turn to you. Introduce your family and friends or whoever you have with you.

TESTIMONY OF ROBERT A. KATZMANN, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. KATZMANN. Mr. Chairman, I would like to thank you for your great courtesy and the courtesy of your staff over these past several months, and also Senator Leahy. I would like to introduce my parents, John and Sylvia Katzmann; my brothers, Gary Katzmann, who is a career—my identical twin brother, Gary Katzmann, who is a career prosecutor in the U.S. Attorney's Office; my brother Martin Katzmann; and my many friends who are here as well. My sister, Susan, unfortunately, could not make it, and her family as well.

Finally, I would like to say a special word of thanks to Senator Schumer and Senator Moynihan for their very generous introductory remarks. Nearly a quarter century ago, Professor Moynihan prepared me for my generals in American Government at Harvard, and in the ensuing years, there is no one who has had a greater impact on my life in his role as teacher, mentor, and friend. And I am so grateful to him and to Liz Moynihan and to Michael Patrick for coming here today. They are really friends for hard winters.

Thank you.

The CHAIRMAN. We are happy to welcome your family and, of course, we are very proud of Senator Moynihan ourselves. He has been a great Senator. He came to the Senate at the same time I did, and so we have been good friends all through these years.

We are happy to have both of you here. Now, we have a rollcall vote, so I hope that some will go vote now and then come back so you can ask questions.

Senator SESSIONS. Mr. Chairman, I am supposed to preside at 4 o'clock. I don't know if others have a pressing need, but if you could allow me a few questions at the beginning. If not, I will understand.

The CHAIRMAN. I will be happy to yield my time to you, Senator, and we will let you take the time, and then if others could go vote and then come right back, then Senator Leahy and I can go.

Go ahead, Senator.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman. I think both of these are extraordinarily skilled lawyers, and I appreciate your abilities, and I did enjoy very much, Ms. Berzon, our conversations. Maybe we did take too long, but it was a very interesting discussion, and I enjoyed it very much. And I thought I would ask a couple of followup questions.

And you know—and I think I made it clear, and I have made it clear to others—that I am concerned about the ninth circuit. The New York Times has said the Supreme Court considers it a rogue circuit. It was reversed, I believe, 29 out of 30 times in 1997 and 1998. And in evaluating a nomination for the ninth circuit, I have publicly said I want to be sure that any nominee is going to help bring it back into the mainstream of American law as set by the

Supreme Court. And so any questions I make, maybe in a different circumstance at a different time I wouldn't be as insistent about it. But I think it is important. And I don't intend to support nominees unless I really believe that it has a possibility of improving that court.

I remember I asked you about Justice Brennan's decision on the unconstitutionality of the death penalty. He believed that the death penalty was unconstitutional. And I told you I thought that that was unfounded because there are multiple references to the death penalty and capital crimes in the Constitution. And I asked you whether or not you shared my view and how you felt about Mr. Justice Brennan's view, and you said you did not like to say what you agree with and what you do not agree with when you haven't had time to think about it. Fair enough.

Have you had time now and would you like to comment now?

Ms. BERZON. I would like to say first that I also very much enjoyed our discussion last year, and I certainly have had a chance to think about it and to go back and look at the Constitution. And having done so, I would certainly agree that the indications of that document are that the Framers of the Constitution understood that capital punishment would be permitted under that Constitution.

There are, as you note and as the Supreme Court noted in *Gregg* v. *Georgia,* many references in the Constitution which indicate that the Framers certainly understood that there would be capital punishment under the Constitution.

Senator SESSIONS. And as a justice, do you feel it would be your duty to ratify in your opinions the understanding of the Framers when they adopted that Constitution and carry out its intent?

Ms. BERZON. As a judge of the ninth circuit, my primary duty and initial duty will be to follow the direction of the U.S. Supreme Court. The U.S. Supreme Court on this question has been quite clear about its conclusion that the death penalty is constitutional, and I will, of course, faithfully and completely apply that conclusion.

Senator SESSIONS. How do you feel about Justice Brennan's view that somehow despite these references and clear, explicit statements of approval of the death penalty in the Constitution explicitly written that he still would find it unconstitutional? Do you affirm or reject that view?

Ms. BERZON. I was a law clerk to Justice Brennan, as you know. I admire him enormously as a man and as a mentor. I do not agree with everything that he said, and I think in particular that I intend to take a more literal view to statutes and to constitutional provisions than he does. It makes me more comfortable, and it is the way I tend to think.

The CHAIRMAN. Could I interrupt for just a second? I notice our two Congressmen from Texas are here in support of the two Texas nominees, and we just want to recognize both of you. Congressman Hall, you have been a friend for a long time, and we are really glad to have you here. And also you, Congressman Sandlin, we are very appreciative that you would come over and lend support to these two Texas nominees.

Mr. HALL. Thank you, Mr. Chairman and members.

The CHAIRMAN. I apologize for not introducing you first. I should have done that.

Mr. HALL. We had to vote.

The CHAIRMAN. That is what I figured. You went to vote, and I certainly wanted to——

Senator LEAHY. We understand that.

The CHAIRMAN. I recognized you in absentia. We will put it that way. But we are happy to have you back.

Go ahead, Senator. I am sorry.

Senator SESSIONS. All right. Briefly, I asked you previously about—I followed up in writing with a question I raised at our initial hearing, and to refresh your recollection, you responded in August 1998, and I had asked you that if when you were vice president of the ACLU in Northern California you approved the ACLU's filing of a lawsuit in *Michele AG* v. *Nancy S.* case. In that case, the ACLU's argument was that a homosexual partner who is neither an adopted or biological parent could be deemed a "parent in fact." The ACLU did take that position, and it was rejected by the California Court of Appeals. And I was conferring a little bit with your answer and would like to follow up.

In your written answers, when I asked you about your connection with this lawsuit, you replied that you "had no recollection of this case until asked about it in connection with the hearing." Then you later in those written answers said you "checked with the ACLU NC"—Northern California—and learned that you were "not present at the meeting at which the case was considered," even though you were chair of that legal committee that set them—approved the filings. And then next you stated that you "learned on inquiry" that a close vote by the board as to whether or not to file that had occurred. It had been proposed by the staff, but that you "do not recall" how you voted or whether you voted and that the ACLU had no records specifying how you voted.

However, in your testimony before the committee, it indicates that voting on cases is not a routine proceeding by the ACLU, and it only occurs if "there is a dispute in the legal committee," which you chaired, or if someone specifically asked for a vote. In fact, your written answer indicated that it was a close vote by the over 30-member staff.

Given the controversial nature of that case and as evidenced by the fact that the board you chaired was closely divided over the issue and the fact that the votes of this kind appear to be an exception rather than the norm for the committee, would you share with us how it is that we ought to understand you don't remember that? And did you take a position that—have you been able to recall any position you took, and can you tell us more about your participation in that?

Ms. BERZON. The case, just to clarify for some of the other members who were not at the hearing and may not have read the questions, was one that dealt, as I understand it from reading the reported opinion—and I want to make clear that I have never seen the brief that the ACLU filed in this brief—in this case. I don't ordinarily see them. I would not have ordinarily seen them. And in this particular case, it was under seal, so I couldn't see it even after I was asked.

Not having seen it, I can only react based on the written opinion that resulted, and that opinion indicates that while the particular individuals who were having a visitation dispute here were homosexual partners who had been parenting this child, the issue in the case really had nothing to do with them being homosexual partners—that is, one could have been a grandparent who was rearing the child or a stepparent who was rearing the child or a fosterparent who had been with the child for a long time. And the issue was one of whether people of that kind who the child will be severed from have some interest in visitation.

The issue is a very complicated one, as the justice who wrote the opinion for the California Supreme Court noted, on a policy basis and one he concluded was properly for the legislature, and I would agree with that conclusion.

I have no specific recollection of the debate, although I did learn, as I said in my answers, that it was a closely divided vote. I suspect—and I very much hesitate to say how I might have voted because I don't have a clear recollection, but I suspect that in a circumstance like that I would probably abstain. And the reason I suspect that is I tend in my participation in the ACLU to be most interested in issues and most concerned about issues having to do with the first amendment, with the rights of free speech and religion, and with discrimination, gender discrimination in particular. And issues of this kind are very far from my expertise or concern, and when it became as contentious as it did, apparently, from the vote, I would probably feel that I had little to add to the debate and probably would not have contributed. But I really don't remember.

Senator SESSIONS. So you don't remember how you voted on that.

Ms. BERZON. I don't remember.

The CHAIRMAN. Senator, your time is up.

Now, Senator Leahy would like to just ask a question or two before we go and vote.

QUESTIONING BY SENATOR LEAHY

Senator LEAHY. Ms. Berzon, you are familiar with the doctrine of stare decisis, I am sure.

Ms. BERZON. I certainly am.

Senator LEAHY. And do you accept that doctrine?

Ms. BERZON. I absolutely do.

Senator LEAHY. And so I can assume from that answer that the decisions of the U.S. Supreme Court you would feel would be compelling on your circuit?

Ms. BERZON. Absolutely, and if confirmed as a judge, I will follow them faithfully and carefully.

Senator LEAHY. And you would give great weight to prior decisions of your circuit?

Ms. BERZON. I will definitely do that.

Senator LEAHY. So it is safe to say that on decisions of the Supreme Court you feel your circuit is bound by that, and you as a judge would be bound by that.

Ms. BERZON. Definitely the ninth circuit is bound by the decisions of the Supreme Court, and I as a judge would be bound by them as well.

Senator LEAHY. But you as a judge are not bound in any way by past decisions of any organization, whether it is the ACLU or a social organization or any other organization. Those are not decisions that bind you. Am I correct?

Ms. BERZON. To the contrary, as a judge I will, of course, be bound only by precedent, by the language of any statutes, by the language of the Constitution, by precedents in other circuits to the degree that they are relevant and convincing, and I absolutely will give no credence whatever to the views of any organization, including the ACLU. Indeed, I would expect that I would rule against the position of the ACLU as often as that of any other organization.

Senator LEAHY. Looking at your background, I would not have expected any different answer. I am extremely impressed with your background. I hope that you will soon be sitting on that court.

Thank you.

The CHAIRMAN. Thank you, Senator. We are going to have to go vote. As soon as Senator Smith gets back, he will ask some further questions, but we will recess until he gets back or until another Senator gets here and proceed as soon as I can get back.

[Recess from 4:02 p.m. to 4:30 p.m.]

The CHAIRMAN. If we could begin, I apologize for the delay. I am going to put the written questions of Senator Thurmond into the record, and I would hope that you would answer them as quickly as possible. He directs questions to both you, Ms. Berzon, and you, Mr. Katzmann, and then he sends questions to the other judges as well. So I would hope that you would answer any and all written questions as quickly as possible. We will keep the record open to have written questions to the nominees until Friday, the end of business on Friday, if that is all right.

[The questions of Senator Thurmond are located in the appendix.]

The CHAIRMAN. Now, Senator Smith, would you like to ask some questions or would you like me to go ahead?

Senator SMITH. Go ahead, Mr. Chairman. I will be ready in a minute. Why don't you go ahead?

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Thank you. OK.

Now, you have heard the questions, Mr. Katzmann, of Senator Sessions. Do you have anything to say about those particular questions?

Mr. KATZMANN. No, I don't.

The CHAIRMAN. OK; how would you answer them?

Mr. KATZMANN. The questions that were asked were in a sense—most of the questions seemed to be particular to various cases.

The CHAIRMAN. Right, that involve California, so you really don't have anything to say about that.

Mr. KATZMANN. Right.

The CHAIRMAN. Let me ask you, Ms. Berzon, you certainly have an extensive record in the area of labor law, something that I take a great deal of interest in as well, representing various labor organizations and some very renowned cases. Now, when many people hear labor law, they generally think of cases between unions and employers. Your experience, as I understand it, however, includes

instances in which you have been an advocate for unions in litigation against the employees they represent on issues ranging from the right of employees who choose not to follow the union's lead in striking to the right of employees not to pay a portion of union dues used for purposes with which they disagree.

Now, Ms. Berzon, given your experience, can you assure this committee that you can be fair and impartial in adjudicating the rights of employees vis-a-vis their unions?

Ms. BERZON. Yes, absolutely. In all of those cases, I was, of course, representing a client as an advocate. I am keenly aware of the difference between an advocacy position and the position of a judge on the ninth circuit or any other court of appeals. In that position, if I am fortunate enough to be confirmed, I am certain that I will be able and I commit that I will leave behind all positions of all of my clients and look with an open mind at the statutes at hand, at the precedents that are relevant, and at any constitutional provisions that are pertinent and so on.

The CHAIRMAN. So you will abide by the precedents as established by the Supreme Court?

Ms. BERZON. I am sorry?

The CHAIRMAN. You will abide by the precedents established?

Ms. BERZON. I absolutely will.

The CHAIRMAN. OK; I presume you will, too, Mr. Katzmann.

Mr. KATZMANN. Absolutely.

The CHAIRMAN. Now, Ms. Berzon, in correspondence to this committee last July, you identified *Ho* v. *San Francisco Unified School District*—that is a recent ninth circuit court case—as one in which the ACLU of Northern California participated while you were a board member.

Now, I have looked at the amicus brief the ACLU of Northern California filed in that case and was interested to note that the principal argument advanced in that brief is that the court "should apply intermediate scrutiny" not strict scrutiny as the appropriate level of review in a challenge to a racial quota that had the effect of limiting the percentage of Chinese school children who could attend San Francisco's public schools.

Now, do you agree with the position advanced by the ACLU of Northern California that the quota at issue was constitutional even though there had never been a judicial finding that segregation existed in San Francisco's school system?

Ms. BERZON. I am at something of a disadvantage because I first saw a part of this brief, and only a part of it, last evening and I read the opinion of the ninth circuit as well. I was actually under the impression—and I could be wrong—that there was a judicial finding or at least that there was a consent decree that served as a—that was confirmed by the court and, therefore, served as a judicial finding. But I am not sure it is relevant to the issues that were addressed in the amicus brief.

I know, as you do, Mr. Chairman, that the Supreme Court in *Adarand* v. *Peña* held that racial classifications are subject to the strictest of scrutiny, meaning that there has to be a compelling interest, and that any classification of that kind has to be extremely narrowly tailored. The ninth circuit held that the issues in that case as to meeting those standards were sufficiently undecided,

that there should be a trial on the question, and actually I know only from the newspapers that the case was settled before trial.

In my role on the board of the ACLU, as Senator Sessions noted, there are only votes held by the board in rare instances, and in this instance there was no vote held by the board and I was not on the legal committee. I did have a chance to check that much.

The CHAIRMAN. OK; and—did I interrupt you?

Ms. BERZON. I am sorry.

The CHAIRMAN. I thought I had interrupted you.

Ms. BERZON. OK.

The CHAIRMAN. You have mentioned the *Adarand* v. *Peña* case. Do you agree that the quota at issue in this matter should have been tested under only an intermediate scrutiny rather than strict scrutiny?

Ms. BERZON. It seemed to me that the ninth circuit opinion holding that it was subject to strict scrutiny was fully consistent with *Adarand,* and I would have no problem in applying that standard at all.

The CHAIRMAN. They indicated that it would be subject to only intermediate scrutiny not strict scrutiny.

Ms. BERZON. I am sorry?

The CHAIRMAN. They indicated that it would be subject to only intermediate scrutiny not strict scrutiny.

Ms. BERZON. They so argued, and it is not a position that I advocated. And as I say, I didn't vote on it either.

The CHAIRMAN. So you would be for strict scrutiny.

Ms. BERZON. I was fully comfortable with Judge Newman's opinion in the ninth circuit.

The CHAIRMAN. Now, Mr. Katzmann, the Founding Fathers believed that the separation of powers in a government was critical to protecting the liberty of people. Thus, they separated the legislative, executive, and judicial branches into three different supposedly co-equal branches of government, the legislative power being the power to balance moral, economic, and political considerations and make law, the judicial power being the power only to interpret laws made by the Congress and by the people.

Now, in your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people or to rebalance the competing moral, economic, and political considerations?

Mr. KATZMANN. I firmly believe that it is the role of the judge to accept the balance struck by the Congress and the people. It is inappropriate for a judge to reorient the calculus.

The CHAIRMAN. Making of law to me is a very serious matter. To make constitutional law, two-thirds of each House of Congress and three-quarters of the States must formally approve the words of an amendment. To make statutory law, only a majority of each House is necessary, and usually the President must formally approve the words of a statute.

This formal approval embodies the expressed will of the people through their elected representatives and thus raises the particular words of a statute or constitutional provision to the status of binding law. Words, theories, and principles that lack this formal ap-

proval are not backed by the will of the people and thus do not rise to the level of legitimate law.

Would you agree that the further a judicial opinion varies from the text and the original intent of a statute or constitutional provision, the less legitimacy it has?

Mr. KATZMANN. I certainly do agree with that. I think in an article, which I, frankly, quoted in my book, "Courts and Congress," which you wrote in the Harvard Journal of Law and Public Policy, you talk about the slippage that can occur the further one gets away from the text of the statute. And I believe that clearly that is a problem if a judge inserts his or her own views about what a statute should mean by moving away from the words of the statute.

The CHAIRMAN. Let me ask both of you this question: Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional? Let's start with you, Ms. Berzon.

Ms. BERZON. The circumstances in which it is appropriate for a court to declare a congressional statute unconstitutional are, of course, quite rare. Such statutes come to the Court with a strong presumption of constitutionality, and in looking at such constitutional arguments, if I were confirmed, I would look carefully at any precedents of the Supreme Court or of the ninth circuit. But absent a compulsion by them to declare a statute unconstitutional, I would do so only when it appeared to be compelled by the constitutional language or by the clear intent and the meaning of the Constitution.

Mr. KATZMANN. I think, Mr. Chairman, that a court should be very wary about declaring unconstitutional an act of Congress. When you look at the constitutional structure, there is article I, the legislative article, article II, the executive, and article III, the judiciary. I would submit that the order suggests that there should be caution on the part of the judiciary in terms of upsetting the law that Congress has made. So I believe that only in the rarest of circumstances would it be appropriate to declare an Act of Congress unconstitutional. There would have to be clearly a very compelling reason to do so. It would have the presumption—an Act of Congress has the presumption of constitutionality.

The CHAIRMAN. Thank you. My time is up.

Senator Smith, do you have questions?

QUESTIONING BY SENATOR SMITH

Senator SMITH. Thank you, Mr. Chairman. Good afternoon to both of you.

I missed Senator Leahy's questioning, but I understand, Ms. Berzon, that Senator Leahy asked you if you felt that the death penalty was unconstitutional, and you replied that it was constitutional. Is that correct?

Ms. BERZON. Yes; the U.S. Supreme Court has so held.

Senator SMITH. I am sorry. Senator Sessions' question.

Ms. BERZON. Senator Sessions did ask me that, and, yes, I agreed with him that——

Senator SMITH. Is that your view as well, Mr. Katzmann?

Mr. KATZMANN. Yes; the Supreme Court has firmly spoken on that issue, making note of a number of clauses in the Constitution which suggest that there is room for capital punishment.

Senator SMITH. Do either of you have any moral or religious or any other personal convictions that would keep you from voting to apply the death penalty in an appellate case?

Ms. BERZON. I do not.

Mr. KATZMANN. Neither do I.

Senator SMITH. On the issue of judicial precedent, what is your view on judicial precedent? I think Senator Leahy asked you about judicial precedent, and I missed that. I think you replied that you supported judicial precedent. Is that correct?

Ms. BERZON. I certainly do. I would be constrained as a ninth circuit judge to follow the precedent of both the Supreme Court and the ninth circuit, and I would do so.

Senator SMITH. Even if you viewed the decision to be wrong?

Ms. BERZON. Yes, even if I viewed the decision to be wrong, with the minor caveat that in the ninth circuit there are times when there are votes as to whether to hear a case en banc, and in that case I would vote in accordance with the guidelines of the ninth circuit whether to hear the case en banc.

Senator SMITH. Is that your view as well, Mr. Katzmann?

Mr. KATZMANN. Yes; I think that if you don't follow precedent, you are inviting judicial activism, which I would deplore.

Senator SMITH. Well, let me ask you a tough question on judicial precedent. Were you to have been on the Supreme Court in 1867 when the *Dred Scott* case came down, Judge Tawney indicated in that decision, the majority decision, that *Dred Scott* was a personal property and, therefore, could not sue in Federal court. We now had precedent that was never overturned by the courts, but it was overturned by some amendments to the Constitution. So if you had had the chance to vote to reverse that judicial precedent, how would each of you have voted?

Ms. BERZON. If you would like me to begin, it is a provocative question, and I note that there is also a set of precedents from the Supreme Court regarding the very rare circumstances in which overturning precedent is appropriate. And one of those circumstances is that it is more appropriate in constitutional than in statutory cases because, with regard to statutory cases, Congress can alter the statute much more easily than it can alter the Constitution.

Now, you have actually pointed to one instance in which Congress did alter the Constitution, or Congress and the people altered the Constitution, but that is relatively rare.

So there is slightly more room in a constitutional case, but, again, as a ninth circuit judge, it would be quite rare because that prerogative is primarily that of the Supreme Court.

Senator SMITH. Same question, sir.

Mr. KATZMANN. I would emphasize, too, that in terms of the position for which I am being considered as an appellate judge, I am bound to follow precedent. The issue as to what I would do if I were a Supreme Court Justice is not something that I have actually fully considered at this moment. But in the case of *Dred Scott,*

when we think about precedent, there are a lot of different questions that one might think about.

One issue might be how long has the precedent been in existence, how long has it stood in existence. That might be of some use. But, on the other hand, if you always stick to precedent at the Supreme Court level, then you would never have had a reversal of *Plessy* v. *Ferguson.*

Senator SMITH. That was my next question.

Mr. KATZMANN. So that there are circumstances in which at the Supreme Court level, where because there is a recognition that a decision was clearly wrong, that there may be some basis for a change in precedent. But at the appellate level, I think the obligation of the judge is to follow the precedent regardless of whether the appellate judge agrees with it or not.

Senator SMITH. Do you have the same view on *Plessy* v. *Ferguson,* Ms. Berzon?

Ms. BERZON. Yes, I do. And as I said, the considerations here with regard to the Supreme Court and appellate courts are really quite different.

Senator SMITH. No, I understand, but the issue in a generic sense was judicial precedent, and I think you both admittedly stated that you didn't feel that would necessarily be the case at the appellate level. You did give a qualifier on both your answers. I just want to make sure the record is straight. You both gave me a qualifier on judicial precedent on both *Plessy* v. *Ferguson,* which was overturning segregated schools, and *Dred Scott,* which was not allowing a black man who was considered property to sue in Federal court. So you did give two qualifiers.

I don't want to misrepresent what you said, but that is the way I read what you said. So now I am going to get you to the least controversial of all the questions I have asked so far, but that is why I wanted to hear your answers to these questions first, which is—I was being funny—the issue of abortion, which is obviously one of the most controversial issues of the day. So if we use the issue of judicial precedent in *Roe* v. *Wade,* what is your view on *Roe* v. *Wade,* each of you?

Ms. BERZON. The Supreme Court, as you know, spoke to that precedent in *Casey* v. *Planned Parenthood,* both with respect to its continuation as precedent and with respect to the precise standard that is applicable under *Roe* v. *Wade* as modified by *Casey. Casey* fully explored the stare decisis considerations, and, again, as a circuit court judge, I am bound by *Casey* in that regard.

Casey held that balancing the women's—the State's concern for fetal life beginning at conception against women's constitutional right that the applicable standard is whether there is an undue burden on that right, and in applying that standard has held certain regulations of abortion, including parental consent, waiting periods, and others, valid. Again, as a ninth circuit judge, I would apply both the general standard and the particular precedents carefully and faithfully, and I would have no opportunity really to consider whether it should be changed, and I would not do so.

Senator SMITH. Mr. Katzmann.

Mr. KATZMANN. As an appellate judge, I am bound to follow the precedent of the Supreme Court. *Casey* is, in a sense, the defining

case as it modifies *Roe* v. *Wade,* suggesting that restrictions on abortion would be upheld so long as there is not an undue burden.

As an appellate judge, I am bound to follow that regardless of my own personal preferences.

Senator SMITH. In a personal sense, if both of you could answer this, do you believe that an unborn child is a human being?

Ms. BERZON. As I said, Senator, my role as a judge is not to further anything that I personally believe or don't believe, and I think that is the strength of our system and the strength of our appellate system.

The Supreme Court has been quite definitive quite recently about the applicable standard, and I absolutely pledge to you that I will follow that standard as it exists now, and if it is changed, I will follow that standard. And my personal views in this area, as in any other, will have absolutely no effect.

Mr. KATZMANN. My concern, Senator, is that when judges enact their personal preferences, whether for or against a particular issue, there is a danger of judicial activism. It is a recipe for judicial activism because it then means that judges pick and choose what they want to enforce in the law according to their own personal preferences.

What I can say to you is that I will faithfully apply the law as the Supreme Court has laid it down, whatever the precedent of the Supreme Court might be in that area at any time.

Senator SMITH. Well, look, and I want to say to both of you I appreciate the fact that you are answering my questions. That is not always the case here, and you are, I think, making an honest attempt to answer the questions, and I appreciate it. But I think what we have in the case of—I agree with you on judicial activism on either side of the political spectrum. I am not in favor of judicial activism. I think that judges and Justices should support the Constitution pretty much in a constructionist way as it is written.

The difficulty for me, and I think for many, on *Roe* v. *Wade* is that by making abortion the law of the land, many would say there is nothing in the Constitution that would provide for that kind of decision to be made. There is no mention of abortion in the Constitution. There is mention of life and the protection of life, but there is no mention of abortion.

And so I think what we have here is an opportunity to say that a life could be taken at any stage; although it is not frequently done in the third stage, there is no restriction on that. And that is the reason I am asking the question. Does the unborn child have a right to life at any point during the 9 months of pregnancy? And if so, at what point? And I think that is a fundamental question that I don't think is an unfair question for a person who, although it is the appellate court, could very well at some point be considered at a higher court, and also very well could face a decision dealing with that issue on the appellate court.

So that is the question that I would like to ask. Does the unborn child have a right to life at any point during the pregnancy? And if so, when, in your view?

Ms. BERZON. My understanding of what the Supreme Court ruled in *Casey,* which is the case that I would be constrained to apply if I am confirmed to the ninth circuit, is that the State does have

an interest in the life of the child from the time of conception, but that there is a competing interest as well in the women's medical rights and otherwise, and that the result of balancing those competing rights, the Supreme Court has instructed us is that the right to abortion is upheld as long as—only if there is no undue burden on the right to abortion.

I have no choice but to answer you that that is what I would apply if I was on the ninth—if I was confirmed to the ninth circuit. And if I answered anything else, I would not be faithful to the role that I will have as an appellate judge.

Mr. KATZMANN. I think that the Court recognizes that the State has an interest in the protection of the child, but there are these competing interests and concerns. One is bound to follow the precedent of *Casey,* and I think that in a sense, if I might say, that when there are nominees to the Supreme Court, that is where one can really change, if one wants to, influence the direction of policy because at the appellate level you are supposed to follow the precedent regardless of how one personally would come out on a particular issue.

I know that is an answer of judicial restraint, but I firmly believe it.

Senator SMITH. Well, let me move it all the way to the end to the most dramatic of all abortions, which is the so-called partial-birth abortion. There is a possibility, although not likely, that we will overturn the President's veto on this. Were that to happen, it would be in the courts, and the constitutionality would have to be determined of that act.

Is the partial-birth abortion ban, as we now know it, the law, the bill that has been passed that has not become law, is that in your view constitutional or unconstitutional as you interpret the Constitution? Mr. Katzmann, why don't you start?

Mr. KATZMANN. I would say that that is an issue that—Senator, that is a very important issue, and that as a judge, I would really have to evaluate that issue in the context of a law that is actually passed, and then in terms of a case or a controversy. In terms of adjudication, there are restrictions on judges rendering advisory opinions on particular pieces of legislation in the advance of passage. And then even after passage, I think what a judge has to do is to evaluate the case in the context of a real case or controversy.

I think the questions that you raise are very important ones and serious ones, and you can be sure that if I ever had a chance to rule on that kind of an issue, I would really be as faithful as I could to the Constitution, recognizing the presumption of legislation to be constitutional.

Ms. BERZON. And I essentially agree with that answer. I note again that the *Casey* standard would be the applicable one, and that the answer might turn on the details of the particular statute. I understand that there have been some partial-birth or late-term abortion statutes that have been held unconstitutional, but apparently for reasons having to do with the particular scheme at hand.

Again, the standard would be whether there was an undue burden on the right to abortion, taking into account the State's interest in life from the time of conception, and that is the standard I would apply. It would be obviously inappropriate to say anything

further than that precisely because the issue might come before a court on which I or Mr. Katzmann could be sitting.

Senator SMITH. Your term "competing interests," though, is an interesting one because you are viewing the term competing interests between the mother and the unborn child. Would you take that competing interest to two individuals, one of whom tried to kill the other one? You don't carry it that far, do you?

Ms. BERZON. Again, I am simply repeating the standard that the Supreme Court has articulated, and it is not my standard.

Senator SMITH. But we indicated twice now in two different examples, by your own admission, that the Supreme Court was wrong at least twice in American history, once in *Dred Scott* and once in *Ferguson,* very dramatic and important cases.

And I would say just for the record—and I am not looking to argue; I have learned after many years of this that arguing doesn't do any good, but discussing sometimes does. I would argue that in the case of *Ferguson,* segregation was a horrible situation, as was the situation of determining that a black person was property and therefore had no legal right to sue. Those were both dramatic departures from the norm from what is right and wrong in America.

And I would venture to say I would add number three to that, and that is the taking of a life of an innocent unborn child, 35 million of which, 35 million of which, have been lost since the *Roe* v. *Wade* decision in 1973. They will never have a chance to be a judge. They will never have a chance to be a mother or a father because of a law that was passed—a Court decision that was made, excuse me, which denied them that opportunity.

And neither one of you are willing to sit here and tell me that you think that is wrong. Is that correct? I mean, I haven't heard anybody say it yet. So 35 million children never have a chance to be here or to be up here or to be out there and have the opportunity to live their dream because of a Court decision.

And had it not been for the guts of somebody in *Ferguson* and the guts of somebody who wrote those 13th, 14th, 15th amendments, we may still have slaves in this country that would never be able to sue. And we may very well have segregation in this country.

The CHAIRMAN. Senator, if I could——

Senator SMITH. A last point, Mr. Chairman. You have been very patient.

The CHAIRMAN. Yes.

Senator SMITH. And I think in this particular case, I would add abortion to that list, and I would say that 35 million children lost is a terrible comment on American society. And I deeply regret, really, with all due respect to both of you, that neither one of you can say that.

The CHAIRMAN. Well, Senator, if I could interrupt, you have asked some very appropriate and good questions. I interpret it a little bit differently. Both of them, in my opinion, have said that they are not sure how they would decide that case, and that they wouldn't want to give the opinion that they have now anyway without hearing all the facts and the evidence.

Senator SMITH. Well, I didn't ask about a specific case, Mr. Chairman.

The CHAIRMAN. No, but I mean——

Senator SMITH. I asked about their point of view, whether or not life was——

The CHAIRMAN. But they both say that that could likely come before them and they are going to have to decide it at that time. And that is a little different from saying that they would not find that process unconstitutional. And I don't know how they can say much more than that at this point in this meeting.

But I share the distinguished Senator's feelings and I share his point of view that it is a tragedy that we have had this issue go as far as it has in our American way of life. And I just hope that both of you will look at the precedents, and also look at what is right and wrong, if that case ever comes before you.

Senator SMITH. Well, I would just make a final point.

The CHAIRMAN. Sure.

Senator SMITH. In the case of the Missouri case where you represented the ADA in your amicus brief in the *Webster* case, I mean I assume you agree with the ADA's position on that case.

Ms. BERZON. Actually, in the—you are referring to me?

Senator SMITH. Yes, ma'am.

Ms. BERZON. In my brief, which was an extremely limited one, I did not address any of the abortion issues in that case as such. The only issue that I addressed was a first amendment issue regarding the communication between doctor and patients and that is all.

The CHAIRMAN. I think the question I would like to ask is will you set aside your own personal views and feelings in order to decide the case on the law rather on what your personal views are?

Ms. BERZON. Absolutely, and I believe that I have so indicated.

The CHAIRMAN. I will be honest with you, Ms. Berzon. On the Ninth Circuit Court of Appeals, we have people there that could care less what the law says. I mean, I hate to say it, and that is what causes me all kinds of problems here on the committee with putting Ninth Circuit Court of Appeals judges through because they are so afraid that we will just have more of the same.

And I have had very liberal judges come up to me and say it is a disgrace what they are doing out there, and they are hurting all of us who are sincere liberals who really want to abide by the law and implement the law as it is written.

Senator SMITH. Mr. Chairman, could I just make a point on that? I understand what both of the nominees have said here, and as far as judicial activism is concerned, I agree with what Mr. Katzmann said about judicial activism. But what I am saying is if you apply the standard of judicial precedent strictly that you never overturn the law, the you never make a decision, then you would never have overturned——

The CHAIRMAN. Nobody is going to——

Senator SMITH. Excuse me. You would never have overturned the *Ferguson* case of segregation and you never would have overturned the *Dred Scott* decision if there had been such a vote before the Court. And that is my only point and I am just saying that I believe abortion belongs in the same league with those other two cases. That is my point.

The CHAIRMAN. Well, it is a good point, no question.

Let me just say this, that I have seldom seen better qualified nominees for circuit court positions than the two of you. While we may differ on certain philosophical points, the fact of the matter is you are both highly qualified. You both have extensive experience in the law. And in your case, Ms. Berzon, you have been here—this is your second time, and it was an extensive, extensive hearing before that went on for hours and there is an extensive record with regard your nomination.

There is another vote, so let me just say this. We are honored to have you here. The President has submitted both of you and we will see what we can do to move your nominations ahead. And we appreciate the forbearance that you have had, in particular, Ms. Berzon. And, Mr. Katzmann, I have known you for quite a period of time. I have great regard for you, as well as Ms. Berzon.

There are many other questions we probably could ask, but I think in your case, Ms. Berzon, an awful lot of them have been asked. In your case, Mr. Katzmann, I am reasonably satisfied as to your qualifications and will do what I can to see that you both have an opportunity to serve on your respective circuits.

I would just ask that when you get there, don't be activist judges; be judges who really abide by the law and set a standard for judges that help us so that it doesn't come down to an issue of liberal or conservative, but it comes down to an issue of understanding the role of judges in our society so that we don't hurt our society.

But in any event, unless you have any further questions, Senator Smith, I think we will release both of you for today. We congratulate your families. I am going to do my best to have all of these judges who are up today on next week's markup. I can't do it by tomorrow because we do have written questions, and so forth. But by next week's markup, I will try and have you on the—and some of you may be put over for a week, so just understand the process. Anybody can put any item that appears first on the list over for 1 week, but then it has to be voted upon at the next markup. So we will move as expeditiously as we can.

Ms. BERZON. Thank you very much, Senator Hatch.

Mr. KATZMANN. Thank you very much, Mr. Chairman and Senator Smith.

The CHAIRMAN. Thank you both for being willing to serve.

[The questionnaires of Ms. Berzon and Mr. Katzmann are retained in committee files.]

The CHAIRMAN. Now, we have got about 15 minutes before I have to—we have got less than 15 minutes before I have to leave. I wonder if I can get the rest of you judgeship nominees to come take your seats. We have six chairs, so that ought to be all right.

Now, let me say at the outset that I believe this is an excellent panel of judgeship nominees. We have extensively looked at your backgrounds and your service to your communities and to the legal profession at large. So I come at this from a position of wanting to support each and every one of you. But let me quickly go through some questions so that we won't keep you too long here today, and then I think what we will do is just start with you Mr. Ellison and go right across.

Now, in general, Supreme Court precedents are binding on all lower Federal courts, and circuit court precedents are binding on all district courts within that particular circuit, as you all know.

Now, is each of you committed to following the precedents of the higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents?

Mr. Ellison.

TESTIMONY OF KEITH P. ELLISON, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Mr. ELLISON. Yes, I am, Mr. Chairman.

TESTIMONY OF GARY ALLEN FEESS, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge FEESS. Yes, Mr. Chairman, without question.

TESTIMONY OF WILLIAM ALLEN PEPPER, JR., OF MISSISSIPPI, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Mr. ALLEN. Yes, sir, I am.

The CHAIRMAN. Ms. Schreier.

TESTIMONY OF KAREN E. SCHREIER, OF SOUTH DAKOTA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA

Ms. SCHREIER. Yes, Mr. Chairman, I definitely am.

TESTIMONY OF STEFAN R. UNDERHILL, OF CONNECTICUT, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF CONNECTICUT

Mr. UNDERHILL. Absolutely, sir.

TESTIMONY OF T. JOHN WARD, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Mr. WARD. Absolutely, Mr. Chairman.

The CHAIRMAN. Thank you.

What would you do if you believed the Supreme Court or the court of appeals had seriously erred in rendering a particular decision? Would you nevertheless apply the decision on your own best judgment of the merits?

Take, for example, the Supreme Court's recent decision in *City of Boerne* v. *Flores*, where the Court struck down the Religious Freedom Restoration Act.

Mr. ELLISON. Whether I agree with the decision or not, it is my obligation to apply it. The only option for a judge who bitterly disagrees with the decision of a higher court is to tender his resignation, never to disregard a higher court's authority.

Judge FEESS. I agree with that, Mr. Chairman.

Mr. PEPPER. I agree with that, Mr. Chairman.

Ms. SCHREIER. I, too, Your Honor, would feel bound by the decision of the Supreme Court and would apply it.

Mr. UNDERHILL. I would feel compelled, Mr. Chairman, to apply the decision regardless of my personal views.

The CHAIRMAN. No matter how lame-brained it may be?
Mr. UNDERHILL. Absolutely.
Mr. WARD. That is correct. I agree 100 percent.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Well, I would be looking for some way of finding a way around the lame-brained decision, but the fact is you have all answered that the way I would like you to answer it. [Laughter.]

You have stated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal circuit court of appeals for your district. There may be times, however, when you will be faced with cases of first impression.

Now, I am tired of picking on you, Mr. Ellison, so I am going to start with you, Mr. Feess, because everybody agrees with you all the time. I get tired of that. [Laughter.]

What principles will guide you, or what methods will you employ in deciding cases of first impression, Mr. Feess?

Judge FEESS. Mr. Chairman, I think that the first question that the judge should ask himself is, is it really first impression, because lawyers are always trying to convince you that they have got the new case, the different case, the case of first impression. So I think the first job is to determine is it truly a case of first impression.

If so, the next step is to find out whether or not there is analogous precedent; is there something in another field or related field, something similar that the court can go to. If you are talking about a novel interpretation of a statute, of course, you have to go to the words of the statute and try to determine from the text what was contemplated in this unusual situation, as you posit it.

But I think first determine is it truly novel; second, if it is really novel, find analogous precedent and then try to determine what—based upon recent Supreme Court jurisprudence where the Supreme Court might go with it if they had the question.

The CHAIRMAN. I presume most all of you would agree with that. Anybody care to add anything to that?

[No response.]

The CHAIRMAN. All right. Let's start with you, Ms. Schreier. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the Equal Protection Clause of the 14th amendment and Federal civil rights laws, of the use of race, gender or national origin preferences in such areas as employment decisions, hiring, promotion or layoffs, college admission and scholarship awards, and the awarding of government contracts. In other words, what would be your best independent legal judgment?

Ms. SCHREIER. Mr. Chairman, under the *Adarand* decision, if race were to be used in giving a preference in hiring decisions or any other decisions, the court would have to apply a standard of strict scrutiny to determine whether or not that preference met a very narrow limit to address the reason for using that racial preference.

Under that strict scrutiny standard, it would be a very difficult standard to meet. It is a very high standard. And, in addition to

that, the remedy would have to be tailored to address the reason why the preference was being used.

The CHAIRMAN. OK; does anybody differ with that answer?

[No response.]

The CHAIRMAN. Now, you have heard the questions asked of the prior two panelists on capital punishment. Would any of you have any difficulty personally or otherwise in enforcing capital punishment?

Mr. Underhill.

Mr. UNDERHILL. No, Your Honor—excuse me——

The CHAIRMAN. That is all right.

Mr. UNDERHILL. No, Mr. Chairman, I would not.

The CHAIRMAN. Mr. Ward.

Mr. WARD. No, Mr. Chairman, I would not.

The CHAIRMAN. Ms. Schreier.

Ms. SCHREIER. No, Your Honor.

Mr. PEPPER. No, Mr. Chairman, I would not.

Judge FEESS. No, and, in fact, Mr. Chairman, I have presided over death penalty cases in my current position.

The CHAIRMAN. Mr. Ellison.

Mr. ELLISON. I would be able to preside over such a case, Your Honor.

The CHAIRMAN. I would have difficulty enforcing the death penalty. Even though I am for the death penalty, I would want it used very sparingly. But the fact is it is the law and you would be sworn to uphold that law and you are going to have to do it.

Do you have any moral beliefs or legal beliefs which would inhibit you from applying the law in that area, any of you?

Mr. ELLISON. No.

Mr. WARD. No, sir.

The CHAIRMAN. Do you believe that 10-, 15-, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a State legislature has made the policy decision that capital punishment is appropriate and that the Federal courts should focus their resources on resolving capital cases fairly and expeditiously—and I am talking about my own habeas corpus reform that the Supreme Court has upheld—do you believe that we should have 15- and 20-year delays in enforcing capital punishment, Mr. Ward?

Mr. WARD. Well, I would follow the reforms that you sponsored without question, Mr. Chairman, and I certainly think that 15 or 20 years is too long.

The CHAIRMAN. Well, we found through the years that innovative lawyers just bring up appeal after appeal after appeal. And what we have done is we have provided for very extensive appeals rights, both up through the State courts and the Federal courts, but ultimately a finality to it that literally stops it from being much more than 3 years.

Does anybody find any difficulty with that?

Mr. WARD. No, sir.

The CHAIRMAN. Doggone, there is no controversy in this group at all. [Laughter.]

It is starting to bother me just a wee bit here. There are a lot of other questions that I have for you. I think what I am going to

do is submit Senator Thurmond's questions and some of mine in writing.

[The questions of Senators Hatch and Thurmond are located in the Question and Answer section.]

The CHAIRMAN. I have confidence that all six of you—that each of you will make tremendous district court judges. I think you are good selections. I am proud to preside over your hearing, and I want to congratulate each of you and the President for having picked you.

Now, I am going to keep the record open for additional questions until the close of business on Friday, and I would suggest that you immediately answer those questions because if you don't, I can't put you on next week's markup. So we will need those answers right back and I want to process you as quickly as I can.

So I just want to congratulate each and every one of you and the President himself. You are all outstanding people, and we have had terrific Senators come and speak for you today and I have been very impressed with the remarks that they have had for each of you. So you ought to thank them because that plays a very significant role in this process, believe it or not.

So with that, I think we will just recess until further notice and we will try to put you all on next Thursday's markup, the Thursday after tomorrow.

Thank you so much.

Mr. ELLISON. Thank you, Mr. Chairman.

Judge FEESS. Thank you, Mr. Chairman.

Mr. WARD. Thank you, Mr. Chairman.

[The questionnaires of Mr. Ellison, Judge Feess, Mr. Pepper, Ms. Schreier, Mr. Underhill, and Mr. Ward are retained in committee files.]

[Whereupon, at 5:16 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF MARSHA S. BERZON TO QUESTIONS FROM SENATOR ABRAHAM

Question 1. Blessing v. *[Freestone]*

Justice O'Connor's opinion for the Court in *Blessing* v. *Freestone,* 520 U.S. 329, which came down quite recently, in April of 1997, and which you handled pro bono at the Supreme Court level, states as follows:

> [I]t is not at all apparent that [what the plaintiff class you were representing was seeking in that case was] any relief more specific than a declaration that [the plaintiff class's] rights were being violated and an injunction forcing Arizona's child support agency to "substantially comply" with federal law requirements concerning child support. *Id.* at 346.

a. Is Justice O'Connor's description of the position you were arguing correct? If not, what is inaccurate about it?

Answer 1a. Justice O'Connor's opinion never described any position I argued to the Supreme Court. Her opinion *did* accurately describe the broad complaint dismissed by the District Court and the similarly broad Ninth Circuit opinion, but I was not counsel nor in any way involved in the case until after certiorari was granted.

In undertaking representation at the Supreme Court level, I did not regard it as my job on behalf of my clients (five mothers seeking child support payments from their childrens' fathers) to be defending the scope of the complaint or of the Ninth Circuit opinion, and did not do so. Instead, my representation of my clients was directed toward obtaining a reversal of the District Court's categorical conclusion that there could be *no* circumstances which *any* right provided by Title IV–D, a complex statute specifying the services that must be made available to each custodial parent seeking child custody payments, can be judicially enforced. For example, the brief I filed explicitly observed, twice, that the only issue before the Court was the propriety of the District Court's total dismissal, not whether any particular remedy would be appropriate. The brief also argued that "because of the very specificity of the statute and the implementing regulations, the * * * fear that the judiciary would have to develop standards for running Arizona's IV–D program if plaintiffs prevailed is unfounded."

The Supreme Court, while reversing the Ninth Circuit's broad ruling, agreed in large measure with the position I advanced on behalf of my clients. The Court held that there is a "possibility that some provisions of Title IV–D give rise to individual rights" and sent the case "back to the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting." 117 S. Ct. at 1362. And the Court also held that "[t]o the extent that Title IV–D may give rise to individual rights * * * the Secretary [of HHS]'s oversight powers are not comprehensive enough to close the door on § 1983 liability," disagreeing with the District Court's ruling to the contrary.

Question b. Didn't the position you were arguing essentially amount to an invitation to the federal district court to take over the running of Arizona's child support system?

Answer b. No, the position I argued did not invite the District Court to run Arizona's child support system.

My assessment of the scope of the position I argued in *Blessing* is shared by my opposing counsel in that case, Carter Phillips. Mr. Phillips last year wrote a letter to the Senate Judiciary Committee commenting on that representation:

> Marsha did an extraordinary job of presenting her clients' position aggressively without overreaching. She presented solid limiting principles that would allow the lawsuit to go forward without placing too much of a burden on the State. I thought her submissions, both written and oral, dem-

onstrated a significant effort to balance the respective interests implicated by the legal issue. Even though the Court reversed what I believed was a plainly overbroad opinion by the Ninth Circuit, the Supreme Court's decision was relatively narrow and that reflected the quality and measured approach put forward by Marsha. Her advocacy demonstrated skill, integrity and sound judgment. These are precisely the traits I would want in an appellant judge.

I am attaching a copy of Mr. Phillips' letter.

Question c. Do you think that is an appropriate responsibility for a federal district court to undertake?

Answer c. No.

Question d. Wouldn't it, of necessity, have involved the court's saying something like "put more resources into child support" or "go about your enforcement efforts more diligently by doing the following things?"

Answer d. No, as I argued on behalf of my clients, if the plaintiffs prevailed a court could grant very specific, limited relief. The provisions of Title IV–D that are enforceable under § 1983 are unusually specific in requiring that particular services, spelled out in enormous detail in the statute and regulations, be provided to individual custodial parents. The courts could therefore devise a limited remedy essentially in the language of the statute simply ordering that specified services be provided. Such relief would not require the courts to make any substantive decisions at all about the resources, staffing, administration, or services of Arizona's child support system.

Question e. Shouldn't these kinds of decisions be made by other branches of the government, not the judiciary?

Answer e. Yes, decisions regarding staffing, funding, and other administrative matters are properly made by the legislative and executive branches, not the judiciary.

Question f. Since you undertook to represent the plaintiffs pro bono in this case, is it fair to conclude that you personally believed that it would be both legally proper and in the public interest for the Supreme Court to endorse this level of judicial involvement in Arizona's child support laws? If not, please explain why not.

Answer f. No. As explained above, I did not in my briefs or arguments to the Supreme Court endorse judicial management of the Arizona child support system, or argue in support of the complaint or the Ninth Circuit opinion insofar as either endorsed such broad judicial involvement.

Question g. Please explain how you came to be involved in this case.

Answer g. I became involved in the *Blessing* case after certiorari was granted. The lawyer who had principal responsibility for the case in the District Court and the court of appeals asked me to undertake the representation. I agreed to do so because I thought the plaintiffs deserved competent representation in their efforts to obtain child support for their children, and because the issues in the case involved complex and interesting issues as to which I thought I could aid the Court in resolving narrow threshold questions concerning the correctness of the District Court's dismissal of the entire case. (As it turned out, the state raised other, broader issues which I also had to brief on behalf of my clients but which the Court did not resolve because, as we argued, they were not properly before the Court.)

Question 2. People v. *Horton II,* 11 Cal. 4th 1068, 906 P.2d 478, 47 Cal. Rptr.2d 516 (1996). This is another recent case that you handled pro bono, in this instance before the California Supreme Court. As I understand it, your client in this case had been convicted of first degree murder and robbery. The jury concluded that he had smashed in the skull of his victim with a hammer, inflicting 12 separate injuries that left his victim alive, but to die later following surgery. He was sentenced to death, in part on account of a juvenile conviction for gang-related murder in Illinois. As I understand it, you succeeded, on a pro bono basis, in persuading the California Supreme Court to vacate the death sentence, principally by arguing that the Illinois trial court had committed constitutional error in connection with the juvenile convention rendered over 20 years earlier. I also understand that at the time of his original juvenile conviction, your client had appealed it through the Illinois courts, and the Illinois courts rejected his challenge. Finally, I understand that the constitutional position that you were arguing, that the conviction was tainted on account of the absence of defendant's appointed counsel when the judge decided to give an *Allen* charge rather than declare a mistrial, was not exactly one that was clearly mandated by the Constitution.

a. Since your representation of this defendant was also pro bono, would it be fair for me to conclude that in your view, the California Supreme Court's decision to en-

tertain this belated collateral challenge and vacate the death sentence on the ground that it had been reached in reliance on the juvenile conviction is both legally correct and in the public interest?

Answer 2a. As a point of information, my representation of the defendant in *Horton* was not pro bono. Rather, my firm was compensated by the California Supreme Court for representing Mr. Horton, as part of the Court's program of appointing and paying counsel for automatic death penalty appeals.

Given my firm's role as appointed counsel for Mr. Horton, my responsibility was to advance all possibly meritorious contentions on his behalf. The arguments made on Mr. Horton's behalf therefore do not represent either my legal or my policy conclusions.

For completeness, I would add that the California Supreme Court had decided dozens of death penalty cases on direct appeal immediately prior to *Horton* without reversing a death penalty. In doing so, the California Supreme Court had rejected many constitutional arguments because it determined those arguments to be unfounded in the precedents. As I read the *Horton* opinion, authored by Justice (now Chief Justice) Ronald George, the Court concluded that the constitutional right to counsel infringed in the Illinois litigation was firmly established in the precedents, and that it was also established that a death penalty based on an unconstitutional prior conviction could not stand. Specifically, Justice George wrote that "although the circumstances may be rare that will support a complete denial or representation at a critical trial stage, the record establishes that the defendant met his burden in the present case." 11 Cal. 4th at 1136. Similarly, the Court concluded that, in California, the right to challenge on direct appeal the constitutionality of a prior conviction that is the basis for a death penalty sentence was established by earlier state criminal procedure precedents, including in circumstances in which there had been an earlier appeal of the prior conviction.

I note that as a judge, my role would be entirely different from my role as an advocate. If confirmed, my task would be to consider the factual and legal arguments of advocates for both sides, and then come to a neutral, balanced conclusion on the basis of the facts, precedents, statutes, and constitutional provisions if any. In doing so, I would expect, as many lawyers have done on ascending the bench, to reject many positions I have advocated on behalf of clients; including those advocated on behalf of Mr. Horton.

Question b. Please describe how you came to be involved in this case.

Answer b. My firm became counsel in *People* v. *Horton* as the result of a specific request to me by the California Appellate Project (CAP), a nonprofit organization which at the time was assigned by the California Supreme Court the task of recruiting counsel for appointment in appeals of death penalty convictions, automatic under California law. The Executive Director of CAP called and informed me that there were insufficient qualified criminal appellate lawyers available to handle such appeals, and that he was therefore asking me and my firm, as well as several other lawyers and law firms without substantial criminal experience, to undertake such representation with substantive assistance from CAP. I understood the request to be on behalf of the Court, which could not process the appeals if there were not available lawyers to represent the defendants. My firm therefore agreed to take the representation, as did lawyers from many of the major San Francisco law firms at around the same time.

Question c. Please describe your client's current sentencing status.

Answer c. James Horton is under sentence of life without possibility of parole.

Question 3. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme court decision in the last thirty years? Please explain the rationale for your answers.

Answer 3a. The most important Supreme Court decision in the last thirty years is, in my view, *Buckley* v. *Valeo,* 424 U.S. 1 (1976). *Buckley* was significant because it established the basic constitutional principles governing the constitutionality of campaign finance legislation, and as such has had a major impact on the operation processes in this nation.

Buckley was also, in my view, the "worst" Supreme Court decision in the last thirty years, not in its outcome—which I am reluctant to judge, since I will be bound to apply it if confirmed as a judge—but in its broad scope. As a general matter, I believe that incremental, narrow judicial decisionmaking, going only so far as necessary to decide a particular case, yields the best long-term results, because such decisionmaking provides the opportunity to test legal theories against different factual situations that judges are unlikely to foresee in advance. The Article III "case or controversy" requirement so recognizes.

SIDLEY & AUSTIN,
Washington, DC, March 13, 1998.

Re Marsha Berzon's Nomination.

Hon. ORRIN G. HATCH,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write in enthusiastic support of Marsha Berzon's nomination by President Clinton to be a Judge on the United States Court of Appeals for the Ninth Circuit. I have worked on two cases in which Marsha was deeply involved: *Blessing* v. *Freestone,* 117 S. Ct. 1353 (1997); and *UAW* v. *Brock,* 477 U.S. 274 (1986). Both cases provided me with an opportunity to observe closely Marsha's abilities and professionalism. Based on those experiences, I have absolutely no doubt that Marsha would be a wonderful addition to the federal appellate bench.

In *Blessing,* Marsha was opposing counsel. She represented a class of plaintiffs who were seeking State assistance in obtaining child support from the plaintiff's spouses. The lawsuit was filed under 42 U.S.C. § 1983 and sought to order the State of Arizona to provide greater assistance to the plaintiffs based on obligations arising under federal child support legislation. Marsha was retained after the State had successfully obtained review of the case in the Supreme Court and the issue was whether the obligations of the child support statute could be enforced in a Section 1983 action against state officials.

The issue is very complicated and it raises relatively delicate federalism concerns. I thought Marsha did an extraordinary job of presenting her clients' position aggressively without overreaching. She presented solid limiting principles that would allow the lawsuit to go forward without placing too much of a burden on the State. I thought her submissions, both written and oral, demonstrated a significant effort to balance the respective interests implicated by the legal issue. Even though the Court reversed what I thought was a plainly over broad opinion by the Ninth Circuit, the Supreme Court's decision was relatively narrow and that reflected the quality and measured approach put forward by Marsha. Her advocacy demonstrated skill, integrity and sound judgment. These are precisely the traits I would want in a federal appellate judge.

In *Brock* Marsha and I were on the same side; I represented a group of organizations, which included the National Association of Manufacturers, the Sierra Club, the U.S. Chamber of Commerce and the Alliance of Justice, who filed an *amicus curiae* brief in support of Marsha's client. The legal question that brought such diverse interests together was whether the doctrine of associational standing should be abolished, which was raised by the Solicitor General as the respondent in the case. Marsha represented the petitioner in *Brock* and had presented a very solid argument on the merits, which caused the Solicitor General to respond with an argument that upped the ante in the case significantly. Marsha helped to bring the issue to the attention of the various organizations that would have been adversely affected by the Solicitor General's argument if it were adopted by the Court. I coordinated the presentation of the amici's arguments with Marsha briefing and was extremely impressed by Marsha's insights and analytic skills. Marsha won that case handily.

I am sure that there are other attorneys in private practice who know Marsha better than I do, but I doubt that there are many who are more enthusiastic about her becoming a federal judge. My mentor, Rex Lee, and I used to talk a lot about what kinds of judges we preferred appearing before and the answer was always the same—intelligent, experienced and open-minded individuals. Marsha has all of those qualities. In sum, she would be a judge that I would be extremely happy to have on any case because I know that she would understand the arguments completely and would apply the law faithfully. No advocate can ask for more than that. Accordingly, I urge you and the other members of the Committee to vote to confirm Marsha Berzon's nomination.

If you have any questions, please feel free to call me directly or to have someone on your staff contact me.

Sincerely,

CARTER G. PHILLIPS.

RESPONSES OF MARSHA S. BERZON TO ADDITIONAL QUESTIONS FROM SENATOR ABRAHAM

Question 1. In response to my question 1d regarding *Blessing* v. *Freestone,* you stated as follows:

> The provisions of Title IV–D that are enforceable under § 1983 are unusually specific in requiring that particular services, spelled out in enormous detail in the statute and regulations, be provided to individual custodial parents. The courts could therefore devise a limited remedy essentially in the language of the statute simply ordering that specified services be provided. Such relief would not require the courts to make any substantive decisions at all about the resources, staffing, administration, or services of Arizona's child support system.

Please provide the Committee a draft of what such an order would have looked like. I realize that because the case has been settled, there is in fact no such order and that I am asking you to draft a hypothetical order.

Answer 1. The Supreme Court in *Blessing* v. *Freestone,* applying to established standards for determining whether a federal statute establishes rights enforceable under 42 U.S.C. § 1983, held that the Ninth Circuit erred in finding that individuals have an enforceable right under Title IV–D of the Social Security Act to "substantial compliance" with the provisions of the statute as a whole. At the same time, the Court held that some provisions of Title IV–D may given rise to individual rights, and that such rights could be enforceable under § 1983. As I noted in may answer to your earlier question, my representation in the Supreme Court was directed toward overturning the district court's conclusion that under no circumstances can an individual enforce any aspects of Title IV–D under § 1983, not at the propriety of broad "substantial compliance" relief.

The Supreme Court in *Blessing* provided guidance as to the kind of relief that would be available if, on remand, one or more of the plaintiffs that individual rights accorded by Title IV–D has been violated:

> For example, respondent Madrid alleged that the state agency managed to collect some support payments for her ex-husband but failed to pass through the first $50 of each payment, to which she was purportedly entitled under the pre-1996 version of § 657(b)(1). Although § 657 may give her a federal right to receive a specified portion of the money collected on her behalf by Arizona, she did not explicitly request such relief in the complaint. 117 S. Ct. at 1362.

In other words, if the district court found after trail that the state was not remitting to Ms. Madrid a portion of child support payments due her and that Ms. Madrid had a federal right to such payments, the court could order that such payments be made thereafter, in accord with the directive of the statute as to amount and timing. *See* 42 U.S.C. § 654B, 657.

As a point of information, since the Supreme Court decision remanding the case for the purpose of clarifying the complaint and determining whether any particular, individual rights had been violated, I have not served as counsel in the case. For that reason, I have not seen any pleadings on remand, nor have I had any involvement in the court litigation or negotiations. I have not seen any settlement document, and have no knowledge of the substantive terms of any settlement that has been reached.

Question 2. At your hearing last year, Senator Feinstein asked you "Did you have any involvement with proposition 209?" You responded, "I had no role at all in the litigation whatever."

a. Apart from the litigation, did you have any involvement with the proposition itself, either in support of it or in opposition to it in some other way?

b. If so, please describe that involvement.

Answer 2a and b. I did not publicly support or oppose the proposition, or play a role in the campaign for or against its enactment. My involvement was to vote on Proposition 209 as a citizen of California, and to contribute $200 to the Campaign to Defeat 209 and $250 to the No on CCRI campaign.

RESPONSES OF MARSHA S. BERZON TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905) an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism (not including *Lochner* if your answer to the prior question was yes). Is *Roe* v. *Wade,* 410 U.S. 113 (1973) an example of judicial activism?

Answer 1. (a) Judicial activism is disregard of the limitations on the judicial branch of government imposed by the separation of powers and by the "case or controversy" provision of Article III of the Constitution. Under those limitations, judges

may not reach out to issue legal rulings beyond those necessary to decide the case before them, express their own policy preferences in the guise of statutory or constitutional adjudication, or invade the legislative role by making the law rather than interpreting it.

(b) *Lochner* is an example of judicial activism. In *Lochner,* the Supreme Court invalidated economic regulation on the ground that it was incompatible with a particular economic or social philosophy, *Ferguson* v. *Skrupa,* 372 U.S. 726, 729 (1963). By doing so, *Lochner* intruded the judiciary into an area properly reserved for legislative decision making.

(c) Three examples of judicial activism are:

(1) the *Dred Scott* decision, 60 U.S. 393 (1856). In *Dred Scott,* the Court first decided that it lacked jurisdiction. The Court nonetheless reached out to decide that the Missouri Compromise was unconstitutional. By issuing an advisory opinion unnecessary to deciding the ease before it, the Court destabilized a fragile political situation.

(2) *Swift* v. *Tyson,* 16 Pet. 1 (1842). In *Swift,* the Supreme Court assumed for the federal judiciary broad authority to create a federal common law. As the Supreme Court later concluded, the *Swift* rule was an unconstitutional assumption of power by the judiciary. It permitted the federal judiciary to announce rules of law based on judges' own policy predilections and invaded the independent role of the states in determining the legal principles applicable within their jurisdiction. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938).

(3) *Adkins* v. *Children's Hospital of District of Columbia,* 261 U.S. 525 (1923). In *Adkins,* the Court went even beyond *Lochner,* which had by the time of *Adkins,* been interpreted to permit courts to uphold many kinds of regulation of contracts, by invalidating entirely a broad category of governmental economic regulation on the basis of the court's own economic analysis. *Adkins* was reversed in *West Coast Hotel* v. *Parish,* 300 U.S. 379 (1937).

(d) With respect to the question of judicial activism in *Roe* v. *Wade;* I note that *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), expressly reaffirmed the essential holding of *Roe* v. *Wade.* Unlike *Lochner* and the other three cases listed above, then, *Roe* v. *Wade* remains binding Supreme Court precedent, as modified by *Casey.* If I am fortunate enough to be confirmed as a court of appeals judge, I would be obliged to apply and enforce *Roe,* as modified in *Casey.* In our hierarchical judicial system, a circuit judge must treat a presently applicable Supreme Court precedent as a proper exercise of judicial authority.

Question 2. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 2. *United States* v. *Lopez* held that the Gun Free School Zones Act of 1990, 18 U.S. § 922(q)(1)(A), making it a federal offense to possess a firearm in a school zone, is unconstitutional. The Court concluded that § 922(q) is beyond Congress' Commerce Clause powers because possession of a gun is not itself a commercial activity and the statute does not contain any requirement linking the particular possession proscribed to interstate commerce.

To determine if a statute exceeded the power of Congress under the Commerce Clause. I would apply the test articulated in *Lopez.* That test provides that Congress under the Commerce Clause may only regulate: (1) the use of the channels of interstate commerce, (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. In applying the third prong of this test, a trivial, attenuated, or speculative impact on interstate commerce is not sufficient. 514 U.S. at 558–59.

Question 3. Do you think that there is tension between the Supreme Court's holdings in *Romer* v. *Evans,* 517 U.S. 620 (1996) and *Bowers* v. *Hardwick,* 478 U.S. 186 (1986)? If there is, how would you reconcile that tension? If there is not, how are they reconcilable?

Answer 3. There is no tension between *Bowers* and *Romer* on the central issue of the standard of constitutional scrutiny generally applicable to governmental classifications based on sexual orientation. Both decisions apply the lowest level of constitutional scrutiny, the rational basis standard.

Bowers v. *Hardwick* held that governmental classifications regarding sexual orientation or preference are not in any way suspect, or subject to heightened scrutiny. Rather, such classifications are analyzed under the rational basis test, and, as such, are extremely unlikely to be held unconstitutional.

Romer v. *Evans* applied a rational basis analysis to a Colorado constitutional provision that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. The Court concluded that the Colorado

constitutional provision fails rational basis analysis because the Court "[could] not say that [it] is directed to any identifiable legitimate purpose of discrete objective." 517 U.S. at 635.

Question 4. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be? Would any such classification require a showing of particularized past discrimination?

Answer 4. The highest level of constitutional scrutiny applies to government-imposed explicit racial classifications. To survive strict scrutiny is extremely difficult: The governmental purpose must be compelling, and the program must be narrowly tailored. *Adarand Constructors Inc.* v. *Pena,* 515 U.S. 200 (1995). The Supreme Court has not indicated specifically what kinds of explicit racial classifications, if any, would survive this standard.

The Ninth Circuit has held that under *Adarand* an explicit racial classification may be used temporarily if it is necessary to compensate individuals themselves injured by the use of a racial classification. *Ho by Ho.* v. *San Francisco Unified School District,* 147 F.3d 854, 864 (9th Cir. 1998). The difficult burden of justifying the use of a racial classification under this extremely stringent standard is on the government, and that high burden must be met by particularized evidence of past discrimination and present effects, not by generalized assertion of past discrimination and present effect. *Ho by Ho,* 147 F.3d at 865. As a Ninth Circuit judge I would be required to, and would, apply the *Adarand* strict scrutiny standard as carefully explicated in *Ho* in cases involving explicit governmental racial classifications.

Question 5. Is there a legislative classification that would fail rational basis review?

Answer 5. A statutory classification fails rational basis review only where the grounds upon which it rests are wholly irrelevant to the achievement of the State's legitimate objective. Further, classifications subject to rational basis review are upheld as long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification, whether or not that evidence or that basis actually motivated the legislative enactment. *Heller* v. *Doe by Doe* 509 U.S. 312 (1993). Under this standard, governmental classifications are extremely unlikely to be held unconstitutional.

Question 6. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious or non-sectarian, constitutional?

Answer 6. A program for educational subsidies that can be used in religious schools is valid as long as the program has a secular legislative purpose and a principal or primary effect that neither advances for inhibits religion; and does not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602, 612–13 (1971). Under this standard, government financial grants that directly aid the educational function of religious schools can be valid if made available without regard to the sectarian-nonsectarian or public-private nature of the institution benefited and disbursed directly to students rather than to any particular school. *Agostini* v. *Felton,* 117 S. Ct. 1997, 2011 (1997); *Witters* v. *Washington Department of Services of Blind,* 474 U.S. 481 (1986). That funds are disbursed only as a result of the private choices of many individual parents is a factor strongly favoring constitutionality. *Mueller* v. *Allen,* 463 U.S. 388, 398–99 (1993).

Applying these recently-clarified standards, the Supreme Courts of Arizona and Wisconsin have concluded that particular state programs for subsidizing primary and secondary education without regard to whether the school chosen is secular or religious do not violate the Establishment Clause. *Kotterman* v. *Killian,* 972 P.2d 606 (1999); *Jackson* v. *Benson,* 218 Wis. 2d 835, 578 N.W., 2d 602 (1998). An Ohio program has been held invalid because of its particular features. *Simmons-Harris* v. *Behr,* 1997 Ohio App. LEXIS 1766.

If I am fortunate enough to be confirmed as a court of appeals judge, I would view a constitutional challenge to any school voucher or similar program, like any other constitutional challenge to a state or federal statute, with a strong presumption that the program is constitutional, and would apply carefully the Court's recent precedents clarifying and limiting Establishment Clause review.

Question 7. In your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 7. The rights protected by the Constitution do not grow or shrink with the times.

In interpreting the rights protected by the Constitution, the starting point must be the textual language and the long line of precedents that have developed regarding various provisions of the Constitution over the last two centuries. Absent an applicable precedent, the Constitution, in my view, is best interpreted according to the

intent of its Framers, by reading the language of the Constitution in light of the understanding of that language at the time it was written.

Issues of constitutional interpretation do sometimes require applying the text of the Constitution to circumstances that the Framers could not possibly have anticipated because of technological changes since the Constitution was written, such as the introduction of photography, moving pictures, television, computers, and so on. Even where the precise circumstances were not anticipated, however, the meaning of the text remains the same and does not change, and courts must therefore apply the general principles incorporated in the Constitution as the text and historical background suggest the Framers would have done had they anticipated the technological changes.

Question 8. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 8a. A consistently higher than average rate of reversal for a particular judge or court over an extended period of time can pose problems for the judicial system. (Some reversals on appeal and short term fluctuations in reversal rates are to be expected—indeed, are inherent in the availability of appeals so as to permit several judges to consider the issues in a case before a decision becomes final—and do not have detrimental impact.) Our system depends upon the assumption that once legal issues are settled they will remain settled, so that potential litigants and attorneys can predict the outcome of litigation and adjust their affairs accordingly. Consistently high reversal rates disturb this predictability, and force litigants to incur added costs in order to obtain on appeal the result they should have obtained in the first place.

(b) Correcting high reversal rates may depend on the reasons the judge or court is reversed unusually often.

The reasons for a higher than normal reversal rate could include: a caseload in the jurisdiction more likely to raise difficult rather than routine issues; institutional difficulties and procedures that make it hard for a particular judge or court to be fully apprised by the parties of the applicable law and to correct its own mistakes in advance of appeal; case loads so high that the judge or court does not have a fair opportunity to undertake the necessary research and consideration; incompetence of a judge in performing legal research or applying the higher court's precedents; and, on very rare occasions, an entirely improper decision by a particular judge to express his or her own policy preference rather than decide the case according to established precedents and the language and intent of statutes and constitutional provisions.

Among the options that are available to correct unacceptably high reversal rates are: self-revision of court procedures for briefing, oral argument, rehearing, and rehearing en banc to allow for more informed decision making and more self-correction; self-revision of internal court operating procedures, including methods of research, preparation of research memoranda, and efficient use of law clerks for performing such research; providing additional research resources for the court, or establishing lower caseloads through the addition of more judges; enhanced judicial education on administrative, procedural and substantive matters through the Federal Judicial Center; legislative changes in court structure; and express admonitions by the reviewing court when it believes that the decision below is not only incorrect but beyond the realm of fair legal argument.

Question 9. Is "substantive due process" a legitimate constitutional doctrine?

Answer 9. The Supreme Court, in a recent opinion by Chief Justice Rehnquist, reviewed the present status of substantive due process as a constitutional doctrine, concluding that the doctrine remains viable but only within very narrowly constrained limits. *Washington* v. *Glucksberg,* 117 S. Ct. 2258, 2267 (1997).

In *Glucksberg,* Chief Justice Rehnquist first reaffirmed that "the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical constraint" and summarized some of the rights that have been held to be within substantive due process protection in a "long line of cases." *Washington* v. *Glucksberg,* 117 S. Ct. 2258, 2267 (1997). At the same time, the Court stressed in *Glucksberg* that great care that must be taken before expanding the concept or content of substantive due process, so as to avoid impeding democratic processes and transforming the liberty protected by the Due Process Clause through the policy preferences of individual judges and justices.

If I am fortunate enough to be confirmed as a court of appeals judge, I would be bound by the precedents of the Supreme Court. Since that Court continues to recognize a limited substantive due process doctrine, I would be required to, and would,

apply the Supreme Court's precedents establishing certain rights as protected under substantive due process.

Question 10. Is it appropriate for circuit judges to recognize new "substantive due process" rights? If yes, what should the guiding principles be?

Answer 10. If I am fortunate enough to be confirmed as a circuit court judge, I do not expect to have occasion to consider recognition of new substantive due process rights. Supreme Court precedent should govern any case that comes before me concerning substantive due process rights.

If, however, it were necessary in order to decide a case to reach the question whether to recognize an entirely new substantive due process right on which neither the Supreme Court nor the Ninth Circuit had ever spoken, I would be required to do so. In doing so, I would apply the specific, stringent standards the Court spelled out in *Glucksberg* as governing substantive due process analysis. Those standards are that there must be (1) objective indication that the right in question is so deeply rooted in our Nation's history and tradition that, without the right, there could be neither liberty nor justice, and (?) a careful description of the asserted liberty interest. *Id.* at 2268. As the Chief Justice admonished in *Glucksberg,* I would apply these standards with the utmost care, in full recognition of the dangers undue extension of the substantive due process doctrine poses for the separation of powers that undergirds our system of government.

Question 11. In your testimony before the committee, you stated that the opportunities for a circuit judge to attempt to overturn an erroneous decision (the examples given were *Dred Scott* and *Plessy* v. *Ferguson*) were "quite rare" and that such action was "primarily for the Supreme Court." Both of these statements are qualified, indicating that you believe that there are circumstances where it would be possible and appropriate for you to attempt to over turn such a precedent. When, if ever, is it appropriate for a circuit judge to draft an opinion calling into doubt the validity of a Supreme Court precedent? What standards govern the decision to do this? Is it ever appropriate for a circuit judge to overrule a Supreme Court precedent? What standards govern the decision to do this?

Answer 11. It is never appropriate for a circuit court judge to "overrule" Supreme Court precedent. I did not mean for my answers at the hearing to suggest any different understanding, or to indicate that there is any qualification upon the unalterable duty of court of appeals judges to follow Supreme Court precedent.

The confusion may have resulted from the fact that there are two related but separate jurisprudential doctrines. First, there is the hierarchical principle, which can never be varied, that lower courts must always follow the precedents of higher ones. Second, there is the horizontal principle of *stare decisis,* requring adherence by each circuit court of appeals and by the Supreme Court to each court's own precedents.

I understood Senator Smith's questions to concern the latter, *stare decisis* principle, using Supreme Court examples. That horizontal *stare decisis* principle, binding a court to its *own* precedent, is, as I noted at the hearing, subject to some, very rare exceptions, spelled out in Supreme Court and court of appeals precedents. As I believe I also indicated, however, a court of appeals judge may properly vote for overruling a precedent of his or her own circuit court only when the court is considering a case en banc.

I have seen circuit court opinions that point out tensions between lines of Supreme Court authority and suggest that it would be helpful to the lower courts for the Supreme Court to resolve those tensions. The actual holding in such an instance, however, must be based upon adherence to any directly governing Supreme Court precedent, as well as the closest possible adherence to a closely analogous Supreme Court precedent.

RESPONSES OF MARSHA S. BERZON TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mrs. Berzon and Mr. Katzmann, in our tripartite system of government, the Congress, under the Constitution, *makes* the law. The President, as the Chief Executive, *enforces* the law. The judiciary *interprets* the law. Some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Answer 1. I agree with your view that the separation of powers is of great importance in our tripartite system, and that in that tripartite system the role of the judiciary is to interpret the law, not to make it.

Question 2. Mrs. Berzon and Mr. Katzmann, what is your view of mandatory minimum criminal sentences, and would you have any reluctance to uphold them as a Federal judge?

Answer 2. Statutes imposing mandatory minimum criminal sentences are properly within the scope of the legislature's authority to determine the appropriate punishment for particular crimes. As a federal judge, I would have no reluctance in applying mandatory minimum sentences prescribed by the legislature.

Question 3. Mrs. Berzon and Mr. Katzmann, do either of you have any personal objections to the death penalty that would cause you to be reluctant to uphold a death sentence?

Answer 3. No, I have no such personal objections, views or beliefs.

Question 4. Mrs. Berzon, in *People* v. *Horton II* you challenged the death penalty conviction of a man who was found guilty of a brutal murder and robbery. The California Supreme Court set aside the death sentence. I understand that you took this case on a pro bono basis. Please explain your involvement in the case.

Answer 4. My firm became counsel in *People* v. *Horton* as the result of a specific request to me by the California Appellate Project (CAP), a nonprofit organization which at the time was assigned by the California Supreme Court the task of recruiting counsel for appointment in appeals of death penalty convictions, automatic under California law. The Executive Director of CAP called and informed me that there were insufficient qualified criminal appellate lawyers available to handle such appeals, and that he was therefore asking me and my firm, as well as several other lawyers and law firms without substantial criminal experience, to undertake such representation with substantive assistance from CAP. I understood the request to be on behalf of the Court, which could not process the appeals if there were not available lawyers to represent the defendants. My firm therefore agreed to undertake the representation, as did lawyers from many of the major San Francisco law firms at around the same time.

As a point of information, my firm did not take *People* v. *Horton,* on a *pro bono* basis. Rather, my firm was paid for the representation by the California Supreme Court as part of its program of appointing and paying counsel for automatic death penalty appeals.

The California Supreme Court, in an opinion authored by Justice (now Chief Justice) Ronald George, affirmed the conviction but reversed the death penalty sentence. The ground for the death penalty reversal was that the basis for that penalty, a prior conviction, was unconstitutionally obtained because the defendant had been totally deprived of representation by counsel at a critical stage of the proceedings. The defendant remains incarcerated under a sentence of life without possibility of parole.

Question 5. Mrs. Berzon, you have been a strong advocate for organized labor throughout your legal career. For example, you served for a time as Associate General Counsel of the AFL–CIO and have authored many briefs in support of organized labor. How can you assure us that you can be fair and unbiased in cases involving labor and management issues?

Answer. If I am fortunate enough to be confirmed as a court of appeals judge I would, like other attorneys appointed to the bench, put aside the interests and views of my clients, and decide cases based solely on precedent and, where there is no precedent, on a careful, unbiased reading of the language of statutes and constitutional provisions. Judges who, before joining the judiciary, represented principally labor or principally management (such as Judges Lawrence Silberman (management) and Harry Edwards (labor) of the United States Court of Appeals for the D.C. Circuit) have done so. I am confident that I will have no trouble doing so as well, in cases raising labor and management issues as in any other. I am gratified that a great many attorneys who principally represent management have stated in letters to the Senate Judiciary Committee their confidence that I will decide labor-management questions in a fair and unbiased manner. (I am attaching to these answers a few of the many such letters sent to the Committee.)

Further, as a partner in a law firm, I *am* an employer, and have in that capacity viewed employment law issues from the point of view of an employer. Additionally, I have represented unions in their capacity as employers, and have represented defendants in employment discrimination cases.

Finally, I have served as an early neutral evaluator and mediator for the United States District Court for the Northern District of California in many employment cases, and have had no difficulty in appreciating and fairly evaluating the arguments of both parties.

Question 6. Mrs. Berzon, I understand that you served on the Board of Directors or in other leadership positions for the ACLU of Northern California during various periods from 1985 to 1991. Are you aware of any cases taken or amicus briefs filed by the ACLU of Northern California during your involvement with that organization that you did not agree with? Please explain.

Answer 6. Yes. There were positions advanced by the ACLU of Northern California in litigation during my involvement with that organization that I believe at the time were quite unlikely to be sustained by the courts, and in which I would not have ruled in favor of the ACLU position if I were a judge ruling on the case. My role as an outside Board member and Legal Committee member was not to decide whether the ACLU's legal position was correct, but whether it was based on a colorable legal argument.

I note that at least twice while I was on the ACLU Board I took positions on behalf of clients in cases in which an ACLU affiliate or the national ACLU took an opposing position. In *Cammack* v. *Waihee,* 502 U.S. 1219 (1992), I represented a client in supporting the constitutionality of a Good Friday holiday against an ACLU Establishment Clause challenge. In *Schenck* v. *Pro Choice Network of Western New York,* 519 U.S. 357 (1997), the ACLU filed an *amicus brief* supporting the validity of an injunction limiting anti-abortion protests, while I filed an *amicus brief* on behalf of a client arguing for close scrutiny of such injunctions.

If I am fortunate enough to be confirmed as a Court of Appeals judge, my role would be entirely different from my role on the ACLU Board. As a judge, I would be responsible for the actual determination of legal issues after consideration of all parties' arguments based on the law, not for the different and circumscribed task of determining whether a particular argument has sufficient legal basis that it can appropriately be presented to the courts for determination. If confirmed as a judge, I will review arguments made by the ACLU for consistency with precedent and by statutory and constitutional language on exactly the same basis as I will do for other litigants, and would expect, as for other litigants, to reject many of the ACLU's arguments.

Question 7. Mrs. Berzon, it is widely accepted that the Ninth Circuit is reversed more often by the Supreme Court than any other circuit. Do you agree, and if so, why do you think the Supreme Court has found it necessary to reverse the Ninth Circuit more often than others circuits?

Answer 7. It is my understanding that in some recent past terms, the percentage of reversals by the Supreme Court has been higher for the Ninth Circuit than for other circuits. I do not know whether that will be true for this term (which is not yet complete).

I have not seen or done a study systematically comparing the various circuits with respect to the cases reversed and sustained in the Supreme Court and isolating the factors that contribute to the differences in reversal rates. Rather, my perspective at this juncture is simply one of a litigator who has appeared in many different appellate courts, state and federal.

From that perspective, I can say that it is my observation that the cases the Supreme Court has reversed coming from the Ninth Circuit include not only highly visible cases but also technical, narrow cases. This suggests that, whether or not other factors are operating as well, there are institutional factors that have made it more difficult for the Ninth Circuit than for other circuits to self-correct erroneous decisions.

One possibility is that the size of the Circuit contributes to the difficulties the Circuit sometimes experiences in correcting its own mistakes and in developing law that provides adequate guidance to litigants while avoiding the creation of unnecessary circuit conflicts. The Report of the Commission that Congress created to look into the question of configuration of the circuits has recently been issued, and it will be up to Congress to decide whether to follow its recommendation for reorganizing the adjudicative structure of the Circuit.

There may be internal operating procedures and habits at work as well that impede self-correction by the Ninth Circuit. These may include the tendency of the circuit to hold fewer en bancs than other circuits, the special, less-than-half-the-judges en banc procedure the Ninth Circuit uses, and the absence, at least in the past, of any process for circulating proposed opinions to the court as a whole in advance of issuance. I am aware that the Ninth Circuit has begun changing some internal practices and is considering changes in others in order to produce more internal consistency and less conflict with other circuits.

WILSON SONSINI GOODRICH & ROSATI,
Palo Alto, CA, April 30, 1998.

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Senator ORRIN G. HATCH,
U.S. Senate,
Russell Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: During my service with the Reagan Administration as a Commissioner of the Equal Employment Opportunity Commission and Assistant Secretary of Labor for the Department of Labor, I came to appreciate your perspective on the proper role of judges in our constitutional system. I join you in your view that federal judges should faithfully interpret laws. In that spirit, I am writing to recommend, without hesitation, that you positively consider the candidacy of Marsha S. Berzon to the Ninth Circuit Court of Appeals.

Since I left Washington in 1989, I have resumed my management-side labor law practice in the San Francisco Bay Area and have come to appreciate the respect that Ms. Berzon commands in our legal community among management and union side lawyers alike. Ms. Berzon has been an outstanding advocate for the positions of her clients and has practiced with the highest degree of integrity, Ms. Berzon's vigorous advocacy, superb intellectual acuity, and remarkable ability to articulate her position have earned her respect from both Courts and opponents.

Because of the high caliber of her legal skills, I was delighted to join with a group of other management labor lawyers to commend Ms. Berzon to President Clinton when she was under consideration to be nominated to the Ninth Circuit. In that same vein, I am delighted to join, once again, with my colleagues on the management-side to stand up for and endorse her confirmation to that position.

Like others, I would be confident as an advocate on behalf of management that were I arguing a proposition of employment law on behalf of an employer client, Ms. Berzon would fairly consider, from a completely neutral stance, the legal arguments that I would present. Ms. Berzon's intellectual capabilities, coupled with her integrity, assure me that she would fully and clearly understand my clients' arguments and would apply the law as written by the Congress and interpreted by higher courts in a fair and even-handed manner. I am also confident that her decisions as a jurist would be made within the proper limitations of that role and would not be motivated by the positions that she has previously advocated in her representation of unions in the employment law area. Clearly, someone with the intellect and integrity, which Ms. Berzon had demonstrated, understands the difference between advocacy and the solemn responsibilities undertaken as a federal appellate court judge.

In conclusion, the overwhelming support for such a highly regarded employment law adversary by so many well respected management lawyers should indicate to you and your colleagues the extraordinary talent of Ms. Berzon and the esteem in which she is held by those most likely to be her harshest critics. In fact, I can think of no other union-side lawyer who would command so strong and so compelling a consensus from management lawyers on her suitability for such an important position on the Ninth Circuit Court of Appeals. Accordingly, I am delighted to join with my management colleagues to commend her to you with confidence that she recognizes the proper role of the judiciary in our constitutional system and will interpret rather than attempt to create the law.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI,
Professional Corporation,
Fred W. Alvarez.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, ATTORNEYS AT LAW,
Los Angeles, CA, April 3, 1998.

Re Candidacy of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: The undersigned are attorneys from Southern California law offices having substantial management-side labor law practices. We write in support of the candidacy of Marsha S. Berzon for appointment to the United States Court of Appeals for the Ninth Circuit.

Marsha Berzon has a well-deserved, national reputation as a brilliant appellate advocate. Her work on behalf of unions and employees has not only brought praise

from the union-side bar, but she is admired as well by her adversaries for her consummate professionalism, exceptional analytical skills, and extraordinary intellect.

We write to convey both the breadth and depth of the management bar's esteem for Marsha. Frequently, but not always, we advocate against the positions Marsha advances. She is, however, principled in her approach to labor and employment law issues. Most importantly, Marsha is not dogmatic; she approaches the law of the workplace with a profound desire to find simple, practical solutions to complex problems. She believes, as do we, that cooperation between labor and management is preferable to antagonism.

We know Marsha from personal experience, either in connection with litigation or through her extensive involvement in bar association and continuing education activities. Without reservation, we recommend Marsha as a worthy candidate for nomination to the Ninth Circuit. If nominated and confirmed, she will be a valuable, constructive contributor to the development of labor and employment law.

We set forth below our names and firm affiliations. However, the views we express are our own; we do not purport to speak for our respective firms.

Respectfully submitted,

STACY D. SHARTIN,
Seyfarth, Shaw, Fairweather & Geraldson.
LARRY C. DRAPKIN,
Mitchell, Silberberg & Knupp.
ROBERT A. SIEGEL,
O'Melveny & Myers.
WILLIAM B. SAILER,
Qualcomm.
JAMES N. ADLER,
Irell & Manella.
PAMELA L. HEMMINGER,
Gibson, Dunn & Crutcher.
ANNA SEGOBIA MASTERS,
Crosby, Heafey, Roach & May.

STEPHEN E. TALLENT,
Washington, DC, March 9, 1998.

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to urge you to support the nomination of Marsha S. Berzon to the United States Court of Appeals for the Ninth Circuit. I am a member of the Bar of the State of California and the Ninth Circuit, among others.

Before moving to Washington in 1981 to become senior partner in the Firm's D.C. office, I spent many years practicing at Gibson, Dunn & Crutcher in Los Angeles. Since then, I have continued to work closely with the attorneys in our Los Angeles office. The Ninth Circuit therefore has always been extremely important to me, and I have litigated numerous cases there. Although this letter is written entirely in my individual capacity as the immediate past President of The College of Labor and Employment Lawyers and the Chair-Elect of the ABA's Section of Labor and Employment Law, I have had a unique opportunity to be aware of the professional reputation of lawyers in these fields throughout the country.

As an attorney representing the management side in labor and employment disputes and a Republican, I firmly believe Marsha Berzon will be a very worthy addition to the Ninth Circuit bench. She is admired and respected throughout the legal community for her intellectual honesty open-mindedness and keen sense of fairness. Moreover, I am confident that she has a clear understanding of the proper role of the judiciary in our governmental system.

Marsha Berzon is very much a bi-partisan, consensus nominee for the Ninth Circuit. Prior to her nomination, attorneys from virtually every major California law firm that represents the management side in employment cases, including my partner Pamela Hemminger, Chair of the Labor and Employment Law Section of the Los Angeles County Bar Association, joined together to write the President urging Marsha Berzon be named to the Ninth Circuit. In supporting Marsha's nomination "without reservation," they pointed not only to "her consummate professionalism, exceptional analytical skills and extraordinary intellect" but stressed that she is

"principled in her approach" and "not dogmatic," and that she approaches the law "with a profound desire to find simple, practical solutions to complex problems."

I concur whole-heartedly in their assessment, and would add that an additional consideration favoring Marsha's confirmation is that the federal courts of appeals have relatively few judges with broad backgrounds in labor and employment law, although a large percentage of the courts of appeals' workload involves such cases. Those of us who practice in the area find that court decisions sometimes display a lack of understanding of labor and employment law and of the practical realities of the workplace. I therefore urge Marsha Berzon's prompt confirmation.

Thank you for your consideration.

Very truly yours,

STEPHEN E. TALLENT.

HANSON, BRIDGETT, MARCUS,
VLANOS & RUDY, LLP,
San Francisco, CA, March 6, 1998.

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I'm writing to express my strong support for the candidacy of Marsha S. Berzon for appointment to the United States Court of Appeals for the Ninth Circuit. She is extremely well-qualified for this position and will be a welcome addition to the Ninth Circuit. I urge you to schedule hearings concerning her appointment so that you and other Senators will have the opportunity to see for yourselves what an outstanding choice she is.

I am presently the Managing Partner of the Hanson, Bridgett firm, a firm of 85 attorneys representing a wide array of public and private entities in most areas of practice. I myself have practiced labor and employment law for 30 years, for the last 27 of which I have represented management. My practice and that of others in my firm includes a great deal of litigation in both state and federal courts. I have appeared many times before the Ninth Circuit.

Because Marsha Berzon's law firm represents primarily unions and employees, I and others in my firm have had numerous cases in which Marsha Berzon's firm has represented clients adverse to the clients I have represented. I myself have had the opportunity to get to know Marsha Berzon quite well because we both have been active on the Executive Committee of the Labor and Employment Law Section of the Bar Association of San Francisco, which includes over 600 lawyers practicing labor and employment law in the San Francisco Bay Area. I was Chair of that Section for a two-year term several years ago. I have, therefore, had extensive opportunity to interact with Marsha one-on-one and in committee discussions about cases and legal issues. My opinions about her are, as a consequence, well-grounded in personal experience.

She is, in my opinion, not only a person of extraordinary intellect and proven legal ability but also one who is highly principled, objective, and fair-minded. Even though she has typically represented clients and interests which are often adverse to the clients and interests I have represented, I have never found her to be doctrinaire or ideological in her approach to legal issues. She is willing and able to entertain and understand opposing points of views and to reexamine her own views in light of them.

Marsha is widely known and highly respected by a large number of lawyers in this area. They and I will welcome her confirmation to the Ninth Circuit. I and other attorneys who typically represent employers and corporate interests will look forward to appearing before her because we know she will entertain our arguments and examine them on their merits in a completely fair and impartial manner. I certainly endorse her without reservation and hope that you and your Committee will be able to proceed quickly with confirmation hearings.

Respectfully submitted,

DOUGLAS H. BARTON,
Managing Partner.

THE SUPERIOR COURT,
MICHAEL M. JOHNSON, JUDGE,
Compton, CA, April 17, 1998.

Re Nomination of Marsha Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to support the President's nomination of Marsha Berzon to the United States Court of Appeals for the Ninth Circuit.

Prior to my appointment to the Los Angeles Superior Court, I was a partner with the firm of Baker & Hostetler specializing in the representation of management in labor and employment disputes. I worked closely with Marsha during the period 1991 through 1997 when I was the Chair and Marsha and I were both members of the Executive Committee the California State Bar Labor and Employment Law Section. Even before that, I was familiar with Marsha's reputation as an outstanding attorney in the field of labor and employment law.

Based upon my experience I can say without hesitation that Marsha is well qualified to be a member of the Ninth Circuit Court of Appeals. She is fair, open minded and has high standards of excellence and integrity. Marsha is widely respected by all attorneys (management and labor) in California and other parts of the country.

As a Republican, I do not always support to the President's nominations. In Marsha's case, however, I do so without qualification. Marsha is a brilliant appellate attorney, and she would be an excellent addition to the Ninth Circuit. I urge you and the other members of the Judiciary Committee to approve her nomination.

Very truly yours,

MICHAEL M. JOHNSON,
Superior Court Judge.

DICKSTEIN, SHAPIRO,
MORIN & OSHINSKY, LLP,
Washington, DC, April 14, 1998.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR MR. CHAIRMAN: It is my understanding that President Clinton has nominated Marsha S. Berzon of California to the position of Circuit Judge on the United States Court of Appeals for the Ninth Circuit. In this regard, I am pleased to support her nomination without reservation.

As you know, I have been active on behalf of the Republican party for more than thirty-eight years and take great pride in having served several Republican Presidents and devoted substantial time and effort to many Republican Congressional campaigns. I applaud and am proud of the leadership you have demonstrated in the confirmation process on federal judges throughout the United States. Once again, standards of excellence and commitment to the law have become the primary focus for confirmation.

I mention all of this in that Ms. Berzon is not typical of someone who would naturally receive volumes of loyal Republican support. She, however, should receive just such support. She is truly an exceptional person and an outstanding lawyer. She would bring to the Court qualities of exceptional experience, judgment and legal scholarship all of which would be brought to bear without prejudice or bias when rendering legal opinions.

I am hopeful that the Committee will schedule an early confirmation for Ms. Berzon and I am confident she will perform with distinction.

My thanks to you Senator and congratulations for the job you are doing as Chairman and best wishes for the success I know you will continue to enjoy.

Sincerely,

HENRY C. CASHEN II.

BUTZEL LONG,
Detroit, MI, February 28, 1998.

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Senator ORRIN G. HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: I am an attorney who has practiced in the labor and employment area for 21 years. I am writing to urge you to schedule confirmation hearings and support the confirmation of Marsha S. Berzon to the Ninth Circuit Court of Appeals.

I spent my first ten years of practice with the National Labor Relations Board in Washington, DC in the Division of Enforcement Litigation. In that capacity, I argued before the Courts of Appeals across the country. Based on that experience, I know the difference that a bright, dedicated, and committed judge can make. Marsha possesses all of those qualities. Hers is a name that is recognized by labor practitioners across the country. She is known for her extraordinary intellect and proven legal ability.

For the past 11 years, I have been a management labor lawyer. Based on my experiences, I can say that Marsha has the respect and admiration of labor lawyers from all sides—union, management, and government. She is not doctrinaire in her approach to labor and employment law issues. Rather, she understands legitimate employer interests and the need to work together.

I have also been fortunate enough to get to know Marsha on a personal level. She lives up to her high reputation in all respects. My only regret is that now that my practice is based primarily in Michigan, it is unlikely that I will have the opportunity to appear before Marsha if she is confirmed to the Ninth Circuit.

I hope that you will see to it that Marsha's confirmation is handled expeditiously and that you will vote for her confirmation and urge others to do so. Thank you for your consideration.

The views set forth in this letter are my own and I do not purport to speak for my firm.

Respectfully submitted,

LYNNE E. DEITCH.

RESPONSES OF ROBERT A. KATZMANN TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mrs. Berzon and Mr. Katzmann, in our tripartite system of government, the Congress, under the Constitution *makes* the law. The President, as Chief Executive, *enforces* the law. The judiciary *interprets* the law. Some Judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Answer 1. I very much agree with your interpretation of our Federal system of government.

Question 2. Mrs. Berzon and Mr. Katzmann, what is your view of mandatory minimum criminal sentences, and would you have any reluctance to uphold them as a Federal judge?

Answer 2. Congress clearly has the prerogative as a policy matter to create mandatory minimum criminal sentences, and as a federal judge I would have no reluctance to uphold them.

Question 3. Mrs. Berzon and Mr. Katzmann, do either of you have any personal objections to the death penalty that would cause you to be reluctant to uphold a death sentence.

Answer 3. I do not have any personal objections that would cause me to be reluctant to uphold a death sentence.

RESPONSES OF ROBERT A. KATZMANN TO QUESTIONS FROM SENATOR SESSIONS

Question 1. You wrote an article entitled "Guns, the Commerce Clause and the Court" in which you analyzed the Supreme Court's 5–4 decision in *U.S.* v. *Lopez* in which the Supreme Court held that Congress had exceeded its Commerce Clause authority by enacting the Gun Free Zones Act of 1990. In your analysis you sided with the dissenters, writing:

> With a tour de force review of the literature (including a wide range of social science research), Justice Breyer concluded that the gun problem sig-

nificantly undermines the quality of education that is critical to economic prosperity; that guns threaten the commerce to which teaching and learning are inextricably linked.

To what extent do you feel it is appropriate for Courts to rely on "social science research" to determine the Constitutionality of Federal Statutes?

Answer 1. I believe that it is inappropriate for courts to rely on "social science research" to determine the constitutionality of federal statutes.

With all due respect, my short piece, "Guns, the Commerce Clause and the Court," made no judgments whatsoever about the merits of any of the opinions. I did not side with the dissenters. Rather, the piece was an attempt to assess the possible impacts of the *Lopez* decision, concluding that "a prudent Congress would be well advised to make express findings as to the effects of its legislation on interstate commerce."

Moreover, the reference to Justice Breyer was simply an acknowledgement of a broad, wide ranging review of the literature. It was not an endorsement of the use of social science research to determine the constitutionality of federal statutes.

Question 2. Does your endorsement of the use of "social science research" in the *Lopez* context reveal a tendency you might have to use your position as an appellate judge to take an activist "problem-solving" approach to statutory interpretation?

Answer 2. I do not endorse the use of "social science" research in the *Lopez* context or in any other context in determining the constitutionality of federal statutes. I do not take an activist "problem-solving" approach to statutory interpretation. As I have written in a variety of books and articles, the court's responsibility is to be faithful to the words of statutes. On the judicial activism question, I have been referred to as a "court skeptic"—those who "hold that court-directed reform, although not inevitably doomed to failure, is highly problematic." See, Peter H. Schuck, "Public Law Litigation and Social Reform," 102 *Yale Law Journal* 1763, 1768–69 (1993).

Question 3. In your legal opinion how broad is the government's power under the Commerce Clause? What restrictions do you believe exist on the Governments assertion of regulatory power under this Clause?

Answer 3. In his concurring opinion in *Lopez* joined by Justice O'Connor, Justice Kennedy wrote that "stare decisis operates with great force in counseling us not to call in question the essential principles now in place." But as a restriction, *Lopez* clearly stands for the principle that Congress can regulate *intrastate* activities only if the activities substantially affects *interstate* commerce.

Question 4. In your personal legal opinions, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rationale for your answers.

Answer 4. In my opinion the most important Supreme Court decision in the last thirty years in *United States* v. *Nixon,* 418 U.S. 683 (1974) (Chief Justice Burger writing the unanimous opinion) because it stands for the proposition that the President is not above the law. In that case, the Supreme Court, while acknowledging the constitutional status of a president's claim of "executive privilege" rejected a presidential claim of an absolute and unreviewable claim of "executive privilege" within the context of a criminal investigation.

I am not sure what the worst Supreme Court decision of the last thirty years might be, but I have wondered about the wisdom of the Supreme Court's abandonment of the longstanding balancing test of *Sherbert* v. *Verner,* 374 U.S. 398 (1963) in the case of *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990). *Smith* held that there should be no exemption from otherwise "generally applicable laws" for individuals claiming they are denied the First Amendment's protection for the free exercise of religion. *Sherbert* v. *Verper* forbade a state government from burdening a person's free exercise of religion, unless the government demonstrates that the regulation or law burdening an individual's religious freedom furthers a compelling governmental interest, and is the least restrictive means of furthering that compelling interest.

RESPONSES OF ROBERT A. KATZMANN TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905) an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism not including *Lochner* if your answer to the prior question was yes. Is *Roe* v. *Wade,* 410 U.S. 113 (1973) an example of judicial activism?

Answer 1. Judicial activism is the usurpation by the courts of the prerogatives of the legislative or executive branches or the states. Judicial activism is also mani-

fested by judicial decisions which are not firmly based in the Constitution or in statutes.

I believe that *Lochner* v. *New York,* striking down a New York regulation limiting the hours of labor in bakeries, is an example of judicial activism. Three other Supreme Court decisions which I believe are examples of judicial activism are *Dred Scott* v. *Sanford,* 19 How. (60 U.S.) 393 (1857), (denying that all blacks could be citizens); *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) (upholding the doctrine of "separate but equal"; and *Korematsu* v. *U.S.,* 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans during World War Two).

In *Roe* v. *Wade,* the Supreme Court moved sweepingly to create a rigid framework that a later Court would ultimately find to be unworkable, displaced virtually every state law then in force, and eliminated dialogue in state legislatures. The *Roe* precedent has been restricted in the years since the decision was issued. In *Planned parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court based its reaffirmation of a "right of the woman to choose to have an abortion before viability," not on the soundness of *Roe*'s rationale, but on grounds of stare decisis, and what the Court perceived to be the costs to its institutional legitimacy if it overruled the *Roe* precedent.

Question 2. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 2. In *United States* v. *Lopez,* the Supreme Court held unconstitutional the Gun Free School Zones Act of 1990, which made it a federal crime to possess guns within 1,000 feet of a school. The Court determined that the possession of a gun in a school zone is a wholly intrastate and noncommercial activity, so that regulation of the activity was beyond Congress' power under the Interstate Commerce Clause. The test to be applied in determining whether the statute exceeded the legislative power under the commerce clause is whether the activity that Congress seeks to regulate substantially affects interstate commerce. If Congress can show that the activity does, then it will likely survive a legal challenge. If not, that is, if the activity is determined to be intrastate, then it will be likely struck down.

Question 3. Do you think that there is tension between the Supreme Court's holding in *Romer* v. *Evans,* 517 U.S. 620 (1996) and *Bowers* v. *Hardwick,* 478 U.S. 186 (1986)? If there is, how would you reconcile that tension? If there is not, how are they reconcilable?

Answer 3. The tension between the Supreme Court's holding in *Romer* v. *Evans* and *Bowers* v. *Hardwick* is more apparent than real. In *Bowers* v. *Hardwick,* the Supreme Court upheld a Georgia law making heterosexual and homosexual sodomy a crime, and rejected the argument that the Constitution confers "a right of privacy that extends to homosexual sodomy." The Court held that governmental classifications regarding sexual orientation or preference are to be analyzed under the rational basis test, which is almost always satisfied, and hence likely to be upheld as constitutional. In the subsequent case *Romer* v. *Evans,* the Supreme Court, although invalidating Amendment 2 to the Colorado State Constitution, reaffirmed that "rational basis" is the governing standard, and declined to analyze the classification in terms of "strict scrutiny," under which governmental classifications are very difficult to sustain constitutionally. Hence, the fundamental standard, as stated in *Bowers,* remains in place.

Question 4. Is there an explicit racial classification that would survive strict scrutiny. If yes, please explain what that would be? Would any such classification require a showing particularized past discrimination?

Answer 4. The Supreme Court held in *Adarand Constructors, Inc.* v. *Peña,* 114 S. Ct. 2097 (1995), that all racial classifications, imposed by federal state or local governments, are subject to the highest form of scrutiny, that is, strict scrutiny. In other words, there must be a compelling governmental interest for such a classification, and it must be narrowly tailored to further that compelling governmental interest. It would be extremely difficult to satisfy the *Adarand* strict scrutiny standard. The thrust of the Supreme Court's ruling suggests that any such classification would require a showing of particularized past discrimination and would have to be narrowly tailored to serve a compelling governmental interest.

Question 5. Is there a legislative classification that would fail rational basis review?

Answer 5. Rational basis review is the lowest level of scrutiny, in which the court asks whether there is a rational basis or reasonable basis for legislation. In the abstract, it is difficult to think of legislative classification that would fail rational basis review.

Question 6. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious or non-sectarian, constitutional?

Answer 6. In reaching a judgment about such a state program, a court would be guided by Supreme Court precedent. The Supreme Court has not directly ruled on the question of the constitutionality of giving parents a set sum of money to be used by parents to pay for tuition at any school they choose, public, private, religious or non-sectarian. In addressing the question with regard to private or non-sectarian schools, the Supreme Court might sustain such programs as long as the schools do not discriminate on the basis of such disqualifying criteria as race. As to religious institutions, the Supreme Court has increasingly upheld programs of aid which benefit children attending parochial schools, finding that they meet a three-pronged test: they do not serve a nonsecular purpose, do not have the primary effect of advancing religion, and do not constitute excessive "entanglement" of government and religion. Two recent cases on point are *Agostini* v. *Felton,* 117 S. Ct. 1997 (1997), and *Zobrest* v. *Catalina Poothills School District,* 509 U.S. 1 (1993). The thrust of the Court's reasoning suggests that the Supreme Court might very well hold constitutional a program of tuition payments towards education at a religious school. Indeed, voucher programs have been upheld by state courts of last resort, for example, in Wisconsin and Colorado.

Question 7. In your view, to what extent, if any do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 7. In my view, the rights protected by the Constitution do not grow or shrink with changing historical circumstances.

Question 8. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 8. It is a problem if a particular judge or a court has a high rate of reversal on appeal or by the Supreme Court. It suggests a lack of appreciation for precedent. Judges or courts have a high rate of reversal should be subject to appropriate criticism. A way to prevent the problem from arising is for the Senate, in the exercise of its advise ad consent responsibility, to insure that nominees have a proper respect for precedent.

Question 9. Is "substantive due process" a legitimate constitutional doctrine?

Answer 9. "Substantive due process" has been eroded as a constitutional doctrine.

Question 10. Is it appropriate for circuit judges to recognize new "substantive due process" rights? If yes, what should the guiding principles be.

Answer 10. It is not appropriate for circuit judges to recognize new "substantive due process rights."

RESPONSE OF KEITH P. ELLISON TO A QUESTION FROM SENATOR HATCH

Question 1. Litigation has become a more and more expensive means to resolve disputes. The Federal Arbitration Act[1] provides a means for parties to agree to binding arbitration, instead of resolving their differences in court. Nonbinding mediation is also becoming a more popular method of cost-effective, non-judicial dispute resolution. In your view, what role should federal district courts play in seeking to lower the cost of dispute resolution?

Answer 1. Federal district courts should play an active role in seeking to lower the cost of dispute resolution. Our system of legal redress cannot work if the cost of dispute resolution is beyond the average citizen's financial means. As a federal district judge, I would work in conjunction with the Judicial Conference and bar groups to study various means of reducing the costs of dispute resolution. I would also make every attempt to move my own docket rapidly, since delays inevitably tend to escalate costs. Some district court judges require mediation of disputes before they will schedule trials. While I do not believe every dispute benefits from mediation, many do, and I would strongly suggest to litigants in my court that they go through mediation. I believe arbitration through the Federal Arbitration Act should be encouraged, and courts should exercise only with the greatest reluctance any power they have to review arbitration decisions.

If confirmed as a district court judge, I would like to have magistrates conduct mediations in appropriate cases, with the understanding that communications made by the parties to the magistrate would be confidential, and would not be divulged to me.

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[1] The Federal Arbitration Act is codified at 9 U.S.C. §§ 1 to 16.

RESPONSES OF KEITH P. ELLISON TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer 1. As a federal district judge, I would be bound to uphold the law, as previously interpreted by the United States Supreme Court and the Court of Appeals for the Fifth Circuit. Relevant statutes and precedents would guide me in all my judicial decisions. Current law does not appear to conclude whether an unborn child is a human being per se. However, it is clear under *Planned Parenthood* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), that an unborn child is entitled to certain protections, and that the state has an interest in protecting that life "from the outset of the pregnancy." 505 U.S. at 846, 112 S. Ct. at 2804.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer 2. Under the tenets set forth in *Planned Parenthood* v. *Casey,* the state has an interest in, and the therefore can protect, an unborn child's right to life. As *Casey* points out, various factors must be utilized to determine how to balance the rights of the child and those of the mother. It appears clear, however, that, in some circumstances, the unborn child's right to life would supersede any other rights.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. I have not reviewed the Act. If I am fortunate enough to be confirmed, and if such a question were to come before me, I would, of course, begin with the presumption of constitutionality that is due all enactments of Congress. I would further review with care all applicable precedents of the Supreme Court and the Court of Appeals for the Fifth Circuit. My current understanding of precedents, including *Planned Parenthood* v. *Casey,* is that there clearly are situations in which abortion can be prohibited, and it therefore follows that Congress could enact constitutional legislation in this area.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. As a federal district judge, I would be bound to uphold the law, as previously interpreted by the United States Supreme Court and the Court of Appeals for the Fifth Circuit, concerning a citizen's rights under the Second Amendment to the Constitution. I understand that there has been very little constitutional jurisprudence on this point. See *Printz* v. *United States,* 117 S. Ct. 2360, 2386 at n.2 (1997); *United States* v. *Miller,* 307 U.S. 174, 59 S. Ct. 816 (1939). The Second Amendment does appear on its face to protect an individual's right to keep and bear arms, and that would be my starting point in any analysis of the subject. At this moment, I am unable to define in the abstract how, if at all, this right is limited.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. Yes. I do believe that the death penalty is constitutional. *Gregg* v. *Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. No. I do not have any such qualms about enforcing the death penalty.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. No. There are absolutely no circumstances under which a district court judge may refuse to apply a Supreme Court precedent.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. A Supreme Court precedent should be overruled only by the Supreme Court, and only if it is clearly wrong, if its continued validity causes great injustice, and if no greater injustice would be caused by is validation. See generally *Agostini* v. *Felton,* 521 U.S. 203, 235–236, 117 S. Ct. 1997, 2016–2017 (1997).

RESPONSES OF KEITH P. ELLISON TO QUESTIONS FROM SENATOR SESSIONS

Question. 1. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rationale for your answers.

Answer 1. I have never characterized precedents from any court. In particular, precedents of the United States Supreme Court are absolutely binding on all district

court judges, irrespective of any judge's view of the merits of any given precedent. With that caveat, I do believe *United States* v. *Nixon,* 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) was important when decided and remains important as a clarification of the Constitution's separation of powers. I believe Justice Douglas' opinion in *Holtzman* v. *Schlesinger,* 414 U.S. 1316, 94 S. Ct. 1, 38 L. Ed. 28 (1973) violated the political question doctrine.

Question 2a. In assessing the Texas legislature's performance in 1997, the Planned Parenthood of Houston and Southeast Texas Chapter, upon whose board of directors you sat, characterized the Texas legislature of having been unduly influenced by "religious political extremists". In fact your chapter has stated that "From the Halls of Congress to the local sheriff's office and courthouse, religious political extremists are working to eliminate access to abortion and to end family planning services". Do you share the view of the Planned Parenthood chapter of Houston and Southeast Texas that those who oppose abortion and work to express their views through the free exercise of their democratic rights through their state legislatures are simply "religious, political extremists"?

Answer 2a. I do not share the view that those who oppose abortion and work to express their views through the free exercise of their democratic rights are "religious, political extremists." I firmly believe that many people of all religious and political persuasions oppose abortion and they have an absolute right to express their views. They also have an absolute right to engage in lawful conduct in furtherance of their views.

Question B. The 1997 legislative session your chapter criticizes passed the following laws:

(1) "No state funds may be used to dispense prescription drugs to minors without parental consent." Do you share the opinion of your chapter that requiring parental consent in this context is an extreme act?

(2) Another law criticized by your chapter was the appropriation of $3.7 million dollars to fund "abstinence only" education. Do you believe that the funding of "abstinence only" education is an extreme act?

Answer B. I do not consider legislation requiring parental consent or funding abstinence only programs, as outlined in your question, to be extreme.

Question C. The National Chapter of Planned Parenthood has written that the "Child Custody Protection Act" is "dangerous". As you know, this act makes it a federal crime to transport a minor across state lines for an abortion in a state that does not respect the parental rights of the resident state. *Given that your organization has taken such an adversarial position on the concept of parental notification and consent, and has specifically opposed this legislation, do you feel you would be able to set aside any biases you may have to fairly rule upon the bills validity should it be passed into law?*

Answer C. I strongly believe that I would be able to rule fairly upon the validity of the Child Custody Protection Act, if it becomes law and I am called upon to do so. With respect to any case that I am called upon to decide, if I am fortunate enough to be confirmed, I will not allow any of my own opinions to keep me from applying the law objectively and dispassionately. As I stated in my testimony to the Senate Judiciary Committee, any federal judge who cannot apply the law independent of his personal feelings should resign.

Question D. Planned Parenthood has taken the position that the following constitute "rights" which are fundamental to every individual: the right to privacy; the right to education and information about abortion services, including ensuring that this is offered in "the home, schools, public health facilities, religious organizations and youth serving organizations"; the right to access to abortion services, including the use of taxpayer dollars to subsidize the cost of abortions.

Do you share the belief of your organization that these are "fundamental rights"?

Answer D. In determining what is a fundamental right, I would be guided by decisions of the Supreme Court. I believe the Court has determined that the right to privacy is a fundamental right found in the United States Constitution. I do not believe the other "rights" referred to in your question are considered fundamental.

Question E. During your term as Justice Blackmun's clerk, the United States Supreme Court decided the case of *Regents of California* v. *Bakke,* which held, on a 5–4 decision, that the University of California-Davis' race-based admissions program was unconstitutional. Although he joined with the dissenting Justices, who would have upheld the admissions program, Justice Blackmun contributed his own opinion.

(1) Do you remember working on this case? Did you make contributions to Justice Blackmun's opinion?

(2) What is your personal legal opinion on the use of race as a factor for preferential treatment by government institutions?

(3) Do you agree with more recent decisions, such as *Aderand* v. *Peña,* that subject government sponsored affirmative-action programs to strict scrutiny?

(4) In his opinion, Justice Blackmun approvingly cites a passage from former Justice Cardozo in which he states that "the great generalities of the Constitution have a content and a significance that vary from age to age". Do you agree with this notion of a "living constitution"? On what would you base your interpretation of statutory or constitutional questions?

Answer E1. My personal commitment to Justice Blackmun, as well as applicable law, prohibit me from discussing the nature of the work I did while a Supreme Court clerk. See Code of Conduct for Law Clerks of the Supreme Court of the United States Canon 3(c). If confirmed, I would expect my own clerks to be equally circumspect. See Judge Alex Kozinski, Conduct Unbecoming, 108 Yale L.J. 835 (1999).

I know that you will appreciate the importance of these restraints.

Answers E2 and 3. If confirmed, I will adhere to the Supreme Court's judgment in *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). Specifically, all governmentally imposed racial classifications are subject to strict scrutiny and are also subject to a "narrow tailoring" test.

Answer E4. The language of the United States Constitution is undeniably broad and, partly as a result, there has been little need for amendments since the Bill of Rights was added. In this respect, the federal Constitution can be usefully contrasted to that of Texas which was written with so little flexibility that complex amendments are regularly required.

This question, in the end, is one of degree. For example, the First Amendment's protection of "freedom of the press" is widely agreed to extend to television and radio, even though neither existed when the Constitution was ratified. But, as Justice Cardozo has also said, no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Legal Process 149 (1921).

If I am confirmed, my approach to all issues of constitutional interpretation would be to start with the language of the Constitution and its original intent and to review with care all applicable Supreme Court and Courts of Appeals precedents.

RESPONSES OF GARY FEESS TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answers 1 and 2. My personal opinion on this subject would have no bearing on my role as a U.S. District Court Judge. If I were fortunate enough to be confirmed, I would scrupulously adhere to the precedents of the higher courts that bear on this issue. Specifically, in regard to the issues raised in these questions, I would adhere to the Supreme Court decision in *Planned Parenthood* v. *Casey.* The court has recognized that a state has a "profound interest in [the fetus's] potential life" that the state may assert as a means of regulating abortion. *Planned Parenthood* v. *Casey,* 505 U.S. 833, 878 (1992).

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. If the issue were presented to me, I would consider the text of the statute in light of the applicable provisions of the Constitution and any relevant precedent that might bear on the issues presented, especially the Supreme Court's decision in *Planned Parenthood* v. *Casey* which contains precedent regarding governmental regulation of abortion. As a District Court Judge passing on the constitutionality of a statute duly enacted by the Congress, I would be guided by the proposition that there is a presumption of constitutionality. As to the outcome, I do not believe that it would be appropriate for me to state an opinion on potential legislation which might come before me as a judge if I am confirmed.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. If a Second Amendment issue were presented to me, I would carefully consider the text of the Amendment and all relevant and binding precedent. The Second Amendment provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

I note that the most recent Supreme Court decision addressing the Second Amendment was issued 60 years ago in *United States* v. *Miller,* 307 U.S. 174. The text of the Constitution and the *Miller* case would be the starting point for my analysis of any Second Amendment issue.

Question 5. Do you believe that the death penalty is constitutional?

Answer 5. The death penalty has been held constitutional by the Supreme Court of the United States (*Gregg* v. *Georgia,* 428 U.S. 153 (1976)), and the court's decision is supported by the text of the constitution which contains numerous references to capital crimes.

Question 6. Do you have personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. No. As a state court judge, I have presided over a death penalty trial and imposed the death penalty in that case.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. No. A District Court Judge has a duty to apply Supreme Court precedent. The Supreme Court has made it clear that only it can overturn Supreme Court precedent. *Agostini* v. *Felton,* 521 U.S. 203, 237 (1997). In applying such precedent, the judge can write an opinion and state his or her objections to the result with reasons given, but he or she may not refuse to follow Supreme Court precedent.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. If, over time and upon considerable reflection, it appeared to me, as a Justice of the Supreme Court of the United States, that precedent was plainly contrary to the U.S. Constitution, I would vote to overrule the decision establishing the precedent. In *Agostini* v. *Felton,* the Supreme Court discussed the importance of giving great deference to stare decisis but outlined the principles to be applied by that court in addressing whether to overturn its own precedent, 521 U.S. 235–36. In that case the Court used those principles to overturn its decision in *Aguilar* v. *Felton.*

RESPONSE OF GARY FEESS TO A QUESTION FROM SENATOR SESSIONS

Question 1. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rationale for your answers.

Answer 1. Since my graduation from law school in 1974, I have read very few Supreme Court decisions outside the area of criminal law. As a result, I do not consider myself well qualified to critique the jurisprudence of the Supreme Court over the last thirty years. However, from the perspective of a state court trial judge, there is a recent line of cases from the Supreme Court that I consider particularly noteworthy because of their practical importance to the litigation process.

Daubert v. *Merrell Dow Pharmaceutical* and its progeny, in my opinion, are among the most important decisions to come out of the the Supreme Court because they give the trial judge discretion to exclude "junk science," and other "junk expertise," from the courtroom. These cases give the trial judge greater power to expedite litigation, eliminate gamesmanship and enhance the search for the truth.

On the other hand, and with the caveat that as a trial court judge I am duty bound to follow Supreme Court precedent, one decision that has been particularly troublesome for trial judges handling criminal cases is *Faretta* v. *California* in which the court held that a defendant has a constitutional right to represent himself. This decision causes several practical problems in the administration of criminal justice.

First, criminal defendants are rarely able to provide themselves with effective assistance of counsel. While a court is obligated to interrogate pro se applicants regarding their background, training and experience and the sincerity of their wish to waive their right to counsel, in the end the case law is clear that the court must allow the defendant to represent himself except in the most extreme circumstances. I have presided over several trials involving pro se defendants and they have fallen far short of what one would expect from a criminal trial where the defendant is adequately represented. Furthermore, pro se defendants often choose to represent themselves to obtain privileges—such as access to the law library and more liberalized access to the telephone—that are not afforded other defendants. Where this occurs, the motion to proceed pro se may be more for the purpose of improving the

defendant's custodial status through trial rather than exercising a constitutional right. It should also be noted that, because these defendants are incarcerated, they have more difficulty in conducting their defense; and use that fact as part of a strategy of delay. As a result, a disproportionate amount of court time is spent dealing with cases involving pro se defendants.

RESPONSE OF W. ALLEN PEPPER, JR. TO A QUESTION FROM SENATOR HATCH

Question 1. Nationwide class actions filed in both federal and state courts have become more frequent, more complex, and more expensive. Currently, Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1407 and 1408 govern class actions and multi-district litigation, respectively. In your opinion, are there means to respectively. In your opinion, are there means to reduce the cost and complexity of class actions suits in federal courts?

Answer 1. The forgotten party in class actions is the individual litigant. The result of class actions should not be to provide, after years of litigation, a $500.00 discount off the sticker price of a new pickup truck, as in the saddle-bag fuel tank cases, or the right to buy an "enhanced value" life insurance policy as in the "vanishing premium litigation", while as in both situations, the Plaintiffs attorneys make large fees and the Defendants lawyers create huge hourly bills. This benefits no one but the lawyers.

I suggest that immediately upon certification as a Class Action, alternate dispute resolution measures be implemented to include input from consumers as to what they might reasonably expect as to an ultimate resolution of the case, as well as a Defendant's willing concessions prior to the initiation of long and expensive discovery.

RESPONSES OF W. ALLEN PEPPER, JR. TO QUESTIONS FROM SENATOR SESSIONS

Question 1a. One of the pieces of legislation that Congress is currently considering is S. 96, the Y2K bill. ATLA opposes this bill, in large part because the legislation would cap non-economic and punitive damages at the greater of $250,000 or three times economic damages. In fact, ATLA has made the following statement in regard to this bill:

> Capping the amount a jury can award second-guesses the very people our Constitution vests with the power to decide damages in civil cases, violating the very basis of our civil justice system.

Do you agree with ATLA, an organization to which you belong, that passage of the damages provision included in S. 96 "violates the very basis of our civil justice system"?

Answer 1a. The concept of punitive damages is twofold:

a. To punish a tort-feasor for conduct he knew or should have known was wrong and

b. To act as a deterrent for other parties who would act likewise.

While generally agreeing with the concept of punitive damages, I find it difficult to equate the willful and wanton conduct requirements to Y2Y problems.

Question 2. Do you believe that Federal tort-reform efforts are Constitutionally sound, or does the Constitution prohibit Federal legislation in this area?

Answer 2. Within the confines of the Tenth Amendment to the Constitution which reserves to the States all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, I believe Congress is free to act in any manner it so chooses.

Question 3. Are you familiar with the lines of cases, exemplified by the Supreme Courts decision in *BMW of North America* v. *Gore,* that have held that the Due Process Clause of the Fourteenth Amendment prohibits a State from imposing "grossly excessive" punishment on a tortfeasor, and that exemplary damages must bear a "rational relationship" to compensatory damages? What is your understanding of how these rulings are to be applied?

Answer 3. a. Yes, I am familiar with the case of *BMW of North America* v. *Gore* which held that the punitive damage award was grossly excessive and, therefore, exceeded the Constitutional limits.

b. Such an award violates due process when it can be fairly categorized as "grossly excessive" in relation to the state's legitimate interest in punishing unlawful conduct and in deterring its repetition.

Elementary notions of fairness require that a person have fair notice, not only of the conduct that will subject him to punishment but also the penalty that a state might impose. There are three guideposts used in determining whether a Defendant received such fair notice:

(a) Aggravating circumstances must be considered. Was the Defendant's conduct reprehensible or egregious, and if so, to what degree? What was the economic damage inflicted by the alleged conduct, and was there a state statute in effect that would have warned against such conduct? What, if any, is the proof of bad faith, affirmative misconduct, or concealment of evidence of improper motive?

(b) What is the potential for additional harm to the Plaintiff, or other potential plaintiffs by the Complained of policy, and what is the ratio between the plaintiff's compensatory damages and the amount of punitive damages awarded?

(c) What is the difference or relationship between the sanctions imposed in the civil action and penalties that would have been imposed for similar criminal conduct, if any?

RESPONSES OF W. ALLEN PEPPER, JR., TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

Question 1. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rationale of your answers.

Answer 1. A. The most important Supreme Court case, in my opinion, is *Daubert* v. *Merrell-Dow Pharmaceuticals,* because it limits the admissibility of what might be called "junk science" and requires that an experts' testing and principals be generally accepted in the scientific community.

B. The worst Supreme Court case, in my opinion, is *U.S.* v. *Lopez.* This decision, which was based on Congress's reportedly exceeding its authority under the Interstate Commerce Clause, ruled as unconstitutional the Gun Free School Zones Act of 1990 which made it a Federal crime to possess a firearm in or near a school. Subsequent events have proven that this or a similar law is sorely needed.

Question 2. Could you please clarify a response you gave to the question I asked you concerning the case you considered to be the worst Supreme Court decision of the last 30 years? In your answer, you cited the case of *U.S.* v. *Lopez,* in which the Court struck down the Gun Free School Zones Act of 1990, as the worst Supreme Court decision because subsequent events have proven that this or a similar law is sorely needed".

Do you believe that, in interpreting the Constitutionality of Federal Statutes, it is appropriate for Judges to consider whether that law is "sorely needed" as a basis for upholding the statute's constitutional legitimacy?

Answer 2. No, in interpreting the constitutionality of federal statutes, it is not appropriate for judges to consider whether that law is "sorely needed" as a basis for upholding the statute's constitutional legitimacy. A judge's personal beliefs about policy matters should never be a factor as to determining constitutionality. The concerns I expressed with regard to the *Lopez* case were focused on the policy implications of guns in schools—concerns that I fully recognize should not and cannot enter into a judge's deliberation.

Question b. Please explain how you would analyze a statute if asked to rule on its constitutionality. In particular, what factors would be relevant in making your determination?

Answer b. A plain language comparison of the statute with the Constitution is the best method to determine constitutionality. Text, intent of the framers of both the statute and the Constitution, and precedent regarding relevant provisions are the guiding principles. A judge should in no event consider his own personal views in determining the constitutionality of any act.

Question c. Does your answer to the original question I asked you indicate that you would uphold statutes that were otherwise unconstitutional if you felt they would advance particular policy goals you supported? Would you be inclined to strike down otherwise constitutional statutes that you felt were not "sorely needed" as a matter of public policy?

Answer c. The personal feelings of a judge should never play a part in his deliberations as to the constitutionality of any act. If fortunate enough to be confirmed by the Senate as a U.S. District Judge, I would never allow my own views of public policy to be a factor in a determination of constitutionality, regardless of my personal feelings as to whether an act is "sorely needed."

Question d. Could you please explain your views of judicial activism? What do you believe are the characteristics of an activist judge? To what extent should a judge's personal public policy views influence his rulings?

Answer d. Judicial activism is where a judge varies from the text and intent of a statute or constitutional provision to impose his own beliefs. A judicial activist improperly exercises legislative or executive functions. A judge's personal views should have no influence on his rulings, and as a federal judge, I would be duty bound to follow the text and invent of the constitutional provision, statute, and precedents before me and not my own personal beliefs and opinions.

Question 3. Could you please clarify your position on the Constitutionality of federal tort-reform efforts? In your personal legal opinion, does the 10th Amendment preclude Congressional attempts to legislate in this area? Please explain your thoughts on this issue, and provide legal authority for any assertion you make.

Answer 3. With respect to federal tort reform legislation, a court would have to seriously consider the constitutional principle of federalism (see e.g., *The Federalist* No. 51 [Madison]) and the effect on interstate commerce to determine whether it was permissible for the federal government to legislate in this traditionally state law area. A court would have to consider the scope of Congress' enumerated powers set forth in the Constitution (e.g. Article 1, Section 8) and the extent to which Congress is limited by the 10th Amendment. While I have not reached a conclusion with respect to proposed federal tort reform legislation, a court could only make such determination in the context of an actual case or controversy.

RESPONSES OF W. ALLEN PEPPER, JR., TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth.

Answer 1 and 2. As a district court judge, if fortunate enough to be confirmed, I would apply precedent of the U.S. Supreme Court and of the Fifth Circuit as is required in the case of *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*. *Casey* points out that the state has a profound interest in potential life. Therefore, states, in proper circumstances, can regulate abortions.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. I have not read the Partial-Birth Abortion Ban Act, but believe that Congress has the right to enact laws as it chooses, as long as such are not prohibited by Article X of the Constitution as being reserved to the States. I would begin my analysis of any statute enacted by Congress by giving it the presumption of constitutionality. Additionally, I would apply binding precedent of the Supreme Court (*Casey,* in this instance) and the Fifth Circuit.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. As a judge, if a Second Amendment issue were presented to me, I would carefully read and follow the Second Amendment and all binding precedent, e.g., *U.S.* v. *Miller*.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. Yes, the death penalty is constitutional and the U.S. Supreme Court has so held.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. No, I have no personal, moral or religious qualms about enforcing the death penalty as a United States Judge, if the law so requires.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. A U.S. District Judge is required to apply existing precedent regardless of his personal feelings.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. If I were a Supreme Court Justice, then and only then, would I be able to overrule existing precedent as being either wrongly decided or no longer applica-

ble. The facts of each case would determine its disposition, but overruling precedent should be done only in rare circumstances.

RESPONSES OF KAREN SCHREIER TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer 1. I hold no beliefs on this issue that would prevent me from applying Supreme Court precedents. According to the Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), the State has an interest in promoting the life or potential life of the unborn. After a fetus is viable, the State's interest in promoting the life of the fetus may override the right of the woman. I would follow the

Alysis of the relevant Supreme Court precedent in deciding a similar question in litigation.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before death?

Answer 2. According to the Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), the State has an interest in promoting the life or potential life or the unborn. After the fetus is viable, the State's interest in promoting the life of the fetus may override the right of the woman and allow the State to regulate abortion. I would apply the analysis of the relevant Supreme Court precedent in deciding such an issue.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. I do not believe it is proper for a nominee to indicate whether proposed legislation is constitutional; however, as with other legal questions that I will consider if I am confirmed as a Federal District Court Judge, I will review the legislation under the general presumption that the legislation is constitutional. I will than look at the language of the statute, the Constitution, prior United States Supreme Court decisions and decisions of the Eight Circuit Court of Appeals and be bound to apply the prior precedent.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. The Supreme Court held in *U.S.* v. *Miller,* 307 U.S. 174 (1939), that absent a showing that possession of a certain weapon has "some reasonable relationship to the preservation or efficiency of a well-regulated militia", the Second Amendment does not guarantee an individual the right to possess a weapon. I would follow the holding of the Supreme Court precedent in deciding such an issue.

The courts have found constitutional statutes that keep firearms out of the hands of convicted felons, *Lewis* v. *United States,* 445 U.S. 55 (1980), prohibit the possession of unregistered sawed-off shotguns, prohibit the possession of firearms by a person convicted of a misdemeanor crime of domestic violence, *United States* v. *Smith,* 171 F.3d 617 (8th Cir. 1972), and other licensing schemes.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. The Supreme Court addressed this issue in *Gregg* v. *Georgia,* 428 U.S. 153 (1976) and has found the death penalty constitutional. I would follow the holding the Supreme Court.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. I hold no beliefs which would prevent me from enforcing the death penalty as a United States District Judge.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. None of which I am aware.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. As the Supreme Court recognized in *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the obligation to follow precedent is indispensable and should only be abandoned if a prior judicial ruling comes to be so clearly seen as an error that enforcement of the ruling is doomed for that very reason. For example, if the rule has proven intolerable and not workable, or if the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add

inequity to the cost of repudiation. Other examples set forth in *Casey* include if the related principles of law have advanced so far that the only rule is nothing more than an abandoned doctrine or if the facts have so changes that the old rule has been robbed of significant application or justification. Overruling a prior decision should be reserved only for these rare occasions and as the question suggests only by the Supreme Court.

RESPONSE OF KAREN SCHREIER TO A QUESTION FROM SENATOR HATCH

Question 1. In South Dakota, there is a significant Native American population. Throughout our history, the federal government has had many dealings with Native Americans, few of which are examples of fair play. Indeed, in Monday's Wall Street Journal, there was an article discussing the payment of funds by the United States to the Sioux Nation for the Black Hills. If confirmed as a federal district judge in South Dakota, you would have to deal fairly with the Native American's within the district court's jurisdiction. What special issues do you think are important for a judge to consider in dealing with the Native American community?

Answer 1. As a federal judge, it is important to treat all litigants fairly, including Native Americans. The federal government has acknowledged that is has a trust responsibility to the Native American people. This trust responsibility includes, among other things, providing a law enforcement function in Indian Country as defined by federal statute. The federal courts should treat victims of federal crimes that occur in Indian Country with respect and an understanding that the prompt resolution of these cases is important. Defendants in cases that arise in Indian Country should receive competent counsel who will vigorously defend them. Sentences that are imposed should be fair and not treat Native Americans differently than non-Indians. Jury pools should be made up of individuals without bias, including Native Americans. A significant percentage of the criminal caseload in South Dakota involves crimes that are committed in Indian Country.

Other case specific issues may arise regarding the federal and state governments relationship with the tribes. These issues may include land claims, environmental issues, sovereign immunity issues, and Indian gaming issues. I will do my best to apply the law in these areas in a manner that is fair to all the litigants.

RESPONSES OF KAREN SCHREIER TO QUESTIONS FROM SENATOR SESSIONS

Question 1. What is the extent of your involvement in litigation regarding casino gambling? Please cite all cases in which you have represented Casino interests, and provide a brief summation of the issues and controversy and the positions you advocated.

Answer 1. As United States Attorney for the District of South Dakota from July 30, 1993 to the present, I have represented the United States in several criminal prosecutions against individuals who embezzled money from tribal casinos in South Dakota.

While in private practice, I served as co-counsel representing Royal River Casino and its owners in a dispute with the Flandreau Santee Sioux Gaming Commission in 1990 and 1991. This dispute arose due to a disagreement regarding the division of profits under their management contract and the National Indian Gaming Act. The Royal River Casino was operating under an approved compact with the State of South Dakota. Simultaneous actions were pending in the Flandreau Santee Sioux Tribal Court, the state court, and federal court. In an administrative hearing before the Flandreau Santee Sioux Tribal Commission on Gaming, the Gaming Commissioner contended that my client's gaming license should be revoked for refusing to pay to the Fandreau Santee Sioux Tribe 60 percent of the net operating profits of the gaming activities, along with several other allegations. I began representing Royal River Casino and its owners after this hearing was completed and while the appeal was pending to the Flandreau Santee Sioux Tribal Court. The case name of the appeal which was pending in the Flandreau Santee Sioux Tribal Court is In the Matter of Complaints against Royal Hunter Corporation Gaming Licenses, 001–T, 002–T, and 003–T from the Flandreau Santee Sioux Commission on Gaming. At approximately this same time, an additional action was filed in the Flandreau Santee Sioux Tribal Court entitled *Flandreau Santee Sioux Tribe* v. *Royal Hunter Corporation.* On behalf of my client, I contended that the tribal court should be dismissed because the tribal court was without jurisdiction to hear the action, that the complaint failed to state a cause of action, that the Amended Complaint had not been properly served on the defendant, that the tribal court did not have power to grant a temporary restraining order as a CFR Court, and that the Plaintiff's attorney was

not properly admitted into tribal court. In addition, I argued that further tribal court action should be stayed pending the appeal from the license revocation hearing decision of the Flandreau Santee Sioux Commission on Gaming and that the bond of $128,000 was sufficient.

At the same time that these actions were pending in tribal court, co-counsel and I filed an action on behalf of my client in state court entitled *Royal Hunter Corporation* v. *Gordon J. Jones, Sr., et al.* Civ. 90–99 Fourth Judicial Circuit, Moody County, South Dakota. The action sought a declaratory judgment to invalidate four tribal ordinances and to set aside the Gaming Commission order that suspended the gaming license of my clients. Injunctive relief was sought in addition to damages for tortious interference with contract. A temporary injunction was issued by the state court. The defendants removed this action to federal court. The case citation in federal court is *Royal Hunter Corporation* v. *Gordon Jones, Sr., et al.,* Civ. 91–4006, U.S. District Court, District of South Dakota, Southern Division. The primary issue litigated was whether the state or federal court had jurisdiction under this particular compact to resolve contractual disputes. I contended that the state court had jurisdiction for all disputes due to a specific provision of the compact which stated that all disputes would be resolved in state court and the lack of federal question jurisdiction. The tribe contended that only federal courts have jurisdiction over disputes arising in Indian Country.

A matter entitled *Flandreau Santee Sioux Tribal of South Dakota* v. *Royal River Casino, Inc.,* Case No. 91–4019, was filed in the United States District Court for the District of South Dakota. This matter was dismissed based on a Stipulation for Dismissal signed by all the parties before an Answer was filed on behalf of the defendants.

All the litigation was resolved by dismissal of the pending actions.

Question 2. Do you believe that the Federal Government has the authority to allow Casino Gambling on tribal land if a compact has not been entered into between a State and the Tribe? Please cite relevant authority for whichever position you take on this issue.

Answer 2. Because all casino gambling on tribal land in South Dakota is currently conducted under compacts entered into between the Tribes and the State, I have not had occasions to litigate the legal question you raise. If the issue should come before me as a District Court Judge, however, I will look to the Supreme Court and Eighth Circuit Court of Appeals decisions, other relevant precedents, and to the Indian Gaming Regulatory Act to resolve the dispute. If the Eighth Circuit and the Supreme Court have not addressed the issue, then I will look to opinions of other Courts of Appeals for guidance, understanding that decisions of other Courts of Appeals are not controlling. Current relevant legal authority includes the Supreme Court decision in *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996), and current relevant decisions of the Eighth Circuit Court of Appeals include *U.S.* v. *Santee Sioux Tribe of Nebraska,* 135 F.3d 558 (8th Cir. 1998). I do not have any personal reasons that would prevent me from applying the law as it exists.

Question 3. In light of the Seminole Tribe decision, what is your interpretation of a State's ability to regulate gambling within its borders under the Indian Gaming Regulatory Act?

Answer 3. In my experience in South Dakota, through the compact negotiation process, the State has negotiated with the tribes issues including the regulation, scope and location of gambling operations within its borders under IGRA. If the issue of the State's ability to regulate gambling within its borders is litigated before me, I will look to applicable Supreme Court decisions including *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996) together with relevant Eighth Circuit precedent, which includes *Cheyenne River Sioux Tribe* v. *South Dakota,* 3 F.3d 273 (1993) and *United States* v. *Santee Sioux Tribe of Nebraska,* 135 F.3d 558 (8th Cir. 1998). Under the law of the Eighth Circuit in the *Santee* decision, the Court found that a State is not required to negotiate for gambling that is illegal under State law.

Question 4. Have you ever taken a written position on this issue, for example in pleadings or briefs, or in other formats? If so, please explain your position in these instances and provide copies of your writings.

Answer 4. I have no recollection of ever taking a written position on this issue.

RESPONSE OF KAREN SCHREIER TO A GENERAL QUESTION

Question 1. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rational for your answers.

Answer 1. In my opinion, one of the most important Supreme Court decisions is *Brady* v. *Maryland,* 3 U.S. 83 (1963) and its progeny. The *Brady* decision and its progeny impacts each and every federal prosecution as its place the responsibility on federal prosecutors to provide the defense all exculpatory evidence. This helps to ensure that justice is achieved in all cases and that the power given to prosecutors is not abused.

One of the worst Supreme Court decisions in the last thirty years is *Booth* v. *Maryland* 182 U.S. 496 (1987) which disallowed victim-impact testimony during the penalty phase of a capital trial. I believe victim impact is an important factor for the sentencing entity (whether it be a judge or a jury) to consider before rendering a decision on the appropriate punishment.

RESPONSE OF STEFAN R. UNDERHILL TO A QUESTION FROM SENATOR HATCH

Question 1. Intellectual property is a very important area of the law and is likely to grow in importance in the 21st Century. If you are confirmed as a district judge, it will be important for you to draft opinions that both the bench and bar can understand and follow. In your view, are there any special considerations for intellectual property cases that you believe a judge should consider in trying a case and in drafting an opinion?

Answer 1. Some intellectual property cases are not significantly more complex or difficult than the average commercial dispute. Thus, for example, a copyright royalty dispute or a simple trademark infringement action may not require special considerations in the trial or decision of the case.

Other intellectual property cases, however, notably patent cases, often involve highly technical engineering and scientific issues. This class of cases does require various special considerations. Perhaps the most fundamental consideration is the need to make highly technical concepts and information understandable to a jury. An uninformed or confused jury cannot render a fair verdict. Therefore, the court should take various steps to improve the quality of jury decision making. The court must construe the patent under the *Markman* decision and should render a clear and concise *Markman* ruling that will facilitate fact finding by the jury. The court should also consider appointing its own expert to tutor the jury in the art of the patent if it appears that the parties' experts are unable or unwilling to do so. Various techniques recommended by the Manual for Complex Litigation, such as jury note taking and preinstruction of the jury, should also be used by the judge as appropriate in complex intellectual property cases.

When drafting an opinion in an intellectual property case, either in connection with a *Markman* hearing or with any other question raising technical issues, the judge must strive for heightened clarity. Every opinion serves several functions, including informing the parties of the reasoning underlying the court's decision, permitting appellate review, and serving to guide other lawyers and parties who seek to conform their conduct to the law. When highly technical issues are involved, any of these functions can be undermined by a lack of crispness and clarity in the court's opinion. The judge must ensure that the technical aspects of the case are understandably set forth in the opinion, but he must do so without allowing the technical aspects of the case to overwhelm the reader.

RESPONSES OF STEFAN R. UNDERHILL TO QUESTIONS FROM SENATOR SESSIONS

Question 1a. What are your opinions regarding judicial activism? What are the principles that would guide you in statutory interpretation?

Answer a. I oppose judicial activism. The proper role of a judge is to decide each case brought before him. This requires the judge to carefully apply the law to the facts proven by the parties. Trial judges should not create law. Doing so not only violates the separation of powers under our constitutional system, but also disrupts the reasonable expectations of all who seek to conform their conduct to the requirements of law.

When interpreting a statute, I would faithfully follow controlling precedent of the United States Supreme Court and of the Second Circuit Court of Appeals. In the absence of applicable authority, statutory interpretation is analogous to contract interpretation. I would start with the plain language of the statute. If the statute were clear on its face, no real interpretation would be needed. If the relevant language of the statute were ambiguous, I would reason by analogy from decisions involving similar language in other statutes and would, as a last resort, look to the legislative history of the statute, much as one might look to parol evidence when

interpreting an ambiguous contract clause. In this latter effort, I would also look for persuasive decisions of other courts at both the appellate and trial level.

Question b. In a 1983 law review article, you argue that Congress does not have the ability to limit the jurisdiction of federal courts, even though your paper cites the Supreme Court case of *Sheldon* v. *Sill* for standing for the proposition that "having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."

Additionally, your article states that "the language of Article III apparently grants Congress the power to create lower federal court that exercise only part of their Constitutionally permissible power, and most certainly grants it power to limit the Supreme Court's appellate jurisdiction."

(1) Given the strong weight of authority that you cite as supporting the proposition that Congress could in fact limit federal court jurisdiction, how did you come to the conclusion that Congress lacks the authority to do so?

(2) Having stated that "the language of Article III apparently gives" Congress the authority to enact such legislation, do you feel that in going beyond the words of the Constitution to draw a contrary conclusion it is fair to criticize your article as an "activist" work?

(3) Has your thinking on this topic changed since the publication of this article?

Answer b. I do not believe that the article I co-authored with Professor Brilmayer argues that Congress does not have the power to limit the jurisdiction of federal courts. To the contrary, as the second paragraph of this question itself suggests, the article expressly acknowledges Congress' power in this area. See, e.g., 69 Va. L. Rev. at 822 ("Congress undeniably enjoys at least some power under article III to shape both the overall jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court."); id. at 824 ("Apparently, no constitutional case enjoys an absolute right to be adjudicated in the lower federal courts because the Constitution would permit Congress to decline to establish such courts, nor must any particular case outside the Supreme Court's original jurisdiction necessarily be heard in that Court. Otherwise, the textual grant of congressional power in article III would be reduced to a triviality * * *"); id. at 824 n.28 ("Federal courts, unlike state courts, are courts of limited jurisdiction. An affirmative constitutional source of jurisdiction must be found before a federal court has jurisdiction over a cause of action."); id. at 849 ("Congress need not establish lower federal courts, vest them with general jurisdiction, or leave the Supreme Court's jurisdiction totally intact.").

In addition, the article criticizes other scholars who have failed to account for this power when writing about the subject. See, e.g., id. at 830 n.62 ("We need not argue, as did Professor Eisenberg, that: 'the jurisdiction of these courts is not a matter solely within the discretion of Congress.'"); id. at 848 ("The most serious defect [in other articles on this subject] is that they reduce the congressional role to triviality and thus interpret the regulations and exceptions clause and the power to create lower federal courts into absurdity.").

The article does argue that a number of specifically identified bills introduced in Congress in the early 1980's were unconstitutional attempts to use Congress' power over federal court jurisdiction. Id. at 822 ("We argue only that Congress cannot discriminate against constitutional claims in drafting jurisdictional bills."). Although Congress enjoys power to restrict federal court jurisdiction, it cannot exercise that power in an unconstitutional manner. This distinction is highlighted at the end of the article where Professor Brilmayer and I suggest an alternative by which Congress could restrict the jurisdiction of the federal courts to hear specific constitutional claims without running afoul of the principle of equal access described in the article. See id. at 848 ("Were it not for these general grants [of federal question jurisdiction], it would arguably be permissible for Congress to create a purely statutory jurisdiction by affirmatively building it up, statute-by-statute, without discriminating against any constitutional claims at any step.").

Given its repeated acknowledgment of Congressional power over federal court jurisdiction and given its complete reliance on established precedents of the United States Supreme Court, I do not believe that the article can fairly be criticized as an "activist work." Rather than disputing Congress' power to control federal court jurisdiction, the article argues merely that certain specific bills exercising that power would have been unconstitutional. The article even suggests a method by which Congress could lawfully achieve the jurisdictional limitations sought by the bills discussed. Accordingly, the article not only relies on but is also consistent with the holding of *Sheldon* v. *Sill.*

My thinking on this topic has not changed since publication of this article. I remain comfortable with the analysis and application of the Supreme Court decisions on which the article was based.

Question 2. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years? Please explain the rationale for your answers.

Answer 2. In may personal legal opinion, the most important Supreme Court decision in the last thirty years was *United States* v. *Nixon,* 418 U.S. 683 (1974). There is perhaps no more significant case in modern history on the subject of the separation of powers among the branches of government. In that decision, issued at a time of constitutional crisis, the Supreme Court recognized the need for each branch to carry out its constitutional duty without interference from others. Of equal significance, the Court confirmed that no person is above the law. One way to evaluate the importance of a judicial decision is to imagine the effect if it had been decided differently. Had *United States* v. *Nixon* been decided differently by the Supreme Court, I fear that it would have had a significant and negative impact on the future of our system of government and on the separation of powers under the Constitution.

I do not feel qualified or comfortable identifying a Supreme Court case as the worst decision in the last thirty years. I generally read Supreme Court cases to learn what the law is and how it affects my clients and cases. When the Supreme Court decides a case without providing needed guidance to lower courts, lawyers, and parties, however, I believe that it has failed to fulfill a fundamental duty. This happens most obviously when the Supreme Court Justices issue multiple opinions, concurring and dissenting in part from the opinions of other Justices—whether or not any of these opinions are thoughtful or "correct" on the merits, the overall result is unfortunate.

One example of this type of fractured decision is *Mobile* v. *Bolden,* 446 U.S. 55 (1980). There was no majority opinion in *Mobile* v. *Bolden.* Justice Stewart's plurality opinion was joined in by Chief Justice Burger and by Justice Powell and Rehnquist. Justice Blackmun concurred "in the result," and Justice Stevens concurred "in the judgment." Justice White dissented. Justices Brennan and Marshall dissented in a separately published decision that is not even published with the other opinions in the Supreme Court Reporter. Although I cannot say that the *Mobile* v. *Bolden* decision or even any one of its many opinions is—on the merits—the worst issued by the Supreme Court in the last thirty years, the disjointed opinions issued by the Supreme Court are representative of what I like least about Supreme Court decisions. In that case, the Supreme Court failed to render a decision that lower courts, lawyers and parties could reasonably be expected to understand and to follow.

RESPONSES OF STEFAN R. UNDERHILL TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer 1 and 2. Should either of these questions come before me as a judge, I have no personal beliefs that would prevent me from analyzing the issues objectively and rendering a fair decision. In such a case, I would faithfully apply Supreme Court precedent on these issues. Present Supreme Court precedent, notably *Planned Parenthood* v. *Casey,* 510 U.S. 833 (1992), holds that the state has an interest in protecting the life of the fetus that may become a child. I would have no difficulty applying the *Casey* decision.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. Like every federal statute, the Partial-Birth Abortion Ban Act would enjoy a strong presumption of constitutionality. I have never read the Partial-Birth Abortion Ban Act and am not familiar with the details of that legislation. For this reason, and because it is possible that the Act might come before me if I were to be confirmed as a District Judge, I am not able to answer this question in any greater detail without prejudging this issue.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. On its face, the Second Amendment to the Constitution of the United States appears to protect the right to keep and bear arms. Like other constitutional rights, the rights granted by the Second Amendment are subject to some limitations. In *United States* v. *Miller,* 307 U.S. 174 (1939), for example, the Supreme Court

held that an individual's Second Amendment rights do not preclude some state regulation of activities involving firearms. I am not aware of the precise scope of the limits on an individual's Second Amendment rights.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. Yes, the United States Supreme Court, in *Gregg* v. *Georgia,* 428 U.S. 153 (1976), has clearly held that the death penalty is constitutional.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. No, I do not have any personal, moral, or religious qualms about enforcing the death penalty should I be confirmed as a District Judge.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. I cannot think of any circumstances in which a District Court Judge could refuse to apply controlling Supreme Court precedent, even if the Judge concludes that such precedent is flatly contrary to the Constitution. The rule of law would be undermined if a trial judge were free to ignore Supreme Court precedent with which he disagreed.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. Even if I were a Supreme Court Justice, I would vote to overrule a precedent of the Court only under circumstances meeting the high threshold set by the Supreme Court. In cases such as *Agostini* v. *Felton,* 521 U.S. 203 (1997), the Supreme Court has held that it can overrule its own precedent involving constitutional law only "where there has been a significant change in or subsequent development of our constitutional law." Principles of *stare decisis* argue for similarly demanding standards for overruling precedent involving non-constitutional questions. Absent such compelling circumstances, even Supreme Court Justices should adhere to prior Supreme Court precedent.

RESPONSES OF T. JOHN WARD TO QUESTIONS FROM SENATOR SESSIONS

Question 1a. Mr. Ward, the following are a list of policy positions taken by the ACLU. Given that you have been a member of this organization, do the positions supported by the ACLU fairly reflect your views? Do you support or oppose these positions? Please explain your position on these topics.

- The ACLU asserts that "in all circumstances, the death penalty is unconstitutional under the Eighth Amendment."
- The ACLU "opposes the criminal prohibition of drugs," supports the legalization of needle exchange programs, and opposes drug testing programs in schools.
- The ACLU "opposes parental consent and notification laws on the grounds that they infringe upon minor's constitutional rights and serve no useful purpose."
- The ACLU believes that the "right to an abortion" is guaranteed not only by a right to privacy, but also by the 14th Amendment's guarantee of equal protection and the 1st Amendment's prohibitions on religious establishment.

Answer 1a. The various positions taken by the ACLU do not fairly reflect my personal views. While I am a member of the ACLU, I am not a member of its boards or committees, and am not involved in its policy or decision making. As with any organization to which any of us belongs, the ACLU holds some positions with which I agree, and some with which I disagree. However, because my personal beliefs and opinions would not be relevant to my role as a U.S. District Court judge, I think it would be inappropriate to express them here. Rather, I can assure the Committee that I firmly believe in a district judge's limited role of applying, and not making, the law.

I can also assure you that should these issues come before me as a district judge, I would faithfully and without hesitation apply the relevant precedents where they exist. Where there is no applicable precedent, I would analyze the legal questions by examining the plain language of the statute at issue, the language of the Constitution, and any cases on analogous and related legal issues.

Specifically, with respect to the four questions you posed:

- The Supreme Court has clearly held that the death penalty is constitutional in *Gregg* v. *Georgia,* 428 U.S. 153 (1976) and I would follow this ruling without hesitation.
- The United States Supreme Court has characterized the right to abortion as one part of a more general right of privacy or Fourteenth Amendment liberty. If confirmed, I would not expand the right to abortion beyond that granted by the Su-

preme Court. I would not hesitate to impose limitations on this right as directed by the U.S. Supreme Court or Fifth Circuit precedent. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), and *Mazurek* v. *Armstrong,* ____ U.S. ____, 117 S. Ct. 1865 (1997), the Court approved certain limitations being placed on the right of abortion.

• *Casey* addressed the question of parental consent and parental notification. I would follow that decision without hesitation.

• It is clear that the use and sale of drugs may be criminally prohibited. Should a question of the constitutionality of needle exchange programs or school drug testing programs come before me, I would presume the constitutionality of the statutes, examine their plain language, and apply any relevant or analogous Supreme Court or Fifth Circuit precedents, including *Vernonia School District* v. *Acton,* 515 U.S. 646 (1995) (drug testing in schools held constitutional under the particular facts of case).

Question b. Would you have difficulty in separating the policy positions you may hold as a member of the ACLU from your duty to interpret the legitimacy of federal statutes?

Answer b. The question seems to assume that my personal views are the same as those advocated by the ACLU. That assumption is not correct. I assure you that should I be confirmed, I would have no difficulty in separating any personal policy views, or positions that I might have from my duty to interpret the legitimacy of a federal statute.

Question c. Mr. Ward, you are also a member of People for the American Way, an organization that waged a highly visible campaign against the impeachment of President Clinton. As you may know, during the impeachment proceedings, the President's defense team offered the argument that his behavior should not be held to the same standard of behavior that we expect out of federal judges. He offered this defense, in part, to differentiate the perjury charge leveled against him from the perjury charges that had previously resulted in the removal of Federal Judges.

(1) What is your opinion on the standard of behavior the Constitution requires of Federal Judges? Under what circumstances is it appropriate to remove a Federal Judge?

(2) Do you agree with my concern, that in articulating a separate standard of removal for Federal Judges, the President's politically expedient argument undermines judicial independence and could reinvigorate attempts to remove judges on the basis of their issuing unpopular decisions?

Answer c1. My wife is a member of People for the American Way and I am listed as such because both our names appear on the checks she uses to send her contribution. I have not been actively involved in that organization. Moreover, I am not fully familiar with the various defenses offered by the President.

Nonetheless, the constitutional standard for a judge's behavior is set forth in Section 4 of Article II. This standard is specific as to the offenses of treason and bribery and general with respect to the phrases of high crimes and misdemeanors. Because of this generality, the Senate, in its Advice and Consent role, should scrutinize the candidate's background and qualifications and be satisfied with a nominee's integrity as revealed by the strenuous investigation. Senator Phil Gramm and Senator Kay Bailey Hutchison go the "extra mile" by having their own committee of lawyers investigate and evaluate the nominee.

Answer c2. The plain language of Section 4 of Article II provides that the same standard of conduct applies to both a federal judge and the President. I believe that the duty of a judge is to follow the plain language of the Constitution, and I would be concerned if the plain language of the Constitution was not followed.

Question d. People for the American Way has taken an aggressive stance on a variety of public policy issues. For example, your organization:

• Opposes School Voucher programs;
• Opposes a Constitutional Amendment to Prevent Flag Desecration;
• Opposes a ban on Partial Birth Abortions;
• Opposes Parental Consent laws, including the "Child Custody Protection Act";
• Opposes efforts, like Proposition 209 in California, which seek to eliminate state-sponsored racial preferences;
• Supports same-sex marriage "rights".

(1) What are your positions on these issues? Is it fair to assume that you share these views? Does your membership in this organization indicate a predisposition to how you would rule on these controversial issues if brought before you?

(2) At what point do you believe school voucher programs pass Constitutional muster? Are they always unconstitutional in your view?

(3) In your opinion, does the United States Constitution contain a "right" for same-sex marriage? If so, on what authority do you base this proposition?

(4) Given PFAW's unflinching support for affirmative action programs, do you agree with the recent line of Supreme Court cases, such as *Adarand* v. *Peña*, that hold these programs to strict scrutiny standard?

Answer d. While my name is on the membership roll because my name was on the check drawn on our joint checking account, it would not be fair to assume that I agree or disagree with the views of People for the American Way. My wife and I have enjoyed almost 35 years of very happy marriage. We have many things in common, but we also have different views on many issues. Those on the committee who are or have been married can appreciate that.

My membership in this organization does not indicate any predisposition as to how I might rule, if I am confirmed, should any of these issues come before me. If confirmed, I would not allow my personal view on any matter to determine my ruling. I am committed to applying the law consistent with the principles of *stare decisis,* presumption of constitutionality, and construing statutory language according to its plain meaning. I will faithfully follow all relevant United States Supreme Court and Fifth Circuit precedent.

I can also assure you that should these issues come before me as a district judge, I would faithfully and without hesitation apply the relevant precedents where they exist. Where there is no applicable precedent, I would analyze the legal questions by examining the plain language of the statute at issue, the language of the Constitution, and any cases on analogous and related legal issues.

Specifically, with respect to the particular issues that you raised:

• The Supreme Court in *Adarand* v. *Peñ,* 515 U.S. 200 (1995), set forth a three point test to be applied to all affirmative action programs which establishes preferences based upon race or national origin. Such programs must be held to a strict scrutiny standard; a compelling governmental interest must be at stake; and the program must be narrowly tailored. If confirmed, I would follow this decision without hesitation.

• Should there be any amendment to the Constitution, such as one preventing flag desecration, a district judge would have no discretion whether to enforce it. If confirmed, I would enforce such an amendment as written.

• In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court balanced the right to abortion against the state's interest in potential life by adopting the undue burden analysis. Applying this standard, the Court held that requiring a minor to obtain parental consent to an abortion was not an undue burden and was constitutional I would faithfully follow this precedent. This same balancing approach would be the starting point for an analysis of the constitutionality of a statute providing a ban on partial birth abortions.

• If confirmed, issues involving School Voucher Programs, the Child Custody Protection Act, and other issues the Supreme Court has not addressed, could come before me as a judge. I hold no personal view that would prevent me from fairly deciding such questions. Any statutory enactment would be presumed to be constitutional, be measured by existing United States Supreme Court and Fifth Circuit precedent, and be interpreted in accordance with the plan language of the statute.

• I am not aware of any provision of the United States Constitution that contains a "right" to the same sex marriages.

Question 2a. In your personal legal opinion, what is the most important Supreme Court decision in the last thirty years? What is the worst Supreme Court decision the last thirty years? Please explain the rationale for your answers.

Answer 2a. As a practicing trial lawyer, the opinion in the case of *Daubert* v. *Merrill Dow Pharmaceuticals,* 509 U.S. 579 (1993), has been of great importance. In short, the court in *Daubert* put in place a mechanism for limiting the introduction of scientific opinions into evidence in a jury trial. The presiding judge is the "gatekeeper" who decides whether the particular scientific opinion is sufficiently supported in the scientific community to be received and considered by a jury. It provides a mechanism for keeping "junk science" from being placed before a jury. Prior to *Daubert,* "junk science" opinions would often get before a jury and an opposing party's only remedy was cross-examination. From my perspective as a trial lawyer, *Daubert* leveled the playing field in jury trials where opinion evidence is the norm. *Daubert* has recently been extended to non-scientific opinions in the case of *Kumho Tire Co.* v. *Carmichael,* ____ U.S. ____, 119 S.Ct. 1167 (1999). The function of the presiding judge will be even more important in performing this gatekeeper function on opinion evidence.

One of the worst opinions in the last thirty years is the 1972 case of *Furman* v. *Georgia,* 408 U.S. 238 (1972). *Furman* abolished the death penalty in 39 states.

The reason that I believe that *Furman* was one of the worst decisions is succinctly stated in Justice Powell's dissent when he remarked "[l]ess measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint, and—most importantly—separation of powers."

Likewise, Justice Powell noted that the decision of the majority was plainly one of great importance because of the number of state laws affected together with the District of Columbia, Criminal Code of United States, and Uniform Code of Military Justice. Justice Powell's dissent is over twenty-five pages in length and gave a detailed and scholarly statement for his dissenting opinion.

RESPONSE OF T. JOHN WARD TO AN ADDITIONAL QUESTION FROM SENATOR SESSIONS

Question 1. Mr. Ward, in your previous set of written questions, I asked for your personal opinion in regard to certain controversial positions advocated by the ACLU, an organization to which you belong. You failed to answer this question, stating that your personal beliefs would not be relevant to your role as a U.S. District Court Judge, and that as a result "it would be inappropriate to express them here". Considering that you have been nominated for a position that requires the Senate to "advise and consent", I respectfully disagree with your assertion. For example, a Federal District Judge will be required to hear cases involving illegal drugs, and, as a result, I think it is appropriate to ask a prospective nominee about their personal opinion on such an issue, if only to assess to my satisfaction that a nominee contains no inner biases that would prevent them from properly applying applicable law.

Having said this, I would like you to express your personal opinion with regard to the following positions advocated by the ACLU. Specifically, I would like to know whether you agree or disagree with the positions the ACLU has taken, and your reasons for either supporting or opposing the following ACLU positions.

Answer 1. I understand and think it is appropriate for a Senator to ensure that a judicial nominee holds no inner biases that would prevent him or her from properly applying applicable law. My answers to the specific questions are as follows:

(A) Do you believe the ACLU is correct when the ACLU asserts that "in all circumstances, the death penalty is unconstitutional under the Eighth Amendment"? Do you support or oppose this position? Please explain your answers.

No, the ACLU is not correct if it asserts that "in all circumstances, the death penalty is unconstitutional under the Eighth Amendment". I do not support this position. The reason is that the Supreme Court has held in *Gregg* v. *Georgia,* 428 U.S. 153 (1976), that the death penalty is not unconstitutional. Moreover, the Constitution makes explicit reference to capital punishment. I have no personal views or biases that would prevent me from imposing the death penalty in accordance with the law. I will faithfully follow the judicial precedent of the Supreme Court.

(B) The ACLU "opposes the criminal prohibition of drugs", supports the legalization of needle exchange programs, and opposes drug testing programs in schools. Do you agree or disagree with the ACLU's position? Please explain your answers.

I do not support the ACLU's position on any of these issues. The laws criminalizing drugs are valid and entitled to enforcement. I would enforce all criminal statues in accordance with the law. Drug testing in schools has been held constitutional in the case of *Vernonia School District* v. *Acton,* 515 U.S. 646 (1995). I would faithfully follow this precedent and any applicable Fifth Circuit precedent. I am not aware of any precedent dealing with a needle exchange program but, should this issue come before me through a challenge to a statutory enactment, I would presume the constitutionality of the statute, examine its plain language, and apply any relevant or analogous Supreme Court or Fifth Circuit precedent. I have no personal biases or views that would prevent me from enforcing the applicable law on these issues.

(C) Do you believe the ACLU is correct when the ACLU "opposes parental consent and notification laws on the grounds that they infringe upon minor's constitutional rights and serve no useful purpose."? Do you support or oppose the ACLU's position? Please explain your answers.

The ACLU position is not correct if it "opposes parental consent and notification laws on the ground that they infringe upon minor's constitutional rights and serve no useful purpose" and I do not support this position. The Supreme Court has, in *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), specifically ruled that the requirement of parental notification and consent was constitutional and an enforceable requirement for an abortion by a minor holding this was not an undue burden.

I would faithfully follow this precedent. I hold no personal views or biases that would prevent me from upholding these limitations on minors seeking an abortion.

(D) Do you believe the ACLU is correct when the ACLU asserts the "right to an abortion" is guaranteed not only by a right to privacy, but also by the 14th Amendment's guarantee of equal protection and the 1st Amendment's prohibitions on religious establishment? Do you support or oppose the ACLU's position? Please explain your answer.

The ACLU's position is not correct if it asserts the "right to an abortion" is guaranteed by the 14th Amendment's guarantee of equal protection and the 1st Amendment's prohibitions on religious establishment? I do not support the ACLU's position because it seeks to expand privacy rights beyond that recognized by the Supreme Court in *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992). I will faithfully follow this precedent. I have no personal biases or views that would prevent me from enforcing the applicable law on this issue.

RESPONSES OF T. JOHN WARD TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer 1. In *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the United States Supreme Court recognized that the state had a legitimate interest in protecting an unborn fetus at such time as it became viable. If confirmed, I would apply the relevant judicial precedent, including *Casey*, to any questions concerning the rights of the unborn.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer 2. In *Casey*, the U.S. Supreme Court addresses the protection of the unborn. If confirmed, I would apply *Casey* together with other relevant precedent.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. All statutes are presumed to be constitutional. If confirmed, I would start with the presumption of constitutionality and examine it in accordance with all relevant judicial precedent. I would look to the plain language of the statute. However, if confirmed, this is a question that could come before me and I do not believe it would be appropriate to give my personal opinion.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. If confirmed, I would look to the plain language of the Second Amendment together with all relevant judicial precedent to decide any Second Amendment issues.

Question 5. Do you believe that the death penalty is constitutional?

Answer 5. In *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Supreme Court ruled that the death penalty was constitutional. If confirmed, I will follow that precedent and all other relevant Supreme Court decisions without any question or hesitation.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer 6. No, I do not.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. None that I am aware of.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. In responding to certain questions, I have referred to *Planned Parenthood* v. *Casey*. In *Casey,* the United State Supreme Court listed some of the questions that the Supreme Court would ask in reaching a decision to abandon a prior ruling. These include:

(a) Whether the rule has proven to be intolerable simply in defying practical workability.

(b) Whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.

(c) Whether related principles of law have so far developed as to have left the old rule more than a remnant of abandoned doctrine.

(d) Whether facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification.

Having reviewed those general principles, I find I am again standing on the side of *stare decisis*. There is relevant judicial precedent for deciding when to abandon previous rulings. The Court in *Casey* also recognized that "a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."

RESPONSE OF T. JOHN WARD TO A QUESTION FROM SENATOR HATCH

Question 1. Your file shows that you have litigated numerous complex civil cases. I am sure that you are aware that the discovery provisions contained in Rules 26 through 37 of the Federal Rules of Civil Procedure may have avoided "trial by ambush," but at an increasingly high cost. Indeed, the current rules may have resulted in more of fights in cost and discovery burden than in legitimate resolutions of the merits of cases. In your view, what can and should be done with current discovery practice to move the emphasis away from discovery fights toward dispute resolution?

Answer 1. In the Eastern District of Texas, the judges have put in place an aggressive set of local rules imposing rigorous voluntary disclosure of documents and identification of witnesses. The success of these rules in reducing the cost of litigation, in my opinion, depends upon the degree to which the United States District Judge insists upon compliance with these local rules. If confirmed, I would insist upon compliance with a resulting lowering of the cost of litigation. Additionally, these rules make the courts more accessible to the average citizen.

In addition to using these voluntary disclosure requirements, I believe there are other steps a United States District Judge can take:

(1) The judge should take a hands-on management of the cases through his or her own efforts and the use of United States Magistrate Judges.

(2) The judge should set the tone for appropriate behavior in all depositions, hearings, and trials. A judge does this by treating all lawyers, parties, witnesses, and jurors with respect and recognition of their individual dignity; insisting upon civility in all proceedings; listening carefully to all parties; and ruling fairly based solely upon the applicable law and relevant facts.

(3) With the hands-on approach, the judge should require all parties to submit alternative dispute resolution plans at a time before parties have exhausted all discovery efforts, but at a time when parties can evaluate the case for settlement purposes.

NOMINATIONS OF CHARLES R. WILSON (U.S. CIRCUIT JUDGE); MARSHA J. PECHMAN, CARLOS MURGUIA, ADALBERTO JOSE JORDAN, AND WILLIAM HASKELL ALSUP (U.S. DISTRICT JUDGES)

TUESDAY, JULY 13, 1999

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

The committee met, pursuant to notice, at 2:19 p.m., in room SD–628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Sessions, Leahy, and Schumer.

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

The CHAIRMAN. I apologize for being late, and I know we have some Senators who are really pressure-packed, especially the Senator from Kansas.

Today we are holding hearings for five judicial nominees—one circuit court nominee and four district court nominees.

Now, the hearing follows the committee's approval of 10 nominees earlier this year. Together Senator Leahy and I have ensured that this committee has taken a balanced and fair approach in administering the committee's role in performing its constitutional duties of advise and consent.

It is our responsibility to see that the President's nominees receive a fair hearing and that the Federal courts are adequately staffed to perform their constitutional function. This committee has been instrumental in the Senate's confirmation of 311 of President Clinton's judicial nominees and over 200 other nominees. By conducting thorough but expeditious reviews of nominees and by holding hearings, we should be able to keep the number of vacancies from inhibiting the work of the Federal courts and other bodies. By working together we can conduct a fair and evenhanded process for evaluating and approving nominees, just as we have done in the past.

We have two panels today. The first panel consists of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of the nominees themselves.

When Senator Leahy arrives, we will give him adequate time to make any statement he would care to make, and I will be glad to turn to him at that time.

If we can, the distinguished Senator from Kansas, Senator Roberts, has to get to a markup, so I am going to turn to him first for his nominee, and then we will go to the rest of the Senators who are here.

Senator Roberts.

STATEMENT OF HON. PAT ROBERTS, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator ROBERTS. Mr. Chairman, thank you very much for the recognition, and I am both very pleased and privileged to speak on behalf of Judge Carlos Murguia and to recommend to the committee that he be approved as a U.S. district judge for Kansas.

As I welcome the judge, please allow me to acknowledge his family. They are truly a Kansas and American success story. First of all, we have Alfred and Amalia Murguia. That is Carlos' mother and father right behind me, and they are with us today. Alfred worked for 37 years in a Kansas City steel plant to provide for his family while Amalia stayed home to raise their seven children.

Joining Alfred and Amalia are three of Carlos' six siblings. We have Ramon, a graduate of the Harvard Law School, works in private practice, and is involved with many Kansas City area civic organizations. I also welcome Janet, who now works at the White House in Congressional Affairs.

Now, Mr. Chairman, in my office, we consider Janet as part of the family. As a staff member for former——

The CHAIRMAN. I do, too.

Senator ROBERTS. As a staff member for former Kansas Congressman Jim Slattery, she was most helpful as we worked together on rural health care issues. Now, we have been on opposite sides of the fence on several occasions in regards to issues, but with Janet we take the fence down, and she is, in fact, part of the family.

Also here today is Janet's twin sister, Mary, who is a University of Kansas law graduate who works at the Department of Justice overseeing all of the State attorney generals. We are also joined by Carlos' wife, Ann Marie, who plays an important role in our criminal justice system as a probation and parole officer.

Unfortunately—or maybe fortunately—Carlos' 2-year-old son is not here. He sends his greetings. Wyatt, his brother, Alfred Jr., and sisters Martha and Rosemary were simply not able to be with us.

Mr. Chairman, this whole family is respected and admired and loved in the Kansas City area.

The CHAIRMAN. You forgot one. You have to stand up, too.

Mr. ALFRED MURGUIA JR. I showed up.

Senator ROBERTS. He is like Elvis in reverse. He is in the building.

Mr. Chairman, this whole family, as I have indicated, is respected and admired and loved in the Kansas City area. It was clear the minute that Carlos' nomination was sent to the Senate that he has an immense number of friends, both Democrat and Re-

publican, and so this nomination really transcends any kind of partisan politics. I am honored to speak on his behalf.

Judge Murguia has worked as a State district court judge since 1990. He was nominated to fill a vacancy, but he has been re-elected twice. Since 1995 he has presided over 25 jury cases involving civil and criminal and domestic relations. He has also worked in the juvenile court and limited actions civil docket.

His judicial career began in 1985 as the Wyandotte County District Court small claims judge, a position he held for 5 years. Also, in 1985, he was the judge pro tem assigned to child support, child visitation, and protection from abuse, and traffic habitual violator cases. In April of 1990, he was appointed to be the Wyandotte County District Court's first hearing officer.

Judge Murguia received his law degree from the University of Kansas Law School about the same time as the senior Senator from Kansas and his Bachelor of Science degree in journalism in 1979 from the University of Kansas.

During his third year of law school, he was honored with the U.S. Law Week Award for improvement in regards to academics. He has been active in his community, serving on many civic boards: El Centro, Inc., the Greater Kansas City Scholarship Fund Steering Committee, Leadership 2000, Partnership for Children, the United Way of Wyandotte County, and the National Conference of Christians and Jews.

In short, Mr. Chairman, Carlos Murguia is the type of individual that we seek and need for judicial service. Our State, Kansas, is proud of the judge and his family. I am confident that he will be an outstanding Federal judge, and I thank the Chairman.

The CHAIRMAN. Thank you, Senator Roberts. We are happy to have the Murguia family here. They clearly are a wonderful family, and we are looking forward to having this hearing completed on your behalf.

I have to go down through this list in seniority, at least I have it, so we will turn—Senator Feinstein is not here. She is on the committee. But we will turn to you, Senator Graham.

Senator BOXER. I do have a statement for her.

The CHAIRMAN. That will be fine.

Senator Graham, we will put you on next, then Senator Gorton, then Senator Mack is here, then Senator Boxer, Senator Murray, Senator Brownback.

Senator Graham.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Mr. Chairman, thank you very much, and I appreciate the opportunity to present two distinguished candidates for the Federal judiciary, and I want to say how much I appreciate the courtesy that you have extended for the several Florida nominees that have been before your committee in recent months.

It is a tremendous privilege to introduce Charles Wilson and Adalberto Jordan for your consideration as the two newest Federal judges from Florida. Mr. Wilson has been nominated to succeed the retiring judge Joseph Hatchett in the Eleventh Circuit Court of Ap-

peals. Mr. Jordan has been selected for an open judgeship in Florida's Southern Judicial District.

Before I commence—and I would like to ask, Mr. Chairman, if I could file my full statement.

The CHAIRMAN. Without objection, we will take all the statements.

Senator GRAHAM. And I will, in deference to your busy schedule, summarize it.

I want to thank my colleague and good friend, Senator Mack, for his tireless efforts on behalf of Florida's Federal judicial nominees. He was unable to be here today but asked that a statement of——

The CHAIRMAN. He is right behind you.

Senator GRAHAM. Oh.

The CHAIRMAN. I think what we will do, we will have Senator Mack right after you so that we can do each judge in a row.

Senator GRAHAM. I had actually even more flattering statements about Senator Mack, but he will have to read those in the statement that will be submitted for the record.

Mr. Chairman, again, Senator Mack and I appreciate your attention to Florida's needs in the midst of what has been described as a Federal judicial crisis. But for the fact that this committee has been so attentive when vacancies occurred, that crisis would be even deeper. And I thank you for your commitment to addressing these special challenges.

Charles Wilson and Bert Jordan are the latest in a long line of outstanding judicial nominees who have been before this committee. During their long legal careers, they have demonstrated mastery of the law, personal dedication to the betterment of the legal community, and an abiding commitment to public service. This combination of qualities has prepared them well for the service that they will soon render with the consent of this committee and the Senate on the Federal bench.

It is entirely appropriate that Charles Wilson succeed Judge Hatchett as the appellate judge in the Eleventh Judicial Circuit. Mr. Wilson's legal career began at the distinguished jurist's side when he served as Judge Hatchett's clerk in 1981. This was an auspicious and telling beginning.

In the nearly 2 decades since then, Chuck Wilson has established himself as one of Florida's most respected members of the legal community. He has practiced law from a variety of perspectives, including 5 years of private practice and service as an assistant county attorney in one of our largest counties, Hillsborough County. It was my privilege in 1986 to appoint Mr. Wilson as a county judge in Florida's Thirteenth Judicial Circuit, which is based in Tampa. By then Chuck Wilson's legal acumen had attracted attention from every corner of our legal community.

After 4 years as a county court judge, he was appointed U.S. magistrate judge in the Middle District of Florida, and in 1994, President Clinton nominated him and this committee approved him for an opening at the U.S. Attorney position in the Middle District of Florida. He has held that position since that time and has served with great distinction. He has done so in a district which is under unique pressures. It is a district which grew by 52 percent since

1980. It is a district which has had an exploding caseload. Chuck Wilson has met those challenges.

Mr. Chairman, I would like to enter into the record an editorial on Mr. Wilson's behalf from the Tampa Tribune entitled "The Strong Case for Charles Wilson." Endorsing his nomination, the Tribune calls Mr. Wilson "a man of conviction whom we can trust to act fairly and wisely." I would ask that that be included.

The CHAIRMAN. Without objection, we will put it in the record.

[The article follows:]

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THE STRONG CASE FOR CHARLES WILSON

Thursday, April 15, 1999
Section: NATION/WORLD
Page: 14

Memo: EDITORIALS

In 1994 then-U.S. Magistrate Charles Wilson left his judicial robes behind to become U.S. attorney for the Middle District of Florida. He never said, however, that he intended to stay the top prosecutor for a large portion of the state forever.

Now Wilson is the presumptive nominee to become a judge on the 11th Circuit Court of Appeals after the retirement of Chief U.S. Circuit Judge Joseph Hatchett in May. Even amid speculation that Wilson was promised a federal judicial post when he took the job as U.S. attorney, we believe he is a worthy successor to Hatchett and hope the bar association will give him its highest recommendation.

As Tribune reporter Sarah Huntley reported last week, a judicial watchdog group, the Alliance for Justice in Washington, D.C., says Wilson's name has been submitted to the American Bar Association, which is likely to recommend his nomination to President Clinton.

Significantly, Wilson once served as a law clerk for the man he would replace. Hatchett, a Clearwater native, was the first black lawyer appointed to the Florida Supreme Court and then the first black to serve on the U.S. circuit court.

Wilson, 44, has a history of public service to Tampa and the state. He was born in Pensacola but grew up here. He returned to Tampa after completing undergraduate and law school at the University of Notre Dame.

He served as a Hillsborough County judge before becoming a magistrate and took over an office in disarray when he became U.S. attorney. His predecessor, Larry Colleton, stepped down after a Justice Department probe determined he used poor judgment, embarrassed his office and damaged morale in a series of incidents that included grabbing a television reporter around the throat.

Unlike Colleton, the low-key and deliberate Wilson keeps his counsel. He has not always been as forthcoming answering questions about his office as we would like, but he is known to be a man of convictions whom we can trust to act fairly and wisely.

During his tenure as U.S. attorney, he has overseen mostly successful prosecutions. He has brought health care fraud to the forefront in Tampa and undertaken difficult prosecutions for environmental crimes. He has investigated allegations of local government corruption and continued prosecutions of drug dealers.

Wilson has been criticized by letters on these pages for the questionable actions of some of his prosecutors, but he does not have the reputation of playing fast and loose with the law. As the leader of one of the busiest and fastest-growing law enforcement districts in the country, he defends his staff admirably.

If Wilson receives the lifetime appointment to the federal bench he can live anywhere in Florida, Georgia or Alabama, the states overseen by the 11th Circuit. We hope that he would choose to stay in Tampa. His appointment would allow for the opening of a branch circuit office here, bringing with it the opportunity for a small number of jobs and the chance for appeals to be heard in Tampa.

And we know of the perfect spot - the old federal courthouse. The large, central courtroom on the first floor remains the most beautiful in Tampa, and the bench could be enlarged to include a panel of judges.

If there was ever a person both sides of the political spectrum could support, we think he is Charles Wilson. We urge a quick recommendation, nomination and Senate approval.

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Senator GRAHAM. Mr. Chairman, the theme of today's hearing on these two outstanding nominees could well be summed up as the Federal prosecutors' losses are the Federal courts' gains. I am very pleased to introduce Mr. Adalberto Jordan, who is currently serving as Assistant U.S. Attorney in Florida's Southern Judicial District.

Before commenting further on Mr. Jordan, I would like to introduce first Mr. Wilson's wife Belinda who accompanies him today. And Mr. Jordan is accompanied by his mother Elena Ruiz, his mother-in-law Flor Castillo, his wife Esther, who is a high school teacher, and his two children, Diana, 9, and Elizabeth, 5.

The CHAIRMAN. We are sure happy to have all of you here. That is great.

Senator GRAHAM. Bert Jordan has excelled as a member of the South Florida community and in our State's legal circles throughout his life. That pattern of distinction was set early in his career when he finished second in his class at the University of Miami Law School.

In the years since then, he has distinguished himself as an attorney in private practice with one of Florida's most distinguished firms, a member of the University of Miami Law School faculty, and the chief of the Appellate Division of the U.S. Attorney's Office.

But in evaluating Mr. Jordan's intellectual fitness for a Federal judgeship, we need only to look across the street at the United States Supreme Court. A year after graduating from law school, Bert Jordan reached a goal that only a select few ever attain: a clerkship in the United States Supreme Court. From 1988 to 1989, he clerked for Justice Sandra Day O'Connor.

All of these accomplishments are even more impressive given how Bert's life began. Like many other residents of South Florida, Mr. Jordan was born under Fidel Castro's brutal rule in Cuba. He fled to the United States at a young age. More than most, he understands the importance of liberty, justice, and equal treatment under the law. He can be expected to put his unique perspective to work for the people of the Southern Judicial District.

Mr. Chairman, I appreciate this opportunity to present these two outstanding nominees, and I urge your favorable and expedited attention.

Thank you.

[The prepared statement of Senator Graham follows:]

PREPARED STATEMENT OF SENATOR BOB GRAHAM

Mr. Chairman, it is a tremendous privilege to introduce Charles Wilson and Adalberto Jordan for your consideration as the newest federal judges from Florida.

As you know, Mr. Wilson has been nominated to succeed retiring Judge Joseph Hatchett in the 11th Circuit Court of Appeals.

Mr. Jordan has been selected for an open judgeship in Florida's Southern Judicial District.

Before I begin, I want to thank my good friend and fellow Floridian Connie Mack for his tireless efforts on behalf of Florida's federal judicial nominees.

During our more than ten years of joint service, Senator Mack and I have worked closely together to move judicial candidates through the Senate. Our bipartisanship has paid dividends, and I commend Senator Mack for his focus and commitment to filling vacancies in Florida's federal courts.

Due to Senate floor responsibilities, Senator Mack could not be here today. But he supports both of these nominations, and respectfully requests that his written statement be included in the hearing record.

As you know, Mr. Chairman, Florida is in the midst of a full-blown federal judicial crisis. At the end of 1998, nearly 1700 criminal cases were pending in our state's fast-growing Middle Judicial District. More than 6200 civil cases had yet to receive final disposition. Since 1991, filings in the Southern Judicial District have increased by 30 percent.

But as distressing as these numbers are, they would be even worse had the members of this committee not moved quickly to fill judicial vacancies in Florida's federal courts.

In the last three years alone, your sensitivity to Florida's needs have led to the confirmation of eight new federal judges:

Robert Hinkle and Stephan Mickle in the Northern District; Richard Lazzara in the Middle District; Alan Gold, Don Middlebrooks, William Dimetroylayus, and Patricia Seitz in the Southern District; and Stanley Marcus to the 11th Circuit Court of Appeals.

I thank you for your commitment to addressing Florida's special judicial challenges.

Charles Wilson and Adalberto Jordan are the latest in this long line of outstanding judicial nominees. During their long legal careers, they have demonstrated mastery of the law, personal dedication to the betterment of Florida's legal community, and abiding commitments to public service. This combination of qualities has prepared them well for service on the federal bench.

It is entirely appropriate that Charles Wilson succeed Judge Hatchett as an appellate judge in the 11th Judicial Circuit. Mr. Wilson's legal career started at the distinguished jurist's side in 1981, when he served as Judge Hatchett's clerk. That was an auspicious and telling beginning.

In the nearly two decades since then, Chuck Wilson has established himself as one of the most respected members of Florida's legal community.

He has practiced law from a variety of perspectives, including five years in private practice and service as an Assistant County Attorney in large Hillsborough County.

In December 1986, my last month as Florida's Governor, I was honored to appoint Mr. Wilson as a County Judge in Florida's Thirteenth Judicial Circuit, which is based in Tampa. By then, Chuck Wilson's legal acumen had attracted attention from every corner of our legal community.

Four years into Judge Wilson's service in County Court, he was appointed a U.S. Magistrate Judge in Florida's large Middle Judicial District.

In 1994, based on my recommendation, President Clinton nominated him for the open U.S. Attorney post in the Middle District. He has held that position since both this committee and the full Senate approved his nomination. As the Middle District's U.S. Attorney, Mr. Wilson has been the top federal prosecutor in one of the fastest growing judicial districts in the nation.

Between 1980 and 1995, the Middle District, which stretches nearly 400 miles, grew by 2.7 million new residents—a whopping 52 percent growth rate. The district's population is expected to increase by an additional 21 percent in the next 10 years. That explosive population growth is compounded by a heavy flow of tourists and winter residents, pressures not present in many other parts of the nation.

Despite these obvious challenges, Chuck Wilson's service as U.S. Attorney has been exemplary.

Mr. Chairman, I'd like to enter into the record an April 15, 1999 editorial from the Tampa Tribune entitled "The Strong Case for Charles Wilson."

In endorsing his nomination, the Tribune calls Mr. Wilson "a man of conviction whom we can trust to act fairly and wisely."

I think that every Floridian who has benefitted from his leadership would agree with that statement—and with the belief that his outstanding service will continue once he is confirmed as an appellate judge in the 11th Circuit.

Mr. Chairman, the theme of today's hearing on these two outstanding nominees could well be summed up in this way: federal prosecutors' losses are federal courts' gains.

I am also very pleased to introduce Mr. Adalberto Jordan, who is currently serving as an Assistant United States Attorney in Florida's Southern Judicial District. He has been nominated to succeed Federal District Judge Lenore Nesbitt, who has elected to take senior status.

Bert Jordan has excelled as a member of the South Florida community and in our state's legal circles. That pattern of distinction was set early in his career, when he finished second in his class at the University of Miami Law School.

In the years since then, he has distinguished himself as an attorney in private practice, a member of the University of Miami Law School faculty, and the Chief of the Appellate Division in the U.S. Attorney's Office.

But in evaluating Mr. Jordan's intellectual fitness for a federal judgeship, we need only to look across the street to the United States Supreme Court.

A year after graduating from law school, Bert Jordan reached a goal that only a select few ever attain: a U.S. Supreme Court clerkship. From 1988 to 1989, he clerked for Justice Sandra Day O'Connor.

All of these accomplishments are even more impressive given how Bert Jordan's life began. Like many other residents of South Florida, Mr. Jordan was born under Fidel Castro's brutal rule in Cuba. He fled to the United States at a young age.

More than most, he understands, the supreme importance of liberty, justice, and equal treatment under the law, and can be expected to put his unique perspective to work for the people of the Southern Judicial District.

Mr. Chairman, throughout their careers, Chuck Wilson and Bert Jordan have been respected by their peers, recognized for their outstanding public service, and praised for their skill and competence in the legal arena. I have no doubt that this pattern of distinction will continue once they are sworn in as federal judges.

Thank you.

The CHAIRMAN. Thank you, Senator Graham.

Senator Mack, we will finish up with these two nominees, and then we will turn to Senator Gorton.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MACK. Thank you, Mr. Chairman and members of the committee. First of all, again, I want to thank you for your responsiveness to the needs of the State of Florida, and I want to extend my appreciation and thanks not only to members of the committee but also to the staff as well. You have worked with us closely over the years, and we greatly appreciate that.

The CHAIRMAN. Thank you.

Senator MACK. First, I would like to recommend Charles Wilson for confirmation to the position of circuit judge for the U.S. Court of Appeals for the Eleventh Circuit. Mr. Wilson is a well-respected attorney who has a varied and distinguished career in the Florida legal community. He is highly respected in the Middle District of Florida where he is currently serving as the U.S. attorney.

Mr. Wilson's legal career spans back to 1979. As a sole practitioner, he represented clients in both the civil and criminal arena. Mr. Wilson spent time on the other side of the bench as both a county judge for the Thirteenth Judicial Circuit of Florida located in Hillsborough County and as U.S. Magistrate Judge for the Middle District of Florida.

It is evident that a considerable amount of Mr. Wilson's legal career has been spent in the courtroom, and as a result of this extensive experience, he is well prepared to handle the challenges of a Federal Circuit Court Judge.

It is my belief that this nominee is one that the Senate can be proud to confirm. I am confident that, if confirmed, Mr. Wilson will bring to the appellate bench an outstanding background which will serve to maintain the integrity of our legal system and provide justice for those who come before him.

Further, Mr. Chairman, I am also pleased to recommend Mr. Adalberto Jose Jordan for confirmation to the position of U.S. District Judge for the Southern District of Florida. Following graduation from the University of Miami School of Law, Mr. Jordan served as a law clerk to Judge Thomas Clark of the Eleventh Circuit Federal Court of Appeals. He then had the honor of clerking for Supreme Court Justice Sandra Day O'Connor.

After completing these two judicial clerkships, Mr. Jordan began a distinguished career in the Miami legal community in the litigation department at the law firm of Steel, Hector & Davis. The subject matter of his litigation practice was extremely varied, ranging from First Amendment issues to civil rights claims. Mr. Jordan was named as a partner to this prominent firm before leaving in 1994, and since 1994 Mr. Jordan has served as an Assistant U.S. Attorney for the Appellate Division in the Southern District of Florida. Mr. Jordan was appointed chief of the Appellate Division in 1998, and he currently oversees the appeals process of all civil and criminal matters for the U.S. Attorney's Office.

During his esteemed career, Mr. Jordan has written over 125 appellate briefs at the State and Federal level and has presented over 35 appellate arguments.

I have examined Mr. Jordan's qualifications and find him to be a highly qualified nominee. As a result of his vast and complex experience, I believe he is well prepared to handle the many challenges of a Federal District Court Judge.

Mr. Chairman, these two nominees are both excellent candidates with exemplary credentials. I urge the committee's and the Senate's swift confirmation of both Mr. Wilson and Mr. Jordan, and I thank you again.

Please enter my full statement into the record.

[The prepared statement of Senator Mack follows:]

PREPARED STATEMENT OF SENATOR CONNIE MACK

Mr. Chairman and members of the committee, I am delighted to be here today to recommend two judicial nominees for confirmation and to thank you for your responsiveness to the needs of Florida's judiciary.

First, I would like to recommend Charles Wilson for confirmation to the position of Circuit Judge for the United States Court of Appeals for the Eleventh Circuit.

Mr. Wilson is a well-respected attorney who has a varied and distinguished career in the Florida legal community. He is highly respected in the Middle District of Florida where he is currently serving as the United States Attorney.

Mr. Wilson's legal career spans back to 1979. As a sole practitioner, he represented clients in both the civil and criminal arena. Mr. Wilson spent time on the other side of the bench, as both a County Judge for the Thirteenth Judicial Circuit of Florida located in Hillsborough County and as a United States Magistrate Judge for the Middle District of Florida.

It is evident that a considerable amount of Mr. Wilson's legal career has been spent in the courtroom, and as a result of this extensive experience he is well-prepared to handle the challenges of a Federal Circuit Court Judge.

In addition to his career achievements, Mr. Wilson has taken time out of his busy schedule to give back to the legal community by serving as the President of Hillsborough County Bar Association, Young Lawyers Division, and as President of the Ferguson-White Inn of American Inns of Court, which is a group of judges, attorneys, law professors, and law students who meet once a month to hold programs and discussions on matters of ethics, skills and professionalism. Further, Mr. Wilson served as a member of the Civil Justice Reform Act Group for the United States District Court for the Middle District of Florida. This advisory group assessed the handling of civil cases in federal court and made recommendations for the improvement of the system.

It is my belief that this nominee is one that the Senate can be proud to confirm. I am confident that, if confirmed, Mr. Wilson will bring to the appellate bench an outstanding background which will serve to maintain the integrity of our legal system and provide justice for those who come before him.

Further, Mr. Chairman, I am also pleased to recommend Adalberto Jose Jordan for confirmation to the position of United States District Judge for the Southern District of Florida.

Following graduation from the University of Miami School of Law, Mr. Jordan served as a law clerk to Judge Thomas Clark of the Eleventh Circuit Federal Court

of Appeals. He then had the honor of clerking for Supreme Court Justice Sandra Day O'Connor. After completing these two judicial clerkships, Mr. Jordan began a distinguished career in the Miami legal community in the litigation department at the law firm of Steel Hector and Davis. The subject matter of his litigation practice was extremely varied—ranging from First Amendment issues to civil rights claims. Mr. Jordan was named as a partner in this prominent firm before leaving in 1994.

Since 1994, Mr. Jordan has served as an Assistant U.S. Attorney for the Appellate Division in the Southern District of Florida. Mr. Jordan was appointed Chief of the Appellate Division in 1998 and he currently oversees the appeals process of all civil and criminal matters for the U.S. Attorney's office.

During his esteemed career, Mr. Jordan has written over 125 appellate briefs at the state and federal level and has presented over 35 appellate arguments.

Aside from the success he has enjoyed as a litigator and as an appellate attorney, Mr. Jordan has also served the community in several capacities. For example, he has taught a capital punishment seminar as an adjunct professor at the University of Miami School of Law since 1990. In addition, Mr. Jordan has received service awards for his pro bono representation of abused and neglected children in state parental rights termination proceedings.

I have examined Mr. Jordan's qualifications and find him to be a highly qualified nominee. As a result of his vast and complex experience, I believe he is well-prepared to handle the many challenges of a Federal District Court Judge.

Mr. Chairman, these two nominees are both excellent candidates with exemplary credentials. I urge the committee's and the Senate's swift confirmation of both Mr. Wilson and Mr. Jordan. Thank you.

The CHAIRMAN. Well, thank you, both of you Florida Senators. That is high praise indeed for these two fine nominees. We look forward to having them testify in just a few minutes, but we will be happy to release you so that you can go about your business. We know you are both busy.

Let's turn to the ranking member who would care to make a statement at this point.

Senator LEAHY. Mr. Chairman, I just want to thank you for holding this hearing. I know that another member of the committee was going to be here and was otherwise detained and that you filled in for him and I appreciate that. As you know, I have expressed some concern about where the schedule is. I was glad to see we were able to get some judges confirmed just before the break.

I will put my full statement in the record in the interest of time. I do know we are going to be hearing from the two Senators from Washington State regarding Marsha Pechman. A friend of hers, Sanford Kinzer, used to be my chief of staff and started out working with me on this committee. He contacted me in Vermont over the weekend once again, as he has some other times, saying very nice things about her.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

This afternoon the Judiciary Committee holds only its second confirmation hearing for judicial nominees this year. It is now the middle of July, with only 11 more weeks in which the Senate is scheduled to be in session this year. We have 37 nominees pending before the Committee with more coming from the President. I am gratified to have the five nominees participating in today's hearing, for this opportunity to move their nominations forward, but I am concerned that, at this pace, many highly qualified nominees will be left behind again this year.

By July 13 last year, the Committee had held eight judicial confirmation hearings and the Senate had confirmed 33 judges. By July 13 in 1992 (President Bush's fourth year with a Democratic Senate), the Committee had held 10 hearings and the Senate had confirmed 37 judges. By July 13 in 1987 (President Reagan's third year in his second term with a Democratic Senate), the Committee had held seven hearings and the Senate had confirmed 13 judges. The Committee hearing schedule

is behind even the pace of 1996, when the Senate confirmed a record low of only 17 judges all year and no judges for the Courts of Appeals. To date, the Senate this year has confirmed only seven judges.

Last year around the All Star break in the Major League baseball season I began comparing the Senate's judicial confirmation pace with that of Mark McGwire, Sammy Sosa and other home run hitters. This year we are not even in the same ballpark. Seven confirmations in seven months in nothing to joke about.

More than a year ago, Chief Justice William Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." The New York Times reported recently how the crushing workload in the federal appellate courts has led to what it calls a "two-tier system" for appeals, skipping oral arguments in more and more cases.

Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These are not the ways to continue the high quality of decision making for which our federal courts are admired or to engender confidence in our justice system.

When the President and the Chief Justice spoke out, the Senate briefly got about its business of considering judicial nominations last year. Unfortunately, the Senate is back to a pace of confirming a judge a month. That is not acceptable, it does not serve the interests of justice and it does not fulfill our constitutional responsibilities. For the last several years I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

In spite of our efforts last year in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are, again, approximately 70 and the vacancies gap is, again, moving in the wrong direction. We have more federal judicial vacancies extending longer and affecting more people.

Chairman Hatch reminded us earlier this year that what is important is "the actual performance of our responsibility to examine and take action on the qualified judicial nominees sent to us by the administration" and that the Senate's "primary interest must be what is best for the country and the Judicial Branch."

During Republican control of the Senate, it has taken two-year periods for the Senate to match the one-year total of 101 judges confirmed in 1994, when we were on course to end the vacancies gap.

What progress we started making last year has been lost and the Senate is again failing even to keep up with normal attrition. Far from closing the vacancies gap, the number of current vacancies has grown from 50, when Congress recessed last year, to almost 70. Judicial vacancies now stand at 8 percent of the federal judiciary (69/843). If one considers the 69 additional judges recommended by the Judicial Conference, the vacancies rate would be above 15 percent.

Nominees like Judge Richard Paez, Justice Ronnie L. White and Timothy Dyk deserve to be treated with dignity and dispatch—not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking service as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologies than were nominated during the Reagan Administration.

Our independent federal judiciary sets us apart from virtually all others in the world. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence.

The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

I look forward to the Committee completing its consideration of the nominations included in today's hearing for vacancies in California, Florida, Kansas and Washington and the vacancy on the Eleventh Circuit. I thank the Senators who have come to introduce them to the Committee and invite them to monitor closely our committee's consideration of these fine nominees.

The CHAIRMAN. Thank you, Senator.

Sorry other Senators have had to wait. Senator Gorton, we will turn to you.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, Senators Leahy and Schumer, Senator Murray and I appear here today in total harmony in recommending to you the confirmation of Marsha Pechman to be U.S. District Court Judge for the Western District of Washington. Senator Murray and I jointly appointed a search committee, interviewed the candidates submitted to us by that search committee, and are united on the recommendation of Judge Pechman to this committee and to the Senate as a whole.

Perhaps I can be excused for saying that Judge Pechman's qualifications are marked particularly by a brief 3-month stint she spent as a law intern in the office of the attorney general of the State of Washington while I held that office. But her overwhelming qualifications come from more than 11 years of service as a trial court judge on the Superior Court of the State of Washington for King County, the trial court of general jurisdiction in our State.

She spent time as a prosecuting attorney in the criminal courts. She spent time in the practice of law frequently in the civil courts. She has tried both kinds of cases as superior court judge and is highly esteemed not only among her judicial colleagues but in the bar generally in the State of Washington. In other words, she comes to you out of a relatively large court with a large number of judges, with a noted enough career so that she appeared before both our search committee and the two Senators from the State as someone highly qualified not only by experience and education but by temperament for a position on the U.S. district court.

I am particularly gratified that we, Senator Murray and I, were able to reach across any kind of partisan lines with the assent of the President and his officers to make a recommendation of this absolutely first-rate potential judge. And I would now introduce her and her husband, William Fitzharris, a practicing lawyer in Seattle, and their two daughters, Colleen and Ellen, on Colleen's birthday.

The CHAIRMAN. We are happy to have you here. Happy to have you all here.

Senator GORTON. With that, I yield to Senator Murray.

The CHAIRMAN. Senator Murray.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you, Mr. Chairman. I appreciate your having this hearing today, and I really appreciate the committee moving ahead with these critical nominations and, of course, I particularly applaud your decision to hear Judge Marsha Pechman today.

Senator Gorton just introduced the judge along with her family. I would like to note that they did take the "red eye" to get here, so we know how important this is to them and especially appreciate them being here. We know how difficult that overnight plane ride is.

Colleen's birthday is today. It is her 14th birthday. And Ellen, who is also known as "Ellen the Hammer Fitzharris" on her Little League baseball team, is here too. We are delighted you both are here with your father to support your mother.

The CHAIRMAN. "Ellen the Hammer"?

Senator MURRAY. "Ellen the Hammer."

The CHAIRMAN. That is pretty good. [Laughter.]

I wonder if you are playing soccer, too.

Senator MURRAY. Women do well at baseball as well as soccer, so we are going to be watching her.

Mr. Chairman, Judge Pechman was one of three individuals recommended for this seat by a bipartisan judicial merit selection committee that, as Senator Gorton mentioned, we convened last year. The 12 members of the committee chose Judge Pechman and two others after an exhaustive search and interview process.

Senator Gorton and I agreed to recommend Judge Pechman to President Clinton to replace Judge William Dwyer, who is ill with Parkinson's disease, on the Federal District Court for Western Washington. I know that both of us hope this committee can move expeditiously to confirm Judge Pechman so that Judge Dwyer will be free to retire and spend time with his family.

Judge Pechman has been a trial judge for the last 11 years. She has heard cases ranging from speeding tickets to first-degree murder, from small claims to complex litigation. She has spent a considerable amount of time working to improve our State court system. She led the way in revamping the manner in which judicial calendars are set to give judges more control over their schedules and introduced a new method of jury selection which cut the time necessary for jury selection in half.

In addition, Judge Pechman began a unified Family Court Project to streamline the process and ensure that the judge who hears each case knows of and can rule on other cases involving that family, including restraining orders, at-risk youth petitions, dissolution orders, dependency petitions, and truancy cases.

This change has resulted in a family receiving comprehensive attention from the judicial system and in a judge having a full picture of the family's case. Such innovation is truly a hallmark of Judge Pechman.

The judge has also helped create better lawyers by teaching ethics and trial skills at the University of Puget Sound Law School. In fact, she was the director of the Clinical Trial Program at the law school. In addition, she has been teaching other judges on various subjects since 1988.

Mr. Chairman, one of the things Judge Pechman is most proud of is that she is a breast cancer survivor. As a survivor, she had been a peer mentor for other women who have suffered from this traumatic disease. Judge Pechman, through her commitment to her family, her excellence in her work, and her involvement in her community, has been a shining example for many breast cancer victims.

Mr. Chairman, I strongly support the confirmation of Judge Pechman. She will be an outstanding addition to the Federal bench, and I urge the committee to send her to the floor where I hope she will be confirmed as soon as possible.

Thank you.

The CHAIRMAN. Thank you, Senator.

Judge Pechman, you are well represented by these two Senators. We are glad to have them with us and glad to have their solid recommendations for you.

Senator Boxer, we will turn to you now.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Mr. Chairman. I would ask unanimous—sorry?

The CHAIRMAN. We will put Senator Feinstein's full statement in the record.

Senator BOXER. Yes, I was going to ask unanimous consent to include Senator Feinstein's full statement in the record, as well as my own.

The CHAIRMAN. Without objection.

Senator BOXER. And in the interest of time, I will do my best to be very brief. But I want to convey to you my thanks for holding this hearing. You have always been gracious. Your staff has always been gracious to us. You are very straightforward with us, and I think you will find this nominee to be very confirmable.

At this time I would ask William Alsup to stand up, as well as his wife Susan. We welcome them here today.

The CHAIRMAN. Happy to have you here.

Senator BOXER. I want to tell you that Mr. Alsup's background and qualifications are impeccable. He graduated with honors from Mississippi State University. In 1971, he received a joint law and master of public policy degree from Harvard and the Kennedy School of Government. After graduation, he clerked for U.S. Supreme Court Justice William Douglas and then moved on to private practice.

In 1972 to 1973, he worked at the Jackson, Mississippi, law firm of Pyles & Tucker, and then Mr. Alsup's wife Susan, who you just met, a native Californian, convinced him to move west, for which we are eternally grateful because he has been a stellar member of the California legal community and the community at large.

He has practiced at the law firm of Morrison & Foerster, one of the Nation's most preeminent law firms. He started as an associate, became a partner in 1977. He did interrupt his practice for 2 years to accept a position as an assistant to Solicitor General Wade McCree, and he had the privilege then of arguing six cases before the Supreme Court.

At Morrison & Foerster, Mr. Alsup's focus has been complex civil litigation with extensive experience in Federal court at both the district and appellate level. Moreover, he has been listed in all editions of "Best Lawyers in America" in the category of business litigation. He is so highly regarded for his intellect, legal abilities, and skills that he was called upon by the U.S. Department of Justice on two separate occasions to assist with antitrust investigations.

Mr. Chairman, in winding up, let me quickly tell you his list of honors and awards. Appointed by the chief judge for Northern California District as the first Chair of the Advisory Committee on Professional Conduct, he was asked by the current chief judge to con-

tribute to a local rule governing disciplinary procedures for professional misconduct. And in 1997, he was rated exceptionally well qualified by the Board of Governors of the California Women Lawyers in an evaluation for the Federal bench. And there are many others.

So I will close by saying that Mr. Alsup has a stellar record and reputation throughout the legal community and broad support which we have outlined in both of our statements from the legal community, and I hope that the committee will agree with us, with Senator Feinstein and myself. We are very proud to bring you this nominee, and we hope that he will be confirmed soon.

Thank you, Mr. Chairman. Thank you, Mr. Schumer, for joining.

The CHAIRMAN. Well, thank you, Senator, and I think it is a good thing that you and Senator Feinstein are so strongly behind him. We hear very good things about your nominee, and we appreciate having you here today.

Senator BOXER. Thank you.

[The prepared statements of Senators Boxer and Feinstein follow:]

PREPARED STATEMENT OF SENATOR BARBARA BOXER

Thank you Mr. Chairman. I am delighted to be here today to introduce William Alsup to the Committee. Mr. Alsup is eminently qualified and I am hopeful he will receive the support and approval of this Committee.

Before I share with you Mr. Alsup's background and qualifications, let me first acknowledge his wife Suzan Caldwell Alsup who is here with him today.

Mr. Alsup's background and qualifications are impeccable. He graduated, with honors, from Mississippi State University in 1967, and in 1971 he received a joint law and Master of Public Policy degree from Harvard Law School and the Kennedy School of Government. After graduation, Mr. Alsup clerked for United States Supreme Court Justice William O. Douglas and then moved to private practice.

From 1972 to 1973 Mr. Alsup worked at the Jackson, Mississippi law firm of Pyles & Tucker. In 1973 Mr. Alsup's wife Suzan, a native Californian, convinced her husband to move to California from his native Mississippi. And we in California are very fortunate that Suzan Alsup was able to get her husband to move west because he has been a tremendous asset to the California legal community.

Since leaving Mississippi, Mr. Alsup has practiced at the law firm of Morrison & Foerster—one of the nation's most preeminent law firms. Mr. Alsup started as an associate in 1973, and became a partner in 1977. Mr. Alsup did interrupt his practice during the years 1978 to 1980 in order to accept a position as an Assistant to Solicitor General Wade McCree. As an assistant to Mr. McCree, Mr. Alsup had the privilege of arguing six cases before the Supreme Court.

At Morrison & Foerster, Mr. Alsup's focus has been complex civil litigation. As such, he has had extensive experience in the federal courts, at both the district and appellate court level. Moreover, Bill Alsup has been listed in all editions of The Best Lawyers in America in the category of business litigation. In fact, he is so highly regarded for his intellect, legal abilities, litigation skills and specialized knowledge, that he was called upon by the United States Department of Justice, on two separate occasions, to assist with antitrust investigations.

Bill Alsup also has an impressive list of honors and awards to his credit. Let me share a few of those honors and awards with the Committee: he was appointed by the Chief Judge for the Northern District of California as the first chair of the Advisory Committee on Professional Conduct for the United States District Court for the Northern District of California, and he was asked by the current Chief Judge to contribute to a local rule governing disciplinary procedures for professional misconduct, in 1997 he was rated "exceptionally well qualified" by the Board of Governors of the California Women Lawyers in an evaluation for the federal bench, he was asked by the court to serve as a pro tem judge in the Superior Court for Santa Clara County, and he was selected as Chair of the nationwide Litigation Department of Morrison & Foerster for the years 1985 through 1988.

Mr. Chairman and members of the Committee, I will close by saying that Mr. Alsup has a stellar record and reputation throughout the legal community and he

has received broad support for his nomination to the federal bench. He has long-standing and significant community involvement, including pro bono work with his law firm. I hope the Committee will agree that Mr. Alsup is deserving of its support and vote to send Mr. Alsup's nomination to the floor in short order.

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN

Mr. Chairman, I am pleased to introduce William Alsup to the Committee. Mr. Alsup is a nominee to the U.S. District Court for the Northern District of California.

Mr. Alsup has had a remarkable academic and legal career. He has extensive experience as a civil litigator, is renowned as one of the nation's finest trial lawyers, and has devoted considerable energy to both the Justice Department and the American Bar Association.

Mr. Alsup graduated cum laude from Harvard Law School, and upon graduation worked as a law clerk for Supreme Court Justice William O. Douglas. In 1973, he began work as an associate at Morrison & Foerster LLP, and quickly became a partner. He became regarded as an expert on complex commercial litigation, and was selected as one of the top 1 percent of all business litigators in the United States.

His 17 year tenure with this firm was twice interrupted for special assignments within the Department of Justice. From 1978 to 1980, Mr. Alsup was the Assistant to the Solicitor General, where he handled criminal cases and worked to uphold Federal criminal convictions on appeal. In 1998, he accepted the assignment as chief trial counsel for the Antitrust Division of the Department of Justice in the government's suit to enjoin a major industry merger.

In addition, Mr. Alsup has been very active with legal associations. From 1995 to 1997, he was a member of the Amicus Brief Committee which reports to the ABA. In 1995, he was appointed by Chief Judge Henderson of the Northern District of California to chair the Committee on Professional Conduct, and most recently has worked with Judge Marilyn Patel, Chief Judge of the Northern District of California, to create new rules to reduce professional misconduct.

He has expressed his support for the death penalty, and his willingness to follow the Supreme Court's precedent on this issue.

Outside of his professional duties, Mr. Alsup has undertaken pro-bono work to protect California's wilderness. He helped to found the Yosemite Restoration Trust, and is on the board of several other environmental conservation groups. He led the fight to protect Bodie, a State Historic Park, from proposed mining operations.

Mr. Alsup has received a flood of endorsements from his peers in the legal community. A. Wallace Tashima, District Judge for the Central District of California, describes Alsup as "able, tempermentally suited to the bench, dedicated to the cause of justice, and a man of the highest integrity." Harvard Law Professor Philip B. Heymann, who knew Alsup from Harvard Law School and from working with him in the Department of Justice said he is "wonderfully honorable * * * I cannot think of a person you would be prouder to see on the federal bench." And Steven M. Schatz, a lawyer who argued against Alsup on several occasions says that Alsup has "a strong sense of right and wrong * * * he has developed a broad understanding of criminal law matters as well as societal implications underlying a broad range of issues arising in the federal courts."

The American Bar Association's Judicial Nominations Committee has determined that he is "well qualified" for the position of District Judge.

I am pleased to introduce William Alsup to the Committee today and strongly urge his prompt consideration and confirmation.

The CHAIRMAN. Senator Brownback, you are clean-up batter.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. It looks like it, and I guess I am the only thing that stands between these nominees and the Federal bench at this point.

Thank you very much——

The CHAIRMAN. Well, there are a few other things that stand between——

[Laughter.]

Senator BROWNBACK. There are a few others that are there. I didn't want to get their hopes too high.

Thank you, and thank you, Senator Schumer, for hosting this hearing today. I am here on behalf of Judge Murguia that Senator Roberts had introduced earlier. Judge Murguia and I attended the University of Kansas School of Law together, and so I have known him for some period of time.

He did an unusual thing right after law school in that he had a law degree, he had a good chance to make a lot of money at different places, and instead he went home and served in a relatively poorly served area of Kansas City to help people who don't normally get legal advice to have legal advice. And it is that sort of selflessness that really marks this family, and it marks Judge Murguia. He not only has a first-class, well-trained legal mind; he has a beautifully crafted heart and soul. This is a man that, one, we will put on the bench and we will see shine for a lot of years, not only for the brilliance of his mind but also the nature of his heart.

And with that, I think this is the sort of judiciary that we all seek to have, ones that have both brilliant minds and great hearts to boot. He has a wonderful family. He is going to do an excellent job. He was originally appointed to the bench in Kansas by a Republican Governor. He is supported by both Senator Roberts and myself and by many members of the judiciary.

And with that, I support his nomination and will submit a complete statement for the record as well.

[The prepared statement of Senator Brownback follows:]

PREPARED STATEMENT OF SENATOR SAM BROWNBACK

Mr. Chairman, and members of the committee, thank you for the opportunity to appear before you today with my esteemed colleague Pat Roberts to speak on behalf of Judge Carlos Murguia, who has been nominated to serve on the Federal bench for Kansas.

The Federal judiciary is a high honor and responsibility, and those nominated to serve must be men and women of the highest professional and personal qualifications. I am both privileged and pleased today to commend to the Senate Committee on the Judiciary Judge Carlos Murguia of Kansas City, Kansas.

A native of Kansas City, Carlos Murguia is part of remarkable family. Every one of his four siblings earned a law degree from the University of Kansas. One sister is Deputy Director of Legislative Affairs at the White House, another sister is an assistant U.S. attorney in Arizona. Judge Murguia's parents and family are with him here today, and I would like to recognize them for their accomplishments.

Judge Murguia has served as a Wyandotte County district judge since September 1990. He is a graduate of the University of Kansas School of Journalism, and is also, more importantly I think, a graduate of my alma mater, the University of Kansas School of Law. His status as a fellow Jayhawk may be Judge Murguia's most important qualification, and I'm sure Pat will agree.

Judge Murguia took an unusual career path upon graduation from that institution of legal scholarship that has turned out so many outstanding attorneys. He chose to use his newly minted legal skills to help others in an area of Kansas City known as the Argentine. He chose to help others in this poor, Hispanic-dominated area who ordinarily would not have access to legal representation, in situations others often take for granted.

Judge Murguia took his first step into the judiciary while still in private practice, serving first as a part-time small claims judge for the Wyandotte County district court, and later as a part-time judge pro tem for Wyandotte County. In 1990, Kansas Republican Governor Mike Hayden appointed Mr. Murguia Wyandotte County district judge, filling the remainder of the term of a judge who died in office. Elected to his own full four-year terms in 1992 and 1996, Judge Murguia has served Wyandotte County with distinction in this office for ten years.

Mr. Chairman, I am confident that Judge Murguia will bring to the Federal bench the skills and knowledge of an outstanding jurist, and the personal integrity and dedication of a man who took his law degree to help his fellow citizens, not for personal gain.

I therefore am pleased to wholeheartedly commend to the committee Judge Carlos Murguia's nomination for the Federal district court.

Thank you Mr. Chairman and members of the committee.

The CHAIRMAN. Well, thank you, Senator Brownback. That was a really fine statement. Judge, I think that stands you in good stead.

We are happy to have all these Senators testify for the judgeship nominees here today, and I just wonder if each of the nominees will now stand and come up to the table. If you will all raise your right hands, I will swear you in. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge PECHMAN. I do.

Judge MURGUIA. I do.

Mr. JORDAN. I do.

Mr. ALSUP. I do.

Mr. WILSON. I do.

The CHAIRMAN. Thank you. Please take your seats at the witness table, and we are very pleased to have all five of you here today.

We will start with you, Judge Pechman. Do you have any statement you would care to make? If any of you care to make statements, we will be happy to take those at this time.

TESTIMONY OF HON. MARSHA J. PECHMAN, OF WASHINGTON, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON; HON. CARLOS MURGUIA, OF KANSAS, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON; ADALBERTO JOSE JORDAN, OF FLORIDA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; WILLIAM HASKELL ALSUP, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA; AND CHARLES R. WILSON, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

TESTIMONY OF MARSHA J. PECHMAN, OF WASHINGTON, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Judge PECHMAN. Only, Senator, that it is a pleasure to be here.

The CHAIRMAN. It is a pleasure to have you.

Judge Murguia.

TESTIMONY OF JUDGE CARLOS MURGUIA, OF KANSAS, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Judge MURGUIA. I want to thank you for allowing me to be here. It is a great honor and privilege for me to be before you and the committee. The only other thing I would like to add, Senator, if I may, is that I truly appreciate my family being present. There are two other sisters that I have, Rosemary and Martha, that were not able to be here, and my son, Wyatt, is now being taken care of by

my mother-in-law, my wife's mother, Maureen Brandau, and I appreciate that as well.

The CHAIRMAN. Well, thank you. We are happy to have you here. It is a privilege to have all of you here.

Mr. Jordan.

TESTIMONY OF ADALBERTO JOSE JORDAN, OF FLORIDA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Mr. JORDAN. No, Senator, no statement. Just to say that it is an honor and a privilege to be here, and I would like to thank my family for accompanying me: my wife, my daughters, my mother, and my mother-in-law. They are a big sense of support for me.

The CHAIRMAN. It is a pleasure to have you here.

Mr. Alsup.

TESTIMONY OF WILLIAM HASKELL ALSUP, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF FLORIDA

Mr. ALSUP. Mr. Chairman, I want to also say how honored I am to be able to appear here and how obliged I am to Senator Boxer for the kind words she said about me. I am very pleased that my wife could be with me here today, and some of my oldest friends who have been with me at various places of great importance in my life are here in the room today as well. Thank you.

The CHAIRMAN. Thank you.

Mr. Wilson.

TESTIMONY OF CHARLES P. WILSON, OF FLORIDA, TO BE U.S. DISTRICT CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Mr. WILSON. Senator, I am very pleased and privileged to be here today, and I would like to express my appreciation to both Senators Mack and Graham for their appearance here today and for their statements on my behalf. I am also pleased to have my wife here today. My two daughters, Courtney and Kendall, were unable to make it, but they are here in thought, and I appreciate the opportunity.

The CHAIRMAN. We will have "The Hammer" be the representative of all the other children that can't be here. We are happy to have all of you here. We think it is a tribute to each of you that you have the nomination of the President of the United States for your respective judgeships. It is a privilege to serve on the Federal bench, one of the highest privileges in this land, one of the few jobs that really are for life and literally have lifetime salaries, even when you retire. So we appreciate the qualifications of each of you.

QUESTIONING BY SENATOR HATCH

Let me begin with you, Mr. Wilson. As U.S. Attorney and as a former Federal magistrate in Tampa, Florida, you have had to deal with some very difficult cases involving drug use and drug trafficking. In addition, you have had to deal with the civil forfeiture of assets used in the drug trade.

Now, in your view, what are the major legal concerns that arise from the civil forfeiture of assets?

Mr. WILSON. Well, the Middle District of Florida has really been one of the leaders in the country over the past 5 years in forfeiture of assets previously owned by criminals. The Department of Justice feels very strongly that forfeiture is one of the most important tools that we have in our arsenal to fight crime, not just because of the deterrent effects but because forfeiture deprives sophisticated criminal organizations of the wherewithal to operate.

I understand that there is legislation that is presently under consideration, the Civil Forfeiture Reform Act, and there is a proposed amendment to that legislation by the Department of Justice. If I am selected to serve as a court of appeals judge, I will faithfully and scrupulously apply that law if it is enacted by the Congress.

The CHAIRMAN. Thank you. In addressing cases that deal with the proper role of the States and the National Government in our system of federalism, it is important for an appellate judge, a Federal appellate judge, to follow the text and the history of the Constitution as well as the precedents from our U.S. Supreme Court.

For example, Article I, Section 8 of the Constitution enumerates several limited powers of Congress, and the Tenth Amendment reserves powers not granted to the Federal Government to the States or to the people.

Now, in your view, what role do the States have in our constitutional system?

Mr. WILSON. Well, certainly, if I am selected to serve, I will be sensitive to concepts of comity and federalism and support those provisions of the Constitution that articulate the limited powers of the United States in conjunction with the powers of the State, and I will faithfully apply the precedents established by the U.S. Supreme Court which limit the powers of the United States in relation to the powers of the State.

The CHAIRMAN. Will you faithfully apply those precedents, even if you disagree with the decisions of the Supreme Court?

Mr. WILSON. My personal opinions will have no bearing whatsoever on my role as a U.S. circuit judge.

The CHAIRMAN. Thank you.

QUESTIONING BY SENATOR HATCH

Mr. Alsup, you clerked for Supreme Court Justice William O. Douglas, and you have authored an article entitled "A Passion for the Wild" that recounts Justice Douglas' commitment to the environment. In the article, you quote from an opinion of Justice Douglas stating that, "Inanimate objects such as rivers and trees should be treated as ships when assessing standing in Federal court." That is in *Sierra Club* v. *Morton,* a 1972 case where Justice Douglas said it.

Now, could you elaborate on your view of the legal standing of inanimate objects in environmental concerns or environmental cases?

Mr. ALSUP. Yes, thank you, Mr. Chairman.

First, let me say that I agree with the position of the majority in that Court with respect to what the standing issue is and do not believe that Justice Douglas' position was ever accepted by the Supreme Court. So he stated his own view of what the law might be,

but it is actually—the law really is as the majority had stated it in the *Sierra Club* v. *Morton* decision.

The article that you are referring to I wrote because I thought it was appropriate on the 100th birth date of Justice Douglas to honor his memory, and since I had clerked for him the year that decision was handed down, I selected that as a decision that was emblematic, so to speak, of his work and contribution. But I do recognize that that was his position, motivated very strongly by his love for the wilderness. But as I stated in the article, that was not the position accepted by the Supreme Court majority. And if I were confirmed, I would, of course, apply the law as it actually exists and as it has been handed down by the Supreme Court majorities, and, of course, I would not attempt to apply Justice Douglas' concurring opinion or separate opinion in that case.

The CHAIRMAN. Thank you.

QUESTIONING BY SENATOR HATCH

Mr. Jordan, you have had significant experience in civil cases and private practice and, of course, as an Assistant U.S. Attorney. As I am sure you are aware, litigation has become more and more an expensive means to resolve disputes. The Federal Arbitration Act provides a means for parties to agree to binding arbitration instead of resolving all of their differences in court. Nonbinding mediation is also becoming a more popular method of cost-effective, nonjudicial dispute resolution.

In your view, what role should Federal district courts play in seeking to lower the cost of dispute resolution?

Mr. JORDAN. Mr. Chairman, I think they should have a role. I think that with respect, for example, to mediation, one of the ways that district judges can best try to further alternative dispute resolution mechanisms is to seek or to have parties go to magistrates, for example, or special masters, and mediate their disputes before things get too far along in the process.

In terms of arbitration, I think that courts can enforce arbitration clauses. If parties had the wherewithal to agree to them in an arm's-length transaction, then courts should have no problem whatsoever in holding parties to their bargain.

I think that district judges can also take a role in the discovery process, and making sure that that progress moves along expeditiously and quickly, with no short shrift to the litigants, but that discovery matters don't last forever and sort of drag out the process and increase costs for everyone.

The CHAIRMAN. Thank you.

QUESTIONING BY SENATOR HATCH

Judge Murguia, you have been a trial judge in Wyandotte County, KS for a number of years, and I am sure you are aware that the discovery provisions contained in rules 26 through 37 of the Federal Rules of Civil Procedure and similar State rules may have avoided what has been referred to as "trial by ambush." But an increasingly high cost seems to be the result. Indeed, the current rules may have resulted in more fights in the cost and discovery burden than in legitimate resolution of the merits of cases.

In your view, what can and should be done with current discovery practice to move the emphasis away from discovery fights and toward dispute resolution?

Judge MURGUIA. Thank you, Mr. Chairman.

I will tell you that it has been a privilege for me to be on the bench in Kansas, and part of that has been the experience that I have gained by being there. And what my experience has been in regard to the issue that you have raised is that if a trial court at a very early stage becomes involved in the discovery process, then there is less likelihood of the costs increasing.

What I have done and what other judges in my division and my district do is that early on we schedule conferences, we find out what the issues involved are going to be, we explore whether there are any other alternative dispute resolutions available to them, and then keep on top of the case by scheduling status conferences, making the court available to the parties at any stage where they believe that an issue has arisen which, if the court is able to review it, could decrease the costs involved with their litigation.

The CHAIRMAN. Thank you.

QUESTIONING BY SENATOR HATCH

Judge Pechman, you have served as a trial judge in King County in Washington for a number of years. As I am sure you are aware, nationwide class actions filed in both Federal and State courts have become more frequent and more complex and much more expensive. Currently, rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. sections 1407 and 1408 govern class actions and multidistrict litigations, respectively.

In your opinion, are there means to reduce the cost and complexity of class action suits in our Federal courts?

Judge PECHMAN. I think so, Senator. One of the things that I have been most proud of in my work as a trial court judge is moving my court from a master calendar system to an individual calendar, where judges take more control and more responsibility for their particular cases and then must work collaboratively with the attorneys involved to ensure that we have a swift and cost-effective resolution to the problems created by massive litigation.

I have introduced some creative ways of taking a look at large pieces of litigation. I have had an opportunity in very large pieces of litigation to come up with creative ways to solve it, including having the parties agree with the formula for discovery disputes, including having attorneys think of classrooms as courtrooms, or courtrooms as classrooms, so that they teach the judge and the juries involved what they need to know in order to make a particular decision.

So I have tried in every way I can to streamline and make more effective all pieces of litigation, including the most complex.

The CHAIRMAN. Thank you.

Let me ask a series of questions now of all of you that I think we need to ask. The Founding Fathers believed that the separation of powers in a Government was critical to protecting the liberty of the people. Thus, they separated the legislative, executive, and judicial branches of government into three different branches of government, the legislative power being the power to balance moral,

economic, and political considerations and make law; the judicial power being the power only to interpret laws made by Congress and by the people. In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people, or to rebalance the competing moral, economic and political considerations?

We will start with you, Judge Pechman.

Judge PECHMAN. Well, Senator, as a Federal district court judge, if I receive the nomination, I would adhere to the principle that it is not the business of a district court judge to legislate; it is the business of the district court judge to interpret the legislation that is made, and that is how I would conduct my business.

The CHAIRMAN. Thank you.

Judge Murguia.

Judge MURGUIA. Senator, the only other thing I would add would be that I would start with the presumption that any acts of Congress are constitutional, and I also would follow through with the acts that have been passed and also the law as it applies.

The CHAIRMAN. Mr. Jordan.

Mr. JORDAN. I have little to add, Mr. Chairman. Obviously, every act of legislation comes with a presumption of validity. I do not think it is the business of any judge anywhere to try to reset the balance or recalculate it. Obviously, a judge cannot take a completely hands-off posture, either; he or she is there to find out whether or not a piece of legislation is constitutional or not. But again, those pieces of legislation come with a severe presumption of constitutionality, and I do not think it is the business of a judge to try to reallocate whatever balance a State or Federal legislature thought proper.

The CHAIRMAN. Mr. Alsup.

Mr. ALSUP. In my view, a court should never substitute its judgment for that of Congress or a legislature. In a democracy, we elect people to Congress and the legislatures because they are the ones who will make the laws, and it is the role of the judge to take whatever Congress or the legislature says is the law, is the statute, and apply that just as Congress or the legislature intended. So in my view, a judge should never substitute his or her judgment for that of the elected branch of the government.

The CHAIRMAN. I presume you agree with all that, Mr. Wilson?

Mr. WILSON. I agree, Senator. I am a strong proponent of our system of separation of powers.

The CHAIRMAN. Let me ask you a separate question, Mr. Wilson. Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Mr. WILSON. I think that every statute when it is enacted is afforded the presumption of constitutionality, so if I were selected to serve, that would be my role as a U.S. circuit judge, to afford statutes enacted by Congress with the presumption of constitutionality.

The CHAIRMAN. At times, you all have stated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal Circuit Court of Appeals in your district. At least that is the way I have interpreted what you have had to say.

Does anybody disagree with that?

Mr. WILSON. No, Senator.
Mr. ALSUP. No, Senator.
Mr. JORDAN. No, Senator.
Judge MURGUIA. No, Senator.
Judge PECHMAN. No, Senator.

The CHAIRMAN. There may be times, however, when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ in deciding cases of first impression?

Shall we start with you, Mr. Wilson?

Mr. WILSON. Well, if it is an issue of—I think you first look to the Constitution of the United States and apply the plain meaning of the Constitution if it is a case involving the constitutionality of a particular statute or a law. From there, you would look to settled precedent rendered by the U.S. Supreme Court or to the law of your circuit or to the other circuits within the Federal system. So I believe in the concept of stare decisis; you look to the Constitution and then established Supreme Court precedent, settled Supreme Court precedent, and then to the law of your circuit, and in the absence of circuit authority, to the circuit authority of the various other circuits.

The CHAIRMAN. Mr. Wilson, let me ask you one other question. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the Equal Protection Clause of the Fourteenth Amendment and Federal civil rights laws of the use of race, gender, and national origin-based preferences in such areas as employment decisions—that would be hiring, promotions, or layoffs—college admissions and scholarship awards, and the awarding of government contracts.

Mr. WILSON. I believe the Supreme Court has spoken on that issue in the *Adarand* case, and if I am selected to serve, I will strictly apply that decision on the Eleventh Circuit. I believe that the Supreme Court has ruled in that case that affirmative action plans with respect to governmental entities are subject to a strict scrutiny analysis which is a very high analysis. The court is required under those circumstances to ensure that the affirmative action plan is narrowly tailored to further a compelling governmental interest, and I will follow that precedent faithfully.

The CHAIRMAN. Thank you.

Let me ask you this, Mr. Alsup. Do you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Mr. ALSUP. No, sir.
The CHAIRMAN. How about you, Mr. Jordan?
Mr. JORDAN. No, Mr. Chairman.
The CHAIRMAN. Judge Murguia?
Judge MURGUIA. No, Mr. Chairman.
The CHAIRMAN. Judge Pechman?
Judge PECHMAN. No, Mr. Chairman.
The CHAIRMAN. How about you, Mr. Wilson?
Mr. WILSON. No, Mr. Chairman.

The CHAIRMAN. Do you believe that 10-, 15-, or even 20-year delays between the conviction of a capital offender and execution is too long?

Judge Pechman.

Judge PECHMAN. Well, obviously, any delay that slows down the swift resolution of legal principles is too long, so I think it would probably depend on each circumstance, and I would apply the law that was applicable at the time.

The CHAIRMAN. Judge Murguia.

Judge MURGUIA. I believe that every case would have to be examined in the context of its own facts. I also agree that any type of delay is a burden on both sides involved in that type of case, and I would also follow the precedents that applied.

The CHAIRMAN. Mr. Jordan.

Mr. JORDAN. Mr. Chairman, I agree. I note also that the habeas reforms passed by Congress several years ago are slowly but surely working their way toward reducing delays not only in capital punishment cases, but in the regular, run-of-the-mill, non-capital punishment cases. I think it will take time for them to work the process through, but as a Federal prosecutor, I think we have begun to see the delays shortened. By and large, most litigants now have a year after their conviction becomes final to seek Federal habeas corpus review, and that is obviously a much shorter time period than the loose one that existed before.

The CHAIRMAN. Mr. Alsup.

Mr. ALSUP. I agree with what has been said and would only add that the kinds of delays that you mention in your question are unacceptable and that the courts and Congress should work together to find ways to speed the process up, as Congress already has in the Habeas Reform Act which the Supreme Court has upheld.

Mr. WILSON. I would agree. It is a well-worn expression, but justice delayed is justice denied, and I think public confidence in our judicial system is furthered by expeditiously resolving this issue as quickly as possible.

The CHAIRMAN. The Senator from New York has been very, very kind to let me go through some of these questions; I thought we needed to do that. But I will turn to you, Senator Schumer.

Senator SCHUMER. I thank you, Senator.

I just want to congratulate the witnesses and their families on this momentous day for all of you. I look forward to hearing the debate on the floor of the House and voting on your nominations.

I do not have any questions. I think we have a fine group of nominees. I note that Mr. Jordan is a soccer coach for his 10-year-old daughter. I have a 10-year-old daughter, and my Senate duties do not permit me to be the coach, but I go to a lot of the games. Maybe they will both be on the U.S. championship team in 20 or 25 years.

Thank you.

Mr. JORDAN. Thank you, Senator.

Senator SCHUMER. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I want to thank all of you. We have done a lot of examination of each of you before you got here, so I know an awful lot about

each of you, and I am very proud to be able to support each of you for these respective positions.

I would just encourage you to really live up to what you have said here today. I will give you an illustration. This committee is having a whale of a difficult time—let me just single out one circuit court of appeals, the Ninth Circuit Court of Appeals—getting anybody approved for that circuit, which is short a considerable number of judges, because there are a number of people on that circuit court of appeals who disregard what the law says; they just substitute their own ideas for what the law ought to be in their eyes. In the process, they have really hurt liberal judges all across this country.

I have had a number of excellent liberal judges come to me and say, "It is a disgrace what they are doing, because they are hurting all of us; they make us all look bad."

You have all said today that judges are suppose to interpret the laws, not make them. You are not elected to anything. You are nominated by the President, and I believe you will be confirmed by this committee and the Senate before the end of this year, and hopefully before the end of this month, and you are nominated and confirmed for life. You do not have to stand for reelection. Senator Schumer and I do have to stand for reelection, and if people do not like the laws we pass, they can throw us out of office.

Senator SCHUMER. Although I would say, Mr. Chairman, I like the 6-year term much better than the 2-year term we had in the House.

The CHAIRMAN. That is why you went through all that pain up there in New York. I feel sorry for the First Lady, to be honest with you.

But you can do judging a great favor by recognizing the role of judges. Naturally, you are going to have cases of first impression where you are going to have to decide them. You may be right and you may be wrong in deciding, depending upon the appellate courts above you, district judges, and the Supreme Court above you, Mr. Wilson But the fact of the matter is that you really hurt everybody if you do not abide by the rule of judging. And it is something that I am fairly strong about, because we do have an excellent Federal judiciary. I think it is the branch of government that has done more to preserve the Constitution and save this country than any other branch. And I sit in the legislative branch, and in many ways, I think it is the most powerful branch because we have the power of the purse, but you have the power of determining whether we are going to live by rule of law, which many countries do not live by. So it is very important that you set an example and that you do what is right even if you disagree with the courts above you. Unless there is some legitimate reason for disagreeing that is more than judicial activism, it seems to me you have got to apply the law as it is written and observe the rule of judging and acknowledge that there are obligations and duties of the other two branches of government that are separate from yours and just as important as yours. I commend all of you.

I had not noticed Senator Sessions here until now. Senator, do you have any questions?

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Just briefly, Mr. Chairman. I want to second your comment that we do review the nominees and their backgrounds carefully; that has been done by my staff and the committee staff. You bring much to commend each of you. I hope that I will be able to support each of you.

I do take this advise and consent responsibility seriously. This is the only time the people have any opportunity to say on your nomination other than the fact that you have been nominated, and you have a lifetime appointment, which is a rather august, serious event for us to look at.

I thought I would ask a few questions. Judge Pechman, you have been involved in plaintiff work over the years. Do you have any philosophical objections to reducing verdicts that you think are excessive?

Judge PECHMAN. I do not, Senator, and in appropriate cases, I have done so.

Senator SESSIONS. Earlier, in discussing the death penalty and delays, you indicated that you would follow the law. Do you personally have any concern that death penalty cases that routinely are 12, 15, 16, 18 years to conclusion are excessive and that somehow, a legitimate criticism can be laid on the courts for that?

Judge PECHMAN. Senator, I could not agree more than to agree with Mr. Wilson when he says that justice delayed is justice denied, and it is incumbent upon every district court judge to manage their calendar so that that does not happen.

Senator SESSIONS. In your experience, have you had instances and do you believe that courts have not moved as expeditiously as they could have, and that that is one reason for these extremely long delays?

Judge PECHMAN. I think that many times, there has been room for improvement. I have seen it in my own court and sought to correct it.

Senator SESSIONS. As Attorney General of Alabama, I have seen a number of those cases in which judges just fail to rule on motions for years or refuse to set cases for execution, therefore not upholding in effect the statutes and really undermining, I believe, as U.S. Attorney Wilson said, the respect for law when things go for so long that people wonder if we have a just legal system.

So I think we have responsibility if we have a legal system to rule on the defense motions properly and move on to justice, and if that means carrying out the execution, so be it.

Judge Murguia, would you comment on that? Have you had the same experience, and do you have any views about the death penalty delays?

Judge MURGUIA. Yes, sir. I have shared the same experiences that Judge Pechman just mentioned to you. Quite frankly, I think it is a combination of factors that affect that. Part of it could be the type of docket that you are involved in, if it is civil or criminal, and how heavy it is at times, and also I think a significant factor is a court's management of their docket and what types of procedures they follow.

My own personal experience has been that that plays an important role in how you track your cases and how quickly you are able to move them through your court.

Senator SESSIONS. Mr. Jordan, do you agree, or would you comment? As an appellate lawyer in a U.S. attorney's office, you have probably had some experience with appeals.

Mr. JORDAN. That is basically what I do day in and day out. In our office, we have not had any of the delays that you described, obviously, because the Federal death penalty, at least as it has been enlarged, is relatively new, and there have been no death penalty cases arising out of our district, so at least in the Federal system, those delays are relatively unknown. I think in the States, the cases coming over from State courts and coming over to Federal court and Federal habeas are where those delays are seen.

Obviously, those delays are very difficult for everybody. They prevent closure for the victims; they prevent attorneys on both sides of the fence from moving on, and it makes things much more unpredictable and more difficult at the end if something new is going to be done—for example, if a new trial or a new hearing is going to be ordered—because then witnesses are lost, memories are dimmed, and I think that that is a real concern.

Senator SESSIONS. I think it is a very real concern. I remember vividly quite a number of years ago, probably in the mid-eighties, an Eleventh Circuit Conference, your circuit, in Atlanta in which the chief justice of the Georgia Supreme Court at the Federal Eleventh Circuit Conference looked at the Federal judge and said, "Gentlemen, I have come to believe that there is a determined effort by the Federal courts to sabotage the implementation of the death penalty."

I think that that has changed some, but Federal judges are deeply involved in this process, as you know—it goes up through the State system and then over to the Federal system—and I think that sometimes too often, judges accept cases that deal with issues that clearly do not meet the legal standards, allowing an entirely new appeal process to go for maybe a year or more. We have multiple cases before the Supreme Court. A case goes to the U.S. Supreme Court multiple times, to the courts of appeals multiple times, to the State supreme court multiple times, and you begin to wonder after a while if we are dealing with law or if we are just dealing with some theory that we can never reach finality in death penalty cases. And although they are the most serious kinds of cases, finality is necessary.

Mr. Alsup, I know that you clerked for Justice Douglas, and he dissented in death penalty cases consistently, and if I am not mistaken, along with Justices Marshall and Brennan, took the astounding position in my view—at least Marshall and Brennan did—that the death penalty was cruel and unusual punishment as defined by the Constitution even though within the Constitution itself, it makes multiple references to the death penalty.

I consider that to be the high-water mark of judicial activism when courts are declaring a plainly accepted constitutional penalty and declaring it unconstitutional by a different view.

I guess I would ask you if you would enforce the death penalty laws as they are interpreted by the Supreme Court today, and

would you comment on the cruel and unusual punishment argument.

Mr. ALSUP. I think to answer your first question, the Supreme Court has made very clear, absolutely clear, that the death penalty is constitutional, and as a district judge, I would fully apply that law; I would have no personal qualms in applying that law or in applying the death penalty in an appropriate case where Congress had imposed it.

All I can say on the cruel and unusual point that I think you are referring to is that that argument by the Justices you mentioned was rejected by the majority in the Supreme Court, and it is not the law.

Senator SESSIONS. I know that it is difficult to ask you to comment on a Justice you worked for. We all respect people for whom we have worked. But would you analyze the danger of a court that takes one clause of the Constitution and gives it an unusual construction in the face of multiple other clauses that appear to be plainly contrary to that? Would that trouble you?

Mr. ALSUP. That would trouble me, of course, Senator. I can only say that at that time—and it has been many years since that case, and I do not remember the exact arguments back and forth; you will have to forgive me on that—but I can say that there were honest differences of opinion over that issue, and I cannot now reconstruct in my mind what the exact arguments were, but I do remember that one argument that was made against the position of Justice Douglas was exactly the one that you mentioned, which is that the death penalty is referred to or implied in a number of the other provisions of the Constitution.

Senator SESSIONS. It talks about taking a life——

Mr. ALSUP. Yes.

Senator SESSIONS [continuing]. Only take life without due process refers to capital crimes, and that sort of thing.

So I think the Constitution contemplated the death penalty, and the reason why that is important to me is not because I am overly concerned about the death penalty—and I respect people who may disagree—it is the question of the passion of people opposed to the death penalty allowing that passion to overcome their legal judgment and responsibility as members wearing a robe of the United States. That is a big responsibility.

I am kind of encouraged, Mr. Chairman—and I know you have stood firm on these issues for so many years—that maybe the tide has turned on those questions, and maybe we are getting more judges who are prepared to follow the traditional, plain meaning of the Constitution.

That is all I would have. I would say, Mr. Alsup, that I enjoyed meeting with you and your friend and mine from Mississippi State and Mobile, AL. I was really impressed by your work ethic.

Senator Hatch, he says he gets up earlier than you, I believe, at 5, and he is at work at 6. Senator Hatch is in the gym at 6.

The CHAIRMAN. I get up at 5 to 5, I want you to know. [Laughter.]

Senator SESSIONS. It is hard to get up earlier than Senator Hatch.

Anyway, he has a great work ethic and is well-respected; lawyers from California have complimented him to the committee, and I think he has the kind of determination to make an outstanding judge.

Thank you.

The CHAIRMAN. Thank you, Senator Sessions.

I want all of you to know how proud we are of you and how proud I will be to support each and every one of you. The record will remain open for follow-up questions until the close of business Thursday, July 15.

I want to thank all of your family members for being here and others who are your friends and supporters. It is wonderful to see you all and to see what good families you have. Knowing what I know about your backgrounds, I am very, very impressed.

So we are happy to have all of you here, and we will be happy to try to get you up before the Judiciary Committee as soon as we can and hopefully report you to the floor as soon as we possibly can.

[The questionnaires of Judge Pechman, Judge Murguia, Mr. Jordan, Mr. Alsup and Mr. Wilson are retained in committee files.]

The CHAIRMAN. With that, we will recess until further notice.

[Whereupon, at 3:28 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF JUDGE MARSHA J. PECHMAN TO QUESTIONS FROM SENATOR HATCH

Question 1. In your view, what does Article III of the Constitution authorize federal judges to do? Specifically, do you believe that the judicial power encompasses the power to interpret existing law or to make new law? What are the limits on the scope of a federal judge's power?

Answer 1. The scope of authority granted to Article III judges is to interpret existing law and to apply it to an actual case in controversy, keeping in mind the issues of standing, ripeness, and mootness.

Question 2. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of the Article III judicial power.

Answer 2. A District Court Judge should begin with the text of the act under consideration, the text of the Constitution, and any legal precedents of the Supreme Court and of the circuit in which the judge sits. This list of authorities is consistent with the Article III power that limits the role of the District Court Judge to interpreting and applying law, not legislating.

Question 3. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution, (2) discernment of the "community's interpretation" of constitutional text; see, William J. Brennan, The Constitution of the United States Contemporary Ratification, Text and Teaching Symposium, Georgetown University (October 12, 1985) and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer 3. Approach number one is a legitimate route to take when reviewing a constitutional right whether or not it has previously been specifically ruled on. Although I am unfamiliar with the text referenced in approach number two, "discernment of the 'communities interpretation' of constitutional text" is not recognized as an appropriate approach. Approach number three would require that after ratification of an Amendment under Article V, the amendment becomes part of the Constitution itself and therefore it becomes the text to be examined.

Question 4. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 4. The analysis in both instances begins with the plain meaning of the statute (which is given the presumption of constitutionality), the text of the constitution, and controlling case law. In a case that is not one of first impression, I would apply controlling precedent. In the case of first impression (which, in my experience as a trial court judge, is rare, even when the litigants urge that position), your search for precedent would include review and guidance from analogous cases or the application of established standards of review.

Question 5. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III? A. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); B. *Alden* v. *Maine,* 119 S.Ct. 2240 (1999).

Answer 5. In both *Griswold* and in *Alden,* the Court looks outside the text of the Constitution and the Bill of Rights. In *Griswold* the court held that the law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy, arguing that the First Amendment has a penumbra where privacy is protected from government intrusion and is fundamental. In *Alden,* the court held that Congress could not subject a state to suit in state court without its consent. The court

looked to history, practice, precedent, and structure of the document to determine what is "residual" and confirmed that immunity from suit is a fundamental aspect of sovereignty that the states enjoyed before ratification and it is retained today. How this will impact the scope of judicial and federal government power under Article III will certainly be the subject of debate and scholarly work in the years to come. Whenever there appears to be a necessity to retreat from the words of the text there is an opportunity to either expand or contract the court's power or influence.

Question 6. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments. A. *Wickard* v. *Filburn,* 317 U.S. 111 (1942); B. *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer 6. *Wickard* v. *Filburn* took an expanded view of what can be regulated under the commerce clause, reaching to intra-state activity and finding that it had interstate impact. The court held that the Agricultural Adjustment Act of 1938 was constitutional and that even local farming activity may be reached by Congress if it exerts a substantial economic effect on interstate commerce. It has been used by scholars as the best example of the court yielding to the nationalist economic philosophy of the New Deal era, *U.S.* v. *Lopez* revisited the issue and sought to clarify prior case law with a more restrictive view, finding that the regulated activity must have a direct impact on commerce and not an inferred impact. *Lopez* held that the possession of a gun in a local school zone is not economic activity that would have a substantial effect on commerce.

Question 7. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments. A. *United States* v. *Lopez,* 514 U.S. 549 (1995); B. *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996); C. *Printz* v. *United States,* 521 U.S. 898 (1997); D. *Colleges Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.,* 119 S Ct. 2219 (1999); E. *Alden* v. *Maine,* 119 S Ct. 2240 (1999).

Answer 7. All five of the cases listed demonstrate the tension between the states' powers and federal power. By a 5–4 majority each case has furthered the interpretation that the states hold significant power to govern in the primary instance and the federal government is limited in what it may direct states to do or in when and where the states may be sued. *United States* v. *Lopez* held that the Gun Free School Zone Act of 1990 was unconstitutional as it exceeded Congress' power under the commerce clause. Congress had not shown that regulating this local criminal activity had a substantial impact affecting interstate commerce. In *Seminole Tribe* v. *Florida* the court also concluded that Congress had exceeded its authority under the Eleventh Amendment and that Congress cannot authorize suits by individual tribes against the states to enforce legislation without the states' consent or waiver. Similarly, in *Printz* v. *U.S.* the court also held that the Federal Government may not compel the states to administer or enact the Brady Act. *College Saving Bank* v. *Florida* again turned to the issue of sovereign immunity in declaring that without voluntary waiver the Trademark Remedy Clarification Act did not abrogate the states' sovereign immunity. Finally, in *Alden* v. *Maine* the Supreme Court confirms that immunity from suit is a fundamental aspect of sovereignty that the states enjoyed before the Constitution's ratification and it is retained today. The court supported the state's position that it could not be sued in state court for Fair Labor Standards Act violations. This line of cases underscores the prerogatives of the states and the limitations of federal authority. If I am fortunate to be confirmed I will of course follow the holdings and any subsequent decisions.

RESPONSES OF JUDGE MARSHA J. PECHMAN TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. In your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 1. The rights protected by the Constitution do not grow or shrink. They are from time to time examined in the light of new developments. For example, the advent of cars and airplanes had an effect on commerce. The telephone and the internet affect communication. These technical developments may require courts to review factual circumstances. However, the rights in the Constitution do not change.

Question 2. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 2. Yes, a high rate of reversal is a problem. Reversal can be the product of multiple converging issues. It can be caused by high volume workload, failure to adhere to precedent, adherence to past precedent, judicial temperament or disability, failure of the trial court to develop a record for review, and the presentation on appeal of theories or issues not developed at the trial court level. The corrective measures for a single judge to take include: identifying or isolating the reason for reversal, and searching for a pattern and taking remedial steps to rectify the deficiency. It is also the obligation of each judge to assist his or her fellow judges to work collegially to remedy a problem persistent to the court as a whole.

Question 3. Is "substantive due process" a legitimate constitutional doctrine?

Answer 3. Substantive due process has been recognized by the Supreme Court as recently as 1997 in the case of *Washington* v. *Glucksberg,* 521 U.S. 702. The Court, in reviewing the statute concerning assisted suicide, held that substantive due process has two features. First, that it protects liberties which are deeply rooted in the Nation's history and tradition, and second that a careful description of the fundamental liberty interest is required. Thus, in very limited circumstances it is a legitimate doctrine.

Question 4. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 4. In *U.S.* v. *Lopez* the court held that in the absence of a showing that the activities in question substantially affected interstate commerce Congress exceeded its authority under the Commerce Clause by attempting to criminalize the possession of a gun in a school zone. The test to apply is whether the regulated activity arises out of, or is connected with, a commercial transaction which, viewed as a whole, substantially affects interstate commerce.

Question 5. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be? Would any such classification require a showing of particularized past discrimination?

Answer 5. The Supreme Court, in *Adarand Constructors Inc.* v. *Peñ,* indicated that courts must carefully review any use of race using the strict scrutiny test and the any program must be narrowly tailored and be based upon a compelling government interest. I am unable to think of any such acceptable classification that would withstand *Adarand's* strict scrutiny test. If confirmed I would, of course, review any classification by following *Adarand* and any subsequent case law. Particularized past discrimination would be an important relevant factor but would not necessarily be determinative.

Question 6. Is there a legislative classification that would fail rational basis review?

Answer 6. Without text to examine, I am unable to think of any classification which would fail rational basis review. Rational basis review merely requires that government show the classification "reasonably relates" to a legitimate government interest.

Question 7. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious or non-sectarian constitutional?

Answer 7. The Supreme Court decision in *Agostini* v. *Felton* did not squarely reach the issue of the constitutionality of school vouchers in general, leaving this issue subject to further development. If presented with a specific case at issue I would begin my review with the text of the statute, the Constitution, the presumption of constitutionality, and any precedent set by the Supreme Court and my circuit.

Question 8. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905), an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism (not including Lochner if your answer to the Prior question was yes). Is *Roe* v. *Wade,* 410 U.S. 113 (1973), an example of judicial activism?

Answer 8. The definition of judicial activism is when the court ignores precedent to achieve a desired result in a case and/or substitutes his or her judgment for that of the legislature. Many judicial scholars have cited *Lochner* v. *New York* as an example. Other examples have included *Dred Scott* v. *Sanford, Adkins* v. *Children's Hospital of the District of Columbia,* and *Roe* v. *Wade.* At the time *Roe* v. *Wade* was decided, it was argued by scholars that it was judicial activism. Subsequent case law

of *Webster* and *Casey* argues that it was founded on precedent. As a District Court Judge, I will faithfully adhere to the decisions made by the Supreme Court regardless of label or my personal views.

RESPONSES OF JUDGE MARSHA J. PECHMAN TO QUESTIONS FROM SENATOR SESSIONS

Question 1. What do you believe is the most important Supreme Court decision of the past 30 years? What do you believe was the worst Supreme Court decision during this time? Please provide a brief explanation of your answer.

Answer 1. Speaking as a trial judge, the case with the most direct impact to the trial court is *Daubert* v. *Merrill Dow Pharmaceuticals Inc.*, 516 U.S. 869 (1995). It has changed the way judges must view their role as gatekeepers to expert testimony, although Washington State, in *State* v. *Copeland*, 130 Wn.2d 244 (1996), has rejected the analysis of Daubert and continues to apply the Frye test. As a state court judge, I apply *Frye;* if confirmed, I would adhere to the *Daubert* analysis.

Again, as a trial court judge, the worst decisions are those in which the opinions are so fractionalized that the rule of law cannot be ascertained or easily applied. This leaves the rule of law unsettled and the trial judge in a quandary. *Furman* v. *Georgia*, 408 U.S. 238 (1972) is an example where the justices did not speak with single voice. However, even the most fractionalized opinion must be deciphered and followed, and it would be inappropriate for a trial judge to label or denigrate any individual case as the "worst".

RESPONSES OF JUDGE MARSHA J. PECHMAN TO QUESTIONS FROM SENATOR BOB SMITH

Question 1. Leaving entirely aside the relevant Supreme Court precedent about the legal status of unborn children, do you as an individual believe that the unborn child is a fellow human being?

Answer 1. As a judicial nominee, I must answer this question in the context of case law. Moreover, as a State Court trial judge in Washington I am further constrained not to provide my personal views on this important question by my oath and the Washington State Code of Judicial Conduct. Washington Ethical Advisory Opinion 90–6 indicates that a judge shall not make any public comment concerning the judge's personal views on abortion. If confirmed, I would steadfastly follow the precedent of *Planned Parenthood of Southwestern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), which holds that the State has a legitimate interest in protecting an unborn fetus.

Question 2. As you know, the Supreme Court held in *Roe* v. *Wade* that the unborn child has no constitutional right to life before birth. Leaving entirely aside any obligation that you may or may not have as an inferior court judge to follow Supreme Court precedent, do you as an individual believe that the Supreme Court was legally and/or morally wrong in determining that an unborn child, even in the final weeks of pregnancy, has no constitutional right to life?

Answer 2. Once again, I recognize that this is very important, however, if I am privileged to be confirmed I must be bound by the case law which has further developed *Roe* v. *Wade. Casey* affirmed the principal that "the state has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus" (505 U.S. 833 at 846). I would follow this principal. As noted above, as a sitting trial judge I am constrained from personal comments by Washington Ethical Advisory Opinion 90–6 which indicates that a judge shall not make any public comment on abortion.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. Legislation enacted by Congress is presumed to be constitutional, and if I am fortunate to be confirmed, I will of course begin any analysis of the constitutionality of a statute with this premise in mind. I will further look to *Casey* and other Supreme Court cases for guidance. I have not read the act and I do not have an opinion about its constitutionality. In addition, I could not render an advisory opinion on an issue which may come before me.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so what are the limits, if any, of that right?

Answer 4. In *U.S.* v. *Miller,* 307 U.S. 174 (1939), the Supreme Court protected the citizen's right to own firearms that were ordinary militia weapons. Since *Miller,*

the court has not addressed the issue. I would, as a District Court Judge, be bound by this holding, and by any subsequent decisions of the Supreme Court.

Question 5. Do you believe that the death penalty is constitutional?

Answer 5. Yes, the Supreme Court has ruled so in *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 6. Would you have any personal, moral, or religious qualms about enforcing the death penalty as a judge?

Answer 6. No. I would follow the *Gregg* precedent and all other subsequent holdings without regard to personal beliefs.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. None of which I am aware.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. Only the Supreme Court may overrule itself, and even then only when using the appropriate analysis. In *Casey* v. *Planned Parenthood,* the Court outlined the questions which must be considered when overruling precedent: (1) Whether the rule has proven to be intolerable because it defies practical workability? (2) Whether the rule is subject to a kind a reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation? (3) Whether related principals of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine? (4) Whether facts have so changed or have come to be seen so differently as to have robbed the old rule of significant application or justification? These are the principles which the Supreme Court requires to be applied before the Court may overrule itself.

RESPONSES OF CARLOS MURGUIA TO QUESTIONS FROM SENATOR SMITH

Question 1. Leaving entirely aside the relevant Supreme Court precedent about the legal status of unborn children, do you as an individual believe that the unborn child is a fellow human being?

Answer 1. As a federal judicial nominee, I feel bound to answer this question in the context of the law. If I am fortunate to be confirmed as a federal district court judge, I would be bound to uphold the law, as interpreted by the United States Supreme Court and the Court of Appeals for the Tenth Circuit. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court recognized the state has a legitimate interest in protecting an unborn fetus. I would apply the relevant judicial precedent to any questions concerning the rights of the unborn. I want to assure the Senate Judiciary Committee I have no personal views that would interfere with my ability to follow and apply precedent.

Question 2. As you know, the Supreme Court held in *Roe* v. *Wade* that the unborn child has no constitutional right to life before birth. Leaving entirely aside any obligation that you may or may not have as an inferior court judge to follow Supreme Court precedent, do you as an individual believe that the Supreme Court was legally and/or morally wrong in determining that an unborn child, even in the final weeks of pregnancy, has no constitutional right to life?

Answer 2. I read *Roe* v. *Wade,* 410 U.S. 113 (1973), as holding that the State has an interest in protecting an unborn fetus, and that this interest becomes more significant as the fetus develops. The Court in *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), further clarified and expanded on this holding. In *Casey,* The Supreme Court addressed an unborn child's constitutional right to life. If confirmed, I would apply *Casey* together with other relevant precedent whenever that issue were to be presented to the court. I want to assure the Senate Judiciary Committee I have no personal views that would interfere with my ability to follow and apply precedent.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. An Act of Congress is presumed to be constitutional. If partial-birth abortion legislation were to come before me as a district court judge, I would begin with that premise, and look to all relevant precedent, including *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992).

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. On its face, the Second Amendment appears to protect a right to keep and bear arms. Like other constitutional rights, the rights granted by the Second Amendment are subject to some limitations. If confirmed, I would look to the plain language of the Second Amendment together with all relevant judicial precedent to decide any Second Amendment issues.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. The death penalty has been held to be constitutional by the Supreme Court in *Gregg* v. *Georgia,* 428 U.S. 153 (1976). I would follow the holding of the Supreme Court.

Question 6. Would you have any personal, moral, or religious qualms about enforcing the death penalty as a judge?

Answer 6. No, I do not.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. None of which I am aware.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. Overruling a prior decision should be reserved only for rare occasions and, as the question suggests, only by the Supreme Court. A Supreme Court precedent should only be overruled by the Supreme Court, and only if it is clearly wrong, if its continued validity causes great injustice, and if no greater injustice would be caused by its invalidation. *Agostini* v. *Felton,* 521 U.S. 203 (1997).

RESPONSE OF CARLOS MURGUIA TO A QUESTION FROM SENATOR SESSIONS

Question 1. What do you believe is the most important Supreme Court decision of the past 30 years? What do you believe was the worst Supreme Court decision during this time? Please provide a brief explanation of your answer.

I believe it is difficult to characterize one decision as the "most important" or "worst." An important decision was *M.L.B.* v. *S.L.J.,* 519 U.S. 102 (1996). The Court held that the access to an appellate court of a parent whose custody rights have been terminated cannot be conditioned on the parent's ability to pay for that access. The decision reinforces the principle that the legal system should be available to all, regardless of their ability to pay, especially when issues involving family relationships are involved. I cannot think of a "worst" case within the next 30 years. I do believe that *Lochner* v. *New York,* 195 U.S. 45 (1905) was improperly decided. The *Lochner* Court substituted its own social and economic beliefs for the judgment of a legislative body that had been elected to make those policy choices.

RESPONSES OF CARLOS MURGUIA TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

Question 1A. The majority of your legal career has been spent as a State district court judge. In fact, your questionnaire indicates that you have spent very little time in Federal Court as a practitioner. In fact, your questionnaire indicates that your legal practice has been in State Courts of Record nearly 98 percent of the time, and in Federal Court only 2 percent of the time. Do you think that your lack of experience in the Federal system will pose any difficulties for you to effectively serve as a District Court Judge?

Answer 1A. I would hope not, and I truly do not believe it will. Based on my training and experience as an attorney and state trial court judge, I believe I can effectively carry out my duties as a federal district court judge. The Kansas rules of civil and criminal procedure are patterned after the federal rules and during the past nine years as a state trial court judge, I have a applied those rules in the cases that I have heard. Effective July 1, 1993, Kansas began using sentencing guidelines for the criminal sentencing of convicted felons. The Kansas guidelines are similar to the federal sentencing guidelines that are presently being used by the federal district court. As a state trial court judge, I have been involved in several cases where federal rights and issues have been raised and ruled on.

Question 1B. What attributes do you bring to bear that will help ensure an effective transition?

Answer 1B. If I am fortunate enough to be confirmed, I believe my transition would be comparable to my transition from private practice to the state court bench. I have extensive experience in effective case management and courtroom control

that I have developed over the past nine years on the state court bench. I would also commit the time and effort necessary to familiarize myself with the differences between the federal and state court systems. I plan to work very diligently to prepare for the different federal procedures used in civil and criminal cases, and to review and study the substantive areas of federal law that are new to me. I am a hard worker and will conscientiously attempt to carry out my judicial duties fairly and properly.

Question 2A. Your biography also lists that you have been a member of some organizations that lobby before Congress. At least one of these organizations has taken very public positions in support of affirmative action programs. In a suit challenging a government racial classification, preference, quota or set-aside, will you follow the 1995 *Adarand* v. *Peña* decision and subject that racial preference to the strict scrutiny standard?

Answer 2A. If I am fortunate enough to be confirmed, I will faithfully uphold the Constitution of the United States and follow the precedents of the Supreme Court and the Tenth Circuit Court of Appeals. I will follow *Adarand,* and all other relevant Supreme Court precedent, and subject racial preferences to the strict scrutiny standard.

Question 2B. In your personal legal opinion, how difficult is it for a government program or statute to survive strict scrutiny?

Answer 2B. Based on the *Adarand* decision, it is extremely difficult for any government program or statute that is based on racial, or suspect, classifications to survive strict scrutiny. In *Adarand,* the Court held that any program or statute which is based on a racial classification is subject to the strict scrutiny test, and the program or statute must be narrowly tailored to respond to a specific compelling state interest.

Question 2C. As general legal proposition, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

Answer 2C. In my opinion, voter referenda should be scrutinized in the same manner as laws enacted by legislatures. A court should begin with the presumption that the referendum is constitutional. Further analysis would include a review of the language used in the referendum, the Constitution, and relevant Supreme Court and appellate court precedent.

RESPONSES OF CARLOS MURGUIA TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. In your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 1. In my opinion, although times may change, the rights contained in the Constitution stay the same. A federal district court judge should interpret constitutional rights by looking at the language of the Constitution and relevant Supreme Court precedent.

Question 2. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 2. It could be a problem depending on the reasons for the reversals and the frequency of the reversals. A possible remedy would be for the court to review the reason(s) for the reversal, such as: are the reversals for procedural or substantive reasons, is the court failing to make sufficient findings of fact, are the facts improperly being applied to the law, is the court improperly applying the law, and is the court not following controlling legal precedent.

Question 3. Is "substantive due process" a legitimate constitutional doctrine?

Answer 3. "Substantive due process" is a term which has been used in different contexts by various legal commentators and courts. In *Washington* v. *Glucksberg,* 521 U.S. 702 (1997), Chief Justice Rehnquist describes two primary features of "substantive due process." First, the Due Process Clause protects those fundamental rights and liberties which are objectively, deeply rooted in the nation's history and tradition. Secondly, the status must provide a careful description of the asserted fundamental liberty interest. The *Glucksberg* analysis of the "substantive due process" issue serves as a guide for any court that is presented with that issue. In my opinion, due process is to be interpreted and enforced pursuant to the Constitution and relevant Supreme Court precedent. A court should not create rights that are not already in the Constitution.

Question 4. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 4. My understanding is *Lopez* held that provisions of the Gun-Free School Zones Act of 1990 were unconstitutional based on Congress exceeding its authority under the Commerce Clause. The Court held that Congress improperly relied on its authority to regulate interstate commerce to regulate intrastate criminal activity. If fortunate enough to be confirmed, the test I would apply would be to begin with the presumption that the statue is constitutional, followed by a review of the language in the statute, the Constitution, and relevant Supreme Court precedent and appellate court precedent.

Question 5. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be? Would any such classification require a showing of particularized past discrimination?

Answer 5. None of which I am aware. The Supreme Court holding in *Adarand* v. *Peña,* 515 U.S. 200 (1995) is clear that any racial classification is subject to strict scrutiny analysis. The strict scrutiny analysis is the most stringent analysis a court may use. The burden would be on the proponent of the classification to prove that the classification is narrowly tailored to respond to a specific compelling government interest.

Question 6. Is there a legislative classification that would fail rational basis review?

Answer 6. It would be difficult for a legislative classification to fail a rational basis review. In *City of Cleburne, Texas* v. *Cleburne Living Center,* 473 U.S. 432 (1985), the Court held that legislation is presumed to be valid and will be sustained if the classification drawn by the legislation is rationally related to a legitimate state interest. A rational basis review of a legislative classification would depend on the language used in classification, the Constitution, and relevant Supreme Court and appellate court precedent.

Question 7. Is a state program that gives parents a set sum of money to be used by the parents to pay for tuition at any school they choose, public, private, religious or non-sectarian, constitutional?

Answer 7. A state program based on state legislation has a presumption of constitutionality. In *Jackson* v. *Benson,* 578 N.W. 2d 602 (1998), *cert. denied.* 119 S. Ct. 466 (1998), the Wisconsin Supreme Court upheld a program of this nature by relying on existing Supreme Court Establishment Clause precedent. An analysis of the constitutionality of a state program would consist of a review of the language used in the legislation enacting the state program, the Constitution, and relevant Supreme Court and appellate court precedent.

Question 8. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905) an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism (not including *Lochner* if your answer to the prior question was yes). Is *Roe* v. *Wade,* 410 U.S. 113 (1973) an example of judicial activism?

Answer 8. In my opinion, judicial activism is disregarding the inherent limits on judicial authority under the Constitution and a judicial activist is a judge who seeks to legislate from the bench. The role of a judge is not to make laws but to interpret and enforce the Constitution and be bound by relevant Supreme Court precedent. I do not believe that *Lochner* was properly decided. In *Lochner,* the Court appears to have interjected its own personal philosophies and policy views instead of a fair interpretation of the Constitution. Three other Supreme Court opinions that appear to be examples of judicial activism are: *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923), in which the Court struck down a District of Columbia minimum wage statute for women; *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504 (1924), in which the Court struck down a law fixing the weight of loaves of bread; and *Morehead* v. *New York,* 298 U.S. 587 (1936), in which the Court invalidated a state minimum wage law for women. In *Roe,* the Court found that a woman has a right to an abortion based on privacy rights that exist in the "penumbras" of the Constitution. Since *Roe,* the Court in *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), held that the State had a legitimate interest in protecting an unborn fetus. If I am confirmed as a federal district court judge, I would be required to follow Supreme Court precedent irrespective of my personal views of the holding. I would apply the relevant judicial precedent to any questions concerning the rights of the unborn.

RESPONSES OF CARLOS MURGUIA TO QUESTIONS FROM SENATOR HATCH

Question 1. In your view, what does Article III of the Constitution authorize federal judges to do? Specifically, do you believe that the judicial power encompasses the power to interpret existing law or to make new law? What are the limits on the scope of a federal judge's power?

Answer 1. Article III vests the judicial power of the United States "in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." The judicial power shall extend to all cases arising under the Constitution and the laws of the United States. The role of a federal judge is to apply and enforce the Constitution and not to legislate from the bench and make new laws. In doing so, a court should look at the language of the Constitution, or statute, and be bound to follow relevant Supreme Court and appellate court precedent. The limits on the scope of federal judicial power are to apply the law only to cases in controversy and within the court's jurisdiction.

Question 2. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities in consistent with the exercise of the Article III judicial power.

Answer 2. A judge should analyze the legal effect of a statute or constitutional provision by reviewing the language of the statute or provision, the Constitution and relevant Supreme Court and appellate court precedent. In reviewing the statute or provision, a court should look at the text and plain meaning of the language used, and only if that language is ambiguous, should a court resort to an examination of its legislative history.

Question 3. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer 3. I believe that only the Supreme Court should consider a claim based on a constitutional right not previously upheld by a court, and further that consideration should only take place on very rare occasions. In response to the question: (1) It is presumed legitimate for a judge to review the language used in the Act, statute or constitutional provision; the language of the Constitution; and relevant Supreme Court and appellate court precedent. (2) The "community's interpretation" approach would be suspect and contrary to the constitutional function of judicial review. (3) The Constitution is clear that Article V is a legitimate method by which the Constitution may be amended. An amendment enacted pursuant to Article V should be given the same force and effect as other constitutional rights. Judicial review of that amendment would be based on its language, the Constitution, and relevant Supreme Court and appellate court precedent.

Question 4. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 4. If I am fortunate enough to be confirmed, my analysis of a case that is not one of first impression would begin with the presumption that the statute is constitutional. I would then review the language of the statute, the Constitution, and relevant Supreme Court and appellate court precedent. For a case of first impression, it is very rare to find a case that has no existing precedent in one form or another. However, if a case of first impression were to come before me, I would review the language of the statute, the Constitution, and relevant Supreme Court and appellate court precedent.

Question 5. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III? (A) *Griswold* v. *Connecticut,* 381 U.S. 479 (1995); (B) *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answer 5A. In *Griswold,* the Court found a right to privacy in the Constitution. The Court looked at the Bill of Rights as a whole and found a right of privacy in the "penumbras" of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The Court found that the state law in question violated an individual's right to privacy. The Court's holding appears to be based on the Court's interpretation

of the Constitution, a review of the language of the statute in question and relevant Supreme Court precedent.

Answer 5B. In *Alden,* the Court held that a State's sovereign immunity applies to lawsuits brought in their own state courts (as well as federal courts) by private individuals. The Court went on to hold that this immunity cannot be abrogated by Congress acting pursuant to its Article I legislative authority. The Supreme Court's holding appears to be based on the Court's interpretation of the Constitution, its review of the language of the Fair Labor Standards Act and relevant Supreme Court precedent.

Question 6. Compare the following cases with respect to their fidelity to the test and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments. (A) *Wickard* v. *Filburn,* 317 U.S. 111 (1942); (B) *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer 6A. In *Wickard,* the Court upheld the provisions of the Agricultural Adjustment Act of 1938 dealing with the penalties for exceeding statutory limits on wheat production based on the Commerce Clause. The Court found that the statute was constitutional based on Congress's authority to regulate interstate commerce. It appears the Court interpreted the Constitution to allow Congress to regulate interstate commerce in this particular area (agriculture), even when the commerce was entirely intrastate, and in this case, Congressional authority should be given full force and effect.

Answer 6B. In *Lopez,* the Court struck down the Gun-Free Zones Act of 1990 which made it a federal crime to possess firearms within 1000 feet of a school. The Court found the Act unconstitutionally attempted to use Congress's right to regulate interstate commerce by applying it to an intrastate criminal activity. The Court held that this type of activity as set out in the Act was subject to State regulation and not federal. The Court held that Congress had failed to appropriately identify the conditions under which Congress could regulate this intrastate activity. These cases illustrate the Court's holding on the limitations of Congressional authority under the Commerce Clause and the obligation of the Court to preserve the autonomy of the States within the federal system in this particular area.

Question 7. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments. (A) *United States* v. *Lopez,* 514 U.S. 549 (1995); (B) *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996); (C) *Printz* v. *United States,* 521 U.S. 898 (1997); (D) *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.,* 119 S. Ct. 2219 (1999); (E) *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Our system of government is founded on the principle of separation of powers. The three separate branches of government are each dependent on the other to function according to their proper constitutional role. The relationship between the federal government and state governments is similar. The Constitution is the source for the separation of power doctrine, individual personal liberty rights and the authority of federal judges. Any impact that a separation of power issue may have is to be guided and decided by the Constitution and relevant Supreme Court precedent. Our justice system has thrived because of the balance of powers and the faith placed in the judiciary by the American people.

Answer 7A. In *Lopez,* the Court found that Congress's authority to regulate interstate commerce under the Commerce Clause had been exceeded in this Act. The Court found the Act was intended to address criminal activities that should be better left to State regulation under its general police powers. The Court held that Congress had failed to appropriately identify the conditions under which Congress could regulate this intrastate activity.

Answer 7B. In *Seminole Tribe,* the Court determined that Congress cannot use its Commerce power to limit a State's sovereign immunity from civil suits. The Court held that suits seeking injunctive relief from violations of federal rights may only get past the Eleventh Amendment barrier if Congress has not already enacted a remedial statute to enforce those rights.

Answer 7C. In *Printz,* the Court found that provisions of the Brady Handgun Violence Prevention Act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks violated the Constitution. Under the principle of dual sovereignty, the Court held that the State's sovereignty was paramount in holding that Congress may not compel the States to enact or administer a federal regulatory program.

Answer 7D and E. In *College Savings Bank* and *Alden,* the Court held that a State's sovereign immunity applies to lawsuits brought against States in state courts (as well as federal courts). The Court went on to hold that this immunity cannot be abrogated by Congress acting pursuant to its Article I legislative authority. The Court held that the State's immunity does not apply to suits brought by the United States and can be abrogated by Congress pursuant to the Fourteenth Amendment, by Congressional attempts to seek voluntary consents to private suits or by unequivocal waiver of immunity by the States themselves. These cases illustrate the limitations that the Court has found in regards to Congress when Congress attempts to encroach on the States' autonomy.

RESPONSES OF ADALBERTO JORDAN TO QUESTIONS FROM SENATOR HATCH

Question 1. In your view what does Article III of the Constitution authorize federal judges to do? Specifically, do you believe that the judicial power encompasses the power to interpret existing law or to make new law? What are the limits on the scope of a federal judge's power?

Answer 1. In my view, Article III authorizes federal judges to adjudicate concrete legal controversies where there is proper subject-matter and personal jurisdiction. Judges are interpreters of constitutional and/or statutory language, and should not be in the business of making new law.

There are numerous limits on the scope of a federal judge's power, including the text of the Constitution, the separation of powers inherent in our governmental scheme, the respect due to coordinate branches of the federal government, the balance of power between the federal and state governments, the presumption of validity for legislation, and the "case of controversy" requirement of Article III of the Constitution (and its attendant principles, e.g., mootness, ripeness, and standing).

Question 2. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of the Article III judicial power.

Answer 2. A federal judge may properly use the following authorities in determining the legal effect of a statute or constitutional provision: the text of the provision; precedent; historical sources which demonstrate the practices existing at the time of enactment; legal documents or writings which shed light on the intent of those who drafted the provision (e.g., *The Federalist*); the legal antecedents of the provision and judicial interpretations of those antecedents; legislative history; legal treaties, commentaries, books, and law review articles; canons of statutory construction, and legal and non-legal dictionaries.

A judge should begin his or her analysis of a constitutional or statutory provision with the provision's language and use the plain meaning of the text to determine the provision's legal effect. By focusing on their text of the provision, a judge stays within his or her Article III authority. There are, however, rare situations when the provision's meaning is not apparent from the text, or when there is no constitutional text speaking to the precise question presented, and in those situations the additional authorities mentioned above can and should be used to discern the provisien's legal effect or the result mandated by the Constitution. *See e.g, Printz* v. *United States*, 521 U.S. 898, 117 S. Ct. 2365, 2370 (1997) ("Because there is no constitutional text speaking to this precise question, the answer * * * must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.").

Question 3. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by the court: (1) interpretation of the plain meaning of the text and original intent of the framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer 3. A court acts legitimately when it interprets the plain meaning of the text and seeks to ascertain the original intent of the Constitution's framers. A court also acts properly when it analyzes the ratification of an amendment under Article V of the Constitution. As explained in my answer to question 2 above, the use of these authorities is perfectly consistent with the judicial power conferred by Article III. A court acts within its proper role when it interprets constitutional text, as well as when it considers the impact of an amendment to the Constitution. *See e.g., College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Bd.*, 119 S.

Ct. 2219, 1999 WL 412639, *3 (1999) (explaining the impact of the Fourteenth Amendment, which was enacted after the Eleventh Amendment, on the federal-state balance).

I have not read Justice Brennan's materials for the 1985 Georgetown teaching symposium, though I have found some law review articles referencing those materials. *See e.g.,* J. Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L. J. 1119, 1185 n. 65 (1995). I therefore find it difficult to answer the portion of the question relating to Justice Brennan's view of "community interpretation." If, however, by "community interpretation" Justice Brennan means that a judge seeks the community's interpretation when he ascertains the meaning of constitutional text and takes it upon himself or herself to speak for the community when he or she feels the public is mistaken, then in my view the judge has stepped outside of his or her proper judicial role.

Question 4. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 4. If a statute was challenged on constitutional grounds in a case that was not one of first impression, I would first determine whether there was binding precedent from the Supreme Court or the Eleventh Circuit (which I would be bound to follow). If so, the analysis would end there, and I would apply the binding precedent to resolve the case. If the only cases addressing the issue were not from the Supreme Court or the Eleventh Circuit, I would read those cases to get an idea of how other courts had resolved the issue. I would then put those cases to the side, and determine the meaning of the statute by looking at its text. Next, I would turn to the constitutional provision at issue, analyze its language and history, and determine how the provision had been interpreted by courts in other scenarios in order to discern its core principle(s) and the appropriate standard of review. Finally, I would review the statue under the relevant constitutional principles, keeping in mind that legislation is clothed with a presumption of validity and that in our system legislatures are not prohibited from enacting innovative legislation to tackle the problems of the day.

If a statute was challenged on constitutional grounds in a case of first impression, my analysis would be the same as above, except that I would not be able to use or rely on any cases directly on point.

Question 5A. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III? *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Answer 5A. In *Griswold* the Court held that a Connecticut statute prohibiting the use of contraceptives (as well as the aiding and abetting of such use) was unconstitutional because it violated the marital right of privacy, which was within the penumbras of specific guarantees of the Bill of Rights. The Court stated that it was not relying on cases like *Lochner* because it did not sit as a super-legislature. Acknowledging that the "association of people" was not mentioned in the Constitution or the Bill of Rights, the Court explained that it had been found, in prior rulings, to be included in and protected by the First Amendment. Using these rulings and others, the Court said that specific guarantees of the Bill of Rights had "penumbras, formed by emanations from those guarantees that help give them life and substance." The Court then concluded that marital privacy was among those rights in the zone of privacy protected by the penumbras of the First, Fourth, and Fifth Amendments. Justices Harlan and White, who concurred in the judgment but did not join the Court's opinion, relied on the liberty interest protected by the due process clause of the Fourteenth Amendment. The Court's majority opinion in *Griswold*, which concluded that the specific guarantees of the Bill of Rights had penumbras, expanded the scope of judicial power and limited the ability of the national and state governments to legislate in certain areas.

Question 5B. Alden v. *Maine*, 119 S. Ct. 2240 (1999).

Answer 5B. In *Alden*, the Court ruled that Congress could not use Article I to subject a state to suit in state court (in this particular case, for alleged violations of the Fair Labor Standards Act) without its consent. The Court's opinion first found that the Constitution's structure and history (as well as the Court's cases) made clear that immunity from suit was a fundamental aspect of the sovereignty enjoyed by the states prior to ratification, and that such immunity was retained by the states unless the Constitution or its Amendments altered it. In reaching this initial conclusion, the Court relied on constitutional text, secondary sources like *The Federalist* and Blackstone, past and present Court decisions, the ratification debates, and the history of the Eleventh Amendment (which the Court found was enacted

to restore the original constitutional understanding). The Court's opinion then concluded that Congress could not subject the states to suit in their own courts under Article I (though it could do so under the Fourteenth Amendment). The Court relied on the same sources cited above to reach this conclusion. As the Court put it, its analysis considered "history, practice, precedent, and the structure of the Constitution." Finally, the Court's opinion found that Maine (the state being sued under the FLSA) had not waived its immunity or consented to suit.

The Court's opinion in *Alden* used traditional sources of judicial interpretation. The opinion will, it appears, impact the power of the federal government, first by concluding that Congress cannot subject a state to suit under Article I of the Constitution (but can do so under the Fourteenth Amendment), second by explaining that a state's immunity does not bar suits by the federal government, and third by noting that the federal government can, if it deems a matter to be compelling, sue a state to further national interests.

Question 6. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress' power and on the federal government's power compared with the power of state governments. (A) *Wickard* v. *Filburn*, 317 U.S. 111 (1942); (B) *United States* v. *Lopez*, 514 U.S. 549, (1995).

Answer 6A. *Wickard* and *Lopez* represent somewhat different—thought not necessarily irreconcilable—visions of our constitutional structure and the division of power between the federal and state governments. *Wickard,* decided unanimously in 1942 (while the United States was fighting World War II on several fronts), held that a federal statute governing (and limiting) wheat production could constitutionally be applied to wheat not intended to any part for commerce, but wholly for consumption within the farm in which the wheat was grown. *Lopez* decided in 1995, held that Congress had exceeded its authority under the commerce clause by criminalizing the possession of a firearm within a school zone, where the federal statute did not regulate a commercial activity or contain a requirement that the possession of the firearm be connected in any way to interstate commerce.

Despite their different results, both opinions reviewed the relevant constitutional text as well as the history of federal commercial regulation. In addition, both cases illustrated the critical role that federal courts play in determining the federal state balance in our system. Disputes about the appropriate division of power between the federal government and the states will usually be resolved by the judiciary, thereby enhancing the role of courts in that debate.

Answer 6B. As *Lopez* itself explained, *Wickard* (and similar cases) expanded the "previously defined authority of Congress" under the commerce clause, and "reflected a view that earlier commerce clause cases artificially had constrained the authority of Congress to regulate interstate commerce." As *Lopez* also made clear, even under cases like *Wickard* there is an outer limit to Congress' power under the commerce clause. With respect to what may be described as intrastate transactions, *Lopez* said that Congress can "regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Lopez* stated that although *Wickard* "was perhaps the most far reaching example of commerce clause authority over intrastate activity," the statute in *Wickard* regulated economic in commercial activity in a way that the criminal statute in *Lopez* did not. In footnote 3, *Lopez* also noted that the federal statute criminalizing the possession of a firearm in a school zone might have upset the relation between federal and state criminal jurisdiction.

Question 7. What rule does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments. (A) *United States* v. *Lopez,* 514 U.S. 549 (1995); (B) *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996); (C) *Printz* v. *United States,* 521 U.S. 898 (1997); (D) *College Savings Bank of Florida* v. *Florida Prepaid Postsecondary Education Expense Bd.,* 119 S. Ct. 2219 (1999); (E) *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answers 7A–E. The division of power between the federal government and the state governments is very important to our constitutional system. The Constitution gives the federal government exclusive authority over certain matters, as the framers understood that there are matters of national importance where a single voice is essential. As the same time the structure of our system and the Tenth and Eleventh Amendments make clear that federal power is limited. For individuals, limited national power means less federal regulation.

States play an indispensable and, as the Supreme Court has said, sovereign role in our system. See *Alden* v. *Maine*, 119 S. Ct. 2240, 1999 WL 41267, *5–*6 (1999). This does not mean that all state legislation is automatically constitutional, but it does mean that such legislation is clothed with a presumption of validity when challenged in court.

The cases listed in the question all make clear that there are constitutional limits to what the federal government can do vis-a-vis the states, *Lopez* concluded that Congress had exceeded its commerce clause powers by criminalizing the possession of a firearm within a school zone, because the legislation did not affect a commercial activity and did not require any connection between the firearm and interstate commerce. *Seminole Tribe, College Savings Bank* and *Alden* each explained (in somewhat different scenarios) that states retain immunity from suit as part of the sovereignty they enjoyed at the time of the Constitution's framing, that such immunity cannot be abrogated by Congress (either in federal or state court) under Article I (though it can be abrogated under the Fourteenth Amendment), and that states do not waive their immunity by engaging in interstate commerce. *Printz* held that Congress could not require local law enforcement authorities to conduct background checks for the purchase of firearms because the federal government lacked the power to compel the states to enact or administer a federal regulatory program.

RESPONSE OF ADALBERTO JORDAN TO A QUESTION FROM SENATOR SESSIONS

Question 1. What do you believe is the most important Supreme Court decision of the past 30 years? What do you believe was the worst Supreme Court decision during this time? Please provide a brief explanation of your answer.

Answer 1. I do not think I can characterize any Supreme Court opinion of the past 30 years as *the* most important or *the* worst, but a couple of the Court's decisions, in my view, rank among the most important and worst decisions during that period.

One of the most important recent decisions is *Washington* v. *Glucksberg*, 117 S. Ct. 2258 (1997), in which the Supreme Court held that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment. *Glucksberg* is important because Chief Justice Rehnquist's majority opinion teaches that federal courts are not to create constitutional liberty interests (under a substantive due process analysis) if our country's history and traditions have not embraced the practice at issue, particularly when the states are engaged in debate about the practice.

One of the worst decisions is *Furman* v. *Georgia*, 408 U.S. 238 (1972), which held, by a 5–4 vote, that the death sentences imposed in the cases before the Supreme Court were unconstitutional. *Furman* was a poor decision because it failed to provide any real guidance to citizens, legislators, and judges concerning the Eighth Amendment's applicability to the death penalty, and failed to adequately explain why the capital sentencing schemes which then existed failed to pass constitutional muster. *Furman* produced 9 separate opinions (5 to overturn the death sentences (with no majority or plurality opinion) and 4 to affirm them) spanning 243 pages of the U.S. Reports, but no coherent rationale for the result reached.

RESPONSES OF ADALBERTO JORDAN TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

Question 1. Mr. Jordan, your biography states that you teach a 2-credit course on capital punishment at the University of Miami School of Law. Could you please share your views on this subject?

Answer 1. I believe that the federal and state legislatures have the constitutional authority to enact capital punishment schemes and that the federal and state executive branches have the power to carry out the death penalty in cases where judges or juries decree it to be the appropriate punishment. The Supreme Court has so held, e.g., *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and I tell my students that *Gregg* was correctly decided given the various references to the capital punishment in the Constitution. As I told Chairman Hatch at the confirmation hearing. I have no personal views or beliefs that would prevent me from imposing or upholding a death sentence.

Question 2. Your biography also reveals that in 1990 you appeared before the Florida Supreme Court to discuss legal developments regarding affirmative action.

Answer 2. I spoke to the Florida Supreme Court's Racial and Ethnic Bias Study Commission (but not the Florida Supreme Court) in Orlando, Florida, at the invitation of its chairman, Frank Scruggs.

Question 2A. Have you continued to follow the development of the law in this area?

Answer 2A. I have continued to follow the development of the law in this area.

Question 2B. If confirmed, will you follow the *Adarand* v. *Peña* decision and subject racial preferences to the strictest judicial scrutiny?

Answer 2B. If confirmed, I will follow the *Adarand* decision and subject racial preferences to the strictest judicial scrutiny.

Question 2C. In your personal legal opinion, how difficult is it for any government program or statue to survive strict scrutiny?

Answer 2C. It is extremely difficult for a government program or statute to survive strict scrutiny analysis.

Question 3A. Your biography states that you handled, on a pro bono basis, the representation of a death row inmate who sought a habeas corpus appeal to challenge his death sentence. In the case, a jury in Florida had sentenced him to a life sentence, but the judge in the case overruled the jury to impose the death sentence. Ultimately, the Eleventh Circuit affirmed the district court's [judgment]. Your biography states you were responsible for selecting the issues to be raised on appeal. Could you please summarize briefly any constitutional issues you raised in this case, and the positions you advocated?

Answer 3A. The appellate brief raised some, but not all, of the constitutional claims that had been presented in the defendant's habeas corpus petition in district court. The Eleventh Circuit, after a "careful review of the record," denied relief "essentially for the reasons stated in the district court's opinion." *Routly* v. *Singletary*, 33 F.3d 1279, 1282 (11th Cir. 1994). The constitutional issues raised on appeal were as follows:

1. We argued that the prosecution, during jury selection, violated the defendant's due process right (under the Fifth and Fourteenth Amendments) to remain silent by repeatedly commenting to the prospective jurors that the defendant had a right to testify, that the defendant could be believed or disbelieved if he testified, and that if the defendant decided not to testify, that was his personal decision. Supported by decisions of the Missouri and Nebraska Supreme Courts, *e.g., State* v. *Lindsey*, 578 S.W.2d 903 (Mo. 1979), we argued that the prosecution's comments had coerced or compelled the defendant to take the stand thereby warranting a new trial.

2. We argued that the defendant was entitled to a new trial under the due process clause of the Fourteenth Amendment, *see Napue* v. *Illinois*, 360 U.S. 264 (1959), because of the false testimony of the state's key witness. The witness had falsely testified that she had not been charged with the victim's second-degree murder. In fact, the witness had been charged with second-degree murder but had then been offered transactional immunity in exchange for her testimony against the defendant. Moreover, despite the second-degree murder charge, the prosecution in its closing argument told the jury that there was not need to give the witness immunity because she did not have anything to do with the murder and because there was "no way" the state could prove that she was a murderer. We argued that the witness' false testimony, coupled with the prosecution's use of that false testimony at closing argument, entitled the defendant to a new trial.

3. We argued that the defendant was entitled to a new trial under the due process clause of the Fourteenth Amendment, *see Brady* v. *Maryland*, 373 U.S. 83 (1963), because the prosecution had withheld from defense counsel the transactional immunity agreement given to the state's key witness. The state trial court found, as a factual matter, that the agreement had never been provided to defense counsel, and we argued that the agreement was "material" under *Brady*.

4. We argued, relying on Fifth Circuit precedent, *see United States* v. *Herberman*, 583 F.2d 222 (5th Cir. 1978), that the cumulative effect of the constitutional violations set forth in arguments 1–3 had denied the defendant a fair trial under the due process clause of the Fourteenth Amendment.

5. We argued, relying on *Stokes* v. *Singletary*, 952 F.2d 1567 (11th Cir. 1992), that the district court erred in not holding an evidentiary hearing on the defendant's contention that his confession to authorities had been involuntary. The defendant testified that he gave his confession because of several promises made by the authorities, including a promise that he would only be charged with second-degree murder. Because one of the officers who interrogated the defendant admitted telling the defendant that he would be charged with second-degree murder, we argued that the district court should have held an evidentiary hearing.

6. We argued that the state denied the defendant his Sixth Amendment right to a speedy trial. The defendant's trial was delayed for over 8 months due to various continuances sought and obtained by the prosecution, and we argued that the de-

fendant was entitled to relief under the analysis set forth in *Doggett* v. *United States*, 505 U.S. 647 (1992).

7. We argued that the Florida Supreme Court had inconsistently applied the jury override standard in cases where sufficient mitigating evidence was presented to the jury, and that the result of the override in the defendant's case was arbitrary and/or capricious under *Lusk* v. *Dugger*, 890 F.2d 332 (11th Cir. 1989). At oral argument, the Eleventh Circuit asked the parties to submit supplemental memoranda concerning this issue, but ultimately rejected our argument.

8. We argued that, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the defendant was denied his right to effective assistance of counsel (guaranteed by the Sixth and Fourteenth Amendments) at sentencing. We argued that defense counsel failed to conduct an adequate investigation in to the defendant's background and therefore failed to present available mitigating evidence which would have precluded the override of the jury's recommendation of a life sentence.

Question 3B. In your personal legal opinion, is the 1996 Habeas Corpus Reform Legislation constitutional?

Answer 3B. I cannot comment on every aspect of the 1996 habeas corpus reforms, but federal courts, including the Supreme Court, have consistently rejected claims that the reforms are unconstitutional. Congress can, of course, generally expand or restrict collateral habeas corpus remedies, and the Supreme Court has held that some of the 1996 amendments did not repeal the Court's authority to entertain original habeas corpus petitions and did not amount to an unconstitutional suspension of the writ. *See e.g. Felker* v. *Turpin*, 518 U.S. 651 (1996). I would of course follow cases like *Felker*, and have no reason to believe, given my experience as a federal prosecutor, that the 1996 reforms suffer from any constitutional infirmities.

RESPONSES OF ADALBERTO JORDAN TO QUESTIONS FROM SENATOR SMITH

Question 1. Leaving entirely aside the relevant Supreme Court precedent about the legal status of unborn children, do you as an individual believe that the unborn child is a fellow human being?

Answer 1. As a federal judicial nominee, I believe that I must answer this question and others in light of existing principles. By drawing the constitutional line at viability in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court has acknowledged that at such a stage the state has a compelling interest in protecting and furthering human life.

Question 2. As you know, the Supreme Court held in *Roe* v. *Wade* that the unborn child has no constitutional right to life before birth. Leaving entirely aside any obligation that you may or may not have as an inferior court judge to follow Supreme Court precedent, do you as an individual believe that the Supreme Court was legally and/or morally wrong in determining that an unborn child, even in the final weeks of pregnancy, has no constitutional right to life?

Answer 2. The Supreme Court held, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), that a state has an interest in promoting the life or potential life of the unborn, and that after viability it can prohibit abortions (as long as there are exceptions for pregnancies which endanger the life or health of the woman). I have no personal, moral, or religious views that would prevent me from applying *Casey* or the then-applicable precedent on the rights of the unborn.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. Laws passed by Congress are presumed to be constitutional. I would begin any review of federal legislation, including the Partial-Birth Abortion Ban Act, with that presumption, and apply *Casey* or the then applicable precedent to analyze the constitutional issue presented.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. Although most federal courts, interpreting *United States* v. *Miller,* 307 U.S. 174 (1939), have held that the Second Amendment speaks only of a collective right, a federal district court in Texas recently ruled that the Second Amendment protects an individual right to keep and bear arms. *See United States* v. *Emerson,* ____ F. Supp. 2d ____, 1999 WL 198865 (N.D. Tex. April 7, 1999). If the issue were to come before me, I would look at the text and history of the Second Amendment,

as well as applicable precedents, to determine the scope of the Amendment's guarantee.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. The Supreme Court has held that capital punishment is constitutional, and I would follow its ruling.

Question 6. Would you have any personal, moral, or religious qualms about enforcing the death penalty as a judge?

Answer 6. I do not have any personal, moral, or religious qualms about enforcing the death penalty as a judge.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the judge may refuse to apply that precedent to the case before him or her?

Answer 7. I cannot think of a circumstance that would allow a circuit or district judge to disregard binding Supreme Court precedent.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. The doctrine of *stare decisis* plays an important role in our legal system, and precedents should not be lightly overruled. If I were a Supreme Court Justice, I would look at various factors to decide whether a precedent should be overruled, including whether or not the precedent is clearly wrong, how long the precedent has existed, whether the precedent was statutory or constitutional, whether the precedent has been eroded or reaffirmed, whether the precedent has provided a workable rule, and whether the precedent has created reliance interests. *See Agostini* v. *Felton,* 521 U.S. 203, 235–37 (1997).

RESPONSES OF ADALBERTO JORDAN TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. In view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 1. I do not believe that constitutional rights grow or shrink with changing historical circumstances. With respect to modern developments (e.g., technological advances) that the founding fathers could not have foreseen, the role of a judge is to remain faithful to the extent of the framers by determining whether the core constitutional principle at issue should apply.

Question 2. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 2. Without knowing the types of cases at issue or the bases for reversal, it is difficult to answer the question. There are various possible reasons for a high reversal rate, including lack of precedent (i.e., cases of first impression), inconsistent circuit precedent, refusal to abide by binding precedent (which would of course be improper), and workload. The appropriate remedy would depend on the reason (or combination of reasons) for the high rate of reversal.

Question 3. Is "substantive due process" a legitimate constitutional doctrine?

Answer 3. The Supreme Court has not overruled the doctrine of substantive due process, though it has explained that federal courts are not to create new constitutional liberty interests unless our country's history and traditions have embraced the practice at issue. *See, e.g., Washington* v. *Glucksberg,* 521 U.S. 702 (1997) (holding that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment). As a federal district judge, I would follow the Supreme Court's precedent concerning substantive due process, whatever that precedent happened to be.

Question 4. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 4. My understanding of *Lopez* is that Congress' commerce clause power has limits, and that there are areas of purely local concern that federal legislation cannot constitutionally reach. As a federal district judge, I would apply the existing standard (from *Lopez* and other cases) in analyzing a commerce clause issue. *Lopez* explains that there are 3 broad categories of activity that Congress can regulate under the commerce clause. Congress can regulate the use of the channels of interstate commerce; Congress can regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and Congress can regulate those activities which have a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Question 5. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be? Would any such classification require a showing of particularized past discrimination?

Answer 5. Under cases like *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200 (1995), any government classification which takes account of race must be subjected to strict scrutiny, which requires that the classification be narrowly tailored to further a compelling interest. Strict scrutiny analysis requires a court to consider whether race-neutral means could have been used to remedy the problem at issue. Although *Adarand* states that strict scrutiny is not always fatal, *id.* at 237, it is clear that the existence of past discrimination is a crucial factor in determining whether a race-conscious measure is constitutionally permissible.

Question 6. Is there a legislative classification that would fail rational basis review?

Answer 6. Under the rational basis test, a law need not be in every respect logically consistent with its aims to be constitutional. It is sufficient that there is a problem that needs correction, and that "it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 487–88 (1955). Thus, only in an extremely rare case would a legislative classification fail rational basis review.

Question 7. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious, or non-sectarian, constitutional?

Answer 7. The constitutionality of so-called school voucher programs is currently being decided in courts around the country. Those courts upholding the constitutionality of such programs have concluded that it is permissible for states to establish programs that are wholly neutral in offering educational assistance directly to citizens, in a class defined without reference to religion, because such programs do not have the primary effect of advancing religion. *See, e.g., Jackson* v. *Benson,* 578 N.W. 2d 602, 615–17 (Wisc. 1998). Others contend that such programs violate state constitutional provisions barring expenditures for religious societies or groups, *see, e.g., id.* at 632 (Bablitch, J., dissenting), or violate the establishment clause of the First Amendment. If I were called upon to review a school voucher program, I would apply the analysis set forth in *Agostini* v. *Felton,* 521 U.S. 203 (1997) (holding that the establishment clause of the First Amendment does not prohibit the use of public school teachers to provide remedial instruction to disadvantaged children at parochial schools).

Question 8. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905), an example of judicial activism? Please identify three Supreme Court decisions that you believe are examples of judicial activism (not including *Lochner* if your answer to the prior question was yes.) Is *Roe* v. *Wade,* 410 U.S. 113 (1973), an example of judicial activism?

Answer 8. In my view, judicial activism describes the philosophy that judges can go beyond the text of the Constitution and the history and traditions of this country and decide legal issues by reference to their own personal beliefs about what is best for society. *Lochner* v. *New York,* 198 U.S. 45 (1905), is an example of judicial activism. Other examples of judicial activism include *Dred Scott* v. *Sandford,* 60 U.S. 393 (1856), *Hammer* v. *Dagenhart,* 247 U.S. 251 (1918); and *Adkins* v. *Children's Hospital of the District of Columbia,* 261 U.S. 525 (1923).

Some commentators and judges have said that *Roe* v. *Wade,* 410 U.S. 113 (1973), constituted judicial activism because it departed from the text of the Constitution and the traditions of the country. *See, eg.,* J. Ely, *The Wages of Crying Wolf, A Comment on Roe* v. *Wade,* 82 Yale L. J. 920 (1973). Although the Supreme Court has not overruled the doctrine of substantive due process—the doctrine on which *Roe* relied—it has recently explained that federal courts are not to create new constitutional liberty interests unless our country's history and traditions have embraced the practice at issue. *See Washington* v. *Glucksberg,* 521 U.S. 702 (1997).

RESPONSES OF WILLIAM ALSUP TO QUESTIONS FROM SENATOR HATCH

Question 1. In your view, what does Article III of the Constitution authorize federal judges to do? Specifically, do you believe that the judicial power encompasses the power to interpret existing law or to make new law? what are the limits on the scope of a federal judge's power?

Answer 1. In actual cases and controversies, brought before the federal courts, Article III authorizes federal judges to apply and to interpret the existing law, including statutes, treatises, regulations and the Constitution itself—but not to make new

law. A foremost limitation on a federal judge's power is the duty to rule in accordance with the evidence and the controlling precedents, including the strong presumption of constitutionality afforded statues.

Question 2. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of the Article III judicial power.

Answer 2. A federal district judge is strictly obligated to follow the controlling precedents of the Supreme Courts and the courts of appeals. Where there is no directly controlling authority, a district judge should, first and foremost, rely on the actual language of the statute or the constitutional provision at issue. Where a statute or constitutional provision includes a term that is truly ambiguous, it is permissible to resort to the legislative history or, in the case of constitutional issues, the drafting and ratification history. Where there is no directly controlling authority, a district judge should also consider related decisions and authorities outside the circuit. These sources are consistent with the Article III authority of the courts to interpret and to apply the existing law, but not to make new law.

Question 3. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer 3. I should begin by saying that a district judge is completely obliged to follow the controlling precedents and it would be a rare case for a district judge to have to consider a case of first impression on a constitutional issue. At all events, it is not the role of a court to invent new constitutional rights based on the personal policy preferences of the judge. Judges should decide in accordance with the actual text of the Constitution, its plain meaning and the intent of the framers of the Constitution. Justice Brennan's essay seems to say that judges should seek to find the "community's interpretation." The danger with that approach is that the community's viewpoints are subject to many possible interpretations and should not be utilized as a review process. With respect to amendment, one legitimate way to create a new constitutional right is to seek and to obtain a constitutional amendment.

Question 4. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 4. Where there is controlling authority by the Supreme Court or the Ninth Circuit or the Federal Circuit (in a patent case or other subject under its aegis), I would, of course, follow and apply that authority. Where the issue is one of first impression, I would (i) examine the plain language of the statutory and/or constitutional provisions at issue and to the extent of any ambiguity, then examine the history of those provisions, and (ii) would determine the extent to which there is relevant authority from the Supreme Court, other circuits or courts which, even though not controlling, may well be persuasive. At all events, I would accord the statute a strong presumption of constitutionality and would insist that the challenger overcome that burden before, if ever, declaring any part of a statute invalid. I would also make sure the challenger had actual standing to raise the challenge, that the question was ripe for decision, and that the decision was not made in a vacuum but was made on a proper record, including substantial evidence as appropriate.

Questions 5A–B. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III? (A) *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); (B) *Alden* v. *Maine,* 119 S.Ct. 2240 (1999).

Answers 5A–B. Both of these Supreme Court decisions upheld a claim of constitutional right or immunity not specifically enumerated in the Constitution, but used different approaches.

Griswold v. *Connecticut,* 381 U.S. 479 (1965), held (7–2) that a criminal prohibition on prescribing contraceptive devices for use by married couples violated a married couple's constitutional rights. Five members of the Court rested their decision on a constitutional right of privacy. These five acknowledged that no such privacy right was enumerated in the Bill of Rights. The five listed a number of provisions in the Bill of Rights relating to aspects of the "privacies of life," such as the Search

and Seizure Clause of the Fourth Amendment. Marital privacy, they said, was within the "penumbra" of the combined reach of these provisions. Justices Harlan and White concurred in the result but on a different approach, on the ground that the word "liberty" as protected by the Fourteenth Amendment, included "the right to be free of regulation of the intimacies of the marriage relationship." *Id.* 502–03. Justices Black and Stewart dissented on the ground that Justices Harlan and White necessarily relied on "substantive due process" and that the penumbra approach of the majority created a new right not itself enumerated in the Bill of Rights.

Alden v. *Maine,* 119 S.Ct. 2240 (1999), held (5–4) that Congress lacks power under Article I to abrogate the sovereign immunity of states from suit, not only in federal courts, as had already been held in *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996), but also in state courts. The Court held (in an opinion by Justice Kennedy) that the Constitution itself limits the power of Congress in this regard, thus finding a constitutional right of state sovereign immunity. There was no actual language in the Constitution itself that recognized any such limitation. The Eleventh Amendment, for example, only expressly barred suits by citizens of one state against another state and even then only in a federal court. A 5–4 majority nonetheless found in the overall "structure" of the Constitution and its history an intent to preserve state sovereign immunity and held that this intent overrode the express delegation of power to Congress under Article I.

Use of these sources of law enlarge the scope of judicial power at the expense of legislative power.

Questions 6A–B. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments. (A) *Wickard* v. *Filburn,* 317 U.S. 111 (1942); (B) *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answers 6A–B. Both decisions involved the Commerce Clause and the extent of Congress' power thereunder. *Wickard* held that Congress could, under the Commerce Clause, regulate wheat grown for home consumption because, in the aggregate, home-consumed wheat would have a substantial influence on market price and market conditions. *Lopez* held that the Commerce Clause did not authorize Congress to regulate possession of a firearm in a local school zone, at least where Congress made no legislative finding of an impact on interstate commerce. *Lopez* quoted from the Federalist Papers as to the advantages of a healthy balance of power between the state and federal government. In the main, however, both the decisions reviewed the Court's prior decisions under the Commerce Clause.

With respect to their impacts on judicial power versus congressional power, *Wickard* favored Congress because of the judicial tradition of deference to congressional judgment and sustaining any economic regulation under the Commerce Clause so long as it has any rational basis. Conversely, *Lopez* enlarged judicial power at the expense of congressional power by refusing to find a rational basis for the statute at issue. With respect to the federal-state balance, *Lopez* favored state power over national power while *Wickard* favored federal power.

Questions 7A–E. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments. (A) *United States* v. *Lopez,* 514 U.S. 549 (1995); (B) *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996); (C) *Printz* v. *United States,* 521 U.S. 898 (1997); (D) *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.,* 119 S.Ct. 2219 (1999); (E) *Alden* v. *Maine,* 119 S.Ct. 2240 (1999).

Answers 7A–E. In our system of federalism of "dual sovereignty," the states are sovereigns themselves and not just political subdivisions of the national government. Thus, we have fifty state sovereigns and, separately, one federal sovereign. Accordingly, there is a division of power between the federal sovereign, on the one hand, and the state sovereigns, on the other. This diffusion of power is not accidental but calculated to prevent an undue concentration of power in a single government. It serves as a check on the power of all governments and thus enhances the liberty of the individual. As the Supreme Court has said, "In the tension between federal and state power lies the promise of liberty." *Gregory* v. *Ashcroft,* 501 U.S. 452, 458–59 (1991).

The Supreme Court decisions listed in this question all concern the constitutional boundary between state and federal power. The *Lopez* decision recognized limits on federal power under the Commerce Clause, preventing federal intrusion into purely state matters. The *Printz* decision held that the Constitution prohibited Congress from commandeering police units in state governments as an arm of the federal gov-

ernment and forcing them to run background checks on gun purchasers. The federal government, the Court held, may not compel a state to administer a federal regulatory program. The remaining three decisions (*Seminole Tribe, College Savings Bank,* and *Alden*) further defined the constitutional boundary between the powers of the dual sovereigns by upholding the sovereign immunity of the states and invalidating legislation by Congress authorizing suits against the states. These three decisions enlarge the authority of the states and decrease the power of the federal government.

RESPONSE OF WILLIAM ALSUP TO A QUESTION FROM SENATOR SESSIONS

Question 1. What do you believe is the most important Supreme Court decision of the past thirty years? What do you believe was the worst Supreme Court decision during this time? Please provide a brief explanation of your answer.

Answer 1. The most important was probably *Gregg* v. *Georgia,* 428 U.S. 153 (1976). This decision was important because it reinstated the death penalty in America and has thus had a major impact on the administration of justice. The "worst" was probably one of those splintered decisions in which there were a number of opinions with competing rationales, none of which commanded a majority, leaving the country uncertain as to the governing law. Although I believe all justices individually act in good faith in such cases, the problem is that, collectively, they and the Supreme Court do not fulfill their role as the ultimate voice for the judiciary in such splintered decisions. Two examples are *A Book Named "John Cleland's Memoirs of A Woman of Pleasure"* v. *Massachusetts,* 383 U.S. 413 (1965) (seven opinions; six justices voting to reverse without agreeing on an opinion for the Court), and *Arnett* v. *Kennedy,* 416 U.S. 134 (1973) (five opinions).

RESPONSES OF WILLIAM ALSUP TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

Questions 1A–B. Mr. Alsup, I noted in your biography that you served as a lawyer delegate to the Ninth Circuit Judicial Conference from 1993–1996. As you may know, the Ninth Circuit has come under severe criticism from many who feel that it is a rogue circuit with rulings that are not in the mainstream of American law. In fact, at one time the Ninth Circuit had 27 out of 28 cases reviewed by the Supreme Court reversed. (A) To what do you attribute this high reversal rate? Do you believe that recent Ninth Circuit rulings have been outside the mainstream of American law? (B) What steps do you think could be taken to reduce this Circuit's reversal rate?

Answer 1A. It is true that two years ago the Ninth Circuit was reversed in 27 out of 28 cases reviewed by the Supreme Court. Many, including Ninth Circuit judges themselves, recognized that this was too high a reversal rate. Since then, the Ninth Circuit reversal rate has improved but still needs improvement. The Ninth Circuit has a high caseload, running about 8500 terminations per year, including about 4200 opinions on the merits per year. This is about twice the national average for all circuits combined. Possible causes are the high caseload and the low rate of en banc hearings to resolve intra-circuit conflicts.

Answer 1B. It would be presumptuous for me to prescribe a remedy. I do think serious consideration should be given, as Congress and the White Commission are doing, to reorganizing or to dividing the Ninth Circuit. Serious consideration should also be given to holding more en banc panels within the circuit itself to resolve intra-circuit conflicts.

Question 2. In your article you write "[Justice Douglas] opposed dam after dam on wild rivers. The Corps of Engineers, the TVA, the Bureau of Reclamation, and the Forest Service, among others, were all on [Douglas'] public enemies list. They had abandoned their charters to protect the public interest, [Douglas] felt, and had combined with corporate moguls to flatten, grind up, pollute, and destroy the earth."

- Do you think it is appropriate for a Judge to maintain a "public enemies list"?
- Do you believe that Justice Douglas allowed personal biases he had to unduly influence his judicial decisionmaking? If so, is this proper?
- You note in the article that, given your own appreciation for the environment, "I think I know how William O. Douglas felt on this one." Do you feel you would be able to set your own personal views on the environment aside to render impartial justice to litigants who come before you?

Answer 2. I do not think it is appropriate for a judge to maintain a public enemies list. The passage quoted from my article dealt with Douglas' views as a "lifelong mountaineer and conservationist," i.e., as a citizen. I then pointed out that Douglas'

"reverence for the wild and his legal career crossed paths in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972)." I did not mean to imply that Justice Douglas actually maintained a public enemies list and never knew him to do so. I used the term as a figure of speech to convey Douglas' belief that those agencies had failed in protecting public lands.

Whether Justice Douglas allowed his personal biases to unduly influence his judicial decisionmaking or not could only have been answered by him. He never discussed it with me. I do know that he stated in several of his opinions that it would be improper to do so. See, for example, his opinion in *Hannah* v. *Larche,* 363 U.S. 420, 507 (1960) ("We look to the Constitution—not to the personal predilections of the judges—to see what is permissible.")

I do not believe a judge should ever allow personal biases to influence judicial decisionmaking. If confirmed as a district judge, I would follow the law as laid down by the controlling authorities regardless of any personal views I might have on the subject.

Question 3. In an article you wrote entitled "Freedom of Information and Privacy," you discussed the concepts of "the right to know" and the "right to privacy." In particular, you made two statements about each right:

- "The right to know derives, as Justice Douglas has said, from 'the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner.' This broad precept comprehends several distinct concepts, not all of which have been recognized by the Supreme Court; the right to speak, the right to publish, the right to confidentiality of journalist's sources, and the right of access to government information."

Question 3A. Where in the Constitution is there a reference to a "right to know"? If it exists, what is the source of the right?

Question 3B. In your legal opinion, how broad is this right? Are there additional rights that you believe exist in the Constitution that derive from the same source of authority that the "right to know" originates from?

Answer 3A. There is no reference in the Constitution to a right to know. As I pointed out in the article (page 4), the Supreme Court has flatly rejected an affirmative constitutional right to know i.e., to have access to information in government hands in *Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978). In light of the fact that there is no such constitutional right, one main point of the article was to survey the sources of rights of access other than the Constitution, such as the FOIA and congressional access to agency data (see pages 5 to 10 of article).

Answer 3B. As stated in the article (page 4), the Supreme Court has rejected flatly any such right of access in the *KQED* case. I am unaware of any "right to know" recognized by any controlling authorities. If confirmed, I would strictly follow the controlling authorities.

- You also wrote: "The right to privacy derives from many constitutional sources—the express provisions and the penumbras of the First, Fourth, Fifth, and Ninth Amendments and liberty itself, ensured by the Constitution."

(A) Are there other rights that the Supreme Court has not yet recognized that you believe are covered by the "penumbras" of the Constitution? If so, what additional rights do you, in your legal opinion, believe exist?

(B) Many critics feel that when courts "discover" rights that had never before been legally recognized by using a so-called "Constitutional penumbra," Courts are inappropriately usurping the legislative function. Do you agree with this view?

Answer A. No, I am unaware of any such rights not already recognized by the Supreme Court. I believe the last time (and only time) a Supreme Court majority relied on a penumbra approach to find a constitutional right was *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Since then, the Supreme Court has not used the penumbra approach to identify new rights. As I pointed out in the article (at page 10), "There is no general constitutional right to privacy," citing *Katz* v. *United States,* 389 U.S. 347, 350–51 (1968). If confirmed, I would follow the controlling Supreme Court precedents on this subject as well as all other subjects.

Answer B. I agree that in a democracy, law should be made by representatives elected at the ballot box and not by appointed judges. Judges should not substitute their judgment on what is wise statutory policy for that of the legislature. All statutes, therefore, must be accorded a strong presumption of constitutionality. In interpreting the Constitution and statutes, the central focus must be on the words actually used and their clear intent. When judges go beyond the words actually used and their clear intent, there is a substantial danger that judges will intrude on the legislative function. Courts, thus, should not "discover" rights for the first time, whether under a penumbra approach or not.

RESPONSES OF WILLIAM ALSUP TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. In your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 1. For a district judge, there is no latitude for growing or shrinking constitutional rights because a district judge is bound strictly to apply the governing precedents of the Supreme Court and courts of appeals, leaving it to higher authority to decide whether and to what extent to modify constitutional law. The Supreme Court has said, as to its own role in elaborating on constitutional law, that the doctrine of stare decisis should be the primary guiding principle as historical circumstances change, because "it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee,* 501 U.S. 808, 827 (1991). In *Agostini* v. *Felton,* 521 U.S. 203 (1997), the Supreme Court listed the types of rare occasions in which it would overrule its own precedents. Again however, a district judge cannot overrule or modify controlling precedents but must faithfully apply them.

Question 2. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 2. Yes, it is a problem. This question raises the question of the Ninth Circuit and its high reversal rate two years ago (27 out of 28 cases reversed by the Supreme Court). Many, including circuit judges on the Ninth Circuit itself, recognized that such a reversal rate was a problem. Fortunately, in the last two years, the reversal rate for the Ninth Circuit has improved. Nonetheless, sincere questions continue to be raised over whether the Ninth Circuit has too large a caseload and ought to be reorganized. It would be presumptuous for me to recommend an answer but solutions of the type recommended by the White Commission and/or those being reviewed by Congress at present should be studied and considered, including reorganization and/or creating a new circuit.

Question 3. Is "substantive due process" a legitimate constitutional doctrine?

Answer 3. According to Chief Justice Rehnquist in a recent opinion for the Supreme Court, it is a legitimate constitutional doctrine in a limited way. He said that "substantive due-process analysis" was an "established" part of the constitutional law, which protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg,* 521 U.S. 702, 720–21 (1997). At the same time, the Court resisted expanding the doctrine by refusing to recognize a constitutionally-based right to die.

Question 4. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 4. In *United States* v. *Lopez,* the Supreme Court held that the Gun-Free School Zones Act of 1990 Act exceeded Congress' authority to legislate under the Commerce Clause of the Constitution. The act made it a federal offense for any individual knowingly to possess a firearm in a local school zone. *Lopez* identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce; second, Congress may regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce; and third, Congress may regulate those activities having a substantial relation to interstate commerce. With regard to the third category, *Lopez* concluded that the regulated activity must substantially affect, rather than just affect, interstate commerce. *Id.* at 559. If confirmed as a district judge, I would be duty-bound to apply the *Lopez* test.

Question 5. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be. Would any such classification require a showing of particularized past discrimination?

Answer 5. In *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200, 237 (1995), the Supreme Court stated that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." Although the Supreme Court did not offer examples of race-based classifications that would survive the "narrow tailoring" test, the Court stated that "the unhappy persistence of both the practice and the lingering effect of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 237, *Adarand* states that a showing of particularized past discrimination is probative to show a compelling state interest but does not rule out other ways to meet the strict scrutiny test.

Question 6. Is there a legislative classification that would fail rational basis review?

Answer 6. The Supreme Court has held that the Fourteenth Amendment requires that a legislative classification bear a rational relationship to an independent and legitimate legislative end. In *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), for example, the Court held unconstitutional an Idaho law that treated applicants for letters of administration differently on the basis of gender, using the rational basis test.

Question 7. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious or non-sectarian, constitutional?

Answer 7. The Supreme Court has not addressed the issue and, in fact, has reserved the issue of whether such programs are constitutional under the First Amendment. *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 782 n.38 (1973). A recent state court decision upheld a state program providing parents with tuition assistance for private schools, including sectarian private schools. *Jackson* v. *Benson,* 218 Wis. 2d 835 (1998), *cert. denied,* 119 S. Ct. 467 (1998). Any such statute must be given a strong presumption of constitutionality. Because this issue is currently being litigated and the Supreme Court has not yet settled the issue, I believe it would be inappropriate for a judicial nominee to comment further on the constitutionality of such programs since the issue could come before the nominee if confirmed.

Question 8. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 45 (1905) an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism (not including *Lochner* if your answer to the prior question was yes). Is *Roe* v. *Wade,* 410 U.S. 113 (1973) an example of judicial activism?

Answer 8. Judicial activism occurs when a judge disregards the law, in whole or in part, in order to substitute his or her personal policy views. *Lochner* is often cited as an example of judicial activism because in that case the Supreme Court seemed to substitute its own judgment for that of the legislature and invalidated a state labor law as unduly interfering with the right of free contract. The following cases are similar examples from the *Lochner* era:

> *Coppage* v. *Kansas,* 236 U.S. 1 (1915): Held unconstitutional a Kansas state law prohibiting employers from requiring employees to agree, as a condition of employment, not to join a union on grounds that the law violated the Fifth Amendment Due Process Clause (employing substantive due process reasoning).
>
> *Adair* v. *United States,* 208 U.S. 161 (1908); Like *Coppage,* held unconstitutional a federal law prohibiting employers from requiring employees to agree, as a condition of employment, not to join a union on grounds that the law violated the Fifth Amendment Due Process Clause (employing substantive due process reasoning).
>
> *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923): Held unconstitutional District of Columbia law prescribing minimum wages for women on grounds that the law violated the Fifth Amendment Due Process Clause (employing substantive due process reasoning).

A district judge has no latitude to engage in judicial activism (nor should any other judge). A district judge is absolutely obligated to adhere to the controlling law laid down by the Supreme Court and the courts of appeals.

Although *Roe* v. *Wade* has also been criticized by prominent constitutional scholars and others as judicial activism, there can be honest differences of opinion on this question. While the decision recognized a constitutional right never before specifically recognized by the Supreme Court, the decision was joined by seven justices, including Chief Justice Burger, Justice Powell and Justice Stewart, all of whom were well known for opposing judicial activism. And, Justices O'Connor, Kennedy and Souter, also opponents of judicial activism, joined with others in 1992 to re-affirm (with limitations) the privacy right upheld in *Roe* v. *Wade. Planned Parenhood* v. *Casey,* 505 U.S. 833 (1992). In light of that spectrum of justices, all of whom wrote or joined in opinions explaining how the result flowed, in their view, from the precedents, it would be hard to say that the justices as a whole simply disregarded the precedents and substituted their own personal policy judgment.

I repeat, however, a district judge is absolutely duty-bound to follow the controlling precedents of the Supreme Court and the courts of appeal. If confirmed, I would do so in all cases.

RESPONSES OF WILLIAM ALSUP TO QUESTIONS FROM SENATOR THURMOND

Question 1. In your article, "Freedom of Information and Privacy" you refer to a "right to know" as a "broad precept [which] comprehends several distinct concepts, not all of which been recognized by the Supreme Court." Do you believe that the Constitution contains any rights regarding the "right to know" or the "right to privacy" that have not yet been explicitly recognized by the Supreme Court? Please explain.

Answer 1. As my article stated (at pages 4–5), the Supreme Court "flatly" rejected any constitutional "right to know," *i.e.*, a right of public access to government information, in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). The Supreme Court has also stated that "There is no general constitutional right to privacy." *Katz* v. *United States*, 389 U.S. 347, 350–51 (1968). I am not aware of any other constitutional rights of privacy or "right to know" not yet explicitly recognized by the Supreme Court.

Question 2. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act. What is your view of courts acting in this manner?

Answer 2. A court should not try to create new rights or duties to solve social problems (whether or not the legislature has failed to address them). Rather, a court must apply the governing law and settled precedents to determine the rights and obligations of litigants.

Question 3. It is my view that judges should have judicial temperament. The more power an individual has, the more courteous he or she should be. Probably no one in our society has more power over the lives of individuals than a Federal judge, so it is especially important that someone in this role be courteous and civil. What are your thoughts on judicial temperament?

Answer 3. I agree with you that a judge should be courteous and civil. There will be occasions when a judge must also be firm and must exercise control over proceedings, but even this can be done in a civil and courteous manner. It is important that a judge be (and be perceived to be) fair.

Question 4. Are there any circumstances under which a judge should attempt to establish new judicial precedent and, if so, what criteria do you consider important in determining the propriety of reversing some existing precedent?

Answer 4. A district judge is absolutely obligated to follow the controlling precedents. If ever a case arises of first impression over which there can be honest differences of opinion, a district judge will be called upon to decide one way or the other. Reversal of existing precedent, however, is different. Although the Supreme Court on rare occasion will overrule one of its cases, and has set out its criteria for doing so in *Agostini* v. *Felton*, 521 U.S. 203 (1997), a district judge should never overrule precedent.

Question 5. In our tripartite system of government, the Congress, under the Constitution, makes the law. The President, as the Chief Executive, enforces the law. The judiciary interprets the law. It appears that some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Answer 5. I agree with your statement.

RESPONSES OF WILLIAM ALSUP TO QUESTIONS FROM SENATOR SMITH

Question 1. Leaving entirely aside the relevant Supreme Court precedent about the legal status of unborn children, do you as an individual believe that the unborn child is a fellow human being?

Answer 1. As framed, this is a combined question of medicine and theology and one on which physicians and theologians, to the extent they have reached conclusions, have honest differences of opinion. I am not qualified in these fields and have truthfully reached no conclusions on the subject. I certainly hold no beliefs that would prevent me from applying the controlling law on the subject. According to the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 846, 871 (1992), the State has a constitutionally-recognized interest in promoting the life or potential life of the unborn, a right that may override the woman's rights once the unborn fetus achieves viability. Even before viability, the State may take steps to persuade the woman about "philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term," 505 U.S. at 872. State restrictions not imposing an undue burden on the women's decision are constitutional. If confirmed, I would follow the relevant Supreme court precedents in deciding all issues of law on such subjects.

Question 2. As you know, the Supreme Court held in *Roe* v. *Wade* that the unborn child has no constitutional rights to life before birth. Leaving entirely aside any obligation that you may or may not have as an inferior court judge to follow Supreme Court precedent, do you as an individual believe that the Supreme Court was legally and/or morally wrong in determining that an unborn child, even in the final weeks of pregnancy, has no constitutional right to life?

Answer 2. In the *Casey* decision cited above, the Supreme Court held that the State has a legitimate and constitutionally-recognized right to promote the life or potential life of the unborn. The decision also held that once a fetus is viable, the State's interest in promoting the life of a fetus may outweigh the women's rights and allow the State to regulate or even prohibit an abortion. I am not qualified to address the morality of the Supreme Court's decisions but would, if confirmed, follow at all times the relevant and controlling precedents on this subject.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. All statutes carry a strong presumption of constitutionality and the burden is on the litigant challenging a statute to demonstrate clearly that it is unconstitutional. Such litigants also carry the further burden of establishing "standing" to sue and "ripeness" of the particular issues raised. A constitutional challenge, moreover, should be reached for decision only if there is no non-constitutional basis, such as statutory construction, for disposition of the case. In deciding such cases, I would look to the plain meaning of the statutes and constitutional provisions at issue as well as the Supreme Court and appellate decisions., Beyond this, I do not believe it would be proper for a nominee to indicate whether proposed legislation would be constitutional because the issue might come before the nominee if confirmed as a judge.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. The Second Amendment states in full: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The amendment itself thus recognizes a right to keep and bear arms. In upholding the prohibition in the National Firearms Act against sawed-off shotguns, the Supreme Court has held that the Second Amendment right to bear arms must be "some reasonable relationship to the preservation or efficiency of a well regulated militia," *United States* v. *Miller,* 307 U.S. 174, 178 (1939). I would follow the law set forth by the Supreme Court in deciding cases on the subject.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. Yes. The Supreme Court so held in *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 6. Would you have any personal, moral or religious qualms about enforcing the death penalty as a judge?

Answer 6. No, I have no such qualms about enforcing the death penalty.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. No.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. If I were a Supreme Court justice, I would rarely vote to overrule a precedent, and even then only in those unusual circumstances that the Supreme Court itself has described as appropriate for overruling precedent, such as precedent that has proven intolerable and unworkable or precedent whose related principles of law have advanced so far as to leave it as a stranded remnant of jurisprudence. *See generally Planned Parenthood* v. *Casey,* 505 U.S. 833, 854–55 (1992), and *Agostini* v. *Felton,* 521 U.S. 203, 235–36 (1997). Otherwise, respect for stare decisis requires that justices adhere to the Court's own precedents. And, certainly a district judge has no room ever to overrule or disregard a Supreme Court precedent.

RESPONSE OF CHARLES WILSON TO A QUESTION FROM SENATOR SESSIONS

Question 1. What do you believe is the most important Supreme Court decision of the past 30 years? What do you believe was the worst Supreme Court decision during this time? Please provide a brief explanation of your answer.

Answer 1. Every Supreme Court decision is important especially for the party or parties affected by each individual decision. It is very difficult to select one decision in particular and distinguish it from all others as most important, but if I had to select one, it would be *Gregg* v. *Georgia,* 428 U.S. 153 (1976), upholding the constitutionality of the death penalty. I select that case in particular because I believe it has had the most significant impact on our justice system, substantially affecting the business of the courts especially state courts.

I am reluctant to identify a case in particular that could be singled out as the "worst" Supreme Court decision. Troublesome decisions would be those that are issued by a sharply divided Court, where the majority opinion lacks the necessary clarity and guidance needed by lower courts. Especially troublesome are Supreme Court decisions which are criticized by subsequent decisions of the Court. An example of a prior decision that lacked necessary guidance to lower courts would be *Furman* v. *Georgia,* 408 U.S. 238 (1972) which invalidated the death penalty as cruel and unusual punishment under the Eighth and Fourteenth Amendments. Every Justice who participated in the decision issued a separate written opinion resulting in a lack of clear guidance to the lower courts. *Furman* is, of course, no longer good law as the constitutionality of the death penalty has been upheld in *Gregg* v. *Georgia.*

RESPONSES OF CHARLES WILSON TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

Question 1. In your biography, you state that in your current capacity as United States Attorney for the Middle District of Florida you participate in legal strategy sessions, and that you do set the prosecution priorities for your office. What factors do you use to set your prosecution priorities? Please describe your analytical process for making these determinations.

Answer 1. The starting point for the establishment of prosecution priorities for the District must necessarily include consideration of the initiatives and directives of the Department of Justice as set by the Attorney General. Those initiatives must be considered, and tailored to fit the individual crime trends and needs of the District. The crime trends in the Middle District of Florida substantially mirror those of the country and include violent crime and drug trafficking. For the past few years, our top white collar crime priority has been health care fraud. We have also devoted resources to the investigation of official public corruption, telemarketing fraud, financial institution fraud and insurance company fraud. Because there are many senior citizens within the District who provide a target rich environment for white collar criminals, a heavy emphasis has been placed on the investigation and prosecution of health care fraud and telemarketing fraud.

In determining enforcement priorities, I meet regularly with federal, state and local law enforcement agency heads, as well as community and business leaders to receive their input as well.

Finally, I have requested, and received, the FBI's periodic crime trend reports for my District which are also very useful. It is important that prosecution resources compliment investigative resources from a quantitative and program priority standpoint.

Question 2. In your bio, you also discuss your implementation of the Department of Justice's "Weed and Seed" program. This is a program I am very familiar with, as I worked very hard to make this a successful program when I was the U.S. Attorney for the Southern District of Alabama. Your program makes extensive use of asset forfeiture.

(A) What is your opinion of the present asset forfeiture approach? Are there any constitutional impediments to asset forfeiture that concern you?

Answer 2A. Federal agencies use the criminal and civil forfeiture laws to take property from serious criminals; forfeiture is an essential component of the effort to combat drug trafficking, money laundering, terrorism, alien smuggling, counterfeiting, and white collar crimes that victimize consumers, the elderly and taxpayers.

Fairness and due process are furthered when seizures take place pursuant to a warrant, unless one of the judicially-recognized exceptions to the Fourth Amendment applies. Civil forfeiture should ensure fairness and due process without giving criminals a windfall. Aspects of asset forfeiture practice that are of concern include the impact that forfeiture can have on an individual's ability to have a lawyer of his or her choice, as well as an impact on Fourth Amendment interests and rights.

If I am selected to serve on the Eleventh Circuit, I will be sensitive to the property rights of all concerned.

Question 2B. As part of your program, your bio describes an instance in which you negotiated the property you seized to particular groups. For example, in one instance you negotiated the transfer of a forfeited bar to the Manatee Branch of the NAACP for use as a small business incubator, and in another instance you negotiated the transfer of a tavern to a community service organization known as the "Quality of Life Center".

How do you select the organizations that you provide this forfeited property to?

Answer 2B. The United States Attorney's Office's Law Enforcement Coordinating Manager serves as a co-chair of the various Weed and Seed Steering Committees and receives input from the community. The organization selected must be a public or private non-profit organization with broad-based community support and adequate funding, and must be a member of the local Weed and Seed Steering Committee. The proposed use of the property must comport with the goals of the Weed and Seed initiative. Permissible uses would include community-based drug abuse treatment or prevention programs, education, housing, or job skill training. The Weed and Seed Steering Committee determines which organization should receive the property based on these considerations.

Please describe the procedures you use to transfer the property, and any requirements that a potential recipient of this property must meet.

The United States Attorney must obtain the agreement of the law enforcement agencies that participated in the investigation that led to the forfeiture of the asset because those agencies would be required to agree to forego their equitable shares of the proceeds. The approval of the Deputy Attorney General or the Director of the Treasury Executive Office for Asset Forfeiture is required, as well as the United States Marshal. If everyone is in agreement, a memorandum of understanding is entered into by all parties and a contract is negotiated with the recipient of the property. The property is transferred to the recipient and is to be used for law enforcement purposes (a broad definition). There is a five-year window for return if the property is not used in accordance with the agreement. The property is quit-claimed to the recipient agency through the state or local law enforcement agency that participated in the investigation. The United States cannot directly transfer forfeited property to a private non-profit organization pursuant to the Weed and Seed initiative.

RESPONSES OF CHARLES WILSON TO QUESTIONS FROM SENATOR ASHCROFT

Question 1. In your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Answer 1. The Constitution is written not for one generation but for the ages. The rights protected by the Constitution do not grow or shrink and they are to be safeguarded and protected. The rights do not change but may be given new application which is sometimes essential to a changing society. For example, the Fourth Amendment which protects the right of the people to be free from unreasonable searches and seizures has been given new application with regard to automobile searches even though the framers of the Constitution may not have envisioned the invention of the automobile.

Question 2. If a particular judge or court has a high rate of reversal on appeal, or by the Supreme Court, is that a problem? If it is, what can and should be done to remedy that problem?

Answer 2. A high reversal rate is indicative of a problem and reflects that the judge is failing to follow the law consistent with his or her obligation. An appropriate remedy might include a suggestion that the judge participate in continuing education, and attend seminars sponsored by the National Judicial College and the Federal Judicial Center.

Question 3. Is "substantive due process" a legitimate constitutional doctrine?

Answer 3. Recent Supreme Court decisions have significantly limited what has been referred to as "substantive due process". Procedural due process rights continue to be safeguarded and protected by the Courts. There may remain some vestiges or limited principles of "substantive due process", but is very limited. In *Washington* v. *Glucksberg,* 521 U.S. 702 (1997), the Supreme Court upheld a Washington law banning physician-assisted suicide that was challenged as a violation of the Fourteenth Amendment. The Court recognized that the Due Process Clause provides protection of "certain fundamental rights and liberty interests", from government interference, which would include the right to marry, to have children, to direct the education and upbringing of one's children. The Court expressed a reluctance to expand the concept of "substantive due process," asserting that "guideposts

for responsible decision-making in this unchartered area are scarce and open-ended." The Court recognized that any extension of constitutional protections to certain "asserted rights" would place the matters outside the arena of public debate and legislative action where the matters belong. Due process protects fundamental rights and liberties that are objectively "deeply rooted in this nation's history and tradition."

In the event that I serve on the Eleventh Circuit, I will faithfully follow these guideposts established by the Supreme Court.

Question 4. Is it appropriate for circuit judges to recognize new "substantive due process" rights? If yes, what should the guiding principles be?

Answer 4. No. It would be inappropriate for a Circuit Judge to recognize a new "substantive due process" right.

Question 5. What is your understanding of the holding in *United States* v. *Lopez,* 514 U.S. 549 (1995)? What test would you apply to determine if a statute exceeded the power of Congress to enact under the Commerce Clause?

Answer 5. In *United States* v. *Lopez,* the Supreme Court ruled that the Gun Free School Zones Act of 1990, which made it a federal crime to possess a firearm in or near a school, is beyond Congress's powers under the Interstate Commerce Clause. Congress can regulate intrastate activities only if the activities substantially affect interstate commerce. The test to determine if a statute exceeds the power of Congress to enact under the Commerce Clause is whether the activity "substantially affects" interstate commerce.

I would apply this test if I am permitted to serve as a Judge on the Eleventh Circuit.

Question 6. Do you think that there is tension between the Supreme Court's holdings in *Romer* v. *Evans,* 517 U.S. 620 (1996) and *Bowers* v. *Hardwick,* 478 U.S. 188 (1986)? If there is, how would you reconcile that tension? If there is not, how are they reconcilable?

Answer 6. In *Bowers* v. *Hardwick,* the Supreme Court Ruled that the Constitution does not confer upon homosexual persons the right to engage in sodomy, upholding the validity of state laws making such conduct illegal. The Court found no fundamental privacy right outweighing the authority of a state to make sodomy itself illegal. *Romer,* addresses a different issue. In *Romer,* the Supreme Court held that an amendment to the Colorado constitution prohibiting legislative, executive or judicial action designed to protect homosexual persons from discrimination violates the Equal Protection Clause of the United States Constitution for the reason that it is "a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." The Court determined that the Colorado law singled out homosexual persons from other citizens entitled to certain fundamental rights such as the right to participate in the political process. Although there may appear to be tension between these two decisions, they are reconcilable with one another in that they address two different issues.

Question 7. Is there an explicit racial classification that would survive strict scrutiny? If yes, please explain what it would be? Would any such classification require a showing of particularized past discrimination?

Answer 7. In *Adarand* v. *Peña,* 515 U.S. 200 (1995), the Court applied the "strict-scrutiny" standard to federal affirmative action programs, holding that such programs that use race as a factor in decision-making must be narrowly tailored to serve a compelling governmental interest. Therefore, the Courts must carefully scrutinize any attempted use of race to ensure that it meets the extraordinarily high level of constitutional scrutiny. It would be very difficult for an explicit racial classification to survive strict scrutiny. I would follow the guidance provided by the United States Supreme Court, including its decision in *Adarand.*

Question 8. Is there a legislative classification that would fail rational basis review?

Answer 8. Much deference is afforded to Congress in the establishment of legislative classifications and I would afford any such classification the presumption of constitutionality. Legislative classifications that bear a rational relationship to a legitimate end are favored by the Courts if the particular law does not burden a fundamental right nor target a suspect class. Under the rational basis standard, any legislative classification bearing a rational relationship to an independent and legitimate legislative end, and not drawn specifically to disadvantage the group burdened by the law, should not be disturbed. Therefore, it is difficult to envision a classification that would fail rational basis review.

Question 9. Is a state program that gives parents a set sum of money to be used by the parent to pay for tuition at any school they choose, public, private, religious or non-sectarian constitutional?

Answer 9. The test for constitutionality is set forth in *Agostini* v. *Felton* which holds that the Establishment Clause permits public school teachers to be sent into parochial schools to provide remedial education to disadvantaged children. In *Agostini,* the Court re-asserted the traditional three-part test for constitutionality: Whether the program (1) serves a secular purpose, (2) does not have the primary effect of advancing religion; and (3) does not constitute excessive entanglement of government religion. I would use the standards set forth in *Agostini,* and any other binding precedent, in deciding this issue, and I would afford the statute, whether federal or state, the presumption of constitutionality to which it is entitled.

Question 10. Please define judicial activism. Is *Lochner* v. *New York,* 198 U.S. 46 (1905) an example of judicial activism? Please identify three Supreme Court opinions that you believe are examples of judicial activism (not including *Lochner* if your answer to the prior question was yes). Is *Roe* v. *Wade,* 410 U.S. 113 (1973) an example of judicial activism?

Answer 10. When a judge disregards the law and deviates from settled judicial precedent, he or she engages in judicial activism. Cases presented for judicial review should be decided without ideological bias, with adherence to the concept of *stare decisis* and consistent with established judicial precedent. A judge should not allow personal viewpoints to interfere with his or her duties as a judge. Otherwise, the judge invites judicial activism.

Lochner v. *New York* is considered by many to be an example of judicial activism. I am reluctant to criticize Supreme Court opinions, because even though they may be examples of judicial activism, I would nonetheless be required to follow them as a lower court judge. Nevertheless, an example of judicial activism can be found by the Supreme Court's decision in *Adkins* v. *Children's Hospital of the District of Columbia,* 261 U.S. 525 (1923). In this case, the Court was called upon to consider the constitutionality of a District of Columbia statute providing for the fixing of minimum wages for women and children. The Court invalidated the statute, contending that the statute authorized an unconstitutional interference with the freedom of contract including the guarantees of the due process clause of the Fifth Amendment.

Other examples of judicial activism would include *Morehead* v. *New York, ex rel. Tipaldo,* 298 U.S. 587 (1936), invalidating on due process grounds a state's minimum wage law, *Adair* v. *United States,* 208 U.S. 161 (1908), invalidating on due process grounds statutes criminalizing the discharge of certain workers because of their union membership; and *Allgever* v. *Louisiana,* 165 U.S. 578 (1897), invalidating on due process grounds a state law setting limits on who could conduct insurance business in Louisiana. In these cases, the Supreme Court slighted state substantive laws, relying on principles of general constitutional law to answer questions of state general or constitutional law.

Roe v. *Wade,* which restricted the ability of states to regulate abortion, has been cirticized by many as an example of judicial activism. The Supreme Court subsequently adjusted the *Roe* decision, holding in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 510 U.S. 833 (1992) that the states have an interest in protecting the life or potential life of the unborn. I would follow the *Casey* ruling if I am confirmed to the Eleventh Circuit.

RESPONSES OF CHARLES WILSON TO QUESTIONS FROM SENATOR HATCH

Question 1. In your view, what does Article III of the Constitution authorize federal judges to do? Specifically, do you believe that the judicial power encompasses the power to interpret existing law or to make new law? What are the limits on the scope of a federal judge's power?

Answer 1. The Constitution authorizes the federal judiciary to interpret and apply the Constitution and the laws enacted by Congress. In our system of separation of powers, it is not the function of the judiciary to make law or infringe upon the prerogative of the legislative branch.

Question 2. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of the Article III judicial power.

Answer 2. Under prevailing rules of statutory construction, a federal judge is duty-bound to apply the plain language of the statute or constitutional provision. When the language of the law is clear, the judge is not free to replace it with unenacted, legislative intent. If the judge is unable to discern the plain meaning of the statute, the next step is to look to the surrounding body of law including deci-

sions of the United States Supreme Court followed by the Court of Appeals within the judge's circuit. Only in the absence of guidance from these sources can a judge consider legislative history.

Question 3. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution, (2) discernment of the "community's interpretation" of the constitutional text, see William J. Brennan, *The Constitution of the United States Contemporary Ratification.* Text and Teaching Symposium, Georgetown University (October 12, 1985), and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer 3. The first and third approaches are legitimate methods of supporting a claim based on a constitutional right not previously upheld by a Court. Any approach to uphold such a claim on the basis of a discernment of the "communities interpretation" of constitutional text would not be legitimate. Judges are required to interpret the Constitution in accordance with original intent and its plain meaning as set forth by the Framers. Of course, the Constitution sets forth a method for its amendment.

Question 4. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer 4. If the case is not one of first impression, I will faithfully follow established judicial precedent. In the absence of Supreme Court or Eleventh Circuit authority, I would look to the precedents of sister circuits for guidance, although they are not binding. In a case of first impression, I would afford the statute the presumption of constitutionality and begin my analysis with an application of the plain meaning of the pertinent statute or constitutional provision.

Question 5. In your view, what are the sources of law and methods of interpretation used in reaching the court's judgment in the following cases? How does the use of these sources of law impact the scope of the Judicial power and the federal government's power under Article III?

(A) *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

(B) *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answer 5A–B. In *Griswold,* the Supreme Court evaluated its prior rulings and concluded that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The Court states further in its decision, "[w]e deal with a right of privacy older than the Bill of Rights * * *" In *Alden,* which held that Congress could not subject a state to suit in state court without its consent, the Court held that the state's immunity from suit "is a fundamental aspect of the sovereignty they enjoyed before the Constitution's ratification and retained today except as altered by the plan of the Convention or certain constitutional Amendments." When the Eleventh Amendment was ratified, "Congress acted not to change but to restore the original constitutional design." Therefore, sovereign immunity derives from the structure of the original Constitution rather than from the Eleventh Amendment. Federalism requires that Congress respect the states as residuary sovereigns and co-participants in the government of the nation. The judiciary is equally required to support these established concepts of federalism.

Question 6. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

(A) *Wickard* v. *Filburn,* 317 U.S. 111 (1942).

(B) *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer 6A–B. In *Wickard* v. *Filburn,* the Supreme Court upheld the application of Congressional amendments to the Agricultural Adjustment Act of 1938 enacted to control the volume of wheat moving in interstate and foreign commerce. The Court recognized early principles "affecting" restraints on the Federal Commerce Power holding that they must proceed from "political rather than from judicial processes." The Court also recognized that certain activities, identified in the opinion, are "within the province of state governments and beyond the power of commerce under the Commerce Clause." These activities may only be reached by Congress if they exert "a substantial economic effect on interstate commerce."

In *Lopez,* the Court invalidated the Gun Free School Zones Act which made it a federal offense to possess a firearm at or near a school, finding that it was not an economic activity under the Commerce Clause "substantially affecting interstate

commerce." The Court in *Lopez* identified three broad categories of activity that Congress may regulate under its commerce power which would include: (1) the use of channels of interstate commerce, (2) the regulation and protection of instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities, and (3) activities having a substantial relation to interstate commerce. With regard to the latter, the proper test is whether the state or federal activity regulated "substantially affects" interstate commerce.

Lopez cites *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." The more recent *Lopez* decision makes it clear that the Courts are required to respect the separation and independence of the coordinate branches of the federal government and preserve the constitutional balance of power between the states and the federal government. I will follow that guidance as a member of the Eleventh Circuit.

Question 7. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments?

(A) *United States* v. *Lopez,* 514 U.S. 549 (1995).

(B) *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996).

(C) *Printz* v. *United States,* 521 U.S. 898 (1997).

(D) *College Savings Bank* v. *Florida Prepaid Postsecondary Educ, Expense Bd.,* 119 S. Ct. 2219 (1999).

(E) *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answer 7A–E. The division of power between the national government and state governments plays an important and vital role in our federal system. Its importance is underscored by the decisions in each of these cases.

The Court in *Lopez* invalidated the Gun Free School Zones Act of 1990, which made it a federal crime to possess a firearm in or near a school ruling that firearm possession near a school zone is an interstate non-commercial activity. Congress can only regulate intrastate activities if they "substantially affect" interstate commerce.

In *Seminole Tribe of Florida,* the Court invalidated a provision of the Indian Gaming Regulatory Act permitting Indian tribes to sue states for failing to negotiate gaming compacts in good faith as an impermissible exercise of the Commerce Clause. In that case, the court ruled that the states entitlement to sovereign immunity pursuant to the Eleventh Amendment protects them from suit without their consent to be sued.

The Court in *Printz* struck down a part of the interim provisions of the Brady Gun Handgun Violence Prevention Act which required local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court found that the requirements of the statute imposed an unconstitutional obligation on state officers to enforce federal laws.

In *College Saving Bank,* the Supreme Court upheld a dismissal of an action by a bank which sold deposit contracts for funding college education against the Florida Prepaid Post-Secondary Education Expense Board alleging unfair competition under the Lanham Act based on the board's alleged false advertising. According to the Court, federal courts lack jurisdiction over the matter since Florida's sovereign immunity "was neither validly abrogated by the TRCA nor voluntarily waived" by its activities in interstate commerce.

In *Alden,* the majority ruled against parole and probation officers who brought an action against Maine claiming denial of overtime under the Fair Labor Standards Act, finding that Congress could not subject a state to sue in state court without its consent.

All of these cases emphasize constitutional limitations on the federal government's authority to regulate interstate commerce. The cases are based on fundamental principles of federalism which the Courts must safeguard in discharging its important responsibilities and obligations under Article III of the Constitution.

As stated in *Lopez,* the Constitution recognizes the limited role of the federal government with enumeration of its powers in the Constitution. The Court stated that those powers not specifically enumerated are reserved to the states. *Lopez* quotes Founding Father James Madison who describes the powers of the federal government as "few and defined" and those of the states as "numerous and indefinite." The division of authority mandated by the Constitution furthers the protection of the individual and fundamental liberties of Americans. The Constitution not only strikes a balance of power between the three branches of the federal government but also includes a "healthy balance of power between the States and the Federal Government * * * [reducing] the risk of tyranny and abuse from either front."

RESPONSES OF CHARLES WILSON TO QUESTIONS FROM SENATOR SMITH

Question 1. Leaving entirely aside the relevant Supreme Court precedent about the legal status of unborn children, do you as an individual believe that the unborn child is a fellow human being?

Answer 1. If I am fortunate to serve as an Eleventh Circuit Judge, my personal opinions will have no bearing whatsoever in the decision-making process. I have no personal views that would interfere with my ability to apply the law faithfully and scrupulously. That includes issues and precedent relating to the state's interest in protecting the life of the unborn as set forth in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992).

Question 2. As you know, the Supreme Court held in *Roe* v. *Wade* that the unborn child has no constitutional right to life before birth. Leaving entirely aside any obligation that you may or may not have as an inferior court judge to follow Supreme Court precedent, do you as an individual believe that the Supreme Court was legally and/or morally wrong in determining that an unborn child, even in the final weeks of pregnancy, has no constitutional right to life?

Answer 2. I have never, in my legal career, publicly criticized a Supreme Court decision. Most of my legal career, has been spent in an official capacity as either a Judge or as United States Attorney. I remain reluctant to criticize, or publicly express disagreement with established Supreme Court decisions that I may later be required to follow. The Supreme Court made it clear in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), that states have an interest in protecting the life of the unborn which may override the right of the woman, permitting the state to impose regulation on those who seek abortion. I will follow Supreme Court precedent if I am confirmed to be an Eleventh Circuit Judge.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer 3. I would be guided by the United States Constitution and prevailing Supreme Court and Circuit Court precedent. I am very reluctant to state my beliefs on the constitutionality of the Act without the opportunity to review the legislation and consider the law and arguments presented in support of and in opposition to the constitutionality of the Act. If called upon to consider the constitutionality of the Act, in the context of a specific case or controversy, I would afford the Act the strong presumption of constitutionality that it is entitled to.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer 4. There is very little Supreme Court precedent addressing this issue. The most recent major decision addressing this issue is *United States* v. *Miller,* 307 U.S. 174 (1939). The Second Amendment states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

If called upon to address that issue, I will look to the Supreme Court's decision in *Miller* and the plain language of the Second Amendment as starting points for my analysis.

Question 5. Do you believe the death penalty is constitutional?

Answer 5. Yes. The Supreme Court of the United States ruled in *Gregg* v. *Georgia,* 428 U.S. 153 (1976) that the death penalty is constitutional.

Question 6. Would you have any personal, moral, or religious qualms about enforcing the death penalty as a judge?

Answer 6. No. I have no personal views that would interfere with my duty to enforce the death penalty as a United States Circuit Judge.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer 7. No. In *Agostini* v. *Felton,* 521 U.S. 203 (1997), the United States Supreme Court ruled that only that Court can overturn Supreme Court precedent.

Question 8. If you were a Supreme Court Justice under what circumstances would you vote to overrule a precedent of the Court?

Answer 8. If I were a Supreme Court Justice, I would follow the guidance set forth in *Agostini* v. *Felton,* 521 U.S. 203 (1997). This decision sets forth those circumstances that would be determinative in overruling an established precedent of the Court. Precedent is overruled only in the unusual, rare and extreme case in

which case the precedent is clearly wrong, and to continue the precedent would cause great harm and injustice.

NOMINATIONS OF MARYANNE TRUMP BARRY, AND RAYMOND C. FISHER (U.S. CIRCUIT JUDGES); NAOMI REICE BUCKWALD, DAVID N. HURD, M. JAMES LORENZ, VICTOR MARRERO, AND BRIAN THEADORE STEWART (U.S. DISTRICT JUDGES)

THURSDAY, JULY 29, 1999

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

The committee met, pursuant to notice, at 9:06 a.m., in room SD–628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter, Feinstein, Schumer, Smith, Torricelli, Sessions, Leahy, and Feingold.

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

The CHAIRMAN. If we could begin. Today, we are holding a hearing for seven judicial nominees: two Circuit Court nominees and five District Court nominees.

This hearing follows the committee's approval of 16 judicial nominations earlier this year. We have three panels today. The first panel will consist of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of the two Circuit Court nominees, and the third panel will consist of the five District Court nominees.

Before we turn to the panels, the Ranking Member is not here, but we will reserve time for him to make his opening remarks when he arrives.

Let me just say we are very pleased today to have the two Senators from California speaking on behalf of two of our judgeships here today, and we will turn to you, Senator Feinstein, first, and then you, Senator Boxer, second.

Please.

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

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

The CHAIRMAN. I would also invite Mr. Campbell to the table, too. We normally do not have the House Members speak, but you are still in the fabled Judiciary Committee over there.

Mr. CAMPBELL. No, I am a graduate.

The CHAIRMAN. You are not there anymore. You are just the expert in antitrust over in the House. So we are certainly going to give you an opportunity to say something.

Mr. CAMPBELL. Thanks, Mr. Chairman.

The CHAIRMAN. Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman, for holding this hearing today.

It is my pleasure to introduce the Associate Attorney General Ray Fisher to the Judiciary Committee as a nominee for the Ninth Circuit Court of Appeals.

I think, by any standard of measurement, Ray Fisher should be counted as a superlative nominee. Prior to his appointment as Associate Attorney General, he was considered one of the top trial lawyers in Southern California. His legal skills are so highly regarded that he was recently inducted into the American College of Trial Lawyers, an honor bestowed on only the top 1 percent of his profession.

His academic record is sterling. He graduated from Stanford Law School in 1966 where he was president of the Stanford Law Review and awarded the Order of the Coif.

Following law school, he served as a law clerk for Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit and Supreme Court Justice William Brennan.

During his 30-year career in private practice, Ray Fisher specialized in the toughest of cases, complex civil litigation and in alternative dispute resolution. In 1988, he founded the Los Angeles office of Heller, Ehrman, White and McAuliffe, an office that has grown from 6 attorneys to 48. The majority of his court appearances have been before the Federal courts.

Ray Fisher has an impressive history of public service. During the turbulent times in Los Angeles after the Rodney King verdict, he served an invaluable role as Deputy General Counsel to the Christopher Commission which reviewed the actions of the Los Angeles Police Department. He also served on the Los Angeles Police Commission for 2 years, and he was president of the commission during 1996 and 1997.

His nomination enjoys the strong support of law enforcement. The National Sheriffs Association has awarded him a lifetime membership. In addition, the Fraternal Order of Police and the National Association of Police Organizations count themselves among his strongest supporters.

It is a tribute to Mr. Fisher's civil mindedness that he left a burgeoning private practice to enter Government service as Associate Attorney General in 1997. As the third-ranking official of the Department of Justice, he oversees the work of the civil litigating divisions, including antitrust, civil, civil rights, environment and natural resources divisions, and tax. In addition to these responsibilities, he has focussed on expanding access to community policing and has worked diligently to bring new technology into the hands of State and Federal law enforcement.

I would like to just mention a few of the testimonials on his behalf. Los Angeles Mayor Richard Riordan writes, "As a Republican mayor, I can assure you that Ray does not have a partisan agenda.

He is a superb lawyer, with extensive trial and appellate experience, who will use his keen analytic mind in a fair and restrained manner."

John G. Davis, a retired U.S. District Judge appointed by President Reagan in 1986, says, "I can attest that he is not an idealogue, has no agenda, and will be an intellectually honest and superior member of the court. He is dedicated to the rule of law, and is possessed of the appropriate intellect and temperament for this appointment."

The Standing Committee on Federal Judiciary of the American Bar Association has deemed Mr. Fisher well qualified for appointment as Judge of the U.S. Court of Appeals.

Mr. Chairman, I whole heartedly recommend Raymond C. Fisher for a Ninth Circuit appointment. He has truly first-rank legal credentials.

If I may, I would just like to say a quick word on behalf of Senator Boxer's nomination for a District Judge in the Southern District of California.

Jim Lorenz is Senator Boxer's nominee, but I would like the committee to know that since 1994, he has served as chairman of my judicial screening committee, and he is batting 100 percent on the nominations that that committee has submitted to the President and to the Senate Judiciary Committee. He has put forward excellent candidates, and certainly made my job easier. He is a distinguished trial lawyer in both civil and criminal cases. He has tried actually 36 cases to judgment, serving in 29 as co-counsel.

His career has been divided into two stages. He has served as both a State and Federal prosecutor in Southern California, and for 10 of these years, he actually initiated and built up the fraud unit in the San Diego County District Attorney's Office. He served as first Assistant U.S. Attorney and Acting U.S. Attorney in San Diego.

I know Senator Boxer wants to say more about him, but I want this committee to know that he has my full-hearted support. As a human being, as a lawyer, he is an absolute 10.

So I will yield the rest of the statement to Senator Boxer and ask that my full statements be placed in the record.

The CHAIRMAN. Well, thank you. They will be.

[The prepared statements of Senator Feinstein follow:]

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN ON BEHALF OF RAYMOND C. FISHER

Thank you, Mr. Chairman, for holding this hearing today. It is my pleasure to introduce the Associate Attorney General, Ray Fisher, to the Judiciary Committee as a nominee to the Ninth Circuit Court of Appeals.

By any standard of measurement, Ray Fisher should be counted as a superlative nominee. Prior to his appointment as Associate Attorney General, Ray Fisher was considered one of the top trial lawyers in Southern California. His legal skills are so highly regarded that he recently was introduced into the American College of Trial Lawyers, an honor bestowed on only the top one percent of the profession.

His academic record is sterling. He graduated from Stanford Law School in 1966, where he was president of The Stanford Law Review and awarded the Order of the Coif. Following law school, he served as a law clerk for Judge J. Skelley Wright of United States Court of Appeals for the District of Columbia Circuit and Supreme Court Justice William Brennan.

During his 30 year career in private practice, Ray Fisher specialized in the toughest of cases, complex civil litigation, and in alternate dispute resolution. In 1988,

he founded the Los Angeles Office of Heller Ehrman, White and McAullife, an office that has grown from 6 attorneys to 48. The majority of his court appearances have been before the Federal courts.

Ray Fisher also has an impressive history of public service. During the turbulent times in Los Angeles after the Rodney King verdict, he served an invaluable role as Deputy General Counsel to "The Christopher Commission," which reviewed the actions of the Los Angeles Police Department. He also served on the Los Angeles Police Commission for two years, and was President of the Commission during 1996–1997.

His nomination enjoys the strong support of law enforcement. The National Sheriff's Association has awarded him a Lifetime Membership. In addition, the Fraternal Order of Police and the National Association of Police Organizations count themselves among the strongest supporters of his nomination.

It is a tribute to Ray Fisher's civic-mindedness that he left a burgeoning private practice to enter government service as Associate Attorney General in 1997. As the third ranking official of the Department of Justice, he oversees the work of the civil litigating divisions, including Antitrust, Civil, Civil Rights, Environment and Natural Resources Divisions, and Tax.

In addition to these responsibilities, he has focused on expanding access to community policing, and has worked diligently to bring new technology into the hands of state and Federal law enforcement.

I will read just a few of the testimonials on his behalf.

Los Angeles Mayor Richard J. Riordan writes: "As a Republican mayor, I can assure you that Ray does not have a partisan agenda. He is a superb lawyer, with extensive trial and appellate experience, who will use his keen analytic mind in a fair and restrained manner."

John G. Davies, a retired U.S. District Judge appointed by President Reagan in 1986 says: "I can attest that he is not an ideologue, has no agenda, and will be an intellectually honest and superior member of the Court. He is dedicated to the rule of law, and is possessed of the appropriate intellect and temperament for this appointment."

The Standing Committee on Federal Judiciary of the American Bar Association has deemed Mr. Fisher "Well Qualified" for appointment as Judge of the United States Court of Appeals.

Mr. Chairman, I wholeheartedly recommend Raymond C. Fisher for a judgeship in the Ninth Circuit. He has truly first-rank legal credentials. His acute interest in public service, specifically in public safety, and his overreaching concern for fairness will serve the Ninth Circuit well.

I urge his prompt consideration and confirmation.

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN ON BEHALF OF JIM LORENZ

I am pleased to support Jim Lorenz's nomination to be a District Judge in the Southern District of California.

Although Jim Lorenz is Senator Boxer's nominee, I have personally benefitted from his legal acumen and commitment to public service. Since 1994, he has served as Chairman of my judicial screening committee. His record of putting forward such excellent candidates certainly made my job easier. I can't let this opportunity go by without saying thanks to Jim Lorenz for his efforts.

Jim Lorenz's nomination comes after a distinguished career as a trial lawyer in both civil and criminal cases. He has tried 36 cases to judgement, serving in 29 as co-counsel. This is one judge who will know every nuance of the courtroom from the day he first presides.

His career can be divided into two stages. From 1966 to 1981, he served as a State and Federal prosecutor in Southern California. For 10 of these years, he initiated and built-up the Fraud unit at the San Diego County District Attorney's Office. From 1978 to 1981, he served as First Assistant U.S. Attorney and Acting U.S. Attorney in San Diego County.

Since 1982, Mr. Lorenz has worked in private practice, dividing his time between civil litigation and white collar criminal defense. His civil practice areas include real estate, labor law, and commercial transactions.

Jim Lorenz has the unwavering support of local law enforcement including the San Diego Police Chief, the District Attorney, the sheriff, and the San Diego County Police Chief's Association. San Diego District Attorney, Paul J. Pflingst, a Republican states: "* * * I cannot imagine a more talented and even-tempered candidate for judge than Jim Lorenz. I have not seen a candidate better suited for the bench than [him]."

Jim Lorenz also has devoted an impressive portion of his time to public service. He is co-founder and past-Chairman of the San Diego Crime Commission. He also manages to find time to sit on the Board of Trustees of California Western School of Law and on local Marine Corps advisory Boards.

I urge the committee to move rapidly forward with Jim Lorenz's nomination. Not only is he an exemplary candidate, but the Southern District of California desperately needs this judgeship filled. Its caseload of 1030 cases per judge is the highest in the entire Ninth Circuit. By way of comparison, the national average per district court judge is 484. In addition, the Southern District of California continues to have the highest number of criminal felony cases per judge in the nation.

Thank you again. I look forward to the hearing.

The CHAIRMAN. If I could interrupt, Senator Boxer. I did not realize that Senator Specter, who is very senior on this committee, was here to speak in favor of Maryanne Trump Barry and others. So I would like to interrupt and call on Senator Specter at this time, and then we will go to you and Congressman Campbell.

Senator SPECTER. Thank you, Mr. Chairman. I will take only a moment or two.

The CHAIRMAN. I would like to have our statements be as short as we can because we do want to get this hearing started, as we are going to have votes all day, and I do want to get through with this hearing.

Senator SPECTER. As I said, I will just take a moment or two, and I have to excuse myself after this brief statement.

I want to commend you, Mr. Chairman, for moving ahead with the judicial nomination process and to say a few words in support of Judge Maryanne Trump Barry.

I compliment the President on his bipartisan approach. There are two vacancies coming from New Jersey. One will be a Democrat, and one, a Republican, and I compliment Senators Lautenberg and Torricelli for their bipartisan approach and we are trying to extend that bipartisanship to the Third Circuit and to the Pennsylvania selections, I might add.

Judge Barry comes to this nominating process with an extraordinary record. She has served on the U.S. District Court for the District of New Jersey since 1983. She has been a part of the panel of the Third Circuit by designation. Before becoming a judge, she was in the U.S. Attorney's Office where she was a first assistant and executive assistant. She has an extraordinary record of community service and legal scholarship, and I think she will make an excellent addition to the Third Circuit.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank you, Senator Specter. We appreciate it.

This is high praise for these nominees coming from Senator Feinstein and Senator Specter who are Members of the Committee.

Senator Boxer.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman and Members, for holding this hearing and giving us an opportunity to introduce you to two very fine Californians.

Let me first say that I want to underscore what Senator Feinstein has said about Ray Fisher. We are excited about this nomination and hope you will be as excited as we are and move expeditiously on it.

Mr. Chairman, it is a pleasure to be with you today to introduce a gentleman that Senator Feinstein has said has headed her judiciary advisory committee and has done an excellent job for her. I am very proud that he was chosen by my committee for a slot on the Federal District Court for the Southern District of California. His name is Myron James Lorenz, and I know you will have a chance to question him about his life, career, and thoughts on the law. Before you do, I will be very brief in sharing some of the highlights of his career, which is a long and distinguished one.

He is currently a partner with the law firm of Lorenz, Alhadeff, Cannon and Rose in San Diego. His specialty is complex litigation in business, health care, real estate, labor law, financial institutions, and fraud. He regularly represents companies and individuals in civil and criminal investigations brought by a variety of Federal agencies, and he is an excellent attorney.

In addition to his work in the courtroom, he is often employed by companies to conduct internal investigations of possible fraudulent activity by employees.

Before entering private practice, Jim Lorenz was a prosecutor, and I know that is important to many of you on this committee. After law school, he joined the District Attorney's office in San Diego where he worked for 11 years, eventually rising to be chief of the Fraud Division. In 1978, he joined the U.S. Attorney's Office in San Diego as an Assistant U.S. Attorney. Two years later, he was named U.S. Attorney for the Southern District.

Throughout his years in the District and U.S. Attorney's Offices, he has distinguished himself for being tough, thorough, and fair, and it is precisely this history and record of success that causes Jim to be so universally admired in the San Diego area and beyond.

I have received strong letters of support for Jim Lorenz from Jerry Saunders, who is the former San Diego Chief of Police; Paul Finks, the San Diego District Attorney; Bill Collander, San Diego County Sheriff; and Richard Emerson, the president of San Diego County Police Chiefs and Sheriffs. These are bipartisan endorsements, Mr. Chairman, and I believe, as they do, that Jim would be a great credit to the bench.

I want to mention just quickly a couple of other things. He served his country as an active-duty officer in the U.S. Marines for 2½ years, and as an officer in the U.S. Marine Corps Reserves for 15 more years. He consistently makes time for pro bono and other work designed to build and strengthen the community.

For example, he is chairman of the San Diego Crime Commission, which supports law enforcement in the community, and he has chaired a county commission looking into the issue of indigent defense. While doing all of this, he and his wife, Marcia, have found time to raise two children.

So, in short, Jim Lorenz is a man of proven character, talent and dedication. As Senator Feinstein has said, his judgment is excellent, and every individual he has recommended to her has been successfully seen by this committee and the President. He receives very high marks from my committee, and I would ask unanimous consent that the rest of my statement be submitted for the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF SENATOR BARBARA BOXER

It is may great pleasure to be with you today to introduce Myron James (Jim) Lorenz to the members of the Senate Judiciary Committee. Jim Lorenz is my recommendation to fill a vacancy in the Federal District Court for the Southern District of California.

Shortly you will have the opportunity to question Mr. Lorenz directly about his life, career and thoughts on the law and its proper place in American society. Before you do, however, I would like to share a little of what I know about Jim and why I think he would make an exceptional federal judge.

Jim Lorenz has had a long and distinguished career in the law and public service. He is currently a partner with the law firm Lorenz, Alhadeff, Cannon and Rose in San Diego, California. His specialty is complex litigation in areas such as business, health care, real estate, labor law, financial institutions, securities and other forms of fraud and RICO. He regularly represents companies and individuals in civil and criminal investigations brought by a variety of federal agencies including the Justice Department, the Environmental Protection Agency, the Securities and Exchange Commission, the Internal Revenue Service and others. In addition to his work in the courtroom, he is often employed by companies to conduct internal investigations of possible fraudulent activities by employees.

Before entering private practice Jim Lorenz was a prosecutor. After law school, he joined the District Attorney's office in San Diego where he worked for over 11 years eventually rising to be chief of the fraud division. In 1978, he joined the U.S. Attorney's Office in San Diego as an Assistant U.S. Attorney. Two years later he was named United States Attorney for the Southern District. Throughout his years in the District and U.S. Attorney's offices, he distinguished himself for being tough, thorough and scrupulously fair.

It is precisely this history and record of success that causes Jim to be so universally admired and respected by law enforcement officials in the San Diego area. I have received strong letters of support for Jim Lorenz from Jerry Sanders, former San Diego Chief of Police; Paul Pfingst, San Diego District Attorney; Bill Kolender, San Diego County Sheriff, and Richard Emerson, President of San Diego Counties Police Chief's and Sheriff's Association. All believe, like me, that Jim would be a credit to the bench.

But there is more to commented Jim Lorenz than his numerous professional accomplishments. He served his country as an active duty officer in the United States Marines for two and a half years, and as officer in the U.S. Marine Corps Reserves for 15 more. He consistently makes time for pro bono and other work designed to build and strengthen the community. For example, he is Chairman of the San Diego Crime Commission, which supports law enforcement in the community, and has chaired a county commission looking into the issue of indigent defense. And while doing all this, he and his wife Marcia still found the time to raise two children.

In short, Jim Lorenz is a man of proven character, talent and dedication. He received exceptionally high marks from my judicial advisory committee and enjoys a broad range of support among his colleagues and other community leaders. By all accounts he has the experience, temperament and passion for the law that have always been the hallmarks of our best jurists. It was my pleasure to recommend him to the President in December, just as it is my pleasure to introduce him to you today.

RAY FISHER

Before I conclude, I would like to say a few words on behalf of another Californian who will be before you today, Raymond Fisher. Ray Fisher is a nominee for the 9th Circuit Court of Appeals and the current Associate Attorney General. He is an outstanding attorney and person with a distinguished professional and public service record. I am confident he would make a fine Circuit Court judge.

Senator BOXER. I would ask Jim to stand.

We are very proud of you, as we are of Ray Fisher, who has brought his entire family here, and we are very happy to see everyone here today.

Thank you, again.

The CHAIRMAN. Thank you, Senator Boxer.

One of the people I most respect in the House, of course, is Congressman Campbell, and we are happy to have you here. With your knowledge of the law and your professorship at Stanford, your opinion gives great weight to this committee.

We are also happy to have had the two Senators from California. They both have spoken very glowingly about these candidates.

Congressman Campbell.

STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative CAMPBELL. Mr. Chairman, you honor me. Thank you very much.

I have never come before your committee unless I knew the person I was speaking about. So I do not come all that often, and today, I know Ray Fisher and I recommend him strongly for a couple of reasons. I repay your compliment in allowing me to speak by being succinct. I hope I succeeded in that.

I came and testified on his behalf when he was up for Associate Attorney General saying that he had great promise in the management of the Department of Justice, and although I am no longer a Member of the Judiciary Committee, I stay very active in the work product of the Judiciary Committee.

The reports are marvelous. He has been a very fine administrator in the Department of Justice. I know particularly his work on alternative dispute resolution, where he had a background going in and where he advanced that very important policy of resolving disputes without costly litigation within the Department.

If the time ever comes and the Federal Circuits adopt that kind of approach, which we have in our Courts of Appeals in California, I think Ray Fisher might be one to do it; in other words, to use mediation on appeal, which is, of course, not the case in the Federal Circuits, but something worth considering.

Second, he comes very highly recommended. You have heard from our two Senators. I also note the strong support of former U.S. Attorney in Los Angeles, Bob Bonner, and, of course, Mayor Riordan.

Before Mayor Riordan, he was the appointee on the police commission, later chaired the police commission, and has throughout shown a very fair and bipartisan, non-ideological, but full of ideas approach. Let me just repeat, full of ideas, but not ideological.

I have had the occasion to read his writing. He is a scholar of first order. He would have been a great law professor. Our profession lost when he chose to become a practitioner.

Last, I want to thank you, Mr. Chairman. We are short of judges on the Ninth Circuit. This has been the subject of hearings on whether we should split the Ninth because of some of the problems that we see there with delays, with reversal rates, and your holding hearings on Ninth Circuit nominees, I think, is the most important step we can presently take, short of legislation, to solve the problems that we have in the Ninth.

So I thank you for scheduling these hearings.

The CHAIRMAN. Thank you, and we are honored to have you here. That is very good praise for Mr. Fisher, who I happen to also

feel very deeply about and have a great deal of confidence in. So thank you for being here.

Representative CAMPBELL. Thanks, Mr. Chairman.

The CHAIRMAN. We appreciate it.

I think we will take Senator Bennett and myself next, and maybe I can say a few words.

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

The CHAIRMAN. Our nominee, Ted Stewart, for many years I have always respected his character and his commitment to public service, and his judgment, and I am pleased that President Clinton saw fit to nominate this fine man for a seat on the U.S. District Court for the District of Utah.

Mr. Stewart received his law degree from the University of Utah School of Law, and his undergraduate degree from Utah State University. He worked as a practicing lawyer in Salt Lake City for 6 years, and he served as trial counsel with the Judge Advocate General in the Utah National Guard.

In 1981, Mr. Stewart came to Washington to work with Congressman Jim Hansen. His practical legal experience served him well on Capitol Hill where he was intimately involved in drafting legislation.

Mr. Stewart's outstanding record in private practice and in the legislative branch earned him an appointment to the Utah Public Service Commission in 1985. For 7 years, he served there in a quasi judicial capacity on the commission, conducting hearings, receiving evidence, and rendering decisions with findings of fact and conclusions of law.

Mr. Stewart then brought his experience as a practicing lawyer, as a legislative aide, and as a quasi-judicial officer to the executive branch in State government. Beginning in 1992, he served as executive director of the Utah Departments of Commerce and Natural Resources, and since 1998, Mr. Stewart has served as chief of staff of our current Governor, Michael Leavitt.

Throughout Mr. Stewart's career in private practice, in the legislative branch and the executive branch, and as a quasi-judicial officer, he has earned the respect from all of those who have worked for him, those who have worked with him, and those who have been affected by his decisions.

A large number of people from all walks of life, and I might add on both sides of the political aisle, have written letters supporting Mr. Stewart's nomination.

James Jenkins, president of the Utah State Bar, wrote, "Ted's reputation for good character in industry and his temperament of fairness, objectivity, courtesy, and patience are without blemish."

Don Fiay of the conservation group, Sportsmen for Fish and Wildlife, wrote, "I have nothing but respect for a man who is honest, fair, considerate, and extremely capable."

R.G. Valentine of the Utah Wetlands Foundation wrote, "Mr. Stewart's judgment on judicial evaluation of any project or issue has been one of unbiased and balanced results."

Utah State Senator, Democrat, Mike Demetrich, one of the many Democrats supporting this nomination, wrote, "Mr. Stewart has al-

ways been fair and deliberate and shown the moderation in thoughtfulness that the judiciary requires."

I understand that the American Bar Association has concluded that Ted Stewart meets the qualifications for appointment to the Federal District Court.

This sentiment is shared strongly by many in Utah, including the president of the Utah State Bar. I would like to place copies of some of these letters of support for Mr. Stewart and a list of his major accomplishments in protecting the environment in the record at this point. So, without objection, we will do so.

[The information referred to is located in Submissions for the Record.]

The CHAIRMAN. This legion of letters and testaments in support of Mr. Stewart's nomination reflects the balanced and fair judgment that he has exhibited over his long and distinguished career. Those who know Ted well know he will continue to serve the public well.

A final note, Ted Stewart is needed in Utah. The seat he will be taking has been vacant since 1997. So I look forward to expeditiously moving his nomination through the committee.

At this point, we will turn to Senator Bennett for his remarks, and we will look forward to hearing from you, Senator Bennett.

I might add that Mr. Stewart's wife, Lora, is here, and Ted's brother, Tim, is here with his wife, Marcia. So we are happy to welcome all of you here. We will have all the judges introduce their families when they come up.

Senator Bennett.

STATEMENT OF HON. ROBERT F. BENNETT, A U.S. SENATOR FROM THE STATE OF UTAH

Senator BENNETT. Thank you, Mr. Chairman. I will be brief because I have to chair another hearing in about 3 minutes.

I first met Ted Stewart when he and I contended for the Republican nomination for the Senate in 1992. I knew nothing about him and never met him, never heard of him, and there were several of us running for that nomination, as you will recall.

In Utah, we have a ritual where you go from county to county and give your speeches before the county conventions. There are 29 counties, and at the end of that ritual, you know everyone else on the road show pretty well.

There was another candidate in that group, Mike Leavitt, running for Governor. As things turned out, both Governor Leavitt and I ended up winning our particular races, but of all of the people that I went through that experience with, the one that impressed me the most was Ted Stewart. I barely beat him in the convention for the opportunity to appear on the Republican ballot and said at the time Ted Stewart will be heard from again. This is a man of tremendous capability.

Governor Leavitt had not known him either before that experience, and I find it interesting that when Governor Leavitt required a chief of staff, it was to Ted Stewart that he turned.

There are those who have complained that Ted's judicial experience has all been at the State level, that he has not held any Federal positions with respect to his legal background and training

other than service on Capitol Hill, but as you have pointed out in your statement, Mr. Chairman, those who have worked with him in his judicial-type activities at the State level all have the highest praise for his fairness, his thoroughness, and his intelligence, and I am happy to join with you, Mr. Chairman, in giving my unqualified support for Ted Stewart for this position. I know of no one who brings to this assignment a higher intellect, a better work ethic, or a greater determination to bring credit to the assignment than he has. He takes this, as everything he does, very seriously, and I think he will be a superior Federal Judge.

The CHAIRMAN. Thank you, Senator Bennett. I think Mr. Stewart and his family have to be very heartened by your wonderful comments. We appreciate you being here.

At this point, I understand Senator Lautenberg is coming. So let me turn first to Senator Torricelli.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator TORRICELLI. Thank you, Mr. Chairman.

Mr. Chairman, I want to thank you very much for the extraordinary speed in which to be able to deal with the nomination of Maryanne Trump Barry for the Third Circuit Court of Appeals.

She is, as I am certain you have now recognized, eminently qualified. Indeed, of all the District Court Judges in New Jersey, when it came time for the President to choose to elevate someone to this position on the Third Circuit, it is remarkable how little debate there was about the possible candidates. Indeed, from the recommendations of Members of your party, the President to Members of the Senate, it was a very, very clear choice.

In large measure, this is a reflection not only of her extraordinary service on the district court, but indeed the reputation she has developed in judgment and in temperament.

I would like, Mr. Chairman, just to tell you a few things about her career. So the confidence I know you already feel in her nomination can only be strengthened.

She is a graduate of Mount Holyoke. She received her master's degree from Columbia University and her law degree from Hofstra. Recognizing the best thing to do with a New York education is to move to New Jersey, she then moved and worked in the U.S. Attorney's Office in New Jersey——

Senator LEAHY. You want to make sure you get all the votes around here, don't you, Bob?

The CHAIRMAN. We suddenly have conflict on this eminent committee.

Senator TORRICELLI. She rose through the ranks in New Jersey, first serving as the Chief of Appeals and then as the first assistant U.S. attorney.

At the time, Mr. Chairman, interestingly, she was the highest-ranking female prosecutor of any U.S. Attorney's Office in the Nation.

In 1983, President Reagan nominated her for the U.S. district court, where she has been serving since. She is also, Mr. Chairman, a former president of the Association of the Federal Bar for the State of New Jersey.

I cannot think of anyone that the President could have nominated who is more eminently qualified, and mostly, due to the vacancies in our court and the business before that court, I am very grateful to you for having moved this nomination so expeditiously.

The CHAIRMAN. Thank you, Senator Torricelli. I think it is a real compliment to Judge Barry that you have come here and spoken so eloquently on her behalf, and we appreciate it.

We will interrupt when Senator Lautenberg comes. He is not here yet. We will certainly accommodate him when he comes, but let me turn to Senator Schumer, who speaks for our three New York nominees.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I want to congratulate you for holding this hearing in the way that you have moved these nominations along with dispatch.

I also want to express on behalf of myself and Senator Moynihan, who could not be here today, our deep thanks for you attending to New York's judicial needs. Looking at today's slate of nominees, it is clear to me that you deserve today the title of Honorary New Yorker, which I hope will serve you well in Utah.

The CHAIRMAN. Listen, I am deeply honored. We Utahans have always wanted that recognition.

Senator SCHUMER. Yes, indeed.

He has many fans in New York.

Senator LEAHY. He does not even talk about being born in Pennsylvania when he goes out to Utah.

The CHAIRMAN. You did not have to mention that one. I will tell you, I am proud of all three States. I just wish Vermont would be a little more supportive.

Senator LEAHY. Now, Mr. Chairman, here I am organizing Democrats for Hatch in Vermont.

The CHAIRMAN. I am going to remember that.

Senator LEAHY. With those three electoral votes, I am going to put you over the top, and you diss our State like that.

The CHAIRMAN. And to think, he does not even have a judgeship on this panel.

Senator LEAHY. No, but I will try to find one.

The CHAIRMAN. All right.

Senator SCHUMER. All right, I am sorry I brought all that up.

In any case, Mr. Chairman, it is with a great deal of pride and pleasure that I introduce three superb New Yorkers to you and this committee. They are Naomi Buchwald, David Hurd, and Victor Marrero.

I will speak of Ambassador Marrero first. At my recommendation, I am honored that this is my first recommendation. President Clinton has nominated Victor Marrero, the U.S. Ambassador to the Organization of American States, to fill a vacant Federal judgeship in the Southern District of New York.

Ambassador Marrero's experiences and accomplishments as both a practitioner of law and a public servant render him extremely well qualified to be a Federal District Judge. His legal career is extensive and distinguished, not extinguished at all. Between his two

stints in public service, each of which I will soon discuss, he spent 12 years practicing law at two prominent New York City law firms. He was a partner for every day of those 12 years, specializing in real estate finance, land use law, environmental law, and property development.

The ambassador's practice entailed extensive advocacy on the part of his clients before adjudicatory bodies, including the New York City Planning Commission, the New York City Board of Standards and Appeals, and the New York City Department of Environmental Protection.

In recognition of his practical experience as an advocate and his wealth of knowledge in the areas of real estate and land use law, Ambassador Marrero was appointed a visiting lecturer at Yale Law School and Columbia Law School. His work in professional circles also contributed to his election as vice president of the extremely distinguished association at the Bar of the City of New York.

Ambassador Marrero's public service career is almost without equal in its breadth and degree of achievement. Immediately upon graduating Yale Law School in 1968, which he completed in 4 years after spending 1 year studying in England on a Fulbright scholarship, he began what turned out to be a 13-year stint in public service. He served, among other things, as executive director of New York City's Department of City Planning, chairman of the City Planning Commission, commissioner of New York State's Division of Housing and Community Renewal, and ultimately Under Secretary at the U.S. Department of HUD.

After some years in private practice, Ambassador Marrero returned full time to public service in 1993, when President Clinton appointed him U.S. Ambassador to the Economic and Social Council at the UN. In 1998, he became the U.S. Ambassador to the Organization of American States.

Perhaps most telling testament to Ambassador Marrero's commitment to public service and the esteem with which he has held is the fact that he has been confirmed by the U.S. Senate on three different occasions over the past 20 years. I look forward to adding a fourth Senate confirmation to an already-impressive resume.

The ambassador's resume does not, however, convey the full measure of the man. He is a true son of New York, an exemplar of the American dream. Born in Puerto Rico in 1941, came to America at the age of 10, his widowed mother had journeyed to our country 6 months before her son's arrival to earn the money to pay for his passage. Ambassador Marrero did not speak a word of English when he emigrated to the United States, but nonetheless, he became valedictorian of his public junior high school in East Harlem. He then gained admission to the well-regarded Bronx High School of Science where his work earned him a full tuition scholarship to New York University. He planned to pursue engineering in college, but inspired by President Kennedy's eloquent portrait of public services and noble endeavor, he instead pursued a pre-law degree, graduated cum laude, and then set off on a path of legal and public service that led him here today.

He has given back to his community not only through Government service, but through involvement in numerous organizations dedicated to enhancing New York's libraries, museums, and parks,

and expanding educational and legal opportunities for Puerto Ricans and other Hispanics.

He is joined today by his wife, Veronica White, who serves as president and chief executive officer of the New York City Partnership. They have two children, Andrew and Robert, who unfortunately cannot be here today, and I want to welcome Ambassador and Ms. White, and urge his confirmation.

It is also my honor to introduce to the committee, David Norman Hurd, nominated by President Clinton to serve as a judge in the U.S. District Court for the Northern District. He is currently a magistrate for the Northern District, a position to which he was appointed in 1991. During his years of service in the Northern District, Judge Hurd wrote a host of significant opinions, which have earned him respect of advocates and politicians of all ideological stripes.

Indeed, I recently received a petition in support of Judge Hurd's nomination from the Oneida County Board of Legislators. Every member of the board, each of the 19 Republicans and 10 Democrats, signed the petition. I am glad they got to that petition, Mr. Hurd, before Woodstock occurred. They are busy now.

In an accompanying letter, the Chairman, Majority Leader, and Minority Leader wrote jointly, "We want to emphasize our strong bipartisan support for Judge Hurd who we know to be a distinguished jurist and a quality human being."

Prior to his appointment as a magistrate judge, he had an extensive career in private practice in Rome, New York, and he also prosecuted cases as a part-time District Attorney in the Oneida County District Attorney's Office. He is a cum laude graduate of Syracuse University, with distinction from the Order of the Coif. His undergraduate work occurred at Cornell, another fine New York school.

Finally, I would like to introduce Judge Naomi Buchwald. It is with great pleasure I introduce Judge Buchwald. She was nominated by President Clinton to serve as a judge on the U.S. District Court for the Southern District. She served with great distinction as a magistrate judge and chief magistrate judge of the Southern District of New York for almost 19 years. During that time, she has worked on matters ranging from complex corporate and securities litigation to patent and copyright suits, through a broad range of cases involving Federal constitutional issues.

She has served on court committees, bar councils, and associations that are too numerous to list, without further abusing the amount of time we have here.

Suffice it to say that based solely on the substantive work Judge Buchwald has done for the court during the last 2 years, she is eminently qualified to serve as a District Court Judge. She is envied in the Southern District not only because of her keen legal intellect, but also because she has never had a motion on the dreaded 6-month list, the published list of motions that have been pending for more than 6 months.

Judge Buchwald is also known for her ability to settle cases, which is perhaps an overlooked, but certainly vital part of the efficient administration of justice, and not easy with a bunch of New York lawyers in the courtroom.

For these reasons and others, she is held in the highest regard, not just by the New York Bar Magistrate Court, but also by her colleagues on the District Court who I am told are very excited about transferring cases to her, once she is confirmed.

Judge Buchwald's resume prior to becoming a magistrate judge is impressive. She was born in Kingston, NY, in the Hudson Valley, graduated Phi Beta Kappa from Brandeis University and then graduated from Columbia Law School, where she edited the Columbia Journal of Law and Social Problems.

She then worked for 5 years at a New York law firm before joining the U.S. Southern Attorney's Office for the Southern District.

Achievements and accolades besides, Judge Buchwald tells me that she and her husband, Don, also a lawyer, are the proud parents of two children, David and Jennifer. Don, David, and Jennifer are here today. I know my colleagues join in welcoming them with me today, and I also want to acknowledge two of Judge Hurd's family is here, Mary, who teachers at New York State School for the deaf.

Senator LEAHY. Would the Senator from New York just yield for one point.

On Judge Buchwald, I have also received a number of calls from a dear and close friend, a former Chief Judge of the Second Circuit, Jim Oakes, about her, and also about Judge Hurd, urging their speed and consideration. I just wanted to add that Judge Oakes takes a very real concern on these issues and echo the same fine things that the Senator from New York has said.

Senator SCHUMER. I thank my friend and colleague, the Senator from Vermont, for those two endorsements.

I just wanted to mention that Mary Hurd is here, as is Judge Hurd's son, Steve, and we welcome them as well.

The CHAIRMAN. Thank you, Senator.

I might mention that Congressman Sherwood Boehlert has called to express his support for Judge David Hurd as well.

We have Senator Lautenberg here. The vote has begun. I wonder if you folks could go vote and then come back. The trouble is, we have got three votes in a row, as I understand it. So what I am going to try to do is keep this confirmation hearing going, even during those three votes, if we can.

Senator Sessions, if you could go over and vote and then come right back.

Senator Lautenberg, we will be happy to take your statement.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman and Members of the Judiciary Committee.

It is a distinct honor and pleasure today to recommend Judge Maryanne Trump Barry to be a U.S. judge for the Third Circuit, and I want to commend you, Chairman Hatch, for moving forward with this and the other nominations that are before the committee today.

We must ensure that the judiciary is fully staffed so that all citizens will receive prompt justice, and again, I thank you for taking this step to provide that kind of service to our citizens.

I know this committee is familiar with Judge Barry's excellent credentials, and I will try to keep my remarks brief.

I had the honor of presenting her to this committee after her nomination by President Reagan in 1983. It was the first time that I had a chance to present one of our distinguished persons from New Jersey, and since that time, she has compiled an impressive record on the District Court, become a nationally recognized expert on a wide range of criminal and civil law matters.

Her knowledge of criminal law led Chief Justice Rehnquist to appoint her to chair the Committee on Criminal Law of the Judiciary Conference of the United States. It was a position that she held from 1993 to 1996, a testimony to her outstanding credentials.

Additionally, the Federal Judiciary Center asked her to make an instructional videotape called "How to Try a Complex Criminal Case," and that tape is being played for all new District Court Judges at their orientation seminars.

In the area of civil law, Judge Barry has issued many important rulings, including a decision that Blue Cross was required to pay for a bone marrow transplant for a terminally ill young girl who would have certainly died without the procedure.

While her judicial colleagues hold her in high regard, Judge Barry is also well respected by the many attorneys who have appeared before her. I have spoken to them, and the praise was universal. They praised her command of the law, her professional demeanor, and her razor-sharp wit, which she does not hesitate to use when cutting short a particularly loquacious presentation.

The CHAIRMAN. A little bit like yours, I suppose.

Senator LAUTENBERG. I would like to use her as a model, sir, undoubtedly.

Her years in prosecuting cases as an Assistant U.S. Attorney led her to her appreciation of fair and considerate treatment of all members of the Bar.

As a result of her tenure in the U.S. Attorney's Office, her 16 years of outstanding service at the District Court level, and her legal expertise, Judge Barry is well prepared for the elevation to the Circuit Court. In fact, she has already sat by designation on the Court of Appeals and written several opinions.

Mr. Chairman and Members of the Committee, I highly recommend Judge Barry, and I know that you will help move her nomination through the full Senate. As you know, the Third Circuit is currently facing a judicial emergency. The appointment of Judge Barry will help relieve that situation to further address the crisis.

Mr. Chairman, I hope that the committee will soon take up the nomination of another excellent candidate for the Third Circuit, Judge Julio Fuentes, and a District Court opening that Faith Hochberg, U.S. attorney, has been recommended for.

I thank you, Mr. Chairman and all the Members of the committee, for your time and consideration. We are pleased and lucky to have someone of Judge Barry's talent with us, and I thank you.

The CHAIRMAN. Thank you, Senator Lautenberg. We appreciate it, and it is very high praise indeed. We appreciate it.

Senator SCHUMER. Before we break, I would thank Senator Lautenberg for his statement and ask unanimous consent that Senator

Moynihan's statements on behalf of our New York Judges be added.

The CHAIRMAN. Without objection.

[The prepared statements of Senator Moynihan follow:]

PREPARED STATEMENT OF SENATOR DANIEL PATRICK MOYNIHAN ON BEHALF OF NAOMI BUCHWALD

It is a great pleasure, Mr. Chairman, to introduce to this Committee Naomi Reice Buchwald, who has been nominated to fill a vacancy on the United States District Court for the Southern District of New York. Hailing from Kingston, New York, Judge Buchwald is a Phi Beta Kappa graduate of Brandeis University and a cum laude graduate of Columbia University's law school. While at Columbia, she was an editor of the Columbia Journal of Law and Social Problems. After graduation Judge Buchwald worked in private practice and then in the United States Attorney's Office for the Southern District of New York where she became Chief of the Civil Division.

For the past 19 years, Judge Buchwald has sat as a magistrate judge for the Southern District of New York, the same court to which she has now been nominated. During these nearly two decades, Judge Buchwald has presided over a wide array of civil and criminal matters and earned an outstanding reputation from both the bench and bar for her knowledge of the law, her fairness, her temperament, and her fundamental decency. Because of her extensive experience as a magistrate judge for the Southern District of New York, she is an expert on the Court's local rules and procedures, no small thing in ruling on increasingly complex matters arising in this very busy judicial district.

An eminently seasoned and distinguished nominee, Judge Buchwald would make a splendid United States district court judge.

PREPARED STATEMENT OF SENATOR DANIEL P. MOYNIHAN ON BEHALF OF DAVID NORMAN HURD

It is a very special pleasure, Mr. Chairman, to introduce to this Committee David Norman Hurd, who has been nominated to be a judge on the United States District Court for the Northern District of New York. Raised in the Village of Hancock, New York, Judge Hurd took his undergraduate degree at Cornell University. He was graduated cum laude, with the distinction of Order of the Coif, from Syracuse University's school of law. A veteran and skilled private practitioner, who tried both civil and criminal cases for more than twenty-five years, Judge Hurd in 1991 became a magistrate judge for the Northern District of New York.

Over the last 8 years, Judge Hurd has presided over a host of complicated criminal and civil matters. Highly regarded by both the bench and bar, Judge Hurd's experience has provided him with a complete familiarity with the practices and rules of the court to which he has now been nominated.

Judge Hurd will be a superb addition to the United States District Court for the Northern District of New York.

PREPARED STATEMENT OF SENATOR DANIEL P. MOYNIHAN ON BEHALF OF VICTOR MARRERO

It is with great pleasure that I introduce to this Committee Victor Marrero, the United States Ambassador to the Organization of American States who comes before you as the nominee for the United States District Court for the Southern District of New York. Born in Puerto Rico, Ambassador Marrero resides in New York City. He was graduated cum laude from New York University and earned his law degree from Yale Law School, where he was elected Editor of the Yale Law Journal. He is a Fulbright Scholar and a member of Phi Beta Kappa. He served as a visiting Lecturer at the law schools at Yale and Columbia.

Twice an appointee of President Clinton, Ambassador Marrero has served for the past year and a half as the U.S. Permanent Representative to the Organization of American States, and previously for four years as the Representative of the United States on the Economic and Social Council of the United Nations. Ambassador Marrero brought to his diplomatic posts extensive experience from his private law practice and his public service positions at the Federal, State, and local levels. He will bring this same depth of experience with him to the District Court in the Southern District of New York. I thank the Committee for allowing me the honor of introducing such a distinguished New Yorker.

The CHAIRMAN. We will also put the statement of Senator Patrick Leahy into the record at the appropriate beginning of the proceedings.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

In the last six weeks the Judiciary Committee has held three hearings for judicial nominees, the Committee has considered and reported 14 judicial nominees to the Senate.

The Senate has proceeded to confirm seven of those nominees and brought the total number of judges confirmed this year to nine. The Senate has before it ready for action the nominations of Marsha Berzon to the Ninth Circuit, of Justice Ronnie L. White to the District Court in Missouri and five other qualified nominees.

Later today the Judiciary Committee has the opportunity to vote again on the nomination of Judge Richard Paez to the Ninth Circuit. I have had occasion to speak often of this nomination during its pendency before the Senate of the last three and one-half years. I trust that the Committee will again vote to report the nomination to the Senate, as we did last March. I hope that the Senate will, at long last, fulfill its duty and vote on Judge Paez' nomination without additional delay and obstruction.

Of course, by this time last year the Committee had held eight confirmation hearings for judicial nominees, 36 nominations had been reported to the Senate and 33 judges had been confirmed. We still remain well behind the pace of last year, but over the last few weeks we have been making progress.

We have only nine weeks in session in which the Senate is scheduled to be in session all year. I recall that in 1998, the Senate confirmed 32 judges in that amount of time at the end of that session. And in 1997, the Senate confirmed 27 judges in that amount of time. I hope that we can do better in the time remaining to us this year.

I know that the Chairman shares my view that each nominee needs to be treated fairly. For the last several years I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

In spite of our efforts last year in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are, again, approximately 70 and the vacancies gap is not being closed. We have more federal judicial vacancies extending longer and affecting more people. Judicial vacancies now stands at over 8 percent of the federal judiciary (68/843). If one considers the additional judges recommended by the judicial conference, the vacancies rate would be over 15 percent.

Nominees deserve to be treated with dignity and dispatch—not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

Certainly no President has consulted more closely with Senators of the other party on judicial nominations. The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed without justification for to long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

I thank the Senators who have come to introduce these nominees to the Committee. I look forward to the Committee completing its consideration of all of the nominations included in today's hearing for District Court vacancies in New York, California and Utah and vacancies on the Ninth and Third Circuit.

The CHAIRMAN. I think what we are going to do is swear in the two Circuit Court Judges and have you introduce your families, and then we are going to have to go vote. So, if the two Circuit Court Judges will come forward.

Judge Barry and the Honorable Ray Fisher, would you both raise your hands. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FISHER. I do.

Judge BARRY. I do.

The CHAIRMAN. Thank you.

If we could, rather quickly, Judge Barry, would you mind introducing anybody you have with you here today.

TESTIMONY OF HON. MARYANNE TRUMP BARRY, OF NEW JERSEY, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge BARRY. Yes. Thank you, Mr. Chairman. Thank you, Members of the Committee, for the opportunity to appear before you today.

My husband and my son wanted very much to be here. My son is quite ill, and my son is being operated on as we speak. I am not totally bereft of family, though. My nephew, Donald Trump, Jr., is here. Unfortunately, Senator Schumer, he is going to Wharton, about to graduate from the great State of Pennsylvania, and my law clerks, Jennifer Rochon, Sarah Coyne, and a former law clerk, Cori Flam, who now works on the House side for the Minority Counsel, also a friend, Nadia Stone.

I thank you again for the opportunity to appear before you. I hope it is also a pleasure.

The CHAIRMAN. We are delighted to have you here, and I think it will be a pleasure. You never know about this committee, but I think it will be fine.

Mr. Fisher, would you care to introduce your family?

TESTIMONY OF RAYMOND C. FISHER, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. FISHER. Mr. Chairman, I want to thank you again, for all of your courtesies, Senator Schumer, and I would like to introduce my wife, Nancy Fisher.

The CHAIRMAN. It is good to see you again.

Mr. FISHER. As you know, she is a public high school teacher. My son, Jeff, is from California, also a public high school teacher, and his daughter and our granddaughter, Megan.

The CHAIRMAN. Megan, you look pretty good here.

Mr. FISHER. Coming the other way behind is my daughter, an attorney, Amy Ahlers, and a very sleepy Madeleine, our granddaughter.

The CHAIRMAN. Madeleine looks good.

Mr. FISHER. My sister, Debbie Fisher from Oregon, and her son and my nephew, Joaquin.

Unfortunately, Rose Fisher, Jeff's wife, and our other grandson are back in California, and Amy's husband, James, is also back in California, but are here with us in spirit.

Thank you.

The CHAIRMAN. We are happy to have them all. We are happy to welcome all of you here, and we are honored to have the two of you before this committee.

I think what we are going to do, and we do not have much choice, we have the reconciliation bill up, which is the tax bill, all day today, and we are going to have vote after vote after vote, but I think when we get these three votes over with, I think we will have a period of time because Senator Gramm is going to bring his amendment up and I suspect that will cause quite a furor on the floor for a while. We should be able to finish this hearing after we get back, but I think rather than disconnect this hearing, we will recess until we can get these three votes over, and we will come back as soon as they are over. We will start with the two of you and then go to our five District Court nominees.

So, with that, we will recess until we can get back.

[Recess taken from 9:50 a.m. to 10:41 a.m.]

The CHAIRMAN. I apologize for the delays here, but that is just the way life is around this place. So we are happy to have both of you here. We are pleased with your patience, and it stands you in good stead to be circuit judges to have this kind of patience.

Do either of you want to make a statement? Judge Barry.

Judge BARRY. Just to repeat that I am so grateful for the opportunity to be here. And I was remiss when I spoke earlier, Mr. Chairman, not to have thanked Senator Torricelli, who has been so helpful to me in every way, for his kind remarks this morning, and Senator Lautenberg and, of course, Senator Specter from Pennsylvania. And I would be very remiss if I did not put that on the record.

The CHAIRMAN. You bet. We are happy to have you do it.

Mr. Fisher.

Mr. FISHER. Mr. Chairman, equally, I thank the Chair and the committee for its attention to this matter, and am happy to be patient, not a problem. And I too would like to thank, of course, Senator Feinstein, Senator Boxer, and Representative Tom Campbell for their kind remarks.

The CHAIRMAN. Well, thank you.

QUESTIONING BY SENATOR HATCH

Now, Judge Barry, as a former assistant U.S. attorney and as a Federal judge, you have had substantial experience in criminal law. Indeed, you chaired the Committee on Criminal Law for the Judicial Conference of the United States. In that position, you opposed the mandatory minimum sentences. As an appellate judge, will you apply mandatory minimum sentences to convicted criminals even if you personally disagree with the statutory minimum?

Judge BARRY. Absolutely. We apply the law whether or not we agree with the law. That is our job. And, of course, when I spoke and wrote against mandatory minimum sentences, it was as a representative of the Judicial Conference.

The CHAIRMAN. Well, you have every right to do that, and I think judges should speak out. If they think that the laws we pass are not working well, they ought to speak out. Frankly, I have some qualms about the mandatory minimum sentences. I am a supporter of them, but I also want them to work, and work fairly. And in some cases they don't, and we have got to try and find out how to resolve those. So if we had more help from Federal judges on this committee, we could do even better.

Mr. Fisher, when you served on the Los Angeles Police Commission, you had to deal with the relationship between police officers and the citizens they deal with. One of the most controversial areas of police action involves searches and seizures under the Fourth and 14th Amendments. In your view, what are the most important considerations for an appellate judge to consider in reviewing the constitutionality of such a search, or any search?

Mr. FISHER. Senator, the search law is governed, of course, by a long body of Supreme Court law. And, in fact, in the last term there were a number of decisions of the Court dealing with the scope of the Fourth Amendment. As an appellate judge on the Ninth Circuit, if I were to be confirmed, I would, of course, be bound by and follow those decisions.

They tend to be—the cases tend to be fact-based, and my review of any such appeal would, of course, take into account the specific facts as found by the district court, and would, of course, also abide by the Supreme Court precedent.

The CHAIRMAN. Now, for both of you, the Founding Fathers believed that the separation of powers in a government was a critical provision protecting the liberty of the people. Thus, they separated the legislative, executive and judicial branches into three different branches of government, the legislative power being the power to balance moral, economic and political considerations and to make law, the judicial power being the power only to interpret the laws made by Congress and by the people.

Now, in your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people, or to rebalance the competing moral, economic and political considerations?

We will start with you, Mr. Fisher.

Mr. FISHER. I do not think that is the proper role of a judge to rebalance or to bring his or her personal views to the matter. It is to follow the provisions of Article III, which is a limited review authority, and to be bound, as I have indicated earlier, by the applicable precedents of the Supreme Court.

The CHAIRMAN. Judge Barry.

Judge BARRY. I agree.

The CHAIRMAN. OK. Under what circumstances do you believe it appropriate for a Federal judge to declare a statute unconstitutional? Judge Barry.

Judge BARRY. You start with a presumption of constitutionality, and you start with another provision that is well-known in the law that you try to avoid reaching a constitutional issue if there is another basis on which to decide the case.

I would be very conservative, very careful before declaring an act unconstitutional. One must look at the Constitution itself, first and foremost. What does it say? One must look at the intent of the Framers. One must look at Supreme Court precedent and precedent from one's own circuit, which binds.

Then one would go to analogous cases from other circuits, if there is nothing on point, and to legislative history. How did Congress think that this statute should be interpreted? It is a long process, it is a difficult process, and it is one we would approach with much trepidation.

The CHAIRMAN. But what would you do if you believed in your heart that the Supreme Court or the circuit court had erred in rendering a decision—seriously erred—let's put it that way—seriously erred in rendering a decision? Would you nevertheless apply the decision on your own best judgment of the merits? You could take, for example, the Supreme Court's recent decision in *City of Boerne* v. *Flores,* where the Court struck down the Religious Freedom Restoration Act, in part.

Judge BARRY. If I agreed with that decision or I disagreed with it, it is an irrelevancy. I would apply binding precedent.

The CHAIRMAN. Mr. Fisher.

Mr. FISHER. I couldn't add anything more eloquent than Judge Barry. I agree with her statement on both counts.

The CHAIRMAN. You both have indicated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal circuit court of appeals in your circuit. There may be times, however, when you will be faced with cases of first impression.

Now, let me ask you what principles will guide the two of you, or you individually, and what methods would you employ in deciding cases of first impression. We will start with you, Mr. Fisher.

Mr. FISHER. Senator, roughly the same principles Judge Barry articulated in the prior answer, although in cases of first of impression, first of all, I would want to be sure, really, after careful analysis it really was truly one of first impression. I think it is important to look at the statute involved, give it the presumption of constitutionality that it is due, certainly look for whatever analogous precedents—if it is not directly on point, whatever analogous precedents would be guiding us from the Supreme Court. That would be the first place to look, and I think the most persuasive place to look.

The CHAIRMAN. And I think you have basically answered that, Judge Barry.

Let me just ask you this. In addressing the cases that deal with the proper role of the States and the National Government in our system of federalism, it is important for an appellate judge to follow the text and history of the Constitution, as well as the precedents of the Supreme Court.

For example, Article I, section 8, of the Constitution enumerates several limited powers of Congress, and the Tenth Amendment reserves powers not granted to the Federal Government to the States or to the people, as you know. In your view, what role do the States have in our constitutional form of Government?

Judge BARRY. The States have a very broad role. And indeed in the criminal context, which you flattered me earlier alluding to my background, the States are the bastion of law enforcement. The people reside in the States, the people are in their local communities. The States have broad powers. The Federal Government has much more limited powers.

The CHAIRMAN. All right. Mr. Fisher, please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the Equal Protection Clause of the 14th Amendment and the Federal civil rights laws of the use of race-, gender- or national origin-based preferences in such areas

as employment decisions—that would be hiring, promotion or layoffs—college admissions and scholarship awards and, of course, the awarding of government contracts.

Mr. FISHER. Well, Senator, the *Adarand* decision is the most recent and binding precedent of the Supreme Court. It has articulated that in order for any kind of racial preference to be granted which it did not rule out absolutely but subjected it to the strictest scrutiny of the law, and that there must be a demonstrated compelling interest. And if there is found an exceptional case, it must be narrowly tailored to meet the specific instances involved.

So it is a very, very, very strict standard and that is the binding precedent that, of course, if I am confirmed would govern any decision I might make.

The CHAIRMAN. Judge Barry, are you basically in agreement with that?

Judge BARRY. It is the toughest standard and I would apply it.

The CHAIRMAN. Now, with regard to capital punishment, do either of you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge BARRY. No, and Supreme Court precedent would be followed.

Mr. FISHER. And I would answer the same.

The CHAIRMAN. Let me turn to Senator Smith for any questions he may have.

Senator SMITH. Thank you, Mr. Chairman. Good morning.

Mr. FISHER. Good morning.

Judge BARRY. Good morning.

QUESTIONING BY SENATOR SMITH

Senator SMITH. I have been frustrated over the years that I think oftentimes when people come before the committees and are asked questions about various issues, some of them controversial, it seems like the ones who don't answer them get confirmed and the ones who do don't. So I have some questions that I would appreciate you doing the best you can to answer them.

I didn't hear—I came in late. Did Senator Hatch ask you if you believed in the constitutionality of the death penalty? If he didn't, would each of you answer that question?

Mr. FISHER. *Gregg* v. *Georgia* has held that it is constitutional. I accept that.

Judge BARRY. My answer is the same, Senator.

Senator SMITH. Thank you. If a judge on an inferior court other than the Supreme Court concluded that a Supreme Court precedent was unconstitutional, are there any circumstances where you could refuse to apply that precedent in a case before you?

Judge BARRY. I will answer no. I would apply binding precedent. I am required to do so, whether or not I agree with it.

Senator SMITH. So you have to apply the precedent, regardless?

Judge BARRY. Yes.

Mr. FISHER. My answer would be the same, Senator.

Senator SMITH. What about if you look at—in the *Dred Scott* case, for example, in which there was no precedent because it didn't get—it was overturned, I believe, by the 14th Amendment,

but in the *Dred Scott* case where a black man was denied the opportunity to sue in Federal court because he was property, and that decision was handed down by Chief Justice Tawney in a majority opinion, if that case had come before the Court and had been determined that that precedent was allowed to stand, you don't believe there would be any justification to break precedent in that case?

Mr. FISHER. Senator, as a lower inferior court judge, whether one agrees or disagrees with the Supreme Court decision, we are bound to follow that. It is up to the Supreme Court to decide when, if ever, to overrule its prior decisions.

Senator SMITH. This is not 1860, and I understand that and I am not trying to be difficult here, but I want to understand something. So if you were on a lower court in 1867 or sometime post-1867 after the *Dred Scott* case was handed down, you would have to rule, because of precedent, that a black man could not sue in your court because he was property. Is that correct?

Mr. FISHER. If that is the final determination of the Supreme Court, yes. It is up to the Supreme Court to reverse that decision. It is not within the power of a lower Federal court to ignore binding Supreme Court precedent.

Senator SMITH. Do you agree with that?

Judge BARRY. Yes, I do, Senator.

Senator SMITH. Your conscience wouldn't dictate to you that you should refuse to issue such a decision and take your consequences, such as the possibility of impeachment or removal?

Mr. FISHER. Senator, I don't think that that would be the appropriate remedy for a judge. I think judges can articulate their disagreement perhaps in exceptional circumstances by writing their concerns, but they must apply the law under our form of Government and set forth by the Supreme Court. That is the mechanism we have.

Senator SMITH. And I understand that. I understand what you mean by the law, and you are correct on the precedent. But I think if you look at *Plessy* v. *Ferguson,* which was overturned by *Brown* v. *Board of Education,* here is a case where segregation was overturned, and in another case where we already talked about the *Dred Scott* case—these are two huge issues, slavery and the right to sue as a black person who was a slave, and also the issue of segregation where that segregation, separate but equal, was overturned.

And it seems to me that to sit—I have never been a judge, but to sit on a court and have to uphold that kind of abhorrent precedent would be something that I couldn't do. I would resign or vote the other way and take my consequences. Neither one of you would do that in that particular case?

The CHAIRMAN. Of course, there is another alternative, and that is you could write a blistering disagreeable opinion expressing your viewpoint.

Would you consider doing that?

Mr. FISHER. Well, as I indicated in my prior answer, that would be the appropriate——

The CHAIRMAN. While you uphold the Supreme Court, which you are bound to do.

Mr. FISHER. So, indeed, the evolution from *Plessy* to *Brown* v. *Board of Education* indicates that the Supreme Court itself did reconsider it after a period of time.

Senator SMITH. So you would be willing to at least write a dissenting opinion, but not dissent because of the precedent?

Mr. FISHER. I would uphold the law. I would not write a dissenting opinion. Yes, I would write an expression of my concern, but again I would only do that in exceptional circumstances, Senator.

Judge BARRY. And I would agree with that.

Senator SMITH. So I guess what you are saying to me is there are no circumstances where you would vote to overrule precedent.

Judge BARRY. Not as a lower court judge.

Senator SMITH. I understand you are not on the Supreme Court here. I understand, but I mean there are precedents.

You answered the question when Senator Hatch asked you if you had any personal, moral or religious qualms about the death penalty. That is a personal question and you answered, no, you did not. Let me ask you a personal question. In your mind, outside the law, strictly personal, is an unborn child a human being?

Judge BARRY. If I answered a personal opinion on the death penalty whether I believe in it or I don't, I didn't mean to speak personally. I am bound to apply the death penalty, were I to remain on the district court or to consider cases on the appellate court in which it has been applied, and I am bound by the precedents of the Supreme Court.

My personal opinions on any subject are really not relevant, not important. And to the extent I might inject them, I am acting improperly as either a district court judge or as an appellate court judge.

Senator SMITH. Well, that is right, but I am asking you for your personal opinion on this question. Do you believe that an unborn child at any stage of the pregnancy is a human being?

Judge BARRY. *Casey* is the law that I would look to. If I had a personal opinion—and I am not suggesting that I do—it is irrelevant because I must look to the law which binds me.

Mr. FISHER. I think, Senator, I would adopt that. I think the purposes of a Federal judge in my position sitting on the—if I were confirmed to be on the court of appeals, I would be bound by the Supreme Court precedent which has addressed those issues from a legal standpoint. That is what I would be concerned about. I don't think in that or other matters I should be injecting my personal views into the process.

Senator SMITH. If you were a Supreme Court justice, I am assuming you would agree that a Supreme Court justice, because it is the Supreme Court, could break precedent and vote to overturn a decision such as *Plessy* v. *Ferguson* or *Roe* v. *Wade,* correct?

Mr. FISHER. The Supreme Court does have that authority and has articulated fairly restrictive grounds on which it will address prior precedent and set forth those criteria, yes.

Judge BARRY. Yes, because stare decisis is a very important principle in our system of jurisprudence.

Senator SMITH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

We will now turn to Senator Sessions.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman.

Ms. Barry, I would just ask a few questions. You got a couple of pluses in my book by being a long-time assistant U.S. attorney, first assistant, executive assistant, chief of the appeals division. I think that is a good background for the Federal court.

I guess you practiced full-time in Federal court for most of your career. Is that correct?

Judge BARRY. Yes, Senator.

Senator SESSIONS. Some would say that would be one side of the coin, but I think your experience as a district judge, I am sure, has given you a breadth of experience that would assist you on the court of appeals.

I notice that you have written—and I am not sure quite the details of it—questioning the Sentencing Guidelines and mandatory minimums. What have you written to the Congress with regard to those issues and how do you feel about them?

Judge BARRY. All right. I have written to the Congress as Chair of the Criminal Law Committee of the Judicial Conference of the United States, and I have written on occasion as to mandatory minimums and the Sentencing Guidelines articulating the Judicial Conference's position.

I have always said when I wrote those letters—and basically they are written with reference to legislation that Congress is considering—I have always said that it is the position of the Judicial Conference that it is Congress that has the power and the authority to decide sentencing policy and to decide sentencing policy questions, and to determine whether or not it wishes to enact mandatory minimum sentences.

But we have opposed as a longstanding matter mandatory minimums for primarily two reasons. Judges agree with Congress that drugs and violent crime are seriously hurting this society, and they agree that they must be strongly punished. But the mandatory minimums have operated unfairly in quite a number of cases, very unfairly.

And we look at the mule, for example, bringing drugs in from one of the drug capitals of the world. It is fortuitous whether he is bringing in 100 grams, 1,000 grams, 4 kilos, but it is the amount of the drugs under the mandatory minimum that sets the sentence, with no mitigating factors to be considered.

And the second reason that the Conference has traditionally opposed mandatory minimums, or at least since the Guidelines have come into effect, is that the Guidelines work at cross-purposes with the mandatory minimums. They are two separate sentencing schemes, both set up by Congress, and they do not operate gently together.

One is an individualized, if you will, form of sentencing. The other is more a charge-based offense. And the thing that is quite interesting is that when one considers for a mandatory minimum defendant what his guideline range would be, interestingly in the majority of cases it is right at about what the mandatory minimum sentence would be. But there is the ability to then put into play,

were there no mandatory minimum sentence, the considerations that Congress believed important when it enacted the Sentencing Guidelines.

That having been said, whether I have a personal feeling about the mandatory minimums, whether I don't, I will always apply them when the cases come to me.

Senator SESSIONS. Well, I think you made just about as good a statement of the opposing view as could be made. I think it is worth discussing. One reason the Guidelines are consistent with the minimum mandatories, I believe, is because they had to accommodate to the minimum mandatories and have tried to be consistent with them, which the Sentencing Commission should.

But in the long run I believe that a wise application of minimum mandatories and Sentencing Guidelines is beneficial for consistency of sentencing, and also to send a clear message. So I would disagree with you on the policy, but the most important thing is that you would follow the law as it is set forth by the Congress.

I remember when the things were being considered, and I attended an Eleventh Circuit, Judge Tjoflat, who was on the commission at the time, was asked some questions by the judges, some of whom were aghast that their freedom to sentence any way they wanted to—I mean, I have gone in with drug cases in which there would be probation or 25 years for virtually the same offense, depending on the judge. And he said, gentlemen, the truth is the Congress doesn't trust you to sentence. I don't know if that was the motivating factor, but perhaps it was.

Mr. Fisher, you clerked for Justice Brennan, and I think you have previously been asked about the death penalty and Justice Brennan dissented on all death penalty cases. I don't know if he did that when you clerked for him. Did he?

Mr. FISHER. No, he had not arrived at that view at the time that I was on the Court.

Senator SESSIONS. But before he left the Court, for a number of years he and Justice Marshall and others—and they did so under the view that the Eighth Amendment, cruel and unusual punishment—that the death penalty is cruel and unusual punishment. And that has been rejected by the Supreme Court today and I don't think there is anyone on there that still adheres to that view.

Let me ask you, is that your view of the Constitution personally?

Mr. FISHER. My view, Senator, is that, as you indicated, the Supreme Court has ruled that the death penalty is constitutional. As a lower appellate court judge, that is the law that I am governed by. I don't want in my judicial career, should I be fortunate enough to have one, to inject my personal opinions into whether or not I follow the law. I believe that the precedent of the Supreme Court is binding and that is what my function is.

Senator SESSIONS. Well, you will have a lot of decisions that come up that won't be absolutely clear under prior precedent. I just want to know how you think about this subject because I would like for you to say what you—you are familiar with that position of his. You are familiar that the Constitution within itself refers to taking life with due process, capital crimes which are death penalty cases.

I think it was clear that the Constitution, when adopted, contemplated that—and every State had a death penalty at that time. So I guess my question to you is do you believe that the Cruel and Unusual Punishment Clause—personally, do you agree with Justice Brennan's view that it makes the death penalty unconstitutional?

Mr. FISHER. I don't think I agree with it, Senator, but I have not made it my work to go back and reanalyze his position. I am, as a potential Federal judge, keenly aware that the Supreme Court has ruled in *Gregg* v. *Georgia,* and I would apply that precedent. That would be my duty.

Senator SESSIONS. Well, you don't think you agree with it. Why would you be in disagreement with Justice Brennan on that? How would you analyze it?

Mr. FISHER. I don't—let me be clear. Justice Brennan arrived, as did Justice Marshall, at a view that was singular to the two of them. They fought that battle in the Supreme Court, as I understand it. The Supreme Court has resolved that disagreement. The law of the land, as declared by the Supreme Court as set forth in *Gregg* v. *Georgia,* is the binding law of the land.

Senator SESSIONS. Well, I am aware of that.

Mr. FISHER. I know you are.

Senator SESSIONS. I am aware of that. That was flatly rejected, and it never was accepted by a majority because it was outside of any logic that I could see based on a plain reading of the Constitution. Do you have any difficulty with the statement I just made?

Mr. FISHER. I do not.

Senator SESSIONS. Mr. Chairman, my time is expired. Thank you very much.

The CHAIRMAN. Thank you. I appreciate.

Senator SESSIONS. Let me just say both of these nominees have extraordinary academic backgrounds and seem to be men and women of integrity and ability, and I am pleased to see them nominated.

The CHAIRMAN. Well, thank you. I am, likewise.

I have to say that it is important for people to understand that judicial activism—that is, judges making laws rather than interpreting the laws—is wrong, whether it comes from the left side of the table or the right side of the table. You know, a lot of people don't realize that conservative judicial activism is just as wrong as liberal judicial activism.

In particular, Mr. Fisher, on the Ninth Circuit Court of Appeals, as you know, it is very often reversed by the Supreme Court, more than 75 percent of the time, and almost 100 percent last year and some other preceding years as well. One reason that happens is because of judicial activism, judicial activism primarily from the left. But I have to say to you that judicial activism from the right is equally heinous because if judges don't recognize the role of judging, then our Constitution won't last.

You both have answered these questions, I think, very fairly, and that is that you are going to abide by the precedents of the Court. Even if you agree or disagree with them, you are going to abide by those precedents, and that is all you can do as a lower court judge.

Senator SMITH. Mr. Chairman, I would just make a point on that, and I understand that and I respect that you both have to say that. But precedents on the Supreme Court are set on the basis of people's personal views. Many times, that has happened.

For example, prior to *Roe* v. *Wade,* if I asked you whether or not there was a constitutional right to abortion, what would you say? There is no precedent here now, so I am asking was there a constitutional right to abortion prior to 1973 when the precedent was set.

The CHAIRMAN. As much as I agree with your position on that, that is not a fair question to these two nominees here because regardless of what happened pre-1973, they have to abide by what has happened post-1973 and the current precedents that the Supreme Court has.

Senator SMITH. Mr. Chairman, I understand that, but my point is that precedent is set because—Senator Sessions just mentioned the case where a justice's personal views on the death penalty impacted his decisions in setting precedent, if his view had prevailed, which it did not. That is all I am getting at.

I am not trying to have you pre-judge a case, and I understand you can't do that, but it is difficult for us in the advise and consent role if we can't get into your minds a little bit. You could very well be a Supreme Court justice in the future, and so I am just trying to understand where the thinking comes here.

Precedent is one thing, but I don't think you can always separate—when you are setting the precedent as a Supreme Court justice, should you be a Supreme Court justice, I don't think you can always separate your personal views from the law because you are establishing the law with that precedent. That is the point that I am making.

The CHAIRMAN. If I could just add, I think those are interesting comments. I have to say that judges, if they don't abide by the rule of law, then they shouldn't be on the bench, especially lower court judges, and especially circuit court judges. I mean, this is the closest thing to the Supreme Court, and the circuit courts decide thousands and thousands of very important cases that the Supreme Court is never going to decide. So I don't know how you could have answered any differently than you did.

Again, I would just caution both of you that I have seen terrific liberal circuit judges and I have seen lousy ones. And I have seen terrific conservative circuit judges and I have seen lousy ones. The key is do you understand the role of judging and will you apply the most honorable, honest approach that you possibly can to the cases that come before you. I will tell you one thing, I have no doubt that both of you will do that, and so we strongly support you and we will get you out of this committee as soon as we possibly can.

Mr. FISHER. Thank you.

The CHAIRMAN. We think both of you have led very distinguished careers and we are honored to have both of you with us today. So with that, we may put you on—in fact, we may put all the judges on today's judiciary markup. And if we can, we will try to get you out and through the floor as quickly as we can because you are excellent people and we are honored to have you here.

Senator SESSIONS. Mr. Chairman, we do have a problem with the Ninth Circuit and there is some real genuine concern about that.

The CHAIRMAN. And I think that is right.

Senator SESSIONS. And Mr. Fisher is, I guess, the third in line on that. I am not sure that the President understands the need of moving that circuit into the mainstream, and until we get some sort of accord from that we are going to have controversy over the Ninth Circuit nominees.

The CHAIRMAN. And rightly so.

Senator SESSIONS. I have made my position clear on it, and I appreciate your position, but it is an unfortunate circumstance at this point in time.

The CHAIRMAN. Well, it is, and some of our people feel very deeply about that and I do, also. I just don't believe that we should hold up good nominees or vote against them just because it is the Ninth Circuit.

We believe, Mr. Fisher, you are going to add something to that circuit.

Mr. FISHER. I would hope so and I——

The CHAIRMAN. You understand the role of judging and you have expressed that very satisfactorily to me, and I hope that you will be a force for good there because that circuit is hurting a lot of liberal nominees because of the judicial activism that goes on there, and I say unjustified judicial activism, not that it is ever justified, but let's just make it even more clear.

Mr. FISHER. I am aware of the Senator's concerns.

The CHAIRMAN. Well, we are counting on you helping to restore that court to the dignity that it should have and that it does not have today because of some of these judges who basically ignore the law.

So we thank both of you for being here. We will do the best we can to get you out of the committee as soon as we can.

Judge BARRY. Thank you, Mr. Chairman.

Mr. FISHER. Thank you. Thank you all.

The CHAIRMAN. Thank you.

[The questionnaires of Judge Barry and Mr. Fisher are retained in Committee files.]

The CHAIRMAN. If we can have the district court nominees come to the table, we are pleased to have the following nominees for the district courts with us today: Judge Naomi Reice Buchwald, of New York, to be U.S. District Judge for the Southern District of New York; Judge David N. Hurd, of New York, to be U.S. District Judge for the Northern District of New York; M. James Lorenz, of California, to be U.S. District Judge for the Southern District of California; Victor Marrero, of New York, to be U.S. District Judge for the Southern District of New York; and Brian Theodore Stewart, of Utah, to be U.S. District Judge for the District of Utah.

If you would all raise your hands, do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth so help you God?

Judge BUCHWALD. I do.

Judge HURD. I do.

Mr. LORENZ. I do.

Mr. MARRERO. I do.

Mr. STEWART. I do.

The CHAIRMAN. Thank you. Please be seated.

Let me just start with Judge Buchwald and go across the table, and if you have any short statement to give—and the shorter the better because we are going to run into votes here again and I would like to finish this hearing this morning—please make that, and then introduce those who are with you here today. We would be happy to meet them and recognize them.

Judge Buchwald.

TESTIMONY OF HON. NAOMI REICE BUCHWALD, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Judge BUCHWALD. Senator Hatch, I would just like to say that I am honored to be here this morning, and I want to express my gratitude to Senator Moynihan and to his judicial selection panel, who is represented here this morning by Mr. Richard Eaton, and to Senators Schumer and Leahy for speaking on my behalf this morning.

I would also like to say that I am delighted to be joined this morning by my husband, Don, and our two children.

The CHAIRMAN. Can they stand and stay standing? I want to see you all, people. We judge the judge nominee a lot by the family.

Judge BUCHWALD. Then I shouldn't have any trouble.

The CHAIRMAN. Then you shouldn't have any trouble. I can see that.

Judge BUCHWALD. David and Jennifer are a constant source of pride and joy to us. I am also pleased that my brother-in-law, Todd Buchwald, is here, as well as one of my future law clerks, Chris Giampapa from the class of 2000.

The CHAIRMAN. OK, good to have all of you here.

Judge Hurd.

TESTIMONY OF HON. DAVID N. HURD, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

Judge HURD. Mr. Chairman, I thank the committee for inviting me to be here today, and I thank Senator Moynihan for his recommendation, the kind words from Senator Schumer and Senator Leahy, and also that Congressman Boehlert contacted you.

The CHAIRMAN. Yes, he did.

Judge HURD. That is very much appreciated.

I would also like to introduce my wife, Connie, and my son, Steve, who are here today. Steve is an attorney from New York City. My other three children were not able to come. One is an attorney in Albany, the other teaches English at the prison system in New York State, and my third daughter is in Virginia and works for the Fox Family Television Network.

The CHAIRMAN. It sounds like a great family. We are happy to have you all here.

Mr. Lorenz.

TESTIMONY OF M. JAMES LORENZ, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Mr. LORENZ. Mr. Chairman, it is a pleasure to be here today. I want to thank Senator Boxer and Senator Feinstein for the kind words. Because of the short time frame that I had to jump on a plane, unfortunately my wife, Marsha, and my son, Mike, and daughter, Christine, could not be here today, but they are here in spirit.

Thank you very much.

The CHAIRMAN. Well, thank you. We are delighted to have you here.

Ambassador Marrero, we are happy to have you here.

TESTIMONY OF VICTOR MARRERO, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. MARRERO. Thank you very much, Mr. Chairman. I want to thank the committee for this hearing. I want to thank Senator Schumer for his recommendation.

The CHAIRMAN. I want you to know he was on my back for weeks on this, but I wanted to get you up, too.

Mr. MARRERO. I appreciate very much your expeditious handling of the nomination. I also thank Senator Schumer's screening committee; Mark O'Donoghue, who worked on the matter.

My wife, Veronica, is here in the back.

The CHAIRMAN. We are happy to have you here.

Mr. MARRERO. And her sister, Virginia White-Mahaffey. My two sons, Andrew and Robert——

The CHAIRMAN. They look pretty young to be with you. Go ahead.

Mr. MARRERO [continuing]. Could not be here, but they are also here in spirit. My special assistant, Scott Hamilton, and my deputy ambassador, Ambassador Godard, were here before and had to leave to mind the shop. And I am very glad to be here.

Thank you.

The CHAIRMAN. Well, we are honored to have you here.

Mr. Stewart.

TESTIMONY OF BRIAN THEADORE STEWART, OF UTAH, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF UTAH

Mr. STEWART. Mr. Chairman, I too am honored and appreciate very much this opportunity. I very much appreciate your support and the very kind words of Senator Bennett.

I would like to introduce to the committee my wife, Lora. We are the parents of six children—and we have one grandson—scattered from Fiji and Alaska and around. Also with us is my sister-in-law, Marcia Stewart, who is an employee of the House Resources Committee; my friend, Joanne Neuman, who runs Governor Leavitt's office here in Washington, DC.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Well, we are happy to have all of you with us and we are honored to have you here, Ted. We look forward to all of your testimony.

Let me begin with you, Judge Buchwald. Am I pronouncing that right? Is it Buchwald?

Judge BUCHWALD. You are, sir.

The CHAIRMAN. OK. Now, as a Federal magistrate, I am sure that you are aware that the discovery provisions contained in rules 26 through 37 of the Federal Rules of Civil Procedure may have avoided, "trial by ambush," by an increasingly high cost. Indeed, the current rules may have resulted in more fights and cost and discovery burden than in legitimate resolutions of the merits of the cases.

In your view, what can and should be done with current discovery practice to move the emphasis away from discovery fights and toward dispute resolution? You are uniquely qualified to answer that question.

Judge BUCHWALD. Senator, I think it is essential that judges take an early and sustained interest in discovery issues, and specifically I think it is helpful if at a very early stage in the litigation a judge may explore with counsel and the parties those discovery matters that are primary to enable them to resolve the case short of a full-blown trial. And I think if you do that, you will be able to resolve cases efficiently and fairly and at the minimal expense.

The CHAIRMAN. Judge Hurd, you have had significant experience in civil cases in private practice and with civil and criminal cases as a Federal magistrate. As I am sure you are aware, there have been several attempts to provide for cameras in Federal courtrooms during a trial. What is your view on that? Should cameras be allowed in Federal courtrooms?

Judge HURD. At the present time in the Second Circuit, cameras are not permitted in courtrooms, except for ceremonial events. If that rule should change, I believe that it should be up—it would be a discretionary matter with the judge in each case and would have to balance the interests of the litigants, the prosecution, the defendant, as opposed to the public's right to know and the freedom of press and the other rights under the First Amendment. And I would apply whichever rules the Second Circuit put into effect, and at the present time we have no choice. There are no cameras in the courtroom.

The CHAIRMAN. Mr. Lorenz, you have had significant experience with complex litigation, including experience with class actions. I am sure that you are aware that nationwide class actions filed in both Federal and State courts have become more frequent and more complex and more expensive.

Currently, rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. section 1407 and section 1408 govern class actions and multi-district litigation, respectively. In your opinion, are there means to reduce the costs and complexity of class action suits in Federal courts?

Mr. LORENZ. I am sorry. The last question?

The CHAIRMAN. Are there means to reduce the cost and complexity of these class actions in Federal courts?

Mr. LORENZ. Yes. Well, I think some of the case law that has come down is helping to do that in any case. You have—class certification is far more difficult in the Federal courts than it is in the State courts, for one; the fact that there is also legislation related to the fact that securities fraud under RICO is not available anymore, and a lot of the cases were filed under RICO cases.

But to reduce the use of the multi-district coordination, also utilizing magistrates, getting on top of the case at the very beginning, as far as class certification is concerned to be very strict in class certification—those issues are very complex. There are changes in lead plaintiffs to ensure—in the past, lead plaintiffs had primarily been professionals, and the idea is to scrutinize that. So there are, yes, methods to reduce the time.

The CHAIRMAN. Fine.

Ambassador Marrero, you have had significant experience in international matters through your work with the United Nations. The Southern District of New York does have a significant number of cases that involve international parties and international law.

Now, in your view, are there any special considerations that a Federal district judge should take into account in dealing with international parties? And I am thinking specifically of how should a court deal with service on parties, depositions of witnesses and discovery of documents located overseas.

Mr. MARRERO. Senator, a very big event happened 10 years ago in Berlin with the fall of the Berlin Wall, which has caused a great deal of globalization of commercial activities, opportunities for American corporations to do business overseas, and vice versa. This has resulted in a great deal of litigation. As you indicate, the Southern District is a center for that activity.

As a Federal district judge, I would be very much on top of these very practical issues of international litigation by expediting as much as possible—facilitating the ability of parties and attorneys to take depositions, for example, in other countries, and in dealing with some of the other aspects of international transactions, for example, extradition of parties, another very important issue.

The CHAIRMAN. Thank you.

Mr. Stewart, as a public service commissioner and as a high-level executive branch official in State government, you have had significant experience with regard to litigation, discovery, and with settlements. As I am sure you are aware, litigation has become more and more expensive as a means to resolve disputes among people.

The Federal Arbitration Act provides a means for parties to agree to binding arbitration instead of resolving their difficulties always in court. Non-binding mediation is also becoming a more popular method of cost-effective non-judicial dispute resolution. So in your view, what role should Federal district courts play in seeking to lower the costs of dispute resolution?

Mr. STEWART. Senator, in the 7 years I served on the Public Service Commission, we operated under a statute that specifically encouraged the parties to proceedings before the Commission and, in fact, the Commission itself to become involved in trying to settle cases before they went to hearing, and we were very successful. I

think it was to the betterment of both the ratepayers and shareholders of the utilities that we regulated.

In the State government, I have been involved in many litigation matters both as a plaintiff and defendant, and I have seen the drain on resources that litigation can be to government and to the individuals involved. So I could, in good conscience, say to you that I would strongly and to the best of my ability encourage the compliance with the Federal statute that you referred to, both the letter and the spirit, and in all other cases encourage mediation to try to keep the costs of litigation to a minimum.

The CHAIRMAN. Well, thank you.

One of the things that I hear as a major complaint about Federal district judges is they don't decide motions very quickly and they let the motion docket—any trial lawyer will tell you that they can live with decisions, they can't live with non-decisions.

The judges that I have found around the country that are the best Federal district judges and the ones that are most respected have a very, very low docket on motions. In other words, they decide and make decisions. It is important you make right decisions, but the point is that it is important you make a decision, too.

And some of these judges allow that motion docket to build and build and build as they anguish, anguish, anguish over how to make decisions. This is something that I encourage all of you to try and expedite litigation by making decisions, hopefully the right decisions. That is why you are picked, is because of your specific talents hopefully to make the right decisions.

Let me just ask you all this question, and we will start with you, Mr. Stewart. Under what circumstances do you believe it appropriate for a Federal court to strike down a Federal statute or State law or a referendum as unconstitutional?

Mr. STEWART. Mr. Chairman, I fully understand the limited role of an Article III district court judge. I understand we are limited in jurisdiction and power and authority. I would begin that analysis by presuming the constitutionality. I would certainly look to the precedents that might be binding on me, and only in very rare instances—and I cannot think of any—would I think that I would do anything other than follow that—clearly, I would follow the precedents of the Supreme Court.

I would interpret the statute, I would interpret the Constitution. I would follow the precedents of the Tenth Circuit, and the presumption would be clearly that a statute was constitutional, a referendum, or the other things that you mentioned.

The CHAIRMAN. Thank you.

Mr. Marrero.

Mr. MARRERO. I would accept the answer that Mr. Stewart has given except, of

Purse, that I wouldn't follow the Tenth Circuit, but the Second Circuit.

The CHAIRMAN. Mr. Lorenz.

Mr. LORENZ. I fully agree, except I would follow the Ninth Circuit.

Judge HURD. We are in the Second Circuit, Mr. Chairman, so I would follow the Second Circuit. And I would anticipate that such an action would be rare, if ever happened.

Judge BUCHWALD. Senator Hatch, I obviously agree, and would just add that I would also be mindful that courts are not supposed to be substituting their views for economic and social reflected in the legislation or referendum.

The CHAIRMAN. That is correct. I take it from that that you would all be bound by precedent of the higher courts. Anybody here feel he or she couldn't be bound by the precedents of the higher courts?

[No response.]

The CHAIRMAN. Now, will you follow—I will start with you, Mr. Lorenz—will you follow the Supreme Court's decisions in *Adarand* v. *Pena* and *City of Richmond* v. *J.A. Croson and Company* with respect to affirmative action and other race-based classifications?

Mr. LORENZ. I certainly would follow that Supreme Court case. The strict scrutiny standard is the highest, and you would have to have any exception to be a very narrow, tailored and focused decision that would be in a compelling State interest. I certainly would follow that decision.

The CHAIRMAN. Judge Hurd.

Judge HURD. Yes, I would.

The CHAIRMAN. Judge Buchwald.

Judge BUCHWALD. Absolutely.

Mr. STEWART. Absolutely.

Mr. MARRERO. Yes, Senator.

The CHAIRMAN. Now, do any of you—and let's start with you, Judge Buchwald—do any of you have legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge BUCHWALD. I do not, sir.

Judge HURD. I do not, Mr. Chairman.

Mr. LORENZ. I do not, Mr. Chairman.

Mr. MARRERO. No, Mr. Chairman.

Mr. STEWART. No, sir.

The CHAIRMAN. Do you believe that 10-, 15-, or even 20-year delays between conviction of a capital offender and execution is too long, and do you believe that district courts must place a priority on the processing of capital cases to ensure inordinate delays do not occur?

Judge Buchwald.

Judge BUCHWALD. I would agree, sir.

The CHAIRMAN. You what? I didn't hear you.

Judge BUCHWALD. I said I would agree, Mr. Chairman.

Judge HURD. Yes, I agree that 10-, 15-, 20-year delays are much too long, and one of the duties of a district judge would be to expedite procedures not only in death penalty cases, but in all cases.

Mr. LORENZ. I agree with that.

Mr. MARRERO. I agree, also.

Mr. STEWART. I agree, also.

The CHAIRMAN. I think one of the highest callings in this country is to be a Federal district judge, to be a Federal judge in any form. But the Federal district judges are the judges closest to the people who have to really decide these very difficult, complex issues, and have to decide them in ways that can be very easily tested. And

from what I hear of each of you, you are capable of doing that. My personal belief is that this is an excellent panel, and I want to commend the President for being willing to select each of you to be district court judges.

But I really am deft on judges that really don't recognize what their role is and who expand that role in really unreasonable ways. I lived in the Western District of Pennsylvania, where I practiced law in the early years of my life, and we had one judge, in particular, who was a great judge in some ways, but in other ways was kind of a tyrant on the bench, and who didn't care what the law said.

In Utah, we had Judge Willis Ritter, who is world-renowned for the way he handled the district court judgeship. Now, I happened to really like him, and he liked me and I was always treated fairly in his courtroom. But there were many who felt that they weren't treated fairly, and some of that came down because the judge would ignore the law and just do whatever he felt was right rather than applying the law as written by the appropriate State or Federal legislature, and executive matters as decided by the President or the executive branch.

I think it is very important that you understand the roles that you have, which is not to make the laws. And, you know, you are going to find cases where they are cases of first impression and you are going to have to make the law in those cases. And you might be criticized whichever way you make it. The key is to make it when you have a case of first impression and do the very best you can.

But in other cases, you really need to follow the precedent of the upper courts or we lose control of our system. If judges start usurping the role of the legislative branch or the executive branch, this country will not survive in its present form. It has been the judiciary that has kept the Constitution viable and active.

So I want to just thank each of you for your willingness to serve. We will try to put all of you on the docket for today. Now, hopefully, I can get all of you out of the committee today. That does not mean that we will get you through the floor before the recess, but I am going to do everything I can to try and see that that happens.

We do have a lot of conflicts on judges, and there is a lot of disagreement over what the role of judges are and some of it is very sincerely held. And we will do our best to try and move your nominations as quickly as we can. But I want to thank each of you for your willingness to serve, and I just welcome you to the Federal judiciary if we can get this done quickly, and hope that you will have a very interesting time on the bench.

Senator Feingold, I just noticed you are here, if you have any questions.

Senator FEINGOLD. Yes, I do.

The CHAIRMAN. I think it is time to wrap this up myself.

QUESTIONING BY SENATOR FEINGOLD

Senator FEINGOLD. It will not take long. Mr. Chairman, I first want to thank you for holding these hearings on the President's nominees.

I want to congratulate all of you on your nomination. I just have a few brief questions and they are specific only to Mr. Stewart.

Mr. Stewart, I strongly believe that the person who fills this district court seat needs to be prepared to deal with complicated natural resource issues, particularly those that arise under Federal public lands law. So I appreciate this brief opportunity to learn from you about your perspective on these issues.

On September 18, 1996, President Clinton designated the 1.6-million-acre Grand Staircase Escalante National Monument in southern Utah. It was reported in the L.A. Times on May 10, 1999, that shortly following the creation of the Monument you stated that the creation of the Monument was, "a day of infamy." Is that an accurate reporting of what you said on the matter?

Mr. STEWART. Senator, I believe it was.

Senator FEINGOLD. Based on existing case law and the language of the Antiquities Act, do you believe that the Monument was created in an illegal way?

Mr. STEWART. Senator, I don't think I can—we did not ever do a legal analysis. And inasmuch as I may have the opportunity if I am successful in being confirmed in dealing with issues of that sort, and that issue specifically, I believe it would be inappropriate for me to express an opinion at this time.

Senator FEINGOLD. You don't have a current opinion on the legality?

Mr. STEWART. I do not, Senator, no.

Senator FEINGOLD. Given your statement that the creation of the Monument was, "a day of infamy," would you have recused yourself from Antiquities Act litigation had you already been on the bench and been assigned to the case?

Mr. STEWART. I believe that under 28 U.S. Code 455, section (b)(3), that I will have an obligation to look very carefully at any matters that I would have been involved in in my employment in State government. And I will do so and I will liberally interpret that provision to ensure that any litigant before me has a high degree of comfort that I will be fair and impartial and will leave my personal views behind me when I become a judge.

Senator FEINGOLD. So is it fair to say that you would consider recusal in light of your statements on this issue if a matter comes before you in the future, if and when you are confirmed?

Mr. STEWART. Senator, the decision would have to be based upon the facts before me, but I would consider it, yes.

Senator FEINGOLD. Thank you. The Bureau of Land Management recently completed a survey of public lands in Utah and concluded that a total of 5.8 million acres of land meet the criteria for wilderness set forth in the Wilderness Act of 1964. Is it true that you opposed the BLM survey to which I refer, and that while you were head of the Department of Natural Resources the State of Utah sued the Federal Government to stop the inventory?

Mr. STEWART. Those are facts, Senator, but may I point this out that as with any other attorney who represents clients, in a sense I represented the State of Utah. I represented a governor, I represented a department or departments. If I am fortunate enough to become a Federal judge, just as any other attorney leaves those prior associations, those prior representations, those prior advoca-

cies behind them, I would be required to do so and would do so willingly.

The CHAIRMAN. If I could add, his language on the "day of infamy" was fairly mild compared to what I had to say about it. [Laughter.]

Senator FEINGOLD. I am not going to ask you any questions, Mr. Chairman.

The CHAIRMAN. That is good. [Laughter.]

That is good because you might get some answers, I tell you.

Senator FEINGOLD. I have a feeling I would.

With regard to that same case, Mr. Stewart, is it also correct that the Tenth Circuit dismissed that case?

Mr. STEWART. That is correct, Senator.

Senator FEINGOLD. Could you just quickly review the holding of the court for the committee?

Mr. STEWART. The holding was, in essence, that the State of Utah had no, nor did the other plaintiffs in that case, have standing on that specific issue.

Senator FEINGOLD. Did not?

Mr. STEWART. Did not.

Senator FEINGOLD. Finally, do you oppose the Federal agency's authority to review and catalog land under their jurisdiction?

Mr. STEWART. Senator, I do not oppose it, but what my personal view is is irrelevant to whether or not—in the event I become a judge, as I have stated, I would assure to the best of my ability that those personal views that I might have are never reflected in any decision I may ever render.

Senator FEINGOLD. I just want to be sure I heard you correctly. Did you say you did not oppose the Federal agency's authority, or did you say you did?

Mr. STEWART. Speaking generally, no——

Senator FEINGOLD. Just what you said a moment ago.

Mr. STEWART. I do not oppose it.

Senator FEINGOLD. OK. Mr. Stewart, thank you for answering the questions directly. And I want to thank the chairman for his time.

The CHAIRMAN. Thank you. I might point out that you do have quite a bit of environmental support as well. And let me also point out that some of the antagonism to Mr. Stewart was scurrilous by people who basically had axes to grind. And you have both Democrat and Republican support, and frankly some of the antagonism very much offended me.

Let me just ask this question. Regardless of your personal views, or any decision you made in State government at the behest of the governor or of others for whom you served, are you going to be willing to apply the precedents that are established by the appellate courts?

Mr. STEWART. Absolutely.

The CHAIRMAN. And you will apply those regardless of what your personal views are?

Mr. STEWART. Yes, Mr. Chairman.

The CHAIRMAN. And you will live in accordance with that rule of judging?

Mr. STEWART. I will.

The CHAIRMAN. Anything else?

Senator FEINGOLD. Thank you, Mr. Chairman.

The CHAIRMAN. Well, then let me just say one other thing because I have a great deal of respect for my colleagues. I would like to just say a couple of things about this.

For the last several years, I have worked to process nominees in a fair and principled manner. While some might prefer that I conduct my responsibilities at a different pace—some wish I would move nominees more quickly, others would like to see me move them more slowly—few would dispute the fact that I have refused to play politics with individual nominees.

There have been plenty of occasions where it would have been politically beneficial and a heck of a lot easier for me to oppose a given nominee, but I refused to do so. The constitutional responsibility we bear and the consequences to the reputations of those we might tarnish are too great, in my opinion.

It is with this in mind that I mention the Stewart nomination. I would be naive to think that some wouldn't be tempted to play politics with this nomination. Still, given my record on this committee, I must confess that I was surprised by the level to which some political groups sank in trying to affect this nomination.

Now, I appreciate the fact that people may differ on what the best environmental policy or policies might be. I appreciate the fact that others might have preferred to see someone else nominated, perhaps a politically connected spouse, for example. But that does not excuse playing politics with people's reputations, and I don't like it whether it comes from the left or whether it comes from the right.

The Constitution grants the Senate the power and the duty to render advice and consent on the President's nominees to the Federal bench. And during my tenure as chairman, we will continue to perform our role in this constitutional process in a manner that brings credit to this committee and to the Senate as a whole. And I will continue to do that, and I think my colleagues know that I have striven to do my very best in this area.

I am proud of all five of you nominees. Knowing Mr. Stewart as I do, I am very proud of his nomination, and I believe that he will become one of the great district court judges in this country. And if he doesn't, I personally will get after him, I tell you. But he will. There is no question in my mind that you, Mr. Stewart, will be one of the great district court judges.

And I feel the same about each of you. I have heard very good things about each of you. Now, there are some who don't like each of you. You need to know that. We see some of these things as we review these raw files, and we separate and sift through those files and we try to do the very best job we can.

So all I can say is that each of you deserves to be nominated. I commend the President for having done so and I am going to move this committee to act on your nominations with dispatch, and hopefully we can do it today. And I would like to be able to move other nominees between now and the end of this President's tenure, and we will certainly do so.

Senator Schumer, do you have any questions?

Senator SCHUMER. No. Thank you, Mr. Chairman. I should tell all the nominees our chairman has been doing a great job trying to move this process forward, and I just want to thank him for that.

I would just say that I am proud of all of our nominees, but three of them in particular from New York State. I know them all and their records well. I think they will be great additions to the bench, and I don't have any questions, Mr. Chairman.

The CHAIRMAN. My gosh, that is a first, I have to say, and I appreciate it.

Senator SCHUMER. When these nominees are so good, even I don't have questions.

The CHAIRMAN. That is a good point. I will remember that.

Well, we want to thank each of you for being here. We want to thank your families for being as great as they are, for their support of you, because your family members are going to have to really support these judges as they become judges on the district bench. Those are tough jobs. Sometimes, they take inordinate amounts of time. There is a lot of criticism that can come and it is tough on the families sometimes. So we just appreciate the family support that you have, and those who couldn't be here today as well, and we understand in some cases they really couldn't be here. So thank you all for being here.

With that, we are going to try to put you all on the docket for today and try and move all of you today because you deserve to be moved, and we will do our very best to get you through if not before this recess, then afterwards. So thank you all for being here and we appreciate you.

[The questionnaires of Judge Buchwald, Judge Hurd, Mr. Lorenz, Mr. Marrero, and Mr. Stewart are retained in Committee files.]

[Whereupon, at 11:50 a.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF THEADORE STEWART TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. You testified today that as a District Court judge you would be bound by the precedents established by the higher courts. In future litigation regarding inventories conducted by federal agencies pursuant to the Wilderness Act of 1964, would you follow the Tenth Circuit's decision in wilderness re-inventory case that we discussed at the hearing?

Answer 1. Yes. As a District Court judge I would be bound to abide by the precedents of the Supreme Court and the 10th Circuit Court of Appeals in such litigation as well as any other litigation.

Question 2. Please describe your professional involvement in the establishment or modification of state or federal environmental law, or state environmental regulatory policy. Describe the position you held and your specific activities with respect to each such involvement.

Answer 2. As Executive Director of the Utah Department of Natural Resources, I was responsible for advocating the Governor's policy in seven divisions of state government. My role in assisting the Governor in making policy, however, was limited by the existence of citizen, policy-making boards in six of those divisions: Wildlife Resources, Parks and Recreation, Oil, Gas and Mining, Geological Survey, Water Resources and the Utah Geological Survey.

I did, however, play a role in the following specific areas:

1. Assisted in the passage of state legislation to create an Endangered Species Mitigation Fund for the state of Utah to assist in protecting endangered species.
2. Advised the Governor in formulating state policy on BLM wilderness legislation.
3. Assisted in the state's partnership in the Book Cliffs Wildlife Initiative.
4. Assisted in negotiating an agreement to protect federal reserved water rights in Zions National Park.
5. Was the state's representative in efforts to protect the endangered fish in the Colorado and Virgin Rivers, Desert Tortoise, Utah Prairie Dog and Coral Pink Sand Dunes Beetle.
6. Assisted in the creation, by state legislative action, in a permanent fund for wildlife habitat.
7. Initiated a comprehensive planning effort for the Great Salt Lake ecosystem.
8. Testified before Congress on RS 2477 right of way issues, amendments to the Surface Mining Control and Reclamation Act, and wilderness legislation.

For purposes of recusal, I would examine my exact role in any of the above matters as it related to the case before me under the provisions of 28 U.S.C. § 455.

Question 3. A February 23, 1993 article in the Price Sun-Advocate describing your speech at an annual Lincoln Day dinner quotes you as stating that you and your audience "shared a common enemy"—those who "oppose the multiple use of public lands," In particular, you cited Clinton Administration proposals to raise grazing fees, eliminate below-cost timber sales, and institute hard-rock mining royalties as examples of anti-multiple-use policies. Please identify the individuals or groups that you characterized as the "common enemy" and describe your interpretation of the term "multiple-use?" As a member of the federal bench, how would you approach litigation brought by interest groups with which you previously have had an adversarial relationship? Under what circumstances would you recuse yourself in litigation involving those groups?

Answer 3. I was not referring to a specific individual or group, rather I was referring to the policy position supporting preferred single-use of the public lands over multiple-use. I define multiple-use as the management of the public's lands to assure their use by as many of the public, in as many ways possible, consistent with principles of sustainable management.

As a member of the federal bench, my responsibility would be to ignore personal relationships, opinions, and philosophy and to interpret the Constitution and statutes, as they are written and interpreted by higher courts.

Based upon the specific facts of a case before me, I would recuse myself when required by 28 U.S.C. § 455.

Question 4. In this same article you raised concerns that Utah environmental groups wanted to make the issue of wilderness protection for federal lands in Utah a "national issue." Is it your interpretation of the law that the inclusion of land in the National Wilderness Preservation System is not a proper federal activity?

Answer 4. Inclusion of land in the national Wilderness Preservation System can only occur by the passage of federal legislation pursuant to the Wilderness Act of 1964, I would interpret such legislation consistently with the binding precedent for the 10th Circuit and the Supreme Court.

Question 5. You have publicly opposed legislation known as the America's Redrock Wilderness Act, which would designate 9.1 million acres of land in Utah as wilderness based upon a citizens' inventory of Utah lands. Do you still hold that view? please describe your current position on this legislation?

Answer 5. As Chief of Staff to Utah's Governor, I advocated his position that the Bureau of Land Management wilderness issue in Utah can best be solved by approaching it in an incremental fashion, taking one area of the state at a time and focusing on that area to fashion federal wilderness legislation.

As federal judge, I would not be an advocate, but would be an impartial decision maker. And I would approach interpretation of the Redrock Wilderness Act, or any other statute, by adhering to the text of the statute and the interpretations of the statute by the 10th Circuit and the Supreme Court.

Of course, based upon the specific facts of a case before me, I would recuse myself when required by 28 U.S.C. § 455.

Question 6. While you were the head of the Utah Department of Natural Resources you presided over considerable reduction in the staff of the Division of Wildlife Resources and the complete elimination of the Native Species Section. What were the circumstances requiring these reductions? Following the reductions, was the Department able to meet its obligations under the federal Endangered Species Act?

Answer 6. I inherited a Division of Wildlife Resources that faced a substantial operating deficit ($3 million) in fiscal year 1993–94. Further, an organizational study by the Wildlife Management Institute recommended a substantial reduction in staff at the state level and an increase of staff on the regional level. Reductions in force were necessary to meet these fiscal and organizational demands.

The Department did meet its obligations under the federal Endangered Species Act. Following the reorganization, the Division of Wildlife Resources has become a nationally recognized leader in partnering with federal and local governments and private groups to protect the habitat of the Desert Tortoise, Utah Prairie Dog, fish species in the Colorado River, fish and terrestrial species in the Virgin River Basin, the Coral Pink Sand Dune Beetle, and other endangered or threatened species.

Question 7. Do you believe that, under the law, all species are eligible for protection under the Endangered Species Act if they are found to be in danger of extinction? In your view, is such protection available only when a species faces an imminent threat of extinction?

Answer 7. I believe that the Endangered Species Act requires protection of all species found to be in danger of imminent extinction. I further believe that threatened species, as defined under the federal Act, require special protection.

However, while I was Executive Director of the Department of Natural Resources, the State of Utah maintained a list of "Sensitive Species", those that are not now on the federal threatened or endangered species list, but might in the future because of limited habitat. We implemented partnerships with federal and local government and private interests to protect the habitat of such species so that they would never face imminent threat of extinction.

As a federal judge, my personal beliefs regarding a legislative policy would be irrelevant. As a federal judge, I would interpret the Endangered Species Act, and any federal statute, consistent with its text, the original intent of Congress, and the precedents of the 10th Circuit and the Supreme Court.

TED STEWART

TED STEWART'S POSITIVE ENVIRONMENTAL RECORD

Ted Stewart has a strong and proven record in support of the environment, wildlife and wildlife conservation. Consider that, during his tenure as Director of the Utah Department of Natural Resources, Mr. Stewart:

Increased annual funding for wildlife conservation by 33 percent.

Advocated for, and established through the Utah legislature, a state fund to help with endangered species protection.

Made the State of Utah an active partner on the Colorado and the Virgin Rivers in endangered species recovery for the Desert Tortoise, Utah Prairie Dog, and Coral Pink Beetle.

Helped pass a landmark piece of legislation that places $3 million annually into wildlife habitat preservation.

Lead calls for open space protection and responsible economic development.

Strongly advocated for the Central Utah Wildlife Conservation and Mitigation Commission.

Strongly advocated for the Book Cliffs Conservation initiative—a 500,000 acre project—in spite of opposition from oil, gas, and grazing interests.

Won "praise" from Secretary of the Interior Bruce Babbitt for his work. Babbitt thanked him for his "outstanding support" for a historic water rights agreement.

Environmental/conservation groups and advocates supporting Stewart's nomination include: Sportsmen for Fish and Wildlife; Utah Open Lands Conservation Association; Utah Wildlife Federation; Utah Wetlands Foundation; William Christensen, Field Director, Rocky Mountain Elk Foundation; Utah Chapter of The Nature Conservancy; Virgin River Land Preservation Association; FNAWS; Utah Farm Bureau Federation.

DEMOCRATIC SUPPORT FOR TED STEWART—UPDATED JANUARY 27, 1999

John Preston Creer, Attorney at Law, Democrat.
Sheldon Richins, Summit County Commissioner, Democrat.
Lee E. Howard, President Utah FNAWS, Democrat.
Stephen G. Boyden, Assistant Utah Attorney General, Democrat.
Brent H. Cameron, Deputy District Attorney, Salt Lake County, Democrat.
Dennis D. Ewing, Tooele County Clerk, Democrat.
Kristine Frischknecht, President Utah Assoc. of Counties, Democrat.
D. Frank Wilkins, Utah Supreme Court Justice, (Former), Democrat.
Joe C. Judd, Kane County Commissioner, Democrat.
Joseph Bernini, Juab County Commission, Democrat.
Chad Johnson, Chairman, Beaver County Commission, Democrat.
Thorpe Waddingham, Waddingham & Peterson Attorneys at Law, Democrat.
Warren H. Peterson, Waddingham & Peterson Attorneys at Law, Democrat.
Sidney G. Baucom, Jones, Waldo, Holbrook, & McDonough, Democrat.
Daniel Berman, Berman, Gaufin, Tomsic & Savage, Democrat.
Daniel H. Tuttle, Utah State Representative, Democrat.
Dale F. Gardiner, O'Rorke & Gardiner, LLC, Democrat.
F. Ross Peterson, Professor of History, Utah State University, Democrat.
Mike Dmitrich, Utah State Senate, Democrat.
Mark O. Walsh, Asst. Director Utah Assoc. of Counties, Democrat.
Scott Daniels, Attorney at Law, Democrat. Utah State District Court (Former), Democrat.
Jeffrey S. Packer, All Pro Real Estate Inc, President, Democrat.
Lorinda Rose, Virgin River Land Preservation Assoc, Exec. Dir., Democrat.
Donald B. Holbrook, Jones, Waldo, Holbrook & McDonough, Democrat.
Brooke Williams, Confluence Associates, LLC, Democrat.
Desmond C. Barker, Utah Open Lands Conservation Association, Democrat.
Gerald E. Gordon, Utah Wildlife Federation, Chairman, Democrat.
R. G. Valentine, Utah Wetlands Foundation, President, Democrat.
William E. Christensen, Rocky Mountain Elk Foundation, Utah Field Dir., Democrat.
Christopher F. Robinson, Utah Chapter of The Nature Conservancy, Democrat.
Rulon C. Gardner, State Assembly, County Commission (Former), Democrat.
Joseph L. Hull, Utah State Senate, Assistant Minority Whip, Democrat.

THE SECRETARY OF THE INTERIOR,
Washington, March 5, 1997.

Mr. TED STEWART,
Executive Director, State of Utah, Utah Department of Natural Resources, Salt Lake City, Utah.

DEAR MR. STEWART: Thank you for your letter of January 3, 1997, and for the photographs of the recent water rights agreement signing in Zion National Park. I share your view that this water rights agreement is an historic accomplishment and want to praise the negotiation process employed to resolve conflicts between park protection and water development.

A large measure of credit for this successful undertaking is due to the commitment of the individuals involved. My special thanks to you for providing outstanding support to the negotiation team. The exemplary efforts of Bob Morgan, Jerry Olds, Mike Quealy, John Maybe, Norm Stauffer, and Todd Adams warrant special recognition.

It is my understanding that discussions of opportunities for future water rights settlements at other units of the National Park System in Utah have already begun. I can assure you that I am committed to this process and look forward to further dialogue on this subject.

Sincerely,

BRUCE BABBITT.

UTAH FARM BUREAU FEDERATION,
Sandy, Utah, March 31, 1999.

Re Ted Stewart Nomination for Federal Judgeship.
Attention Mr. Charles Ruff,

Hon. PRESIDENT WILLIAM J. CLINTON,
The White House,
Washington, DC.

DEAR PRESIDENT CLINTON: The Utah Farm Bureau is Utah's largest general farm and ranch organization and represents over 22,000 member families. We are writing to urge your appointment of Mr. Ted Stewart to the Federal District Court Judgeship in the District of Utah.

Mr. Stewart has distinguished himself as a tireless public servant. Through his promising career in various levels of government he has won the respect of numerous individuals with his fearless enthusiasm and fair and balanced approach to solving difficult problems. These attributes, along with his keen intellect and impeccable integrity qualify him for this important position.

A barometer of Mr. Stewart's outstanding judicial temperament was displayed while serving as chairman of the Utah Public Service Commission, which oversees all controversial public utility matters in our state. In that capacity, he effectively portrayed strong levels of independence, decisiveness, and understanding.

We therefore strongly believe he qualifies for this appointment.

Sincerely.

C. BOOTH WALLENTINE,
Executive Vice President and
Chief Administrative Officer.

JANUARY 5, 1999.

Re pending nomination for United States District Judge for the District of Utah.
Attn: Charles Ruff.

Mr. WILLIAM J. CLINTON,
President of the United States,
Washington DC.

DEAR MR. PRESIDENT: I am writing to recommend the nomination of Mr. Ted Stewart to the District Court bench for the District of Utah. I have known Mr. Stewart for many years. He is fair minded, and moderate. As Chair of the Public Service Commission (a quasi-judicial body), he showed restraint, intelligence and common sense, as well as good judicial temperament and courteous civility. I don't believe we could ask more from a judicial candidate.

I make this recommendation in spite of the fact that Mr. Stewart is a Republican. I am a life-long Democrat. I was a Democratic candidate for Utah Attorney General

in 1992. I have served on dozens of Democratic Party and Democratic candidate campaign committees, and as delegate to numerous State and County conventions. I have served as Chair of both the State and County Conventions and as full time campaign manager for a Democratic congressional candidate. Governor Matheson appointed me to the State District Court bench, where I served as Judge from 1982 to 1992 when I resigned to run for Attorney General. Except for years on the bench, I have been fully involved in the Democratic Party. I was probably your earliest supporter in the State of Utah. If you have old financial records, you will find that I contributed to your unsuccessful Gubernatorial campaign in 1980.

I appreciate your consideration of my views as you make this important decision.

Very truly yours,

SCOTT DANIELS.

STATE OF UTAH,
OFFICE OF THE ATTORNEY GENERAL,
Salt Lake City, UT, January 4, 1999.

Re appointment of Ted Stewart to be U.S. District Court Judge for Utah.
Attn: Mr. Charles Ruff.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I understand that Senator Orrin Hatch has sent the name of Ted Stewart to the White House as his choice to fill the vacancy left by Senior Judge J. Thomas Greene in the District Court of Utah. Ted Stewart is a Republican and I am a Democrat, but qualification for judicial office should not only turn on party affiliation. I have known Ted Stewart for years, and I had the opportunity to be his legal counsel as he served as Executive Director of the Department of Natural Resources for the State of Utah.

Ted has always possessed extraordinarily sound judgment and has been a quick study of complex issues. He is totally honest and forthright, yet considerate and affable. Ted has the ideal temperament and intellect to serve as a judge. I have seen him operate in a judicial capacity as the presiding officer in departmental administrative hearings. He conducts himself with dignity and is imbued with a sense of fairness that attorneys and litigants appreciate. He has always carefully balanced the rights of individuals with governmental interests.

I have read in the local newspapers statements made by some party leaders criticizing Ted for his lack of experience in the courtroom. Unfortunately, they ignore his vast government experience in both the legislative and executive branches. In my view, Ted's even temper, good humor, integrity and first-hand experience working with people uniquely qualify him for a federal judgeship. Anyone would feel confident as they appear before him that Ted would be impartial, competent and understanding. I could not ask more of any judge be he a Republican or a Democrat.

Sincerely,

STEPHEN G. BOYDEN,
Assistant Attorney General.

VIRGIN RIVER LAND
PRESERVATION ASSOCIATION,
St. George, UT, January 19, 1999.

President WILLIAM J. CLINTON,
1600 Pennsylvania Ave. NW,
Washington, D.C. 20500

DEAR MR. PRESIDENT: I am writing to express the appreciation and support of this organization for Mr. Ted Stewart of Utah for appointment to a federal judgeship.

The Virgin River Land Preservation Association is a nonprofit land trust working with communities and landowners to preserve southwestern Utah's heritage of scenic beauty and open lands. Incorporated in 1993 in the rapidly growing community of St. George, the land trust strives to find mutually beneficial solutions which resolve conflicts between development and preservation interests.

The land trust has had the privilege of working with Mr. Stewart in his former capacity as the director of Utah Department of Natural Resources (UDNR) and in his role as Chair of the Utah Critical Land Conservation Committee. The issues which he worked to resolve were complex and, at times, volatile. In these challenging leadership positions Mr. Stewart demonstrated integrity and a dedication to balance and fairness.

Under Mr. Stewart's guidance, UDNR and its divisions worked closely with the county to develop and implement the Washington County Habitat Conservation Plan to protect the threatened Desert Tortoise; they have also been working collaboratively to develop a management plan and for the Virgin River intended to balance habitat preservation for endangered desert fish with limited additional water development.

As Chair of the Utah Critical Land Conservation Committee, Mr. Stewart championed the need for the State of Utah to play a role in the preservation of critical lands threatened by rapid urbanization and sprawl. He and the Governor have stood as leaders in this effort despite a less than sympathetic state legislature. We credit their leadership for the fact that open space preservation is at the top of the 1999 legislative agenda with early indications from state lawmakers of bipartisan support.

It is an honor to make this recommendation to you for your consideration. The Virgin River Land Preservation Association strongly supports the appointment of Mr. Ted Stewart to the position of federal judge. If you have any questions or reservations, please contact us so that we may discuss Mr. Stewart's qualifications in more detail.

Sincerely,

LORINDA ROSE,
Executive Director.

[EDITOR'S NOTE: Mr. Gerald E. Gordon submitted a letter in support of Mr. Ted Stewart, former Utah Director of Natural Resources.]

SALT LAKE CITY, UT,
January 18, 1999.

Re Mr. Ted Stewart—Utah Federal Judicial Appointment.
Attn: Mr. Charles Ruff.

Hon. WILLIAM JEFFERSON CLINTON,
President of The United States of America, Washington DC.

DEAR PRESIDENT CLINTON: Utah in recent years has been faced with significant public and private land and environmental issues. To some, the wilderness debate has been their charge. Myself and many others are primarily concerned with the permanent private land conservation of Utah's last best open spaces, mainly located near the rapidly urbanizing areas of our great state.

I write to you as an individual that has spent the last eight years on the board of Utah's only statewide land trust. Utah Open Lands Conservation Association works to preserve Utah's wildlife, scenic, historic and agricultural lands. For the past two and a half years I have served as Chairman of the board of trustees. Utah Open Lands is not a political advocacy organization. I therefore am writing to you as an individual who has been deeply involved in Utah land conservation. I became involved in land conservation while serving as the economic development director for Summit County, Utah (one of the nation's fastest growing counties). I see land conservation indelibly tied with quality of life and economic preservation which significantly benefits the environment and society as a whole.

I have had numerous experiences with government officials, both elected and appointed. I am writing to fully endorse Mr. Ted Stewart for the Federal Judgeship he is being considered for, I and many others have worked with Mr. Stewart for years in achieving quality land conservation in Utah. Mr. Steward has been a facilitator in supporting and putting together public private partnerships to achieve quality land conservation in Utah. I have seen his pragmatic approach to cooperation strike fair balance to do good for Utahns.

As one example, Mr. Stewart, while serving as the Director of the Utah Department of Natural Resources, guided his agency through a unique conservation partnership which included State Division of Wildlife Resources, State Parks, private landowners, private mining claims, local community leaders, private investors, The Nature Conservancy and Utah Open Lands to achieve the preservation of over 750 acres in one of Utah's most beautiful locations facing hugh development pressure. Since that time we have been able to add acreage to this preservation through additional mining claims and developer owned land. Without Mr. Stewart's support and help, this achievement would have been significantly more difficult.

Since being appointed to be Governor Michael O. Leavitt's Chief of Staff, Mr. Stewart has continued and expanded his efforts to strike a fair balance while promoting and achieving quality open space preservation.

I wholeheartedly endorse Ted Stewart for this appointment knowing he would apply an even hand to those issues that could come before him.

Sincerely,

DESMOND C. BARKER.

CASTLE VALLEY, UT,
January 21, 1999.

President WILLIAM JEFFERSON CLINTON,
1600 Pennsylvania Avenue,
Washington, DC.

DEAR PRESIDENT CLINTON, I understand that Ted Stewart is being considered for the position of Federal District Court Judge. After decades as a parttime environmentalist, I started a consulting business six years ago to deal with environmental issues from both a community and an economic development perspective. I have worked with Ted on many occasions and feel that it is necessary that I comment on my experience, with the hope that it might help you in your decision.

In general, I find Ted to be fair minded, very reasonable, creative, and very quick to want all the details of issues in which he is involved. I've known people who have worked directly for Ted and without exception they have unfailing loyalty.

I have learned valuable lessons from Ted. One of those lessons has come from working on issues on which he and I find ourselves on opposite sides. Wilderness designation and 2477 Road issues in Utah are two examples. Ted is a strong proponent of local control where I feel that in many situations, the Federal Government must step in and make decisions for the greater good of the American people. The lesson here is that while we disagree on these issues, knowing Ted has taught me that he and I definitely share more than we don't. We share a desire to protect open space. Ted has been a force in driving local legislation to fund open space protection. We share the idea that sensitive species might have a higher probability of survival if they can be kept off the Endangered Species List and he instigated a Conservation Agreement Process for the Coral Pink Sand Dunes Tiger Beetle, of which I was a part. I now look at everyone on the opposite side of the issue and wonder more about what we might have in common.

The hesitation I have in writing this recommendation due to Ted's bias in certain areas of public land policy is small in comparison to the integrity and creativity he could bring to this position.

Good luck in your decision and in all you are involved with at this time.

Very truly yours,

BROOKE WILLIAMS.

JONES, WALDO, HOLBROOK & MCDONOUGH,
Salt Lake City, UT, January 25, 1999.

Re Ted Stewart: Nominee for U.S. District Court in Utah.

Hon. WILLIAM JEFFERSON CLINTON,
President of the United States, The White House, Washington, DC.

DEAR MR. PRESIDENT, I understand that you are considering the nomination of Ted Stewart as a Judge in the U.S. District Court in Utah.

I have practiced law in the State of Utah for forty-five years. I am also a life long Democrat, having been active in Utah politics for many years including delegate to the National Convention in Chicago in 1968, and as Candidate for the U.S. Senate in 1974 and campaign manager for Calvin L. Rampton and Senator Ted Moss.

I had the opportunity to observe Ted Stewart's work in the early 1980's in representation of Utah's principal utility before the Public Service Commission where Ted served as a Commissioner, including Chairman for several years. As lead outside counsel for Utah Power & Light Company, my work before the Commission included a variety of matters including a number of hearings. Ted always performed in a very intelligent and lawyer like manner. He was fair in discharging his responsibility as a Public Service Commissioner both in cases in which the Commission ruled favorably as well as against my client. He showed good judicial temperament.

Based upon my observations, I believe he has the experience and skills to be an effective Federal Judge.

Sincerely,

DONALD B. HOLBROOK.

ALL PRO REAL ESTATE, INC.
Brigham City, UT, January 4, 1999.

Re Federal District Judge Appointment of Ted Steward.

Attention: Mr. Charles Ruff.

President WILLIAM JEFFERSON CLINTON,
The White House, Washington, DC.

DEAR MR. PRESIDENT, As a lifelong Democrat, I write to give my most ardent endorsement to Ted Stewart to serve as Federal District Judge. I have served with Ted for the past 6 years and have observed his powerful character, even temperament and his keen intellect. Regardless of the difference in our political affiliations, Ted has exemplified an inordinate capacity to set aside political considerations for good policy and fairness.

I was disappointed to read the State Democratic Party's criticisms to Ted's nomination by Senator Hatch. They are not an accurate reflection of his judicial temperament. Ted has been active in the Republican Party and me in the Democratic Party supporting competing candidates. His common sense and decency have kept his partisanship to a minimum focusing on good policy rather than raw politics.

His environmental record as executive director for the Utah Department of Natural Resources is to be envied by all who love nature. Currently I serve as the chairman of the Board of Parks and Recreation for the State of Utah, overseeing a division of the department of natural resources. Our mandate is to "protect, preserve and enhance" the natural resources of Utah. As the department director Ted has the uncanny ability to bring together diverse and competing interest resolving complex environmental issues.

A careful review of his professional record should quickly discount some in our party who have criticized his experience and preparation for the important duties of a Federal District Judge. Ted has the respect of a broad spectrum of Utah's citizens. His reputation of integrity, fairness, a keen intellect and unwavering love for the constitution and the rights of the individual will make his appointment to this position a credit to your administration.

Sincerely,

JEFFREY S. PACKER,
President.

UTAH STATE SENATE,
Salt Lake City, UT, January 5, 1999.

President WILLIAM J. CLINTON,
White House, c/o Charles Ruff, Washington, DC.

MR. PRESIDENT: It is my great pleasure to recommend to you the name of Ted Stewart for the office of Federal District Judge, State of Utah. In doing so, I will receive the enmity of a large number of people in my party. Therefore, please be assured that I do not make this recommendation lightly. I hate to even count the years I have worked with Mr. Stewart but I can say that I have always been impressed with him. He has always been fair and deliberate and shown the moderation and thoughtfulness that the judiciary requires. As a Democrat in an overwhelmingly Republican state, he was one person I knew I could talk to and get a totally non-partisan hearing of my issues.

I am not only a life long Democrat, I represent the only Utah county that twice voted you a full majority vote (Carbon County). We are moderate, hard working, blue collar Democrats. Like you we are firm centrists with strong opinions of what is right and best for our Country. I know for a fact that mine is not the only Democratic letter you will receive supporting Mr. Stewart. Furthermore, I am the most senior member of either body in the Utah Legislature having served there since 1968. Nonetheless, I feel compelled to agree with Senator Orrin Hatch that Mr.

Stewart is unquestionably the man for this job. I hope this finds you and yours in good health.

Most sincerely yours,

MIKE DMITRICH,
Utah State Senate, District 27.

UTAH ASSOCIATION OF COUNTIES,
Salt Lake City, UT, January 7, 1999.

President WILLIAM J. CLINTON,
The White House, Washington, DC.

DEAR MR. PRESIDENT: Ted Stewart of Utah is under consideration for appointment to a federal judgeship in Utah. I want you to know of my support for Ted's appointment.

In the last two years of United States Senator Frank E. Moss' [D–UT] term, I served as his legislative assistant. Additionally, I served as legislative staff director to United States Congressman K. Gunn McKay [D–UT] and also worked for former Utah Governor Scott Matheson.

In the nearly twenty years that I have known and worked with Mr. Stewart, I have found him fair, wise and of good judgement. I have worked with him on numerous complicated and technical issues and found him to be knowledgeable, helpful and solution driven. I believe he has the judicial temperament and ability to make a great contribution to the federal judicial bench in Utah and to distinguish himself as an excellent judge.

I look forward to Mr. Stewart's appointment.

Sincerely,

MARK O. WALSH,
Associate Director.

BERMAN, GAUFIN, TOMSIC & SAVAGE,
Salt Lake City, UT, January 5, 1999.

CHARLES F. RUFF,
Counsel to the President, The White House, Washington, DC.

DEAR MR. RUFF: I see from the local paper that some Democrats are opposing the appointment of Ted Stewart as U.S. District Court Judge. According to the newspaper, these party members have criticized Mr. Stewart as a "partisan political operative who has little or no judicial temperament."

There is no question, of course, that Mr. Stewart is a Republican and serves as Governor Leavitt's Chief-of-Staff, but I find the charges and perjoratives used against Mr. Stewart extraordinary. I knew Mr. Stewart when he was Chairman of the Utah Public Service Commission. During his tenure, I represented Utah Power & Light in the largest and most controversial Public Service Commission case of the last twenty years. It was a case that involved well over $100 million and extended to charges of wrongdoing by the power company involving the operation of company mines producing fuel for over 1,200 megawatts of power in Carbon and Emery Counties. Mr. Stewart, in this proceeding, performed the function of a judge and I feel I am in a position to express an opinion with regard to his competence and temperament.

In my opinion, Mr. Stewart displayed genuine competence and excellent judicial temperament in the discharge of his judicial functions as Chairman of the Public Service Commission. I say that even though Mr. Stewart ruled against the power company and I think it is fair to state, took a pro-consumer position on the issues presented. I may not have agreed with his rulings, but I have respect for the manner in which he discharged his responsibilities.

It is not my place to determine the politics of an appointment to the federal bench, but I believe the partisan charges against Mr. Stewart are wholly unfounded. I believe he has an excellent judicial temperament and if appointed, would be a very good federal judge.

Sincerely,

DANIEL L. BERMAN.

HOUSE OF REPRESENTATIVES,
STATE OF UTAH,
Magna, UT, January 4, 1999.

Hon. WILLIAM J. CLINTON,
President, United States of America, Washington, DC.

DEAR PRESIDENT CLINTON: This letter is in reference to Ted Stewart's nomination for a possible appointment to the federal bench. I have known Mr. Stewart for fourteen years in his capacity as Commissioner of our Public Service Commission and then as Director of Utah State Department of Natural Resources as well as his current position as Chief of Staff to Governor Mike Leavitt.

Mr. Stewart has always been fair in his dealings to me as a Democrat in a sea of Republicans. He has treated me with respect and has been non-partisan in his various positions in state government. He has stood out in his leadership in moving us toward the future. He has left each position better than when he took it over.

Please give him your consideration as you make your appointment to the District bench. If I can provide any further information, please let me know.

Sincerely,

DANIEL H. TUTTLE.

O'RORKE & GARDINER, LLC,
ATTORNEYS AT LAW,
Salt Lake City, UT, January 5, 1999.

Re letter in support of the nomination of B. Ted Stewart to serve as a Federal District Court Judge for the United States District Court for the District of Utah.
c/o Charles Ruff, Counsel to the President.

President BILL CLINTON,
1600 Pennsylvania, Avenue,
Washington, DC.

DEAR PRESIDENT CLINTON: As a long-time Democrat activist and party member,[1] as well as a practitioner in the Federal Courts,[2] I am writing this letter in support of the nomination of B. Ted Stewart to serve as a Federal District Court Judge here in Utah.

Ted Stewart is uniquely and eminently qualified to serve as a Federal District Court Judge. Most of Ted's professional life has been devoted to resolving some of Utah's most complex, intractable and difficult legal issues and contests. For many years (1980's), Ted served as Chairman of the Utah Public Service Commission. While practicing law before the Commission, I observed firsthand Ted's ability to identify the pivotal legal issues, correctly apply the law and spearhead Commission decisions that were not only legally correct, but also served up with a much needed dose of common sense and compassion.

Ted's ability to resolve complex legal disputes and balance competing interests continued to benefit Utahns while he thereafter served as the Department Head of the Utah Department of Natural Resources. For example, when the Central Utah Project municipal water supply was threatened due to the inability of Utah's major water purveyors and the Bureau of Reclamation to come up with an acceptable operating agreement for the Bureau's reservoirs, the Bureau of Reclamation as well as Utah's water districts asked Ted Stewart to mediate and assist the parties in drafting an acceptable but legally correct operating agreement. This assignment required that Ted not only have a thorough understanding of Utah water law and contract law, but also Federal Reclamation Law. Ted was successful in completing the project and preserving the Central Utah Project water supply.

Ted's knowledge of federal law has also assisted the State in addressing and resolving various endangered species issues. In short, Ted is uniquely qualified to serve as a Federal District Judge because of his extensive experience in dealing with

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[1] I was the Democrat Third Congressional candidate in Utah in 1986 and the party's candidate for the Salt Lake County Commission in 1988. I have also often served as a Voting District Chairman and as a State Convention Delegate and a County Convention Delegate. I am a contributor (albeit a somewhat modest one) to Democratic candidates. I am also involved in traditional Democratic causes. I have represented labor in the past and I currently serve as a counsel for two moderate environmental organizations, "The Grand Canyon Trust" and "The Trust For Public Lands."

[2] I currently litigate cases in the United States District Court for the District of Utah and have successfully argued appeals before the United States Circuit Court of Appeals for the Tenth Circuit as well as the Ninth Circuit. I have also practiced before the United States Supreme Court.

complex federal legal issues and his ability to balance competing interests by correctly and compassionately applying the law. Mr. Stewart is an outstanding candidate for a Federal District Court Judge.

Very truly yours,

DALE F. GARDINER.

UTAH STATE UNIVERSITY,
Logan, UT, January 6, 1999.

Re Ted Stewart.

CHARLES RUFF,
White House,
Washington, DC.

DEAR MR. RUFF: Senator Orrin Hatch of Utah nominated Ted Stewart for the position of federal judge in Utah. The leadership of the state Democratic Party has publicly opposed Mr. Stewart's nomination. As a lifelong Democrat, I respect my party's position, but I disagree with their assessment of Mr. Stewart's career and potential.

Ted Stewart is an excellent choice as a federal judge. I have known him as an undergraduate, a law student, a legislative aid, a member of the public utilities commission, director of the state's division of natural resources, and the chief of staff for the governor. There are three characteristics that he exhibited in all of his positions; openness, fairness, and honesty. As an administrator, he demonstrated a tremendous intellectual capacity to see all sides of issues and make sound judgments. He has an abiding commitment to represent the public and to act in their best interest.

The courts of Utah will be well served by Ted Stewart. Although his career as a public servant has taken him on a different legal track, he is well prepared to become a judge. Please give him every consideration because he is an able, competent, and deserving nominee. I do believe my Democratic colleagues know that he is one of Utah's finest citizens. We will all be well served by his confirmation. I know few people with more personal integrity than Ted Stewart.

Thank you very much for serving and best wishes for the challenges that lie ahead.

Sincerely,

F. ROSS PETERSON.

JONES, WALDO, HOLBROOK
& MCDONOUGH,
Salt Lake City, UT, January 13, 1999.

Re Ted Stewart.

Mr. CHARLES F. RUFF,
Counsel to the President, The White House, Washington, DC.

DEAR MR. RUFF: I was saddened to see the partisan expressions in The Salt Lake Tribune concerning Ted Stewart who it was alleged lacked judicial temperament.

I am a Democrat and have practiced law in Utah for 45 years. I have appeared before most Judges in the State, past and present, as well as before various administrative agencies in a number of states as well as those in the Federal system. I have appeared a number of times in cases before Ted Stewart when he was on the Utah Public Service Commission and can say categorically that the allegation of his having "little or no judicial temperament" is utterly false and nonsense.

He is a person of the highest character and would grace the Bench with distinction should he be selected.

I would be pleased to discuss this subject in further detail if you or any of your associates consider it desirable.

Respectfully,

SIDNEY G. BAUCOM.

WADDINGHAM & PETERSON,
Delta, UT, January 7, 1999.

Attention: Charles Ruff.

Hon. WILLIAM J. CLINTON,
President of the United States, Washington, DC.

DEAR MR. PRESIDENT: We are writing this letter in support of Ted Stewart, candidate for nomination as a Federal District Judge in Utah. We have known Mr. Stewart for approximately six years. He has earned our respect through his handling of issues in his role as Executive Director of the Utah Department of Natural Resources. As private attorneys, we represent many clients with interests in environmental and natural resource issues that involved Mr. Stewart. We have also had opportunity to work with Mr. Stewart in his present position as Chief of Staff for Governor Michael Leavitt.

In our experience, Mr. Stewart is thoughtful, decisive, moderate, and exceptionally honest. We have been impressed with his analytical skills and ability to decide specific issues, while understanding the broader implications of these decisions. In situations involving conflict, he maintains composure and possesses a personal style that reduces antagonism. He is an articulate speaker and writer. We have both sat in numerous meetings conducted by him and have found him to be an effective and firm moderator, yet he fosters participation from all viewpoints.

This is high praise for a Republican, since we are both lifelong Democrats who have between us held elected and appointed state and local offices. We both sincerely believe that Mr. Stewart would be a deserving appointment to the District Court Bench.

If you would like any further information or recommendation, please feel free to contact either of us.

Sincerely yours,

THORPE WADDINGHAM.
WARREN H. PETERSON.

BEAVER COUNTY COMMISSION,
Beaver, UT, January 6, 1999.

Re Recommendation for the Appointment of Ted Stuart to the Position of Federal Judge in Utah.

Attention: Charles Ruff.

President WILLIAM JEFFERSON CLINTON,
White House, Washington, DC.

PRESIDENT CLINTON, I am proud to be a Democrat and to be an elected County Commissioner for Beaver County, Utah. I have held the office of County Commissioner, as a Democrat, for the past 22 years.

During my time in office, I have had the opportunity to work with a good number of elected and appointed officials. One of these officials is Ted Stuart. I have found Ted to be an intelligent and caring person with the ability to look at all sides of an issue before making a decision.

I believe that Ted Stuart would be an excellent Federal Judge and would urge you to appoint Ted to the position of Federal Judge in Utah.

Sincerely,

CHAD W. JOHNSON,
Chairman.

UTAH WETLANDS FOUNDATION,
Salt Lake City, UT, January 20, 1999.

Attn: Mr. Charles Ruff, Esq., Counsel to the President, Washington, DC.

President WILLIAM JEFFERSON CLINTON,

DEAR PRESIDENT CLINTON: The Utah Wetlands Foundation is a 501(c)(3) tax exempt organization founded for the enhancement, protection and propagation of wetlands throughout the state of Utah. We have been participating in these endeavors for over two decades. We have been successful through this period in restoring, acquiring or protecting through financial contributions. Our ability to work with other agencies has resulted in protection of thousands of acres within the state of Utah particularly as it surrounds the Great Salt Lake, for the preservation of many species of shorebirds and waterfowl. The aquatic wildlife associated with these same areas has been enhanced as well. Through our efforts with the Nature Conservancy

and the Utah Division of Wildlife Resources we have purchased thousands of acres and turned them over to other agencies for management.

The purpose of this letter is two-fold. First, it has come to our attention there are some environmental organizations within the state of Utah that are attacking Mr. Ted Stewart and his record on the management and preservation of natural resources within the state of Utah. To the contrary, our experience being first-hand with Mr. Stewart while he was the Executive Director of the Dept. of Natural Resources is one that has been very favorable regarding natural resources and their protection within the state of Utah. From personal experience, I am very aware of Mr. Stewart and his dedication to judicial use of those natural resources as well as their preservation throughout the state of Utah. In all cases, Mr. Stewart has personally been involved with the management and management philosophy of natural resources within the state, and in each case has had those resources and their preservation uppermost in mind. So although there may be some opposition his management of some particular resource within the state, on the whole, Mr. Stewart has an extremely fine track record in their behalf.

The second point I would like to make is that having worked with Mr. Stewart on a very close basis for several years, I would recommend favorable consideration for any position for which he may be nominated. Mr. Stewart's judgment and judicial evaluation of any project or issue has been one of unbiased and balanced results. Therefore, this organization would like to again endorse Mr. Stewart for favorable consideration for any recommendation or nomination for which he may be considered.

We thank you very much for your consideration and are confident if you make a favorable decision in Mr. Stewart's behalf, it is a decision that you shall not regret.

R.G. VALENTINE,
President, Utah Wetlands Foundation.

ROCKY MOUNTAIN ELK FOUNDATION,
Riverton, UT, January 14, 1999.

Attn: Mr. Charles Ruff, Counsel to the President, Washington, DC.

The PRESIDENT,

DEAR MR. PRESIDENT: This letter confirms my strong support for your consideration of Ted Stewart to fill Utah's federal district judgeship. I have known Ted for over 8 years and have always found him to be honest and fair.

Working closely with him on environmental and conservation issues, I have been impressed by his concern and knowledge of the issues facing wildlife and the environment. He has always been reasonable and open to constructive ideas and solutions. Although we have not agreed on every issue, I have always been impressed by his fairness and his ability to listen.

Ted's background will allow him to make thoughtful, reasoned decisions. He has a track record of bringing competing advocates together and finding common ground on tough environmental issues. This experience makes him uniquely qualified to serve our citizens as a judge.

Thank you for this opportunity to recommend Ted Stewart for this important position. I appreciate your consideration. Please feel free to contact me concerning this appointment.

Sincerely,

WILLIAM E. CHRISTENSEN,
Utah Field Director.

SALT LAKE CITY, UT,
January 25, 1999.

Re: Recommendation for Brian T. "Ted" Stewart as Federal District Judge.

Attention: Charles Ruff, The White House, Washington, DC.

President WILLIAM JEFFERSON CLINTON,

DEAR PRESIDENT CLINTON: I am aware you are currently considering a number of candidates to fill a vacancy for Federal District Judge here in Salt Lake City. I am writing to recommend Ted Stewart for this position and hope you will give his candidacy every consideration.

I have come to know and respect Ted through my activities as a Utah businessman dealing with natural resource issues and through my service as a member of

Executive Committee and Board of Trustees of the Utah Chapter of The Nature Conservancy.

As you are aware, Ted currently serves as Chief of Staff to Utah Governor Michael O. Leavitt. Before this time, he ably served as the Director of our Department of Natural Resources, as a staff member on Capitol Hill and as a private attorney. Ted is a hardworking and industrious individual whose years of public service speak volumes about his contributions to our state. He is very knowledgeable about western natural resource and environmental issues and has always been a fair and conscientious judge of the conflicting demands on our lands and waters. Though some groups involved in wilderness protection issues have not always agreed with Ted, I know many of us who are both business leaders and conservationists have respected Ted's commitment to open space preservation, his ability to exercise sound judgment in weighing difficult preservation vs. development issues and his sincere commitment to quality growth.

I realize you are now in a position of having to choose between a number of qualified candidates. In your deliberations, I hope you carefully consider Ted's substantial abilities and experience. He has my hearty recommendation and hopefully will earn yours as well.

Sincerely,

CHRISTOPHER F. ROBINSON.

TOOELE COUNTY CLERK,
TOOELE COUNTY COURTHOUSE,
Tooele, UT, January 8, 1999.

President WILLIAM JEFFERSON CLINTON,
Charles Ruff, The White House, Washington, DC.

DEAR MR. PRESIDENT: I am writing to let you know that I support Ted Stewart for the appointment to a Federal Judgeship in Utah.

I am currently the Tooele County Clerk, a Democrat, and have held this elected position for the past 25 years. Through this position I have been active in our State Association, having served as President of the Utah Association of Counties in 1994. Through my activity in the UAC it has been necessary to work closely with Ted Stewart, as the Director of the Utah State Department of Natural Resources and also while he is serving as Senior Staff to the Governor, on a variety of issues which faced our state and counties. I have always found Ted to be fair and honest in our relationship and in all of his dealings.

It is with great pleasure that I can recommend Ted Stewart for a Federal Judgeship, knowing that he will serve all of Utah fairly and honestly.

Sincerely,

DENNIS D. EWING,
Tooele County Clerk.

BRENT H. CAMERON,
ATTORNEY AT LAW,
Salt Lake City, UT.

CHARLES F. RUFF,
Counsel to the President, The White House, Washington, DC.

DEAR MR. RUFF: I am writing concerning the Judicial appointment to the Tenth Circuit. It is my understanding that Brian T. (Ted) Stewart is being considered.

I served for four years on the Utah Public Service Commission with Ted, two while I was chair, and two while he was. His temperament, demeanor, legal and analytical ability were excellent. He routinely handled complex legal and regulatory issues with competence and ability. I believe he would be able to deal effectively with legal matters before the Court.

Ted has had extensive experience in the drafting and preparation of complex regulatory orders and his writing skills are excellent.

Ted's professionalism, integrity and honesty are above reproach. I believe he would make an excellent federal judge.

Sincerely,

BRENT H. CAMERON,
Deputy District Attorney, Salt Lake County.

P.S. I am a Democrat, I have worked on the staff of U.S. Senator Frank E. (Ted) Moss (D-Utah) and two Utah Governors, Calvin L. Rampton and Scott M. Matheson, both Democrats.

FOUNDATION FOR NORTH AMERICAN
WILD SHEEP, UTAH CHAPTER,
January 22, 1999.

President WILLIAM JEFFERSON CLINTON,
Charles Ruff, Counsel to the President, Washington, DC.

DEAR PRESIDENT CLINTON: I am writing on behalf of the nomination for a Federal District Court Judge appointment for Mr. Ted Stewart of Farmington, Utah.

Wild Sheep are considered by many wilderness advocates as a key indicator species of the health of wilderness. Mr. Stewart was awarded the "Distinguished Government Official" award in 1996 by the Utah Chapter of the Foundation for North American Wild Sheep for his support of restoring Bighorn to Utah's vast mountain and desert wilderness areas. Because of Mr. Stewart's support over the past eight years, millions of acres of wild sheep habitat have been secured. Ten new Bighorn populations were re-introduced to their once native habitats. After decades of improper grazing and mining practices, Bighorn were nearly extirpated from Utah's landscape. Over the past decade, a concerted effort has produced dramatic results. Bighorn sheep now number over 3,000 animals in over 20 different populations in Utah. Mr. Stewart has been a strong advocate of this effort.

The 500 members of the Utah FNAWS chapters include many of Utah's leading business, legal, and medical professionals. We recognize Mr. Stewart's exceptional skills in evaluating facts, and making sound judgments.

We therefore encourage Mr. Stewart's appointment to this important position.

Sincerely,

LEE E. HOWARD,
President, Utah FNAWS.

SUMMIT COUNTY, STATE OF UTAH,
January 13, 1999.

President WILLIAM J. CLINTON,
The White House, Washington, DC.

DEAR MR. PRESIDENT: Ted Stewart of Utah is being considered for appointment to a federal judgeship in Utah. I want you to know of my endorsement and support for Ted's appointment.

I have served as commissioner in Summit County for the past 10 years. During those years of leadership I have worked with Ted on several occasions. Ted served as Director of Natural Resource Committee for the State of Utah. During this tenure. I found him fair, wise and of good judgement. I currently work closely with him serving as Chief of Staff for the Governor where he works on a variety of complicated subjects. Ted is very knowledgeable and has the foresight to work and resolve issues.

I believe he has the judicial temperament and ability to make a great contribution to the federal judicial bench in Utah and to distinguish himself as an excellent judge.

I look forward to Mr. Stewart's appointment.

Respectfully,

SHELDON D. RICHINS,
Summit County Commissioner.

January 12, 1999.

Hon. WILLIAM J. CLINTON,
President of the United States, c/o Charles Ruff, Washington, DC.

DEAR MR. PRESIDENT: I am writing this letter on behalf of Ted Stewart who has been nominated by Senator Orrin Hatch to be a United States District Court Judge for the District of Utah.

I am a democrat and my family has been so for three generations in the State of Utah. I have previously held public office and been the democratic candidate for governor of the State of Utah.

I have practiced law in the State of Utah since 1962 and have an active practice in the United States District Court for Utah. I practiced law with Ted Stewart for several years and I know him to be a man of honor and principle and extremely thorough in all that he does. He was and is an excellent lawyer even though, of recent years, he has held administrative positions, I am confident that he would be an excellent district court judge.

In my 36 years of practice I have seen many judges come and go in the federal and state courts. I believe that Mr. Stewart has a fine judicial temperament and would not let his political leanings interfere with his being fair and impartial.

I recommend that his name be sent to the United States Senate for confirmation.

Very truly yours,

JOHN PRESTON CREER.

UTAH STATE SENATE,
January 8, 1999.

President WILLIAM JEFFERSON CLINTON,
White House, Washington, DC.

DEAR PRESIDENT CLINTON: Please allow me to introduce myself. I am a Democrat senator representing District 20 in the Utah State Senate and have just completed four years of service as Assistant Minority Whip in the Utah State Senate. I have previously had the honor of meeting you at a function arranged by NCSL in Washington, DC.

I am writing this letter concerning the pending appointment of a federal district court judge in Utah. I would like to endorse the nomination of Ted Stewart to fill this appointment.

I have had the opportunity to work with Mr. Stewart in several different capacities during the last twelve years. Mr. Stewart has always been very fair and judicious in his decision making and as far as I can ascertain has dealt in a bipartisan fashion in the manner in which he had expedited his employment responsibilities. He has served as a Public Service Commissioner, as the Director of the Department of Energy and Natural Resources and presently serves as Governor Leavitt's Chief of Staff. He comes to you with considerable broad based expertise and experience.

I would highly recommend Mr. Ted Stewart for the appointment to the Federal District Court Judgeship.

Sincerely,

SENATOR JOSEPH L. HULL,
District 20.

RULON C. GARDNER,
Fruit Heights, UT, January 6, 1999.

Attention: Charles Ruff.

President WILLIAM JEFFERSON CLINTON,
Washington, DC.

DEAR PRESIDENT CLINTON: I would like to lend my support to Ted Stewart who has been nominated as a Federal Judge. In my experience as a democratic State Delegate for three years, a County Delegate for two, having had a long tradition of being involved in the Democratic Party in Utah by supporting a brother who ran for the Governorship in 1984, as well as other candidates over the past few years, I am confident that Ted Stewart would be a great Judge.

Recently, I worked with Ted Stewart when he was Director of the Department of Natural Resources for the State of Utah in the construction of a new facility. Mr. Stewart wanted to make a conscientious statement that the Natural Resources building would be more than just an office building. We spent considerable time in evaluating zero-scape landscaping, energy efficiency through a combination of light, shelves, energy control of the lights, and an energy efficient mechanical system. During this process Mr. Stewart demonstrated his desire to provide not only a better space for his employees but also to construct an environmentally efficient facility. He is a man with the highest integrity and principles.

I would strongly request your consideration of Ted Stewart for the new Federal Judge.

Sincerely,

RULON C. GARDNER.

CHRISTOPHER F. ROBINSON,
Salt Lake City, UT, January 25, 1999.

Re recommendation for Brian T. "Ted" Stewart as Federal District Judge.
Attention: Charles Ruff.

President WILLIAM JEFFERSON CLINTON,
The White House,
Washington, DC.

DEAR PRESIDENT CLINTON: I am aware you are currently considering a number of candidates to fill a vacancy for Federal District Judge here in Salt Lake City. I am writing to recommend Ted Stewart for this position and hope you will give his candidacy every consideration.

I have come to know and respect Ted through my activities as a Utah businessman dealing with natural resource issues and through my service as a member of Executive Committee and Board of Trustees of the Utah Chapter of The Nature Conservancy.

As you are aware, Ted currently serves as chief of Staff to Utah Governor Michael O. Leavitt. Before this time, he ably served as the Director of our Department of Natural Resources, as a staff member on Capitol Hill and as a private attorney. Ted is a hardworking and industrious individual whose years of public service speak volumes about his contributions to our state. He is very knowledgeable about western natural resource and environmental issues and has always been a fair and conscientious judge of the conflicting demands on our lands and waters. Though some groups involved in wilderness protection issues have not always agreed with Ted, I know many of us who are both business leaders *and* conservationists have respected Ted's commitment to open space preservation, his ability to exercise sound judgement in weighing difficult preservation vs. development issues and his sincere commitment to quality growth.

I realize you are now in a position of having to choose between a number of qualified candidates. In your deliberations, I hope you carefully consider Ted's substantial abilities and experience. He has my hearty recommendation and hopefully will earn yours as well.

Sincerely,

CHRISTOPHER F. ROBINSON.

FOUNDATION FOR NORTH
AMERICAN WILD SHEEP,
Cody, WY, January 25, 1999.

Attn: Charles Ruff, Counsel to the President.

President WILLIAM JEFFERSON CLINTON,
Washington, DC.

DEAR PRESIDENT CLINTON, I am writing on behalf of the nomination for a Federal District Court Judge appointment for Mr. Ted Stewart of Farmington, Utah.

The Foundation for North American Wild Sheep is an international wildlife conservation organization, funding over $25,000,000 to protect wild sheep and their habitats from Alaska and the Northwest Territories of Canada to the Rocky Mountains, to the deserts of Mexico.

Utah had great potential for bighorn populations, but until the past decade, this potential was neglected. I know that Mr. Stewart has been a key advocate for wildlife conservation and bighorn sheep, particularly in Utah.

With my cousin having served as President Reagan's Press Secretary, I fully understand the importance of appointing well respected and experienced individuals to Federal District Court positions.

We strongly support Mr. Stewart's appointment to this position.

Sincerely,

LELAND SPEAKS, Jr.,
President.

SPORTSMEN FOR FISH AND WILDLIFE,
Bountiful, UT, January 20, 1999.

Attn: Charles Ruff, Counsel to the President.

President WILLIAM JEFFERSON CLINTON,
Washington, DC.

DEAR MR. PRESIDENT: I am writing on behalf of the nomination for a Federal District Court Judge appointment for Mr. Ted Stewart of Farmington, Utah.

For decades, Utah wildlife advocates felt that wildlife and wildlife conservation always came second to mining, timber, domestic grazing, petroleum exploration, and other commodity production interests. That was until Mr. Stewart was appointed as Director of the Utah Department of Natural Resources in 1993. Since then, Mr. Stewart increased annual funding for wildlife conservation by 33 percent. He helped pass a landmark piece of legislation that places $3 million annually into wildlife habitat preservation. Mr. Steward has been a leading voice within his party for open space protection and responsible economic development. He has been a strong advocate of endangered species protection. He has been a strong advocate for the Central Utah Project Wildlife Conservation and Mitigation and Commission.

I have personally watched Mr. Stewart in a professional manner face hostile opposition from industry representatives, ultimately making policy decisions that protect wildlife habitat, and wildlife conservation. Mr. Stewart has been a strong advocate of the Book Cliffs Conservation Initiative, a 500,000 acre project, in spite of opposition from oil and gas and grazing interests.

Public land use policy in Utah is a very controversial issue, with many differing values. Mr. Stewart has always been a straight shooter, being fair, factual, and professional in all his actions and decisions. These seem to be very important credentials for appointment to a Federal District Court Judge.

In a very personal situation, I was one of two finalists for the Director of the Utah Division of Wildlife Resources. Even though Mr. Stewart selected the other finalist, I hold Mr. Stewart in the highest esteem. He made a decision that was best for the entire state of Utah at that particular time. Mr. Stewart's judgment over the past few years has been extremely well respected from all parties, even when those judgments come down in favor of the other parties. All parties know the facts have been considered impartially, based on fact, merit, and what is best for the public good.

On behalf of several thousand Utah citizens who are respected businessmen and wildlife conservation advocates, I strongly encourage your favorable consideration for Mr. Stewart's appointment to this position. There is not one candidate more qualified.

Sincerely,

DONALD K. PEAY,
Executive Director.

KANAB, UT,
March 2, 1999.

Attention: Charles Ruff.

President WILLIAM J. CLINTON,
President of the United States,
Washington, DC.

DEAR PRESIDENT CLINTON: As a lifelong Democrat and Mayor of Kanab City I am seeking your approval of Ted Stewart to the Federal Judicial Bench in the State of Utah.

Having had the opportunity to work with Ted Stewart, I have found him to be extremely up front and honest in his dealings. He listens, he considers the information and the facts and makes decisions that have been fair and unbiased. I am confident that he would be a great asset to serve on the bench and it would be a benefit to the people of the United States.

I would appreciate your consideration of Ted Stewart.

Sincerely,

KAREN L. ALVEY,
Mayor.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, March 18, 1999.

President WILLIAM JEFFERSON CLINTON,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: It is with great enthusiasm I write to recommend Brian T. Stewart for federal judgeship. Ted Stewart and I have worked together for many years and without exception, he has impressed me as extremely intelligent, open minded, fair, compassionate, and willing to listen to all sides of an issue. He has a sharp legal mind and would make an excellent federal judge.

Ted has a long distinguished history in the legal field in both public and private practice. He was an attorney for the Law firm of Senior & Senior in Salt Lake City from 1974 to 1980. He served as U.S. Representative Congressman James Hansen's Administrative Assistant from 1981 to 1985. He then returned to Utah to serve as a Public Service Commissioner.

During Ted Stewart's public service tenure, he has presided over a very prosperous time for his State. But perhaps Utah is best known across the nation for its natural beauty. Ted Stewart has been a powerful advocate for responsible environmental policy. As Executive Director of Utah Department of Natural Resources from 1993 to 1998, Ted's commitment to the environment ensured that habitat for wildlife was strongly protected. Because of this commitment, Utah's elk and bighorn sheep populations thrive and provide the breeding stock for new herds throughout the western United States. If it were not for Ted's environmental leadership this would not have been possible. Ted is a person who insists that the solutions to environmental problems should be based on facts rather than fears. Ted demonstrated that he makes decisions based on the law and the public interest and that he cannot be cowered by heavy political pressure.

For these and numerous other reasons, I urge you to nominate Ted Stewart as a Federal Judge. I believe that he would be one of the finest judges in our nation's history.

Sincerely,

MERRILL COOK,
Member of Congress.

FABIAN & CLENDENIN,
ATTORNEYS AT LAW,
Salt Lake City, UT, March 16, 1999.

Re Nomination of Ted Stewart for Federal Judgeship in Utah.

Mr. JOHN PODESTA,
Chief of Staff, The White House,
Washington, DC.

DEAR MR. PODESTA: Regarding the proposed nomination of Ted Stewart to the federal district bench in Utah, I believe it is important for you to be aware that Mr. Stewart is not "anti-environmental" as some have suggested. While it is true that his views on wilderness designation are more conservative than many in the environmental community, Mr. Stewart has demonstrated that he can work effectively with mainstream organizations to advance important conservation initiatives in Utah. As counsel for The Nature Conservancy and the Rocky Mountain Elk Foundation, I had the opportunity to work with Mr. Stewart on a far-reaching plan to preserve the Book Cliffs region of northeastern Utah, a large block of primitive land containing some of the best wildlife habitat in the State. In his capacity as Director of the Department of Natural Resources, Mr. Stewart played a crucial role in implementing the Book Cliffs conservation plan and in protecting it from misguided attacks by certain resource development interests.

Mr. Stewart has worked well with the Audubon Society in its efforts to preserve lands around the Great Salt Lake, critical habitat for many species of migratory shorebirds and waterfowl. In addition, he is responsible for initiating the State's first comprehensive resource management plan for the Great Salt Lake, a much needed program.

Finally, having practiced law in Utah for almost 20 years, I had several occasions to appear before Mr. Stewart when he served on Utah's public utility commission.

I always found him to be thoughtful, fair and considerate. I would rate his judicial temperament as excellent.

Yours truly,

W. CULLEN BATTLE.

SUITTER AXLAND,
Salt Lake City, UT, March 31, 1999.

Attn: Mr. Charles Ruff, Esq., Washington, DC.

President WILLIAM JEFFERSON CLINTON,

DEAR MR. PRESIDENT: I am writing to express support for the nomination of Mr. Brian Theodore "Ted" Stewart to fill a vacancy in the Federal District Court for Utah. I am familiar with Mr. Stewart's background:

A graduate of the University of Utah Law School in 1975.

Attorney with the Salt Lake City law firm of Senior and Senior from 1975 to 1980, where he specialized in natural resource and environmental law. His practice included representation of major clients involved in mining and the oil and gas industry.

Chief of Staff to Congressman James V. Hansen of Utah from 1981 to 1985. In this position Mr. Stewart served as Chief Advisor to the Congressman on all legislative matters.

Member and Chairman of the Utah Public Service Commission from 1985 to 1992. These seven years as a member of the Public Service Commission required him to decide cases which demanded understanding of complex matters of law, economics, engineering and accounting. In that position, Mr. Stewart acted very much in the role of a judge. As Chairman, Mr. Stewart developed a reputation for fairness in the method of conducting the formal hearings before the Commission.

Executive Director of the Utah Department of Commerce and the Utah Department of Natural Resources from 1992 to 1998. In these positions, Mr. Stewart was responsible for the management of large agencies of state government, as well as the making of policy for the areas covered by the department's jurisdiction. His responsibilities include management of legal strategy for the departments.

Currently as Chief of Staff to Governor Mike Leavitt of Utah.

In all of my dealings with Mr. Stewart, I have found him to possess a judicial temperament * * * I find him to be a man of integrity * * * He is capable of grasping complex issues * * * In sum, I believe he would be a very competent judge.

I would respectfully request that you advance the name of Mr. Stewart to the United States Senate for confirmation as a Federal District Court Judge.

Thank you for your consideration.

Sincerely yours,

FRANCIS H. SUITTER.

APRIL 2, 1999.

Attn: Mr. Charles Ruff, Esquire.

President WILLIAM JEFFERSON CLINTON,
Washington, DC.

DEAR MR. PRESIDENT: I am writing to express support for the nomination of Mr. Ted Stewart to fill a vacancy in the Federal District Court for Utah. I am familiar with Mr. Stewart's background as an attorney, Chief of Staff to Congressman James V. Hansen of Utah, as a member and chairman of the Utah Public Service Commission, Executive Director of the Utah Department of Natural Resources and currently as Chief to Staff to Governor Mike Leavitt of Utah.

However, as the State Forester I am most familiar with his administration of the natural resources within his jurisdiction as Director of the Utah Department of Natural Resources. His ability to grasp complex issues, sort through the various conflicts, and orchestrate solutions are second to none. In my thirty-five plus years in the field of natural resource administration, Mr. Stewart stands out as a notable individual. He is fair, willing to listen to all sides, and at the same time offer suggestions based on his knowledge of law and democratic principles.

I believe his even attitude, mild temperament and his legally based professionalism make him uniquely qualified to assume the role of Federal District Judge.

I respectfully request you forward Mr. Stewart's name to the U.S. Senate for confirmation as a Federal Court Judge in Utah.

Sincerely,

ARTHUR W. DUFAULT,
Utah State Forester.

THE SALT LAKE TRIBUNE,
April 19, 1999.

Some of my chemical engineering colleagues went on to get MBA's at Harvard and Stanford. One got a law degree from Chicago. One of my MBA classmates is enjoying a successful career on Wall Street with the most prestigious investment banking firm in the world.

Ted Stewart is as sharp as anyone I have dealt with, some of the brightest people in the USA. Over the past seven years, Ted has displayed a remarkable amount of good judgment. He has stood up to commodity producers of various sorts and said, "there will be a balance for wildlife, wildlife habitat protection, and other uses." Funding for wildlife and environmental protection increased by tens of millions of dollars under his watch as Department of Natural Resources director.

Two years ago, I sat in Mr. Stewart's court of judgment as a finalist for the Division of Wildlife Resources director position. Mr. Stewart selected John Kimball, who has done a fine job. Having been on the "losing" side of Ted's judgment, I have nothing but great respect for a man who is honest, fair, considerate, and extremely capable. The people of the United States and of Utah would be very well served if President Clinton appoints Ted Stewart to a federal judgeship. Any criticism is just party politics.

DON PEAY,
Sportsmen for Fish and Wildlife, Salt Lake City.

JOHN PAUL KENNEDY,
ATTORNEY AT LAW,
Salt Lake City, UT.

Re: Support for Ted Stewart as Federal District Court Judge for the District of Utah.

President WILLIAM J. CLINTON,
The White House, Washington, DC.

DEAR PRESIDENT CLINTON: As a life-long Democrat and strong supporter of you and your administration, I am writing to endorse the appointment of Ted Stewart for the position of Federal District Court Judge for the District of Utah. I have practiced law for thirty-three years. Most of my practice is in the Federal Courts where I have specialized in Indian Affairs and Employment matters. As a result, I am very familiar with the Utah Federal (and state) Courts. In addition, years ago I ran for Utah's Second Congressional seat on the Democratic ticket and served for several years as the Utah Democratic Party attorney. I was a delegate to two National Democratic Conventions.

I recognize that Federal judicial positions ordinarily are awarded to persons of the same political party as the President, but in this case, I believe there are excellent reasons for an exception to the general rule. Of course, Mr. Stewart possesses outstanding academic credentials, is hard-working, and has high-level experience in a variety of positions which provide a broad-based background for serving as a Judge in the Federal Court. In addition to these important qualifications, Mr. Stewart also has a number of unique characteristics, which in my opinion make him the best choice for the current opening.

Ted Stewart has demonstrated extraordinarily good and balanced judgment in instances where I have been personally involved. He has reached out to show compassion for the underprivileged and has fought for bi-partisan solutions to old and perplexing problems. For example, much of the credit for the ultimate success of the recent Utah School Trust Lands settlement may be given to Mr. Stewart for his persuasive efforts and tenacious follow-through. In addition, he has been able to help form a coalition among environmentalists and others, who are typically at odds with each other, to protect Utah's West Desert from unwanted development.

While Mr. Stewart's career has not included an active role as a trial lawyer, he has for a number of years on a day-to-day basis been involved in reviewing and evaluating complex and technical legal matters, many of which are in active litigation. Again, his understanding of legal principles, ethics, trial tactics and strategies is ex-

ceptional. I have no doubt that from the outset he will be able to function at a highly competent level as a trial judge. His even temperament and courteous manner would complement the already excellent Federal Bench here in this District.

In short, I wholeheartedly lend my support to Ted Stewart for appointment to the important position of Federal District Court Judge. Many of my Democrat friends have similarly expressed their approval of Mr. Stewart for such a position. I would be happy to provide your office with any additional information with respect to this matter.

Sincerely,

JOHN PAUL KENNEDY.

THE TOWN OF VINEYARD, UT,
April 1, 1999.

Re: Ted Stewart Nomination for Federal Judgeship.

Attention: Mr. Charles Ruff, The White House, Washington, DC.

Hon. WILLIAM J. CLINTON,

DEAR PRESIDENT CLINTON: I am writing to urge your appointment of Mr. Ted Stewart to the Federal District Court Judgeship in the District of Utah.

Mr. Stewart has broad experience in governmental service and in the private practice of law. He has distinguished himself in dealing with controversy and making difficult leadership decisions, especially while serving as chairman of the Utah Public Service Commission. I have counseled with him on several occasions on matters critical to our area surrounding Utah Lake during the time he served as Director of the Utah Department of Natural Resources. He has demonstrated balance and good judgement in his responsibilities.

Mr. Stewart is intelligent and clear in his thinking and speech. I strongly encourage his appointment to this Judgeship.

Sincerely,

J. RULON GAMMON,
Mayor.

UINTAH COUNTY,
STATE OF UTAH,
April 6, 1999.

Re: Support of Ted Stewart as Federal District Court Judge for Utah.

Senator ORRIN HATCH,
U.S. Senate, Salt Lake City, UT.

DEAR SENATOR HATCH: We are writing in support of the nomination of Ted Stewart to be a Federal District Court Judge for the State of Utah. While we may not always agree with Mr. Stewart on issues, we have without exception found him to be a man of integrity and fairness. He is the type of person who can empathize with common people on issues of importance and one who is willing to listen to all sides of an issue.

We hope you will stick to your guns, no matter how difficult or harsh Mr. Stewart's critics may be. We cannot overstate how important this nomination is to the people of Uintah County and to the state at large.

Sincerely,

Uintah County Commission,
HERB SNYDER, *Chairman.*
LLOYD W. SWAIN.
CLOYD HARRISON.

THE WILDERNESS SOCIETY, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNSEL, DEFENDERS OF WILDLIFE, FRIENDS OF THE EARTH, NATIONAL ENVIRONMENTAL TRUST ENVIRONMENTAL DEFENSE FUND,

February 3, 1999.

Re possible appointment of Ted Stewart to vacant federal circuit judgeship in Utah.

Mr. JOHN PODESTA,
Chief of Staff, The White House,
Washington, DC.

DEAR MR. PODESTA: A recent press report and conversations with White House staff have confirmed that Ted Stewart, Chief of Staff to Utah Governor Mike Leavitt, is currently under consideration for an appointment to the federal judiciary in Utah. We are writing to express our deep concern about and united opposition to the possible appointment of Mr. Stewart. Mr. Stewart's extreme views on environmental matters, as evidenced by his past statements and actions, leaves us convinced that he could not be relied upon to render unbiased judgements in federal environmental cases. At a minimum, his rabid criticism of President Clinton's decision to create the Grand Staircase-Escalante National Monument should raise questions to the Administration about his view of environmental issues.

Upon graduation from the University of Utah School of Law, Mr. Stewart practiced law at the law firm of Senior and Senior in Salt Lake City. In 1980 he went to work for Utah Congressman James Hansen, a position he held for five years. He ran unsuccessfully for the U.S. Senate in 1992. In early 1993 he was appointed by Gov. Leavitt to head the Utah Department of Natural Resources.

Shortly after his appointment, Mr. Stewart gave an address at the annual Republican Party Lincoln Day dinner in Price, Utah. According to the February 23, 1993 Price Sum-Advocate, Mr. Stewart warned the crowd that he and they "shared a common enemy" in those who he claimed opposed the multiple-use of public lands. In particular, he cited Clinton administration proposals to raise grazing fees, eliminate below-cost timber sales, and institute hard-rock mining royalties as examples of anti-multiple-use policies. Mr. Stewart complained that environmental groups wanted to make the issue of wilderness designations in Utah a national issue. In keeping with his "shared common enemy" theme, Mr. Stewart warned the crowd that, "They [the environmentalists] think it should be decided by Clinton and the Democrats."

At the Department of Natural Resources, Stewart quickly went to work, dismantling the arm of the department that for decades was the principle research agency, the Division of Wildlife Resources. In 1993, 28 biologists lost their jobs, and another 71 scientific and research personnel were terminated between 1993 and 1996. In response to a letter written by a chapter of the American Fisheries Society expressing concern about the agency. Ted Stewart wrote that "professional and technical expertise do not necessarily translate into management and administrative competence." Division of Wildlife Resources professionals anonymously penned a letter-to-the-editor that Outdoor Life ran in July, 1996: "Gov. Mike Leavitt, Department of Natural Resources Director Ted Stewart and Utah Division of Wildlife Resources Director Bob Valentine have destroyed a professional wildlife-management agency and its dedicated personnel in three short years. Morale has never been lower and prospects for scientific management [have never been] bleaker.

Mr. Stewart opposed Secretary of the Interior Bruce Babbitt's review of that agency's wilderness recommendation in Utah and strongly supported the Governor's decision to file a lawsuit that would have prevented the review from going forward. In a 1997 meeting with Gov. Leavitt representatives of Utah environmental organizations argued that the Governor should end the state's involvement in the lawsuit in order to help the Governor fulfill his ambition of being an honest broker in the wilderness debate. The Governor declined after Mr. Stewart, recently appointed as the Governor's Chief of Staff, vigorously opposed the suggestion. (A lower court decision in the state's favor was later overturned by the 10th Circuit Court of Appeals.)

Ted Stewart, a self-described "Reagan-type Republican" (Salt Lake Tribune, August 29, 1991) has been a vocal opponent of Clinton Administration public land policies. With a lifetime appointment to the federal bench, he could give vent to his anti-federal and anti-environmental views without fear of removal. There are many candidates who could fill the Utah judicial vacancy. We urge you to seek an individual whose judicial philosophy is more consistent with this Administration.

Please do not hesitate to contact us should you desire to discuss our opposition to Mr. Stewart's nomination in greater detail.

Sincerely,

WILLIAM H. MEADOWS.
CARL POPE.

JANUARY 7, 1999.

Attention: Mr. Charles Ruff.

President WILLIAM J. CLINTON,
White House,
Washington, DC.

DEAR PRESIDENT CLINTON: Please allow me to introduce myself. My name is Joseph Bernini, Democratic member of the Juab County Commission, State of Utah. Also, I serve on the Central Committee to the Utah State Democratic party. I have been involved in Democratic politics in Utah for over 55 years.

I write in support of the appointment of Ted Stewart to the Federal Bench for the District of Utah. Although, Mr. Stewart is a Republican and I a died in the wool Democrat, I believe him to be the best candidate for the job. The experience and judgment in the broad range of issues required for such a high and important position demand that the best candidate for such a position be sought, not the best candidate from a particular party.

I believe Ted Stewart to be that candidate. For that reason, I urge you to appoint Ted Stewart as the next Federal Judge for the District of Utah.

Respectfully yours,

JOSEPH BERNINI,
Juab County Commissioner.

KANE COUNTY COMMISSION,
Kanab, UT, January 6, 1999.

Attention: Charles Ruff.

WILLIAM J. CLINTON,
President of the United States, The White House,
Washington, DC.

DEAR PRESIDENT CLINTON: I am writing as a Democratic County Commissioner in the State of Utah in support of Ted Stewart being approved in the Federal Judicial Bench in the State of Utah.

In my dealings and working with Mr. Stewart, I have found him to be a fair and honest person, one of judicial temperament. I feel he would be a great asset to the judicial system.

I appreciate the opportunity to make this recommendation and thank you for your consideration.

Yours truly,

JOE C. JUDD,
Kane County Commissioner.

BERMAN, GAUFIN, TOMSIC & SAVAGE,
LAW OFFICES,
Salt Lake City, UT, January 6, 1999.

Re: Ted Stewart.

CHARLES F. RUFF,
Counsel to the President, The White House,
Washington, DC.

DEAR MR. RUFF: The Salt Lake Tribune in an article dated January 1, 1999, reported that "Utah Democrats," opposing the appointment of Ted Stewart as a U.S. District Court Judge, say "he has little or no judicial temperament." That is not true.

Briefly, I am a Democrat, once serving as Chairman of the Democratic Party in Utah. Also, in addition to my private legal practice, I have served as a Commissioner of the Utah Public Service Commission, a Utah District Judge, and a Supreme Court Justice of Utah.

I appeared before Ted Stewart when he was Chairman of the Public Service Commission in Utah on about four occasions. I found him to be courteous, possessing an abundance of judicial temperament, bright, and competent.

If you have any questions, I, of course, would be pleased to answer any of them.

Respectfully,

D. FRANK WILKINS.

HILLYARD, ANDERSON & OLSEN,
ATTORNEYS AT LAW,
Logan, UT, January 8, 1999.

Attn: Charles Ruff.

Re: Ted Stewart Judicial Nomination.

President BILL CLINTON,
1600 Pennsylvania Avenue,
Washington, DC.

DEAR MR. PRESIDENT: I have been active in the Democratic Party for approximately 35 years. I have served as the Chairman of the Cache Democratic Party and on numerous state Democratic subcommittees.

Approximately 27 years ago, I met Ted Stewart while we were matriculated at Utah State University. I have followed Ted's career path over the years. I have retained my friendship with him and his good wife.

During the course of that friendship, I have never known, heard or observed Ted do anything that was inappropriate in any way whatsoever. He has always acted with exemplary decency without regard to partisan politics insofar as my experience extends.

I would have been pleased to see a Democrat nominated to the Utah judicial vacancy currently being considered; but in the absence thereof, I am comfortable that Ted can competently fulfill the duty and tasks of a federal judge.

If you have any questions or concerns which I may address, I am pleased to do so.

Sincerely,

HERM OLSEN,
Attorney at Law.

SANPETE COUNTY COURTHOUSE,
Manti, UT, January 7, 1999.

Attn: Charles Ruff.

Re: Recommendation for Ted Stewart.

President WILLIAM J. CLINTON,
White House, Washington, DC.

DEAR PRESIDENT: As a democratic elected official in Sanpete County, and as President of the Utah Association of Counties, I feel very comfortable in recommending Ted Stewart for the appointment of Federal District Court Judge.

Ted Stewart has a reputation that is one of fairness. He has the judicial temperance that would be well served on the Federal Bench. Ted has many admirable and outstanding qualities that have earned the respect of County Officials in the State of Utah.

I am pleased to recommend Ted Stewart for the Federal Judgeship without reservation.

Sincerely,

KRISTINE FRISCHKNECHT,
President of Utah Association of Counties, Sanpete County Clerk.

FOUNDATION FOR NORTH AMERICAN
WILD SHEEP, UTAH CHAPTER,
January 22, 1999.

Attn: Charles Ruff, Counsel to the President.

President WILLIAM J. CLINTON,
White House, Washington, DC.

DEAR PRESIDENT CLINTON: I am writing on behalf of the nomination for a Federal District Court Judge appointment for Mr. Ted Stewart of Farmington, Utah.

Wild Sheep are considered by many wilderness advocates as a key indicator species of the health of wilderness. Mr. Stewart was awarded the "Distinguished Government Official" award in 1996 by the Utah Chapter of the Foundation for North American Wild Sheep for his support of restoring Bighorn to Utah's vast mountain and desert wilderness areas. Because of Mr. Stewart's support over the past eight years, millions of acres of wild sheep habitat have been secured. Ten new Bighorn populations were re-introduced to their once native habitats. After decades of im-

proper grazing and mining practices, Bighorn were nearly extirpated from Utah's landscape. Over the past decade, a concerted effort has produced dramatic results. Bighorn sheep now number over 3,000 animals in over 20 different populations in Utah. Mr. Stewart has been a strong advocate of this effort.

The 500 members of the Utah FNAWS chapters include many of Utah's leading business, legal, and medical professionals. We recognize Mr. Stewart's exceptional skills in evaluating facts, and making sound judgments.

We therefore encourage Mr. Stewart's appointment to this important position.

Sincerely,

LEE E. HOWARD,
President, Utah FNAWS.

UTAH STATE BAR,
Salt Lake City, UT, June 21, 1999.

Re: Mr. Brian Theadore (Ted) Stewart
Judicial Vacancy, U.S. District Court of Utah.

Hon. WILLIAM J. CLINTON,
President of the United States of America, Washington, DC.

DEAR MR. PRESIDENT: I write to solicit your appointment of Mr. Brian Theadore Stewart to fill the vacancy in the U.S. District Court of Utah. As President of the Utah State Bar, a member of the American Bar Association, and as a trial attorney of the state and federal courts of Utah for nearly 23 years, I know the duties and qualifications of a federal trial judge. I have known Ted and his family for many years; and, without reservation, I endorse his appointment to this important office.

Mr. President, I subscribe to the principle that our judicial officers should be selected upon the basis of meritorious qualification. This is, of course, a principle also endorsed by the ABA, the American Judicature Society of which I am also a member, and most every other organization interested in maintaining a strong and independent judiciary. I also subscribe to the ABA standards for evaluating judicial nominees upon integrity, professional competence, and judicial temperament.

As you know, today's political agendas motivate some people to criticize any candidate for public office, if such might advance a personal cause. Such criticism or commentary has no place in the process of judicial selection; it is plainly disingenuous. From my observation, the only challenge to Ted Stewart's appointment has been the suggestion that he lacks substantial courtroom experience and thus lacks professional competence. This argument is, I believe, politically motivated and without merit.

Most significantly, Mr. Stewart's integrity and judicial temperament has never been questioned. Ted's reputation for good character and industry and his temperament of fairness, objectivity, courtesy, and patience is without blemish. On these counts, you could not find a better, more qualified judicial candidate. With reference to the category of professional competence, even Ted's detractors acknowledge that he possesses the highest qualities of intellect, judgment, and writing and analytical skills. Instead, his appointment has been challenged because Ted has selected a legal career which has not followed the traditional litigation-oriented track. I suggest, however and for this very reason, that Mr. Stewart is not only professionally competent but indeed a uniquely qualified, candidate for the federal trial bench. There is, Mr. President, a need from time to time to leaven the composition of the federal judiciary with diversity of professional experience. Your appointment of Ted Stewart presents an opportunity to do this in the District of Utah.

As you are aware from the content of Mr. Stewart's disclosure of his professional experience, he has not tried cases in the traditional courtroom setting; yet, he has had an abundance of meaningful and successful litigation experience as a practicing attorney, as a member and chairman of the Utah Public Service Commission, and as an executive officer for the state government of Utah. Ted's work with the complex and extremely stressful caseload of the Utah Public Service Commission alone qualifies him as professionally competent to serve as a U.S. district court judge. Ted's adjudicatory experience and skills outside the traditional courtroom model not only compensate for such traditional experience, they provide an exceptional contribution of qualification that most trial judges do not possess.

You and Mr. Stewart are nearly the same age and have been lawyers for approximately the same length of time. As I consider, Mr. President, your own professional experiences, you have only limited courtroom and trial experience; yet, it would be unreasonable to suggest that your experience as a law professor, a State Attorney General, a Governor, or as President are not overriding alternatives to the tradi-

tional experiences which would be considered to qualify you competent to serve in the federal judiciary.

I am confident that history will record the wisdom and courage of your appointment of Ted Stewart, because he will undoubtedly prove to be a distinguished judge of the U.S. District Court and a respected servant of the people of Utah. Thank you for your consideration of this important matter.

Sincerely,

JAMES C. JENKINS,
President.

NOMINATIONS OF RONALD M. GOULD (U.S. CIRCUIT JUDGE); ANNA J. BROWN, FLORENCE MARIE COOPER, RICHARD K. EATON, ELLEN SEGAL HUVELLE, AND CHARLES A. PANNELL, JR. (U.S. DISTRICT JUDGES)

TUESDAY, SEPTEMBER 14, 1999

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

The committee met, pursuant to notice, at 2:12 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl presiding.

Also present: Senators Kohl and Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. This hearing of the Senate Judiciary Committee will come to order.

This is a judicial nominations hearing scheduled for the purpose of considering the nominations of a candidate for judge of the Ninth Circuit Court of Appeals and five candidates for U.S. district court positions.

There will be three panels. The first panel will consist of members of the Senate and the House of Representatives who will be introducing candidates. The second panel consists of the candidate for the Ninth Circuit Court of Appeals. And the third panel will consist of the five district court judges.

Let me at this time recognize the Members of Congress who are at the dais. Let's see here, in the proper order—and Senator Feinstein, by the way, should be joining us shortly. I should have said that in the beginning. But Senator Moynihan, Senator Gorton, Senator Murray, Senator Wyden, and—and Representative Boehlert, and excuse me for calling you Senator, Representative Boehlert. I didn't mean to cast any aspersions by that reference. [Laughter.]

I would call upon you in the order that I announced your names to designate the candidates you support, and then we will see if there are other Members of Congress who would like to join the dais at that time.

Senator Moynihan.

Senator MOYNIHAN. Thank you, Mr. Chairman. I wonder if I might defer to Representative Boehlert, who is in the middle of a fierce debate over on the House floor.

Senator KYL. Yes, indeed. Representative Boehlert.

Senator MOYNIHAN. We are here on behalf of our good friend and constituent, Richard K. Eaton, who is a candidate for the International Trade Court.

Senator KYL. Representative Boehlert.

STATEMENT OF HON. SHERWOOD L. BOEHLERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Representative BOEHLERT. Thank you very much. Senator Moynihan always brings his Congressman along with him.

Mr. Chairman, it is my pleasure, both professionally and personally, to present to this distinguished panel for its consideration and deliberation the name of Richard K. Eaton for a seat on the U.S. Court for International Trade.

Mr. Eaton is many things. He is a constituent. He is a colleague, a distinguished attorney, and a friend. I have known him for a quarter of a century. He is of the finest character, a man of integrity, impeccable credentials, and I would urge you move with dispatch and affirmation on his nomination.

Thank you, Mr. Chairman, and thank you, Senator Moynihan.

Senator KYL. Thank you, Representative Boehlert.

Senator MOYNIHAN. I think perhaps the Representative might go back to the——

Senator KYL. Yes, indeed. Representative, you are excused, and I think his succinct comments might serve as a guide to all of us in our deliberations this afternoon. Thank you for setting that wonderful precedent.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Senator, I would add a very brief thing. For a quarter of a century, near on, Mr. Eaton has been first secretary, then later chairman of the Judicial Selection Committee which we have established in New York in 1977. It is a nonpartisan process which we feel has been a considerable example to others.

New York University Law School Professor Stephen Gillers put it this way:

> In most places, lawyers who count, who want to be judges, become politically active. In New York, lawyers who want to be Federal trial judges complete a 12-page questionnaire containing 37 questions. An 11-member panel screens applicants and recommends nominees who have been—[these] nominees. They are a first-rate group, as might be expected from the process that produced them.

And if I may, sir, Mr. Eaton is the person who produced that process, and I commend him to you with the greatest respect.

Senator KYL. Thank you very much, Senator Moynihan.

Senator Gorton.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, it is with great pleasure, but pleasure as long delayed as it is great, that I introduce and com-

mend to you Ronald Gould as a nominee to the Ninth Circuit Court of Appeals.

Since 1975, Ron has practiced law at the Seattle law firm of Perkins Coie, the largest law firm in Seattle, and I believe the only law firm in Seattle larger than the one of which I am an alumnus, specializing in commercial litigation.

The numerous letters of support and recommendations sent to members of this committee and previously to Senator Murray and myself by both Ron's colleagues and by his clients attest to his skill and knowledge in his profession.

That admirable profession and academic record, however, while alone enough to qualify him for the Federal bench, represents only a small part of the legal and life experience that would make him a true asset to the Ninth Circuit Court of Appeals.

Ron has participated actively in legal and civic organizations and projects too numerous to recite in full. Simply to give you an idea of the breadth of his experience, however, let me mention a few of them.

In addition to being a former president of the Washington Bar Association, Ron has served on the historical societies for the Supreme Court and the Ninth Circuit Court of Appeals. He has cochaired with Washington State Attorney General Christine Gregoire a project to develop mediation in high schools as a member of the Washington Women's Lawyers and a member of the Washington Association of Lawyers with Disabilities.

Now, when my staff assistant prepared these remarks, Mr. Chairman, he didn't realize that during the time that Mr. Gould was president of the Washington State Bar Association he helped me with a project that is of equal interest to you as it is to me, the reorganization of the Ninth Circuit Court of Appeals. And if nothing else commends him to you, I believe that that should.

Senator KYL. Perhaps, Senator Gorton, we should keep that real quiet until after his confirmation. [Laughter.]

Senator GORTON. Among the many nonlegal civic organizations in which Ron has been involved are the Boy Scouts of America, for which Ron has served on the executive board of the Chief Seattle Council since 1984; the People to People Citizen Ambassador Program, for which Ron traveled to East Asia, Japan, and Eastern Europe in the late 1980's; and on the board of trustees for the Bellevue Community College. Ron's legal and life experience has been simply extraordinary, so extraordinary that I am proud to be able to recommend him to you for confirmation to the Ninth Circuit Court of Appeals, again, with Senator Murray, with whom I have enjoyed a constructive and productive partnership in working toward fine judicial nominations emanating from the State of Washington.

Senator KYL. Thank you, Senator Gorton.

Senator Murray.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you, Mr. Chairman. And I am pleased to join Senator Gorton here to recommend to the committee the confirmation of Ron Gould for the Ninth Circuit Court of Appeals.

Senator Gorton is right. We have been working closely together to make sure we have the highest quality nominees, and this committee has been very helpful in moving them along. We are pleased that Mr. Gould is next in line.

Before I begin, I want to recognize the members of Ron's family who are with him: his wife of 30 years, Suzanne; their son, Daniel; and his mother, Mrs. Sylvia Gould.

Senator KYL. When people recognize you, would you at least raise your hand if not stand so we can see who you are. Thank you. You are very welcome to be here, and we appreciate knowing precisely who is being referred to here. Thank you.

Senator MURRAY. You should know, Mr. Chairman, that Ron's mother, pushed him to succeed in school and in Boy Scouts, and his wife, Suzanne, worked as a computer programmer to finance her husband's law school. So I think they are both taking credit for his being here in front of us today.

Senator KYL. As is appropriate.

Senator MURRAY. His daughter, Rebecca, who was unable to be here today is a sophomore at Hampshire College at Amherst, is a strong supporter of her dad. Daniel, I have been told, is a jazz musician who just graduated from Stanford University and is working to get his own Internet startup company off the ground.

I also should tell you that Mrs. Gould, his mother, is an active 81-year-old walker and swimmer, who traveled from White Rock, British Columbia, to be here with all of us today. So we are delighted to have all of you here with us today.

Senator KYL. We are pleased to have you all here.

Senator MURRAY. So let me now talk about Ron Gould. He is an excellent choice for the Ninth Circuit. He has been a partner with the prestigious firm of Perkins Coie in Seattle since 1981. He is an expert in antitrust, banking director and officer liability, trade secrets and complex commercial litigation. In addition, he has served inside the courtroom as law clerk both to Judge Wade McCree on the Sixth Circuit and Justice Potter Stewart on the U.S. Supreme Court.

He is also very well respected among his peers. As Senator Gorton said, in 1994, he was elected to serve as president of the Washington State Bar Association. I wanted you to know that in that capacity, he served on a project to decrease youth violence by developing student mediator programs within our Washington State high schools. He also convened Bar Association board meetings in locales where he could meet with local leaders to learn how the bar could help address youth violence programs. The program they developed was dubbed LASER, for Lawyers and Students Engaged in Resolution, and it is now a statewide initiative that continues to attract schools interested in innovative problem solving.

Mr. Gould is also very active in higher education, serving as a trustee of the Bellevue Community College. He also is active in the Boy Scouts of America, where he serves as a board member.

Mr. Gould is very committed to the next generation of Americans, just as he is to law and our legal system. And I am certain that he is going to treat those who come before him on the Ninth Circuit with justice, fairness, and dignity. I am certain he will be an excellent judge.

So I am very pleased that after 2 years of waiting he now has the opportunity to be heard, and this committee and the Senate will finally have a chance to know Mr. Gould as both Senator Gorton and I do. I have the greatest confidence that all of you will be very impressed with him. He is an outstanding human being and a very capable lawyer. So I urge this committee to report his nomination and look forward to voting for him on the Senate floor this year.

Senator KYL. Thank you, Senator Murray.

Senator Wyden.

STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM THE STATE OF OREGON

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

Let me begin by expressing my appreciation to you. You and I have worked together often in our years in both the House and Senate, and it is good to see you with the gavel in your hand today, and also express our thanks to the staff. They have been very helpful.

Oregon, as you know, has been able to get a number of judicial appointees confirmed, and we are very grateful to you and the way this committee has assisted our State.

I also, before I begin, want to particularly praise my colleague, Senator Gordon Smith, for all of his efforts on behalf of Judge Anna Brown and all of the nominees that he and I have considered together. We have worked on this on a bipartisan basis at every single step along the way and have tried to make it very clear that, with respect to this and important issues for our State, politics is going to stop at the State's borders. And I am very grateful to him for all his support. He is going to, I think, be arriving here momentarily. He is tied up in the Senate Foreign Relations Committee, but he has done yeoman work for Judge Brown.

Now, Mr. Chairman, we are very pleased to be able to present to this committee the name of Judge Anna Brown to be U.S. district judge for the District of Oregon. Her husband is traveling internationally, so he can't be with us today. But her sister is here, and it is a family in the Oregon tradition, involved in just about every aspect of civic life, and we are very glad that she is here with us.

I am a strong supporter of Judge Anna Brown for a variety of reasons. She has generated support from across our State, from both sides of the aisle, from judges and litigants alike. And perhaps reflective of the view about Judge Anna Brown, the presiding judge of the Multnomah County Circuit Court, where the judge serves, called her, "one of the most capable and energetic judges I have ever had the privilege to work with." So she comes with extraordinarily high praise.

And I would mention two other points just very briefly on behalf of the judge. One of the other reasons that Senator Smith and I are so pleased to be bringing her name to you today is her extraordinary work ethic. She was a full-time police community service officer while earning her college and law school degrees at night. This is an individual who, in addition to her rigorous judicial schedule, has served on numerous boards and commissions. She

was one of the organizers of the task force on gender fairness, for example, in our State. She also served as chairperson of the U.S. Magistrates Merit Selection Panel in 1993.

The list goes on and on, but since those days when she was a full-time police community service officer while putting herself through school, she has demonstrated an extraordinary work ethic, and that is an additional reason for going forward with her candidacy.

Finally, the last point is that she is a judge who respects and understands her role as a judge. She very clearly is aware of the difference between being a legislator and being a judge. And one of the things that one hears consistently in our State is that her opinions reflect a firm adherence to the law as written by the Oregon Legislature. When you are handling complex cases, as she has, I think that is something that legislators particularly appreciate. And on behalf of Senator Smith and myself, let me say we are grateful that she is being considered today. She is going to bring to the Federal bench the same energy, intelligence, and integrity that she has brought in her earlier work.

We are grateful to you, Mr. Chairman, and to the committee for her consideration today.

Senator KYL. Thank you very much, Senator Wyden. And I should indicate at this point that Senator Leahy, the ranking Democrat on the full Judiciary Committee, has asked that his statement be submitted for the record, which, without objection, it will be.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

The Senate has before it ready for action the nominations of Judges Richard Paez, Raymond Fisher and Marsha Berzon to the Ninth Circuit, Justice Ronnie L. White to the District Court in Missouri, and other qualified nominees. For Judge Paez and Justice White, this is this second extended hold on the Senate calendar, having been favorably reported by the committee both last year and earlier this year.

I urge the Senate Republican leadership to heed the words of Justice Rehnquist: "Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote * * *. The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down." At the time the Chief Justice issued the challenge, Judge Paez' nomination had already been pending for 11 months and Justice White's nomination for six months—that was almost three years ago.

It is September 14 and this is only the committee's fourth hearing for judicial nominations all year. To put that in perspective, this week, the Congress will hold three hearings on the President's recent use of his clemency power. We have only six weeks in which the Senate is scheduled to be in session for the rest of the year. The chairman has indicated that this is likely to be the third-to-last hearing all year.

By this time last year the committee had held ten confirmation hearings for judicial nominees, and 39 judges had been confirmed. By comparison, this year there have been only four hearings and only 17 judges have been confirmed. Thus, the Senate is operating this year at less the half the productivity of last year. We remain miles behind our pace in 1994, when by this time we had held 19 hearings and the Senate had confirmed 63 judges.

Accordingly, I want to congratulate each nominee who has been accorded the privilege of appearing here today. I imagine that Mr. Gould, who was first nominated in 1997 for a vacancy on the Ninth Circuit, and who has waited patiently for 22 months for this day, is glad that it has finally arrived.

I deeply regret that there remain scores of judicial nominees who have yet to be accorded that opportunity. For the last several years I have been urging the Judici-

ary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

In spite of our efforts last year in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are 63 with 15 on the horizon and the vacancies gap is not being closed. We have more federal judicial vacancies extending longer and affecting more people. Judicial vacancies now stands at over eight percent of the federal judiciary. If one considers the additional judges recommended by the judicial conference, the vacancies rate would be more than 15 percent and total 135.

Nominees deserve to be treated with dignity and dispatch—not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are deterred from seeking to serve as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions.

Certainly no President has consulted more closely with Senators of the other party on judicial nominations. The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed without justification for too long. Just last month, in his remarks to the American Bar Association, the President, again, urged us to action. He said: "We simply cannot afford to allow political considerations to keep our courts vacant and to keep justice waiting." We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility. I continue to urge the committee and the Senate to attend to these matters with dispatch and I hope that this hearing will mark a new and more productive chapter of our efforts in that regard.

I thank the senators who have come to introduce these nominees to the committee. I look forward to the committee completing its consideration of all of the nominations included in today's hearing.

Senator KYL. Pursuant to a brief conversation with Senator Feinstein just a moment ago, I will defer calling on her until the other members of the panel have been called upon.

Senator Moynihan, you probably need to be excused, but—go ahead.

Senator MOYNIHAN. Mr. Chairman, I neglected to ask that a statement by Senator Schumer be included in the record on behalf of Mr. Eaton.

Senator KYL. Without objection, it shall be.

Senator MOYNIHAN. I want to tell you that his lovely wife, Susan, his daughters Alice and Liza, and his sister, Mary, are with us today.

Senator KYL. Wonderful. Thank you very much.

[The prepared statement of Senator Schumer follows:]

PREPARED STATEMENT OF HON. CHARLES F. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

It is a special pleasure for me to introduce to you today Richard K. Eaton, who has been nominated for the United States Court of International Trade, which sits in New York City. Mr. Eaton, who was born and educated in New York, is currently a partner in the D.C. office of the New York Law Firm, Stroock & Stroock & Lavan, LLP. First admitted to the Bar in 1975, Mr. Eaton has extensive and diverse legal experience, having practiced as both a corporate lawyer and a litigator. Recognizing Mr. Eaton's talents, my colleague Senator Moynihan has called upon Mr. Eaton's services on several occasions. In fact, Mr. Eaton was Senator Moynihan's Chief of Staff when Senator Moynihan became Chairman of the Finance Committee, which, of course, has primary jurisdiction, over international trade law. Mr. Eaton's experiences on the Hill, and earlier as Director of two of Senator Moynihan's New York offices, helped him gain an intimate understanding of legislative drafting and legislative history, skills which will prove invaluable on a court whose subject matter is primarily statutory.

I thank you for this opportunity to introduce such a fine candidate.

Senator KYL. Senator Cleland has joined us now, and, Senator Cleland, would you like to present your testimony at this point?

STATEMENT OF HON. MAX CLELAND, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CLELAND. Well, thank you very much, Mr. Chairman. It is my pleasure to introduce for this marvelous panel's consideration one of the most distinguished members of a very distinguished family in the public life of Georgia. The individual before you today is Judge Charles Pannell, currently a superior court judge in Dalton, GA, and the President's nominee to the U.S. District Court for the Northern District of Georgia. That is a very prestigious position, and he occupies a marvelous position of responsibility and public trust in Georgia already. But sometimes I wonder if his family and his ancestry doesn't dwarf him.

His father was a distinguished State senator in our State, spawning a family that was devoted to public service. Charles Pannell's brother, Jim Pannell, is a former member of the Georgia House of Representatives, and hearing my colleague Senator Wyden here talk about a judge understanding the different roles of legislator and judge; and then as a judge following the rules as laid down by the legislature, I am sure it was fun for Judge Charles Pannell to try to interpret the laws that his brother wrote.

But be that as it may, not only is he related to his father, the former distinguished State senator from Georgia, and his brother, a former wonderful member of the Georgia House, and another brother, Bill Pannell, a distinguished lawyer in Georgia, but Judge Pannell had the great sense to marry his lovely wife, Kate, who herself brings fantastic ancestry to public service. Kate is the great-great-niece of Alexander Hamilton Stevens, who served in the U.S. Congress from 1843 to 1859 and as Governor of Georgia and was also Vice President of the Confederacy. The Confederacy, for your edification, Mr. Chairman, was formed before Arizona was a State. [Laughter.]

So we are delighted to bring to your attention today Judge Charles Pannell for a seat on the U.S. District Court for the Northern District of Georgia. He is an outstanding candidate and uniquely qualified for appointment to the Federal bench. He has established a superb record of leadership in the Conasauga Circuit of the Georgia Superior Court, and I have no doubt that he will continue that performance at the U.S. district court level.

Judge Pannell received his Bachelor of Arts degree in 1967 from the University of Georgia and his J.D. in 1970 from the University of Georgia School of Law. Judge Pannell was an assistant U.S. attorney for the Northern District of Georgia from 1971 to 1972, he also was an associate and partner with the law firm of Pittman, Kinney, Kemp & Avrett from 1972 to 1976. In addition, he served in the U.S. Army Reserve, the JAG Corps there, from 1971 to 1997. His last assignment was in the rank of colonel as a senior military judge.

Prior to his appointment and then election to the Superior Court in Georgia, he served as a part-time special assistant attorney general for the law department of the State of Georgia from 1974 to

1976 and as district attorney for the Conasauga Judicial Circuit from 1977 to 1979.

At the time of his appointment in the Conasauga Circuit in 1979, Charles was the youngest superior court judge in Georgia, and he has since been elected to five consecutive 4-year terms, most recently in 1996. Judge Pannell has presided over three death penalty cases and also performs the duties of juvenile court judge.

Throughout Judge Pannell's career in the U.S. Attorney's Office, in private practice, and as a superior court judge, he has earned the respect of his colleagues in the legal community. As evidence of his character and judgment, many, many people from Georgia have written letters supporting Judge Pannell's nomination. Mr. Joe B. Tucker, senior judge, Georgia's Superior Court judge in the Lookout Mountain judicial circuit, wrote, "Charlie is a student of both the law and human nature. He is a man of uncommon common sense and can identify with the man on the street."

According to another writer, Bill Cummings, of the Georgia House of Representatives, "Charles is a man of great ability, knowledge, and insight. Judge Pannell comes from a distinguished family, many of whom were members of the Georgia Bar. He is an asset to the State of Georgia and our country."

Besides his professional career as a judge, Charles Pannell has attained three notable milestones. This year he was awarded the Silver Beaver by the Boy Scouts of America, and in 1995, Charles was awarded the Cross and Flame Award, a national award for work with youth in the United Methodist Church. Finally, Judge Pannell attained the rank of colonel in the U.S. Army Reserves and is a graduate of the U.S. Army War College course.

Judge Pannell is active in Leadership Georgia, the Boy Scouts of America, and Kiwanis International. Charles is also a member of several professional and civic organizations, including the State Bar of Georgia, the American Bar Association, the Georgia Conservancy, and the Reserve Officers Association.

Charles Pannell is an outstanding judge and will be an excellent addition to the Federal bench. Judge Charles Pannell, Jr., of Chatsworth, GA, has served almost 20 years as superior court judge. He has served with distinction as a judge on the State superior court and as district attorney for the State of Georgia and as assistant U.S. attorney for the Northern District of Georgia.

I believe that he demonstrates the personal and professional qualities that will make him an outstanding Federal judge, and I hope he will be approved by the committee and confirmed by the full Senate as soon as possible.

Senator Coverdell joins me in introducing him today. Although Senator Coverdell cannot be with us present at the table here, he, however, has entered a statement into the record.

[The prepared statement of Senator Coverdell follows:]

PREPARED STATEMENT OF SENATOR PAUL D. COVERDELL

Mr. Chairman, I am proud to join my esteemed colleague Senator Cleland, and professionals within the legal community, to recommend to you today Charles A. Pannell, Jr. to sit on the United States District Court for the Northern District of Georgia. Judge Pannell's record as a practicing attorney, a sitting judge, a U.S. Army Reservist and an active member of his community speaks volumes for the qualities he would bring to the federal branch.

Judge Pannell's qualifications stand on their own. He has served as an Assistant U.S. Attorney, a Special Assistant Attorney General, has been elected District Attorney for the Conasauga Judicial Circuit in Georgia and has practiced law as an associate and partner in the law firm of Pittman & Kinney in Dalton, Georgia. In 1979 Judge Pannell was appointed as a Superior Court Judge and has spent the subsequent 19 years serving in that capacity, having been elected to the post for five consecutive four year terms. In addition to this service Judge Pannell served in the U.S. Army Reserve, Judge Advocate General's Corps for 18 years, most recently as a Senior Military Judge.

Judge Pannell's service to his community extends far beyond his work on civilian and military benches. He is an active member in a number of civic and professional organizations including the Boy Scouts and Leadership Georgia and several Bar Associations including the State Bar of Georgia and the Federal Bar Association. Judge Pannell has also been active in such organizations as the Reserve Officers Association and the United Way. This leadership within his community only underscores his commitment to service—a commitment that will serve him well on the federal bench. And I would be remiss if I did not mention his wife Kate Pannell and his two children Charles and Ruth Ann. Certainly their support has been instrumental to Judge Pannell's personal and professional development and will continue to be should Judge Pannell's confirmation be affirmed by this Committee.

Mr. Chairman, I understand Judge Pannell's qualifications to be superb and I believe that he has demonstrated the commitment to his profession and to his community that Congress should look for in its federal bench appointments. I appreciate the Chairman's consideration of Judge Pannell's appointment and respectfully request your fair and speedy review. I thank the Chairman.

Senator CLELAND. In addition to his wife, Kate, his son, Chad, is here with us today. His daughter, Ruth Anne, cannot be with us, though. She is a 1st-year medical student in studies, but we do have with him his two brothers, Jim Pannell and Bill Pannell. So it is an honor to be with this distinguished Georgian and this distinguished American.

Thank you, Mr. Chairman.

Senator KYL. Thank you very much, Senator Cleland.

I should announce that Senator Coverdell is managing the resolution currently on the Senate floor. We are going to have to vote on that perhaps in 45 minutes or so, and so I am going to try to move the hearing right along. But thank you very much for that statement.

Senator CLELAND. Thank you, Mr. Chairman.

Senator KYL. We are now joined by Delegate Eleanor Holmes Norton, and the floor is yours.

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

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Chairman, I come to recommend two distinguished Washingtonians to you. The first you have already heard concerning Richard K. Eaton, who now lives in the District of Columbia but is originally from New York, and you have heard from Mr. Moynihan, who knows him especially well because Mr. Eaton served in leadership posts on Senator Moynihan's staff. I second what the Senator has said and strongly recommend Mr. Richard K. Eaton to you.

I want to especially thank you, Mr. Chairman, and thank Chairman Hatch and Ranking Member Leahy for adding the name of Ellen Segal Huvelle to the list. We have been waiting for some time to have her approved, and I very much appreciate your bringing her forward at this time. She has been a judge on the District of Columbia Superior Court for almost 10 years now. She brings the broadest array of civil and criminal law experience.

Before serving on our own trial court, Judge Huvelle was a partner at Williams and Connolly and is herself a graduate of Wellesley College, of the Yale University School of Architecture, with a master's in city planning, no less, and of Boston College Law School.

She clerked on the Massachusetts Supreme Judicial Court and is especially well qualified, in my view, to be a U.S. district judge for the District of Columbia, and I strongly recommend her, Mr. Chairman.

Senator KYL. Thank you very much for that succinct and fine statement, Delegate Norton. We appreciate that.

What I am going to do now is to call upon—and all of the members at the dais are welcome to excuse themselves if you would like. Senator Smith may arrive later, I am told. If he does, we will fit him in and know that he will second your motion, Senator Wyden.

Senator WYDEN. I thank you, Mr. Chairman. I think my colleague will be coming, and if his statement could be made a part of the record.

Senator KYL. You bet. It will be made part of the record, without objection, and thank you all for being here.

Now I would like to turn to the ranking member of the—well, actually, ranking member of my subcommittee, but another member of the Senate Judiciary Committee, Senator Feinstein, and the ranking member today.

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

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

I am pleased to introduce Florence Marie Cooper. She is my nominee to the U.S. District Court for the Central District of California.

The Los Angeles Bar Association's Committee on Judicial Appointments describes Judge Cooper as one of the most knowledgeable and brightest judges ever known—tough on crime but fair, patient, ethical, and always objective.

She has been named Judge of the Year on three separate occasions: In 1996 by the Los Angeles Criminal Court Bar Association, in 1993 by the Century City Bar Association, and in 1991 by the Los Angeles County Bar Association Criminal Justice Section.

Interestingly enough, she began her career as a single mom supporting two children while working as a legal secretary. She attended night classes at Beverly Law School, now Whittier, where she graduated first in her class magna cum laude in 1975. In fact, she obtained the second highest grade point average in the school's history.

After law school, Judge Cooper served as research attorney for Superior Court Judge Arthur Alarcon, who strongly recommended her, and as a deputy city attorney for the city of Los Angeles before being appointed as a superior court commissioner.

In 1990, after 7 outstanding years as a commissioner, Governor Deukmejian appointed her to be a municipal court judge. She was elevated to the superior court in 1992.

Since then she has served in the superior court's successful civil case Fast-Track Program, and she has managed a caseload of 450 cases through judgment or dismissal.

In state court, she has successfully handled sensitive, high-profile cases, and over 14 death penalty cases. She has received a flood of recommendations. Governor Deukmejian, Los Angeles Deputy District Attorney Patrick Dixon, Superior Court Judge Ann Kough, State Bar Past President Tom Stolpman, U.S. Court of Appeal Judge Arthur Alarcon, and a host of others have written to recommend her highly for this position.

She has done much in the community, but I know time is limited. I think that she is one, Mr. Chairman, of the really outstanding examples of women in the law, women in the judiciary, who really began very humbly, working their way through night school, with great IQ's and much common sense. And I am hopeful that she will end up as a sitting Federal judge.

Senator KYL. Thank you very much, Senator Feinstein.

Senator Kohl, do you wish to make any kind of opening statement?

Senator KOHL. No, thank you, Mr. Chairman.

Senator KYL. All right. We will conclude our panel of introducers unless Senator Smith should arrive, in which case we will afford him the opportunity to speak.

Now, let me make a preliminary comment before I ask the candidates to come forward, and that is that you will see some Senators from time to time come and go as their schedules permit. And you will not hear very many questions from the dais here, I suspect, unless there is a surprise that I am not aware of.

You should not interpret that as a lack of interest in these nominees—in fact, precisely the contrary. It is my impression from the briefing I have received and the conversations with my colleagues that I have had that the reason this panel has been put together today and the reason I think it will be very quickly forwarded to the full Judiciary Committee is that all of these nominees, through their extensive backgrounds and through the support that they have demonstrated from their States and elsewhere, have demonstrated to the members of the Judiciary Committee and the leadership, especially, and staff that they deserve to be considered for confirmation by the Senate. And therefore, again, unless there is some great surprise that I don't think that we are aware of, you will not find very many questions from the dais here. They may seem somewhat perfunctory, but I assure you that the primary point to be made here is that this hearing would not be held today and these candidates would not be before us if we expected any great difficulty. So I hope that that perhaps sets some of your minds at ease.

And since I had that chance to filibuster for 45 seconds, Senator Smith has arrived right on time, and, therefore, we will conclude our panel of introducers with Senator Gordon Smith of Oregon. Welcome. Just in the nick of time.

STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH. Thank you, Mr. Chairman. I appreciate your indulgence for the schedule that has me in too many places at once. But, Mr. Chairman, members of the committee, I am honored to appear before you on behalf of Anna Brown.

I have a statement. I would ask that it be included in the record.

Senator KYL. Without objection, so ordered.

Senator SMITH. So as not to delay these proceedings, I would just simply say that Anna Brown comes to this committee through a bipartisan selection process that Senator Wyden and I have established in Oregon. She has wide support from people throughout the political spectrum. She has been a superlative judge in my State, and she came out No. 1 through this process. And it is without reservation that I recommend her to this committee and to the U.S. Senate and know that my State and my country will be better because of her service on the Federal bench.

Senator KYL. Well, Senator Smith, that is exactly the kind of recommendation we like to hear, and thank you very much for being here. And if you have a statement, we will accept that for the record.

Senator SMITH. Thank you very much.

Senator KYL. Thank you.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF SENATOR GORDON SMITH

Mr. Chairman: It is my privilege to join with my colleague Senator Wyden in highly recommending Judge Anna Brown for confirmation to the United States District Court for the State of Oregon.

In the seven years she has served on the state courts in Oregon's largest county, she has earned a reputation for integrity, hard work, and intelligence. Judge Brown's relentless pursuit of justice in Multnomah County is recognized by lawyers from every political viewpoint, in every corner of our state.

When Senator Wyden and I asked a screening committee to help us compile a list of candidates for the federal judiciary, Judge Brown's name was unanimously placed at the top of this list by the bi-partisan group of her colleagues. The respect that she has earned among her peers is strong testimony in support of her elevation to the federal bench in Oregon.

Judge Brown has also earned the respect of those who enforce our laws, garnering the support of Oregon's law enforcement community. She has a thorough understanding of their challenges, having worked for many years as a Police Community Service Officer and dispatcher while earning her college and law school degrees at night.

The federal bench, my state of Oregon, and the entire country will be well served by her service on the United States District Court. I thank the Committee for giving her a hearing, and am confident she will earn your support as she has mine.

Senator KYL. Now, let me call the first panel: Ronald M. Gould of Washington for the position of U.S. Circuit Judge for the Ninth Circuit.

Senator FEINSTEIN. Mr. Chairman, may I ask——

Senator KYL. Certainly, Senator Feinstein.

Senator FEINSTEIN. I neglected to mention that my colleague, Senator Barbara Boxer, would like to have a statement entered into the record on behalf of Judge Cooper.

Senator KYL. Without objection, it will be entered.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF SENATOR BARBARA BOXER

Thank you Mr. Chairman, I appreciate having the opportunity to lend my support to the nomination of Florence Marie Cooper for the Central District of California. Ms. Cooper's academic background and professional experiences are impressive.

Ms. Cooper graduated from Whittier College School of Law, Magna Cum Laude, in 1975. After graduation she clerked for a Los Angeles Superior Court Judge and thereafter the California Court of Appeals. In 1977, after completion of her clerkships, she was appointed a Deputy City Attorney for the City of Los Angeles. From 1983 to 1990 she served as a Los Angeles Superior Court Commissioner, and from 1990 to 1991 she served as a Los Angeles Municipal Court Judge. Since 1991, Ms. Cooper has served as a Judge on the Los Angeles Superior Court.

Ms. Cooper has received strong support from the California legal community and the American Bar Association has rated her as "well-qualified" for appointment as a Judge of the United States District Court for the Central District of California. I am hopeful, therefore, she will receive the support and approval of this Committee.

Senator KYL. Mr. Gould, if you would raise your right hand, do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GOULD. I do, Mr. Chairman.

Senator KYL. Thank you.

Mr. Gould, if you have a statement, you are welcome to give that statement. If you have anyone else you would like to introduce, you are more than welcome to introduce them at this time.

TESTIMONY OF RONALD M. GOULD, OF WASHINGTON, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. GOULD. Mr. Chairman, I have no statement except to say that I am very grateful for the opportunity to be here with you today, grateful for the kind comments of Senator Murray and Senator Gorton, grateful that my family could be here with me today as introduced by Senator Murray, and grateful that friends have come here today from high school, from law school, and from my professional life.

QUESTIONING BY SENATOR KYL

Senator KYL. Well, thank you. In view of the recommendations, that is probably the best opening statement you could make, and we appreciate your family being here as well.

I am going to lead with a couple of questions that are very basic in terms of your judicial philosophy and then call upon other members of the panel.

The first question I have for you is under what circumstances you believe it is appropriate for a Federal court to declare a statute enacted by the Congress unconstitutional.

Mr. GOULD. The power to declare a statute unconstitutional is a power to be exercised sparingly and only when, in my opinion, there is specific constitutional text and authority that requires of necessity that the statute be declared unconstitutional. Each statute, Mr. Chairman, comes before a Federal judge with a presumption of constitutionality. It should be interpreted in a way to avoid constitutional issues.

Senator KYL. Thank you.

Are you committed to following the precedents of the U.S. Supreme Court faithfully and to give them full faith and effect—or force and effect, rather, even if you personally disagree with the precedents of the cases?

Mr. GOULD. Thank you, Mr. Chairman. I am absolutely committed to following the precedents of the Supreme Court faithfully. Whether I admire them or do not admire them or like them or dislike them will make no difference whatsoever. It will be my duty to study and understand the precedents of the Supreme Court and to apply them faithfully.

Senator KYL. Now, on some——

Mr. GOULD. If I am confirmed.

Senator KYL. Absolutely. There are some occasions, of course, on which you are faced with a case of first impression and there are no clear precedents. What principles would guide you in those kind of situations or what methods would you employ to decide a case of first impression?

Mr. GOULD. Mr. Chairman, I would first look at the text of a statute, if it is a statutory case, or of the Constitution, if it is a constitutional issue that is raised. I would look for opinions of the Supreme Court and the Ninth Circuit. But if it is a case of first impression where there are no binding precedents on the issue, then I would look at both analogous cases of the Supreme Court and Ninth Circuit and look at cases of other circuit courts or State supreme courts or other courts of appeals in the State systems for courts that have addressed the issues and take as much guidance as possible from that. But I would return to the text as the primary authority for decision.

Senator KYL. Do you have any legal or moral beliefs which would inhibit or prevent you from upholding a death sentence in a criminal case that might come before you as a Federal judge?

Mr. GOULD. No, Mr. Chairman. I have no qualms or reservations about imposing a death sentence in a case where—upholding a death sentence in a case where it has been properly established under the standards set by the Supreme Court, which has held a death penalty constitutional as long as certain standards are followed.

Senator KYL. Thank you.

Senator Feinstein.

Senator FEINSTEIN. I have no questions, believe it or not.

Senator KYL. Well, I can believe that because of your efficiency.

Senator Kohl.

QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you, Mr. Chairman. I have one question.

Mr. Gould, the Washington Post reported yesterday that a number of prominent appellate judges have ruled on cases involving companies in which they own stock in violation of Federal law. When contacted by the newspaper, most of the judges admitted "embarrassment" and said they would be "more careful" to avoid such problems in the future.

The article in no way suggested that the judges ruled one way or another because of their financial interest in the case.

However, Mr. Gould, are you troubled by these revelations? And if so, what do you believe Federal judges should do to make sure that these types of problems, which undermine confidence in the Federal judiciary, do not occur?

Mr. GOULD. Thank you, Senator. I believe that all persons, and particularly any judge, should be troubled if there is evidence that judges have inadvertently ruled on cases involving parties in which they hold a financial interest. Each judge should establish a system, I believe, in their own chambers to ensure that nothing slips through the cracks.

Judges, of course, may elect to hold mutual funds or some investment vehicle that does not raise multiple conflicts. But if a judge chooses to hold particular stocks, then they must have a system to ensure they recuse themselves in any case where their impartiality could be questioned, and certainly in any case where they have any financial interest, however small.

Senator KOHL. Yes, I would only call to your attention that it is a violation of Federal law for a judge to have a direct financial interest. And here is a judge upholding Federal law, violating Federal law. It is a very serious responsibility, isn't it?

Mr. GOULD. Yes, Senator. I think there could be no more serious responsibility than that the judge who is going to decide the law follow the law and make clear that there is no impropriety and no appearance of impropriety in any way whatsoever.

Senator KOHL. OK. Any penalty that you would impose on a judge who knowingly violates that Federal law?

Mr. GOULD. Well, I would look to the particular Federal law that is involved, and it seems to me it is up to Congress to decide what penalty should attend any violation of it. I am not familiar with the precise penalty on this law. I also know that there are ethics provisions for the judiciary which also prohibit ruling in a case where one has an interest, and there are panels of the judiciary to address those subjects. And they are very important subjects and should be addressed very carefully.

Senator KOHL. Thank you, Mr. Gould.

Thank you, Mr. Chairman.

Mr. GOULD. Thank you, Senator.

Senator KYL. Thank you. Mr. Gould, is there anything else that you would like to say with respect to your proposed nomination? And I don't suggest that there is any problem but, rather, just to afford you a last opportunity prior to the time that we forward your name to the full committee for its consideration.

Mr. GOULD. Thank you, Mr. Chairman. I have nothing to add except to say I am very grateful for the opportunity to be here and to be considered by this distinguished committee and to be included with a group of distinguished nominees for consideration.

Senator KYL. Well, thank you. I know that the chairman is anxious to move the entire panel as soon as possible, and obviously we will be in touch with you. And thank you and your family for attending the hearing.

Mr. GOULD. You are very welcome. Thank you.

[The biographical information is retained in Committee files.]

Senator KYL. Next we will consider as an en banc panel the following candidates: Anna J. Brown, of Oregon—and when I call your name, if you would just come forward—for district judge for the District of Oregon; Florence Marie Cooper, of California, for U.S. district judge for the Central District of California; Richard K. Eaton, of the District of Columbia, to be a judge of the U.S. Court

of International Trade; Ellen Segal Huvelle, of the District of Columbia, to be U.S. district judge for the District of Columbia; and Charles A. Pannell, Jr., to be U.S. district judge for the Northern District of Georgia. Welcome to all of you.

If you would join me by raising your right hand, do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge BROWN. I do.

Judge COOPER. I do.

Mr. EATON. I do.

Judge HUVELLE. I do.

Judge PANNELL. I do.

Senator KYL. Now, I will just take you in the order that you appear at the table, beginning to my left, and what I intend to do is to ask a few questions which will apply to all of you, and we will start with Judge Brown, go down the table this way, and then I will probably ask the next question of Judge Pannell, and we will go back the other way. We will do that a couple of times, and then I will call upon Senator Feinstein and Senator Kohl and anyone else who should join us.

Again, primarily the questions that I would like to ask are basic to all of you and to all lawyers who have had the kind of experience that you would have to have to be in this position. They are designed to simply remind those in the audience and others of the kinds of things that judges have to commit to when they become nominees for the bench and to participate in the judicial branch of Government. Some of you already are there, and you know well the precedents, the rules with respect to activism, precedent, and so on.

So let me begin, Judge Brown, with the question under what circumstances you believe it is appropriate for a Federal court to strike down a Federal statute or a State law or a referendum as unconstitutional.

TESTIMONY OF ANNA J. BROWN, OF OREGON, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF OREGON

Judge BROWN. Thank you, Mr. Chairman. I would like to begin where Mr. Gould left off with that answer because your question includes referenda, which I believe are entitled to the same deference as any legislative act of the State legislature or the Congress itself, and, otherwise, I would adopt Mr. Gould's answer in its entirety.

Senator KYL. Thank you.

Before I go further, I neglected to give each of you the opportunity to make an opening statement, and perhaps as much as an opening statement, an opportunity to introduce anyone in the audience.

Let me go back and the rest of you can think thoughtfully about the answer to that tough question. [Laughter.]

We will start with Judge Brown, if there is anything else you would like to say and anyone you would like to introduce for the panel.

Judge BROWN. Thank you, Mr. Chairman. I am very grateful to Senator Wyden and Senator Smith for their kind remarks and their support throughout this process.

With me today from my hometown is my sister, Mary Jaeger, and with me is my lifelong friend, Dr. Margaret Kaiser, a family care practitioner from Garrett County, MD.

Senator KYL. Would you all raise your hands so we can see who you are? Great. Thank you for being here.

Judge BROWN. My husband is traveling internationally, and with the rest of my family, simply unable to be here. They are with me in my heart as I thank you, Mr. Chairman, and the members of the committee for the privilege to appear today.

Senator KYL. Thank you.

Judge Cooper, why don't I just ask you to make your statement and introduce anyone you would like at this time too?

TESTIMONY OF FLORENCE MARIE COOPER, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge COOPER. Thank you. And special thanks to Senator Feinstein for that lovely introduction, and thank you, Mr. Chairman. I think we all feel a great privilege and are grateful to be here.

I am accompanied today by my dear friend and husband, Les Peckins, and also with me is my once and I hope future law clerk from Los Angeles, Greg Matton, and his wife, Teresa.

Senator KYL. Welcome.

Judge COOPER. And another young woman who would like to be my law clerk, Cyndi Bauerly, from Indiana. I don't want you to feel any pressure, but unless——

Senator KYL. We hope to give you the opportunity.

Judge COOPER. These nice young people would like to have jobs. [Laughter.]

Senator KYL. That is great. Thank you.

Mr. Eaton.

TESTIMONY OF RICHARD K. EATON, OF THE DISTRICT OF COLUMBIA, TO BE A JUDGE OF THE U.S. COURT OF INTERNATIONAL TRADE

Mr. EATON. I, too, would like to thank you, Mr. Chairman, for taking the time to call this hearing today and to thank Senator Moynihan and Congressman Boehlert and Congresswoman Norton for being nice enough to come.

My wife, Susan Henshaw Jones, is here today, along with our two children, Alice and Liza, and my sister, Mary Eaton, has come down from Rochester.

Senator KYL. I saw those hands go up about that far. Thank you.

Judge Huvelle.

TESTIMONY OF ELLEN SEGAL HUVELLE, OF THE DISTRICT OF COLUMBIA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

Judge HUVELLE. Yes, thank you very much, Mr. Chairman. I appreciate you including me. I know I was lately included, and I appreciate it very much, and to Senator Hatch and his staff. I appreciate Congresswoman Norton's kind remarks, and I would like to introduce at this time my family. My husband is here. Jeffrey Huvelle is a lawyer in town. My children, Nicole and Justin, are

both wonderful children, and they have come, one from college and one from high school.

I am also very lucky to have my present law clerk, Adam Harris; two former law clerks, Mary Peters and Emily Gelber; my courtroom clerk, Vonita Burrell. I come from Washington, so I have two former partners from my law firm, Steve Steinbeck and Robert Jacobson, dear friends; Tina Mead, Susan Baker is here, Marianne Shatenstein, as well as—if I have forgotten anyone—oh, my colleague from superior court, Judge Bartnoff. So I thank them very much for coming, and I thank you for having them.

Senator KYL. I want you all to know she did that without notes, too. [Laughter.]

I think instead of asking Judge Huvelle questions, I would like to ask the clerk some questions about Judge Huvelle. [Laughter.]

That is the way we will send this forward.

Judge Pannell.

TESTIMONY OF CHARLES A. PANNELL, JR., OF GEORGIA, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA

Judge PANNELL. Thank you, Senator. Let me just express my thanks to you and the members of the committee for affording us the opportunity for these hearings. And I would like to particularly thank Senator Cleland for my selection and that introduction. The State of Georgia has always taken great pride on providing the U.S. Senate with great leadership. My brother, Jim, who is here, worked for Senator Russell as a legislative assistant, and my brother, Bill Pannell, who is here, was on the staff of Alaska's supreme court. Both of them practiced law in the State of Georgia.

But I would particularly like to introduce my wife, Kate Pannell, who is here, and my son, Charles A. Pannell III, who is a recent graduate of George Tech in chemical engineering. And a good friend of mine from way back, Randy Knuckles, who practiced—who has been on several Senators' staffs here in Washington, and is from Whitfield County, which is part of my circuit, and his mother has been a dear friend in the clerk's office in superior court for many years. And I certainly appreciate their presence and support here.

QUESTIONING BY SENATOR KYL

Senator KYL. Well, we welcome all of you and thank you for those statements.

Now, let's resume the questions, since all but Mr. Eaton represent a district court, of first impression for the consideration of issues of constitutionality of State statutes as well as Federal statutes and referenda. I will reiterate the question about what circumstances you believe it appropriate for a Federal court to strike them down, and we will go to Judge Cooper next.

Judge COOPER. That is, Mr. Chairman, certainly not a task to be undertaken lightly. In the 15 years that I have been on the bench, with all the statutes that I have analyzed and evaluated, I have never found one to be unconstitutional. I think it is a very rare event, not one that has occurred yet in my life, and I think the presumption of validity is one that I greatly respect.

Senator KYL. And the same would apply to referenda?

Judge COOPER. Absolutely.

Senator KYL. Now, to the extent—and I am not precisely sure to what extent these kinds of issues would arise, but, Mr. Eaton, to the extent that they apply to the bench on which you would sit, please respond as well.

Mr. EATON. The statutes that are dealt with by the Court of International Trade come with the same presumption of constitutionality that all other statutes come to a court with. It is difficult to add anything to the——

Senator KYL. Your answer would be the same.

Judge Huvelle.

Judge HUVELLE. My answer would also be the same. They are presumed constitutional and only in the rarest circumstances.

Senator KYL. Judge Pannell.

Judge PANNELL. I adopt their statements, Senator.

Senator KYL. All right. Let's begin now, the next question for you. In general, Supreme Court and circuit court precedents are binding on Federal district courts. Are you committed to following the precedents of the higher courts faithfully and giving them full force and effect, even though you might personally disagree with the holding?

Judge PANNELL. Yes, sir.

Senator KYL. Judge Huvelle.

Judge HUVELLE. I would certainly follow precedent.

Senator KYL. Mr. Eaton.

Mr. EATON. Yes, I am, Mr. Chairman.

Senator KYL. Judge Cooper.

Judge COOPER. Yes.

Senator KYL. Judge Brown.

Judge BROWN. I absolutely am so committed.

Senator KYL. OK. Do any of you—and I will just ask this as a blanket question—have any legal or moral beliefs that would prevent or inhibit you from imposing or upholding a death sentence in a criminal case that might come before you as a Federal judge?

Judge BROWN. No, Mr. Chairman.

Judge COOPER. No, Mr. Chairman.

Mr. EATON. No.

Judge PANNELL. No.

[Judge Huvelle shook her head.]

Senator KYL. I love these kinds of questions. Do you believe that 10-, 15-, or even 20-year delays between conviction of a capital offender and execution is too long? Does anyone believe that is not too long?

[No response.]

Senator KYL. That is the kind of question that we have reams of here that I will not further burden you with. [Laughter.]

There are a lot of questions here that get into individual kinds of cases, very difficult issues that will come before you. All of you in your law practice or experience on the bench have run into these kinds of questions in the past. And rather than asking you questions about specific kinds of issues and how you would rule upon them, I would just urge upon all of you, since you have been so highly recommended, since you do have the experience that com-

mends you to the committee and to the full Senate, to remember as you move through this process what you learned in law school and what you have learned in your professional life about the rule of law in this country, the preeminence of the people speaking through their legislative bodies and through referenda, and the importance that the entire society attaches to rulings from courts, the requirement that our people respect the rule of law and all that stands behind it based upon what judges do, and the fact that sometimes the rule of law can suffer when judges make decisions that go beyond what the common sense of the average citizen suggests is an appropriate response to a judicial issue.

That is not to say that sometimes you wouldn't rule in an unpopular way. That has to be part of what you are volunteering to do in the appropriate circumstance, but certainly to take into account, as all of you said you would, the will of the people as expressed through their legislative bodies and through referenda.

I know that all of you would generally agree, at least I suspect you would generally agree with what I said. And if you have any other kind of comment you would like to make that you would like to leave with this committee, I invite you to do that. And you are welcome to think about that for a moment while I call upon Senator Kohl to see if he has any questions for you.

QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you, Mr. Chairman. I will have a question for each of you.

Judge Brown, in the past few years, there has been a growth in the use of so-called protective orders in product liability cases. Critics of this trend believe that these orders sometimes prevent the public from learning about health and safety hazards. The issue has been debated repeatedly by the Judicial Conference.

So let me ask you this: Should a judge balance the public's right to know against a litigant's right to privacy when the information sought to be sealed could keep secret a public hazard?

Judge BROWN. Absolutely, Senator Kohl, a judge should so balance, and I believe a judge would find helpful legislative guidance about the criteria to apply in those kinds of conflicts. Those policy issues which compete are appropriately to be decided by the legislature, and judges ought to follow them once made.

Senator KOHL. Thank you.

Judge Cooper, what do you believe are the three most important Supreme Court cases of the 20th century? Briefly, why?

Judge COOPER. Important, OK. Certainly *Brown* v. *Board of Education.* It is the first thing that comes to my mind. *Gideon* v. *Wainwright* I think is an extremely important decision.

Senator KOHL. Why?

Judge COOPER. Just because I think it is so essential to what this Nation stands for, that the right of counsel is available to everyone and that we—the system of justice is fairly administered when everyone is on an equal playing field. And I have been a part of the system of justice for so long that that is a decision that I consider extremely important.

And an equally important decision, although one of which I am not over-fond, is *Farretta.* I think *Farretta* has created tremendous

problems for the courts by finding somewhere in the Constitution a right not to have an attorney, a right to represent oneself. It is extremely uncomfortable for courts to deal with a situation where an unrepresented litigant is pitted against an experienced prosecutor. I think it makes judges very uncomfortable. It is a decision, of course, that I have followed whenever it has been—the right has been asserted, but I think it was an important decision and has never been overruled, but I think it is one that has had great impact on the courts. I think, however, it has been negative.

Senator KOHL. Mr. Eaton, before being nominated to the bench, you spent time as a staffer here in the Senate for Senator Moynahan. Now, my staff tells me that legislative history and the legislative process, like hearings on bills, are very important, but I am not so sure.

So, Mr. Eaton, give us your thoughts on the value of the legislative process and tell us whether it will inform your decisionmaking on the bench and to what extent.

Mr. EATON. Thanks, Senator Kohl.

There are two of you who are skeptical about legislative history sitting there, and there are about 30 of you who are not. [Laughter.]

Having worked here on Capitol Hill, I know something about how laws are made and the difference between a law and legislative history. And I know from that experience that the will of the people is found in the law itself, and something else, again—though Heaven only knows what—is found in legislative history, since I have written a certain amount of it. And so if I should be lucky enough to be confirmed, I can tell you that I will pay a lot of attention to the law and not so much attention to legislative history.

Senator KOHL. Thank you very much, Mr. Eaton.

Judge Huvelle, there has been a great deal of attention paid to Federal courts' increased caseloads and the resulting problem of docket backlogs. This backlog has had an adverse effect on the litigants before the court, who have been forced to suffer at least some delay in the resolution of their claims.

If confirmed, what steps will you take to ensure that your docket progresses at as quick a pace as is fair and reasonable and how has your experience prepared you to address the challenge posed by docket backlogs?

Judge HUVELLE. Thank you, Senator.

Well, where I sit now, I have some 500 cases on my docket, and I feel very strongly that it is a judge's obligation to take control of the case quickly, to decide the motions so that litigants do not have to wait to get their case heard, to play an active role in trying to resolve the case, if at all possible, and to keep the case moving so that it does not languish. And I would hope to be able to institute those procedures in Federal court, if I am lucky enough to be confirmed.

Senator KOHL. Thank you.

And Judge Pannell, having cameras in the courtroom sometimes requires balancing the interests of a free press against the interest in having justice rendered fairly. In your opinion, do you believe that Court TV and others should be permitted to broadcast some Federal trials, and has, for example, the O.J. Simpson trial

changed your views in any way? As a judge, if permitted, would you allow cameras in your courtroom, and what limits would you place on the recording of court proceedings?

Judge PANNELL. Thank you, Senator.

In 1983, I permitted cameras in the courtroom for a death penalty case in Georgia that lasted 21 days, and I had a very good experience with that. There were rather restrictive rules that the Supreme Court let me adopt at that time, and those have been expanded since then, and we, in Georgia, have continued to let television in the courtroom.

I usually find that the reporters and the cameras really just want to come for a few minutes, sit down, take a few shots to go on the 6 o'clock news and then leave. But we have had, in my circuit, "20/20" has shown up in little old Dalton, GA. We have had the Atlanta news media there.

Recently, we had, oh, some other news program, one of the news magazine programs show up that were particularly interested in that. And we have never really had a problem with that, and I think it provides some information to the citizens of the United States and the citizens of Georgia of how their courts work.

And I would like, frankly, I was of the opinion then and I am still of the opinion that anything the public can see about how our Government works is better. And if it brings up a shortcoming in the courts, so be it, and maybe the public will help us address those shortcomings.

Senator KOHL. Good. Thank you.

Thank you, folks. Senator Kyl.

Senator KYL. Thank you, Senator Kohl.

I have one final question. It is sometimes quite inconvenient, it can sometimes create delays. But giving victim's rights their due in court, I think is extraordinarily important. There is Federal law on the subject.

My question to all of you, and I would like to have you address it individually, is whether you will make a personal commitment to not only follow the law, but to follow what you think is the best practice, one human being to another, in according victims, particularly victims of serious crime, their full due in your court of law.

Let me start with you, Judge Pannell.

Judge PANNELL. We have a Victim's Rights Program in Georgia, and we follow that. And I have found, as a district attorney, I was not sure that I would like—as a former district attorney, when we started out—I was not sure how I would like that. But it has worked out well, and I think it has given people more confidence in the courts.

Senator KYL. Thank you.

Judge Huvelle.

Judge HUVELLE. I would certainly follow the law. I believe strongly that victims should be included in the process, be able to speak. We do that in our courts. It is very important in the criminal process, especially if you expect these people to be witnesses, that they be fully informed, both by the Government and the courts, and that they are included in the process so that they feel that they are getting their due as well.

Senator KYL. Thank you.

Mr. Eaton.

Mr. EATON. The Court of International Trade is not a criminal court, but I can assure you that I understand that litigants in a civil matter are also entitled to a great deal of respect for their case and that lawyers are entitled to respect, too, and that I intend to show them that.

Senator KYL. Thank you.

Judge Cooper.

Judge COOPER. California has certainly a very aggressive Victim's Rights program, which authorizes victims to speak at sentencing hearings and to—I think it is very important, even if it does not affect what a judge ultimately will do at sentencing, to give the victim a real sense of participation in having been heard. And I have followed that law and will continue to do so.

Senator KYL. Thank you.

Judge Brown.

Judge BROWN. Oregon, likewise, has an active Victim's Rights program. Having been a judge and having worked in law enforcement and around those who must aid the victims of crimes, I am aware how daunting the experience can be, to come into a strange place, particularly for children of crimes. And I believe a judge must be absolutely aware of and sensitive to that experience in order to make the process meaningful for everyone involved.

Senator KYL. Thank you. And I would say that, as important as it is to have the public understand judicial proceedings, the point Judge Pannell made earlier, with respect to the opening of the courtroom to media, enhancing the participation of victims can also lead to a better form of justice. And so it is not simply a matter of assisting individuals who are in a difficult position, but also enhancing the administration of justice.

Thank you.

Are there any other comments that any of the panelists would like to make here?

[No response.]

Senator KYL. If not, let me reiterate what I said in the beginning, and that is that your appearance here today is a reflection of the high opinion that many people have had of you and the assumption that your nominations can move forward, that the chairman of the committee wants to move the nominations forward as soon as he can. And as I said to our Ninth Circuit nominee, we will be certain to communicate with you as soon as we know when that might be.

I should also indicate that the record will be held open for questions from other members, who were not able to be here today, through the close of business on Friday. And if any of you would like to submit anything else for the record, you will have that same period of time to do so.

[The questionnaires are retained in committee files.]

Senator KYL. If there is nothing else then from the committee, this meeting stands adjourned.

[Whereupon, at 3:13 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF RONALD M. GOULD TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer. If I am confirmed and if this important question were presented in an actual case, I would follow pertinent decisions of the United States Supreme Court, including the United States Supreme Court 1992 decision in *Casey* v. *Planned Parenthood,* 505 U.S. 833 (1992), and look for guidance in the principles and considerations set forth in these Supreme Court decisions. I would follow the Constitution and statutory and decisional law, and my personal belief will not be relevant.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. The United States Supreme Court in 1992 in *Casey* v. *Planned Parenthood,* 505 U.S. 833 (1992), reaffirmed a mother's right to abortion in specified circumstances under the precedent of *Roe* v. *Wade,* but also held that the state has an interest in preserving the life of an unborn child and therefore may enact limitations on abortion that do not unduly burden the right of the mother. As examples, limitations such as parental consents and waiting periods have been upheld. These decisions recognize the state's interest in preserving the life of an unborn child and the Supreme Court's balancing test to determine if the mother's rights are unduly burdened. If I am confirmed and this issue were raised in a case before me, I would comply with the precedents of the Supreme Court.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer. If I am confirmed and if presented with a challenge to the Partial-Birth Abortion Ban Act, I would afford it the strong presumption of constitutional validity that is given to each statute enacted by Congress. Moreover, any Act of Congress is to be interpreted, if possible, in a manner that avoids an asserted constitutional defect. I would follow the precedents of the United States Supreme Court including *Casey,* which recognizes the state's interest in preserving the unborn child's life through legislative restrictions on abortion that do not unduly burden a mother's rights.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. The Second Amendment's text states that "A well-regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

If I am confirmed, in any case where these important constitutional issues were raised, I would follow the text of the Constitution as written and any precedents of the United States Supreme Court, including the 1939 case of *United States* v. *Miller,* 307 U.S. 174 (1939). I would look for further guidance to the original intent of the Framers. I would also follow any law of the circuit, if applicable and therefore binding on a particular issue.

Question 5. Do you believe the death penalty is constitutional?

Answer. Yes, the United States Supreme Court has held that the death penalty is constitutional in the 1976 decision of *Gregg* v. *Georgia,* 428 U.S. 153 (1976), and other cases.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer. No, I have no personal, moral, or religious qualms about upholding a death penalty. If I am so fortunate as to be confirmed for the position of Circuit Judge, I would follow the law.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No, a judge must follow binding precedent. A federal Circuit Judge must follow precedent of the United States Supreme Court and the law of the circuit in which he or she sits.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court Justice, I would honor and apply the doctrine of *stare decisis,* except in a rare and extraordinary case where the United States Supreme Court's precedents indicate that a reversal of a prior precedent should be carefully considered. In the Supreme Court's 1997 decision in *Agostini* v. *Felton,* 521 U.S. 203 (1997), the Supreme Court noted that it may be permissible in the rare instance "where there has been a significant change in or subsequent development of our constitutional law" for it to reconsider and overrule a previous decision. I would follow these principles established by the Supreme Court.

RESPONSES OF ANNA J. BROWN TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer. If I am fortunate enough to be confirmed, I am committed unconditionally to observe the separation of powers and to apply the law as enacted by Congress, within the framework of the Constitution and binding precedent. Thus, if the question you pose were to come before me in a case or controversy, I would look to the Constitution, applicable statutes and binding precedent. I have no personal, moral, or religious beliefs that would interfere with this commitment. However, as a currently sitting state court judge in Oregon, my Oath prevents me from expressing my personal beliefs and opinions on matters such as this which foreseeably may come before the court.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the United States Supreme Court held that the government's interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Thus, a statute regulating abortion at any stage of pregnancy is presumed to be constitutional as long as it does not impose an undue burden on the mother's right of access. I have no personal, moral, or religious beliefs that would interfere with my upholding binding precedent like *Casey.* I am precluded from expressing my personal beliefs and opinions on matters such as this which foreseeably may come before the court.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer. Any act of Congress, duly enacted, is entitled to the presumption of constitutionality. I will hold parties who challenge the validity of legislative enactments to the high burden of overcoming that presumption.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. If a question such as this were to come before me in a case or controversy, I would look in the first instance to the text of the Second Amendment which provides "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Additionally, I would consider binding precedent, and I have found only two occasions in which the United States Supreme Court has addressed the issue. In *United States* v. *Miller,* 307 U.S. 174 (1939), the Court reversed a District Court's judgment granting a Second Amendment challenge to the defendant's prosecution for federal firearms charge. And in a footnote in *Lewis* v. *United States,* 445 U.S. 55 (1980), the proposition that the Second Amendment protects the possession of firearms in order to preserve effective state militias is discussed. *Id.* at 65, n. 8. As yet, the United States Supreme Court has not considered expressly whether the Second Amendment protects an individual's right to keep and bear arms. This significant issue is the subject of ongoing extensive debate and is likely to come before the court. Accordingly, I am unable to express my personal beliefs and opinions on the subject.

Question 5. Do you believe the death penalty is constitutional?

Answer. The United States Supreme Court has held that the death penalty is constitutional. Indeed, the text of Fifth Amendment itself contemplates the deprivation of life with due process of law.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer. No, I have no personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No. If I am fortunate enough to be confirmed, I would be bound by my Oath and would follow the law and all binding precedent, including that of my Circuit.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Because I love the work of a trial judge, I have no desire to serve on any appellate court. However, as a starting point to determine what unusual circumstances might justify overruling precedent of the United States Supreme Court, I would look to the Court's own decisions within the framework of the Constitution, including factors analyzed in *Agostini* v. *Felton*, 521 U.S. 203 (1997). The Constitution and the rule of law have served us well for centuries. They will direct the Court in all its decisions, including those in which precedent may be reconsidered.

RESPONSES OF FLORENCE MARIE COOPER TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer. As a judge, if I were presented with a case which required an answer to that question, I would follow the precedent of the United States Supreme Court, including the decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) 505 U.S. 833, which considered the State's interest in the unborn. I would also follow any relevant rulings from the Circuit Courts of Appeal.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* (1992) 505 U.S. 833, the United States Supreme Court recognized that the State has an interest in the potentiality of human life. The Court held that once a fetus is viable, a State may regulate and even proscribe an abortion unless necessary to preserve the life or health of the mother. I would follow the holding in *Casey.*

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer. I have not read any version of such a proposed Act. Of course, all duly enacted statutes are entitled to a presumption of validity and constitutionality. I would consider any challenge to the constitutionality of an Act of Congress against this high standard and in accordance with applicable precedent of the Supreme Court. As to this proposed bill, however, even if I were familiar with its contents, it would be improper for me, as a judge of a state court and as a federal judicial nominee, to render an advisory opinion on an Act which is not yet law and an issue which is not before me.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. If this issue were to come before me in the context of a case or controversy, I would begin my analysis by first turning to the plain meaning of the text of the Constitution, in this case, the Second Amendment, which states: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Additionally, I would be bound to and would follow Supreme Court precedent, which I understand is very limited in this context. See, e.g., *United States* v. *Miller* (1939) 307 U.S. 174; *Lewis* v. *United States* (1980) 445 U.S. 55, 65).

Question 5. Do you believe the death penalty is constitutional?

Answer. The United States Supreme Court in *Gregg* v. *Georgia* (1976) 428 U.S. 153, has held that capital punishment does not violate the United States Constitution so long as certain due process standards are met. I fully agree with the analysis and conclusion of the Supreme Court in that case.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer. No. I have no such qualms. As a sitting state court judge, I have presided over fourteen death-penalty trials. At the conclusion of four of those trials, the jury returned a verdict recommending the imposition of the death penalty. In each of those cases, I concluded that the death penalty was the appropriate punishment, and I imposed it.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the judge may refuse to apply that precedent to the case before him or her?

Answer. No, there are no circumstances under which such an option would be available. A District Court Judge is bound by his or her oath to follow the Constitution and the rulings of the United States Supreme Court and the Circuit Courts of Appeals.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Because of the doctrine of *stare decisis* and the substantial reliance placed on precedent by judges, lawywers, and litigants throughout the nation, the Supreme Court has laid out clear guidelines for itself for overruling precedent. The Supreme Court recognizes this is a step undertaken rarely and only in the face of true necessity and after careful analysis of the consequences. If I were a Supreme Court Justice, I would follow the guidance of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) 505 U.S. 833: "* * * when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability * * *; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine * * *: or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification * * *" (See also *Agostini* v. *Felton* (1997) 521 U.S. 203).

RESPONSES OF RICHARD K. EATON TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer. The Supreme Court, in the cases *Webster* v. *Reproductive Health Services,* 492 U.S. 490 (1989) and *Planned Parenthood* v. *Casey,* 112 S. Ct. 2791 (1992), has addressed the legal aspects of this question and has held that the state has the power to restrict abortion to protect the life of a fetus prior to birth. If I am confirmed, I will apply the Court's holding with respect to this question as I will apply all of the Court's binding precedents.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. In *Webster* v. *Reproductive Health Services* and *Planned Parenthood* v. *Casey,* the Supreme Court found that the state has an interest in protecting life from conception that is balanced against placing an "undue burden" on the rights of the mother. Should this question come before me, I will look to the Constitution and these cases for guidance and, as in all cases, follow binding precedent.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which was vetoed twice by President Clinton, is constitutional?

Answer. While I am not familiar with all of the details of the proposed Partial-Birth Abortion Ban Act, if it were enacted into law it would come before any court with the presumption of constitutionality. In addition, it is clear from the *Planned Parenthood* v. *Casey* that the state has the power to restrict abortions after viability and may do so with certain exceptions.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. The plain meaning of the Second Amendment is found in its words, "A well regulated militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed" and the Supreme Court

has confirmed the rights guaranteed by the Second Amendment, subject to certain limits, such as those contained in *United States* v. *Miller,* 307 U.S. 174 (1939) with respect to the potential use of arms for militia purposes.

Question 5. Do you believe the death penalty is constitutional?

Answer. Yes, the Framers included capital punishment at several places in the Constitution and the Supreme Court has found it to be constitutional.

Question 6. Would you have any personal, moral, or religious qualms about enforcing the death penalty as a judge?

Answer. No, if I am confirmed I will follow the established law on this question, as in all others, without reference to my personal views.

Question 7. If a judge of an inferior court concludes that a Supreme Court precedent is itself clearly unconstitutional, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No, and if confirmed as an inferior court judge, I will follow all binding precedent.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court Justice, I would vote to overrule a precedent of the Court only in those cases when I became convinced that the clear language of the Constitution required it as the Justices of the Court did in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) overruling *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) and in accordance with the standard set out in *Planned Parenthood* v. *Casey,* 112 S. Ct. 2791, 2808 (1992), that the Court overrule itself "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."

RESPONSE OF RICHARD K. EATON TO A QUESTION FROM SENATOR KOHL

Question 1. In your answer to my question today, you seemed to suggest that legislative history has little or no importance. The sarcasm of my tone aside, it is my strong belief that legislative history can be very useful in interpreting statutes that are sometimes ambiguous. Do you believe that legislative history can be important—yes or no? Please explain.

Answer. My poor attempt at humor aside, my view is that while legislative history can be important to interpret statutes that are ambiguous, it cannot be used to alter the plain meaning of a statute.

Legislative history covers a wide array of writings and delivered statements including: statements upon the introduction of legislation, committee reports, floor statements during consideration of a bill, colloquies, managers' statements, conference reports and other similar material. Because none of these can be said to represent the work of the Congress as a whole, care must be taken to give them their appropriate weight. In no case should they be used to change the clear meaning of a statute.

With these caveats, I believe that legislative history can be useful to determine the nature of the problem that the Congress intended to address by legislation, where the resulting statute is ambiguous. Because of the difficulty in determining when it reflects the thinking of Congress as a whole, legislative history is less useful in determining what Congress intended as its solution to that particular problem.

RESPONSES OF ELLEN SEGAL HUVELLE TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that the unborn child is a human being?

Answer. As a sitting judge, I can only respond to this question in terms of binding Supreme Court precedent. This issue was last addressed by the Court *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), which recognized the State's interest in protecting the rights of the unborn fetus, and I would faithfully follow this precedent irrespective of any personal beliefs that I might hold.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. If confirmed as a District Court Judge, my personal views on this subject would be of no consequence, since I would be duty bound to follow Supreme Court precedent including *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), which recognized that the State has a legitimate interest in protecting an unborn fetus from the point of viability. In my prior nine years of experience as a judge, I have always applied binding precedent and I would do so in this instance.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer. Any act of Congress is presumed to be constitutional. If I were asked to rule on the constitutionality of this Act, I would begin by applying this presumption, and I would also apply all relevant precedent, including *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992). But since this is an issue which could come before me if I am fortunate enough to be confirmed as a District Court Judge, I am constrained to avoid giving any advisory opinions.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. The Second Amendment provides that: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." As far as I am aware, the Supreme Court has addressed this issue only in *United States* v. *Miller,* 307 U.S. 174 (1939), where the Court held that the citizen's right to own firearms was protected where the firearms at issue were ordinary militia weapons. I would, if confirmed as a District Court Judge, be bound by the Constitution, this precedent, and any subsequent decisions of the Supreme Court and the Circuit Court for the District of Columbia.

Question 5. Do you believe the death penalty is constitutional?

Answer. Yes. The Supreme Court has upheld its constitutionality in *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer. No. I have no such qualms, and if confirmed, it would be my duty to follow Supreme Court precedent.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. Under our system of law, a Supreme Court precedent may only be overruled by the Supreme Court. Thus, I am unaware of any circumstances under which a District Court Judge could, consistent with his or her oath of office, overturn Supreme Court precedent.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Overruling Supreme Court precedent can only be done by the Supreme Court. In *Casey* v. *Planned Parenthood,* 505 U.S. 833, 854–55 (1992), the Court addressed the questions that had to be answered before precedent could be overturned: (1) whether the rule had proven to be intolerable because it defies practical workability; (2) whether the rule is subject to a kind of reliance that would cause a special hardship if the prior rule were overruled; (3) whether related principals of law have developed to such an extent that the old rule constitutes nothing more than a remnant of abandoned doctrine; or (4) whether facts have so changed, or have come to be seen so differently, that the old rule now lacks significant application or justification. Similarly, in *Agostini* v. *Felton,* 521 U.S. 203, 235–36 (1997), the Court recognized that a prior decision could be overruled where there has been a significant change in, or subsequent development of, constitutional law. If any of these limited circumstances is found to exist, a Supreme Court Justice could vote to overrrule precedent.

RESPONSES OF CHARLES A. PANNELL, JR., TO QUESTIONS FROM SENATOR SMITH

Question 1. Do you believe that an unborn child is a human being?

Answer. As a U.S. District Court Judge, I will be required to follow the Constitution, the legislative enactments of Congress, the decisions of the U.S. Supreme Court and the decisions of the Circuit Court of Appeals on any legal issue, *Roe* v. *Wade,* 410 U.S. 113, 93 S. Ct. 705 (1973), followed a trimester approach in allowing the States to enact legislation to protect maternal health. Specifically, the Court ruled the word "person", as used in the Fourteenth Amendment, does not include the unborn child. In the more recent case of *Planned Parenthood* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791 (1992), the Supreme Court focused on fetal viability in ruling on a State's ability to restrict access to abortion and recognized that a State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

Question 2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

Answer. On any legal issue a U.S. District Court Judge is required to follow the Constitution, the legislative enactments of Congress, the decisions of the U.S. Supreme Court and the Circuit Court of Appeals. The U.S. Supreme Court has not ruled that the unborn child has a constitutional right to life. However, in *Planned Parenthood* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791 (1992), the Court focused on fetal viability and did recognize that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

Question 3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

Answer. In deciding the constitutionality of any statute enacted by Congress, the statute would have a presumption of constitutionality. I would begin any review with an analysis of the U.S. Supreme Court and U.S. Circuit Court of Appeals precedent. In *Planned Parenthood* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791 (1992), the Supreme Court recognized the State's profound interest in protecting human life.

Question 4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

Answer. To determine an individual's right under the Constitution, a court must begin its analysis with the language, the framers' intent and the precedent of any higher court. A U.S. District Court Judge is obligated to apply any controlling precedent of the U.S. Supreme Court. *U.S.* v. *Miller,* 307 U.S. 174, 59 S. Ct. 816 (1939), sets forth an analysis of the Second Amendment applicable to the National Firearms Act.

Question 5. Do you believe the death penalty is constitutional?

Answer. As a U.S. District Court Judge, I will be required to follow the Constitution, the legislative enactments of Congress, the decisions of the U.S. Supreme Court and the decisions of the U.S. Circuit Court of Appeals on any legal issue. The U.S. Supreme Court has found the death penalty to be constitutional. As a Superior Court Judge, I have tried to completion three death penalty cases. In two of these cases the death penalty was imposed.

Question 6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

Answer. I have no personal, moral, or religious qualms regarding the enforcement of the death penalty as a United States District Court Judge.

Question 7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No. If I am fortunate enough to be confirmed as a U.S. District Court Judge, I will be required to follow the decisions of the U.S. Supreme Court on the interpretation of the Constitution until changed by that Court or proper legislative action.

Question 8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Society requires a consistency in the law and the courts to maintain respect for the rule of law. The overruling of precedent should take place on rare occasions and should be based on some compelling reasons. In *Agostini* v. *Felton,* 521 U.S. 203, 117 S. Ct. 1997 (1997), and *Planned Parenthood* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791 (1992), the U.S. Supreme Court listed various circumstances to consider when overruling precedent. These included: (1) Is the precedent clearly erroneous and would its perpetuation work a manifest injustice; (2) has the precedent proved unworkable; (3) can the precedent be changed without serious inequity to those who have relied upon it; (4) can the precedent be changed without significant damage to society; (5) has the precedent become irrelevant or unjustifiable in dealing with the issue; (6) have facts so changed that the precedent has no significant application; and (7) is the court acting to fulfill its constitutional duty, rather than yielding to political pressure.

NOMINATIONS OF RICHARD LINN (U.S. CIRCUIT JUDGE); RONALD A. GUZMAN, WILLIAM J. HAYNES, JR., AND BARBARA M. LYNN (U.S. DISTRICT JUDGES); DIANA E. MURPHY, RUBEN CASTILLO, STERLING R. JOHNSON, JR., ELTON J. KENDALL, MICHAEL E. O'NEILL, WILLIAM K. SESSIONS III, AND JOHN R. STEER (U.S. SENTENCING COMMISSION MEMBERS)

THURSDAY, OCTOBER 7, 1999

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

The committee met, pursuant to notice, at 2:28 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Leahy, Abraham, and Kennedy.

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

The CHAIRMAN. I apologize for starting this late, but we do have to vote around here sometimes, and they always come at the most inconvenient times for the Judiciary Committee, it seems like, and maybe some others as well.

But today the committee is holding its fifth judicial nominations hearing for the year. In addition, we will hear from all seven nominees to the Sentencing Commission.

Let me talk about the Sentencing Commission first. The committee looks forward to considering the seven nominees to the U.S. Sentencing Commission. Congress created the Sentencing Commission in 1984 to reduce disparity in sentencing in the Federal courts, to establish sentencing policies and practices for sentencing Federal offenders, to assist the legislative and executive branches in developing effective punishments, and to collect data on sentencing issues.

The Commission issues uniform Sentencing Guidelines to ensure that two persons convicted of essentially the same Federal crimes under similar circumstances will not receive dissimilar sentences merely because the persons are tried in different courtrooms.

Since the Supreme Court upheld the constitutionality of the Sentencing Guidelines in *Mistretta* v. *United States,* two important developments have taken place regarding the responsibilities of the Sentencing Commission. First, the Supreme Court in *Braxton* v. *United States* indicated that it would look to the Sentencing Commission first for the resolution of conflicts between the lower courts' interpretations of the Sentencing Guidelines. Second, Congress has instructed the Sentencing Commission to address various sentencing issues.

After a lengthy period without any Commissioners, the Commission faces substantial challenges. The number of splits in the circuit courts over interpretations of the Sentencing Guidelines is growing. For example, there is a conflict between the Fourth and Sixth Circuits on how to count marijuana plants in determining the sentence for certain drug offenses. And there is a conflict between the Fifth and the Seventh Circuits regarding when to apply a sentencing enhancement for the distribution with respect to child pornography cases. And there are other splits as well. Each day that such splits are not addressed, district courts sentence convicted defendants based on an interpretation of the guidelines that may lack national uniformity.

Further, the Commission has a number of congressional directives before it. For example, the Protection of Children from Sexual Predators Act of 1998 directs the Sentencing Commission to provide an appropriate penalty for sexual predators. The Wireless Telephone Protection Act directs the Sentencing Commission to provide an appropriate penalty for cloning of wireless telephones. The No Electronics Theft Act of 1997, the Telemarketing Fraud Prevention Act of 1998, and the Identity Theft and Assumption Deterrence Act of 1998 also require action by the Sentencing Commission. And more congressional directives are imminent.

For example, the juvenile justice bill that is currently pending in conference committee requires the Sentencing Commission to provide an appropriate enhancement for any offense which is committed with body armor. Thus, both the judiciary and Congress await important action by the Sentencing Commission.

The next slate of Commissioners will have both a heavy workload and a great challenge as the Sentencing Commission moves into the 21st century. They can meet this challenge by applying their expertise to effectuate Congress' intent that uniform penalties will be imposed in Federal courts.

Accordingly, the committee looks forward to hearing from the nominees regarding their views on how the Sentencing Commission should address the issues before it.

Now, today's hearing also specifically involves four judicial nominees—one nominee to the Court of Appeals for the Federal Circuit, and three district court nominees—as well as seven nominees to be members of the U.S. Sentencing Commission.

We shall have three panels. The first panel will consist of the nominees' sponsors who will give brief statements on behalf of their nominees. The second panel will consist of the judicial nominees. And the third panel will consist of the seven nominees to the U.S. Sentencing Commission.

Now, as soon as the ranking member gets here, we will accord him the privilege of making any statement he would care to make, and I think because of the vote we are late in having the sponsors of these nominees here to speak for and on behalf of the judicial nominees.

Before the sponsors give their statements, I have a few words I would like to say on behalf of nominee Professor Michael O'Neill. Were I not chairing this hearing, I would be sitting with my colleagues delivering the statement on Mike O'Neill's behalf.

STATEMENT OF HON. ORRIN G. HATCH, IN SUPPORT OF MICHAEL E. O'NEILL

The CHAIRMAN. For those who have followed the committee, it will come as no surprise that I strongly support Mike O'Neill's nomination. That is because Mike O'Neill served as counsel to the committee both prior to and following his Supreme Court clerkship for Justice Clarence Thomas. Mike first came to the committee as a detailee from the Department of Justice, where he had been working in the Criminal Division of the Appellate Section. And prior to that time, he worked in the U.S. Attorney's Office in the District of Columbia.

On the Judiciary Committee, Mike distinguished himself early and often, quickly becoming one of my most trusted policy and legal advisers. I know of no one who cares more deeply about criminal justice policy issues than Mike O'Neill. He epitomizes the finest qualities we can and should ask for in a Sentencing Commissioner.

I might add that I believe other members of this committee feel just as deeply about him—maybe not as deeply about him as I do, but feel very deeply about him.

Since our criminal justice system relies so heavily on the work of the Sentencing Commission, it is critically important that we appoint as Commissioners the best amongst our Nation's attorneys. I think we have done just that with the nominees who are here today, but especially with Mike O'Neill. His service in all three branches of Government—as a policy adviser here in the Senate, as a law clerk to one of the most esteemed of our Nation's appellate courts, and as a Department of Justice litigator—I think will prove to be invaluable to the Commission itself. And I have the utmost confidence that Mike O'Neill will ably, honorably, and judiciously serve the Sentencing Commission.

I know this must be a proud day for Mike, his wife Meg, and the rest of his family, so I am real happy to have you here, Mike. Glad to have you back in this committee.

And we welcome all of you here. You are here because of your reputations and because of the qualities that you have that you can lend to these wonderful institutions.

Now, Senator Thurmond is here, and I believe you have a statement, Senator Thurmond. Am I correct?

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. That is right, Mr. Chairman. Thank you.

Mr. Chairman, it gives me great pleasure to introduce to the committee John R. Steer, who has been nominated by the Presi-

dent to serve as a member of the U.S. Sentencing Commission. I believe that Mr. Steer is an exceptional choice for this important position of public trust.

Mr. Steer, who is from Greenwood, SC, received a bachelor's and a master's degree from Clemson University and a J.D. degree from the University of South Carolina. During his career, he has served in various capacities, including administrative assistant on my staff. In 1986, he joined the staff of the U.S. Sentencing Commission where he presently serves as general counsel.

Mr. Steer is an expert on the Sentencing Guidelines. He was involved in their initial drafting and implementation, and he has authored or co-authored numerous scholarly articles regarding the guidelines over the past dozen years. Moreover, he is a man of great character and integrity. He is married and has two children. I believe that his expertise and long service on the staff of the Sentencing Commission make him uniquely qualified for this challenge. I am confident that he will do an excellent job.

It is critical that we fill the positions on the Sentencing Commission as soon as possible. I look forward to Mr. Steer's quick confirmation.

And, Mr. Chairman, thank you for your courtesy.

The CHAIRMAN. Thank you, Senator Thurmond. We appreciate your great statement, and we notice that Senator Hutchison is here. We will turn to you at this point for your statement. Senator Leahy is coming, and we will turn to you.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman, and I understand—well, Senator Gramm is on his way back, and I understand Congressman Frost is here. And at the appropriate time——

The CHAIRMAN. I didn't see Congressman Frost. Would he step up if he would care to make a statement? I am sorry. I missed you, Congressman. I apologize to you. Good to have you here.

Senator HUTCHINSON. I will go ahead and start. Mr. Chairman, I am pleased to introduce to the committee two outstanding individuals. First, Barbara Lynn is accompanied by her husband today, Michael; her daughters, Tara and Whitney; and her parents, Stan and Nelda Golden.

Barbara Lynn was nominated by President Clinton on March 25th to fill a U.S. district vacancy in the Northern District of Texas. I think she will make an excellent addition to the Federal bench. She is a graduate of Southern Methodist University School of Law, where she graduated number one in her class. She received the second highest score on the Texas State Bar exam in 1976. The National Law Journal has named her as one of the 50 most influential women attorneys in the United States.

Since law school, she has been a partner in a major Dallas law firm, and much of her work has been devoted to commercial litigation. She has worked at both the State and Federal levels in those courts and is in court frequently.

In addition to her law practice, she has been active in numerous organizations and charities, contributing in her home town of Dallas. Numerous Texans have written to me in support of Barbara

Lynn's nomination. In the legal community, people whose opinions I value very much from both political parties believe that she is extremely well qualified and would bring a fair, balanced approach to Federal judicial matters.

I urge the committee to approve Barbara Lynn's nomination to be a Federal district judge.

Mr. Chairman, I would also like to join with Senator Gramm in supporting the nomination of Joe Kendall. Joe Kendall is a Federal district judge in Dallas, and he is here today to be appointed to the Sentencing Commission. He was born and raised in Dallas. He is a former police officer, assistant district attorney, and State criminal district judge, and now a Federal judge. I think he will bring a wealth of legal experience at all levels and put that knowledge to good use on the U.S. Sentencing Commission. I can't imagine anyone more qualified, having served at every level of law enforcement, than Joe Kendall and I hope you will act favorably on his nomination.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hutchison. That is high praise for these two nominees.

Let's turn to Senator Gramm, who just arrived, and then, Congressman Frost, you are here for the——

Senator HUTCHISON. Barbara Lynn.

The CHAIRMAN. We will turn to you after Senator Gramm.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Well, thank you very much, Mr. Chairman. I am very proud to be here with Judge Joe Kendall. I was privileged in 1992 to recommend Joe Kendall to the President. The President appointed him to the Federal bench, and that appointment has been an outstanding appointment.

Joe Kendall has a distinguished career in almost every area of criminal law. He has arrested, prosecuted, judged, and sentenced those that commit crimes in America. From 1972 to 1978, he was a police officer in the Dallas Police Department and worked as a police officer while he went to college at night. He graduated from the law school at Baylor University. He became an assistant district attorney and specialized in major felony prosecutions in Dallas County. He was elected State criminal district judge in Dallas County and in his tenure there had the lowest reversal rate of any judge in Dallas County.

He has had a distinguished career as a Federal judge. I think this is an excellent appointment, and I strongly commend Joe Kendall to you for the Sentencing Commission.

Let me also say that I have supported Barbara Lynn and recommended to this committee that she be confirmed. She is strongly recommended by people that know her and work with her, and I commend her to this committee.

And thank you very much, Mr. Chairman, for letting me come over and say a word.

The CHAIRMAN. Well, thank you, Senator Gramm. We appreciate you and Senator Hutchison being here with your busy schedules, and I know that these two nominees do.

Congressman Frost, since we are on the Texas nominee, we will turn to you at this point.

STATEMENT OF HON. MARTIN FROST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative FROST. Thank you, Mr. Chairman, and I will be brief.

The CHAIRMAN. Welcome to this side of the Hill.

Representative FROST. Thank you. I have known Barbara Lynn personally and professionally for more than 20 years. She is an outstanding attorney in the city of Dallas, my home town.

I think that Senator Hutchison has certainly reviewed her qualifications in great detail. I would only add that she most recently has served as Chair of the Litigation Section of the ABA, the American Bar Association. She brings a wealth of experience and I think would be an outstanding Federal judge, and I commend her to this committee.

The CHAIRMAN. Well, thank you so much, Congressman. We appreciate that you take the time to come over.

Senator HUTCHISON. Thank you, Mr. Chairman.

The CHAIRMAN. We will release you two. We know you are busy.

Let us turn to Senator Wellstone, who is next. Senator Wellstone.

STATEMENT OF HON. PAUL WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator WELLSTONE. Mr. Chairman, I have a full statement that I would like included in the record.

The CHAIRMAN. Without objection, we will put it in the record.

Senator WELLSTONE. I thank you for this hearing. As you know, Judge Murphy has been nominated by the President to chair the Commission. The presence of Senator Gramm today indicates what strong bipartisan support she has, and I am going to surprise you and I am going to surprise all my colleagues by finishing up and saying she is great.

The CHAIRMAN. Well, you know, I am starting to really appreciate you. You know that? [Laughter.]

Senator WELLSTONE. It has taken about 9½ years, but I appreciate that.

The CHAIRMAN. Maybe just a little longer than that. Thank you very much, Senator. That is great for you to do that, and we will put your full statement in the record. And we know that Ms. Murphy really appreciates your support.

[The prepared statement of Senator Wellstone follows:]

PREPARED STATEMENT OF SENATOR PAUL WELLSTONE

Mr. Chairman and members of the Committee, I want to thank you for scheduling Judge Diana Murphy and her fellow nominees for this hearing on their nomination to serve on the United States Sentencing Commission. Judge Murphy has been nominated by the President to chair the Commission. A superbly qualified judge with an impressive array of administrative credentials, both within the legal world and outside it, she would be an extraordinarily able chairperson. The presence of Senator Gramm today makes evident the strong bipartisan support she enjoys in Minnesota. I am confident that once you have completed your review of her extraordinary record, you will agree that her nomination should be reported by the Committee promptly, and approved by the Senate before we go out. I urge you to do so.

Judge Murphy served for many years with extraordinary distinction as United States District Court Judge for the District of Minnesota, and in 1994, while serving as Chief Judge of that court, was elevated to the United States Court of Appeals for the Eighth Circuit. In both instances, she broke new ground as the first woman appointed to either body. During her years on the Federal District Court and Appeals Court benches, she has been a thoughtful, forthright, and courageous advocate for justice, and has earned a reputation as a consensus-builder among her judicial peers. That's why her nomination to serve as the Commission's chair enjoys broad support within our state and nationally, and why her nomination should be promptly approved by the Senate. I recommend her to you enthusiastically.

Judge Murphy is an active member of the legal community and has achieved national status as a jurist. She has served as the national president of the Federal Judges Association and chair of the board of the American Judicature Society, two of the most prestigious organizations in the universe of American law. These are both offices of immense responsibility and leadership, indicating the high degree of esteem in which Judge Murphy is held by her colleagues.

Currently, she is the chair of the Judges Advisory Committee to the American Bar Association Standing Committee on Ethics and Professional Responsibility. In addition, she is a member of the United States Judicial Conference Committee on Court Administration and Case Management, a member of the American Law Institute, and of the Eighth Circuit Judicial Council. This impressive string of memberships and leadership positions underscores her formidable administrative skills, and talent for consensus-building within the federal court system.

In addition to participating actively in legal and judicial organizations, her work has had a significant impact on the community in which she lives. She believes that judges must be part of community life, working within the institutions of their home communities. Her roles as a Trustee of the University of St. Thomas and a Trustee of the University of Minnesota Foundation reflect her extraordinary commitment to higher education in our state. She has served in numerous other key community leadership positions, including as a member of the governing boards of the Bush Foundation, the Minnesota Opera, the United Way of Minneapolis, and the Association of Governing Boards of Universities and Colleges.

The United States Sentencing Commission is charged with establishing and administering federal guidelines prescribing the appropriate form and severity of punishments for offenders convicted of federal crimes, and assessing and proposing amendments to those guidelines as appropriate. The Commission evaluates the effects of the guidelines on the criminal justice system, advises Congress regarding modifications or enactment of laws relating to sentencing matters, and maintains a research program on sentencing issues. Given this mandate and her background, I can think of no more qualified candidate to chair the Commission. Her national leadership on sentencing issues is well-known, informed by years of working with federal sentencing guidelines from her positions on both the trial and appellate court benches.

It's clear that Judge Murphy's experience, commitment, and reputation more than qualify her to chair the United States Sentencing Commission. Americans could not ask for a more outstanding candidate, one who has exhibited a fierce commitment to fairness, equal protection, and an even-handed application of justice. I hope that her nomination for a six-year term will be approved promptly by the committee.

I know that you have a lot of nominees today, and little time. I am delighted to commend to you this distinguished jurist. I'm confident that once confirmed, she will bring her deep and abiding commitment to justice to the important work of the Sentencing Commission for many years to come. I thank Chairman Hatch, Senator Leahy and other members of the Committee for your consideration.

The CHAIRMAN. Senator Grams, let's turn to you.

STATEMENT OF HON. ROD GRAMS, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator GRAMS. Thank you very much, Mr. Chairman. It is going to be a little different. I will take just a little longer than my colleague today, but I am glad to be here with Senator Wellstone to introduce this nominee. It is my distinct pleasure to introduce Judge Diana Murphy, a judge on the U.S. Court of Appeals for the Eighth Circuit, to serve as a member and Chair of the U.S. Sentencing Commission.

My statement will be brief, and it will just barely touch on some of the highlights of her career, but Judge Murphy brings a wealth of legal experience and community service to the Sentencing Commission, with credentials and awards just too numerous to mention. However, again, as I said, I will highlight that she received both her undergraduate and law degrees magna cum laude, edited the Law Review at the University of Minnesota, was awarded a Fulbright scholarship, and in 1998 received the National Association of Women Judges Award for Leadership of judges and judicial administration.

Judge Murphy was appointed to the Federal District Court of Minnesota by President Carter and served as chief judge from 1992 to 1994, until being appointed to the Eighth Circuit of Appeals by President Clinton. She has earned a reputation as respectful and courteous to attorneys practicing before her, well prepared, capable, conscientious, and intelligent. It is my privilege to introduce her, along with Senator Wellstone, to this committee today.

The Sentencing Commission, as we know, carries the weighty responsibility of preventing disparity in sentencing in the Federal system by promulgating Sentencing Guidelines for the Federal courts, and I am pleased that Judge Murphy has been nominated to chair the Commission, and assume this very important responsibility. I wish the new Commission well, and I am pleased to support Judge Murphy's candidacy. I hope the committee will favorably report out her nomination.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Well, thank you so much. We appreciate having both of you here.

Let me put Senator Warner's statement for and on behalf of John Steer into the record immediately following Senator Thurmond's statement, if I can, and then later Senator Leahy will be giving a statement that I hope will be immediately following my statement.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Chairman Hatch, and my other distinguished colleagues on the Senate's Judiciary Committee, I am pleased to support the nomination of John R. Steer to serve as a member of the United States Sentencing Commission for a six year term.

As you know Mr. Chairman, the United States Sentencing Commission is an independent agency in the judicial branch. Among its many other duties, the Sentencing Commission prescribes guidelines for federal courts to follow when imposing sentences for offenders convicted of federal crimes. The purpose of the sentencing guidelines is to provide federal judges with fair and consistent sentencing ranges to use in their courts. The guidelines are arranged to provide a score for a convicted defender's criminal history and a score for the seriousness of the defendant's offense. Based on these scores, a sentencing range is determined, and, generally, a federal judge must impose a sentence within the guideline range.

As I am sure you know Mr. Chairman, the work done by the United States Sentencing Commission's members is both legally specialized and complex. In addition, the Sentencing Commission's work is of the utmost importance because it directly relates to the sentences received by convicted federal defendants. Accordingly, members of the Commission must have appropriate experience.

Mr. Steer's experience unquestionably well qualifies him to serve as a member of the Commission. He joined the Sentencing Commission in 1986 and served as its chief deputy general counsel for one year. From 1987 to the present, he has served as the Sentencing Commission's general counsel. In this capacity, Mr. Steer regularly conducts guideline training for judges, probation officers and prosecuting and defense attorneys. Furthermore, Mr. Steer advises the Commission on legal issues relating to its operation and statutory mandate and the application and amendment

of the federal sentencing guidelines. Mr. Steer has also published numerous articles concerning the sentencing guidelines.

Mr. Steer is obviously a very accomplished American who has dedicated a large portion of his career to the United States Sentencing Commission. Mr. Steer is well qualified to serve as a Member of the United States Sentencing Commission. His expertise and familiarity with the legally specialized and complex issues that the Sentencing Commission addresses will certainly be a strong asset for this agency.

Again, I am pleased to indicate my support for Mr. Steer. I look forward to the Committee reporting his nomination favorably and for a confirmation vote before the full Senate.

Senator LEAHY. Mr. Chairman, I should also note when I give mine regarding Mr. Linn that Senator Warner also said he had hoped to have been here with him, but could not because he is testifying on the comprehensive test ban treaty.

The CHAIRMAN. He is really very busy today, and we will put his statement in the record in both cases.

Let's turn to Senator Thompson.

STATEMENT OF HON. FRED THOMPSON, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator THOMPSON. Thank you, Mr. Chairman.

It is my great pleasure to recommend Joe Haynes to be a Federal district judge for the U.S. District Court for the Middle District of Tennessee. I suppose I have a special interest in this particular judgeship. This is a court that I practiced in for about 25 years. And while we all know the importance of Federal district judges in our system, I certainly appreciate, as a practitioner of many years, the qualities that are necessary to make a good one. I have had a special interest, of course, in my home State, and an even more special interest, I suppose, in my old stomping ground over there.

I was privileged to have Senator Baker call on me once upon a time and ask my opinion about a vacancy. You wound up appointing Judge Higgins, who now, as I understand it, is probably going to be taking senior status, which is opening up this vacancy. Judge Higgins and others, of course, were rightfully concerned that someone with suitable experience and integrity have that position.

I talked to a lot of people about this, and there was one unanimous feeling among all of the people that I talked to, and that is that Joe Haynes was the right person for this job.

Judge Haynes has been a magistrate in that district since 1984, and as we all know, Federal magistrate is about as close as you are going to get to a Federal judgeship. So he certainly knows the business. He has a reputation there of being fair, of knowing his cases, of working hard. When he faced reappointment as a magistrate, he received an overwhelmingly positive response from the local lawyers, and he was reappointed. Obviously, after 14 years there, he is well versed in both the substantive legal issues that make up a Federal district court's caseload and the procedural intricacies of trying a case.

He has served with distinction in the Office of the Attorney General for the State of Tennessee. He is a graduate of Vanderbilt School of Law, and he has been a lecturer there as well. So this is truly an outstanding appointment. I am delighted to be here today. This man will make an outstanding Federal district judge, and I wholeheartedly recommend him.

Thank you very much.

The CHAIRMAN. Well, thank you, Senator. As a former member of this committee, I happen to know that you know who will make a good Federal judge and who won't. So we appreciate having you here.

Senator Frist, we will turn to you now.

STATEMENT BY HON. BILL FRIST, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator FRIST. Thank you, Mr. Chairman, and I ask unanimous consent that my entire statement be made a part of the record.

The CHAIRMAN. Without objection, we will put entire statements in the record.

Senator FRIST. Mr. Chairman, I will simply supplement the comments that have already been made by my colleague, Senator Thompson. Several things become apparent as you interview, as you talk to people about the various nominees that come before your committee. And one of the things that stands out to me is what the colleagues of Judge Joe Haynes say about him.

During his period as magistrate judge for the Middle District of Tennessee, that 15-year period that Senator Thompson mentioned, he earned a reputation for fairness and for thoroughness. He is known as a judge who treats his fellow judges, his colleagues, the lawyers who he works with, with tremendous courtesy. Every member of the Nashville bar with whom I have spoken has the highest of praise for him.

I would be remiss if I didn't also mention the man whom Judge Haynes is nominated to replace, a man whom I think Judge Haynes would consider a mentor. Judge Higgins, who has taken senior status, is a lion of the Nashville bar and a highly regarded jurist, and Judge Haynes is the perfect person, I believe, to fill the big shoes that Judge Higgins left.

Let me just also close by looking beyond his formal legal qualifications. Judge Haynes has a range of experiences outside the courtroom that show his devotion to family and to community. He served on the board of the National Bar Association and chaired its pro bono committee. He helped establish a godfather's program at Progressive Baptist Church to provide mentors to inner-city youth. He has been active at the Harry Phillips Inn of Court, where experienced lawyers nurture younger lawyers. He even finds time to coach children's basketball at the YMCA, which is just down the street from my own home in Nashville.

Judge Haynes is clearly qualified by his temperament and by his experience to be district judge for the Middle District of Tennessee, and I do hope the committee can report on his nomination quickly and look forward to his confirmation and investiture.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Frist. That is high praise indeed for this nominee.

Let's turn to Senator Durbin. We would be glad to release you, Senators. We know you are busy.

Senator THOMPSON. Thank you very much.

Senator FRIST. Thank you.

The CHAIRMAN. We will go to Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman, and it is great to be back at the Judiciary Committee. I miss it. It was a good assignment, and I enjoyed working under your chairmanship.

I will tell you that I am here to speak on behalf of two judges, and my comments should also reflect the feelings of my colleague, Senator Peter Fitzgerald, who was here earlier and could not stay because of scheduling problems.

The CHAIRMAN. We will put his statement in the record.

Senator DURBIN. And I will submit my full statement for the record.

Let me just say ever so briefly that U.S. Magistrate Ronald Guzman is a nominee to the U.S. District Court for the Northern District of Illinois, and Judge Ruben Castillo is a nominee to the U.S. Sentencing Commission.

Judge Guzman has served as U.S. magistrate for the Northern District of Illinois since 1990. When he was interviewed by our nominating commission, which is headed by Marty Castro, a Chicago attorney who is here today, he received high praise from a diverse group who considered all of the fine nominees who came before us.

Judge Guzman moved to the United States mainland from Puerto Rico when he was a child. He worked hard to learn the English language and then excelled as a graduate of Lehigh University in Pennsylvania and New York University Law School. The story of Judge Guzman's life is a testament to hard work, strong family values, and a common touch. His wife, Carol, could not join him today, but theirs is certainly a supportive family, including his daughter, Kelly, and son, Michael.

I might say of Judge Ruben Castillo that he has served as district judge for the Northern District of Illinois in Chicago since 1994. He is the first Latino to serve on the Federal district court in Illinois and will be the first person from Illinois to serve on the U.S. Sentencing Commission. There is a similarity in his background in that Judge Castillo is a first-generation American citizen. His parents were immigrants from Mexico, who worked in some very tough manual labor jobs to help him finish school. He excelled, not only graduating from Loyola University in Chicago but a law degree from Northwestern and working with the prestigious firm of Jenner and Block. He then worked in the U.S. Attorney's Office and developed an expertise in many different areas of the law. He is highly respected, and we are honored that he will be the first Illinoisan with an opportunity to serve on the U.S. Sentencing Commission.

Both candidates possess all the qualities necessary to make a tremendous contribution to the U.S. Sentencing Commission and the Federal bench, and their vast experience along with their intelligence and temperament make them well suited.

I thank the committee and the chairman for his patience, and I hope that these nominees are viewed favorable.

[The prepared statement of Senator Durbin follows:]

PREPARED STATEMENT OF SENATOR RICHARD J. DURBIN

Mr. Chairman, members of the Judiciary Committee, it is my great pleasure to introduce two nominees at the hearing today: Ronald Guzman and Ruben Castillo.

U.S. Magistrate Ronald Guzman is a nominee to the United States District Court for the Northern District of Illinois and Judge Ruben Castillo is a nominee to the United States Sentencing Commission.

Judge Guzman has served as a United States Magistrate for the Northern District of Illinois since 1990.

Judge Castillo has served as a District Judge for the Northern District of Illinois in Chicago since 1994. He is the first Latino to serve on the Federal District Court in Illinois and would be the first person from Illinois to serve on the U.S. Sentencing Commission.

Both candidates possess all of the qualities necessary to make a tremendous contribution to the United States Sentencing Commission and the federal bench. Their vast experience along with their intelligence and temperament make them well suited for these positions.

JUDGE RONALD GUZMAN

Judge Guzman has been a U.S. magistrate in Chicago since 1990. He has a broad base of experience in complex litigation and would be an asset to the federal bench.

As a magistrate judge, he presides over a variety of civil lawsuits, including civil rights and copyright matters, as well as some criminal cases. Prior to assuming his position as a magistrate, he amassed a considerable amount of trial experience, both from the office of the Cook County State's Attorney as well as in private practice.

While working as a partner in the litigation firm of Pileggi, Guzman, Ginex & Fecarotta, he also worked as a staff attorney for a federal services program which provided free representation for members of the surrounding community.

He has been honored by the Mexican American Lawyers Association with their Lawyer of the Year Award and has been recognized by DePaul Law School for his service to the community.

Judge Guzman moved to the United States mainland from Puerto Rico when he was a child. He is a graduate of Lehigh University in Bethlehem, Pennsylvania and New York University Law School. The story of Judge Guzman is a testament to hard work, strong family values and a common touch.

Unfortunately, his wife Carol Guzman is unable to be here today. The couple has two children, Kelly Guzman, 17 and Michael Guzman, 11.

JUDGE RUBEN CASTILLO

Judge Castillo is uniquely qualified to serve on the United States Sentencing Commission because of his experience as a prosecutor, a criminal defense attorney, a law professor and as a member of the federal bench. He is a lifelong Chicago resident and is a respected and esteemed member of the Chicago legal community. He has a long record of devotion to public service and is a die hard Chicago Blackhawks fan.

Ruben Castillo was born in Chicago in 1955. He grew up in the West Town neighborhood of Chicago in an immigrant household. His father, Ruben Castillo, Sr. was a building maintenance worker from Oaxaca, Mexico and his mother Carmen Castillo was a factory worker who moved to the U.S. mainland from Ponce, Puerto Rico.

Together, his parents scrimped and saved to help pay their only child's way through Catholic schools, college and law school. Judge Castillo worked nights as a clerk in Cook County Circuit Court to help pay his way through college and law school. He received his B.A. in Political Science from Loyola University in Chicago in 1976 and his law degree from Northwestern University School of Law in 1979.

Upon graduation from law school, he worked at the prestigious firm of Jenner & Block for over 4 years. He concentrated his practice in commercial litigation and criminal law. He left this position to become an Assistant U.S. Attorney in the Northern District of Illinois from 1984 to 1988.

In 1988, he became the Regional Counsel for the Mexican American Legal Defense and Educational Fund. He served in this position until 1991 when he became a partner in the highly respected firm of Kirkland & Ellis. At Kirkland & Ellis, he developed a successful practice in the area of white collar crime until his appointment to the federal bench in 1994.

Judge Castillo's wife, Sylvia Mojica is unable to be here today but is very proud of her husband. The couple has two children, Francisca, 18, who is a freshman at

Fordham University and Roberto, 16, who is a student at St. Ignatius High School in Chicago.

Mr. Chairman, I am pleased to be able to introduce these candidates. And I cannot let pass the opportunity to emphasize how important it is to Illinois that they be confirmed to these posts.

The vacancy which Judge Guzman would fill on the Northern District of Illinois has existed since October 30, 1996 when Judge Brian Duff went on senior status. Filling this vacancy is critical to the continued administration of justice. The median waiting period for civil trials in the Northern District is 25 months, which is almost double what it was in 1993.

Mr. Chairman, I look forward to working with you for the prompt confirmation of both candidates.

Thank you.

The CHAIRMAN. Thank you, Senator Durbin. And as a former member of this committee, I know you know what you are talking about. So we appreciate your kind remarks, and that is very good praise indeed and very helpful to the committee. Thank you for being here.

[The prepared statements of Senator Fitzgerald follow:]

PREPARED STATEMENT OF SENATOR PETER G. FITZGERALD ON BEHALF OF RONALD A. GUZMAN

Thank you Mr. Chairman, for holding this hearing to address various nominations. I would like to take this opportunity to welcome one of my constituents, Magistrate Judge Ronald A. Guzman. I am pleased that President Clinton has nominated Magistrate Judge Guzman to fill a vacant seat on the United States District Court for the Northern District of Illinois.

Judge Guzman received his law degree from the New York University School of Law and his undergraduate degree from Lehigh University. He worked as an Assistant State's Attorney in Chicago for five years and he was in private practice at a Chicago law firm for ten years.

In 1990, Judge Guzman was appointed a United States Magistrate Judge in the Northern District of Illinois, where he continues to serve today. Mr. Guzman is a very well respected Magistrate Judge.

Throughout Judge Guzman's career, in private practice and as a prosecutor he has garnered the respect of his associates and his adversaries. As a Magistrate Judge, he has also earned the respect of his colleagues on the bench, as well as those affected by his decisions.

I also understand that the American Bar Association has concluded that Ronald Guzman meets the qualifications for appointment to the federal district court. This sentiment is shared by many in Illinois' legal community, including the Illinois State and Chicago Bar Associations.

I would also like to impress upon the Committee that this judgeship needs to be filled. The seat Judge Guzman is nominated to fill has been vacant since Judge Brian Duff went on senior status 1996. So, I hope that this Committee will act to move this nomination forward. Mr. Chairman, I would like to thank you again for considering this nomination.

PREPARED STATEMENT OF SENATOR PETER G. FITZGERALD ON BEHALF OF RUBEN CASTILLO

Mr. Chairman, thank you for holding this hearing on the President's nominees for the United States Sentencing Commission. I am pleased to introduce one of those nominees, Judge Ruben Castillo of Chicago.

As you know, the Sentencing Commission sets guidelines for federal trial judges to follow in sentencing those convicted of federal crimes. If confirmed, the President's nominees will evaluate the impact of sentencing guidelines on the criminal justice system and recommend changes in criminal law and sentencing procedures.

Judge Castillo, who earlier this year was nominated for the position of Commissioner, received his law degree from Northwestern University School of Law in 1979 and his undergraduate degree from Loyola University of Chicago in 1976. Judge Castillo has acquired a broad variety of legal experience, having served as a partner in a private firm, as counsel to a public interest organization and on the federal bench.

After graduating from law school, Judge Castillo joined the Chicago law firm of Jenner & Block, where he worked for five years as a litigation associate. In 1988, Judge Castillo left private practice to become an Assistant U.S. Attorney for the Northern District of Illinois, prosecuting criminal cases.

The Chicago Council of Lawyers Board of Governors praised his skills as a prosecutor in a 1993 evaluation of candidates for the federal bench. They wrote: "Mr. Castillo receives very high marks from colleagues and adversaries alike for his work as an Assistant United States Attorney. Mr. Castillo prosecuted a wide variety of criminal cases, some of which were complex. He has been universally described as well-prepared. He has excellent courtroom skills. He also receives high marks for his integrity as a prosecutor for making sure that all defendants who he prosecuted received a fair trial."

In 1988, Judge Castillo brought his experience as a lawyer to the Mexican American Legal Defense and Educational Fund, where he litigated civil rights cases. He joined the nationally respected law firm of Kirkland & Ellis in 1991 as a partner specializing in litigation.

Mr. Castillo's record as a lawyer led to his appointment, at the age of 39, as a District Judge for the Northern District of Illinois. He has served as a federal judge since 1994, presiding over numerous trials and evidentiary hearings.

If confirmed, Judge Castillo would be the first person from our state to serve on the Sentencing Commission. Based on his professional experience, I believe Judge Castillo is qualified to serve as a judicial member of the Commission, and I look forward to the Committee completing its consideration of his nomination.

The CHAIRMAN: Well, if I can ask the four judgeship nominees—Richard Linn, Ronald A. Guzman, William J. Haynes, Jr., and Barbara M. Lynn—to take their seats at the table, we would appreciate that.

If you would all just stand, I will swear you in. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LINN. I do.

Judge GUZMAN. I do.

Judge HAYNES. I do.

Ms. LYNN. I do.

The CHAIRMAN. Thank you very much.

I am going to turn to the ranking member for a statement that he would like to make at this time, and then we will proceed with the hearing.

Senator LEAHY. Thank you very much, Mr. Chairman, and later I will also give another statement at the appropriate time, an opening statement on the Sentencing Commission. But I do not want to hold—I was going to be here, anyway, so I do not want to hold up my other colleagues from the House and the Senate who were making introductions and who would be leaving.

I am extremely proud that the President has sent all of these nominees, but I hope that three of you will not feel at all badly if I mention first Richard Linn.

I have known Richard Linn for well over a decade. I know him to be a man of great integrity and competence and ability. A son of immigrants, a man who worked his way through college and law school, is married to a wonderful woman, Patricia Linn, has two great daughters whom he will introduce, two wonderful sons-in-law, a new grandchild and other grandchildren. It makes me jealous he has more than I do, Mr. Chairman, but not as many as you do, but then nobody does. [Laughter.]

A matter the chairman reminds me of with some frequency—with great pride, I might say.

As you see in his background, his is a law career of experience and accomplishment both as a trial attorney, as a partner in significant law firms, and including today, as one of the leading voices in intellectual property law, one who has argued some of the most significant cases there and written extensively in those areas. All of these things demonstrate a person whose qualities for the Federal Circuit Court of Appeals are so good that anybody, any President, should be glad to see him there, any Senate should be proud to confirm him.

But I can speak as a friend to another factor that will not probably show up in the background checks and all the rest, and that is his sense of integrity, his sense of fairness, his sense of honesty that I have not seen equaled anywhere. He is a man who is also, unlike those who spend their time solely within the confines of the bar and its emoluments, and its return. He has worked so hard outside it, and I would mention one area especially. He has been a leading voice not only in this area but in this country in the fight against juvenile diabetes.

Mr. Chairman, I have seen him go from personal interest and family interest, but something where he has reached out to help families throughout this country. And someday when a cure is found for juvenile diabetes, Richard Linn will be on that stellar list of those who helped bring it about.

So I am glad he is here, Mr. Chairman. I don't want to hold up the committee, but I will put my full statement in the record. But I did want you to know that.

Also, I would emphasize again, as I said earlier, Senator Warner intended to be here for his introduction too, but is testifying in his capacity as Chairman of the Armed Services Committee over in the Foreign Relations Committee.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

I am glad to see the Senate Judiciary Committee resuming hearings on judicial nominees and proceeding to consider the outstanding panel of nominees to the Sentencing Commission.

The Senate should act promptly to consider and confirm the nominees to the U.S. Sentencing Commission. This Commission has been struggling without a full slate of commissioners for over a year. We should not only put the Sentencing Commission back into business but we should restore full funding so the Commission is able to fulfill its statutory mandate.

The Commerce, State, Justice Appropriations Bill significantly cut the funding for the U.S. Sentencing Commission. In reducing funding for this important body, the Appropriations Subcommittee stated in its report that "the carriage of justice has continued unabated in the absence of commissioners." However, that is in direct contradiction to what the Chief Justice of the United States recently stated in his most recent year-end report for the federal judiciary. He observed that "the fact that no appointments have been made to fill any one of these seven vacancies is paralyzing a critical component of the federal criminal justice system."

The Chief Justice had been critical of the Senate for not proceeding promptly on judicial nominations and of the President for not sending nominations to the Sentencing Commission in his year-end report for 1997. I know that in 1997 and 1998 the President was seeking to consult with both Republicans and Democrats in the Senate to nominate a full panel of qualified nominees who would be acceptable to all. He has done that. It has taken a long time. It was delayed by disagreement along the way within the Republican caucus. But now the Republican Leader and Chairman Hatch have both signed off on this distinguished panel, and we should be able to proceed expeditiously to approve the new Sentencing Commission before adjourning this year.

As recently reemphasized to us all by Judge Wilkins in his letter to Chairman Hatch and me earlier this week, the Sentencing Commission is such a critical component of the federal criminal justice system because it establishes and maintains mandatory sentencing guidelines for more than 51,000 criminal cases sentenced in the federal courts each year. The Commission's most critical responsibility today is to adjust the guidelines to implement the important crime legislation we enact every year. Let me emphasize this point: When we enact legislation that calls for increased criminal penalties, it is the Commission's job to make sure that convicted defendants suffer the impact. With no Commissioners since last year, the Commission has been unable to do this job, nor will it next year without new Commissioners and sufficient funding.

Let me give you a few examples of increased penalties we enacted that, to this day, have not caused even one convicted defendant to stay in jail even one more day. Last year, in the Protection of Children from Sexual Predators Act, we required increased penalties for heinous sex abuse against our nation's young. To date, not one sexual predator has been imprisoned for even one day longer. Why? Because the Commission cannot do its job. Nor will it next year without new commissioners and sufficient funding.

Last year, we also passed legislation that required increased penalties for fraudulent telemarketers who prey upon another vulnerable segment of our population, the elderly. Although the outgoing Commission did enact some temporary measures, they are scheduled to expire this Fall. If they do, fraudulent telemarketers, once again, will escape the intended consequences of our legislation. Why? Because the Commission cannot do its job. Nor will it next year without new Commissioners and sufficient funding.

Last Congress, we also passed legislation that required increased penalties for copyright and trademark offenses to protect affected industries from the rampant piracy that threatens job creation and continued economic growth. Once again, not one convicted offender has suffered any increased punishment. Why? Because the Commission cannot do its job. Nor will it next year without new Commissioners and sufficient funding.

So long as the Commission cannot do its job, convicted defendants will also escape the impact of criminal laws we have enacted to combat other serious crimes: methamphetamine trafficking, firearms, phone cloning, and identity theft, just to name a few.

Last May, the Senate approved the Hatch-Leahy juvenile justice legislation, S. 254, that would require the Sentencing Commission to develop comprehensive guidelines for juvenile offenders, so that we can stem the rising tide of juvenile crime. I still hope that the House-Senate conference on that measure will complete its work and report a good bill that includes our provisions. But how can the Commission accomplish this vital and historic undertaking without Commissioners or adequate funding?

We face other unintended, and potentially very costly, consequences of not getting the Commission fully operational soon. I understand that defendants across the country are beginning to mount challenges to the legality of the guidelines in the absence of Commissioners. Regardless of the merits, one can only imagine the paralyzing effects on the criminal justice system if 51,000 defendants start raising this issue. There are better ways to spend limited judicial and prosecutorial resources in fighting crime and enforcing the law than in defending against these claims.

The Commission has an ongoing statutory obligation to amend the sentencing guidelines as necessary to respond to enacted crime legislation, court decisions, and other developments coming to its attention. It needs this distinguished panel of Commissioner nominees to be confirmed so that the Commission may act to implement the will of Congress in short order

Apart from the policy decision-making that only Commissioners may perform, the Commission has numerous routine statutory obligations. The Commission has an ongoing statutory obligation to receive—and federal judges have a corresponding statutory obligation to send—a report from the sentencing court with respect to every sentence imposed under the guidelines, to analyze and share the data in those reports, and use that data to improve the guideline system. The Commission analyzes and enters into our comprehensive database over 50,000 of such cases and extract more than 260 pieces of information from each case annually. Next year, over 50,000 cases that contain valuable information regarding sentencing practices, offenders, and deterrence will go without analysis if the Commissioners are not confirmed and the Commission is not funded for fiscal year 2000.

The Commission also has an ongoing statutory obligation to serve as the lead instrumentality for training newly appointed judges and probation officers, as well as prosecuting and defense attorneys, regarding application of the sentencing guide-

lines and related sentencing issues. Similarly, the Commission has an ongoing responsibility to provide needed continuing education for all those who use the sentencing guidelines to ensure that they are sufficiently informed of recent amendments to the guidelines and significant court decisions. The Commission served as lead trainer to more than 2,500 individuals at 47 training programs across the country in fiscal year 1998. Next year, this need for training will go unmet if the Commission is not funded for fiscal year 2000.

The Commission also has an ongoing statutory obligation to serve as a clearinghouse of information on sentencing-related topics and to stay current on advancements in the knowledge of human behavior and the degree to which the guidelines are achieving the purposes of sentencing such as deterrence and rehabilitation. Ongoing research on important topics such as federal sentencing for crimes involving firearms, associations between federal appellate decisions and offender race, trends in sentences and offender characteristics in drug trafficking cases, and differing sentencing practices of federal immigration offenders by judicial district will not be completed if the Commission is not funded for fiscal year 2000.

Finally, I would like to emphasize what the Chief Justice said. If we are going to have guidelines and require federal judges to impose guideline sentences, the Sentencing Commission must be empowered to do its work. And that means it needs both Commissioners and sufficient funding to fulfill its critical role in the federal criminal justice system.

I have the good fortune of knowing or knowing the work of a number of the nominees before us today. Some have been associated with Democrats, some with Republicans. They represent a diversity of views as they should. That is consistent with the way in which we designed and established the Sentencing Commission and the way that it has always functioned.

The CHAIRMAN. Well, thank you, Senator.

We welcome all of you to the committee. I have to leave, so Senator Thurmond is going to chair until Senator Abraham gets here. We are proud to have you here before the committee, and we look forward to moving your nominations as quickly as we can. So, with that, why don't we start with you, Mr. Linn? And maybe you would want to introduce your family members that are here. Each of you can make whatever statement you would care to make, and then introduce your family and friends, whoever you would care to introduce, and we will go from there. But if you will forgive me, I am going to have to leave.

Thanks, Senator Thurmond.

TESTIMONY OF RICHARD LINN, OF VIRGINIA, TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. LINN. Thank you, Mr. Chairman, and thank you very much, Senator Leahy, for those warm remarks.

It is a pleasure for me to be here, and I thank the committee for inviting me today. I would like to introduce to the committee first my wife of 33 years, Patricia Linn. And I also have with me today——

Senator THURMOND [presiding]. Still with you, eh?

Senator LEAHY. She is still with him.

Mr. LINN. Still with me.

Senator LEAHY. I can certify to the Chair that that is true. I have seen them together. [Laughter.]

Mr. LINN. The first and my only wife.

I am also proud to have my daughter Debbie with me, Debbie Linn, and her husband, Jonah Linn—and that is correct. It is Linn. Jonah had the wisdom and foresight when he married my daughter 2 years ago, in consideration of the fact that I only have daughters, I only have one sister and no brother, that he decided on his initia-

tive to adopt my name to carry on the family name. I am very, very grateful and proud of that.

I also have another daughter, Sandra Arneson, who could not be here with us today—she is a photo editor in Charlotte with the Charlotte Observer—and a wonderful son-in-law, Erik Arneson; three wonderful grandchildren, Eileen, Kyle, and Jaret; and one more on the way.

My mother, Enid Linn, also would have liked to be here today with my sister, Gail. Unfortunately, my mother has been having some health problems, and my sister is very kind in attending to her in New York.

Thank you, Mr. Chairman.

Senator THURMOND. We will be glad to hear from the next one.

TESTIMONY OF RONALD A. GUZMAN, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Judge GUZMAN. Mr. Chairman, I want to tell you how pleased and honored I am to be here today and to thank the committee for holding these hearings. My wife of 22 years, Carol, my daughter Kelly, and my son Michael were not able to be here in person today due to circumstances totally beyond our control, but I feel their presence here in spirit and, as always, I am thankful for their support.

I want to thank again the committee for having these hearings.

TESTIMONY OF WILLIAM J. HAYNES, JR., OF TENNESSEE, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE

Judge HAYNES. Mr. Chairman, I thank the committee for the hearing, and I also express my deep appreciation to Senator Frist and to Senator Thompson for their generous remarks.

If I may, I would like to introduce my wife, Carol, and my older son Paz. My younger son Tony and my daughter Maya are unable to be here. And I appreciate and am honored by the opportunity to appear before the committee.

TESTIMONY OF BARBARA M. LYNN, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

Ms. LYNN. Mr. Chairman, good afternoon. I am Barbara Lynn. I am pleased to introduce my husband of 26 years, Michael Lynn, who is also a lawyer in Dallas; my two daughters, Tara, 17, and Whitney, almost 13; and my parents, Nelda and Stan Golden, who are about to celebrate their 50th wedding anniversary. I am also very pleased and honored to have a number of friends here, and I thank them from the bottom of my heart for being here with me. There are so many of them. I will not take your time to introduce them, but I want them to know how much I appreciate it and how honored I am to be here today.

Thank you so much.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Mr. Linn, in our tripartite system of government, the Congress under the Constitution makes the law. The President as the Chief Executive enforces the law. The judiciary in-

terprets the law. Some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Mr. LINN. Mr. Chairman, I think that it is very important for judges to be deferential to the decisions of the Supreme Court, which represent the law of the land, and to interpret the law and to provide clear, succinct precedent, to provide guidance to practitioners and citizens. And I don't think it is the prerogative of a court to make law but to interpret the law.

Senator THURMOND. Judge Haynes and Judge Guzman, I would like to ask you about the Prison Litigation Reform Act, which is an attempt to limit prison litigation and court involvement in prison operations. Do you believe that the Act has generally been beneficial to the legal system? And do you believe it places too many restrictions on the ability of inmates to bring lawsuits and for judges to remedy constitutional violations in the prison context?

Judge HAYNES. Mr. Chairman, the Prison Litigation Reform Act actually, in our view, codified many of the practices in the Middle District of Tennessee. I do not believe that it interferes with a prisoner's access to court. By its requirement of exhaustion of administrative remedies, it encourages the resolution of disputes before the costly court process begins, and it has not imposed a barrier or an interference to the courts' remedying any constitutional violations.

Judge GUZMAN. Mr. Chairman, let me just add that I agree with Judge Haynes, his analysis of the Prison Litigation Reform Act. I also would like to point out that the Seventh Circuit has had occasion to rule on the constitutionality of that Act and has upheld it. So it is, in fact, the law of the land in my district, and I am duty-bound to follow it.

Senator THURMOND. Ms. Lynn, sometimes legislation fails to act on various public policy matters. What role, if any, do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Ms. LYNN. Mr. Chairman, I think that judges really have no role in developing public policy. The role of a judge is merely to interpret the law. And if there is a matter for congressional action where Congress does not act, then there will be a void there. But that is for Congress to fill, not the courts.

Senator THURMOND. Judge Haynes and Judge Guzman and Ms. Lynn, all three of you, do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

Judge HAYNES. No.

Judge GUZMAN. No.

Ms. LYNN. No.

Senator THURMOND. I will give you 100 percent on that.

Judge Haynes, Judge Guzman, and Ms. Lynn, what is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a judge on the district court?

Judge HAYNES. Mr. Chairman, mandatory minimum sentences are a matter to be addressed by the Congress, and I would enforce the law if Congress imposed mandatory minimums.

Judge GUZMAN. Mr. Chairman, I believe that mandatory minimum sentences reflect a policy determination by the Congress as

to what is necessary in order for the country to be protected from rather serious crimes, and it is my duty to follow those laws and to apply them, and I have no reservation whatsoever in doing that.

Ms. LYNN. Mr. Chairman, I will just say, as did my colleagues, that that is a matter for legislative action, and I would have no difficulty whatsoever in enforcing that matter of policy.

Senator THURMOND. Judge Haynes, Judge Guzman, and Ms. Lynn, as you know, criminal defendants in Federal court are sentenced under the Federal Sentencing Guidelines. Some argue that the guidelines do not provide enough flexibility for the sentencing judge, while others say the guidelines provide needed consistency.

What is your view of the Federal Sentencing Guidelines and their application?

Judge HAYNES. Mr. Chairman, the Federal Sentencing Guidelines represent a matter addressed to the legislature and the Congress and that I will follow the guidelines as set forth by the Congress and also as interpreted by the Sentencing Commission.

Judge GUZMAN. As a Federal magistrate judge for the last 9 years, I have, of course, engaged in many sentencings. All those have been under the Federal guidelines. I have found the guidelines to be helpful, and they are, of course, the law of the land, which I am duty-bound to follow. And I will have no difficulty whatsoever in following the guidelines.

Ms. LYNN. Mr. Chairman, I feel the same way about it.

Senator THURMOND. Senator Leahy.

QUESTIONING BY SENATOR LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

Let me ask Mr. Linn: Let's assume that you are confirmed as a circuit court judge, as I hope you will be. At some point in your career, you may have to apply a Supreme Court precedent that you don't particularly agree with, but it is the standing Supreme Court precedent. Would you feel yourself bound as a circuit court judge to that precedent?

Mr. LINN. Yes, Senator. I clearly would be bound by that. The Supreme Court decision represents the law of the land. I would look very carefully at the facts, and I would look very carefully and consider the facts of the matter before me. But if, in fact, the law applied to those facts, I would clearly apply it.

Senator LEAHY. And, Judge Guzman, you have spent the past 9 years as a magistrate judge for the Northern District of Illinois, which is such an integral part of the Federal court system. What do you think is the most important part of that position that prepares you to be a Federal district judge?

Judge GUZMAN. Senator, the last 9 years have, in my opinion, been on-the-job training for me for the position I now seek. During the course of those 9 years, I have had occasion to preside in one matter—in one manner or another over almost every conceivable type of Federal case, with the possible exception of felony criminal matters. I have presided over patent cases, trademark litigation, antitrust cases, FELA cases, ERISA cases, and many, many more.

In addition to that, I have had occasion to hear and rule upon probably every conceivable type of pretrial motion that can be imagined, and it has given me a feeling and experience along the

depth and breadth of the Federal practice of law, which I could not have gotten in any other position. In that respect, I think it has prepared me well for the position I am asking you to confirm me.

Senator LEAHY. Sort of like taking the stuff off your desk and moving down the hall in some ways.

Judge GUZMAN. Physically and geographically, that is precisely what I would be doing. [Laughter.]

Senator LEAHY. I was trying to remember that. It has been a long time since I have seen that court, but I remember it.

Judge Haynes, you taught as part of the adjunct teaching faculty at Vanderbilt and Southeastern Paralegal. Could you just give me—only because I am curious, how do you feel about teaching the law? Do you feel this helps you as a judge? How do you feel being a teacher? I am just curious.

Judge HAYNES. I enjoy teaching very much. It requires me to think through very thoroughly the issues that I am going to discuss with the students. It is a self-educating process that I have always benefited from in my work as a magistrate judge. The preparation for the class and litigation and also appellate advocacy at the Vanderbilt Law School has aided me immeasurably in issues that I face every day as a magistrate judge.

In addition, going over pretrial procedures and trial practice with paralegal students enables me to gain another insight into how I perform my job, and the exchange with students is always helpful and helps you to re-examine how you do your job and understand well the rationale for what you are doing.

Senator LEAHY. Like other members of this committee, or actually the whole Senate, I occasionally get a chance to do a guest lecture in a classroom somewhere, not on a regular basis but now and then. Frankly, I find it invigorating. I really do. Sometimes I wish I was back in school and realize I should have paid more attention in some of the lectures. When I was an undergraduate or when I was in law school, I sometimes wish I had paid a little bit more attention. But you certainly realize there are some pretty bright kids, some good—you know, everybody talks about the next generation going downhill. I find that there are some awfully good young men and women out there who are coming along for the next generation.

Judge HAYNES. I share that observation, Senator. They are very talented. I am glad I got an early start in the practice of law.

Senator LEAHY. And, Ms. Lynn, I know you have participated in a variety of pro bono projects. Would it be safe to say that you feel that lawyers, members of the bar, should be involved in pro bono work?

Ms. LYNN. I think it is the highest calling for a lawyer. I would like to see lawyers do it because they want to do it rather than that they be required to do so. And in our community, we have been very successful in encouraging members of the bar to take on pro bono matters, and I have found it extremely rewarding work.

Senator LEAHY. I find that especially in a little State like mine, the State of Vermont, we have been extremely fortunate that so many have taken on pro bono work. And I should also note for the record, for those who can't see from back there, Lynn on this side

of the table is spelled L-y-n-n; Linn on this side of the table is spelled L-i-n-n.

Ms. LYNN. I regret that, Senator, because in light of your remarks I wanted to claim Richard Linn as my relative. [Laughter.]

Senator LEAHY. Well, he was president of the Juvenile Diabetes Association—I am probably using the wrong term—now president emeritus, and I just—and Senator Thurmond has heard me say this many times. I have been very pleased when we have lawyers who have been involved in such outside activities, and Senator Thurmond has also told lawyer after lawyer: Remember, if you are confirmed to the bench, remember you don't become God. Remember your days when you had to appear in court and treat people fairly. Thank you.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Senator Leahy.

Senator LEAHY. Thank you, Messrs. Revolving Chairmen here.

Senator THURMOND. You want to take it over for the next panel.

Senator ABRAHAM [presiding]. Thank you.

Senator LEAHY. Also, I do have statements, I might say, from Senator Warner, Senator Schumer, Senator Kennedy, and others, and I would just ask, Mr. Chairman, unanimous consent that, to the close of business today, any appropriate statements of any Senator of either side be admitted.

Senator ABRAHAM. We will keep the record open so those statements can be included.

[The prepared statements of Senators Schumer and Kennedy follow:]

PREPARED STATEMENT OF SENATOR CHARLES E. SCHUMER

I am pleased today to introduce to this committee Judge Sterling Johnson, Jr., who has been nominated to the United States Sentencing Commission. Judge Johnson currently serves as a federal district judge in the Eastern District of New York.

Judge Johnson hails from my stomping grounds—Brooklyn, New York. He grew up in Bedford Stuyvesant and attended New York City's public schools. After serving in the Marine Corps for three years, he joined the New York City Police Department. During his 11 years on the force, he was promoted to Detective and later, to Sergeant.

Judge Johnson earned his bachelor's degree from Brooklyn College in 1963 and his law degree from Brooklyn Law School in 1966. He then proceeded onto a distinguished law enforcement career, serving as, among other things, Assistant United States Attorney for the Southern District of New York, Executive Liaison Officer for the Drug Enforcement Administration, and Special Narcotics Prosecutor for the City of New York—a position he held for 16 years.

Judge Johnson is widely known for his expertise in the areas of drug enforcement and prevention. He has lectured throughout the United States, Europe, South America, the Caribbean, and the Near East and advised Drug Czars and Presidents on these important issues.

Given his extensive experiences in law enforcement, prosecution and judicial administration, I think that Judge Johnson will make a fine Member of the United States Sentencing Commission. He is precisely the sort of person who will ensure that our sentencing guidelines provide for rational and appropriately severe punishment.

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Mr. Chairman, I welcome today's hearing to consider these important nominees and I am hopeful that the committee and the full Senate are on a more positive and less partisan track for the consideration of nominations.

Many of us are especially concerned about long delays in the confirmation process, and about the Senate's unfortunate treatment of qualified nominees who are women

or minorities. The Senate should be a role model for the country, but too often in recent years, we have not been.

The confirmation slowdown is serious. Critical agencies such as the United States Sentencing Commission, nominees for which are before us today, have been rendered virtually ineffective for lack of commissioners. One year after the expiration of the previous commissioners' terms, we are finally holding a hearing for new commissioners.

Senator Thurmond, Senator Biden, I and others, worked well together to pass bipartisan sentencing reform legislation. A key reform in that legislation was the creation of the Sentencing Commission, to achieve greater fairness and uniformity in sentencing. Since its creation, the Commission has promulgated sentencing guidelines that have eliminated the most serious disparities in the sentencing process, without seriously impinging on judicial discretion.

Unfortunately, certain actions by Congress have undermined the Commission's work. The guidelines system was designed to achieve greater uniformity and fairness, while retaining necessary judicial flexibility. Instead, Congress has enacted a steady stream of mandatory minimum sentences that override the guidelines.

In addition, the Commission's efforts to improve the guidelines in areas such as money laundering and other offenses have been nullified by Congress for dubious reasons. A recent study by the RAND Corporation, for example, shows that "mandatory minimums reduce cocaine consumption less per million taxpayer dollars spent than does spending the same amount on enforcement." On the issue of controlling drug use, drug spending, and drug-related crime, the same study found that "treatment is more than twice as cost-effective as mandatory minimums".

One of the important goals of sentencing is general deterrence. We should allow the Commission to do its job, and weigh the Commission's recommendations more carefully before acting against them.

I welcome today's nominees. It is my hope that after their confirmation, we can turn over a new leaf, and work more effectively together to improve the sentencing system, minimize disparities, and achieve the goals we all share for this important part of our law enforcement system.

Mr. Chairman, I look forward to working with you in moving these nominees through the confirmation process quickly.

Senator ABRAHAM. And I think we can thank the panel. I arrived late, and I don't want to extend this panel any longer. We have other votes, I think, maybe, that are going to be coming to the floor that will come up here fairly soon. So we appreciate your being here, and thank you very much for taking time with us, and we look forward to further consideration of all the nominations.

Thank you.

Judge HAYNES. Thank you.

Mr. LINN. Thank you.

Judge GUZMAN. Thank you.

Ms. LYNN. Thank you.

[The questionnaires are retained in committee files.]

Senator ABRAHAM. We will now call up the various nominees for the U.S. Sentencing Commission.

The table is barely large enough. Fortunately, the Commission is no larger than this number here, but we appreciate you all being here.

I believe that Senator Leahy had deferred making an opening statement, so I will call on him at this time to do so.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. We had a number of our colleagues who were here earlier, and I deferred so that I would not delay them, knowing that I was going to be here anyway. I put my whole statement in the record, but I do feel that we

should move promptly to get the U.S. Sentencing Commission confirmed, put it back in business, and fulfill its full funding.

Chief Justice Rehnquist said that the fact that no appointments have been made to fill any of these seven vacancies is paralyzing a critical component of the Federal criminal justice system. But now Majority Leader Lott, Chairman Hatch, and the White House have signed off on this distinguished panel, filling both the Republican and Democratic seats, and we should move forward with them.

Judge Wilkins in his letter to Chairman Hatch earlier this week asked for prompt confirmation of the people, and I will give you some of the reasons.

In the Protection of Children from Sexual Predators Act we passed last year, we required increased penalties for heinous sex abuse against our Nation's children. But that hasn't happened because there hasn't been a Commission that could lay down the guidelines.

Fraudulent telemarketers are preying on our elderly. We need to have some direction there.

Methamphetamine traffic and firearms, phone cloning, identity theft, I mean, there is a whole broad area of white-collar crime, of violent crimes and others that we need to have the Commission here. And I understand defendants across the country are beginning to mount challenges to the legality of the guidelines in the absence of Commissioners. Regardless of the merits of that, I don't want to see 51,000 defendants start raising such issues.

So these are important things, Mr. Chairman. You and I have discussed this before. I will put my full statement in the record. I would, though, note also for the record that Judge William Sessions is one of the nominees here, and, again, I mean no disrespect to all the others here if I mention Judge Sessions. People from your State introduced each of you. I know Judge Sessions. I know him as a lawyer's lawyer and a judge's judge. I have never known in the years I have been a member of the bar in Vermont—and that is about 35 years. I have never known a judge praised more highly by both the prosecution bar and the defense bar. I have just never known it to happen before. But when both prosecutors and defense go out of their way to praise his evenhandedness and his ability to sentence—and we have got a pretty tough prosecutor up there who is trained well, and when I hear the FBI, the police, everybody else praise him, but then the other side praise him, I know we have somebody who understands sentences.

So with that I will put my full statement in the record, Mr. Chairman.

Senator ABRAHAM. Thank you very much, Senator Leahy. And I would echo your comments with respect to the need to fill the Sentencing Commission. We consistently introduce and occasionally even pass laws that purport to add new statutes to the Federal criminal laws, which need to have guidelines established for them, and hopefully we will have the Commission in place soon so that it can be done.

Before we proceed, of course, we will want to swear in each of our nominees here. So if you will all rise and raise your right hands, we will ask if you solemnly swear that the testimony you

are about to give will be the truth, the whole truth, and nothing but the truth, so help you God? Please answer "I do."

Judge MURPHY. I do.

Judge CASTILLO. I do.

Judge JOHNSON. I do.

Judge KENDALL. I do.

Mr. O'NEILL. I do.

Judge SESSIONS. I do.

Mr. STEER. I do.

Senator ABRAHAM. Please be seated.

I know that a number of you have family members here, so before we proceed to statements or questions, I am going to begin with Judge Murphy and ask her to introduce anybody that might be here that she would like to have the committee meet.

TESTIMONY OF DIANA E. MURPHY, OF MINNESOTA, TO BE U.S. SENTENCING COMMISSION MEMBER AND CHAIR

Judge MURPHY. Thank you, Mr. Chairman. I have no immediate family members, but I consider my former law clerks almost immediate family, and two of them who are practicing in the Washington area are still in the room—there was another one here earlier—Beth Coomb and Frances Cook. Thank you for coming.

Senator ABRAHAM. We welcome them and appreciate their being here today.

Judge Castillo.

TESTIMONY OF RUBEN CASTILLO, OF ILLINOIS, TO BE U.S. SENTENCING COMMISSION MEMBER

Judge CASTILLO. Yes, Senator. I was not able to have my family members here, although they are here in spirit. But I have no one to introduce.

Thank you.

Senator ABRAHAM. Thank you.

Judge Johnson.

TESTIMONY OF STERLING R. JOHNSON, JR., OF NEW YORK, TO BE U.S. SENTENCING COMMISSION MEMBER

Judge JOHNSON. I have no family members here in person, but they are here in spirit.

Senator ABRAHAM. I am sure they are.

Judge Kendall.

TESTIMONY OF ELTON J. KENDALL, OF TEXAS, TO BE U.S. SENTENCING COMMISSION MEMBER

Judge KENDALL. Yes, Mr. Chairman. My wife, Ronnie, of 24 years is back home in Dallas with our 13-, 12-, and 9-year old, and, unfortunately, she could not be here with me.

Senator ABRAHAM. Mr. O'Neill.

TESTIMONY OF MICHAEL E. O'NEILL, OF MARYLAND, TO BE U.S. SENTENCING COMMISSION MEMBER

Mr. O'NEILL. I am alone here today, but I feel as though I am in family given the fact that I know so many folks here.

Senator ABRAHAM. Judge Sessions.

TESTIMONY OF WILLIAM K. SESSIONS III, OF VERMONT, TO BE U.S. SENTENCING COMMISSION MEMBER

Judge SESSIONS. Thank you. Thank you, Mr. Chairman.

I have been married for 28 years. I think that is a little bit longer than Judge Kendall. But my wife also was not able to come, and my three children are also at home or in college.

Senator ABRAHAM. Thank you.

Mr. Steer.

TESTIMONY OF JOHN R. STEER, OF VIRGINIA, TO BE U.S. SENTENCING COMMISSION MEMBER

Mr. STEER. Mr. Chairman, thank you. I am pleased that my wife, Lynne, of 20 years is here, my daughter Meredith, my son Derry.

Senator ABRAHAM. We welcome you. Thank you all for being here.

At this time we will allow each of the nominees to make any opening comments they wish. Judge Murphy.

Judge MURPHY. Thank you, Mr. Chairman. I would just like to thank the President for the nomination and this committee for having the hearing, and I also would like to say that I am very proud to be here with this group of nominees.

Senator ABRAHAM. Judge Castillo.

Judge CASTILLO. I have nothing further to add to that, just happy to be here and happy to answer any questions.

Judge JOHNSON. I would echo the sentiments of my colleagues, and I appreciate the opportunity to appear before the committee.

Senator ABRAHAM. Thank you.

Judge Kendall.

Judge KENDALL. All of my adult life in one way or another has been involved in the criminal justice system either as a prosecutor, policeman, criminal defense lawyer, and as a judge, and I hope that I get the opportunity to serve in this capacity.

Senator ABRAHAM. Mr. O'Neill.

Mr. O'NEILL. I would just like to thank Chairman Hatch for convening this hearing and, of course, thank Senator Leahy for his support and also thank the President for the nomination.

Senator ABRAHAM. Judge Sessions.

Judge SESSIONS. I want to say that this is just a tremendous honor for me to be here, and I thank you very much for calling this hearing. I also sincerely appreciate all of the kind comments that Senator Leahy has made on my behalf.

Thank you.

Senator ABRAHAM. Mr. Steer.

Mr. STEER. Mr. Chairman, I am honored to be considered for this position. I appreciate the opportunity to appear before the committee. I thank Senator Thurmond for his very warm and generous statement earlier and Senator Warner for his statement that was placed in the record.

Senator ABRAHAM. Thank you all. If each of our nomination hearings proceeded that quickly through the opening portions, we would have more people through the process quicker. But we appreciate your all being here.

Senator Thurmond had requested to speak first and ask questions first because I know he has another engagement, so we will turn to Senator Thurmond at this time.

QUESTIONING BY SENATOR THURMOND

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

Judge Murphy, as you know, the Sentencing Commission has been without Commissioners for almost 1 year. What do you see as the primary challenges facing the new Commission?

Judge MURPHY. Well, Senator Thurmond, you have put your finger on it yourself. It is because when a new Commission is in place, it is going to have a backlog of work before it starts because of the fact that there are a number of directives that the Commission has received from Congress that haven't been met. And so when the new Commission comes in, that is what the first order of business will be, to address those directives and any offenses that do not have guidelines.

Senator THURMOND. Mr. O'Neill, do you believe that Federal judges today have generally accepted the guidelines and appreciate the guidelines, the guidelines provided in sentencing? Or is acceptance of the guidelines a significant problem today?

Mr. O'NEILL. I think, Senator, that today most judges certainly who were confirmed after 1987 when the guidelines went into effect are much more accepting and understanding of the Sentencing Guidelines.

My understand is that, by and large, judges are pretty happy with the way the guidelines have worked, particularly those confirmed after 1987.

Senator THURMOND. Mr. Steer, what experience in your background has most prepared you for serving as Commissioner and why?

Mr. STEER. Senator, I think the most immediately relevant experience has been that that I have had over the past 10-plus years as general counsel of the Commission. It has enabled me to become thoroughly familiar with the governing law, with the case law as it has been developed by the courts, and, of course, with the Sentencing Guidelines themselves.

Senator THURMOND. Judge Sessions, last year you were reversed by the Second Circuit regarding your decision to grant a downward departure from the guidelines range in *United States* v. *Tejido*. Do you believe that as a general rule the current criteria under the guidelines for granting downward departures is too difficult for judges to meet?

Judge SESSIONS. It is interesting that you picked that case. That was the one case in my 4 years, 4-plus years when I have been a judge that the Government has ever appealed any of my sentences, despite that there is a recent case in which they cross-appealed after I had given a person who was 50 years old 27 years in prison.

I do not think that the rules are too restrictive. That particular case had extraordinary facts. As a result of that direction from the Second Circuit, the case was brought back. There was, by agreement, the request by the Government to depart in a small—to a small extent, which, in fact, I did.

But, generally speaking, it seems to me that the guidelines are extremely effective, and they do provide some leeway. But I don't find the restrictions on departures to be excessive.

Senator THURMOND. Now, this question is for all of the Commission nominees, so you might listen closely. The Sentencing Guidelines have been applied for over a decade since being upheld by the Supreme Court, and they generally appear to have worked well in providing more consistency of punishment. Today, some believe the Sentencing Commission should revisit basic guideline decisions made over a decade ago and possibly make fundamental changes.

Do you believe the guidelines need fundamental changes? You can just answer very briefly and go right down the line.

Judge MURPHY. Senator, to start off, I don't believe that they need fundamental change. I think that they worked very well as a system because it allows the sentencing judge to consider a whole range of different factors and to consider the policy that is in the Sentencing Reform Act. But I think the Commission has to consider whether there are some conflicts in the circuits that develop and whatever, but basically they work very well, I think.

Judge CASTILLO. Senator, I do not believe that the Sentencing Guidelines need fundamental changes. I believe that the Sentencing Guidelines were a drastic improvement over the system that existed prior to their enactment in 1987.

Judge JOHNSON. Senator, I don't think that the Sentencing Commission can change the guidelines. That is something for the Congress to do. Congress created the guidelines.

Judge KENDALL. I do not believe that there is any need for any revisitation in any significant way on what we have established at this time.

Mr. O'NEILL. I agree with my friends here on the panel that I don't believe at this point there is any need for any fundamental or structural change with respect to the guidelines.

Judge SESSIONS. I am a supporter of the guidelines. I don't believe there is a fundamental need to review them. In fact, I think that we are going to be too busy dealing with the issues that we have at hand if we are so lucky to be confirmed.

Mr. STEER. I am very comfortable with the fundamental decisions that were made by the Sentencing Commission. I was pleased to be a part of that process as a staff member, and I think the Commission should move incrementally, as Congress may direct it, to make changes or as the empirical data that we gather indicates that there are problem areas that need to be addressed.

Senator THURMOND. This question is also for all the nominees. As you know, the guidelines have been criticized by some over the years for failing to give the judges sufficient discretion in sentencing. Do you believe the guidelines today generally provide appropriate discretion for judges? Or are they too strict in this regard?

Judge MURPHY. Senator, I believe that they provide sufficient discretion. There is a movement possible within the guideline range. A judge is able to make findings of fact based on the evidence that is produced in the particular case, and that is reviewed, of course, for clear error by the courts of appeal. And while the guidelines are presumptively mandatory, there is the possibility of

departure in appropriate circumstances. So I believe there is plenty of discretion for the sentencing judge.

Judge CASTILLO. Senator, I heard that criticism of the guidelines. I think that after the Supreme Court issued its *Coomb* decision, it became very clear by Supreme Court authority that there is enough individual fact-finding decisionmaking that every judge can make, and I think the Supreme Court helped every single district court judge realize what type of departures are available and what type of departures were not favored by the guidelines. So I believe at this point there is enough discretion for every single trial judge to use.

Judge JOHNSON. I agree with Judge Murphy and Judge Castillo. If there was any doubt before, it was clarified by the Supreme Court in the *Coomb* case.

Judge KENDALL. I have never felt any need for more discretion than what I have in the cases that have come before me, and I think it is important to remember what the purpose of these guidelines were for to begin with back in the 1980's, and that was to rein in unbridled discretion. And you can get to a point where if you want to go down that path, the exceptions swallow up the rule and you are right back where you started. And so I would not be of the view that discretion at the current time is limited in any great or inordinate extent such that it reeks unfairness. At least that is not my experience.

Mr. O'NEILL. I agree, Senator. The very purpose of the guidelines was to cabin judicial discretion and to have a public policy decision made by Congress as to what factors should enter into the sentencing equation. Congress has done that. I think it appropriately has reined in judicial discretion.

Judge SESSIONS. I think there are some fortune in being almost next to last. I agree with everything that has been said. And I would say there is one other advantage to the guidelines which also limits, to some extent, your discretion. But the guidelines focus judges on things that are important to consider in sentencing, and I think that to be a particular advantage of the guidelines.

Senator THURMOND. Mr. Steer, you had a big part in writing these guidelines. I especially appreciate your opinion.

Mr. STEER. Well, thank you, Senator. I appreciate that.

The Commission designed the final guideline range where the court makes its decision as broad as the statute allows. So that range, which is generally 6 months or 25 percent, whichever is greater, provides latitude for the judge's sentencing decision. Additionally, of course, the statute allows a judge to go outside that guideline range if the judge can identify an aggravating or a mitigating factor that truly makes the case atypical and warrants a different sentence.

Senator ABRAHAM. Senator Thurmond, thank you very much. And I also would just want to acknowledge here the important role you played in passage of the 1984 Sentence Reform Act and the establishment of the Sentencing Commission. It is certainly an important achievement in your legislative career.

Senator THURMOND. Thank you. I have been around a good while.

Senator ABRAHAM. Yes, you have. [Laughter.]

Senator LEAHY. You know, we read that, Strom. We read that somewhere.

Senator ABRAHAM. Senator Leahy.

Senator LEAHY. Mr. Chairman, I will withhold for now on my questions and yield to you.

QUESTIONING BY SENATOR ABRAHAM

Senator ABRAHAM. All right. Well, let me begin. I would like to begin by asking each of the nominees to comment on an area that I think is somewhat up in the air based on various court opinions and the absence, frankly, of a Commission to establish some clear guidelines, and that deals with the question of the permissibility under the Sentencing Reform Act or the Sentencing Guidelines of what has come to be known as post-offense rehabilitation.

I am curious as to what each of you thinks about that and how you view—in light of the governing statutes and guidelines, whether or not you believe that post-offense rehabilitation is a proper basis on which to grant downward departures from the guidelines.

Let's start again—maybe it is unfair to keep starting with you, but I will switch around. The next time we will start with Mr. Steer.

Judge MURPHY. Mr. Chairman, of course, when the Sentencing Reform Act was passed, I think rehabilitation was a part of the institution of supervised release in the sense that after any individual was released from an institution, from a period of imprisonment, there would be a period built in in which the individual could be worked with and rehabilitation could be given a try.

Also, depending upon how the guideline range works out, there are—if the range is low enough, there is an opportunity for rehabilitation right at the beginning. But I think it would be an unusual case where there would be a downward departure because of some kind of rehabilitation program.

Senator ABRAHAM. Well, as I understand it—and, again, I don't want to confuse this, either. My question kind of goes to what I believe has become a somewhat growing trend of downward departures that occur based on purported rehabilitation that occurs after the time that the offense might be committed but before the sentencing has taken place. And I know that several of the circuits have had to try to address this because there hasn't been—the Commission hasn't been in a position to address it. And I have heard various arguments both ways as to whether or not that is relevant.

There is a second part of it that I would get to, and maybe, as I said, we would kind of go down this way and maybe start with Mr. Steer coming back on sort of the second part of the question. There has also been, I believe, maybe in at least one circuit, or more, approval given so far based, again, on the absence of a Commission, to the idea of post-offense rehabilitation being brought into play in the case of re-sentencing situations, where someone was initially sentenced, had that initial sentencing challenged based on some sort of imperfection in it, perhaps an inappropriate downward departure, and then in the re-sentencing context had post-offense rehabilitation taken into account.

And I am just curious because I would kind of like to know what direction this Commission is inclined to take this because it seems to me to be a fairly controversial set of decisions. And, again, because the courts are a little bit at odds with one another, since they haven't had the Commission in place to give guidance, I think it would be helpful to get a feeling here today as to what all of you think about both of those contexts, both the initial sort of sentencing as well as any kind of re-sentencing.

Judge MURPHY. Well, Senator, I want to be responsive, and I guess that I find myself approaching an answer from two respects. One is as a judge and my experience, and then it would be a different hat, if confirmed as a member and Chair of the Commission, because in my circuit we don't have that rule and I am unfamiliar with that basis in my own experience as a departure.

But, obviously, as a member of the Sentencing Commission, we are required under statute to listen to different proposals that are made, to consider the victims, the prosecution, the views of the judiciary and the public, and to deliberate among ourselves in coming to any conclusions on points that are raised with us. And so I guess that is the best I can do in response to your question.

Senator ABRAHAM. My understanding in the Eighth Circuit was that it has been—that the Eighth Circuit has ruled to permit departure in an original sentencing but rejected it in the context of re-sentencing circumstances. And my understanding is that the Second, Third, and D.C. Circuits have approved this as a basis for departure in both contexts.

Judge MURPHY. Yes. Since I am in the Eighth Circuit, I am unfamiliar with its use.

Senator ABRAHAM. We will give you a chance here, Mr. Steer. Do you want to comment? It is kind of unfair to everybody to keep starting here with Judge Murphy, so I am going to move in the other direction.

Mr. STEER. Post-sentence rehabilitation is one of the ways that is recognized under the guidelines as a means of earning a discount for acceptance of responsibility, which is a decrease that is built in to the guideline calculation. So I think the question really is: Are there types of cases in which a defendant can do something so extraordinary after the offense has been completed that should merit some greater reduction than is already provided by the up to three level reduction for acceptance of responsibility. And I would draw a distinction between post-offense rehabilitation and rehabilitation that might take place after sentencing and before re-sentencing. In that instance, as the Eighth Circuit recognized, it is really a fortuity that the defendant was able to successfully appeal and thereby get a greater reduction.

I think that Congress has provided in the law good-time credits that a defendant is supposed to earn, and I think that is the way that is should be approached.

Senator ABRAHAM. Judge Sessions.

Judge SESSIONS. Your question really raises the distinction or the difference between being a district court judge and being on a policymaking board like the Sentencing Commission.

I am from the Second Circuit. The Second Circuit has spoken extraordinarily clearly on the issue of extraordinary rehabilitation

and strongly, to some extent, encourages departures. There are a number of cases—*United States* v. *Merritt Sutter*. So that as a district court judge, I view my role as very limited. I interpret the law, and the law in the Second Circuit, as different from other places, says that this should be applied.

When I expand that question to what would I think about if I was on a commission, a policymaking commission, it is a totally different question because I think that to be on a commission of this sort involves the interpretation of significant issues with the help of six other people as well as all of the data and the input from victims in particular, but victims and prosecutors and defense lawyers, et cetera.

So I guess my response is I can't tell until I have heard what other people think and really what other victims and prosecutors and defense lawyers, et cetera, would say.

Senator ABRAHAM. Mr. O'Neill, do you want to comment?

Mr. O'NEILL. Yes, I think that is right. I think part of the reason the Sentencing Commission was created was to avoid some of the emotional, political debates surrounding the imposition of sentences. Obviously, post-offense and post-sentencing rehabilitation has been the subject of some controversy.

I think it is difficult as a policymaker to comment specifically on those cases until I have had an opportunity to review the data and, frankly, to discuss it with the prosecutors and some of the judges who have been involved in the cases. And I think that is precisely what the Commission was designed to do.

Judge KENDALL. Well, you know, I would agree, and my 12 years as a judge has taught me it is kind of unwise to start making decisions before you hear matters. But I would say to you that my experience in the judging business is that most criminals tend to see the light when they feel the heat, and that most often comes up when you talk about post-offense, pre-sentencing rehabilitation. Sure, every bank robber is willing to give the money back when they are standing there in front of you, and it is—but I want to say it is a good thing for drug addicts, for instance, to—maybe that is the event that has happened in their lives that shocked them into finally deciding, you know, it is time for me to get some help for this problem, the arrest and them being before you.

But as Senator Hatch said when he made his opening statement earlier, what this is all about is to try to see to it that if a similarly situated defendant with similar conduct comes into my courtroom in Dallas or one in Brooklyn or one in Vermont or one in Detroit, that they are going to get roughly the same sentence. And the problem is, when you start talking about departures or even enshrining in a guideline matters like this, it in my judgment could be a slippery slope because so many of these determinations give such wiggle room, if you will, that you may damage what you are trying to accomplish by the guidelines themselves.

Senator ABRAHAM. Thank you.

Judge Johnson.

Judge JOHNSON. I agree with Judge Kendall in the sense that there are a lot of people who will get religion when they feel they are going to hell.

Now, I have never had a situation like the one that you asked about, but last Friday I had that situation. This was an individual who had two bank robbery convictions. He got caught on his third one. He was on supervised release when he got caught, a drug problem, and he made that same argument that you say—the question that you asked. And I concluded that I recognized that I have the authority to downwardly depart, but I chose not to exercise my discretion, and I sentenced him to the top of the guidelines.

However, as Judge Sessions says, when you are in a policy-making position, it is something different. And I might well come to the same conclusion, but I would have to hear testimony, evidence, and whatever facts both sides of the argument would present to the Commission.

Senator ABRAHAM. Judge Castillo.

Judge CASTILLO. I see the advantage of going last because I agree with everything that has been said. I think as a deliberative body, we would have to study it after getting input.

But I will tell you this, Mr. Chairman: My initial reaction would be as a trial judge that I expect there to be post-offense rehabilitation because, by very definition, you are talking about somebody who is in the criminal justice system and is being prosecuted. And as my colleague says, that is exactly when people get religion, especially white-collar criminal defendants.

Senator ABRAHAM. Well, I appreciate it. Let me just give everybody a quick update. We just had a roll call vote start, and Senator Leahy and I will have to race over and vote and come right back because I have a number of other questions. I just did want to kind of get a feel from people. I realize that we aren't asking you to perform the duties of the Commission right before our very eyes here. But I do think that Mr. Steer pointed out a very important distinction here, in particular between the issue of where there is a sentence and then there is a re-sentencing context. But I think even in the other context, the concerns that have been raised by the last two speakers I think are real important ones, and I think it is important for the Commission to bear in mind the perspective of people who see, as you all do, those of you on the bench, these remarkable changes that do transpire after there has been a conviction and a prosecution.

So we will take a very brief recess here. We will be back as soon as we possibly can, and we will stand in recess for about 10 minutes. Thank you.

[Recess from 3:50 p.m. to 4:14 p.m.]

Senator ABRAHAM. We will ask everybody to return to their seats. We are going to start the hearing again. I have got a few more questions. And Senator Leahy will be joining us, and it has been indicated that we can begin and proceed at this time with his arrival expected soon. I apologize again. The predictions on votes and when they occur around here is already pretty hard to make.

Let me switch to a similar or to another question that has to do with the commission. It is on the policies. Each of the last two Sentencing Commissions have sent to Congress recommendations, of one form or another, to lower sentences for crack cocaine dealers, largely because of their view that the differential between crack and powder cocaine sentences was too great.

President Clinton endorsed the recommendation sent by the last Sentencing commissioners. The first one, though, that occurred was opposed by us here in Congress. In fact, we passed a bill blocking it, and the President signed it into law. He, too, opposed it. I am personally inclined to believe or to agree with those who say that the differential is too great. But it has always seemed to me that it would be as possible to address this problem by making powder sentences tougher as to making crack sentences more lenient, particularly because I think the message which is sent when you downgrade sentences for drug dealing to young people is a particularly harsh message or at least one that I think leads to potential misunderstandings.

And so what I would like to do is just to ask each of you, if you would, to give me your views with respect to those proposals. Certainly, I'm sure in the context of your work as judges or in the private sector or in the Commission that you have looked at this. I do not want to try to create, as I said, a Sentencing Commission action here today, but I would like to know your thoughts on the proposals that have been sent, since I am sure you have given that some thought in contemplating taking these jobs. So we will start with you, Mr. Steer.

Mr. STEER. Well, Senator, I think at this point it is very much an issue for Congress and not our issue, except perhaps in one respect. The Sentencing Commission has a wealth of data that it can draw on to provide information as Congress may ask us to provide to help the Congress in analyzing how it wants to deal with that issue.

But the Commission has responded to the second directive and sent up a range of recommendations for you to consider, and it is now, as some would say, the ball is in Congress's court.

Senator ABRAHAM. Well, do you have any personal views on the proposal that has been sent?

Mr. STEER. Well, I was generally comfortable with the second range of recommendations. Of course, I was acting in a staff role at that time. But the second set of recommendations recommended, as you know, some change in crack cocaine penalties and also a narrowing of the gap by raising penalties for powder cocaine, as your legislation would do. So it is somewhat in the same ballpark there.

Senator ABRAHAM. Judge Sessions.

Judge SESSIONS. I also agree that this is really an issue that is within the discretion of Congress. I have not heard, I have read the 1995 report. I have also read the 1997 report, as well as Commissioner Glasek's [ph.] concurring opinion I think to the 1997 report.

And what strikes me is that there was a reason for the disparity between crack cocaine and powder cocaine that was decided upon by Congress. And I assume that that related to the addictive quality of crack cocaine, the risk of violence that goes with crack cocaine, et cetera. I am not aware that—I have not reviewed all of that background material. And I have not, in a policymaking capacity, really been able to assess that until—and I cannot do that, I do not think, until I have really heard what the background is to that.

I have passed on the constitutionality of the disparity, and that comes up on a fairly regular basis. But until I have really heard all of the clinical research, as well as the sociological impact of this kind of drug; that is, crack cocaine, I could not give you a sense.

Senator ABRAHAM. Do you have, I mean, in terms of just general views—and, again, this is to the whole panel—about the lowering of the penalties for crack cocaine? I mean, that is obviously part of that proposal. You do not have any——

Judge SESSIONS. I think the proposal essentially was to increase the minimum for the mandatory minimum. I think that technically was it.

Senator ABRAHAM. Yes. It basically was to reduce the disparity from the current level, in terms of the threshold for mandatory minimum, by making the threshold higher for crack cocaine, and for powder, to reduce the lower threshold so that the ratio would be closer.

Judge SESSIONS. In other words, increasing the 5 grams to 25 grams to 75 grams, et cetera, and then reducing the powder cocaine. I mean, again, there is a massive amount of research on the addictive quality of crack cocaine and also on the danger to really vulnerable communities, it seems to me. And I am not familiar with that. I hate to decline to answer the question. All I can say is that I really would like to study that issue, and I would also like to hear all of the input from the various other commissioners.

Senator ABRAHAM. Mr. O'Neill.

Mr. O'NEILL. Senator, I was actually here working in Congress as a staffer, working on that specific bill, in fact, with counsel on your staff as well that blocked the Sentencing Commission's initial proposal. The difficulty, I think, that I have always had with this issue is that most of the evidence, both for the disparity and for the perceived unfairness has been anecdotal. There has been very little really good, hard data either to justify a disparity or to justify a narrowing, frankly.

We start out with the baseline, obviously, that the two things have been quite different; the 100-to-1 ratio that everyone is familiar with. I think it is important that the Commission act upon what Congress has directed, and Congress has made it fairly clear that it recognizes a problem, that perhaps the two sentences need to be narrowed, but that there ought to be some differentiation. What the terms of that differentiation should be I think is something that the Commission is, frankly, designed to do, and that is to undertake a real study to determine what basis there is for the differentiation and how great that differentiation should be.

Senator LEAHY. Could I just interrupt?

Senator ABRAHAM. Sure. Go ahead. Yes, please.

Senator LEAHY. Mr. O'Neill, incidently, nice to see you back here. I am sure you feel familiar in this room.

You do not have any questions that the Congress has the ability to set a disparity in penalties in crack and powder; is that correct?

Mr. O'NEILL. No sir, none whatsoever.

Senator LEAHY. And by the same token, Congress could narrow the disparity within its legislative powers if it wished to.

Mr. O'NEILL. That is correct.

Senator LEAHY. And, Judge Sessions, would you agree with that?

Judge SESSIONS. Absolutely.
Senator LEAHY. And Mr. Steer.
Mr. STEER. Absolutely.
Senator LEAHY. Judge Kendall.
Judge KENDALL. Sure.
Senator LEAHY. Judge Johnson.
Judge JOHNSON. Absolutely.
Senator LEAHY. Judge Castillo.
Judge CASTILLO. Yes.
Senator LEAHY. Judge Murphy.
Judge MURPHY. Yes, Senator.
Senator LEAHY. Thank you.
Thank you, Mr. Chairman.

Senator ABRAHAM. Thanks. And I would agree with that. That is correct. Congress may set these standards. The question I am trying to get at is the feel that members who are going to go on the Commission have about the notion of the reduction of or the making more lenient of sentences for drug dealers and just trying to get a feel for what people's attitudes are. And I realize, and I appreciate that clearly we are not trying to—I am not asking you to formulate a new policy. I am asking you to comment on a proposal that has already been put forth by predecessors on the Commission to get a sense of what your attitudes are about such a proposal.

So, Judge Kendall, if you have any thoughts, that is fine. And if people are not prepared, that is obviously——

Judge KENDALL. Well, I would just say, and I am certainly not going to duck, dodge or bob or weave. It is true that there is a lot of debate out there. It seems that everyone seems to agree that something ought to be done. And while what Michael said was that a lot of the evidence out there is anecdotal about some parts in our society feeling like that this issue that the criminal justice systems reeks unfairness as to them, I think that whether that is right or wrong is really besides the point. If the perception is there, the perception becomes all of our reality, and that is something important that needs to be addressed in one way or another.

Whether or not that solution is to lower crack guidelines, that, as was said, the ball is in Congress's court on that, and I know that politically that might be a very tough thing to do. One solution, I know, Mr. Chairman, that you have a bill pending at this time that provides one solution, which is to narrow that gap by raising penalties for powder. And I really do not know that I have a strong sense, one way or the other, about which way to go, other than to say that at least some people out there see it as a big problem, and it erodes confidence in the criminal justice system, and that is a concern.

By the same token, I am also aware, and I think the evidence is more than anecdotal, that crack is really nasty stuff that is highly addictive, that is associated with much violence. And the victims of whom are almost exclusively in inner-city communities. And so I think that any tinkering with what we have now should be very well thought out.

Senator ABRAHAM. Judge Johnson.

Judge JOHNSON. As Senator Leahy said, Congress has the right to create these disparate sentences. The Supreme Court has said, yes, they can. The Circuit Court says, yes, they can. They can.

Now, as I understand it, that when the last Commission sent to the Congress its recommendation to lower the penalties of crack to fit the powdered cocaine, there was a 4-to-3 vote. And even the three who voted against it agreed that there should be a change. So there is a consensus that there should be a change. The question is what should that change be? Should it be the change that you have expressed in your bill? Should it be something else? I do not know. I have not read all of these other proposals. I think I agree that there should be some change. But, number one, we have the problem that if we are nominated, there is going to be so much on our plate that when will we get to it. We have to look at your proposal in great depth. We also have to look at the other proposals. And then I think that we would come to some sort of a consensus, hopefully, and then submit it to the Congress.

But as I understand it, as someone said earlier the ball is in Congress's court, there is something before the Congress right now. I do not know what it is, but there is something before Congress, in addition to your bill, Mr. Chairman.

Senator ABRAHAM. Judge Castillo.

Judge CASTILLO. Yes. As I understand it, this is not before us if we are confirmed. But if I understand your question, looking at the 1995 proposal and then looking at the 1997 proposal, of the two, personally, I would have favored the 1997 proposal. I do think that Judge Kendall raises a very important point, and that is the perception that the criminal justice system is unfair on this issue, and that is a perception that I think is deeply felt by members of minority communities.

And I think to the extent that that perception, whether real or imagined, can be dealt with or at least if the disparity is to continue, as is, which I think would be a mistake, I think everyone agrees that the disparity needs to be corrected. As to how to do it, I think that needs to be very carefully studied by Congress or if you, in your discretion, direct that issue to the Commission, and we are, in fact, confirmed, that is going to be another issue we are going to have to deal with again. But I think history shows that two Commissions have grappled with the issue two different times and came up with different solutions. And, obviously, it is a matter of public concern and needs a lot of study and, ultimately, Congress is going to be the final decider.

Senator ABRAHAM. Judge Murphy, now that we have let you be the last person for a couple of times, we will turn to you for the final word on this question.

Judge MURPHY. Mr. Chairman, I would say, first, that it is much more relaxing being the last one. [Laughter.]

But I was thinking I do not want to repeat what others have said. But I was a district judge for a long time, and I have seen firsthand the havoc that has been created in families and in neighborhoods by crack. And I understand the basis on which Congress made the determination that it did with the amount of crack that it had in the mandatory minimum statute.

I think, as you said at the very beginning, everybody is feeling there needs to be some adjustment. And I know that your piece of legislation, one of my senators, Senator Grams, was an original cosponsor of it, and I think that is a reasonable, personally, I think that is a reasonable way for Congress to go. And I agree that the ball is in Congress's court, and it may well be that we are going to have this again in the Commission, and then we have to put our commissioner hats on and consider all of the comments.

Senator ABRAHAM. My concern, and I think maybe Senator Leahy and I might disagree on this issue a little bit, but the concern I had was when the original proposal came from the Commission, which was, in effect, to make the crack sentences about 100 times more lenient in order to eliminate the disparity; that it seemed to me to send a terrible message.

The second proposal said, well, they do not have to be equal, but we will move each of them together a little bit to try to create a better ratio. I think we ought to do something, I mean, I am on record very strongly in support of trying to eliminate a lot of that disparity, both because I do think there is a perception problem, but also because I think it has created a situation wherein you have the sort of abnormality that some people who are higher up in the drug chain are getting lower sentences than people who are at the bottom of the chain. And certainly that is not, presumably, the kind of structure we want.

So it is interesting. I appreciate all of your comments, and it is certainly something we will continue to wrestle with here in Congress, and I cannot foresee what will happen with respect to the Commission, whether it will come back in your direction or not. But we will certainly be putting time in on it, I am sure.

Let me ask Judges Johnson and Castillo for each of you to comment on whether you think District Court judges currently have or should have the opportunity to grant downward departures on the basis of cooperation with the prosecution by a defendant in the absence of a prosecution motion. This is another issue that started to develop of where sort of a judicial action taken in the absence of it. I think that the DC Circuit briefly ruled, but then I think changed on this, that district judges might have unilateral authority to make those departures. And I wonder what your thoughts are about—anybody else who would want to comment certainly can, but I would ask each of you to comment, if you would.

Judge CASTILLO. I think the American College of Trial Lawyers has come up with that proposal, and I think other lawyer groups have come up with that proposal. But to my knowledge, no court has seen that the guidelines require that. So it would mean a fundamental change in the guidelines.

Is it necessary? Well, I think that would have to be studied by the Commission. I could see arguments in favor of doing that, given the fact that we have appellate review. So if there was abuse by any District Court judges, it would be corrected by the Circuit Courts. But by the same token, I could see that a lot of prosecutors, and I was a prosecutor for 4 years, believe that that, along with the charging decision, is something that is strictly within their discretion and the discretion of the executive body. So I think we would need to have a balanced approach of input from the defense

bar and the prosecution bar and deliberate and determine if that type of fundamental change was necessary.

Senator ABRAHAM. Judge Johnson.

Judge JOHNSON. I was a policeman for 12 years, I was a narcotics prosecutor for New York City for 16 years, and an assistant U.S. attorney. I have been a judge going on 9 years. So I have some familiarity with this particular problem.

I received the same thing Judge Castillo received, a proposal by the American College of Trial Lawyers recommending this. I thought it was very interesting. If such a change were to take place, I think that that would be something that Congress would have to consider. Because I do not think that the Sentencing Commission could do this. I think that there should be hearings, I think there should be testimony and evidence to support the positions of both sides, and then Congress will decide whether that is possible.

I agree with Judge Castillo, if this did occur by a judge, it would probably have to be extraordinary circumstances because the judge usually knows nothing about the case until the case came to him. And then there would be the checks and balances that are so plentiful in our form of Government. And if some judge went off half-cocked, the Court of Appeals would address that issue. But I think that is something that Congress is going to have to address.

I do not know whether you have seen that particular proposal.

Senator ABRAHAM. I have heard about it. I am familiar with the DC Circuit——

If anybody else wants to, you may. I have some other questions here, and I do not want to keep this thing going too long. But if there are any volunteers, that is fine.

Judge SESSIONS. Well, I would just say that there is clearly nothing in the guidelines which authorize a District Court to depart at this point, and the Circuits are universally holding that that would be totally inappropriate at this point. I do laugh at the thought from Judge Johnson, that there is a judge in this world who would go off "half-cocked." [Laughter.]

Senator ABRAHAM. Judge Kendall.

Judge KENDALL. In 7 years on the Federal bench, I have never had anyone ask me to do this. And when you sit and think through how this would play itself out in the real world, I think that this very well may be much ado about nothing.

The only way, conceivably, that this could come up is if you had a prosecutor dumb enough to cut a deal and to give a person in a plea agreement a substantial assistance departure. If they did so, the person assists, gives truthful and accurate information, pleads to other intelligence evidence, other prosecutions, and then that prosecutor pulls the rug out from under them. It becomes a self-policing deal, where that prosecutor, who has then lost all credibility with the defense bar, is dead, and no one is ever going to cooperate with them again.

Senator LEAHY. To say nothing about losing a little bit of credibility with the judge, too.

Judge KENDALL. Oh, absolutely. Which I think is, in no small measure, while some may talk about this in the cosmic sense, in 7 years, I have never had such a request.

Senator ABRAHAM. Does anybody else want to comment?

[No response.]

Senator ABRAHAM. Judge Kendall, let me just ask you about some comments you made about sentencing guidelines in a case called *United States* v. *Garner*. You said there, "Though not in view in this case, a like concern is prosecution of historic State cases in Federal Court because a selected defendant will almost always receive harsher punishment under the Federal sentencing guidelines."

Now, I do not want to interpret beyond a certain point here, but the way you put it seemed to suggest that you thought that the fact that Federal sentences are generally higher than State sentences might be a problem. And I am wondering if that is the point you were making or if——

Judge KENDALL. In Texas, Mr. Chairman, they absolutely are because, in Federal Court, 20 years is 20 years, and in the Texas State system, 20 years is not 20 years. And so I do think people talk about, and I do not necessarily know that I agree with this, prosecutors have always had—it is their call as to what is brought. The Supreme Court established that in *Bordenkircher* v. *Hayes* [ph.], in 1978, that those calls are prosecutorial calls as to whether a prosecution is brought or not.

It is true, however, that when you have that kind of disparity between a Federal system and a State system, and law enforcement has its choice, that you still have that disparity out there.

I will say to you I am at a disadvantage here because I have no independent recollection of the case or the quote or the context. But I would say that you do, in my State, see a wide gap, particularly with gun criminals. Now, that gap is narrowing, I might add.

Senator ABRAHAM. I guess I am trying to discern if you have an inherent problem with the fact that the Federal system might be tougher or has been tougher than the State system or if it was just——

Judge KENDALL. No, I do not have a problem with that.

Senator ABRAHAM. Judge Sessions, let me ask you about one of your cases as well, which is *U.S.* v. *Frias,* F-r-i-a-s. And what I know of the case comes from the Court of Appeals' opinion. So if I have got anything wrong, it is their fault, not mine. I am just trying to interpret their ruling.

Judge SESSIONS. Would I dare say they got something wrong? Never. [Laughter.]

Senator ABRAHAM. Right. I will not let you say that, but we will find somebody, a third party to raise that. But as I understand the case——

Senator LEAHY. Not the other Senator here. That is my circuit. [Laughter.]

Senator ABRAHAM. As I understand the case involved the conviction of a drug dealer who was convicted of cocaine distribution with two previous felony convictions, one of which was for assault with a deadly weapon and one for cocaine dealing, and he also had two misdemeanor convictions. This made him a career offender under the sentencing guidelines, which could have led to his being in prison for a very substantial sentence, even after a downward adjustment for acceptance of responsibility.

You imposed a sentence that was substantially below that mainly because, at least as the Second Circuit explained or attempted to explain your decision, they indicated that you felt that because he had previously felt light sentences for his earlier offenses, it was not fair to suddenly treat him as a career offender.

The Second Circuit reversed on this and pointed out that the guidelines take the opposite view; that somebody who has had the benefit of prior lenient treatment is not entitled to such treatment in perpetuity and that the demonstrated failure to respond to such treatment may, in fact, be grounds for an upward departure.

And I am just interested if you have resentenced Mr. Frias, if you have recollection of the case, and if you do not——

Judge SESSIONS. No; I do.

Senator ABRAHAM. And what sentence you imposed as a consequence.

Judge SESSIONS. Well, let me go back. Actually, this was——

Senator ABRAHAM. Sure. And please, if you want to elaborate on this, that would be fine. Again, I am going off of the Second Cir—an opinion, and I do not want to——

Judge SESSIONS. The defendant's name was Frias. The case was *Dehada* [ph.], which is the same case that was raised by Senator Thurmond. And it is the one case that the Government appealed of mine in 4 years, and it resulted in a reversal. But let me just give you some background.

Senator ABRAHAM. Sure.

Judge SESSIONS. This was a defendant who was from the Dominican Republic, who was from New York City, who was convicted on two felonies, received sentences in the State system of probation, first, and then 90 days. I think it was 90 days.

He then came to Vermont, and he was convicted of selling a small quantity of powder cocaine, as I recall. Although I have not read the opinion recently. And because he had received two prior convictions, he was facing 15 years, approximately, in prison. Not only that, but he was going to face 15 years in prison, and then as soon as he finished the 15 years, he was going to be deported.

I thought to myself a number of things. But I thought, in particular, that it seemed unusual that we would be paying for someone in the Federal system for that long, and then send them to the Dominican Republic. But I actually did not grant the downward departure just on that one ground. It was, although I must say it was from the bench, and it was not written, it was unartful. I actually used totality of circumstances under 5(k)(2.0).

And what happened is the Second Circuit went through those, said that I could have considered some of those factors, not other factors. Some of those issues had not been resolved at that point. They were resolved by that opinion. And they indicated, as I also had found, that extraordinary family circumstances did not justify departure. As a result, they reversed.

We went back to resentence. The Government agreed that there should be a departure, to some extent, in light of his family circumstances and also in light, quite frankly, of the fact that he was going to be deported to the Dominican Republic. So we all discussed it, there was a departure to 10 years to serve, and then the defendant appealed. So it is on appeal at this point.

Senator ABRAHAM. OK. All right. Well, I appreciate that. Because I sort of wanted to clarify whether it was your general view that somehow the repeat offender should somehow qual—that because the previous offenses had been of a lesser sort, that the somehow would set in motion a pattern where you would, therefore, disqualify someone from being treated as a pattern offender or career offender.

Judge SESSIONS. Oh, absolutely not. This was much more of a totality of circumstances. And, in fact, I have treated persons convicted of three drug offenses extraordinarily seriously.

Senator ABRAHAM. Thank you.

Judge Murphy, let me ask you not a case, but just sort of an interesting feature about the nomination you have received as the Commission Chair because it does not seem to have an expiration date. And I am just curious as to whether your understanding is that you are being nominated for one or two terms as Chairman?

Judge MURPHY. Well, it is my understanding that the nomination is for one 6-year term. I would imagine that there is some document that has it—I have not seen an official document.

Senator ABRAHAM. We will get you the appropriate document and see if there is some way to clarify that.

Mr. O'Neill, let me ask you, and we are getting to the end here, so I will try to speed up. But one of the things that I look at, as I consider each of the various nominees here, is their own personal experiences in areas where sentence experience comes into play. Obviously, most of the nominees are judges, and obviously Mr. Steer has had a very extensive experience in the Commission itself. Your experiences are in somewhat different areas of the law.

And while I certainly do not want to call anything that is not within the context of either the Commission or judicial experience disqualifying, I think it would be interesting to me to hear what you believe to be the perspectives you might bring based on your background, which has not been in this area as much as the other candidates or even close, in some of the cases, to this nomination. And I say that with great respect for the things that you have done, certainly working here on this committee, which a lot of us benefitted from. And it is not meant to be a disrespectful inquiry, but I would like you to comment.

Mr. O'NEILL. I was going to say, yes, that one lame job I had in Congress should disqualify me from any service. [Laughter.]

No, but, Senator, I think I have been blessed to be able to serve in all three branches of Government, and I have done so largely as a Government student and looking at the operation of organizations and the way in which Government functions. That has led me ultimately to an academic career. My interest in this area is primarily an academic one.

I think the two things that I bring to the Commission that are perhaps somewhat different from those with whom, if I am fortunate enough to be confirmed, that I will serve with, is first and foremost the opportunity to have worked here for some time on the Hill and having some sensitivity to sentencing issues and criminal justice and criminal law issues in Congress, and having that sort of an opportunity to judge and understand that Congress is, in fact, in charge, and that we are not, as Justice Scalia called us, in dis-

sent in *Mistretta,* a junior varsity legislature; that we really do operate at the behest of Congress and that Congress is, in fact, of ultimate authority here.

Secondarily, I think an academic perspective is an important perspective to bring to bear on this Commission in the sense that too often it may be the case that if someone has been a prosecutor for a long time or a defense attorney for a long time, you can become very set in your ways and set in your notions. It is good, I think, at least I believe it to be good, to bring sort of a fresh and open perspective to many of the issues that will come before the Commission. I think two of our previous commissioners, Eileen Nagel and Michael Block, were both people who did not hold J.D. degrees at all and had no legal experience, largely because of their academic backgrounds. And I think that is the perspective or the slightly fresher, different perspective that I would bring to the Commission if, in fact, I am confirmed.

Senator ABRAHAM. Thanks.

Mr. Steer, I do not have any specific questions to ask you today because——

Mr. STEER. Well, thank you, Senator.

Senator ABRAHAM. I look at your background here, working on this Commission. And Senator Thurmond told me, if I asked you any questions and he was not in the room, he would be disappointed.

I do have a couple of other general questions, and instead of going through them here, I think what I will do is submit them in writing. And we will leave the record open for other members who might want to. But let me just give you a bit of a heads-up on one of them because it would pertain to the District judges.

I am interested in knowing from each of you, if you would take a little time to kind of look back through your own cases, as to the number, the percentage, roughly, of sentences in which you have granted departures and a sense of both up, as well as down, as to how often you have done that and the general circumstances. I would appreciate knowing that.

And, Mr. Steer, if I could ask you, again, not today, but perhaps you might have some information as to what the typical pattern is in terms of departures for the District Courts of this country. If there is that information available, I would like to have it. And I will submit, as I said, all of this more succinctly in writing.

[The prepared questions of Senator Abraham are located in appendix.]

Senator ABRAHAM. I have no other questions for today. I want to thank you all for being here. I appreciate it very much. I have had, as I think most of you are aware, an ongoing interest in the process of the Sentencing Commission, as well as the general sentence guidelines and appreciate that you have given us the opportunity to get a better understanding of the people who will be soon serving on this Commission. And I thank you for doing it, and I thank Senator Leahy for his cooperation.

Senator LEAHY. I have a couple hours of questions.

Senator ABRAHAM. And his questions will now take place.

Senator LEAHY. I have a couple hours' worth of questions. [Laughter.]

I am afraid I may have to appear before some of your court's some day.

I think we have had a well-worthwhile hearing. I would hope that whatever we have in further questions could be answered very quickly because, as the Chief Justice has said in his statement, we need the Sentencing Commission to be up and running.

And I would put Judge Wilkins' letter to Senator Hatch and myself in here, which he says he thinks this whole group is a very well-qualified group of individuals deserving a prompt approval by the committee and the full Senate. Judge Wilkins said he hopes that we will hurry and confirm all of you and get the Commission running. I agree. I worry very much about the potential of 51,000 appeals that might start working their way up through the court system if we do not have the Commission in place, and that means all of you. And I think the U.S. Senate would have to bear that responsibility if we do not have a vote soon on every member here.

From what I have heard today, and I have sat through virtually all of this, I have read the reports of all of you, I know of nobody I could not vote for. And the Senate should do that as soon as possible. I would ask to put Judge Wilkins' letter in the record.

Senator ABRAHAM. Without objection.

[The letter from Judge Wilkins follows:]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT,
Greenville, SC, October 4, 1999.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Bldg., Washington, DC.

Hon. PATRICK J. LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Bldg., Washington, DC.

DEAR CHAIRMAN HATCH AND SENATOR LEAHY: I write in response to a request from the Chairman's office regarding the pending nominations of the bipartisan slate of sentencing commissioners. While I personally know some of the nominees better than others, overall, it appears that this is a very well-qualified group of individuals deserving of prompt approval by the Committee and the full Senate.

By virtue of my work as the first Chair of the United States Sentencing Commission from 1985–1994, I am very familiar with the agency's important statutory responsibilities within our criminal justice system. Moreover, in my current role as the newly appointed Chair of the Judicial Conference's Criminal Law Committee, which traditionally works very closely with the Commission. I have been made aware of a lengthy and growing list of unresolved sentencing policy issues pending before the Commission. These matters, many of which stem directly from legislation enacted by Congress, will remain unresolved until commissioners are appointed and can undertake the necessary work of developing appropriate guideline amendments. It is, therefore, important that confirmation move forward swiftly so that the will of Congress can be carried out with respect to a variety of criminal laws recently enacted, as well as in regard to other issues such as the resolution of guideline circuit conflicts that traditionally constitutes an important part of the Commission's agenda.

Among the unresolved issues awaiting Commission action are a number of measures in which Congress has specifically directed the Commission to develop revised guidelines to more effectively address particular kinds of criminal offenses. This list of directives from Congress includes the following:

(1) the No Electronic Theft Act of 1997, requiring the Commission to completely rewrite the guidelines for intellectual property offenses in order to strengthen penalties, ensure that the guidelines more adequately reflect economic harm, and thereby better deter these crimes;

(2) the Protection of Children from Sexual Predators Act of 1998, containing five specific instructions on enhancements that need to be added, or strengthening

amendments already existing, to the child pornography and child sexual abuse guidelines;

(3) the Wireless Telephone Protection Act of 1998, directing the Commission to consider amendments to the guidelines for fraudulent cloning of cellular telephones;

(4) the Identity Theft and Assumption Deterrence Act of 1998, directing the Commission to consider the need for penalty enhancements for fraudulent use of identification documents;

(5) the Telemarketing Fraud Prevention Act of 1998, directing the Commission to substantially increase penalties for telemarketing fraud and, in particular, telemarketing conduct that impacted a large number of vulnerable victims and/or involved sophisticated means of perpetration or concealment. (In the case of this particular Act, the last Commission in fact responded with appropriate amendments pursuant to the Act's grant of "emergency amendment authority," but under the terms of that special authority, the amendments will lapse unless repromulgated under the Commission's regular amendment procedures.)

Additionally, there are a number of other important, recently enacted anti-crime measures that, while not containing express directives to the Commission, either will not be fully effective or will provide very uneven punishment unless the Commission follows through with amendments to update and conform the guidelines. Among the statutory changes in this category are:

(1) the Methamphetamine Trafficking Control Act, which increased mandatory minimum penalties for these offenses, but with respect to which no conforming changes in the guidelines linked to the statutory minimums have been made (*i.e.*, the existing guidelines continue to reflect the former, lower statutory penalties);

(2) the "Act to Throttle Criminal Use of Guns" which broadened 18 U.S.C. § 924(c) in response to the *Bailey* v. *United States*, 516 U.S. 137 (1995), decision to cover firearm possession in furtherance of a violent crime or drug trafficking and to provide heightened penalties for brandishing or discharging such a firearm;

(3) several new tax offenses aimed at protecting taxpayer privacy; and

(4) the Defense Authorization Act of 1997 containing a "sense of Congress" expression that the guideline penalties of nuclear, biological, and chemical weapon offenses should be increased.

In the case of each of the above laws, the important crime control objectives that Congress sought to further simply will not be fully achieved until commissioners are appointed and follow through with appropriate amendments to the sentencing guidelines.

In addition to implementing congressional will with regard to newly enacted legislation, the Commission has a critical, ongoing responsibility to carry out the will of Congress expressed in the 1984 Sentencing Reform Act, including the duty to maintain, insofar as possible, a uniform body of sentencing guidelines law. In *Braxton* v. *United States*, 500 U.S. 344 (1991), the United States Supreme Court expressed the view that, under the Sentencing Reform Act, the Commission has the initial and primary task of addressing intercircuit conflicts in guideline interpretation, in order to ensure that unwarranted disparities do not develop as a result of varying court interpretations of the guidelines. In the wake of the *Braxton* decision, the Commission has endeavored to regularly address the more important guideline circuit conflicts, although it has been hampered in recent years, first by a lack of a full complement of commissioners, making it difficult to achieve the requisite four votes to adopt any amendment resolution of a conflict, and within the last year, by the lack of any commissioners at all.

Today there are several dozen significant conflicts in need of Commission amendment action. Some of these conflicts pertain to the operation of the guidelines themselves (*e.g.*, the manner in which "loss" is calculated in measuring the harm resulting from an offense, or whether certain types of prior convictions should be counted in the defendant's guideline criminal history score), while a growing number of conflicts pertain to the circumstances under which a court can "depart" and sentence outside the guideline range (*e.g.*, whether post-sentence rehabilitation and a defendant's status as a deportable alien are permissible bases for downward departure). When circuit conflicts are left unresolved, the variance in case law from circuit to circuit frustrates the intent of the Sentencing Reform Act and result in unwarranted sentencing disparities among similar defendants. For these reasons, the Criminal Law Committee has consistently urged the Commission to vigorously address guideline circuit splits in order to promote a consistent body of governing law nationwide.

The work of the Sentencing Commission is critical to a well-functioning criminal justice process in our federal courts. Accordingly, I urge the Committee to act promptly and favorably on the pending commissioner nominees in order that the Commission can proceed with its important work.

With highest personal regards, I am.
Sincerely,

WILLIAM W. WILKINS, Jr.

Senator ABRAHAM. And let me also say that, for purposes of expediting the process, I would urge or just simply propose that we leave the opportunity for people to submit questions only through the close of business tomorrow. And in that fashion, you would have any inquiries that might be submitted immediately. Mine are, as I said, probably two questions, and we can probably do that today.

[The questionnaires are retained in committee files.]

Senator ABRAHAM. But, again, thank you for being here and thank our audience, and those who participated as well, and the families. We appreciate very much both what you are doing here today and your service ahead.

Thank you.

[Whereupon, at 4:50 p.m., the committee was adjourned.]

Richard Linn's Responses to Follow-up Questions from Senator Smith

1. Do you believe that an unborn child is a human being?

In *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the Supreme Court considered the states' interest in the unborn and held that the state has the power to restrict abortion to protect the life of the fetus. If confirmed, I would follow the Supreme Court's precedent in this matter.

2. Do you believe that the unborn child has a constitutional right to life at any point before birth?

In *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the Supreme Court considered the balance between the states' interest in the potentiality of human life and the rights of the mother. If I were sitting as a judge and this issue was before me, I would follow the precedent in *Planned Parenthood* and would look to other relevant Supreme Court precedent for guidance, as necessary and appropriate.

3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

I have not read the Partial-Birth Abortion Ban Act and am not familiar with its specific provisions. If it were to be passed by Congress and enacted into law, it would be entitled to a presumption of constitutionality.

4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual's right to keep and bear arms? If so, what are the limits, if any, of that right?

The rights contained in the Second Amendment to the Constitution may be appreciated from the plain meaning of the words used. The limits of the right of individuals to keep and bear arms have been addressed by the Supreme Court in such cases as *United States* v. *Miller*, 307 U.S. 174 (1939) and *Lewis* v. *United States*, 445 U.S. 55 (1980).

5. Do you believe the death penalty is constitutional?

Yes, as so held by the United States Supreme Court.

6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

No. If confirmed, I would apply the law in all cases without regard for my personal, moral or religious views.

7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

No. A District Court Judge is bound to follow all relevant precedent of the Supreme Court.

8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

The Supreme Court is the only court that can overrule Supreme Court precedent and then only in rare circumstances. See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954).

Richard Linn's Response to Follow-up Question from Senator Grassley

Question: Do you believe that the judges of the Federal Circuit should strictly construe the Whistleblower Protection Act?

Response: **It is vitally important to the maintenance of the highest standards of accountability and honesty within the federal government that federal government employees who become aware of corruption, abuses and other wrongdoing speak out without fear of retribution or reprisals. The Whistleblower Protection Act of 1989 is intended to establish mechanisms to protect government employees who expose such improprieties in the workplace. It is important that the judges of the Federal Circuit understand the intent of Congress and construe the Whistleblower Protection Act fully and completely according to its terms and plain meaning.**

1. **Do you believe that an unborn child is a human being?**

The Supreme Court has ruled on this issue in the cases of Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Webster v. Reproductive Health Services, 492 U.S. 490 (1989). In those cases the court considered the interest of the State in the unborn. If confirmed it would be my duty to follow the precedent of the Supreme Court. If confirmed I would apply the Court's holding in these cases as I would apply all relevant Supreme Court precedent.

2. **Do you believe that the unborn child has a constitutional right to life at any point before birth?**

In Planned Parenthood v. Casey, 505 U.S. 833 (1992) the Supreme Court held that the State does have an interest in protecting life from conception. The state's right, the court held, is limited in that it may not place an undue burden on the rights of the mother. If confirmed, I would follow the binding precedent in the Planned Parenthood v. Casey decision as I would all Supreme Court precedent.

3. **Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?**

I am not familiar with the details or any of the actual language of the Partial-Birth Abortion Ban Act. It is, however, clear from the holding in Planned Parenthood v. Casey, 505 U.S. 833 (1992), that the State does have the right to place some restrictions on abortions after viability. This right is balanced by the mother's right not to have an undue burden placed upon her right of access. In addition, if enacted into law, the Partial-Birth Abortion Ban Act would enjoy a strong presumption of constitutionality. I would consider any challenge to the constitutionality of any act of Congress in light of this strong presumption and of the Supreme Court precedent in this area.

4. **Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?**

In interpreting the Constitution of the United States one must first look to the plain meaning of the words in the document itself. The Second Amendment states: " A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Supreme Court has indicated that some right to bear arms is guaranteed by this language in its opinion in the case of United States v. Miller, 307 U.S. 174 (1939). I would follow the precodent set by the Supreme Court.

5. **Do you believe the death penalty is constitutional?**

Looking to the language of the Constitution it is evident that capital punishment is referenced several times. Moreover, the Supreme Court has found, in the case of Gregg v. Georgia, 428 U.S. 153 (1976) that such punishment is constitutional. I would follow the Supreme Court precedent in this regard as in all others.

6. **Would you have any personal, moral or religious qualm about enforcing the death penalty as a United States District Judge?**

No, if confirmed I would follow Supreme Court precedent on this question and apply the death penalty.

7. **If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?**

No. A U.S. District Judge is bound to follow all Supreme Court precedent and if confirmed I would follow all such precedent.

8. **If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?**

In Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Supreme Court set out a standard for such situations. It held that the Court should overrule itself only if its prior ruling should come to be seen to be so clearly erroneous "that its enforcement was for that reason doomed."

Responses of William J. Haynes to questions from Senator Smith.

1. Do you believe that an unborn child is a human being?

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) the Supreme Court held that a State possesses the legal authority to protect the life of the fetus prior to birth and I will apply those precedents.

2. Do you believe that the unborn child has constitutional right to life at any point before birth?

In *Webster* and *Casey*, the Supreme Court held that in certain circumstances, a State may prohibit the abortion of a fetus absent a threat to the life or health of the mother. I am bound to follow those precedents.

3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

I am unfamiliar with the provisions of this Act, but if enacted, this Act would enjoy a presumption of constitutionality. The holdings of *Casey* and *Webster* would be applicable in any consideration of the constitutionality of this Act.

4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

In *United States v. Miller*, 307 U.S. 174 (1939) the Supreme Court analyzed the Second Amendment's provisions on the right to bear arms in the context of a well-regulated militia and I am bound to follow that holding.

5. Do you believe the death penalty is constitutional?

Yes, and the Supreme Court has so held.

6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

No, I have no such reservations.

7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

No, a U.S. District Judge must follow Supreme Court precedent.

8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

If I were a Supreme Court Justice, I would vote to overrule a precedent only in the rare circumstances where a precedent is clearly demonstrated to be erroneous and contrary to reason as in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Barbara M. Lynn's
Responses to Follow-Up
Questions from Senator Smith

1. Do you believe that an unborn child is a human being?

I believe the proper role of a district judge in addressing these sensitive issues is to follow applicable precedents and utilize them to resolve the issues presented. The applicable precedents at this time are *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*, both of which have sustained the general power of states to restrict abortions. I would, if confirmed, follow these and all other applicable precedents.

2. Do you believe that an unborn child has a constitutional right to life at any point before birth?

I would address this issue by referring to the precedents established by superior courts, particularly the Supreme Court. *Webster* and *Casey* sustain the state's power to restrict the right to an abortion, which thus provides protection to the fetus.

3. Do you believe that the Partial-Birth Abortion Ban Act, which Congress has passed twice but which has been vetoed twice by President Clinton, is constitutional?

I am not familiar with all of the details of the Partial Birth Abortion Ban Act. Were I to be confirmed and were the law to be enacted, if a constitutional challenge to it came before me, I would first presume its constitutionality and then analyze the language of the statute, the language of those constitutional provisions cited in opposition to and in support of the statute, and the applicable precedents, particularly *Webster* and *Casey*, both of which sustained restrictions on post-viability abortions.

4. Do you believe that the Second Amendment to the Constitution of the United States protects an individual right to keep and bear arms? If so, what are the limits, if any, of that right?

The Second Amendment was the subject of analysis in the case of *United States v. Miller*, 307 U.S. 174 (1939), which addressed the issue in the context of a well-regulated militia. *Miller* is certainly binding precedent on district courts.

5. Do you believe the death penalty is constitutional?

The death penalty was determined by the Supreme Court to be constitutional in *Gregg v. Georgia*, 428 U.S. 163 (1976), and I would certainly follow that precedent.

6. Do you have any personal, moral, or religious qualms about enforcing the death penalty as a United States District Judge?

No, the constitutionality of the death penalty has been determined by the Supreme Court, and I have no personal reservations about following those precedents.

7. If a U.S. District Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

No, it is the role of an inferior court judge to follow all binding precedents, without regard to his or her personal views.

8. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

If I were a Supreme Court Justice, I would vote to overrule established precedent only when it became clear to me that the prior decision was manifestly wrong in light of the plain language of the Constitution. The Court's overruling of *Plessy v. Ferguson*, in *Brown v. Board of Education*, is such a case.

Questions from Senator Abraham for Sentencing Commission Nominees

Response of Judge Diana E. Murphy

1. For All Nominees

I gather that there is a "practitioners advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the Guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a crime victims advisory group to serve a parallel function with respect to victims of crime?

I believe it is important for the Sentencing Commission to hear the views of all those interested in the criminal justice process. The Sentencing Reform Act identified victims of crime as some of these interested parties, and I think they should have an effective way to communicate their views to the Commission. I am not familiar with exactly how the "practitioners advisory group" functions, but I would favor inviting input from national crime victims organizations.

2. For Judge Castillo, Judge Johnson, Judge Kendall, and Judge Sessions, and for Judge Murphy with respect to your service as a district judge.

Please provide a list of cases with citations in which you departed from the Sentencing Guidelines in sentencing in either direction, excluding substantial assistance departures, listing upward and downward departure cases separately. If the relevant opinion is not readily available from published reports or electronically through Lexis or Westlaw, please provide a copy of it to the Committee. Also please provide an approximate percentage of cases in which you have imposed sentence that the cases in which you have departed in each direction represent, in whatever format the Sentencing Commission keeps this information

Answers for Senator Abraham
Judge Diana E. Murphy

that makes it easiest to compare to the similar information it keeps on national averages.

Since 1991 the Sentencing Commission has collected data on district judge sentencing departures from the guidelines. Its records show the following percentages for my departures, excluding downward departures for substantial assistance:

	downward departures	upward departures
1991	2.4%	0%
1992	4.1%	2%
1993	10.9%	0%
1994	11.8%	0%

My findings of fact and conclusions for each guidelines sentencing were set out in unpublished memoranda that were filed with the clerk of court. Since the clerk sends files of cases closed for more than three years to dead file storage facilities outside the circuit, I do not have access to such memoranda. The Sentencing Commission records show departures in the following cases, however:

Upward Departures

U.S. v. Daniel Lee Swanson [§5K2.0] (No. 9100127)

Downward Departures

U.S. v. Michael Ramon Robinson [§4A1.3] (No. 9100029)
U.S. v. Douglas Norman Hagen [§4A1.3] (No. 9100065)
U.S. v. Duane Vaughn Lafky [§3B1.2] (No. 9100065)
U.S. v. Edward Joseph Harris [§5H1.3] (No. 9200071)
U.S. v. Roy Gene Hyten [§4A1.3] (No. 9200092)
U.S. v. Manuela Elvira Abraham [§4A1.3] (No. 9200117)
U.S. v. Norman Franklin Grubbs [§4A1.3] (No. 9200147)
U.S. v. John Richard Schneider [§5H1.6] (No. 9300018)

Answers for Senator Abraham
Judge Diana E. Murphy

United States v. Curtis Jenkins [§4A1.3]
United States v. Frank Edmund Matwezak Jr. [§5H1.1; §4A1.1]
United States v. Mark Anthony Douglas [§4A1.3]
United States v. Kenneth Raymond Malecha [§5H1.6]
United States v. Timothy James Murphy [§5H1.6]
United States v. Thomas Frank Jelinek [§5H1.4; §5H1.3]
United States v. Harold Francis Savage [§4A1.3]
United States v. John Anders Challeen [§5K2.13; §5H1.4]

3. Not applicable.

4. For Judge Murphy, Judge Sessions, Professor O'Neill and Mr. Steer:

a. I would like to ask each of you to comment on whether you think district court judges currently have the authority to grant downward departures on the basis of cooperation with the prosecution by a defendant without a prosecution motion.

District court judges do not have the authority to grant such departures in the absence of a motion by the government.

b. If you think they lack that authority, do you think it would be permissible for the Sentencing Commission to grant it, or would such a change require Congressional legislation?

Such a change would require Congressional legislation.

c. Do you think such a change is desirable?

No.

5. Not applicable.

Follow-up Question for Sentencing Commissioners from Senator Hatch

Response of Judge Diana E. Murphy

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such [] crime" and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the NET Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET Act and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

The Sentencing Commission should implement Congressional directives in a timely way, and if confirmed, I plan to make the No Electronic Theft Act directive a priority. I understand Congress is concerned to have improved deterrence in this area, and I commit to move expeditiously towards a revision of the applicable sentencing guidelines with this in mind.

Question from Senator Grassley For Sentencing Commissioners

Response of Judge Diana E. Murphy

I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

I believe that identity theft and identity fraud are serious crimes and deserve serious penalties. If confirmed, I will work with my fellow Commissioners to address these serious concerns and follow the directive of Congress.

OBS	YEAR	DEPART	REASON1
357	1991	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
1402	1992	Upward Depart	Plea Agreemt -Pursuant to a plea agreement
1403	1992	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1410	1992	DownwardDepart	Missing/indeterminable
1455	1993	DownwardDepart	(5H1.3) Ment/Emotional Conditions
1456	1993	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1457	1993	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1458	1993	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1459	1993	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
1517	1994	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1518	1994	DownwardDepart	(5H1.1) Age
1519	1994	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1520	1994	DownwardDepart	Other SPECIFY
1521	1994	DownwardDepart	(5H1.6) Family Ties and Responsibilities
1522	1994	DownwardDepart	(5H1.4) Physical Condition
1523	1994	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement

OBS	REASON2	REASON3
1357	Inapplicable	Inapplicable
1406	Other SPECIFY	(5K2.0) AggRole-General aggravating or mitigating circumstance
1409	Inapplicable	Inapplicable
1410	Missing/indeterminable	Missing/indeterminable
1455	Inapplicable	Inapplicable
1456	Inapplicable	Inapplicable
1457	Inapplicable	Inapplicable
1458	Inapplicable	Inapplicable
1459	Inapplicable	Inapplicable
1517	Inapplicable	Inapplicable
1518	No PriorRecord -No prior record/first offender	Inapplicable
1519	Inapplicable	Inapplicable
1520	(5H1.6) Family Ties and Responsibilities	Inapplicable
1521	Inapplicable	Inapplicable
1522	(5H1.3) Ment/Emotional Conditions	Inapplicable
1523	Inapplicable	Inapplicable

OBS	WSSCION	DOCKETID	NAME	SENTDATE
1357	85039	9100023	ROBINSON,MICHAEL RAMON	08/29/91
1408	123278	9100127	SWANSON,DANIEL LEE	08/21/92
1409	117389	9100056	HAGEN,DOUGLAS NORMAN	07/02/92
1410	132295	9100065	LAFEY,DUANE VAUGHN	07/31/92
1455	132044	9200071	HARRIS,EDWARD JOSEPH	10/30/92
1456	135053	9200092	HYTEN,ROY GENE	11/20/92
1457	141473	9200117	ABRAHAM,MANUELA ELVIRA	02/05/93
1458	143730	9200147	SAUSSE,NORMAN FRANKLIN	02/05/93
1459	164731	9300018	SCHNEIDER,JOHN RICHARD	07/30/93
1517	178329	9300067	JENKINS,CURTIS	12/03/93
1518	182853	9300014	MATUSZAK,FRANK EDMUND JR.	12/17/93
1519	182983	9300110	DOUGLAS,MARK ANTHONY	04/01/94
1520	200304	9300161	MALECHA,KENNETH RAYMOND	05/26/94
1521	204817	9300180	MURPHY,TIMOTHY JAMES	06/24/94
1522	205852	9300180	JELINEK,THOMAS FRANK	07/15/94
1523	206362	9400004	SAVAGE,HAROLD FRANCIS	08/12/94

OBS	YEAR	DEPART	REASON1	
524	1994	DownwardDepart	(5X8.1$) Dim.capacity	
OBS	REASON2			REASON3
524	(5Wn.4) Physical Condition			Inapplicable
OBS	USSCTON	DOCKETID	NAME	SENTDATE
524	208582	5300149	CHALLEEN,JONK ANDERS	07/28/94

Judge Ruben Castillo's Answers to Questions from Senator Abraham

Question

I gather that there is a "practitioners advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the Guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a crime victims advisory group to serve a parallel function with respect to victims of crime?

Answer

I believe the idea of inviting the national crime victims organizations to create a crime victims advisory group is a good idea which should be undertaken by the Sentencing Commission. Overall, I believe that everyone affected by the Sentencing Guidelines should be given a formal and informal opportunity to present their views to the Commission on a regular basis.

Question

Please provide a list of cases with citations in which you departed from the Sentencing Guidelines in sentencing in either direction, excluding substantial assistance departures, listing upward and downward departure cases separately. If the relevant opinion is not readily available from published reports or electronically through Lexis or Westlaw, please provide a copy of it to the Committee. Also please provide an approximate percentage of cases in which you have imposed sentence that the cases in which you have departed in each direction represent, in whatever format the Sentencing Commission keeps this information that makes it easiest to compare to the similar information it keeps on national averages.

Answer

Neither our Court nor the Sentencing Commission keeps complete and accurate records for all sentencing by individual judges. Instead, these records (which are often incomplete) are kept on a circuit and district court basis. On the basis of records that were made available to me by the Sentencing Commission, I have determined that my overall departure record appears to be just below the Circuit's norm. According to these limited records, in my five years as a district court judge I have only departed seven times out of a total of 108 cases. Six of these departures were downward and one departure was upward. All of these decisions were issued from the bench and did not result in written opinions. None of these departures was appealed. My overall departure rate is less than five percent.

Judge Ruben Castillo's Answer to Question from Senator Hatch

Question

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such crime" and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the NET Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET ACT and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

Answer

I believe the Sentencing Commission should give top priority to all pending congressional directives. If I am confirmed, I will endeavor to expeditiously complete the revisions of the applicable Sentencing Guidelines as directed by the "No Electronic Theft (NET) Act" in a manner which is fully consistent with Congress' intent to improve overall deterrence in this critical area.

Judge Ruben Castillo's Answer to Question from Senator Grassley

Question

I am concerned about the growing problem of identify theft and identify fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

Answer

Once the Sentencing Commission Nominees are confirmed, I believe the Commission should give top priority to all pending congressional directives, including the explicit directive of the Identity Theft and Assumption Deterrence Act to review and amend applicable Sentencing Guidelines to ensure that appropriate penalties are in place, which are consistent with Congress' intent. I believe that identity theft and identity fraud are serious crimes in today's growing complex commercial world and that overall penalties should reflect this reality, as well as Congress' intent to deter crimes in this area.

DEPARTURE AND CASE INFORMATION FOR JUDGE CASTILLO

OBS	YEAR	- DEPART	REASON1	REASON2
48	1996	Upward Depart	(2B1.3) Harm-Monetary value does not reflect extent of harm	Inapplicable
49	1996	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement	Inapplicable
50	1996	DownwardDepart	Remorse	Restitut -Restitution
84	1997	DownwardDepart	(5H1.6) Family Ties and Responsibilities	Inapplicable
85	1997	DownwardDepart	(5K2.0) AggRole-General aggravating or mitigating circumstance	Inapplicable
104	1998	DownwardDepart	(5K2.13) Dim.Capacity	Inapplicable
105	1998	DownwardDepart	(5K2.13) Dim.Capacity	Inapplicable

OBS	REASON3	USSC1DN	DOCKETID	NAME	SENTDATE
48	Inapplicable	279953	9500554	DVORAK,JAMES E.	05/10/96
49	Inapplicable	267648	9400769	ROBERTS,VICTOR	01/22/96
50	(5K1.1) Employmt Record	267484	9400659	TYNEJARDINE,BARBARA	07/17/96
84	Inapplicable	322885	9500728	MCELEY,LARAY	04/22/97
85	Inapplicable	331420	9600409	TANNIEHILL,DALE	06/16/97
104	Inapplicable	363647	9700571	BOENDER,ROBERT	12/18/97
105	Inapplicable	365242	9700855	DOUSON,GENEVA	06/24/98

RESPONSES OF JUDGE JOHNSON TO QUESTIONS FROM SENATOR ABRAHAM FOR SENTENCING COMMISSION NOMINEES

1. **I gather that thee is a "practitioners advisory group" consisting of member of the defense bar that regularly provides the Commission with input regarding its views for how the Guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a victims advisory group to serve a parallel function with respect to victims of crime?**

   I would endorse that idea.

2. **Please provide a list of cases with citations in which you departed from the Sentencing Guidelines in sentencing in either direction, excluding substantia; assistance departure, listing upward and downward departure cases separately. If the relevant opinion is not readily available from published reports or electronically through Lexis or Westlaw, plese provide a copy of it to the Committee. Also please provide an approximate percentage of cases in which you have imposed sentence that the cases in which you have departed in each direction represent, in whatever format the Sentencing Commission keeps this information that makes it easiest to compare to the similar information it keeps on national averages.**

   I do not maintain such a list of my sentencing decisions. Because my trial docket is extremely busy, I do not write sentencing opinions. Most of these dispositions were based on agreement between the defendant and the government. Furthermore, none of these cases was appealed.

   The Sentencing Commission, responsible for keeping statistics does not keep them for the purposes of analyzing individual judge's statistics. The Commission, however, provided at my request a list of sentencing departure for the years 1992-1998. I have attached them for your review but would caution your reliance on them. In 1998 the Commission said I imposed 65 sentences. This number is inaccurate. The Eastern District of New York is one of the busiest districts in the nation, and I know I sentenced many more than 65 defendants in 1998. In any event, the commission indicated in 1998, nationally, 66% of the sentences fell within guideline ranges. Forty-three percent (43%) was the average for the Eastern District of new York. My average according to the Commission was 58%. Although I don't have exact numbers or cases, I know many of the departures were for defendants who were illegal aliens, who pled guilty and agreed not to oppose deportation. Each of these departures was with the consent of the government.

RESPONSES OF JUDGE JOHNSON TO FOLLOW-UP QUESTION FOR SENTENCING COMMISSION NOMINEES FROM SENATOR HATCH

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such crime: and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. Attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. I confirmed, do you intend to make implementation of the Net Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET Act and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

The Commission's first priority should be to act on the directives of Congress. Specifically, I will commit to moving expeditiously to complete revisions of the applicable guidelines as directed by the NET Act and do so in the manner consistent with Congress' intent.

RESPONSES OF JUDGE JOHNSON TO FOLLOW-UP QUESTION FROM SENATOR GRASSLEY TO SENTENCING COMMISSION NOMINEES

I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

I believe that identity theft and fraud are very serious crimes. If confirmed, I am committed to following the directive of Congress.

DEPARTURE AND CASE INFORMATION FOR JUDGE JOHNSON

OBS	YEAR	DEPART	REASON1
184	1992	DownwardDepart	Missing/indeterminable
185	1992	DownwardDepart	Defendant/Offense -Criminal history category over-represents the defendants involvement
186	1992	DownwardDepart	Plea Agreement -Pursuant to a plea agreement
187	1992	DownwardDepart	Plea Agreement -Pursuant to a plea agreement
188	1992	DownwardDepart	Other SPECIFY
270	1993	DownwardDepart	(5H1.6) Family Ties and Responsibilities
271	1993	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
272	1993	DownwardDepart	(5H1.4) Physical Condition
273	1993	DownwardDepart	(5H1.6) Family Ties and Responsibilities
274	1993	DownwardDepart	(5H1.1) Age
371	1994	DownwardDepart	(5H1.6) Family Ties and Responsibilities
372	1994	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
373	1994	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
374	1994	DownwardDepart	Accept Respons-Acceptance of responsibility
375	1994	DownwardDepart	(5H1.6) Family Ties and Responsibilities
376	1994	DownwardDepart	(5H1.6) Family Ties and Responsibilities

OBS	REASON2	REASON3
184	Missing/indeterminable	Missing/indeterminable
185	No Reason given	Inapplicable
186	No Reason given	Inapplicable
187	No Reason given	Inapplicable
188	(5H1.4) Physical Condition	No Reason given
270	Inapplicable	Inapplicable
271	Inapplicable	Inapplicable
272	Inapplicable	Inapplicable
273	Inapplicable	Inapplicable
274	(5H1.4) Drug Dependence and Alcohol Abuse	Inapplicable
371	Inapplicable	Inapplicable
372	Inapplicable	Inapplicable
373	(5H1.6) Family Ties and Responsibilities	Accept Respons-Acceptance of responsibility
374	Inapplicable	Inapplicable
375	Inapplicable	Inapplicable
376	Inapplicable	Inapplicable

OBS	USSECTOR	DOCKETID	NAME	SENTDATE
184	104584	9000322	PEREZ,JOSE	01/03/92
185	111628	9101062	COLON,FERNANDO	03/20/92
186	122577	9100531	DIAZ,JUAN	07/06/92
187	122578	9100531	OLMEDA,JOHNNY	07/09/92
188	133406	9200644	FERGUSON,DONALD	09/25/92
270	147662	9200858	RIVERA,CARLOS	05/26/93
271	149975	9100800	CADZELI,LOUIS	05/31/93
272	154197	9201272	MARIN,CARLOS ARTURO	06/16/93
273	159026	9201276	XXX,ESTELLA	05/13/93
274	171843	9300452	XXXXXX,VICTORIA	08/06/93
371	174526	9300147	MARTE,PATRICIA	10/08/93
372	184710	9201197	POSADA,XXXXLOS	11/12/93
373	188423	9300582	XXXXXXXX,MARIA ALICEA	12/16/93
374	188572	9200708	CLARKE,BYRON ANTHONY	12/17/93
375	192597	9301271	XXXX,ARIWATA	02/22/94
376	193735	9301023	XXXXXX,ROSE	03/18/94

DEPARTURE AND CASE INFORMATION FOR JUDGE JOHNSON

OBS	YEAR	DEPART	REASON1
377	1994	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
378	1994	DownwardDepart	Missing/Indeterminable
379	1994	DownwardDepart	(5H1.6) Family Ties and Responsibilities
380	1994	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
381	1994	DownwardDepart	(5H1.4) Physical Condition
382	1994	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
383	1994	DownwardDepart	Other SPECIFY
384	1994	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
385	1994	DownwardDepart	No Reason given
473	1995	DownwardDepart	(5H1.4) Physical Condition
474	1995	DownwardDepart	(5H1.1) Age
475	1995	DownwardDepart	(2D1.1) Drug: -Unusually high drug amount
476	1995	DownwardDepart	Other SPECIFY
477	1995	DownwardDepart	Other SPECIFY
478	1995	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
479	1995	DownwardDepart	(5H1.6) Family Ties and Responsibilities
480	1995	DownwardDepart	Missing/Indeterminable
481	1995	DownwardDepart	Missing/Indeterminable
482	1995	DownwardDepart	Missing/Indeterminable
483	1995	DownwardDepart	Missing/Indeterminable
484	1995	DownwardDepart	(5H1.6) Family Ties and Responsibilities
485	1995	DownwardDepart	(5H1.1) Age
486	1995	DownwardDepart	(5H1.1) Age
487	1995	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance
488	1995	DownwardDepart	(5K2.0) Aggrvate-General aggravating or mitigating circumstance

OBS	REASON2	REASON3	USSECTOR	DOCKETID	NAME	SENTDATE
377	Inapplicable	Inapplicable	196321	9301068	GUSITOSI,PETER	04/08/94
378	Missing/Indeterminable	Missing/Indeterminable	196882	9302965	FARMILIER,DAVID	03/31/94
379	Inapplicable	Inapplicable	197002	9301297	PALACIOSRUIZ,LUZ	04/07/94
380	Inapplicable	Inapplicable	197394	9301272	JOSSDO,DAVID	03/25/94
381	Inapplicable	Inapplicable	200141	9301242	CHOI,CHRISTINA	05/25/94
382	Inapplicable	Inapplicable	206668	9300951	MEISNER,SUSAN	06/30/94
383	Inapplicable	Inapplicable	207161	9400290	SOMINGUEZCRUZ,JUAN	07/22/94
384	(5H1.4) Physical Condition	Inapplicable	215711	9101116	WILLS,JOSEPH THOMAS	09/27/94
385	Inapplicable	Inapplicable	217667	9301091	ROMAIN,COSMAS	09/21/94
473	Inapplicable	Inapplicable	215721	9301363	SANDISTER,TIMOTHY	10/05/94
474	Inapplicable	Inapplicable	221878	9400711	GASPARO,MICHAEL	10/21/94
475	Inapplicable	Inapplicable	222225	9400831	OKOROZEI,EMU	12/02/94
476	Inapplicable	Inapplicable	222229	9400370	GUICENDORALES,JORGE	12/02/94
477	Inapplicable	Inapplicable	222230	9400370	TORRESDORALEZ,BLANCA	12/02/94
478	Inapplicable	Inapplicable	226916	9301172	REYES,MARE MORALES	01/11/95
479	Inapplicable	Inapplicable	234845	9401205	TAMAYO,MARTHA ECLY	03/10/95
480	Missing/Indeterminable	Missing/Indeterminable	239958	9301418	JIMENEZ,ANA	05/29/95
481	Missing/Indeterminable	Missing/Indeterminable	240157	9301129	CHARETA,ALFREDO	03/15/95
482	Missing/Indeterminable	Missing/Indeterminable	240257	9300217	CASTRILLON,JOHN EDGAR	05/31/95
483	Missing/Indeterminable	Missing/Indeterminable	240803	9301221	FONSECA,RICARDO	03/24/95
484	Inapplicable	Inapplicable	243742	9400514	ROSARIO,FERNANDO DEL	06/16/95
485	Inapplicable	Inapplicable	243850	9300913	LIBERENOS,FERNANDO GOMEZ	05/19/95
486	Inapplicable	Inapplicable	244198	9401292	NUNEZ,BUDDY ANTONIO	05/19/95
487	Inapplicable	Inapplicable	244669	9500178	ESOO,JOHNSON	06/28/95
488	Inapplicable	Inapplicable	252817	9500305	ESPARI,ALI ADEL	09/08/95

DEPARTURE AND CASE INFORMATION FOR JUDGE JORDAN

OBS	YEAR	DEPART	REASON1
585	1996	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
587	1996	DownwardDepart	(5H1.6) Family Ties and Responsibilities
590	1996	DownwardDepart	(5K2.12) Coercion and Duress
591	1996	DownwardDepart	(5H1.6) Family Ties and Responsibilities
592	1996	DotPwardDepart	Depart -Departation
593	1996	DownwardDepart	(5K2.12) Coercion and Duress
594	1996	DownwardDepart	(5H1.6) Family Ties and Responsibilities
595	1996	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
596	1996	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
597	1996	DownwardDepart	Missing/Indeterminable
598	1996	DownwardDepart	Plea Agreemt -Pursuant to a plea agreemnt
599	1996	DownwardDepart	Missing/Indeterminable
600	1996	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
601	1996	DownwardDepart	DefendsInvolve -Criminal History category over-represents the defendants involvement
602	1996	DownwardDepart	Plea Agreemt -Pursuant to a plea agreemnt
603	1996	DownwardDepart	Plea Agreemt -Pursuant to a plea agreemnt
604	1996	DownwardDepart	Depart -Departation
605	1996	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
606	1996	DownwardDepart	(5H1.6) Physical Condition
679	1997	DownwardDepart	Depart -Departation
680	1997	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
681	1997	DownwardDepart	Accept Respons-Acceptance of responsibility
682	1997	DownwardDepart	Depart -Departation
683	1997	DownwardDepart	Depart -Departation
684	1997	DownwardDepart	Depart -Departation

OBS	REASON2	REASON3	USERID#	DOCKETID	NAME	SENTDATE
588	Inapplicable	Inapplicable	295236	9500539	MIRANDA,LUIS	10/13/95
589	Inapplicable	Inapplicable	2582266	9500268	STARR,ANETA	11/01/95
590	Inapplicable	Inapplicable	2580069	9401090	WRIGHT,HENRIETTA	11/01/95
591	Inapplicable	Inapplicable	2580582	9400509	FLORERS,TALIA DARIAN	11/17/95
592	Inapplicable	Inapplicable	258095	9500527	BROWN,MARIO JULIO	11/09/95
593	Inapplicable	Inapplicable	1.58997	9400875	ACOSTA,ERNESTO	11/17/95
594	Inapplicable	Inapplicable	259080	9500570	KESSLER,JUDY	11/17/95
595	Inapplicable	Inapplicable	259352	9500414	MORENO,LUZ MARIA	11/16/95
596	Inapplicable	Inapplicable	262207	9401057	PINEDASURUS,DIEGO	11/29/95
597	Missing/Indeterminable	Missing/Indeterminable	262681	9500213	FINSON,WILLIAM	12/15/95
598	Inapplicable	Inapplicable	269177	9001063	ROBINSON,GARFIELD	01/26/96
599	Missing/Indeterminable	Missing/Indeterminable	274588	9500197	TATO,ROBERT	03/15/96
600	Inapplicable	Inapplicable	281471	9501042	CASTOR,LAURA	05/02/96
601	Inapplicable	Inapplicable	281672	9500976	SYLVESTRE,RALPH MCCARTHUR	05/02/96
602	Inapplicable	Inapplicable	281782	9400706	MARVEY,RICHARD	05/23/96
603	Inapplicable	Inapplicable	282252	9400706	PEREIRA,ROQUE	05/23/96
604	Inapplicable	Inapplicable	285286	9500605	LEON,JUAN DEJESUS	06/21/96
605	Inapplicable	Inapplicable	290451	9402601	SOLDADO,ANTHONY	08/02/96
606	Inapplicable	Inapplicable	290326	9501613	CENKNERE,STEVEN	07/29/96
679	Inapplicable	Inapplicable	298803	9600474	LOPEZ,RICARDO	10/18/96
680	Inapplicable	Inapplicable	299034	9500505	ARENASSETAMEUR,ALICIA	10/18/96
681	Inapplicable	Inapplicable	299966	9501190	GUTIERREZTINO,DANNY	10/10/96
682	Inapplicable	Inapplicable	301015	9501165	TEJERA,CHARLIE	10/25/96
683	Inapplicable	Inapplicable	304893	9600520	WEGNER,KLAUS PETER	11/20/96
684	Inapplicable	Inapplicable	306810	9600479	MARTINEZMARCHO,SIGIFREDO	12/06/96

DEPARTURE AND CASE INFORMATION FOR JUDGE JOHNSON

OBS	YEAR	DEPART	REASON1
685	1997	DownwardDepart	Depart -Deportation
686	1997	DownwardDepart	Depart-Rehabilitation
687	1997	DownwardDepart	Depart -Deportation
688	1997	DownwardDepart	Depart -Deportation
689	1997	DownwardDepart	Missing/indeterminable
690	1997	DownwardDepart	Depart -Deportation
691	1997	DownwardDepart	Depart -Deportation
692	1997	DownwardDepart	Depart -Deportation
693	1997	DownwardDepart	Defendantinvolve -Criminal history category over-represents the defendants involvement
694	1997	DownwardDepart	Time Served
695	1997	DownwardDepart	Depart -Deportation
696	1997	DownwardDepart	Depart -Deportation
697	1997	DownwardDepart	No Reason given
698	1997	DownwardDepart	Missing/indeterminable
699	1997	DownwardDepart	Depart -Deportation
700	1997	DownwardDepart	Depart -Deportation
701	1997	DownwardDepart	Depart -Deportation
702	1997	DownwardDepart	Depart -Deportation
703	1997	DownwardDepart	(5K2.0) Aggravating General aggravating or mitigating circumstance
704	1997	DownwardDepart	Depart -Deportation
705	1997	DownwardDepart	Depart -Deportation
774	1998	DownwardDepart	Depart -Deportation
775	1998	DownwardDepart	Depart -Deportation
776	1998	DownwardDepart	Depart -Deportation
777	1998	DownwardDepart	(5H7.4) Physical Condition

OBS	REASON2	REASON3	USSCID#	DOCKET#	NAME	SENTDATE
685	Inapplicable	Inapplicable	305815	9500434	SANEU,ROGER ALBERT	11/22/96
686	Inapplicable	Inapplicable	305905	9501156	DOME, JOSE	11/12/96
687	Inapplicable	Inapplicable	317434	9600765	GIL,LOUIE ALVARO	12/20/96
688	Inapplicable	Inapplicable	317485	9600960	VELEZ,ALVARO	01/10/97
689	Missing/indeterminable	Missing/indeterminable	317499	9600961	ARCE,ANGEL	01/10/97
690	Inapplicable	Inapplicable	317547	9600968	LAURA,BABATU,KOLAWOLE	01/21/97
691	Inapplicable	Inapplicable	317699	9600787	ARRASOLA,HERMES	01/06/97
692	Inapplicable	Inapplicable	317762	9600333	REVILLARD,CESAR AUGUSTO	12/19/96
693	Inapplicable	Inapplicable	317766	9600247	CABRERA,ROBERT	12/20/96
694	Inapplicable	Inapplicable	320335	9000544	TEURC,DURRHAN	02/14/97
695	Inapplicable	Inapplicable	320341	9500585	GONALS,JOSE	02/14/97
696	Inapplicable	Inapplicable	320721	9600980	SANCHEZ,JOSE HERERO	02/20/97
697	Inapplicable	Inapplicable	320729	9600784	LO,ERI BEANG	02/20/97
698	Missing/indeterminable	Missing/indeterminable	320940	9602048	KLEIN,VERNON T.	02/28/97
699	Inapplicable	Inapplicable	322273	9500905	ROMERO,HENRY	03/21/97
700	Inapplicable	Inapplicable	325034	9700586	POLO,LUIS F	04/04/97
701	Inapplicable	Inapplicable	325212	9601231	HERNANDEZ,CORNELIO	04/25/97
702	Inapplicable	Inapplicable	327342	9600825	MCCALLA,REYNOLD	05/30/97
703	Inapplicable	Inapplicable	330998	9601150	MENDEZ,ENRIQUE	07/31/97
704	Inapplicable	Inapplicable	341818	9700446	MINAGLI,SHASTAY	09/19/97
705	Inapplicable	Inapplicable	345521	9700435	VILLANUEVA-CASTRO,JESIAS	09/26/97
774	Inapplicable	Inapplicable	349721	9700855	LOLAS-VILLANUEVA,JOSE	11/21/97
775	Inapplicable	Inapplicable	349731	9500705	DIDIAZ,YOLINA LIRIO	11/21/97
776	Inapplicable	Inapplicable	351457	9700201	TRUJILLO-ESCOBOSA,JOSE	11/21/97
777	Inapplicable	Inapplicable	353721	9601870	ROSKERTIE,ALAN	12/19/97

DEPARTURE AND CASE INFORMATION FOR JUDGE JOHNSON

OBS	YEAR	DEPART	REASON1
778	1995	Downward@Depart	Depart -Deportation
779	1995	Downward@Depart	Isolated Incident-Offense behavior was an isolated incident
780	1995	Downward@Depart	Depart -Deportation
781	1995	Downward@Depart	Depart -Deportation
782	1995	Downward@Depart	Depart -Deportation
783	1995	Downward@Depart	Depart -Deportation
784	1995	Downward@Depart	Depart -Deportation
785	1995	Downward@Depart	Depart -Deportation
786	1995	Downward@Depart	(5K2.0) Aggravating or mitigating circumstance
787	1995	Downward@Depart	Depart -Deportation
788	1995	Downward@Depart	Depart -Deportation
789	1995	Downward@Depart	Depart -Deportation
790	1995	Downward@Depart	Depart -Deportation
791	1995	Downward@Depart	Plea Agreed -Pursuant to a plea agreement

OBS	REASON2	REASON3	DISSCIDN	DOCKETID	NAME	SENTDATE
778	Inapplicable	Inapplicable	364821	9708785	LABRADO,DAVID RAUL	12/16/97
779	Inapplicable	Inapplicable	369132	9708291	SPANIU,ZENI	02/23/98
780	Inapplicable	Inapplicable	369553	9608526	LOPEZ,MARY	02/19/98
781	Inapplicable	Inapplicable	369539	9709982	920055,MOHALEITE	02/20/98
782	Inapplicable	Inapplicable	381231	9808626	TORRES,PETER	05/08/98
783	Inapplicable	Inapplicable	384603	9809854	BURTADO,JOSE	06/09/98
784	Inapplicable	Inapplicable	384620	9709814	LUCERO,JONATHAN	06/05/98
785	Inapplicable	Inapplicable	385627	9701518	PAOTE,BENJAMIN	06/23/98
786	Inapplicable	Inapplicable	391128	9408837	SANTIBEZ,MARTHA	07/30/98
787	Inapplicable	Inapplicable	396081	9708818	MANTIBEZGONZALEZ,ANDRES	09/02/98
788	Inapplicable	Inapplicable	396682	9701226	CHALACOLLAZOS,ALEJANDRO	09/03/98
789	Inapplicable	Inapplicable	396091	9809921	SAMORRATERAS,EDGAR RAMON	09/04/98
790	Inapplicable	Inapplicable	399939	9809320	AMOS,RANDY	09/10/98
791	Inapplicable	Inapplicable	401521	9508754	RAEURA,PAUL	09/22/98

Answers by Judge Joe Kendall of Texas, Sentencing Commission Nominee, to Follow-Up Questions by Members of the Senate Judiciary Committee

Follow-up Question for Sentencing Commissioner from Senator Hatch

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such [] crime" and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the NET Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET ACT and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

Answer

If confirmed I would like to see implementation of the NET Act directive a priority and would encourage the Chair make it a priority. Furthermore, while I have not reviewed all the applicable data and would of course have to do so before finally making up my mind as to a vote on any given issue, it is my sense that the NET Act identifies a very real and significant problem that would call for applicable guidelines that are severe enough to deter violative conduct. I would add that if confirmed it would be my position that the Commission should immediately and as a first priority move to deal with all of the directives of Congress that have gone without action because of the absence of a Sentencing Commission.

I swear this 12th day of October, 1999 that the above answers to the questions asked of me are to the best of my knowledge true and correct.

Joe Kendall

Joe Kendall
United States District Judge

Answers by Judge Joe Kendall of Texas, Sentencing Commission Nominee, to Follow-Up Questions by Members of the Senate Judiciary Committee

Question from Senator Grassley For the Sentencing Commission Nominees

I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

Answer

I believe that identity theft and identity fraud are very serious crimes. The reality is that in this day and time when so much business is done electronically, stealing someone's identity is worse than merely stealing property from them. By stealing ones identity you steal their very ability, often times, to conduct business and lead their life in a normal fashion. While I cannot make any promises as to what I would do in a specific area before I listen to all the competing arguments, I do believe from what I know from being a federal judge and dealing with cases like this (and I have had several) that this is the type of conduct that should have severe penalties associated with it. Though I must keep an open mind before voting on an issue, I can think of no reason why severe penalties should not be imposed upon those who would steal another person's identity and commit crimes using that identity.

I swear this 12th day of October, 1999 that the above answers to the questions asked of me are to the best of my knowledge true and correct.

Joe Kendall

Joe Kendall
United States District Judge
Northern District of Texas

Answers by Judge Joe Kendall of Texas, Sentencing Commission Nominee, to Follow-Up Questions by Members of the Senate Judiciary Committee

Questions from Senator Abraham for Sentencing Commission Nominees

1. For All Nominees

I gather that there is a "practitioners advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the Guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a crime victims advisory group to serve a parallel function with respect to victims of crime?

Answer

I think it would be useful for the Sentencing Commission to receive input from all informed, interested and affected groups regarding decisions that the Commission is called upon to make. This would include crime victim organizations and such input is, I believe, contemplated by 28 U.S.C. § 994(o)(4) and (5).

2. For Judge Castillo, Judge Johnson, Judge Kendall, and Judge Sessions, and for Judge Murphy with respect to your service as a district judge. Please provide a list of cases with citations in which you departed from the Sentencing Guidelines in sentencing in either direction, excluding substantial assistance departures, listing upward and downward departure cases separately. If the relevant opinion is not readily available from published reports or electronically through Lexis or Westlaw, please provide a copy of it to the Committee. Also please provide an approximate percentage of cases in which you have imposed sentence that the cases in which you have departed in each direction represent, in whatever format the Sentencing Commission keeps this information that makes it easiest to compare to the similar information it keeps on national averages.

Answer

(a) Below is a list of cases and citations for cases I could find where I departed upward.

(1) *U.S. vs. Rosogie*, 21 F.3d 632 (5th Cir.1994)
Affirmed upward departure.

(2) *U.S. vs. McDowell*, 109 F.3d 214 (5th Cir.1997)
Affirmed upward departure.

(3) *U.S. vs. Cooper*, 1998 non-published, copy provided.
Affirmed upward departure.

(4) *U.S. vs. Taylor*, 1999 non-published, copy provided.
Affirmed upward departure.

(b) There are no cases, published or otherwise, of downward departures. All departures have been oral, from the bench, and I do not recall ever writing a departure opinion. In seven plus years as a federal judge the Government has *never*, to my knowledge, appealed because of any downward departure from the Guidelines that I have made.

(c) The Sentencing Commission does not keep accurate statistics for departures of individual judges. The information provided to me last Thursday by the Sentencing Commission was not accurate, and because of various prosecutorial practices, types of cases handled, and volume of work from court to court, even with accurate numbers such comparisons would not tell you much about the way a given judge looks at crime generally and the Guidelines particularly. Given various norms from court to court and circuit to circuit for the reasons stated above, statistical comparisons alone of a given judge to a national average, again even assuming accurate numbers, would be, in my opinion, misleading.

To illustrate, compare the 1998 statistics for "other departures" in the same state: Oklahoma Eastern (18.8%) with Oklahoma Western (2.1%). Pundits would probably believe the judges in the southern states of Texas, Louisiana and Mississippi would depart downward less often than judges in Illinois, Indiana and Wisconsin. But according to the 1998 statistics Fifth Circuit judges (10.2%) depart downward at over twice the rate of Seventh Circuit judges (4.8%). Or simply compare Arizona's rate (61%) of non-substantial assistance downward departures with anywhere else in the Country and one can see that these statistical comparisons alone, without knowing the underlying reasons as well as final sentences given, may not be that helpful in understanding what is really going on.

The numbers provided to me, which are substantially incomplete (especially for years before 1996), show that I depart upward at over twice the national average and depart downward at less than half the rate of the national average. In 1998 I departed downward 6.4% of the time. The national average for 1998 was 13.6%. More to the point, the average in my court was 6.9% and in my circuit, 10.2%. To the extent that such comparisons of raw statistics are useful at all, I believe that comparisons within a District Court and within circuits are fairer in that they take into account various factors that can affect these numbers (such as prosecutorial practices, types of cases, work load or the number of cases in the statistical universe, etc.).

According to the statistics provided to me as I said I depart upward at over twice the national, circuit and Northern District of Texas averages. I departed upward 1.8% of the time in 1998 (only 2 cases) and the national upward departure for that year was 0.8%. Upward departure averages for my court in 1998 was 0.8% and my circuit's 1998 average was 0.7%.

5. For Judge Kendall: The case to which I was referring yesterday was United States v. Garner, 945 F.Supp. 990 (1996). You said there at note 3:

> Though not in view in this case [which, as I understand it, concerned the question of whether in a federal prosecution federal or state law governs the question whether to exclude material obtained by a state police officer], a like concern is prosecution of historic state cases in federal court because a selected defendant will almost always receive harsher punishment under the federal sentencing guidelines.

Please supplement your hearing answer to the extent you wish to do so.

Answer

I appreciate the opportunity to supplement the answer I gave at the hearing. At the time of the hearing I had no recollection of the *Garner* decision. I have a tendency to remember cases by the fact situation presented, not by the name of the defendant. In any event, I have refreshed my recollection and I remember the *Garner* case very well.

The *Garner* case was not a sentencing guideline case. It was a case that dealt with important principles of state/federal comity and the bringing of state cases in federal courts and the impact that has on the federal judicial system, and whether that is something that should be encouraged or discouraged.

The *Garner* case involved an arrest by a *state* highway patrolman of defendant Garner on a *state* highway in a rural area of Texas. Garner was arrested for the *state* offense of urinating in public (the trooper drove up on Garner as he was outside of his vehicle urinating at the side of the road). An inventory of the vehicle revealed residue in a glass pipe and a small amount of controlled substances (at least by federal prosecutorial standards) was recovered in an inventory search of the vehicle at the *state* jail. Garner was charged in state court and his case pended on the state court docket for 13 months before he was charged in federal court. Under relevant Texas state law the search of his vehicle would have been ruled illegal and the evidence of the controlled substances would have been inadmissible. The arresting state officers thus got a federal prosecutor to agree to take the case and prosecute it in my court. There were no federal law enforcement officers involved in this case. Under relevant Fifth Circuit law I denied the defendant's motion to suppress evidence under federal law and he was convicted and sentenced to prison by me. He appealed and my decision was affirmed.

In the *Garner* case I raised several concerns regarding this type of garden variety state prosecution being brought in federal court for the simple reason that federal courts, in my judgment, cannot take every potential case that is out there. If we do so, we risk acts of Congress that provide remedies in civil cases from ever being able to be brought to trial in federal court. One of the concerns I expressed was the concern mentioned in footnote 3, to which I now turn.

To start with please remember that I was a state felony court prosecutor in Dallas, was a Texas Criminal District (felony) Court judge in Dallas County for five and a half years before becoming a federal judge, and have been a Texas Board Certified Criminal Law Specialist since 1985. I have great familiarity with Texas sentencing law and actual state sentencing practice.

The comment regarding the fact that almost always a given defendant will receive harsher punishment under the Federal Sentencing Guidelines than he or she will receive under Texas state law is no comment whatsoever on the appropriateness of any Federal Guideline sentence. What it was is the simple acknowledgment of reality that a defendant will almost always receive more time under the Sentencing Guidelines than he or she will receive in a Texas state court for the exact same conduct. I had at the time of the *Garner* decision and continue to have a concern that this fact may encourage state law enforcement officers to attempt to get federal prosecutors to accept their cases for prosecution in our federal courts rather than go to their own state courts. In my judgment, such prosecutions would not be good for the federal judicial system and the Bureau of Prisons. That does not mean that I believe that the Federal Sentencing Guidelines are too harsh or that they should in any way be changed because of this temptation, but I do believe that federal prosecutors should be encouraged to show restraint in the criminal cases they select for prosecution in federal court. A further reality is that under existing law a United States Attorney's office could literally drown the federal courts in criminal cases if they chose to.

An illustration of how this problem would work itself out in the real world would be to look at one of your pending bills, Senate Bill § 1255, the Anticybersquatting Consumer Protection Act. This proposed legislation in its current form provides what is in my opinion an important remedy for victims of cybersquatting pests who in essence hold domain names for ransom. But it provides a *civil* remedy, a remedy that may have trouble being a real remedy if an aggrieved party can't get their day in court because by law criminal cases take precedence over civil cases and the Judge is dealing with state criminal cases that should have been brought in state court but were brought in federal court because the state officers know the defendant will get more time in federal court because of the Sentencing Guidelines. The solution is not to make the Guidelines more lenient but to discourage state criminal cases from being brought in federal court, which is what *Garner* is really all about.

I swear this 12th day of October, 1999 that the above answers to the questions asked of me are to the best of my knowledge true and correct

Joe Kendall

Joe Kendall
United States District Judge
Northern District of Texas

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
FEB 22 1999
CHARLES R. FULBRUGE III
CLERK

No. 98-10341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISPUS DARIUS TAYLOR, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(7:97-CR-11-1-X)

Before KING, Chief Judge, REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:*

Chrispus Taylor pleaded guilty to sexually abusing a minor in violation of 18 U.S.C. § 2243. The district judge initially calculated the appropriate sentence under the United States Sentencing Guidelines to be between twelve and eighteen months' imprisonment, and then, based on evidence of prior similar sexual predatory behavior by Taylor, granted the government's motion for an upward departure and sentenced Taylor to a 120-month term. Taylor appeals his sentence, arguing that the district court abused its discretion in departing under the

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

guidelines and that the degree to which the district court departed was unreasonable. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Chrispus Taylor, a twenty-three-year-old male, was indicted on June 24, 1997, for engaging in a sexual act with a thirteen-year-old (N.N.) within the boundaries of Sheppard Air Force Base in violation of 18 U.S.C. § 2243(a). Taylor pleaded guilty to the indictment.

At the guilty-plea hearing, Taylor agreed that the facts set forth in the indictment and in the factual resume were true and correct. The factual resume stated that Taylor was a friend of N.N.'s family, that he had spent the night at their house, and that, while other family members were sleeping, he had entered N.N.'s bedroom, woke her, and had sex with N.N. According to the factual resume, N.N. was responsive to Taylor's sexual advances and "never told [Taylor] to stop." The resume also stated that, as a result of the sexual intercourse, N.N. became pregnant. At the sentencing hearing, N.N. testified that she had not consented to having sex with Taylor, but had been too scared to scream or tell him to stop.

The pre-sentencing report (PSR) prepared by the probation office in preparation for Taylor's sentencing assessed a base offense level of twenty-seven on the basis that the offense involved criminal sexual abuse, i.e., that the sex resulted from the threat of force. See U.S. SENTENCING GUIDELINES MANUAL § 2A3.2(c)(1). After hearing testimony from N.N., Taylor, and

N.N.'s mother, the district court found that the record did not support application of § 2A3.2(c)(1) and instead assessed a base offense level of fifteen pursuant to § 2A3.2(a). The court then granted a two-level reduction for acceptance of responsibility, resulting in a total offense level of thirteen. Based on Taylor's criminal history category of I, the district court noted that the appropriate sentencing range under the guidelines was between twelve and eighteen months' imprisonment.

The district judge then considered whether to grant the government's motion for an upward departure. The government argued that the court should depart upward under § 4A1.3 because the applicable sentence under the guidelines did not adequately reflect the seriousness of Taylor's past criminal conduct or the likelihood that he would commit other crimes, and that the court should impose the statutory maximum sentence of fifteen years.

Both the PSR and the testimony at the sentencing hearing revealed numerous instances of allegations of past sexual assaults by Taylor. According to the PSR, Taylor's criminal history began in 1990, when he was fourteen years old. Taylor, whose father was in the Air Force, was babysitting the four-year-old daughter of a noncommissioned officer at the Charleston, South Carolina Air Force Base. The child reported that Taylor placed his penis in her mouth, vagina, and rectal area. Taylor admitted the offense to a psychiatrist, was placed on probation, and was assessed one criminal history point.

The PSR also detailed an allegation that Taylor committed another sexual assault in Charleston three years later. According to the PSR, which cites Air Force Base Security Squadron reports, the victim in that case revealed that she heard noises outside the back of her house, and that she went outside with a kitchen knife to see what had caused the noise. She then saw Taylor, with whom she had been friends for about a year, standing in her backyard. Upon seeing Taylor, the PSR states that she put her knife down and they sat on a picnic table and began talking. After talking for a while, Taylor allegedly picked up the knife and "told her he was going to kill her if she did not do what he said." The PSR recounts that Taylor then grabbed the woman, dragged her into her house, and continued to threaten her with the knife. The woman stated that Taylor then started pulling off her shorts and underwear, and that, as she continued to struggle and yell for help, he laid on top of her. After several attempts to restrain the victim and put on a condom, Taylor allegedly fled the residence. Taylor was charged with assault with intent to commit sexual conduct, but the victim later refused to press charges.

The prosecution, during the sentencing hearing, elicited testimony concerning another instance of sexual predation by Taylor detailed in the PSR. During the hearing, a sixteen-year-old girl testified concerning a pending charge of rape and aggravated burglary against Taylor. The alleged attack occurred in 1997 in Garden City, Kansas, where Taylor attended junior

college. The girl testified that, when she was fifteen years old, she had gone to a party at an ex-boyfriend's house, at which she had talked to Taylor and drank heavily. She stated that she was visibly drunk when she left the party, that she drove home, and that, upon arriving home, she passed out in her bed. She then told the court that the next event she remembered was a light coming on in her room and Taylor pulling his penis out of her vagina and leaving the room. She testified that she had not consented to sex with Taylor, and that she could not have consented because she "was passed out" and did not "even remember (the sex) happening until he was getting off me."

The district judge granted the government's motion to depart upward based on the evidence of Taylor's criminal history. The district judge stated in the written judgment that:

> USSG Section 4A1.3 (Adequacy of Criminal History Category) states that if reliable information indicates that the Criminal History Category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. The defendant's prior conviction is similar conduct to the instant offense. However, in that case, the victim was 4 years old and the defendant was 13 years old. Yet, due to his juvenile status, he received a one year probation sentence. This resulted in a Criminal History Category of I. Pursuant to the commentary of USSG Section 4A1.3(e), the Court may consider prior similar adult criminal conduct not resulting in a criminal conviction as a reason for departure. In view of the aforementioned, this policy statement authorizes the consideration of a departure from the established guideline range. Thus, the Court [departs] upward to a Total Offense Level of 24, and a Criminal History Category of VI.

The court then granted the government's motion for an upward departure and sentenced Taylor to a term of 120 months of imprisonment and three years of supervised release.

II. DISCUSSION

Taylor argues on appeal that the district court erred in departing upward from the guidelines in determining his sentence. A district court's decision to depart from the guidelines is reviewed for abuse of discretion. See Koon v. United States, 518 U.S. 81, 91 (1996); United States v. Wells, 101 F.3d 370, 372 (5th Cir. 1996). A departure will be affirmed on appeal if (1) the district court gives acceptable reasons for departing and (2) the extent of the departure is reasonable. See United States v. Route, 104 F.3d 59, 64 (5th Cir.), cert. denied, 117 S. Ct. 2491 (1997).

A district court may depart upward from the guidelines if the court finds that an aggravating circumstance exists that was not adequately taken into consideration by the Sentencing Commission. See 18 U.S.C. § 3553(b). The district court based its upward departure on the extensive evidence presented in the PSR and at the sentencing hearing of Taylor's prior criminal conduct, finding that "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S. SENTENCING GUIDELINES MANUAL § 4A1.3. A district court's finding that "a defendant's criminal history category does not adequately

reflect the seriousness of a defendant's past criminal conduct is a factor not taken into account by the Guidelines and is a permissible justification for upward departure." United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993) (internal quotation marks omitted); see also Koon, 518 U.S. at 96 (stating that when sentencing guidelines encourage departure based on special factor, "the court is authorized to depart if the applicable Guideline does not already take [the special factor] into account").

We review the district court's factual determination that Taylor's criminal history category did not adequately reflect the seriousness of his past criminal conduct for clear error. See Laury, 985 F.2d at 1310. The district judge explicitly considered several prior instances in which Taylor had been accused of, was prosecuted for, or was found guilty of, sexual crimes against vulnerable young women and girls. Based on Taylor's extensive criminal past, and the fact that his criminal history category as computed under the guidelines was I, we have no trouble concluding that the district judge had adequate justification for finding that Taylor's criminal history category, as recommended by the guidelines, did not reflect his criminal past.

Taylor also argues that the district court failed to follow the procedural requirements for an upward departure as set forth in United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc).

When departing on the basis of § 4A1.3, "the district court should consider each intermediate criminal history category before arriving at the sentence it settles upon; indeed, the court should state for the record that it has considered each intermediate adjustment." Id. at 662. However, we do not require the district court to explicitly and mechanically consider each intermediate criminal history category it rejects; as we stated in Lambert, "[o]rdinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure . . . and its explanation for the category it has chosen as appropriate." Id. at 663.

After reviewing the record, in particular the transcript of the sentencing hearing and the written judgment, it is clear that the district court complied with the procedural requirements this court outlined in Lambert. The judge stated explicitly during the hearing that he departed upward to a 120-month sentence "after having considered incrementally all points in between." In addition, the district judge explained at length his decision to depart as based on his concern that Taylor's criminal history category did not accurately reflect his extensive criminal past. The justification offered by the district court thus clearly indicates why the sentencing range recommended by the guidelines was inappropriate and why the court found the sentence actually imposed to be appropriate. See United States v. Ashburn, 38 F.3d 803, 809 (5th Cir. 1994) (en banc) (stating that district court's

failure to expressly examine each intervening criminal history category was not dispositive because "it [was] evident from the stated grounds for departure why the bypassed criminal history categories were inadequate").

Lastly, Taylor argues that the extent to which the district court departed from the guidelines was unreasonable. He points out that the district court increased his sentence by 102 months; the guidelines recommended a sentence of between twelve and eighteen months' imprisonment and the district court imposed a 120-month term. We conclude that this departure was not unreasonable in light of the extensive evidence concerning Taylor's continuing pattern of sexually predatory conduct that was not considered in the criminal history calculation. See United States v. Daughenbaugh, 49 F.3d 171, 175 (5th Cir. 1995) (stating that district court's upward departure of 169 months was not extensive given defendant's "unusually violent propensities"); Ashburn, 38 F.3d at 810 (stating that upward departure of 108 months was reasonable based on evidence of numerous instances of past criminal conduct not considered in criminal history calculation). We also note that the sentence imposed by the district court was five years less than the statutory maximum for Taylor's offense. See 18 U.S.C. § 2243(a) (setting forth statutory maximum of fifteen years' imprisonment); Daughenbaugh, 49 F.3d at 175.

III CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 10 1998
CHARLES R. FULBRUGE III
CLERK

No. 98-10243
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY WAYNE COOPER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(7:97-CR-18-4)

Before JOHNSON, DUHE, and STEWART, Circuit Judges.

PER CURIAM:*

Terry Wayne Cooper appeals his sentence imposed by the district court for distribution of crack cocaine. He argues that the court improperly departed upward from the Sentencing Guidelines.

A district court may depart upward if it finds that an aggravating circumstance exists which the guidelines did not adequately take into consideration. See 18 U.S.C. § 3553(b). This Court reviews a district court's upward departure for an abuse of discretion. See United States v. Singleton, 49 F.3d 129, 132 (5th

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Cir. 1995). The sentence will be affirmed if (1) the district court gives acceptable reasons for departing and (2) the departure is reasonable under the circumstances of the particular case. See id. After a thorough review of the record, we find that the district court's departure was not unreasonably excessive in light of the defendant's extensive criminal history. Because the district judge clearly stated that Mr. Cooper's criminal history was the basis for his departure, there was no abuse of discretion. AFFIRMED.

Questions from the Senate Committee on the Judiciary

Question from Senator Hatch

1. *In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and on-lone piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such [] crime" and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the NET directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET Act and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?*

The on-line theft of copyrighted works and intellectual property, in general, has become an increasingly serious problem--one that threatens the free-flow of information over the Internet. If confirmed, I will work with my fellow commissioners to make it a priority to implement the directives provided in the No Electronic Theft Act and to develop guidelines consistent with deterring those who may be involved in this type of criminal activity and that account for the retail value and quantity of the pirated items.

Question from Senator Grassley

1. *I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement officers to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?*

I believe that identity theft and identity fraud are among the most serious financial crimes today. Indeed, they threaten the very existence of Internet commerce and pose an enormous hazard for both individuals and businesses. If I am confirmed, I will commit to studying this problem in depth and to working with my fellow commissioners to formulate appropriately severe penalties to combat this growing problem.

Questions from Senator Abraham

1. *I gather that there is a "practitioners' advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a crime victims advocacy group to serve a parallel function with respect to victims of crime?*

It is unfortunate that crime victims' voices have for so long gone unheard. I came to understand their frustrations when I worked on the Mandatory Victim Restitution Act, and the *Habeas Corpus* Reform Act, both of which were incorporated into the 1996 Anti-Terrorism and Effective Death Penalty Act. I thus think it would be an excellent idea to permit victims of crime to provide input to the Sentencing Commission in much the same way the defense bar does.

4. a) *I would like to ask each of you to comment on whether you think district court judges currently have the authority to grant downward departures on the basis of cooperation with the prosecution by a defendant without a prosecution motion.*

I do not believe that district court judges currently possess the authority to grant downward departures on the basis of the defendant's cooperation with the government in the absence of a prosecution motion to do so. Indeed, the circuits have consistently rejected this claim.

b) *If you think they lack that authority. Do you think it would be permissible for the Sentencing Commission to grant it, or would such a change require congressional legislation?*

Congress certainly has the authority to create such a departure. Circumstances may also exist in which the Sentencing Commission might determine that this authority exists. If, for example, a circuit split arose in which one circuit held that such authority existed, and another circuit disagreed with that ruling, it might be possible for the Commission to determine that the authority to grant such a downward departure existed (but, of course, a government motion *is* required to depart below the established mandatory minimum sentence pursuant to 18 USC 3553(e); neither a court nor the Commission could change this statutory directive).

c) *Do you think such a change is desirable?*

I do not think it would be advisable for the Sentencing Commission to permit district court judges to grant downward departures on the basis of the defendant's cooperation with the government in the absence of a government motion. A prosecutor is in a far better position than a district court judge to determine whether a defendant truly has cooperated or rendered substantial assistance. In light of my own personal experience with this issue, and given my understanding of the circumstances in which attempts to grant downward departures on this basis

have been made, I do not think such a change is desirable.

William K. Sessions III
U.S. District Judge for the District of Vermont

QUESTIONS FROM SENATOR ABRAHAM FOR SENTENCING COMMISSION NOMINEES

1. FOR ALL NOMINEES

I gather there is a "practioners' advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the guidelines should be changed. What would you think of the idea of inviting the national crime victims' organizations to create a crime victims' advisory group to serve a parallel function with respect to victims of crime?

ANSWER: As a sentencing judge, I have encouraged the participation of victims in the sentencing process. I would favor the participation of national crime victims organizations as a crime victims advisory group to the Sentencing Commission.

2. FOR JUDGE CASTILLO, JUDGE JOHNSON, JUDGE KENDALL, AND JUDGE SESSIONS, AND FOR JUDGE MURPHY WITH RESPECT TO YOUR SERVICE AS A DISTRICT JUDGE.

Please provide a list of cases with citations in which you departed from the Sentencing Guidelines in sentencing in either direction, excluding substantial assistance departures, listing upward and downward departure cases separately. If the relevant opinion is not readily available from published reports or electronically through Lexis or Westlaw, please provide a copy of it to the Committee. Also please provide an approximate percentage of cases in which you have imposed sentence that the cases in which you have departed in each direction represent, in whatever format the Sentencing Commission keeps this information that makes it easiest to compare to the similar information it keeps on national averages.

ANSWER: You have asked for a list of cases in which I granted departures, both upward and downward, together with citations for those cases.

I have written two opinions in which I granted downward departures: United States v. Simalavong and Panaram, 924 F.Supp. 610 (D. Vt. 1995), and United States v. Griffiths, 954 F.Supp. 738 (D. Vt. 1997). In addition, the United States Court of Appeals for the Second Circuit addressed one of my departures in

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United States v. Teleda, 146 F.3rd 84 (2d Cir. 1998) I discussed that opinion at the confirmation hearing before the Senate Judiciary Committee. I have not written any other decisions regarding the granting of downward departures. Since neither the Government nor any defendant has appealed any other decision in which I granted a downward departure, there are no transcripts available regarding such decisions.

I have reviewed our records in Vermont and the statistics compiled by the Sentencing Commission. I reviewed all of my sentences for fiscal 1999 by examining the Judgment and Commitment documents for each case. Based upon that review, I imposed 94 sentences. Of those 94 sentences I departed upwardly on 2 occasions (2% of the total) and downwardly for reasons other than substantial assistance on 17 occasions (18% of the total). (See Attachment.) Assuming the Second Circuit's statistics remain constant for 1999, I will have departed downwardly substantially less often than most of the judges in our circuit for this period.

For the year 1998, I reviewed statistics compiled by the Sentencing Commission. I imposed 65 sentences and departed upwardly on one occasion. In 15 cases I downwardly departed. That figure represents approximately 23% of all cases. In the Second Circuit, the average rate of departure for all of the judges is 23.4% according to the statistics compiled by the Sentencing Commission. Obviously, those statistics indicate that my rate of downward departure is average within the circuit. The national statistics indicate a rate of downward departure of 13.6%.

In fiscal years 1996 and 1997, I imposed significantly fewer sentences. In 1996, I sentenced 51 individuals. I departed upwardly one time (2%) and downwardly for reasons other than substantial assistance on 9 occasions (17%). In 1997, I imposed 55 sentences. I upwardly departed 3 times (5.5%) and downwardly 20 times (36%). In 1995, I only imposed 4 sentences and downwardly departed one time.

A number of factors affect these statistics, including the number of sentencings per year, the types of crimes within a district, the plea bargaining practices of the local U.S. Attorney, and most importantly, the case law of the circuit. Moreover, we are bound to follow the case law of the circuit, which in our circuit defines grounds for departure in an

William K. Sessions III
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inclusive way.

3. FOR JUDGE MURPHY, JUDGE SESSIONS, PROFESSOR O'NEILL AND MR. STEER.

A. I would like to ask each of you to comment on whether you think district court judges currently have the authority to grant downward departures on the basis of cooperation with the prosecution by a defendant without a prosecution motion.

B. If you think they lack that authority, do you think it would be permissible for the Sentencing Commission to grant it, or would such a change require Congressional legislation?

C. Do you think such a change of desirable?

ANSWER:

A. District judges do not have the authority to grant downward departures motions for substantial assistance without a motion from the Government. Guideline 5K1.1 appears to mandate that a departure be preceded by the such a motion, and there is nothing within that guideline which permits an exception to that requirement.

B. The Sentencing Commission has adopted policy statements which require a Government motion before a court could depart for substantial assistance. At this point, I do not know if a change in the effect of that policy would require a Congressional directive. Whether such a change in Sentencing Commission policies requires Congressional appproval raises a complex issue of law. I have not conducted sufficient research regarding this issue to arrive at a legal determination.

C. Generally, I do not favor a change in Guideline 5K1.1 to permit the district judges to evaluate cooperation without a motion from the Government. Judges are seldom aware of the full complexities of a criminal investigation, nor can judges adequately evaluate the role of a witness in those investigations without the input from the Government. I have never granted a departure for substantial assistance without a Government motion, despite such requests being occasionally made by defense counsel. Moreover, I have never seen examples of the Government abusing its authority under this guideline by obtaining cooperation with the promise of such a motion and then refusing to file it.

William K. Sessions III
U.S. District Judge for the District of Vermont

FOLLOW-UP QUESTION FOR SENTENCING COMMISSIONERS FROM SENATOR HATCH

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such [] crime" and to "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines' reliance on the value of the infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress' directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the Net Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the Net Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET ACT and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

ANSWER: Congress' directive in the No Electronic Theft Act to review guidelines for intellectual property-related crimes was given over two years ago. I view the primary responsibility of the United States Sentencing Commission to implement the intent of Congress. If confirmed, our first task must be to address Congress' longstanding directives, including implementation of guidelines pursuant to the NET Act. Congress directed the Sentencing Commission to fashion guidelines under the NET Act that are sufficiently severe to deter such criminal activity. I personally favor addressing penalties under this statute expeditiously.

William K. Sessions III
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QUESTIONS FROM SENATOR GRASSLEY FOR THE SENTENCING COMMISSION NOMINEES

I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSG) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSG has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

ANSWER: Congress passed the Identity Theft and Assumption Deterrence Act of 1998 to address the growing problem of identity theft and identity fraud in the United States. I share Senator Grassley's concern for the seriousness of this criminal behavior in light of the devastating financial impact such offenses have upon the most vulnerable members of our society. As a general rule, I have sentenced defendants who have victimized our older and less secure citizens severely, especially when such offenses involved telemarketing fraud.

The primary responsibility of the United States Sentencing Commission is to implement directives from Congress. Certainly Congress has spoken clearly that violations of the Identity Theft and Assumption Deterrence Act of 1998 shall be treated with severe penalties. The Sentencing Commission needs to address the implementation of guidelines for these offenses expeditiously, and those guidelines need to reflect the intent of Congress.

William K. Sessions III
U.S. District Judge for the District of Vermont

ATTACHMENT

William K. Sessions III
U.S. District Judge
District of Vermont

Sentencings to date in 1999, as of October 12, 1999: 94

Upward departures: 2 (2%)

Downward departures: 17 (18%)

97-54	Cartmell	Upward departure
97-54	Boyd	Upward departure
99-40	Durocher	Downward departure
98-57	Larivee	Downward departure
98-57	Despatie	Downward departure
98-9	Reynoso	Downward departure
99-13	Lamarche	Downward departure
98-18	Pariseau	Downward departure
98-16	McIver	Downward departure
99-14	Mendez Hernandez	Downward departure
98-16	Jackson, Kenneth	Downward departure
96-68	Friss	Downward departure
97-84	Spence	Downward departure
98-81	Beaudoin	Downward departure
98-36	Zullo	Downward departure
97-99	Bennett	Downward departure
95-72	Koski	Downward departure
98-37	Ritchie	Downward departure
97-59	Hunter	Downward departure

DEPARTURE AND CASE INFORMATION FOR JUDGE SESSIONS Cases prior to 10-1-98

OBS	YEAR	DEPART	REASON1
1545	1995	DownwardDepart	(5H1.4) Physical Condition
1572	1996	Upward Depart	ReSerious -Gen. adequacy of crim. history/ does not reflect seriousness of crim. hist
1573	1996	DownwardDepart	(5K2.0) Aggtole-General aggravating or mitigating circumstance
1574	1996	DownwardDepart	(5K2.0) Aggtole-General aggravating or mitigating circumstance
1575	1996	DownwardDepart	IsolatedIncident-Offense behavior was an isolated incident
1576	1996	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1577	1996	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1578	1996	DownwardDepart	Other SPECIFY
1579	1996	DownwardDepart	(5K2.12) Coercion and Duress
1580	1996	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1581	1996	DownwardDepart	DefendtsInvolve -Criminal history category over-represents the defendants involvement
1624	1997	Upward Depart	ReSerious -Gen. adequacy of crim. history/ does not reflect seriousness of crim. hist

OBS	REASON2	REASON3	USSCIDN	DOCKETID	NAME	SENTDATE
1545	Inapplicable	Inapplicable	250485	9500058	ELIOLASHVILI,MICHAEL	08/25/95
1572	Inapplicable	Inapplicable	290130	9500096	PACZLOWSKI,JOSEF	07/24/96
1573	Inapplicable	Inapplicable	254367	9500056	PARAGAN,LISAH	10/05/95
1574	Inapplicable	Inapplicable	254368	9500059	SINALAVONG,ANOUSONE	10/05/95
1575	(5H1.6) Family Ties and Responsibilities	Inapplicable	268481	9500054	CABAN,BRUCE	01/30/96
1576	Inapplicable	Inapplicable	286475	9600056	LAFASO,MATTHEW J.	04/23/96
1577	Inapplicable	Inapplicable	286519	9500040	LOPEZ,PATRICIO	06/12/96
1578	Inapplicable	Inapplicable	286531	9200102	TEHRANI,MEHDI	04/26/96
1579	Inapplicable	Inapplicable	286534	9600072	REAMO,JEFFREY	05/21/96
1580	Inapplicable	Inapplicable	290947	9500127	[illegible]	[illegible]
1581	Inapplicable	Inapplicable	294948	9500167	HEEKA,LISA	09/23/96
1624	Inapplicable	Inapplicable	298350	9600003	MAHONEY,WILLIAM	10/15/96

DEPARTURE AND CASE INFORMATION FOR JUDGE SESSIONS

OBS	YEAR	DEPART	REASON1
1625	1997	Upward Depart	Ssserious -Can. adequacy of crim. history/ does not reflect seriousness of crim. hist
1626	1997	Upward Depart	Sdeferious -Can. adequacy of crim. history/ does not reflect seriousness of crim. hist
1627	1997	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
1628	1997	DownwardDepart	Missing/indeterminable
1629	1997	DownwardDepart	(5K1.6) Family Ties and Responsibilities
1630	1997	DownwardDepart	(5K1.6) Family Ties and Responsibilities
1631	1997	DownwardDepart	Rehab-Rehabilitation
1632	1997	DownwardDepart	Rehab-Rehabilitation
1633	1997	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
1634	1997	DownwardDepart	(5K1.6) Family Ties and Responsibilities
1635	1997	DownwardDepart	(5K2.0) AggRsiv-General aggravating or mitigating circumstance
1636	1997	DownwardDepart	(5K1.6) Family Ties and Responsibilities
1637	1997	DownwardDepart	(5K1.6) Family Ties and Responsibilities
1638	1997	DownwardDepart	DefendntInvolve -Criminal History category over-represents the defendants involvement
1639	1997	DownwardDepart	Other SPECIFY

OBS	REASON2	SESSION3	USSCIDN
1625	Inapplicable	Inapplicable	306172
1626	Inapplicable	Inapplicable	311821
1627	Time Served	Inapplicable	298351
1628	Missing/indeterminable	Missing/indeterminable	300341
1629	Inapplicable	Inapplicable	300343
1630	MilitaryRecord -Military record	Inapplicable	309208
1631	Inapplicable	Inapplicable	309209
1632	Inapplicable	Inapplicable	309213
1633	Inapplicable	Inapplicable	310296
1634	Inapplicable	Inapplicable	312043
1635	Inapplicable	Inapplicable	318622
1636	Inapplicable	Inapplicable	318671
1637	Inapplicable	Inapplicable	318672
1638	Inapplicable	Inapplicable	324241
1639	Inapplicable	Inapplicable	331583

OBS	DOCKETID	NAME	SENTDATE
1625	9600019	PILION,ANDRE	12/02/96
1626	9600041	DOUGLAS,JOHN	12/30/96
1627	9600033	SANTACRUZ,RIO JAMES	10/15/96
1628	9600002	GREER,RICHARD	11/06/96
1629	9600031	ROSS,JAMES	10/29/96
1630	9500107	DIXON,ANTHONY	01/06/97
1631	9500066	DUPUIE,GARY	01/06/97
1632	9500053	GRIFFITHS,STAYLE	01/13/97
1633	9600072	CUNNINGHAM,CLAIRE	01/13/97
1634	9600036	VARGAS,OSVALDO	01/27/97
1635	9600056	MURRIS,ROY	03/26/97
1636	9400094	STERN,ALLEN	03/26/97
1637	9400094	MURAD,ABE	03/24/97
1638	9500108	BEAUPRE,KEVIN	05/05/97
1639	9600048	WHITEHOUSE,DONNIE J	04/02/97

DEPARTURE AND CASE INFORMATION FOR JUDGE SESSIONS

OBS	YEAR	DEPART	REASON1
1640	1997	DownwardDepart	Plea Agreemt -Pursuant to a plea agreement
1641	1997	DownwardDepart	Rehab-Rehabilitation
1642	1997	DownwardDepart	Depart -Departation
1643	1997	DownwardDepart	Motion Unknown
1644	1997	DownwardDepart	(5H1.6) Family Ties and Responsibilities
1645	1997	DownwardDepart	Defendtsinvolve -Criminal history category over-represents the defendants involvement
1646	1997	DownwardDepart	Rehab-Rehabilitation
1686	1998	Upward Depart	NoSerious -Cat. adequacy of crim. history/ does not reflect seriousness of crim. hist
1687	1998	DownwardDepart	Rehab-Rehabilitation
1688	1998	DownwardDepart	Missing/Indeterminable
1689	1998	DownwardDepart	Rehab-Rehabilitation
1690	1998	DownwardDepart	Isolatedincident-Offense behavior was an isolated incident
1691	1998	DownwardDepart	(5K2.0) AggRole-General aggravating or mitigating circumstance
1692	1998	DownwardDepart	(5K2.0) AggRole-General aggravating or mitigating circumstance
1693	1998	DownwardDepart	(5H1.6) Family Ties and Responsibilities

OBS	REASON2	REASON3	USSCIDN
1640	Inapplicable	Inapplicable	334095
1641	Inapplicable	Inapplicable	335372
1642	Inapplicable	Inapplicable	338092
1643	Inapplicable	Inapplicable	338095
1644	Inapplicable	Inapplicable	338096
1645	Inapplicable	Inapplicable	338178
1646	Inapplicable	Inapplicable	339266
1686	Inapplicable	Inapplicable	397933
1687	Inapplicable	Inapplicable	344381
1688	Missing/Indeterminable	Missing/Indeterminable	351692
1689	Inapplicable	Inapplicable	351508
1690	Inapplicable	Inapplicable	352745
1691	Accept Respons-Acceptance of responsibility	Rehab-Rehabilitation	354456
1692	Inapplicable	Inapplicable	359458
1693	No PriorRecord -No prior record/first offender	Inapplicable	368432

OBS	DOCKETID	NAME	SENTDATE
1640	9600091	DAINTAY,PAUL	07/21/97
1641	9600082	BAILEY,KEITH	08/04/97
1642	9600033	MARTINEZLOPEZ,FREDERICK	08/26/97
1643	9600053	DRENNEN,JEANNETTE	06/20/97
1644	9600061	PEREZ,LUIS	08/20/97
1645	9600068	FRIAS,RAMON	08/25/97
1646	9700001	KEGERT,SHANE	09/08/97
1686	9800005	RAMIREZPEREZ,FRANCISCO	06/13/98
1687	9700015	LAFOUNTAINE,RENEE	10/20/97
1688	9700048	CATIRD,MICHELE	01/26/98
1689	9600096	METZ,BRAD EDWARD	10/16/97
1690	9700033	PEET,MICHAEL	11/10/97
1691	9700009	ALEXANDER,WESLEY	11/17/97
1692	9700029	CEBALLOSPACHECO,EDUARDO	11/24/97
1693	9700072	PAYENALDE,YVAN	03/02/98

DEPARTURE AND CASE INFORMATION FOR JUDGE SESSIONS

OBS	YEAR	DEPART	REASON1
1694	1998	DownwardDepart	(5K2.13) Dim.Capacity
1695	1998	DownwardDepart	Other SPECIFY
1696	1998	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
1697	1998	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
1698	1998	DownwardDepart	(5K2.0) Aggrvte-General aggravating or mitigating circumstance
1699	1998	DownwardDepart	Isolated Incident-Offense behavior was an isolated incident
1700	1998	DownwardDepart	(5K2.13) Dim.Capacity
1701	1998	DownwardDepart	(5H1.6) Family Ties and Responsibilities

OBS	REASON2	REASON3	VSSCIDN
1694	Inapplicable	Inapplicable	376094
1695	Inapplicable	Inapplicable	376098
1696	Rehab-Rehabilitation	Inapplicable	378513
1697	Inapplicable	Inapplicable	378515
1698	Inapplicable	Inapplicable	378516
1699	No Heartland-Not representative of the heartland	Rehab-Rehabilitation	382587
1700	Inapplicable	Inapplicable	386223
1701	Rehab-Rehabilitation	Inapplicable	397536

OBS	DOCKETID	NAME	SENTDATE
1694	9700061	PARKER,GARY	05/04/98
1695	9700039	PAZRANIREZ,JOSE	12/10/97
1696	9700046	INCALLS,KEITH	04/13/98
1697	9700083	SMITH,RUSSELL	06/12/98
1698	9700012	STANHOPE,RONALD	03/30/98
1699	9700052	MUSAVERO,FRANCIS	07/06/98
1700	9600002	BAILY,DOMINICK	07/13/98
1701	9700075	GREEN,MICHAEL	09/14/98

Questions from Senator Abraham

1. I gather that there is a "practitioners advisory group" consisting of members of the defense bar that regularly provides the Commission with input regarding its views for how the Guidelines should be changed. What would you think of the idea of inviting the national crime victims organizations to create a crime victims advisory group to serve a parallel function with respect to victims of crime?

Response from Mr. Steer:

I think the concept of a crime victims advisory group is a worthwhile idea that the Commission should explore, and I would be glad to help do so if I am confirmed. Such an advisory body could serve to regularize valuable victim input into the Commission's guideline amendment processes. The Commission has received comment from victim groups from time to time over the years -- e.g., recently, the Commission sought and received input from senior citizen groups in developing telemarketing fraud amendment proposals and met with a wide variety of representatives of industries affected by copyright and trademark infringement offenses in order to better understand the impact of those offenses. I certainly would welcome any reasonable means of ensuring victim input into the Commission's work.

3. Please provide the average non-substantial assistance departure rate against which to compare the statistical information requested of the individual judges in question 2.

Response from Mr. Steer:

The tables below show the national departure statistics by year as requested, as well as a detailed breakdown by circuit and district. A table from the Commission's FY'98 Annual Report that may be helpful also is included.

I infer from this question that Senator Abraham may have requested the "average non-substantial assistance departure rate" in part to compare the individual departure rates provided in response to Question 2 by the five nominees who are judges with the national data. Based on my experience in working with the sentencing data gathered and compiled by the Commission, I would advise caution about using the data for this purpose. The Commission has a long-standing policy of reporting its data and research in the aggregate, as I have provided here, and not by individual judges.

The Commission has found that comparing judge-specific data to aggregate national data often leads to erroneous conclusions. The Commission calculates aggregate national departure rates using data collected from over 50,000 criminal cases each year. In contrast, the number of cases sentenced by an individual judge may be too small and overly sensitive to minor variations to make reliable conclusions about that judge's sentencing practices.

Upward And Downward Departures:
National, 7th Circuit, Northern District of Illinois
Fiscal Years 1991 Through 1998

Fiscal Year	Upward Departure Rate (%)			Downward Departure Rate (%)[1]		
	National	7th Circuit	Northern Illinois	National	7th Circuit	Northern Illinois
1991	1.7	2.0	0.6	5.8	2.7	1.1
1992	1.5	1.4	0.5	6.0	3.0	3.1
1993	1.1	0.9	0.0	6.6	3.2	2.9
1994	1.2	1.0	1.0	7.6	3.4	5.1
1995	0.9	0.7	0.8	8.4	2.8	3.8
1996	0.9	1.3	1.2	10.3	4.9	7.6
1997	0.8	1.2	0.5	12.1	4.9	5.8
1998	0.8	1.3	0.2	13.6	4.8	5.8

[1]Does not include departures for Substantial Assistance.

SOURCE: U.S. Sentencing Commission: *Annual Report 1991 - 1995; Sourcebook of Federal Sentencing Statistics 1996 - 1998.*

Upward And Downward Departures:
National, 5th Circuit, And Northern District Of Texas
Fiscal Years 1991 Through 1998

Fiscal Year	Upward Departure Rate (%)			Downward Departure Rate (%)[1]		
	National	5th Circuit	Northern Texas	National	5th Circuit	Northern Texas
1991	1.7	2.3	1.2	5.8	5.1	4.4
1992	1.5	1.8	2.0	6.0	4.6	4.3
1993	1.1	1.5	2.2	6.6	4.3	3.6
1994	1.2	1.5	1.4	7.6	4.9	4.4
1995	0.9	1.1	0.9	8.4	5.1	5.2
1996	0.9	1.2	1.1	10.3	9.8	6.1
1997	0.8	0.6	0.8	12.1	9.6	6.9
1998	0.8	0.7	0.8	13.6	10.2	6.9

[1]Does not include departures for Substantial Assistance.

SOURCE: U.S. Sentencing Commission: *Annual Report 1991 - 1995*; *Sourcebook of Federal Sentencing Statistics 1996 - 1998*.

Upward And Downward Departures:
National, Second Circuit, and the Eastern District of New York
Fiscal Years 1991 Through 1998

Fiscal Year	Upward Departure Rate (%)			Downward Departure Rate (%)[1]		
	National	2nd Circuit	Eastern New York	National	2nd Circuit	Eastern New York
1991	1.7	1.2	0.7	5.8	7.1	6.2
1992	1.5	1.4	0.9	6.0	8.9	11.0
1993	1.1	1.0	1.0	6.6	12.5	13.6
1994	1.2	1.1	0.9	7.6	13.3	15.1
1995	0.9	0.6	0.2	8.4	16.2	24.7
1996	0.9	0.7	0.5	10.3	15.2	18.8
1997	0.8	0.7	0.3	12.1	19.9	28.5
1998	0.8	0.7	0.6	13.6	23.4	35.0

[1]Does not include departures for Substantial Assistance.

SOURCE: U.S. Sentencing Commission: *Annual Report 1991 - 1995; Sourcebook of Federal Sentencing Statistics 1996 - 1998.*

Upward And Downward Departures:
National, 8th Circuit, and District of Minnesota
Fiscal Years 1991 Through 1998

Fiscal Year	Upward Departure Rate (%)			Downward Departure Rate (%)[1]		
	National	8th Circuit	Minnesota	National	8th Circuit	Minnesota
1991	1.7	0.9	1.7	5.8	5.0	4.3
1992	1.5	1.2	2.9	6.0	5.5	7.3
1993	1.1	0.9	1.1	6.6	5.7	7.3
1994	1.2	0.7	0.5	7.6	6.2	9.4
1995	0.9	0.9	1.8	8.4	5.6	9.5
1996	0.9	1.1	1.0	10.3	6.2	12.2
1997	0.8	0.9	2.4	12.1	8.8	14.6
1998	0.8	0.7	0.3	13.6	7.7	13.5

[1]Does not include departures for Substantial Assistance.

SOURCE: U.S. Sentencing Commission: *Annual Report 1991 - 1995*; *Sourcebook of Federal Sentencing Statistics 1996 - 1998.*

Upward And Downward Departures:
National, 2nd Circuit, District of Vermont
Fiscal Years 1991 Through 1998

Fiscal Year	Upward Departure Rate (%)			Downward Departure Rate (%)[1]		
	National	2nd Circuit	Vermont	National	2nd Circuit	Vermont
1991	1.7	1.2	5.7	5.8	7.1	3.8
1992	1.5	1.4	4.4	6.0	8.9	5.2
1993	1.1	1.0	2.9	6.6	12.5	12.5
1994	1.2	1.1	0.0	7.6	13.3	11.1
1995	0.9	0.6	2.8	8.4	16.2	11.0
1996	0.9	0.7	2.2	10.3	15.2	19.4
1997	0.8	0.7	3.7	12.1	19.9	26.2
1998	0.8	0.7	0.9	13.6	23.4	20.7

[1]Does not include departures for Substantial Assistance.

SOURCE: U.S. Sentencing Commission: *Annual Report 1991 - 1995*; *Sourcebook of Federal Sentencing Statistics 1996 - 1998*.

GUIDELINE DEPARTURE RATE BY CIRCUIT AND DISTRICT
Fiscal Year 1998

CIRCUIT / District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
		n	%	n	%	n	%	n	%
TOTAL	47,856	36,772	66.3	9,224	19.3	6,509	13.6	391	0.8
DC CIRCUIT	655	531	73.8	83	17.9	40	8.6	2	0.4
District of Columbia	463	338	73.0	83	17.9	40	8.6	2	0.4
FIRST CIRCUIT	1,378	782	66.4	253	21.5	120	10.2	23	2.0
Maine	146	104	71.2	31	21.2	9	6.2	2	1.4
Massachusetts	473	265	56.0	116	24.5	83	17.5	9	1.9
New Hampshire	137	71	51.8	58	42.3	4	2.9	4	2.9
Puerto Rico	309	255	82.5	39	12.6	14	4.5	1	0.3
Rhode Island	113	87	77.0	9	8.0	10	8.8	7	6.2
SECOND CIRCUIT	1,908	1,039	57.9	556	31.9	316	22.4	28	1.7
Connecticut	288	144	50.0	46	16.0	93	32.3	5	1.7
New York									
Eastern	1,361	559	41.3	287	21.1	477	35.0	8	0.6
Northern	333	165	49.5	125	37.5	42	12.6	1	0.3
Southern	1,343	803	59.1	322	23.3	250	18.1	8	0.6
Western	433	264	61.1	132	30.6	31	7.2	5	1.2
Vermont	111	65	58.6	22	19.8	23	20.7	1	0.9
THIRD CIRCUIT	2,181	1,395	52.5	750	31.5	234	9.8	24	1.0
Delaware	126	103	81.7	15	11.9	7	5.6	1	0.8
New Jersey	684	453	66.2	180	26.3	47	6.9	4	0.6
Pennsylvania									
Eastern	902	426	47.2	383	42.7	61	9.0	12	1.3
Middle	290	171	58.6	88	30.0	31	10.6	3	1.0
Western	271	157	57.9	75	26.9	38	14.0	3	1.1
Virgin Islands	107	87	81.3	9	8.4	10	9.3	1	0.9
FOURTH CIRCUIT	4,165	2,881	74.8	882	21.3	152	3.8	44	1.1
Maryland	413	239	57.9	115	27.8	56	13.6	3	0.7
North Carolina									
Eastern	457	287	62.2	129	28.2	7	1.5	4	0.9
Middle	319	245	76.8	63	19.7	4	1.3	7	2.2
Western	402	252	62.7	132	43.6	13	3.0	3	0.7
South Carolina	826	634	76.8	162	19.6	21	2.5	9	1.1
Virginia									
Eastern	902	805	89.0	74	8.2	17	1.9	8	0.9
Western	402	275	68.3	101	25.3	18	4.5	6	1.5
West Virginia									
Northern	167	147	88.0	13	7.8	3	1.8	4	2.4
Southern	271	219	80.8	39	14.4	13	4.8	0	0.0

CIRCUIT		SENTENCED WITHIN GUIDELINE RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
District	TOTAL	n	%	n	%	n	%	n	%
FIFTH CIRCUIT	9,709	6,922	71.3	1,976	20.3	785	8.1	82	0.8
Louisiana									
Eastern	391	285	72.9	70	17.9	33	8.4	3	0.8
Middle	116	93	80.2	17	14.7	5	4.3	1	0.9
Western	285	205	71.9	67	23.5	10	3.5	3	1.1
Mississippi									
Northern	143	91	63.6	33	23.1	17	11.9	2	1.4
Southern	235	172	73.2	45	19.1	14	6.0	4	1.7
Texas									
Eastern	549	441	80.3	75	13.7	30	5.5	3	0.5
Northern	1,021	749	73.4	203	19.9	71	6.9	7	0.8
Southern	2,710	1,675	61.8	624	23.0	397	14.6	18	0.7
Western	3,281	2,607	79.5	342	10.4	312	9.5	20	0.6
SIXTH CIRCUIT	3,853	2,537	65.8	1,045	27.1	247	6.4	24	0.6
Kentucky									
Eastern	381	272	71.4	100	26.2	7	1.8	2	0.5
Western	328	293	89.3	22	6.7	13	4.0	0	0.0
Michigan									
Eastern	758	517	68.2	192	25.3	46	6.1	3	0.4
Western	283	179	63.3	81	28.6	22	7.8	2	0.7
Ohio									
Northern	760	489	64.3	169	22.2	101	13.3	1	0.1
Southern	458	233	50.9	192	41.9	28	6.1	5	1.1
Tennessee									
Eastern	338	188	55.6	141	41.7	7	2.1	2	0.6
Middle	187	116	62.0	66	35.3	6	3.6	1	0.5
Western	580	250	65.8	104	27.6	18	4.7	8	2.1
SEVENTH CIRCUIT	1,771	1,399	73.3	266	20.6	85	4.8	23	1.3
Illinois									
Central	225	132	58.7	77	34.2	15	6.7	1	0.4
Northern	465	328	70.5	109	23.4	27	5.8	1	0.2
Southern	275	240	87.3	25	9.1	6	2.2	4	1.5
Indiana									
Northern	207	221	62.8	28	10.9	13	4.5	5	1.9
Southern	211	120	56.9	75	35.5	11	5.2	5	2.4
Wisconsin									
Eastern	200	155	77.5	34	17.0	11	5.5	0	0.0
Western	128	103	80.5	15	11.7	3	2.3	7	5.5
EIGHTH CIRCUIT	2,035	1,502	68.7	660	32.9	222	7.7	20	0.7
Arkansas									
Eastern	286	249	87.1	20	10.1	5	1.7	3	1.0
Western	115	82	80.0	16	13.9	7	6.1	0	0.0
Iowa									
Northern	162	95	58.6	46	28.4	19	11.7	2	1.2
Southern	236	151	64.0	59	25.0	24	10.2	2	0.8
Minnesota	356	230	64.6	77	21.6	49	13.5	1	0.3
Missouri									
Eastern	523	365	69.8	131	25.0	27	5.2	0	0.0
Western	421	214	50.7	182	43.1	23	5.5	3	0.7
Nebraska	275	171	62.2	82	29.8	20	7.3	2	0.7
North Dakota	168	123	73.2	15	8.9	28	16.7	2	1.2
South Dakota	341	292	85.6	23	6.7	23	6.4	5	1.5

CIRCUIT / District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE n	SENTENCED WITHIN GUIDELINE RANGE %	SUBSTANTIAL ASSISTANCE DEPARTURE n	SUBSTANTIAL ASSISTANCE DEPARTURE %	OTHER DOWNWARD DEPARTURE n	OTHER DOWNWARD DEPARTURE %	UPWARD DEPARTURE n	UPWARD DEPARTURE %
NINTH CIRCUIT	10,265	[illegible]	[illegible]	1,155	11.3	3,937	38.4	76	0.7
Alaska	181	151	83.4	3	1.7	26	14.4	1	0.6
Arizona	2,195	684	31.2	154	7.0	1,349	61.5	17	0.8
California									
Central	911	705	86.7	56	6.9	51	6.3	1	0.1
Eastern	894	679	75.8	122	13.6	81	9.1	2	0.2
Northern	554	329	59.4	65	11.7	143	25.8	17	3.1
Southern	3,152	1,767	56.1	289	9.2	1,073	34.0	13	0.4
Guam	184	117	63.6	64	34.8	2	1.1	1	0.5
Hawaii	259	165	63.7	27	10.7	17	6.6	0	0.0
Idaho	97	66	68.0	14	14.7	13	13.7	2	2.1
Montana	226	158	69.9	32	14.2	34	15.0	2	0.9
Nevada	522	377	72.3	90	17.2	50	9.6	5	1.0
Northern Mariana Islands	19	14	73.7	5	26.3	0	0.0	0	0.0
Oregon	483	336	72.7	65	13.5	56	11.6	6	1.2
Washington									
Eastern	267	159	59.6	33	12.4	74	27.7	1	0.4
Western	433	274	63.3	76	17.6	77	17.8	6	1.4
TENTH CIRCUIT	2,662	1,958	73.6	383	14.4	294	11.0	27	1.0
Colorado	371	220	59.3	114	30.7	31	8.4	6	1.6
Kansas	401	294	73.3	77	19.2	29	7.2	1	0.2
New Mexico	528	382	70.3	50	9.7	101	19.4	5	0.6
Oklahoma									
Eastern	64	46	71.9	6	9.4	12	18.8	0	0.0
Northern	105	147	79.5	26	14.1	7	3.8	5	2.7
Western	276	211	89.4	16	6.8	5	2.1	4	1.7
Utah	458	379	82.8	53	7.8	40	8.7	5	1.5
Wyoming	125	82	68.0	31	34.8	9	7.2	0	0.0
ELEVENTH CIRCUIT	5,608	4,043	72.1	1,223	53.0	292	5.2	48	0.7
Alabama									
Middle	203	141	69.5	51	25.1	10	4.9	1	0.5
Northern	337	245	73.0	79	23.4	10	3.0	2	0.6
Southern	388	241	68.4	129	33.9	6	1.6	4	1.1
Florida									
Middle	1,472	920	66.6	385	26.2	103	7.0	4	0.3
Northern	391	253	64.7	126	32.2	10	2.6	2	0.5
Southern	1,562	1,302	83.9	189	12.1	69	4.4	10	0.6
Georgia									
Middle	368	284	77.5	64	17.4	12	3.3	4	1.1
Northern	505	366	62.1	130	25.6	65	11.3	7	1.3
Southern	373	290	75.9	69	19.8	7	2.5	6	2.0

Of the 30,754 guideline cases, 265 cases with no analogous guideline were excluded from the table. Of the remaining 30,489 cases, 2,503 cases were excluded due to missing departure information. Districts for which departure information is missing in five percent or more of the cases received included: Central California (39.1%), Eastern Virginia (28.2%), Guam (37.7%), Oregon (14.1%), Western Washington (13.9%), Northern New York (10.2%), Northern Mariana Islands (9.1%), Western North Carolina (9.1%), Colorado (9.0%), Southern California (8.2%), Eastern New York (8.1%), Southern Florida (8.1%), and Southern New York (6.9%). Descriptions of variables used in this table are provided in Appendix A of the U.S. Sentencing Commission Annual Report.

SOURCE: U.S. Sentencing Commission, 1998 Datafile, OTAFY98.

4. a. I would like to ask each of you to comment on whether you think district court judges currently have the authority to grant downward departures on the basis of cooperation with the prosecution by a defendant without a prosecution motion.

b. If you think they lack that authority, do you think it would be permissible for the Sentencing Commission to grant it, or would such a change require Congressional legislation?

c. Do you think such a change is desirable?

Responses from Mr. Steer:

a. No, except as recognized in Wade v. United States, 504 U.S. 181 (1992) (i.e., when the government's refusal is based on an unconstitutional motive), or perhaps when the prosecutor's refusal constitutes a breach of a plea agreement (see Santobello v. New York, 404 U.S. 257 (1971)).

b. In the case of departure below a statutory mandatory minimum for substantial assistance without a government motion, only Congress could authorize that action, presumably by amending 18 U.S.C. § 3553(e). In the case of such departures below the minimum of a guideline range when no statutory mandatory minimum is involved, the Commission *probably* could grant such action by amending the pertinent policy statement, USSG §5K2.1. The governing statute that directs the Commission with regard to this issue, 28 U.S.C. § 994(n), does not predicate substantial assistance departures on a government motion. The Commission elected to include that condition in order to be consistent with the procedure for departing below a mandatory minimum under 18 U.S.C. § 3553(e), and for other good reasons. I use the caveat "probably" because another directive in the Commission's organic statute, 28 U.S.C. § 994(b)(1), requires that the Commission's guidelines be "consistent with all pertinent provisions of title 18." Thus, it could be argued that this latter provision implicitly incorporates the government motion requirement from 18 U.S.C. § 3553(e). For several reasons, I do not favor this reading of the several related statutory provisions, and thus I do not believe the government motion requirement is statutorily compelled when no mandatory minimum is involved.

c. No, I do not believe such a change is desirable for a number of reasons. First, there is an inherent, strong incentive for prosecutorial good faith with regard to making the requisite motion, as Judge Joe Kendall cogently pointed out in answer to a similar question at the October 7 hearing. Second, if there were no government motion requirement, defense counsel no doubt would feel duty bound to move for such a departure in virtually every case in which a defendant had provided any assistance to the government. This would lengthen sentencing hearings and unnecessarily burden the courts. Third, I believe there are legitimate separation of powers concerns that strongly argue against routine court inquiries into areas that are traditionally the province of the

prosecutor. The closer the question, the deeper the court might have to dig into the prosecutor's "files," possibly for both the instant case and other cases, in order to ascertain whether the assistance allegedly rendered by the defendant in fact was "substantial" and whether the prosecutor had acted in bad faith in withholding a motion recognizing such assistance. Because the likelihood of prosecutorial abuse by wrongly withholding desired motions is very low, it seems extremely unwise to go down this road. While the above represents my strong inclination at the present time, if I am confirmed and this issue is brought before the Commission, I will endeavor to consider fairly all arguments.

Question from Senator Hatch

In 1997, Congress enacted the "No Electronic Theft (NET) Act" to more effectively deter digital and online piracy of copyrighted works. That legislation included a directive to the Sentencing Commission that instructed it to revisit the guidelines applicable to defendants convicted of intellectual property-related crimes in order to ensure that they are "sufficiently stringent to deter such crime" and to "provide for consideration of the retail value and quantity of the items with respect to which crime against intellectual property was committed." This directive, and its specificity, reflected the concern on the part of Congress that the existing guidelines reliance on the value of infringing items both underestimates the true economic harm inflicted on copyright owners and results in penalties that are so disproportionately low that U.S. attorneys are simply unwilling to prosecute such cases. Despite Congress's directive, the old guidelines remain in place unamended. The result is that today, nearly two years later, there has been only one case brought under the NET Act, and electronic piracy continues as a significant and growing concern. If confirmed, do you intend to make implementation of the NET Act directive a priority, and more specifically, will you commit to moving expeditiously to complete revision of the applicable sentencing guidelines as directed by the NET Act and to do so in a manner that is consistent with Congress' intent to provide improved deterrence in this area?

Response from Mr. Steer:

If confirmed, I would do everything reasonably possible to ensure that the Commission promptly addresses the NET Act directives and does so in a manner consistent with them. In my view, implementation of the NET Act should be at or near the top of the Commission's amendment priority list. This Act dates from 1997, and thus its directives are the oldest yet to be implemented by the Commission. Also adding to the urgency is the fact that Congress apparently intended to confer on the Commission "emergency" authority to amend the guidelines outside the constraints of the regular amendment cycle and process. (I believe making permanent the temporary emergency telemarketing fraud guideline amendments also must be treated as a top priority in order to avoid possible expiration of these provisions at the end of this next amendment cycle).

I further agree that the entire guideline covering trademark and copyright infringements needs to be revised comprehensively to strengthen penalties, ensure that the economic harm resulting from these offenses is more adequately reflected, and better deter the criminal conduct.

Question from Senator Grassley

I am concerned about the growing problem of identity theft and identity fraud. The Identity Theft and Assumption Deterrence Act of 1998 directs the U.S. Sentencing Commission (USSC) to review and amend Federal sentencing guidelines to provide an appropriate penalty for offenses involving identity theft and identity fraud. However, in the absence of Commissioners, USSC has not done so. This, in turn, has impeded the ability of law enforcement agencies to prosecute such crimes. Do you believe that identity theft and identity fraud are serious crimes? If you are confirmed, can you commit to formulating severe penalties for this crime?

Response from Mr. Steer:

I do believe that identity theft and related fraud are serious crimes and that the sentencing guidelines should treat them as such. The Commission has an obligation to implement promptly and faithfully the directives from Congress contained in the Identity Theft and Assumption Deterrence Act of 1998. In my current position as Commission General Counsel, I have worked with Commission staff during the past year when there were no commissioners to investigate this issue and develop information to assist incoming commissioners in responding to this Act.

NOMINATIONS OF ANNE CLAIRE WILLIAMS (U.S. CIRCUIT JUDGE); FAITH S. HOCHBERG, FRANK H. McCARTHY, AND VIRGINIA A. PHILLIPS (U.S. DISTRICT JUDGES)

TUESDAY, OCTOBER 26, 1999

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

The committee met, pursuant to notice, at 3 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond, presiding.

Also present: Senators Abraham, Feinstein, and Torricelli.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The committee will come to order.

I am pleased to hold the sixth judicial nomination hearing for this Congress.

I welcome the distinguished members of the Senate who are present to introduce particular nominees, and I am pleased that the nominees were able to be here today.

Judicial nomination hearings are among the most important duties of this committee. A Federal judgeship is not only a position of great power, it is also one of great responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner. After opening statements, I would like for the Senators who are present to introduce their nominees. The Senators will constitute the first panel.

The second panel will consist of the nominees: Anne Claire Williams of Illinois for the Seventh Circuit Court of Appeals; Faith Hochberg of New Jersey to be a district judge for the District of New Jersey; Frank McCarthy of Oklahoma to be a district judge for the Northern District of Oklahoma; and Virginia Phillips of California to be a district judge for the Central District of California.

Before we start questioning the nominees, I will call on anyone to make an opening statement if they wish.

Senator FEINSTEIN. Why don't I let my colleagues go ahead with their statements, and then I will follow up at the end with my statement, if that is agreeable with you, Mr. Chairman.

Senator THURMOND. That would be fine.

I would like to express my support for the nomination of Anne Claire Williams for the U.S. Court of Appeals for the Seventh Circuit.

Judge Williams was appointed to the U.S. District Court for the Northern District of Illinois by President Reagan in 1985. Prior to that, she served for almost a decade as an assistant U.S. attorney for the Northern District of Illinois.

I have been assured by friends, with whom I have great confidence, that she is a very fine member of the Federal bench and will perform admirably on the circuit court.

I also understand that she is a woman of high character and integrity. She is married and has two children. Although she lives in Illinois, she has close ties to South Carolina. Her parents and her husband were born in South Carolina, and her father resides in the Greenville area today.

I am pleased to support her nomination and look forward to her continued service in this new capacity.

Yes, Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Mr. Chairman, thank you very much, and, Senator Feinstein, thank you as well. I want to thank the committee for having the hearing today on a few nominees to be considered for district court judges and I guess one appellate judge.

Mr. Chairman, I am here today to introduce and recommend the nomination of Frank McCarthy to the U.S. District Court of Oklahoma. I believe he is an excellent nominee. His selection is a result of a bipartisan selection committee that was composed of myself and Senator Inhofe and also an attorney general who happens to be a Democrat, Drew Edmundson. We put together a panel that made recommendations, and Judge McCarthy was highly recommended. So I recommend him to you as well.

I called him a judge because he is currently serving as U.S. Magistrate Judge for the Northern District of Oklahoma. He has held that position since 1995 and has served quite capably.

Prior to serving as Magistrate judge, he was in private practice for several years. I personally got to know him when he served as assistant U.S. attorney. This is back in the early 1980's. He was assistant U.S. attorney, and he was actually senior litigation counsel from 1985 to 1987.

Prior to that in his service to the community, he was a public defender from 1976 to 1985. So he served 9 years as a public defender, 3 years as assistant U.S. attorney, senior litigation counsel. So he has both been a defender and also a prosecutor. He has had several years in private practice where he excelled, and then in the last 4 years has served as the U.S. Magistrate in the Northern District of Oklahoma.

Mr. Chairman, obviously he is well qualified, highly qualified. I think he will do an outstanding job as a Federal district court justice, and I would heartily recommend to the committee to lend its support to his confirmation. I support it very strongly, and I hope that the committee and the Senate will as well.

I thank you, Mr. Chairman, for your cooperation in scheduling this hearing.

Senator THURMOND. Senator Lautenberg.

STATEMENT OF HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman and Senator Feinstein.

I am here today to register my thanks for moving ahead with the nomination of Ms. Faith Hochberg. This is a time when New Jersey's Federal bench is struggling with heavy caseload, shortage of judges, and today's action will help New Jersey's Federal courthouses be more fair and more efficient.

It is a pleasure for me, Mr. Chairman, to recommend Faith Hochberg as a nominee to the U.S. District Court in New Jersey.

Ms. Hochberg has served with distinction as the U.S. attorney for New Jersey since 1994. She is eminently qualified for a Federal judgeship.

President Clinton nominated Ms. Hochberg for the District Court on April 22 of this year. As the first female U.S. Attorney in New Jersey's history, Ms. Hochberg spearheaded corruption probes that led to the conviction of numerous Newark City officials. She participated in the prosecution of the Unabomber, Theodore Kaczynski, and she unraveled widespread police corruption in several of our communities.

Her office has a record of aggressively pursuing child pornography cases. From 1994 through 1998, Ms. Hochberg's attorneys handled 67 of those cases, which was the second highest number among U.S. Attorney's Offices across the country.

Since 1997, Ms. Hochberg has been a member of the Attorney General's advisory committee which advises Attorney General Reno on issues affecting the U.S. Attorney's Office. Ms. Hochberg chairs a white-collar crime subcommittee and has focused the committee's attention on cyber crime issues which, of course, will be an increasing concern in the next century.

This is particularly true in New Jersey which has a high concentration of high-tech industries and serves as a computer nerve center for large New York-based corporations and the Federal Reserve Bank of New York.

Prior to her service as U.S. attorney, Ms. Hochberg served as the Deputy Assistant Secretary of the Treasury for Law Enforcement as well as Senior Deputy Chief Counsel for the Treasury's Office of Thrift Supervision.

She also has experience in the private sector, having worked as a partner in a prominent New Jersey law firm. She has outstanding academic credentials. She was graduated magna cum laude in 1975 from Harvard Law School where she edited the Law Review. In 1972, she was graduated summa cum laude from Tufts University.

Ms. Hochberg also has been a pioneer in her efforts to keep guns out of the hands of criminals. She and a former New Jersey Attorney General organized a project that alerts law enforcement each time a gun is recovered during a criminal incident, and that allows those guns to be traced to their sources.

Mr. Chairman, this hearing could not come at a better time. New Jersey's Federal courthouses are stressed to the limit and delays are becoming more and more common. Of the 94 U.S. district courts in this country, New Jersey courts ranked 74th in the length of time it takes to dispose of felony cases and 83rd in bringing civil cases to trial.

We all know that judicial nominations are frequently undermined by politics during Presidential election years, and with that in mind, I hope that this committee can act quickly in bringing Ms. Hochberg's nomination to the floor for a vote.

Mr. Chairman, I thank you for giving me a chance to appear, and I thank Senator Feinstein for the time and consideration. We have an excellent candidate for the Federal bench in New Jersey, and I hope that her nomination will be processed promptly.

Senator THURMOND. Senator Inhofe, I understand that you have got to leave.

STATEMENT OF HON. JAMES M. INHOFE, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Mr. Chairman, I am chairing a committee right now, a readiness subcommittee. It is in recess. So I will make a very brief introduction and recommendation for Frank McCarthy who is our nominee, is the President's nominee for the U.S. District Court for the Northern District of Oklahoma.

I noticed that Senator Nickles was here before, and I think he probably went over the career background of Mr. McCarthy. He certainly has had a wide variety of experience in both private practice, the U.S. Attorney's Office, as well as U.S. Magistrate.

What he may not have mentioned is that we got together and put together a type of a committee approach to this thing in the early stages, and so Senator Nickles and I and then our highest statewide elected Democrat, Drew Edmondson, who is our Attorney General—each one has people on a committee that does an evaluation. It is a pretty exhaustive system that they have to go through, and they came out with the recommendation that Mr. McCarthy would be an excellent choice.

And I have to say this, too. After my personal interview with him, I agreed with the findings that they finally came up with. So he is one who does enjoy bipartisan support. He is one whose ethics and professionalism has never been questioned by anyone, and it is an honor to be here, for me to recommend with no hesitation your approval of Frank McCarthy.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you very much.

Senator Feinstein.

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

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

I know Senator Boxer and I are going to speak about the same person. So I will be very brief.

I am very pleased to introduce Virginia Phillips, a nominee for the District Court of the Central District of California.

Before speaking about her, if I may, I would like to enter into the record a statement by our Ranking Member Senator Leahy, if I might.

Senator THURMOND. Without objection, so ordered.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

This afternoon the Senate Judiciary Committee is holding only its sixth confirmation hearing for judicial nominees this year after a very late start. Today the Committee will hear from four outstanding nominees: Judge Ann Claire Williams, President Clinton's nomination to the Seventh Circuit Court of Appeals; Faith Hochberg, currently U.S. Attorney in New Jersey and nominated to the District Court there; Judge Frank McCarthy, nominated to the District Court in Oklahoma; and Judge Virginia Phillips, nominated to the District Court in the Central District of California. Judge Williams and Ms. Hochberg have each been previously considered and confirmed for their current positions by this Committee and by the Senate. Judge McCarthy and Judge Phillips are each highly respected magistrate judges.

I am happy that Judge Williams' nomination is getting expedited treatment, especially in the wake of the Senate's treatment of Justice Ronnie White from Missouri. Judge Williams is one of the 7 nominees I highlighted in my statement to the Senate on October 15, in the wake of the unprecedented Republican party line vote to defeat the nomination of Justice White. In addition to prompt consideration of Judge Williams, who will be the first African American to serve on the 7th Circuit, I renew my challenge to the Senate to proceed to vote on the long-delayed nominations of Judge Richard Paez and Marsha Berzon, Judge Julio Fuentes and Judge James Wynn, Kathleen McCree Lewis and Enrique Moreno.

I am sure that Judge Phillips is glad to see this day finally arrive. Hers has been one of the nominations that has been stalled the longest before the Committee this year. She was first nominated in May 1998, more than 17 months ago. She is nominated to fill one of the 20 judicial emergency vacancies around the country.

The Judiciary Committee recently received a letter recently from Chief Judge Hatter of that District Court for the Central District of California in which he implored the Senate to act promptly on the nomination of Judge Virginia Phillips. Judge Hatter notes that the Eastern Division of the Central District is one of the fastest growing areas in the nation and has only one judge with a "staggering caseload." He explains that the reassignment of cases to Los Angeles from San Bernadino "results in a large number of litigants, witnesses, lawyers, and law enforcement officers having to travel to Los Angeles, some sixty (60) miles away, by way of the most traffic congested roads in the United States." I thank Chief Judge Hatter for his letter and want him to know that I, for one, understand. Those who say there is no judicial vacancies problem ought to consider Chief Judge Hatter's perspective and the problems created for thousands of people each year in his District. I hope that in addition to proceeding promptly to consider and confirm Judge Phillips that the Senate will confirm Judge Florence Marie Cooper, Frederic Woocher and Dolly Gee to that District Court.

In addition to these fine nominees, there are still 30 judicial nominations pending before the Committee in need of hearings. By this time last year the Committee had conducted 13 confirmations hearings, more than twice the number conducted this year. By this time last year the Senate had confirmed 66 judges; this year the confirmation total stands at only 25. There are today 9 judicial nominations on the Senate Executive Calendar awaiting final action by the Senate. The Senate should act to confirm all of those nominees and those included in this hearing before it adjourns for the year.

Senator FEINSTEIN. Also a letter from the presiding—the chief judge, the Hon. Terrance J. Hatter, Jr., who I believe is here today. I would like to introduce this into the record in support of Nominee Virginia Phillips, if I might.

Senator THURMOND. Without objection, so ordered.

[The letter follows:]

U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Los Angeles, CA, September 17, 1999.

Hon. ORRIN G. HATCH,
Chairman, U.S. Senate Judiciary Committee,
Washington, DC.

Hon. PATRICK J. LEAHY,
U.S. Senate Judiciary Committee,
Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I write on behalf of more than eighteen (18) million people in the Central District of California and, particularly, the more than three (3) million people in the Eastern Division of our district. The division is comprised of the counties of Riverside and San Bernardino. As you know, Riverside County, with some 1.5 million people, is one of the fastest growing areas in our nation, and San Bernardino is the largest county in the country in geographical area.

Our Eastern Division has only one district judge. That judge is faced with such a staggering caseload that it is necessary to send overflow cases to our Western (headquarters) Division each month. This results in a large number of litigants, witnesses, lawyers, and law enforcement officers having to travel to Los Angeles, some sixty (60) miles away, by way of the most traffic congested roads in the United States.

Meanwhile, the nomination of Judge Virginia A. Phillips, who would be assigned to our impacted Eastern Division has been in the Senate Judiciary Committee since May, 1998.

I implore you to take action on this nominee, who enjoys splendid bi-partisan support from her Inland Empire (Riverside, San Bernardino) community, which she has served as a California State Judicial Officer. She now serves her home community, as well as Los Angeles, as a United Magistrate Judge.

I join Congressman Ken Calvert, members of the bench, bar, other local leaders, and the under-served citizens of Riverside and San Bernardino counties in urging action on this nomination for a second district court judge for the Eastern Division of the Central District of California.

Thank you for working to better the administration of justice in our district, and I would be pleased to aid you and the Committee in anyway you feel appropriate in order to have this critical position filled as soon as possible.

Most sincerely,

TERRY J. HATTER, Jr.,
Chief United States District Judge.

Senator FEINSTEIN. Mr. Chairman, Ms. Phillips' career has been exemplary. She attended the University of California at Riverside, University of California's Boalt School of law. She joined the area's—and this is the Inland Valley of California—the area's largest law firm, Best, Best & Krieger, and she became a very highly regarded civil attorney.

In 1991, she was appointed commissioner of the Riverside County Court and served in that capacity until 1995 when she was appointed U.S. Federal Magistrate.

She has been widely praised for her intelligence, her fairness, for her judicial temperament. People note that she quickly, efficiently, and in a manner such that any attorney, litigant, juror, and visitor to her courtroom perceives that justice will be done.

She has been active in the community, serving on the board of directors of several organizations, including the Riverside Rape Crisis Center, Riverside Youth Service Center. She has many supporters. I notice that Congressman Ken Calvert is before the committee today in support of this nominee, also Representatives Jerry Lewis and Ron Packard as well. In addition to that, she is supported by the Riverside District Attorney Grover Trask, the Mayor Ronald Loverage, the University President Lawrence Garrity, the Press Enterprise Publisher Marcia McQuaren, and the Riverside University Chancellor Raymond Orbach.

This district, the Eastern District of the Central District, has just one Federal judge to supervise the legal needs of 3 million people. Because of the shortage of this judge, over 50 percent of the Federal cases originating in these two large counties are referred 60 miles away to Los Angeles. So I am hopeful that she will be promptly approved by this committee and moved to the floor for a vote, and I know my colleague, Senator Boxer, who is here concurs in those views.

Senator THURMOND. Senator Boxer.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Mr. Chairman, Senator Feinstein.

I am very proud to introduce you to Virginia Phillips. I would ask her to stand, if she would. I am so glad to see you here, Virginia. This has been a long time in coming.

I want to say that Virginia Phillips went through my screening committee made up of some of the finest people in the legal profession with flying colors and she was their very strong recommendation, and I was proud to recommend her to the President. The President nominated her, and now it is up to this committee and the Senate.

Rather than repeating any of her actual background, as Senator Feinstein has stated so well, I would ask unanimous consent that my entire statement be submitted for the record, Mr. Chairman, if that is OK.

Senator THURMOND. Without objection, so ordered.

Senator BOXER. Thank you.

I will simply quote some of my Republican friends who are supporting her because one thing Senator Hatch has told all of us is make sure the people you bring have bipartisan support. So I am going to read some of these.

We know that Congressman Jerry Lewis is a very strong supporter. He wrote to encourage me to make this nomination. I was pleased to make this nomination, and he said, "Her accomplishments are noteworthy and commendable. I hope you will nominate her for the U.S. District Court. I give her my strongest recommendation." Jerry Lewis is a very senior member of the Republican side over in the House. I had the privilege of serving with him.

Congressman Calvert, I am not going to quote him. I was going to, but I am much happier to see that he himself is here to put his own words in favor of Virginia.

Judge Phillips' former colleague, Riverside Superior Court Judge Stephen Cunison, wrote to Chairman Hatch in June 1998 requesting that the chairman "* * * schedule a hearing date to consider the confirmation of Magistrate Judge Phillips' appointment," and that Chairman Hatch vote and urges colleagues to vote to confirm her. Judge Cunison went on to say, "She is firm, fair, and scholarly. The judges of this court relied extensively on her wisdom and her legal acumen, and her departure to the U.S. district court as a Magistrate judge has been a considerable loss. I would respectfully suggest that we as Republicans will stand a bit taller in the

public eye if your committee joins ranks with the President on this appointment."

The Riverside District Attorney Grover Trask, a Republican, has said, "I am honored to recommend for your consideration Virginia Phillips." He goes on to cite her intelligence, her fairness, her exceptional judicial temperament, and just goes on in the most wonderful way.

She has the support of the Riverside law enforcement community endorsed by both the Riverside County Sheriff and the chief of police of Riverside, Gerald Carroll, and it goes on and on.

I want to just close by saying my colleague, Senator Feinstein, made a very important point. The Inland Empire is one of the fastest-growing parts of our great State, and as Senator Feinstein and I always remind everyone, we are a Nation State. We have about 34 million people. We really need this judgeship. We need it badly for the people to do justice for the people, and we urge your prompt consideration.

I thank you so much, and I look forward to hearing Ken Calvert's remarks as well.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF BARBARA BOXER

Thank you Mr. Chairman. I am delighted to be here today to introduce Virginia Phillips to the Committee. Judge Phillips is eminently qualified and I am hopeful she will receive the support and approval of this Committee.

Judge Phillips background and qualifications are impressive. She graduated magna cum laude from the University of California at Riverside in 1979 and went on to earn her Juris Doctor in 1982 from the University of California at Berkeley Boalt Hall School of Law.

After graduation from law school, Judge Phillips joined the Riverside law firm of Best, Best & Krieger. There she practiced mainly in the area of civil litigation. In 1988, she was made a partner at Best, Best & Krieger.

In February 1991, after being appointed a Superior Court Commissioner, Judge Phillips left private practice. As a Superior Court Commissioner, Judge Phillips presided over both civil and criminal cases. On February 24, 1993, Judge Phillips was appointed a United States Magistrate Judge for the Central District of California, and continues to serve in that capacity today.

In addition to Judge Phillips impressive academic and professional background, she has a bevy of support from Democratic and Republican colleagues, the community of Riverside as well as here in Congress.

In March 1998, Congressman Jerry Lewis wrote to encourage me to nominate Judge Phillips to the bench. Congressman Lewis said "her accomplishments are noteworthy and commendable. I hope you will nominate her for the U.S. District Court Bench. I give her my strongest recommendation."

Congressman Ken Calvert also wrote to encourage me to nominate Judge Phillips. Congressman Calvert commented, "Her accomplishments are obviously impressive and well-renowned. I hope you will nominate her for the U.S. District Court Bench. I give her my strongest recommendation."

Judge Phillip's former colleague, Riverside Superior Court Judge Stephen Cunnison wrote to Chairman Hatch in June 8, 1998 requesting that the Chairman "schedule a hearing date to consider the confirmation of Magistrate Judge Phillip's appointment and that [Chairman Hatch] vote, and urge [his] colleagues to vote, to confirm her appointment." Judge Cunnison went on to say, "She is firm, fair and scholarly. The judges of this court relied extensively on her wisdom and legal acumen, and her departure to the U.S. District Court as a magistrate judge has been a considerable loss * * * I would respectfully suggest that we, as Republicans will stand a bit taller in the public eye if your Committee joins ranks with the President on an appointee as well qualified as Judge Phillips * * *"

The Riverside District Attorney, Grover Trask—a Republican—has said, "I am honored to recommend for your consideration Virginia Phillips for nomination to the Federal District Court, Central District of California * * * Ms. Phillips brings intelligence, fairness and exceptional judicial temperament to the bench. She is highly

respected in both the legal community and our community at large. Her nomination would certainly be welcomed by my office * * * She will make an outstanding federal jurist."

Judge Phillips also has the strong support of Riverside law enforcement community. She has been endorsed by both the Riverside County Sheriff, Larry Smith, and the Chief of Police of Riverside—Gerald Carroll. In addition, the late president of the Greater Riverside Chambers of Commerce—Art Pick—weighed in in support of Judge Phillips nomination.

Judge Phillips has a deep commitment to her community having served on the board of directors for the Riverside Youth Service Center and as chairperson for the City of Riverside Law Enforcement Policy Advisory Committee. From June 1993 through February 1998 Judge Phillips published a monthly book review column for the Riverside County Lawyer, the official publication of the Riverside County Bar Association. And from 1983 to the present Judge Phillips has been a visiting lecturer at the University of California at Riverside's Program in Law & Society.

Mr. Chairman and members of the Committee, I will close by saying that Judge Phillips is an excellent nominee as evidenced by her academic background, professional experiences, bipartisan support, and her well-qualified rating from the American Bar Association. I hope that the Committee will agree that Judge Phillips is deserving of its support and vote to send her nomination to the floor before this session adjourns.

Senator THURMOND. Senator Torricelli.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

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

Mr. Chairman, I am here in support of Faith Hochberg, who has been nominated by the President at my request for the District Court in the State of New Jersey.

Ms. Hochberg was previously nominated by Senator Bradley, and upon his retirement from the Senate, he urged me to follow and nominate her for this Court. I did so gladly and willingly because of her rather extraordinary credentials.

Ms. Hochberg, before becoming the U.S. attorney in the State of New Jersey, was a graduate of Tufts University and from the Harvard Law School where she served as editor of the Harvard Law Review. She clerked for the U.S. Court of Appeals for the District of Columbia, served in private practice for 4 years, then, as an assistant U.S. attorney before joining the U.S. Department of Treasury as a senior deputy chief counsel for the Office of Thrift Supervision.

In 1993, Ms. Hochberg returned to Washington where she was appointed Deputy Assistant Secretary for Law Enforcement for Treasury. In this position, she spearheaded the reexamination and improvement of the Department's antimoney-laundering policies.

Since assuming the role of the U.S. attorney, Ms. Hochberg has excelled in administering, I believe, one of the most impressive offices in the Justice Department, indeed with some of its highest standards. She administers a staff of 220 people. She is known as a leader in the prosecution of white-collar crimes. She serves as a member of Attorney General Reno's advisory committee and as a chair of the Attorney General's subcommittee for white collar crime.

I believe, Mr. Chairman, members of the committee will be exceedingly impressed by her credentials. I am very grateful to you for this hearing, Senator Leahy and Senator Hatch and for consideration of her nomination. Ms. Hochberg has waited not only the years since first nominated, but indeed was through this process

with Senator Bradley several years ago. She has, therefore, been in waiting for some considerable time. I look forward to her prompt consideration by the committee, and then indeed by the Senate.

I believe, Mr. Chairman, you will be very impressed by her testimony, as I am sure you are by her credentials.

Senator THURMOND. Thank you.

Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Senator Thurmond, and my colleagues, Senator Feinstein and Senator Torricelli.

First, I would like to ask unanimous consent to enter into the record on behalf of Judge Anne Claire Williams' statement by Congressman Bobby Rush of Illinois. May I enter this in the record, Mr. Chairman?

Senator THURMOND. Without objection.

[The prepared statement of Mr. Rush follows:]

PREPARED STATEMENT OF CONGRESSMAN BOBBY L. RUSH

Mr. Chairman and members of the Committee,

I take great honor in commending the Honorable Anne Claire Williams to the members of this distinguished committee. Judge Williams is an exemplary candidate for the United States Seventh Circuit Court of Appeals. That a confirmation hearing on Judge Williams' appointment has been scheduled at this time, is a testament to this committee's wisdom.

In 1985, Judge Williams was appointed as an Article III Federal Judge in the Seventh Circuit. When appointed, Judge Williams was the youngest person ever appointed to an Article III judgeship, and the first African-American woman appointed to the Seventh Circuit. Currently, no African-American sits on the Seventh Circuit Court of Appeals. Indeed, no minority sits on the court at this time. Appointing Judge Williams to the Seventh Circuit Court of Appeals will acknowledge her judicial acumen, and provide the Seventh Circuit Court of Appeals with much needed diversity.

In 1998, Judge Williams was elected to the Board of the National Association for Public Interest Law, a program which places law fellows in disadvantaged communities. In 1993, Judge Williams founded Just the Beginning Foundation, an organization which educates the public about the history and accomplishments of African-American Federal judges. Additionally, Judge Williams co-founded the Minority Legal Education Resources, Inc. (MLER), which for 20 years has prepared minority law students to pass the Illinois State bar exam. In 1997, Judge Williams founded the MLER Law School Consortium. The consortium helps minority law students in Chicago area law schools achieve greater success in academics and career planning.

Judge Williams' contributions to the bench and the respect of her colleagues are also well documented. Attorneys who have practiced before Judge Williams have stated that she "is one of the top judges on the bench." Almanac of the Federal Judiciary, 1999. Other attorneys affirm, stating that "she's the best federal judge there," and that "she has all the tools to stand out on any court." *Id.* As further recognition of her judicial acumen, in 1997, Judge Williams was elected President of the Federal Judges Association, an organization consisting of more than 800 Federal district and appeals court judges.

It is rare that we are given the opportunity to confirm an individual such as Judge Williams. She possesses distinctive judicial discernment, and has shown an unrelenting commitment to the judiciary and the community. Confirming Judge Williams to the United States Seventh Circuit Court of Appeals will be a benefit to the Seventh Circuit and to the Nation.

I thank the committee for its swift consideration of Judge Williams' nomination, and I hope that the full Senate will move as swiftly in its confirmation.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Chairman, I noted for the record that you began this hearing with a very complimentary reference to Judge Williams who is

seeking appointment to the U.S. Court of Appeals for the Seventh Circuit. Judge Williams told me before the hearing started that she considered it good luck that you were presiding because you presided over the hearing when she became a Federal district court judge. So we are glad to see you here today and happy that you are joining and supporting her candidacy.

I might also note that my colleague, Senator Peter Fitzgerald, is here on behalf of Judge Williams, as evidence of the fact that she has strong bipartisan support not only at this table, but in our State of Illinois.

She was appointed to the Northern District of Illinois in April 1985 by President Ronald Reagan. At the time of her appointment, she was 35 years old. She was the youngest person ever appointed to the District bench in the Northern District and the first African-American woman jurist to have that opportunity to serve and she has served well as a member of that District Court. In various committees, she has been recognized for her expertise.

We believe she has the qualifications and experience necessary to make a tremendous contribution to the seventh circuit. She has worked as a prosecutor, a district court judge, a leader of the Judicial Conference, and in a variety of community activities.

I could go through her resume, but it is before you. I will not, only to tell you that it is extraordinary. I do note here that while she served on the District Court bench, she continues to teach and lecture at various law schools, including Harvard and Northwestern University. She is very active in community service. She is the founder of the Just the Beginning Foundation, which honors African-American U.S. district court judges and raises funds for scholarships for minority law students.

She is joined today by her family, and I am sure you will have a chance to meet them when she comes to the table. I am sure her parents, Joshua and Dorothy Williams, from Detroit, MI, are very proud of their daughter today and the fact that she is being considered by this Senate Judiciary Committee.

Her husband, David Stewart, is here with their two children, Jonathan, a 17-year-old student at St. Ignatius High School in Chicago, and Claire, a 15-year-old student at the University of Chicago Lab School, and finally, Judge Williams' sister, Drue Williams, is here today from New York.

Let me close by telling you, Mr. Chairman, we are often contacted by a variety of people who ask us to support different candidates for different positions. One of the most unique contacts came about 10 days ago when my wife and I went to Notre Dame University in South Bend, IN, to attend a football game with a team from California, and I will not go into details about the outcome, but I will tell you that as we approached the campus, we met the president of the university, Father Malloy, and he said to me, "Senator Durbin, have I ever lobbied you on anything?" I said, "No, Father, I do not believe you have." He said, "Well, I am about to. Do everything you can to help Anne Williams become a member of the Circuit bench in that district." They feel so strongly about her candidacy because she serves as secretary to the board of trustees at Notre Dame University, in addition to her many other activities,

and that is why I am excited to be here today and support her candidacy.

Thank you, Mr. Chairman.

Senator THURMOND. My good friend, Senator Fitzgerald.

STATEMENT OF HON. PETER FITZGERALD, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator FITZGERALD. Thank you, Mr. Chairman and Senators Feinstein and Torricelli, and, Senator Durbin, I am pleased to join with you here in support of Judge Anne Williams.

I wonder if Judge Williams might be able to stand and be recognized. Thank you for being here with your family and your parents from Detroit. We appreciate your being here.

Judge Williams, as Senator Durbin said, was appointed to the Federal bench by President Reagan back in 1985 at which time she was only 35 years old. She was one of the youngest Federal district court judges in the country, and she has had 15 years of serving with distinction in the Northern District of Illinois. In fact, going some years back, I remember appearing before Judge Williams as an attorney in a particular case. So I am pleased to be here today.

As Senator Durbin pointed out, she is a graduate of Notre Dame Law School. Her undergraduate degree is from Wayne State University. Judge Williams also holds a master's degree from the University of Michigan. She served ably as an assistant U.S. attorney in the Northern District of Illinois from 1976 to 1985. Prior to that time, Judge Williams was a clerk for Judge Robert A. Sprecher of the U.S. Court of Appeals for the Seventh Circuit.

I am pleased to stand here with Senator Durbin today. I would ask for unanimous consent that my full statement be submitted for the record.

Senator THURMOND. Without objection, so ordered.

[The prepared statement of Senator Fitzgerald follows:]

PREPARED STATEMENT OF SENATOR PETER G. FITZGERALD

Thank you Mr. Chairman, for holding this hearing to address a number of judicial nominations. I would like to take this opportunity to introduce one of my constituents, Judge Ann Claire Williams, to the Committee. President Clinton has nominated Judge Williams to fill a vacant seat on the United States Court of Appeals for the Seventh Circuit.

Judge Williams received her law degree from the Notre Dame Law School and her undergraduate degree from Wayne State University. Judge Williams also holds a Masters degree from the University of Michigan. She served as an Assistant U.S. Attorney in the Northern District of Illinois from 1976 to 1985. Before joining the U.S. Attorney's office, Judge Williams clerked for Judge Robert A. Sprecher of the United States Court of Appeals for the Seventh Circuit.

In 1985 President Reagan appointed her a United States District Judge in the Northern District of Illinois, where Judge Williams continues to serve today. Judge Williams is a well respected District Judge.

Attorneys throughout the City of Chicago speak highly of her skills on the bench. I also understand that the American Bar Association has concluded that Judge Williams is qualified for appointment to the Seventh Circuit. This sentiment is shared by many in Illinois' legal community, including the Illinois State and Chicago Bar Associations.

I hope that this Committee and the Senate will continue to move this nomination forward. Mr. Chairman, I would like to thank you again for considering this nomination.

Senator FITZGERALD. Thank you.

With that, I would like to thank the committee for its attention and also thank you for moving so quickly to fill the vacancy in the seventh circuit.

Senator THURMOND. Thank you.

Congressman Calvert.

STATEMENT OF HON. KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative CALVERT. Thank you, Senator.

Mr. Chairman, I would like to express my appreciation to you and Senator Feinstein and this committee for conducting today's District Court Judge nomination hearing. I am excited to be before the Senate Judiciary Committee, in support of Virginia Phillips, a highly qualified nominee to serve as U.S. district court judge for the Central District of California.

Without the risk of being redundant, I would ask that my complete statement be entered into the record.

Senator THURMOND. Without objection, so ordered.

Representative CALVERT. I ask the committee's support of Judge Phillips who enjoys tremendous bipartisan support from the Inland Empire, Riverside and San Bernardino community, where she served as a California State judicial officer and now as U.S. Magistrate judge for the Central District in California.

As was mentioned earlier, the Central District of California is composed of over 18 million people, and more than 3 million people in the Eastern Division, the Counties of Riverside and San Bernardino. My home in Riverside County now has over 1½ million people and is one of the fastest-growing areas in the Nation.

Mr. Chairman, before closing, I would like to submit a complete list of folks throughout my area and the State of California who are enthusiastic supporters of Judge Phillips, many local, State, Federal supporters, including Senator Feinstein, Senator Boxer, Jerry Lewis which was mentioned earlier, Ron Packard, all recommending that she be confirmed today or confirmed soon to take over the position that we sorely need her in.

To conclude, again, I reiterate my support for Judge Virginia Phillips and ask the committee also to support her nomination and confirmation to the U.S. District Court judgeship in the Center District of California.

With that, I thank this committee for having me here today.

[The prepared statement of Representative Calvert follows:]

PREPARED STATEMENT OF REPRESENTATIVE KEN CALVERT

Mr. Chairman, I would like to express my appreciation to you, Ranking Member Senator Patrick Leahy and this Committee for conducting today's District Court Judge nomination hearing. I am excited to be before the Senate Judiciary Committee in support of Virginia Phillips, a highly qualified nominee to serve as a United States District Court Judge for the Central District of California.

I ask the Committee's support of Judge Phillips, who enjoys tremendous bi-partisan support from the Inland Empire (Riverside and San Bernardino) community, where she has served as a California State Judicial Officer and now as a United States Magistrate Judge for the Central District Court in California.

Judge Phillips received her B.A., Magna Cum Laude, from the University of California, Riverside in 1979, and later obtained her J.D. from the University of California, Berkeley Boalt Hall School of Law. Her professional activities include: Board of Directors member of the Federal Bar Association—Inland Empire Chapter; Chairperson of the City of Riverside Law Enforcement Policy Advisory Board; Board of

Directors member with the Riverside Youth Center; member of the Riverside Human Relations Committee; and much, much more. Her life long commitment to the Inland Empire community is obvious and compelling.

The Central District of California is composed of over 18 million people, with more than three million people in the Eastern Division—the counties of Riverside and San Bernardino, California. My home area of Riverside County has over 1.5 million people and is one of the fastest growing areas in the nation.

The Eastern Division is in critical need of a second district court judge and I ask the Committee to confirm Judge Phillips to fill this need. At this time, our Eastern Division's one district judge is faced with such a staggering caseload that the overflow of cases are sent to our Western Division each month. The result is a large number of litigants, witnesses, lawyers and law enforcement officers having to travel to Los Angeles, some sixty (60) miles away, on some of the most congested roads in the United States.

Mr. Chairman, before closing, I would like to submit a compilation of Judge Phillips many local, state and federal supporters and the many letters of recommendation written on her behalf. They include Representatives Jerry Lewis and Ron Packard, Senators Diane Feinstein and Barbara Boxer, Riverside District Attorney Grover Trask, County of Riverside Sheriff Larry Smith, and City of Riverside Mayor Ron Loveridge—just to name a few. To conclude, I again reiterate my support for Judge Virginia Phillips and ask that the Committee also support her nomination and confirmation to the United States District Court judgeship in the Central District of California.

PARTIAL LIST OF PEOPLE WHO HAVE WRITTEN LETTERS IN SUPPORT OF VIRGINIA PHILLIPS

The Honorable Ronald Packard, Member of Congress
The Honorable Ken Calvert, Member of Congress
The Honorable Jerry Lewis, Member of Congress
Sheriff Larry Smith (County of Riverside)
Gerald Carroll, Chief of Police, City of Riverside
Grover Trask, District Attorney, County of Riverside
Ron Loveridge, Mayor of City of Riverside
Tom Mullen, Supervisor, 5th District
Raymond Orbach, Chancellor of University of California, Riverside
Marcia McQuern, Editor and Publisher *Press-Enterprise* newspaper
Inland Action, Inc., Donald Singer, President (San Bernardino Business Leaders)
Monday Morning Group of Western Riverside County (Riverside Business Leaders)
Dennis E. Wagner, Deputy County Counsel
Alan Marks, County Counsel of San Bernardino
Margaret Spencer, Public Defender of Riverside County
Art Pick, President/CEO Riverside Chamber of Commerce
Kay Ceniceros, Dean, San Jacinto Junior College
Anne Thomas, Esq.
Virginia L. Field
Mark Schnitzer, Esq.
Salvatore Rotella, President of Riverside Community College
Stephen Cunnison, Judge of the Superior Court
Rene H. Pimental, Esq., President of Inland Empire Latin Lawyers
Harry Freedman
Debbi Huffman Guthrie, President
Dan G. McKinney, Esq.
Donald Ecker, the Managing Partner of Ernst & Young office in Inland Empire
Geoffrey Hopper, Esq.
Robert Krieger
Christopher Carpenter, Esq.
J.D. Butterwick, Esq.
Theodore Stream, Esq., President of local Federal Bar Association
Katherine Warren
Donald Zimmer, Esq.
Gene Tanaka, Esq.
Robert Bowers
Brenda Bowers
Vicki Broach Griffith
David Moore, Esq.
Nicholas Goldware
Max Neiman

James Erickson, Vice Chancellor of Development at University of California, Riverside
Judge Victor Miceli, Judge of the Superior Court
Arthur L. Littleworth, Esq.
Terry Bridges, Esq.

Senator THURMOND. Thank you very much.

I ask that each nominee come and stand at the witness table and raise your right hand, and I will administer the oath.

Raise your right hand. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WILLIAMS. I do.

Ms. HOCHBERG. I do.

Judge MCCARTHY. I do.

Judge PHILLIPS. I do.

Senator THURMOND. Have a seat.

If any of you have an opening statement or would like to introduce any family or friends who are with you here today, please feel free to do so at this time. We will start the hearing with Judge Williams and go down the line.

Judge WILLIAMS. Mr. Chairman, would you like me to proceed first, to introduce my family?

Senator THURMOND. Yes.

TESTIMONY OF HON. ANNE CLAIRE WILLIAMS, OF ILLINOIS, TO BE U.S. CIRCUIT COURT JUDGE FOR THE SEVENTH CIRCUIT

Judge WILLIAMS. I am very pleased, Mr. Chairman.

Senator THURMOND. You can stand up, if you want to.

Judge WILLIAMS. All right. Thank you, Mr. Chairman. I am very pleased to have this hearing today and very honored, Mr. Chairman, because about 15 years ago you presided over my first confirmation hearing.

Senator THURMOND. I am glad to have you back.

Judge WILLIAMS. And I am happier to be back.

I have with me, and I am thrilled to have with me, my parents who were with me 15 years ago.

Senator THURMOND. Stand up.

Judge WILLIAMS. My father, Joshua Williams, who has been living in the Greenville area for the last 10 years, my mother, Dorothy Williams, who lives in Detroit, my husband of 20 years, David Stewart, who was born in Columbia, SC, my two children, Jonathan Williams Stewart and Claire Elizabeth Williams Stewart, who are much bigger, Mr. Chairman, than they were 15 years ago. Also here is my sister, Drue Williams, from New York, the father of my godchildren, Lyle Logan, and many friends and colleagues from the Court Administration and Case Management Committee where I served as chair. In addition, Vincent Barnes is here who is on the staff of Congressman Bobby Rush, my Congressman who unfortunately could not be here today due to the death of his son, and other friends and supporters. The only member of my family who is not here is my sister, Marsha, from Detroit, who unfortunately could not attend.

Senator THURMOND. Well, tell her we missed her.

Judge WILLIAMS. I will do that, Mr. Chairman. Thank you.

Senator THURMOND. We are glad to have all of you.
Senator Abraham, would you like to make a statement?

STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM. I would, and I appreciate the chair's indulgence, and my colleagues. If I could just make a brief statement. I have to be at another place at this point and cannot stay for the hearing, but I just wanted to come by and welcome Judge Williams to our Senate Judiciary Committee today. As the Senator for Michigan, I am proud of the fact that she is a native of our State and went to Wayne State University, I believe, and the University of Michigan Law School. I am not so happy that she then left Michigan and took her great skills and talent to another jurisdiction, but I just wanted to come by because she has much strong support among a number of mutual friends in our State, and I just wanted to come by to wish her a warm welcome and wish her the best in this process and to welcome her family as well. We are very proud of her achievements.

Judge WILLIAMS. Thank you so much, Senator.

Senator THURMOND. We gave her a good start in South Carolina.

Senator ABRAHAM. Thank you.

Senator THURMOND. Thank you very much.

Senator ABRAHAM. Thank you.

Senator THURMOND. Faith Hochberg of New Jersey to be U.S. district court judge for the District of New Jersey.

TESTIMONY OF FAITH S. HOCHBERG, OF NEW JERSEY, TO BE U.S. DISTRICT COURT JUDGE FOR THE DISTRICT OF NEW JERSEY

Ms. HOCHBERG. Yes, Mr. Chairman. Thank you very much for the honor of——

Senator THURMOND. Do you have a statement you would like to make?

Ms. HOCHBERG. Yes, I would, Your Honor—Mr. Chairman. I would like to thank you for the privilege of appearing before this committee today, and I would like to thank Senator Torricelli for his very kind introduction.

I would also like to introduce my family to you and ask them to stand; my father, Mr. Oscar Shapiro, and my mother, Mrs. Judi Shapiro. They have been married over 50 years and have retired nearby in the Silver Spring area.

Also with me today is my husband of 23 years, Dr. Mark Hochberg, and my daughter, Alyssa Hochberg, and my son, Asher Hochberg. I am very, very proud of them. Finally, my executive secretary who has helped me so much during my entire tenure as U.S. attorney, Ms. Nancy Manteiga.

I am very pleased that they are with me today, Senator.

Senator THURMOND. Most of the time, we have judges who are not so nice looking and I congratulate you.

Ms. HOCHBERG. Thank you.

Senator TORRICELLI. Mr. Chairman, if I could. It is going to be hard to follow that compliment.

I am very proud, Mr. Chairman, to bring Ms. Hochberg before the committee. I have had the honor to make three suggestions to President Clinton on judicial nominees, Maryanne Trump Barry who only yesterday took the oath of office for the circuit court, Judge Fuentes who I expect to be before this committee very soon for the circuit court, and Faith Hochberg for the District Court of New Jersey.

I believe, Mr, Chairman, as I suggested in my comments that she is an excellent candidate, and I think members of the committee will be extremely impressed with her. We have been very fortunate in New Jersey to have a very high quality in the Federal bar and the Federal judiciary, and I believe, as Senator Bradley did before me in nominating Faith Hochberg for this court, that she is an excellent choice, and I wanted to welcome her for a second time.

Ms. HOCHBERG. Thank you very much.

Senator THURMOND. Frank McCarthy of Oklahoma.

TESTIMONY OF HON. FRANK H. McCARTHY, OF OKLAHOMA, TO BE U.S. DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF OKLAHOMA

Judge MCCARTHY. Yes, Mr. Chairman. I would like to thank the committee for having me here today and the courtesy that you are extending to me by holding these hearings.

Unfortunately, my wife was unable to attend today. She is at home taking care of our young children, but we are very pleased that we are being allowed to be here today, and I want to thank the committee for this courtesy.

Senator THURMOND. Virginia Phillips of California.

TESTIMONY OF HON. VIRGINIA A. PHILLIPS, OF CALIFORNIA, TO BE U.S. DISTRICT COURT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge PHILLIPS. Thank you, Mr. Chairman, and thank you to the committee for the privilege of being here today.

I have a number of people who have traveled far that I would like to introduce, and I will ask them to stand up as I mentioned them.

Representing my family, my mother and my seven brothers and sisters, is my brother, Patrick Ettinger who has traveled here from Indiana.

I am very honored also to have the chief judge of the district court on which I serve as the Magistrate judge, Judge Terry Hatter here today, and I appreciate his kindness in leaving his other meeting so that he could be here.

I have a number of other longtime friends who are here, my two closest friends for the last 20 years since we started law school together, Elise Chaffin Clowes and Vicki Broach, who have traveled here from California, my friend, Louis Masur, Professor Masur, from City College of New York, who is a colleague of my husband's and a friend of his and also a friend of mine, and I am very happy that he is here today.

Without turning around—let's see. There's a few others. Two of my law clerks are here, Mr. Chairman, and my very first law clerk for me at the district court, Angela Parrott, who hails originally

from Columbia, SC, and I know who is very happy to be here and to see you, and my current law clerk, Mark Ehrlich. He has traveled here from California, and finally, one other friend, Marilyn Bednarski, who has also traveled here from Los Angeles. I appreciate all of them attending and showing their support.

I also want to mention two other people who cannot be here physically with me today, as they are no longer here with us, and that is my father, Edwin Ettinger, and my husband, John Phillips. And I wish to acknowledge my debt to them and their continuing presence in my life.

Senator THURMOND. Thank you.

I would like to recognize Judge Terry Hatter, Jr., of California who is attending the hearing today. We are pleased to have him with us.

Judge HATTER. Thank you, Mr. Chairman.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Thank you.

Judge Williams, in our tripartite system of government, the Congress under the Constitution makes the law. The President and chief executive enforces the law. The Judiciary interprets the law. Some judges seem to think they have the authority to make the law. What is your opinion of my interpretation of our system of government?

Judge WILLIAMS. I think, Mr. Chairman, your interpretation is absolutely accurate. The Constitution calls for three branches to perform the roles as you have described. The role of the judge is to look at the facts and the law presented in a particular case and to rule accordingly. It is not the role of the judiciary to make laws or create laws. That is the role of Congress, and so I agree with your analysis, Mr. Chairman.

Senator THURMOND. It makes me feel better that you agree.

Judge Williams, in *Lifters* v. *Hartigan* in 1990, you held that an Illinois statute prohibiting an experimental medical procedure was unconstitutionally vague and violated a woman's constitutional right to privacy regarding her right to terminate her pregnancy. Please explain to the committee your ruling in this case.

Judge WILLIAMS. All right. Mr. Chairman, it was a State law that prohibited fetal experimentation unless it was therapeutic to the fetus. What I did was look at Supreme Court precedent as well as circuit law to determine whether or not that statute was clear, whether a doctor who was asked to be involved in an experimental project would have sufficient guidance from the language of that statute.

I did as I always begin with any State statute or any Federal statute with the presumption that it was constitutional. Once I then looked at the language of the statute to determine whether the language was clear and whether someone who read the statute would understand it and what effect it would have, I looked at the statute and found that the language was ambiguous, and then in that opinion laid out various examples of why the statute was ambiguous.

I spent the first 14 pages or so dealing with that particular issue and then the last page of the opinion also talked about the right

to privacy and the fact that it violated that from a constitutional standpoint as well.

I think if you have had an opportunity to look at that opinion, I went into great detail explaining the various ways that that law could be interpreted by doctors and felt that in order to be complete, I needed to reach that final issue. I also had anticipated that this was the kind of case that might be appealed and wanted to be as complete as possible, and so that is why I offered an alternative grounds that was consistent with the law of the land.

As it turned out, that case was not appealed on substantive grounds. It was appealed for another reason, but the plaintiffs—the defendants in that case never appealed.

Senator THURMOND. Thank you.

Ms. Hochberg, it is my view that judges should have judicial temperament. The more power an individual has, the more courteous he or she should be. Probably no one in our society has more power over the lives of individuals that the Federal judge. So it is especially important that someone in this role be courteous and civil. Do you agree?

Ms. HOCHBERG. I certainly do, Mr. Chairman.

I absolutely agree with your belief that it is the judge's job not only to administer his court efficiently, but to make sure that he or she is fair and, above all, civil and courteous to each of the lawyers and each of the parties appearing before that judge in the courtroom. There is no room in our system or incivility, and I share your views wholeheartedly.

Senator THURMOND. Judge McCarthy and Judge Phillips, I would like to ask you about the Prisoner Litigation Reform Act, which was an attempt to limit prisoner litigation and court involvement in prison operations. Do you believe that act has been beneficial to the legal system, or do you believe it places too many restrictions on the ability of the judges to remedy constitutional violations in the prisoner context?

Judge MCCARTHY. Mr. Chairman, I have had the opportunity to work with those——

Senator THURMOND. Speak in your machine.

Judge MCCARTHY. I have had the opportunity to work with those reforms that you have mentioned concerning prisoner litigation. I have found them to be very helpful to the courts in streamlining our processes and in weeding out from the courts those cases which do not properly belong before us. So I support those reforms, and I found them to be as a practical matter very helpful to the courts.

Senator THURMOND. Judge Phillips.

Judge PHILLIPS. Thank you, Mr. Chairman.

I agree with my colleague Judge McCarthy's remarks. I, too, as a Magistrate judge, have the opportunity to work with the PLRA on a daily basis, and it does give us as judges added responsibilities to monitor the cases filed by incarcerated persons. I believe, as Judge McCarthy indicated, that that responsibility is well placed, and that some of the clarifications that PLRA has made have enabled us to manage our cases justly and efficiently.

Senator THURMOND. Judge Phillips, there has been much controversy about judges overturning the will of the people through voter initiatives in California such as proposition 209. Should

judges show deference to the voters when reviewing the constitutionality of voter initiatives?

Judge PHILLIPS. Thank you, Mr. Chairman.

Any initiative, judge like any other piece of legislation enacted by the legislature, carries with it a very strong presumption of constitutional validity. So, in determining—resolving any challenge to an initiative, one starts with that very strong presumption of constitutional validity, and it would be a very, very grave matter indeed for a judge to find that an initiative duly enacted by the people did not satisfy constitutional muster.

Senator THURMOND. Now, all of you answer this question. You may start and go down the line. Do any of you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Judge WILLIAMS. I do not, Mr. Chairman. The Supreme Court has spoken, and I do not have any reservation about imposing the death penalty.

Ms. HOCHBERG. I do not either, Mr. Chairman. I have been enforcing that law during my tenure as U.S. attorney, and I would have no difficulty whatsoever in continuing to uphold that law as a district judge if I were to be confirmed.

Judge MCCARTHY. I likewise would have no reservation at all, Mr. Chairman, to impose that law.

Judge PHILLIPS. Thank you, Mr. Chairman.

I agree with my colleagues. The Supreme Court has found the death penalty to be constitutional, and I will follow the law.

Senator THURMOND. Thank you all very much.

Judge MCCARTHY. THANK YOU, MR. CHAIRMAN.

Judge WILLIAMS. Thank you, Mr. Chairman.

Ms. HOCHBERG. Thank you.

Judge PHILLIPS. Thank you.

Senator THURMOND. You answered the question well.

Senator Feinstein, we would call on you now for any questions.

QUESTIONING BY SENATOR FEINSTEIN

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

I would like to ask Judge Williams the first question, if I might. You mentioned that you served as chair of the Court Administration and Case Management Committee of the Judicial Conference of the United States. As I understand it, this body makes policy recommendations to the Judicial Conference concerning issues of court administration and case management for the Federal judiciary. I think one of the issues you worked on was the efficient movement of civil cases through the courts.

What findings, if any, did you make on how to expedite civil cases?

Judge WILLIAMS. Well, the Civil Justice Reform Act, which really grew out of this committee because it was an initiative of Senator Biden, caused the Federal courts to closely examine the procedures that were in place in all district courts and set out some principles that we should abide by in moving cases through the system in an expeditious manner.

As a result of that initiative, we gathered data on thousands of civil cases to try to determine what was an effective way to move cases. Judges had always felt—or many judges had felt that it was very important for a judge to get involved early on in managing a case, and that that was an effective technique. I think the Biden study showed support for that concept.

Another thing that judges felt was useful in helping to move cases was setting a firm trial date so that the litigants knew that cases were going to trial, they had a firm trial date, they would work toward that goal and would move it along.

As a result of that initiative, we examined various techniques, and now many districts have adopted plans tracking cases, putting cases that are not as complex on a fast track, cases that are very complex on a longer track, but I think the bottom line is we recognize in the judiciary that judges cannot sit back and just let the cases move along at their own pace. We have to have a plan that we work on with the lawyers, making sure that everyone has an adequate time for discovery, and making sure that the law is followed, but that kind of plan is necessary in order to move the cases along.

Senator FEINSTEIN. Thanks very much.

Under what circumstances, if any, do you believe an appellate judge should overturn precedent?

Judge WILLIAMS. Well, an appellate judge is bound, I think, by the oath that we take, just as I took an oath as a district court judge to follow the precedent of the Supreme Court, and that is what I would do if I were appointed to the court of appeals.

Senator FEINSTEIN. So are you saying that there are no circumstances?

Judge WILLIAMS. I think it would be an extremely rare circumstance where a circuit judge would enter an opinion to overturn a Supreme Court decision when that Supreme Court law was there. I can't think of a circumstance, Senator Feinstein.

Senator FEINSTEIN. Thanks very much.

Ms. Hochberg, let me ask you this question. Your résumé demonstrates, I think, a very, very legal background. You have worked in government agencies, in private law practice, served as U.S. attorney in New Jersey. How do you think these experiences will help you as a district judge?

Ms. HOCHBERG. Senator Feinstein, if I am fortunate enough to be confirmed, I will draw very heavily on my nearly quarter century of background in different aspects of practicing law. I think there is no substitute for the experience of having been there, of having done a particular job, to be able to empathize with the persons appearing before you, to maintain that degree of courtesy towards them that the chairman was so wise in noting.

It is extremely important to me to be fair to all parties who appear before my court and not have anyone appear before me and make any assumption that because I was the U.S. attorney that I would favor any party over any other, and I believe that the breadth of my experience, both in the defensive cases in the private bar and my decade of service in the public sector, has given me the reputation of being fair to one and all, and I think that will serve me very well as I proceed.

Senator FEINSTEIN. Thank you.

In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis?

Ms. HOCHBERG. Stare decisis is extremely important. It is the doctrine under which our judicial system is pinned, and it is necessary to adhere to that doctrine, to have the degree of continuity that is necessary for our legal system.

As a district court judge, I would, of course, be bound by all of the precedents of the third circuit, as well as the U.S. Supreme Court, and, of course, above all else, the U.S. Constitution. So that is a very important doctrine.

Senator FEINSTEIN. Thank you very much.

Judge McCarthy, what would be your views on stare decisis?

Judge MCCARTHY. I don't have a whole lot to add to the statements that have already been made. As a district court judge, we are completely bound by the pronouncements of the Supreme Court, and in my case, it would be the tenth circuit. And I would be required and gladly follow those precedents and apply them in the cases before me.

Senator FEINSTEIN. Now, in your career, you worked for 10 years in the Tulsa County Public Defenders Office and then subsequently 3 years in the U.S. attorney for the Northern District of Oklahoma. So you have had both sides of the aisle, so to speak.

How do you think this experience has affected your approach as a Magistrate judge?

Judge MCCARTHY. I think it aids me tremendously in being able to see the different perspectives that people and litigants come to the court with. It allows me to give them the time to present their arguments, present their case, and do so in an efficient way, but also to make sure that you hear both sides to the particular dispute that is before you. I find that experience to be very helpful in my current job, and I know that it would be helpful if I were to be confirmed for the job of district judge.

Senator FEINSTEIN. What in your opinion constitutes sound judicial temperament?

Judge MCCARTHY. Sound judicial temperament, I think, is extremely important. I see no reason why the business of the courts cannot be conducted in an efficient way, but yet in a very professional way. So a judge should be civil toward all of the participants in the process, but at the same time be firm and make sure that the rules are followed. That can be done. It is not an either/or proposition. You can be very firm and guide the cases through in a proper way without having to be overbearing or uncivil. So I think temperament sets the tone for the entire courtroom, and the litigants tend to live up to the tone that is set by the judge.

Senator FEINSTEIN. Thank you very much.

Judge Phillips, let me ask you a question. You are apt to have a very big docket. Do you have any thoughts at this point as to how you would handle that docket?

Judge PHILLIPS. Well, I think that one of the things that is important in order to handle a docket efficiently is to get involved, for the court to get involved at the very beginning by scheduling conferences with the counsel on the case, to, among other things, determine which cases are ripe to be perhaps sent out for settlement

or some other form of alternative dispute resolution, to let the attorneys know that I am aware of what their case is about, to assist them in paring it down and focussing the case, and to—as my colleague, Judge Williams, mentioned, I think one of the things that is very important is to set a firm trial date and to remind the attorneys that we have a firm trial date, to rule on all matters that are before me in a prompt and judicious manner so that the case is ready to go to trial as we originally thought.

Senator FEINSTEIN. If you could project yourself, let's say, 10, 15 years down the pike as a Federal judge, how would you like to be regarded? What do you believe would be the qualities that you would want people to believe you held?

Judge PHILLIPS. That I'm hard-working, that I'm always prepared, that I listen to all sides before making up a—before making up my mind or rendering a decision, that I'm well versed in the law, and that I treat everyone in my courtroom, the attorneys appearing in front of me, the witnesses, the courtroom staff, and perhaps most importantly the jurors with dignity and respect and courtesy.

Senator FEINSTEIN. Good statement.

Judge PHILLIPS. Thank you.

Senator FEINSTEIN. Thank you very much. I thank all of you very much.

Thank you, Senator.

Senator THURMOND. Senator.

QUESTIONING BY SENATOR TORRICELLI

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

Let me first congratulate each of the President's nominees on their candid answers to the questions. I thought, Mr. Chairman, their endorsement of the death penalty, considering the views of some members of this committee, showed particularly a good judgment. The only advice I would have in the future to really get the enthusiastic support of the committee would be to say that they not only support the death penalty, but believe generally it does not go far enough.

Senator FEINSTEIN. I hope that is humorous.

Senator TORRICELLI. It is.

I am going to address my questions to Faith Hochberg, but indeed I want to invite each of the other nominees to respond to the extent that they would like to.

I can think of three principal words that led me to believe that nominating you was a good decision for President Clinton. One of those is independence, my hope being that you recognize that you are in the Federal Government, but not of the Federal Government; that indeed you are a bulwark of protection for the people against some of the excesses of the Government itself; and that in your concept of this position, you recognize that you are not an agent of any Federal agency; and that indeed sometimes the most pernicious of threats to American liberties can come from the excesses of government itself.

Ms. HOCHBERG. Senator, I agree with what you have said. I understand that there are three branches of government, and that the Framers of our Constitution were extremely wise in setting up that

system which has within it the important checks and balances which I think has made our form of government the most important and best one in the world.

I fully understand the difference between the executive branch of government where I now reside and the judicial branch of government which requires a judge to independently interpret the law, interpret the law, not make the law. A judge must understand that laws are made by the Congress of the United States, that they are enforced by the executive branch, and that they are interpreted fairly and neutrally by the judicial branch of government. I believe in that separation of powers doctrine. I think it is what makes us the strongest and yet the fairest country on earth, and I would have no hesitation whatsoever in taking on that role.

Senator TORRICELLI. Well, this gets to the second word which is "integrity," and integrity in our society is measured in many manners.

The one that matters the most to me in the Federal judiciary is that you can work every day with Federal agencies, law enforcement agencies, the IRS, and a variety of other agencies. They can be friends and they can be colleagues, but the individual American citizen who appears before you that you might have never met before and never come to ever meet again, nevertheless, gets an equal chance, that that Government agency gets no special provisions, no special rights, no ability to abuse the citizen, simply because you know them or you have worked with them.

To me, for the Federal judiciary, that is real integrity because you are guaranteeing that individual an equal chance.

Ms. HOCHBERG. Every litigant in the courthouse has a right to a fair and open ability to have the judge's attention and for the judge to consider fairly his or her position, regardless of what entity, agency, or person backs the person before you in the courthouse. They are equal in the eyes of the law, and it is essential that their positions be evaluated on their merits with no preconceived notions. That is what independence means, and that is what I will do.

Senator TORRICELLI. The last word, Senator Thurmond already alluded to, and that is "respect." Many Americans can go through most or all of their lives and have little contact with a senior level of the Federal Government. It is critical that when they appear before a Federal judge that they are accorded civility and respect.

Ms. HOCHBERG. That is absolutely correct, and I think the chairman said it extremely well in the remarks that he asked us if we agreed with. We absolutely agree. The more power you have, the more incumbent upon you not to be arrogant, to maintain fairness, decorum, and treat every person before you and in your courtroom with dignity.

Senator TORRICELLI. And finally, one of the problems we have had with our judiciary in New Jersey is they have been very able people, but I have not often thought there has sometimes been enough life experience.

One of the benefits that I believe that you bring to the Federal judiciary in our State is as the newest member you will get some of the worst assignments. The worst assignment is always, with the end of the century, congressional redistricting, which has be-

come an enormous problem with the division of communities, breaking systems of representation. Very often, the newest Federal district judge will end up drawing these lines.

All that I can say to you on that is to be practical, to respect the political subdivisions, to assure that everybody does get equal representation, but also to do so with an understanding of the practicalities of representation. We have done some real damage to this system of representative government by how these lines have been drawn.

If I could, while I have addressed my questions to Ms. Hochberg, if anyone else would like to comment on any of those points, I would be glad to invite you to do so.

If not, maybe I could ask a general question, then, of each of the nominees. There is this evolving new doctrine of the law of exactly what is the appropriate standard on these redistricting cases. It was a strict one man-one vote based on the last census. That seems to have eased in recent cases. We had gone to enormous lengths at court mandate on racial and ethnic drawings of lines in which the court now clearly has an evolving notion as well.

As I suggested, very often these cases go and are decided and drawn at the district court level. Can any of you—if indeed you can give an accurate assessment of where this body of the law is, you would be the only four people in America—but nevertheless I think an appropriate question to get your feelings about where we are with it.

Judge WILLIAMS. Well, Senator, I have to say that I have not had a redistricting case presented to me.

Senator TORRICELLI. Which is only to your benefit.

Judge WILLIAMS. Right.

And if such a case were to be presented before me, of course, I would have to look to the precedence set by the Supreme Court, the law of our circuit, the facts that are presented, and to make those judgments. I can't give you an answer to that question because I don't know all the facts and I don't have the law before me.

Judge MCCARTHY. Senator, I likewise have not had to face the redistricting issue. I can tell you that a more serious case to bring before the court would be hard to imagine than the responsibility that would be before the judge in such a case, and that would be a case that we would need to be especially careful in hearing all sides and making a fair determination on.

Judge PHILLIPS. And, Senator, I, too, have not yet faced such an issue. I agree with what Judge Williams had to say, and I would add only that in addition to the principles that she so ably stated, it would be the type of case where one, as with any case, but particularly in a case with those issues—would keep in mind the tripartite form of government we have and the different functions of the different branches, the function, of course, of the judicial branch being to apply the existing precedence to the facts of the particular case in front of me.

Thank you.

Senator TORRICELLI. Let me just conclude, then, that you would find, as I suggested in my opening comments, that in this Senate on issues of punishment, the standard can never be high enough. Indeed, the death penalty itself largely is as close to a consensus

issue as you can now develop, I think, in the political establishment in this country, but there is another side of this that is almost never raised and I will leave you with it, and that is, the people that you will sentence to incarceration, the standards by which in this country we are now incarcerating people, the manner in which they live, the breeding of crime that we do in these institutions, sometimes the inhuman way in which people are kept, not only to their individual detriment, but to the societies at large given the kind of individuals who are bred in these institutions.

You will in the course of your long tenure on the court also hear many cases and many complaints. This Congress, like most State legislatures, does not often provide the resources to ensure that people who have done wrong, sometimes great wrongs, and should be incarcerated and sometimes for a long period of time, nevertheless retain at least some sense of the human dignity in their conditions, lest they become larger problems for society or lose their lives themselves. That is in your hands.

In our political system today, they will have no other defenders, no other advocates. There is no constituency in the country for them, and there are few in this Congress. Only you will stand before them.

I congratulate each of you. It is going to be an extraordinary experience in life, a wonderful opportunity to serve our country. Any time in being involved in this process, I am always reminded that long after I leave the Senate, indeed most of us leave the Senate, you will continue to impact public policy and the lives of Americans. You are extensions of each of our own careers for a long, long time. Good luck to you.

Judge WILLIAMS. Thank you.

Ms. HOCHBERG. Thank you.

Judge MCCARTHY. Thank you, Senator.

Judge PHILLIPS. Thank you.

Senator THURMOND. I would ask that any followup questions from members be submitted to the committee by the end of Friday of this week.

Does anybody have any further questions?

Senator FEINSTEIN. No. Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you.

I want to thank all of you. I congratulate you and wish you well. If you come by, I would be glad to shake hands with you.

Judge WILLIAMS. All right, Mr. Chairman.

[The questionnaires are retained in committee files.]

Senator THURMOND. We stand adjourned.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF ANNE C. WILLIAMS TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II. Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The Constitution establishes three branches of government. "The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers." *See Public Citizen* v. *United States Dep't of Justice.* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). Congress makes the laws, the Executive enforces the laws, and the courts interpret the laws. In accordance with these roles, the President appoints judges with the advice and consent of the Senate. *See* U.S. Cost., art. II. §2, cl. 2; 28 U.S.C. §44 (appointment of circuit judges); *id.* §133 (appointment of district judges). Hearings are held in furtherance of this rule and offer Senators the opportunity to review the qualifications of nominees and to determine whether nominees will abide by the Judicial Oath and the Constitution, and whether nominees will apply legal precedent and the laws of this Nation.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. It is the role of the Senate to review the qualifications of judicial nominees. It is appropriate for the White House and the Senate to inquire about the views of nominees to determine whether the nominee will be bound by oath, and will follow the Constitution, the laws, and judicial precedent.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. The President appoints judges with the advice and consent of the Senate. *See* U.S. Cost., art, II, §2. cl. 2; 28 U.S.C. §44 (appointment of circuit judges): *id.* §133 (appointment of district judges). The Senate sets up the framework for Judicial Nomination Hearings and decides through its rules and practices the types of questions to be asked of nominees.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution are there any circumstances under which the judge may refuse to apply precedent to the case before him or her?

Answer. No. A U.S. District Court Judge or U.S. Court of Appeals Judge must follow the relevant Supreme Court precedent.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford*?

Answer. Yes. I am familiar with the case of *Dred Scott* v. *Sandford.*

Question 7. If you were a Supreme Court Justice in 1856, what would you hold in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. In *Dred Scott* v. *Sandford,* the Supreme Court held that Black slaves were not citizens of the United States. Your question about this historic case is challenging and hypothetical. It asks for an advisory opinion about the issue of whether, in 1856, Black slaves were United States citizens.

The Constitution limits federal courts to deciding cases and controversies. *See* U.S. Const., art. III, §2. cl. 1. "Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justifiability doctrine: Federal judicial power is limited to those disputes

which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of Resolution through the judicial process." *Flast* v. *Cohen,* 392 U.S. 83, 96 (1968). *See Coleman* v. *Miller,* 307 U.S. 433, 462 (1939) Frankfurter, J., concurring) ("It is not [the Court's] function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency.").

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. 393 (1956), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. *Dred Scott* held that Blacks were not entitled to the right of United States citizenship. After *Dred Scott,* Congress, which has the power to overrule precedent by passing new laws or amendments, enacted the Thirteenth and Fourteenth Amendments to the United States Constitution. These Amendments overruled *Dred Scott.* Therefore, a court today is bound by the law as set forth in the Thirteenth and Fourteenth Amendments.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sanford,* 60 U.S. (19 How.) 393 (1856)?

Answer. Yes. A U.S. District Court Judge or a U.S. Court of Appeals Judge must follow the relevant Supreme Court precedent.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson*?

Answer. Yes. I am familiar with the case of *Plessy* v. *Ferguson.*

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 539 (1896)?

Answer. In *Plessy* v. *Ferguson*, the Supreme Court held that maintaining separate but equal facilities for blacks and whites, including separate railway cars, did not violate the Fourteenth Amendment of the Constitution. Your question about this historic case is challenging and hypothetical. It asks for an advisory opinion about the issue of whether, in 1896, a policy of maintaining separate railway cars for blacks and whites was unconstitutional.

The Constitution limits federal courts to deciding cases and controversies. *See* U.S. Const., art. III, § 2, cl. 1. "Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. *Flast* v. *Cohen,* 392 U.S. 83, 96 (1968). *See also Coleman* v. *Miller,* 307 U.S. 433, 462 (1939) (Frankfurter, J., concurring) ("It is not [the Court's] function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency.").

Question 12. Plessy v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the Supreme Court held that the laws permitting the segregation of public schools on the basis of race, despite equal facilities and resources, violated the United States Constitution. The court found that to separate persons solely on the basis of race was inherently unequal under the Fourteenth Amendment. This case therefore overruled the holding of *Plessy* v. *Ferguson.*

Question 13. Are you familiar with the case of *Brown* v. *Board of Education*?

Answer. Yes, I am familiar with the case of *Brown* v. *Board of Education.*

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. The Supreme Court in *Brown* v. *Board of Education* held that the laws permitting the segregation of public schools on the basis of race, despite equal facilities and resources, was in violation of the United States Constitution. Your question about this historic case is challenging and hypothetical. It asks for an advisory opinion about the issue of whether, in 1954, segregation of public schools on the basis of race was unconstitutional.

The Constitution limits federal courts to deciding cases and controversies. *See* U.S. Const., art. III, § 2, cl. 1. "Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes

which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen,* 392 U.S. 83, 96 (1968). *See Coleman* v. *Miller,* 307 U.S. 433, 462 (1939) (Frankfurter, J., concurring) ("It is not [the Court's] function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency.").

Question 15. In *Brown* v. *Board of Education.* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The Supreme Court has not overruled its holding in *Brown* v. *Board of Education.* Therefore, the decision is to be given due deference under the principle of stare decisis.

Question 16. Are you familiar with the case of *Roe* v. *Wade.*

Answer. Yes, I am familiar with the case of *Roe* v. *Wade.*

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. In *Roe* v. *Wade,* the Supreme Court held that a Texas statute that proscribed abortions except when necessary to save the mother's life violated the Fourteenth Amendment. Your question about this historic case is challenging and hypothetical. It asks for an advisory opinion about the issue of whether, in 1973, a state could place restrictions on abortion.

The Constitution limits federal courts to deciding cases and controversies. *See* U.S. Const., art. III, § 2, cl. 1. "Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen,* 392 U.S. 83, 96 (1968). *See also Coleman* v. *Miller,* 307 U.S. 433, 462 (1939) (Frankfurter, J., concurring) ("It is not [the Court's] function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency.").

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. The Supreme Court has held that the State has a substantial interest in protecting potential human life throughout pregnancy. *See Webster* v. *Reproductive Health Servs.,* 492 U.S. 490, 519 (1989). Chief Justice Rehnquist, in *Webster* v. *Reproduction Health Services,* 492 U.S. 490, 520 (1989), stated that abortion is "a liberty interest protected by the Due Process Clause." "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *See Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 874 (1992).

As a district court judge and if I were fortunate enough to be appointed as a circuit court judge, I would be bound by the decisions of the Supreme Court. I have no personal views that would interfere with my ability to apply the holdings of these cases.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. The Supreme Court has held that the State has a substantial interest in protecting potential human life throughout pregnancy. *See Webster* v. *Reproductive Health Servs.,* 492 U.S. 490, 519 (1989). Under *Casey* the State cannot impose "an undue burden on the woman's decision before fetal viability." *See Casey,* 505 U.S. at 877. The Supreme Court has held that if the fetus is viable, the State may proscribe or prohibit any type of abortion unless necessary to protect the mother's life or health. *See id.* at 879.

As a district court judge and if I were fortunate enough to be appointed as a circuit court judge. I would be bound by the decisions of the Supreme Court. I have no personal views that would interfere with my ability to apply the holdings of these cases.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The Supreme Court has ruled that the death penalty is constitutionally permissible and does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Under *Gregg* v. *Georgia,* 428 U.S. 153, 196 (1976) and *McCleskey* v. *Kemp,* 481 U.S. 279, 303–04 (1987), the test is whether the state has: (1) established rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case warrant the death penalty: and (2) not limited the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty.

As a district court judge and if I were fortunate enough to be appointed as a circuit court judge, I would be bound by the decisions of the Supreme Court. I have no personal views that would interfere with my ability to apply the holdings of these cases.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. In *United States* v. *Miller,* 307 U.S. 174, 178 (1939), the Supreme Court held that it could not find that the Second Amendment necessarily guaranteed to defendant a right to keep and bear a shotgun having a barrel of less than eighteen inches in length, where defendants were charged with a violation of the National Firearms Act for transporting such an instrument through interstate commerce. The court found no evidence that possession or transportation of the *Miller* defendants' weapons had some reasonable relationship to the preservation or efficiency of a well regulated militia and concluded that "it was not within judicial notice that the weapon was part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 178.

As a district court judge and if I were fortunate enough to be appointed as a circuit court judge, I would be bound by the decisions of the Supreme Court. I have no personal views that would interfere with my ability to apply the holdings of these cases.

Question 22. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. The Supreme Court has held that the State has a substantial interest in protecting potential human life throughout pregnancy. *See Webster* v. *Reproductive Health Servs.,* 492 U.S. 490, 519 (1989). "Only where state regulation imposes an undue burden on a woman's ability to make the decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *See Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 874 (1992).

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. The Supreme Court has held that the State has a substantial interest in protecting potential human life throughout pregnancy. *See Webster* v. *Reproductive Health Servs.,* 492 U.S. 490, 519 (1989). According to the Supreme Court, after viability the State may generally regulate or proscribe abortion. *See Webster,* 492 U.S. at 516. After viability, the State's interest in protecting potential human life allows it to prohibit abortions unless the mother's life or health is at risk *See Casey,* 505 U.S. at 879.

As a district court judge and if I were fortunate enough to be appointed as a circuit court judge, I would be bound by the decisions of the Supreme Court. I have no personal views that would interfere with my ability to apply the holdings of these cases.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. Yes. The Supreme Court has ruled that the death penalty is constitutionally permissible and does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Under *Gregg* v. *Georgia,* 428 U.S. 153, 196 (1978) and *McCleskey* v. *Kemp,* 481 U.S. 279, 303–4 (1987), the test is whether a state has: (1) established rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case warrant the death penalty; and (2) not limited to the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty.

Question 25. If you were Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. In *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833 (1992), Justice O'Connor identified a number of guiding principles for Supreme Court Justices faced with the decision of whether or not to overturn precedent. Under the doc-

trine of state decisis, when reexamining the Court's holding, the Court should consider: (1) whether the rule has proved to be intolerable simply in defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend special hardship to consequences of overruling and would add inequity to cost of repudiation; (3) whether related principles of law have so far developed that they have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed or come to be seen differently as to have robbed the old rule of significant application or justification. *See id.* at 854–55. The Court, bound by these principles, would overrule precedent only in those limited circumstances where a thorough consideration of each of these factors led to the conclusion that it was necessary to do so.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislation intent?

Answer. If called upon to construe an Act of Congress or state law, I would first look at the language of the statute to determine the plain meaning of the statute. If the language were ambiguous, I would look to the binding precedent of the Supreme Court, the Seventh Circuit and other relevant case law to determine the meaning of the statute. If the meaning of the statute was still unclear, I would examine the legislative history of the statute. To determine the legislative intent, I would first review the conference reports containing agreed upon language and principles. If that intent was still unclear, I would consider the views of individual legislators, however, I would consider those comments with great caution and care.

If a constitutional challenge was made to the statute. I would first presume that the statute was constitutional. Then I would review Supreme Court and Seventh Circuit and other relevant precedent as described above.

RESPONSES OF FAITH S. HOCHBERG TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes. As a Senator, it is certainly appropriate to ask a judicial nominee questions about the process that he or she would use in ruling on a Constitutional matter, and whether that nominee will follow the law set forth in the Constitution and the binding precedent of the Supreme Court and the Circuit Court of Appeals for the circuit in which the District Court is located regardless of that nominee's personal opinions, if any.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The purpose of the United States Senate in holding hearings on nominees for the federal bench is to seriously and carefully perform its role in providing "advice and consent" to the President with respect to such nominees.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. As a federal prosecutor, I have performed my job pursuant to an oath to preserve, protect and defend the Constitution of the United States as an official of the Executive Branch of Government. If I were to be confirmed as a United States District Judge, I would take a very similar oath in the Judicial Branch of Government. In my view, the oath that I have taken renders me duty-bound to set any personal opinions completely aside and apply the Constitution and the duly-enacted laws passed by Congress, as interpreted by the Supreme Court and the Third Circuit Court of Appeals. I have done so faithfully for many years and have no views that would prevent me from carrying out this duty. It is most appropriate for the White House and the Senate to seek to determine that I have, and that I will, be able to carry out this duty.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. There are no questions that are off limits for a Senator to ask, and it is the duty of the nominee to answer any questions posed in such a manner that his or her answer could never be construed to violate or undermine an Article III Judge's obligation to follow the Constitution, the precedent of the Supreme Court and Third Circuit, and the laws duly enacted by Congress. It is important that no

nominee give the appearance that he or she has pre-judged any issue that might come before the court in any future case or controversy.

Question 5. If a U.S. District Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. The District Judge is bound by the legal precedent of the Supreme Court and the appellate court in the Circuit where the District Judge presides. The District Judge is legally bound to apply this precedent regardless of his or her belief of its merits.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford*?

Answer. Yes, I have read the decision in that case.

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford* 60 U.S. (19 How.) 393?

Answer. I have some concerns regarding this hypothetical question. Though it is certainly an historic opinion, I want to be careful not to undermine the law's prohibition against rendering any advisory opinion. This case was overruled by Congress and people of the United States. I hope that, had I been present to hear oral argument and to have had an opportunity to confer with my colleagues on the Supreme Court bench, I would have had the intelligence to dissent.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. That precedent was overruled by the 13th and 14th Amendments to the Constitution that were passed by Congress and ratified by the states and the case thus has no force or effect today.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. If I had been a District Judge in 1857, presented with facts that were identical to those in that case, I would have been bound to follow that precedent.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson*?

Answer. Yes, I have read that decision.

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 539 (1896)?

Answer. I have concerns regarding this hypothetical question, because, although this is an historic opinion, I must be careful not to undermine the law's prohibition against rendering any advisory opinion. This case has been overruled, and I hope that, had I been present to hear oral argument and to have had the opportunity to confer with my colleagues on the Supreme Court bench, I would have had the wisdom to have joined the eloquent dissent of Justice Harlan, whose position was ultimately to become the law of the land.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statue which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. That precedent was overruled by the Supreme Court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and thus it has not been the law of the land since then.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education*?

Answer. Yes. I have read the decision.

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education*?

Answer. I have the same concerns regarding this hypothetical question that I have voiced above. Though *Brown* is certainly an historic opinion. I must take care not to undermine the law's prohibition against rendering any advisory opinion. I hope that had I been present to hear oral argument and to have had the opportunity to confer with my colleagues on the Supreme Court bench, I would have joined the unanimous opinion of the Supreme Court.

Question 15. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the

protections contained within the Fourteenth Amendment of the Constitution. How should that precedent be treated by the Courts?

Answer. That precedent remains the law of the land and it must be followed.

Question 16. Are you familiar with the case of *Roe* v. *Wade*?

Answer. Yes, I have read the decision.

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade*. 410 U.S. 113 (1973)?

Answer. I believe that it is important to restate the same concern voiced above with respect to this hypothetical question. However, unlike the core issues in *Dred Scott, Plessy,* and *Brown* the issues contained in this hypothetical question are not historic and are still evolving as cases proceed through our court system. As these are issues in active litigation before our courts. I am most hesitation to state how I would have ruled, lest anyone ever interpret my response as an advisory opinion. As a hypothetical Supreme Court Justice in 1973, I would have been grappling with an extremely complex issue of first impression, difficult jurisdictional issues, as well as the substantive issue of whether the freedom to obtain an abortion was a protected "liberty" within the meaning of the Fourteenth Amendment and, if so, to what extent the state had a legitimate interest in regulating it. The complexity of the issues has led to two decades of continued efforts to clarify the law in this area.

The majority opinion found a zone of personal privacy founded in the Fourteenth Amendment that was broad enough to encompass a woman's decision whether or not to end the pregnancy, and proceeded to set forth a test of the degree of permissible state intrusion on that right that varied according to the different trimesters of pregnancy. Justice Stewart wrote a concurring opinion that found a "personal liberty protected by the Due Process Clause of the Fourteenth Amendment," and proceeded to discuss to what extent the state legislature could legitimately regulate abortions or even to prohibit them in late stages of pregnancy, noting that no such state regulatory legislation was actually before the court for decision. In Justice Rehnquist's dissent, he agreed with the concurring opinion of Justice Stewart that the "liberty" granted by the Fourteenth Amendment "embraces more than the rights found in the Bill of Rights" (410 U.S. at 112–13). Justice Rehnquist then argued that the question was whether a deprivation of such a liberty was without due process and what legal test should be applied in making that determination. He disagreed with the decision of the majority to use history and science to break pregnancy into three trimesters, stating that this "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

The subsequent decision in *Webster* v. *Reproductive Health Services,* 492 U.S. 490, 507 (1989), and *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992) define the current state of law if I am fortunate enough to be confirmed as a District Judge, I would allow those precedents.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. As stated in my answer to Question 17, it is the legal reasoning of the current Supreme Court decision in *Weber* and *Casey* that constitute the law of the land, and I would have no difficulty in applying the law of the Supreme Court. My personal views, if any, of the reasoning of the Supreme Court's many Justices' evolving opinions in this area can never intrude upon my obligation, if confirmed as a U.S. District Judge, to apply the law of the Supreme Court at such time as the particular facts of an applicable case or controversy were to come before me.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. Every Judge's duty is to uphold the law—the Constitution, binding precedent, and laws duly enacted by Congress—regardless of his or her personal views. This is how I have conducted myself as a federal prosecutor for many years. Every case presents different facts and circumstances and different measures of State law regulating this area, and it would be improper for me to state a personal view that might someday lead a litigate to question my impartiality in a case before me. I have no view that would prevent me from fully applying the law as it is laid down by the Supreme Court.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The Supreme Court has found the federal death penalty law to be constitutional and I have been enforcing that law since its enactment in my role as

United States Attorney. When I encountered an early case where the aggravating factors listed in the federal death penalty law did not include multiple homicide, I applied the law of Congress and issued a statement suggesting that Congress should consider whether to strengthen its law to include this factor as a basis for federal prosecutors to seek authorization to file a notice of intent to seek the death penalty. Congress subsequently did amend the death penalty statute to include multiple homicide as an aggravating factor that can support a jury's death penalty verdict.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. In any case that might arise under the Second Amendment to the Constitution, I would apply for constitutional language and any applicable Supreme Court by binding Circuit Court of Appeals precedent and not any personal views. The most recent Supreme Court case applying the Second Amendment is *United States* v. *Miller,* decided in 1939. Because there are currently lower court cases that may well be before the Circuit Courts of Appeals and the Supreme Court, this issue may well arise in future litigation before me. If an actual case or controversy were presented to me for decision, I would consider all the facts of the case, the relevant constitutional language, and any pertinent Supreme Court or Circuit decision. I have no views that would prevent me from applying the law of the higher courts.

Question 22. In *Planned Parenthood* v. *Casey* (505 U.S. 833 (1992) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. *Planned Parenthood* v. *Casey* struck down the trimester legal analytical framework of *Roe* that had required a "compelling state interest" to be demonstrated for certain legislative enactments to be constitutional. The Supreme Court in *Casey* held that a state law restricting access to abortion is unconstitutional only if it places an undue burden on the right to seek to terminate a pregnancy. The precise holding of the Court was that a spousal consent requirement was unduly burdensome upon a married woman, but that a parental consent requirement was not unduly burdensome and therefore not unconstitutional. Thus, *Casey* and *Webster,* discussed above, constitute the current state of the law. I do not have any personal view that would prevent me from following the law.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue, do you personally believe that an unborn child is a human being?

Answer. It is the duty of every judge in this country to uphold the law as set forth in the Constitution, binding precedent, and the laws duly enacted by Congress without regard to his or her personal views, if any. That is the oath that I have taken as a federal prosecutor and that is how I have conducted myself as a federal prosecutor for many years. Every case presents different facts and circumstances and different measures of state law regulating this area, and it would be improper for me to state a personal view that might someday lead a litigant to question my impartiality in a case before me. I have no view that would prevent me from fully applying the law as it is laid down by the Supreme Court.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. Yes. The Supreme Court has held that the death penalty is constitutional.

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court Justice, I would give the doctrine of stare decisis the weight and consideration that the Supreme Court has instructed. Only the Supreme Court can overturn Supreme Court precedent, and the Supreme Court may do so only in very narrow circumstances, as enumerated in *Casey,* supra, 505 U.S. at 854.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. I would begin any analysis of a duly enacted statute with the direct language of the statute at issue in the case, as it is the best source of determining legislative intent. If the statute were still unclear after this analysis, I would look to binding precedent and thereafter to persuasive precedent. If the statute were still unclear, only then would I consult legislative history, including formal committee reports and other legislative history. When consulting the testimony of elected officials in debate, caution must be exercised because the debating position of a single

legislator may not necessarily be reflective of the intent of all the other legislators who voted to enact the statute at issue.

RESPONSE OF FRANK H. MCCARTHY TO A QUESTION FROM SENATOR THURMOND

Question 1. At your hearing on October 26, 1999, I asked you "Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?" You answered in the negative. How do you reconcile your answer with the statements regarding the death penalty that the *Tulsa World* on November 3, 1999, reported that you made several years ago.

Answer. Senator Thurmond, thank you for giving me this opportunity to respond.

The *Tulse World* article of November 3, 1999, reported statements I made some 15 or 20 years ago in connection with my work in the public defender's office. The statements concerned my personal opinions and were made at a time when I was free to publicly express such opinions.

Your question to me at the October 26 hearing concerned my role as a judge. As a judge my personal opinions on this, or any other issue, play no part whatsoever in the decisions I make. My duty as a judge is to follow the Constitution, the laws enacted by Congress, and binding precedent.

The death penalty is the law of the United States and I would not hesitate to follow and implement that law in my duties as a judge. I would therefore reaffirm my prior answer to you that I do not have any personal objections to the death penalty that would cause me to be reluctant to impose or uphold a death sentence.

RESPONSE OF FRANK H. MCCARTHY TO A QUESTION FROM SENATOR ASHCROFT

Question 1. In the November 3, 1999, issue of the *Tulsa World* you were quoted as stating in a newspaper article published in the mid-1980's: "In my mind, the death penalty is morally wrong. Society doesn't have that right." Do you still hold that views? If not, what changed your mind? If so, how could you sit impartially on capital cases as a federal district court judge?

Answer. Senator Ashcroft, thank you for giving me this opportunity to respond.

The *Tulsa World* article of November 3, 1999, reported statements I made some 15 or 20 years ago in connection with my work in the public defender's office. The statements concerned my personal opinions and were made at a time when I was free to publicly express such opinions.

Since taking the Oath of Office as a magistrate judge in 1995, I am precluded by the Code of Conduct for United States Judges from expressing my personal opinions on matters that may come before me. However, because the matter has been raised, I think it is especially important that I clearly state that any personal opinions I have on the death penalty would not interfere with my following the law and imposing or upholding a death sentence.

Your question also asks how I could sit impartially as a judge in a capital case. I could sit impartially in a capital case because any personal opinions I have would not play any part in my holding of the case. I would not favor one side or the other, but would apply the law as passed by Congress.

No judge comes to the bench without personal opinions, and many judges have publicly expressed their opinions prior to becoming judges. The Oath of Office requires judges to set aside those opinions and to decide cases based on the law and the evidence. Judges do this everyday in courthouses across this nation. If I could not set aside any personal opinions I have about issues that come before me I would not serve as a magistrate judge and I would not have sought to serve as a district judge. I assure you, and any litigants, who may come before me, that I would set aside any personal opinions I have and faithfully and impartially apply the law to the cases that come before me.

RESPONSES OF FRANK H. MCCARTHY TO QUESTIONS FROM SENATOR SMITH

Senator Smith, thank you for giving me this opportunity to respond.

Question 1. In *Planned Parenthood* v. *Casey,* (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. As noted in the question, the Supreme Court has addressed this issue. Were this issue to come before me, either in my current position as a magistrate

judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make.

Question 2. In January of 1992, while you were serving as a partner in the firm Barkley, Rodolph, and McCarthy you represented a medical center in a medical negligence suit, *Alexander* v. *St. John Medical Center,* et al. The suit concerned the alleged negligence of your client resulting in the deprivation of oxygen to a fetus during delivery causing the child to develop into a spastic quadriplegic. If you agree that your client had a duty of care to the fetus, do you agree that the fetus has rights before birth and what are those rights?

Answer. The Supreme Court has spoken on this issue in *Roe* v. *Wade, Planned Parenthood of Southeastern Pennsylvania* v. *Casey* and other cases. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make.

Question 3. I understand the Supreme Court's rulings on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. As noted in the question, the Supreme Court has addressed this issue. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make.

Question 4. In 1979 and 1983 you represented a defendant who was sentenced to death in the case *Benjamin Brewer* v. *The State of Oklahoma* for the murder of a young woman. I understand that the sentence was subsequently reversed on appeal, but after retrial, Mr. Brewer was put to death. As a result of that case, do you have any personal moral or religious reservations about the death penalty?

Answer. The Supreme Court has consistently ruled that the death penalty is constitutional. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make.

Question 5. Do you believe the death penalty is Constitutional?

Answer. The Supreme Court has consistently ruled that the death penalty is constitutional. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make.

RESPONSES OF FRANK H. MCCARTHY TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes, this is a legitimate desire on your part.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. To fulfill the Senate's constitutional obligation of "Advice and Consent."

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. It is appropriate for the White House and the Senate to ask questions to gain an understanding of how I would approach the analysis of legal and constitutional issues, should I be confirmed as a district judge. In my current position as a magistrate judge, I follow the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals in addressing these issues. If con-

firmed, I will faithfully follow my oath and continue to address these issues in this fashion.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. No, a Senator may ask any question. However, as a magistrate judge and nominee for district judge, I may not pre-judge issues before they are presented to me in actual cases and controversies and I am not permitted to give advisory opinions. Further, the Code of Judicial Conduct limits what statements I may make.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. There are no circumstances under which a United States District Judge or United States Court of Appeals Judge may refuse to apply binding precedent to the case before him or her.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford*?

Answer. Yes, I am familiar with the case of *Dred Scott* v. *Sandford.*

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393?

Answer. In *Dred Scott* v. *Sandford,* the Supreme Court held that black slaves were not citizens of the United States. That decision was nullified by the people of the United States and the United States Congress through the 13th and 14th Amendments to the Constitution. Your hypothetical question, while an interesting matter for consideration, does not present a case and controversy that I as a magistrate judge or as a nominee for district judge may decide. I am unable to answer how I as a judge would have held in a case when I did not participate in the case.

Question 8. Dred Scott v. *Sandford,* 60 U.S. (19 How.) 383 (1856), the Court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. *Dred Scott* v. *Sandford* has no precedential value today because the decision was nullified by the people of the United States and the United States Congress through the 13th and 14th Amendments to the Constitution.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. Yes, a judge must follow binding precedent.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes, I am familiar with the case of *Plessy* v. *Ferguson.*

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson, 163 U.S. 549 (1896)?*

Answer. In *Plessy* v. *Ferguson,* the Supreme Court held that separate but equal accommodations were constitutional. That decision was overruled by later decisions holding separate but equal was not constitutional. Your hypothetical question, while an interesting matter for consideration, does not present a case and controversy that I as a magistrate judge or as a nominee for district judge may decide. I am unable to answer how I as a judge would have held in a case when I did not participate in the case.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The *Plessy* decision has no precedential value today because the separate but equal doctrine has been overruled by later cases.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education*?

Answer. Yes, I am familiar with the case of *Brown* v. *Board of Education.*

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 493 (1954)?

Answer. In *Brown* v. *Board of Education,* the Supreme Court held that separate but equal schools were not constitutional. Your hypothetical question, while an interesting matter for consideration, does not present a case and controversy that I as a magistrate judge or as a nominee for district judge may decide. I am unable

to answer how I as a judge would have held in a case when I did not participate in the case.

Question 15. In *Brown* v. *Board of Education,* 347 U.S. 493 (1954), the Court held that the segregation of children in public schools solely on the basic of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal education opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. *Brown* v. *Board of Education* remains binding precedent to be followed by the courts.

Question 16. Are you familiar with the case of *Roe* v. *Wade.*

Answer. Yes, I am familiar with the case of *Roe* v. *Wade.*

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. In *Roe* v. *Wade,* the Supreme Court held certain state statutes regulating abortion unconstitutional. The decision has been revisited on a number of occasions most recently in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey. Casey* recognized the state's interests and prohibited placing an undue burden upon the person seeking an abortion. Your hypothetical question, while an interesting matter for consideration, does not present a case and controversy that I as a magistrate judge or as a nominee for district judge may decide. I am unable to answer how I as a judge would have held in a case when I did not participate in the case.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statue which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. In *Roe* v. *Wade,* the Supreme Court held certain state statutes regulating abortion unconstitutional. The decision has been revisited on a number of occasions, most recently in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey. Casey* recognized the state's interests and prohibited placing an undue burden upon the person seeking an abortion. As a magistrate judge and nominee for district judge. I would be bound by these precedents in my analysis of the issues.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. The Supreme Court has spoken on this issue *Roe* v. *Wade. Planned Parenthood of Southeastern Pennsylvania* v. *Casey* and other cases. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge. I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The Supreme Court has consistently ruled that the death penalty is constitutional. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge. I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would made. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. The Supreme Court has addressed this issue in *U.S.* v. *Miller,* 307 U.S. 174 (1939). Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 22. In Planned Parenthood v. *Casey* (505) U.S. 833 (1992)), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. As noted in the question, the Supreme Court has addressed this issue. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. As noted in the question, the Supreme Court has addressed this issue. Were this issue to come before me, either in my current position as a magistrate judge or, if confirmed, as a district judge. I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. The Supreme Court has consistently ruled that the death penalty is constitutional. Were this issue to come before me, either in my current position as a magistrate judge, or, if confirmed, as a district judge, I would be bound by the Constitution and precedent from the Supreme Court and the Tenth Circuit Court of Appeals. I can assure the Committee that any personal views that I may have on the issue would not affect any decision I would make. The Code of Judicial Conduct prohibits me from commenting further on the issue.

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court Justice, I would be guided by the considerations discussed in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992 and *Agostini* v. *Felton* 521 U.S. 203 (997), in deciding whether to overrule precedent.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. The legislature expresses its intention in the words of the statute itself. If for some reason, such as an ambiguity, additional evidence of the legislature's intent is required, a court may consider matters other than the words of the statue. In this regard, conference reports or other official collective statements of legislative intent are usually more helpful than the statements of individual legislators. The weight of any evidence of legislative intent will depend on the facts and circumstances of the case.

RESPONSES OF VIRGINIA A. PHILLIPS TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes, it is appropriate for a Senator to seek more information from judicial nominees in order to give "advice and consent" knowledgeably.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. I believe the Senate holds hearings on judicial nominees in order to better ascertain their qualifications for the positions to which they have been nominated.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. It is appropriate for the executive and legislative branches to satisfy themselves as to the qualifications of a judicial nominee, and to inquire of the nominee's willingness to apply the law.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. It is entirely appropriate for Senators to satisfy themselves of judicial nominees' qualifications and commitment to follow the law. As a nominee and a sitting United States magistrate Judge, I am bound by ethical constraints which do not permit me to opine on, or prejudge, an issue which could be presented to me for decision if eventually confirmed.

Question 5. If a U.S. District Court judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent its flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. The District Court and lower courts of appeals are bound by the precedents established by the Supreme Court, and must adhere faithfully to the decisions of the highest court. The role of a lower court judge is to follow precedent, rather than establish new precedents. Every case must be thoughtfully and thoroughly considered in light of existing precedents, and the applicability or distinguishability of those precedents also should be carefully analyzed.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford*?

Answer. Yes, I am familiar with *Dred Scott* v. *Sandford.*

Question 7. If you were a Supreme Court Justice in 1856, what would you have held on *Dred Scott* v. *Sandford*, 60 U.S. (19 Howard) 393?

Answer. The Supreme Court's decision in *Dred Scott* v. *Sandford* has been the focus of intense scholarly analysis and criticism since its issuance. While it is inviting to attempt to decide the case from an historical perspective, as a sitting Magistrate Judge and judicial nominee I am ethically constrained from opining in an advisory manner, and can only decide specific cases which present an actual ease or controversy.

Question 8. In *Dred Scott* v. *Sandford*, 60 U.S.C. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The *Dred Scott* decision has been superseded by the adoption of the Thirteenth and Fourteenth Amendments to the Constitution. It is no longer valid precedent.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent to *Dred Scott* v. *Sandford*, 60 U.S. (19 Howard) 393 (1856)?

Answer. Lower courts are bound by the precedents established by the Supreme Court and the Circuit Court, and must adhere faithfully to the doctrine of state decisis. The role of a lower court judge is to follow precedent, after thoughtfully and thoroughly considering existing precedents and the applicability or distinguishability of those precedents.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson*?

Answer. Yes, I am familiar with *Plessy* v. *Ferguson.*

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 53 (1896)?

Answer. *Plessy* v. *Ferguson*, upholding a Louisiana statute establishing racial segregation in public transportation, has been the subject of scholarly analysis and criticism since its issuance. While it is inviting to attempt to decide the case from an historical perspective, as a sitting Magistrate Judge and judicial nominee I am ethically constrained from opining in an advisory manner, and can only decide specific cases which present an actual case or controversy.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 53 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. *Plessy* v. *Ferguson* was overruled by the United States Supreme Court in *Brown* v. *Board of Education,* 47 U.S. 483 (1954). Therefore it is no longer binding or persuasive authority.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education*?

Answer. Yes, I am familiar with *Brown* v. *Board of Education.*

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. *Brown* v. *Board of Education* overruled *Plessy* v. *Ferguson* and outlawed state-mandated school segregation. While it is inviting to attempt to decide the case

from an historical perspective, as a sitting Magistrate Judge and judicial nominee I am ethically constrained from opining in an advisory manner, and can only decide specific cases which present an actual case or controversy.

Question 15. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The Supreme Court's decision in *Brown* v. *Board of Education* has not been overruled and remains governing precedent. Its application has been addressed in other high court rulings, including, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971) *Milliken* v. *Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), and *Missouri* v. *Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990), and it must be read together with the later precedents.

Question 16. Are you familiar with *Roe* v. *Wade*?

Answer. Yes, I am familiar with *Roe* v. *Wade*.

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. The Supreme Court's decision in *Roe* v. *Wade* has been extensively analyzed and criticized in legal and scholarly writings. While it is inviting to attempt to decide the case from an historical perspective, as a sitting Magistrate Judge and judicial nominee I am ethically constrained from opining in an advisory manner, and can only decide specific cases which present an actual case or controversy.

Question 18. In *Roe* v. *Wade*, 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. Although the analysis of any statute regulating abortion has been modified by the majority opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) a majority of the Supreme Court has declined to overrule the majority's decision in *Roe* v. *Wade*, and therefore it remains valid precedent which is binding on the lower courts. Justice Rehnquist's dissent has not been adopted as the governing interpretation on this issue.

Question 19. I understand the Supreme Court precedent, what is your personal view on the issue of abortion?

Answer. In deciding any case challenging a statute regulating abortion, I would follow the precedents of the United States Supreme Court. Under *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the court is obligated to determine whether a governmental regulation imposes an "undue burden" on a woman's ability to decide whether to terminate her pregnancy; the Supreme Court has ruled that this standard is the appropriate means of safeguarding the state's interest in human life while preserving the constitutionally protected right to decide whether to terminate a pregnancy. As required by judicial oath, I cannot and will not permit any personal belief to interfere with my obligation to follow the law as set forth in the supreme law of the land, the Constitution, as well as the binding precedents of higher courts and the plain text of the legislation.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. It is firmly settled that the death penalty is constitutional. (See, e.g., *Romano* v. *Oklahoma,* 512 U.S. 1, 6, 114 S. Ct. 2004, 2009, 129 L. Ed. 2d 1 (1994).) I cannot and will not permit any personal belief to interfere with my obligation to follow the law as set forth in the supreme law of the land, the Constitution, as well as the binding precedents of higher courts and the plain text of legislation.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. The plain language of the Second Amendment to the Constitution provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." While there is scant precedent interpreting this constitutional provision, in *United States* v. *Miller,* 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 2d 1206 (1939), the Supreme Court analyzed the historical significance of the term "militia" by examining various sources, includ-

ing the debates during the Constitutional convention, the history and legislation of the colonies and states and the writings of commentators such as William Blackstone. In reversing the lower court's judgment dismissing the indictment, the Supreme Court required consideration of the amendment's purpose of assuring the existence and effectiveness of a militia. I would apply that holding in resolving any constitutional challenge to legislation regulating firearms. I cannot and will not permit any personal belief to interfere with my obligation to follow the law as set forth in the supreme law of the land, the Constitution, as well as the binding precedents of higher courts and the plain text of legislation.

Question 22. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. In deciding any case challenging a statute regulating abortion, I would follow the precedents of the United States Supreme Court, including the majority holding in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The Supreme Court has ruled that the "undue burden" standard is the appropriate means of safeguarding the state's interest in human life while preserving the constitutionally protected right to decide whether to terminate a pregnancy.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. In any case presenting an issue regarding the status or rights of an unborn child, a lower court judge must resolve the controversy fairly presented by looking to the plain language of the Constitution, the precedents of the higher courts, and the text of the challenged statute or regulation. I will not permit any personal belief to interfere with my obligation to follow the law as set forth in the supreme law of the land, the Constitution, as well as the binding precedents of higher courts and the language of the legislation.

Question 24. Do you believe the death penalty is Constitutional?

Answer. Yes, it is firmly settled that the death penalty is constitutional. (See, e.g., *Romano* v. *Oklahoma,* 512 U.S. 1, 6, 114 S. Ct. 2004, 2009, 129 L. Ed. 2d 1 (1994).)

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the Supreme Court held that overruling an earlier decision may be appropriate "on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions." The Court also left open whether the existence of "other indication[s] of weakened precedent" might permit the overruling of precedent, but ruled out a "doctrinal disposition" to a different result as an acceptable basis to depart from stare decisis principles. A high court justice would be obligated to follow this guidance in resolving whether to overrule established precedent.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give to legislative intent?

Answer. In construing a statute, a court looks first to its plain language, and only if the legislation is ambiguous on its face or as applied is it necessary to go further. Thus, it is only necessary to resort to analysis of legislative history in rare instances, after one looks at the plain language of the statute, at judicial precedent interpreting the statute or Constitutional provision, and at analogous cases interpreting similar statutes. In attempting to determine legislative intent, which is often ambiguous and difficult to ascertain, a court must be wary of relying on isolated statements in the legislative record which may not be truly representative of the views or intent of Congress as a whole.

SUBMISSIONS FOR THE RECORD

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, September 23, 1998.

Hon. ORRIN HATCH,
Chairman, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR ORRIN: It is my understanding that your committee will review the candidacy of Judge Virginia A. Phillips of Riverside, California for a position as a Federal Judge.

Judge Phillips is a respected professional who has earned the respect and admiration of the entire legal community and the broader community in Riverside County. Her high standards of integrity and fairness are well documented as has been her outreach to youth. She is a legal scholar who has authored many articles in respected publications.

I appreciate your kind attention to this matter and I hope your committee will give Judge Phillips every consideration.

Sincerely,

RON PACKARD,
Member of Congress.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, February 9, 1998.

Hon. BARBARA BOXER,
U.S. Senate,
Washington, DC.

DEAR SENATOR BOXER: I wanted to express my deepest support for Judge Virginia Phillips for the U.S. District Court judgeship in the Central District of California.

Judge Phillips now serves as a United States Magistrate Judge for the Central District Court in California. Prior to her current position, she served as a Commissioner for the Riverside County Superior Court having been assigned to the Civil Trial Department and presiding over cases from initial filing through trial. She also handled the Court's Civil Law and Motion Department.

From 1988 to 1991, Judge Phillips was a partner with Best, Best & Krieger in Riverside, California. She practiced civil litigation emphasizing real property, business tort, contract and employment matters. Judge Phillips also currently serves as a lecturer at the University of California, Riverside's Law and Society Program, and held a Senior Seminar in Constitutional Law.

Judge Phillips received her B.A. (Magna Cum Laude) at the University of California, Riverside in 1979, and later obtained her J.D. from the University of California, Berkeley Boalt Hall School of Law. Her professional activities include: Board of Directors member of the Federal Bar Association—Inland Empire Chapter; Judicial Master, Leo Deegan Inn of Court; Board of Directors member with the Riverside Youth Center; Board of Directors member with the Riverside Area Rape Crisis Center; Volunteer Judge for the Riverside County Bar Association Mock Trial Program; Panel Member with the Riverside County Office of Education, Legal Seminars; Instructor for the Mandatory Continuing Legal Education; member of the City of Riverside Human Relations Committee; Chairperson of the City of Riverside Law Enforcement Policy Advisory Committee, Arbitrator with the American Arbitration Association; and finally, Coordinator/Volunteer for the University of California, Riverside Legal Services Clinic.

Judge Phillips also published a monthly book review column for the Riverside County Lawyer, the official publication of the Riverside County Bar Association. Her accomplishments are obviously impressive and well-renowned. I hope you will nominate her for the U.S. District Court Bench. I give her my strongest recommendation.

I appreciate your kind attention to this matter. Should you have any further questions, please feel free to call me directly, or have your staff contact Nelson Gracia, at x51986.

Sincerely,

KEN CALVERT,
Member of Congress.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, March 3, 1998.

Hon. BARBARA BOXER,
Senate Hart Office Building,
Washington, DC.

DEAR SENATOR BOXER: I am writing to express my support for Judge Virginia Phillips for the U.S. District Court judgeship in the Central District of California.

Since 1995, she has served as the United States Magistrate Judge for the Central District Court of California. From 1991–1995, Judge Phillips served as Commissioner for the Riverside County Superior Court. Prior to this, she was a partner with Best, Best & Krieger in Riverside, California from 1988–1991. She practiced civil litigation, emphasizing real property, business tort, contract and employment matters.

Judge Phillips earned her Bachelor's of Arts (Magna Cum Laude) in 1979 from the University of California, Riverside. She went on to earn her J.D. in 1987 from the University of California, Berkeley. She has published a monthly book review column for the Riverside County Lawyer. In addition, Judge Phillips has lectured at the University of California, Riverside since 1983.

Her community and professional activities are exclusive and wide-ranging. She serves as a member of the Board of Directors for the Federal Bar Association since 1996. She has been a member of the Board of Directors for the Riverside Youth Service Center, a non-profit counseling agency for young people and families, since 1989. She was a member of the Board of Directors for the Riverside Area Rape Crisis Center from 1994 through 1996. She is currently a volunteer judge for the Riverside County Bar Association Mock Trial Program. She was a coordinator and volunteer for the Legal Services Clinic for the University of California, Riverside. She was a member of the City of Riverside Human Relations Commission from 1987–1991; She was Chairperson for the City of Riverside Law Enforcement Policy Advisory Committee from 1988–1990. Finally, she was an Instructor for the Mandatory Continuing Legal Education program where she taught such courses as Criminal Practice in Federal Court, Discovery Motions, and Civil Trial Procedure.

Her accomplishments are noteworthy and commendable. I hope you will nominate her for the U.S. District Court Bench. I give her my strongest recommendation. I appreciate your attention and consideration to this matter. Should you have any further questions, please feel free to call me directly, or have your staff contact Arlene Willis, at x55861.

Sincerely,

JERRY LEWIS,
Member of Congress.

LARRY D. SMITH,
RIVERSIDE COUNTY SHERIFF,
Riverside, CA, May 19, 1998.

Re Appointment of Virginia Phillips, Federal District Court, Central District of California

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: It is my pleasure to support Virginia Phillips for appointment to the Federal District County, Central District of California.

In my position as Sheriff of Riverside County, California, I have seen first hand that Ms. Phillips has the necessary qualifications and demeanor for a successful tenure on the Federal bench. I urge your most serious consideration of her.

Thank you for your time and consideration.

Sincerely,

LARRY D. SMITH,
Sheriff.

POLICE DEPARTMENT,
CITY OF RIVERSIDE,
Riverside, CA, May 26, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I am writing to support the appointment of Virginia Phillips to the Federal District Court, Central District of California. As Chief of Police of the eleventh largest city in the state of California, it is important to me that quality persons are appointed to the federal bench. United States Magistrate Judge Virginia Phillips is such a person.

Ms. Phillips is a longtime Riverside resident and an excellent magistrate judge. In addition to her outstanding qualifications for the federal bench, Ms. Phillips is dedicated to serving her community in a most professional manner. She has been a past member of the Human Relations Commission of the City of Riverside and its subcommittee, the Law Enforcement Policy Advisory Committee. In this role, she provided review and guidance on several key Riverside Police Department policies prior to their implementation. Proper policy development is central to the success of a police department.

The Riverside Police Department is actively engaged in community policing. Ms. Phillips has been active in her local neighborhood association in the Colony Heights Historic District of Riverside. It is important that residents with strong credentials such as Ms. Phillips be recognized as responsible citizens.

I urge you to schedule her hearing date without delay, and then, confirm her appointment to the Federal District Court, Central District of California.

Sincerely,

GERALD L. CARROLL,
Chief of Police.

OFFICE OF THE DISTRICT ATTORNEY,
COUNTY OF RIVERSIDE,
Riverside, CA, August 18, 1999.

Senator ORRIN HATCH,
Chairman of the Judiciary Committee, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I understand that Honorable Virginia Phillips is before the Judiciary Committee for appointment consideration and confirmation to the federal bench. I respectfully request her serious consideration as an outstanding candidate.

Ms. Phillips brings intelligence, fairness, and exceptional judicial temperament to the bench. She is highly respected in both the legal community and our community at large. Her nomination would certainly be welcomed by my office. I respectfully request that you give Virginia Phillips serious consideration for this important nomination. She will make an outstanding federal jurist.

Sincerely,

GROVER TRASK,
District Attorney.

U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Los Angeles, CA, September 17, 1999.

Hon. ORRIN G. HATCH,
Chairman, U.S. Senate Judiciary Committee,
Washington, DC.

Hon. PATRICK J. LEAHY,
U.S. Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I write on behalf of more than eighteen (18) million people in the Central District of California and, particularly, the more than three (3) million people in the Eastern Division of our district. The division is comprise of the counties of Riverside and San Bernardino. As you know, Riverside County, with some 1.5 million people, is one of the fastest growing areas in our nation, and San Bernardino is the largest county in the country in geographical area.

Our Eastern Division has only one district judge. That judge is faced with such a staggering caseload that it is necessary to send overflow cases to our Western (headquarters) Division each month. This results in a large number of litigants, witnesses, lawyers, and law enforcement officers having to travel to Los Angeles, some sixty (60) miles away, by way of the most traffic congested roads in the United States.

Meanwhile, the nomination of Judge Virginia A. Phillips, who would be assigned to our impacted Eastern Division has been in the Senate Judiciary Committee since May, 1998.

I implore you to take action on this nominee, who enjoys splendid bi-partisan support from her Inland Empire (Riverside, San Bernardino) community, which she has served as a California State Judicial Officer. She now serves her home community, as well as Los Angeles, as a United States Magistrate Judge.

I join Congressman Ken Calvert, members of the bench, bar, other local leaders, and the under-served citizens of Riverside and San Bernardino counties in urging action on this nomination for a second district court judge for the Eastern Division of the Central District of California.

Thank you for working to better the administration of justice in our district, and I would be pleased to aid you and the Committee in anyway you feel appropriate in order to have this critical position filled as soon as possible.

Most sincerely,

TERRY J. HATTER, Jr.,
Chief United States District Judge.

OFFICE OF THE MAYOR,
CITY OF RIVERSIDE,
Riverside, CA, June 8, 1998.

Re Appointment of Virginia Phillips to Federal Court, Central Court of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee, U.S. Senate, Dirksen Senate Office Building,
Washington, DC.

As Mayor, I offer my strongest support for Virginia Phillips. When selected, she will be an outstanding Federal Judge.

Let me offer two reasons. First, Phillips has earned an extraordinary reputation for her legal work as well as her legal temperament. Translation: the legal professional and community leaders offer the highest marks of admiration and respect.

Second, Phillips made a major commitment to the life and times of Riverside, actively and effectively serving on the Board of Directors of the Riverside Youth Service Center and the Riverside Area Rape Crisis Center. Perhaps more noteworthy, she was an influential member of the City's Human Relations Commission, with a key role in developing an appropriate and valued law enforcement policy advisory committee.

It is certainly my honor to emphasize the high regard that the greater Riverside community holds for Virginia Phillips.

Sincerely,

RONALD O. LOVERIDGE,
Mayor.

COUNTY OF RIVERSIDE,
Riverside, CA, May 22, 1998.

Senator ORRIN HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This letter is in regard to the appointment of United States Magistrate Judge Virginia A. Phillips to the Federal District Court, Central District of California. I strongly urge you to move forward on this matter and schedule a hearing date at the earliest possible opportunity. I am confident that a confirmation of her appointment will quickly follow.

Judge Phillips' outstanding performance and experience on the bench are well known throughout the region. Her public service on behalf of the legal community for our citizens is well documented. Judge Phillips' credentials for this position are impeccable.

The appointment of Judge Phillips will represent a major milestone for our region and the recognition of the important of over three million citizens who comprise the counties of Riverside and San Bernardino. We are looking forward to the announcement of her confirmation.

Thank you for your prompt attention to this matter.

Sincerely,

TOM MULLEN,
Supervisor, 5th District.

UNIVERSITY OF CALIFORNIA, RIVERSIDE,
Riverside, CA, August 31, 1999.

Hon. ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to express my strong support for the confirmation of United States Magistrate Judge Virginia A. Phillips' to the Federal District Court. Ms. Phillips is extremely well qualified for confirmation to the federal bench. Her extensive career in law as a practicing attorney, and her experience on the bench, have prepared her well for the privilege of sitting on the federal bench.

Ms. Phillips' career has been exemplary. She was a highly regarded civil litigation attorney practicing with Best, Best & Krieger, the premier law firm in the Inland Empire. In 1991, she was appointed Commissioner of the Riverside County Court and served in that capacity until 1995 when she was appointed United States Federal Magistrate. Integrity and innate good sense have marked her career.

Ms. Phillips has also provided extensive leadership in our community through her public service. She serves on the board of directors of several organizations including the Rape Crisis Center and the Youth Service Center.

Based on her legal employment and education, Judge Phillips is extremely well qualified for confirmation to the Federal District Court. I hope that the Senate Judiciary Committee will have the opportunity to hear directly from Judge Phillips on her background, training and judicial philosophy.

Thank you for considering my views on this very fine person.

Sincerely,

RAYMOND L. ORBACH,
Chancellor.

THE PRESS-ENTERPRISE,
Riverside, CA, July 9, 1998.

Senator ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write to urge your confirmation of Virginia A. Phillips to the United States District Court Central District of California.

She has usually strong bipartisan support from civic and legal community leaders in our fast-growing area which now has only one very overloaded federal judge.

As a client of hers, my newspaper found her to be a superb and hard-working lawyer, technically expert and attentive to detail. Her candidacy is commended by her strong educational background, her range of legal experience and her community service.

She is highly regarded by local attorneys and judges, as attested to by the complexity of cases they consented to her hearing as a superior court commissioner, and also by her colleagues at the federal court in Los Angeles where she has been serving as a magistrate.

What is most impressive about her, though, is her clarity of thought and her absolute fairness. She has the judicial temperament we all hope for on the bench. She would make an excellent federal judge.

Sincerely,

MARCIA MCQUEEN,
Editor and Publisher.

INLAND ACTION INC.,
San Bernardino, CA, January 5, 1999.

Hon. ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: Inland Action would like to express our great support for Judge Virginia Phillips for the United States District Court judgeship in the Central District of California. Inland Action is a non-profit corporation of citizens who are banded together to aid in the economic development of the Inland Empire (San Bernardino and Riverside Counties).

Judge Phillips now serves as a United States Magistrate Judge for the Central District Court in California. Prior to her current position, she served as a Commissioner for the Riverside County Superior Court having been assigned to the Civil Trail Department and presiding over cases from initial filing through trail. She also handled the Court's Civil Law and Motion Department.

From 1988 to 1991, Judge Phillips was a partner with Best, Best & Krieger in Riverside, California. She practiced civil litigation emphasizing real property, business tort, contract and employment matters. Judge Phillips also currently serves as a lecturer at the University of California, Riverside's Law and Society Program, and held a Senior Seminar in Constitutional Law.

Judge Phillips received her B.A. (*Magna Cum Laude*) at the University of California, Riverside in 1979, and later obtained her J.D. from the University of Berkeley Boalt Hall School of Law. Her professional activities include: Board of Directors member of the Federal Bar Association—Inland Empire Chapter; Judicial Master, Leo Doegan Inn of Court; Board of Directors members with the Riverside Youth Center, Board of Directors member with the Riverside Area Rape Crisis Center, Volunteer Judge for the Riverside County Bar Association Mock Trail Program; Panel Member with the Riverside County Office of Education, Legal Seminars; Instructor for the Mandatory Continuing Legal Education; member of the City of Riverside Human Relations Committee; Chairperson of the City of Riverside Law Enforcement Policy Advisory Committee; Arbitrator with the American Arbitration Association; and finally, Coordinator/Volunteer for the University of California, Riverside Legal Services Clinic.

Judge Phillips also published a monthly book review column for the Riverside County Lawyer, the official publication of the Riverside County Bar Association. Her accomplishments are obviously impressive and well-renowned. We hope you will nominate her for the United States District Court Bench. We give her our strongest recommendation.

Sincerely,

DONALD L. SINGER,
President.

COUNTY OF SAN BERNARDINO,
COUNTY COUNSEL,
San Bernardino, CA, June 9, 1998.

Re Confirmation of Federal Judge Virginia A. Phillips.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I want to let you know of my support for confirmation of Magistrate Judge Virginia A. Phillips to a Federal Judgeship with the Central District of California. Our office is within the Central District of California and I, in

particular, handle approximately 60 percent of my case load within the Central District of California. The workload of the Central District of California has been ever increasing and the need for quality judicial appointments within the Central District is great.

I Know Virginia Phillips and her work as a Magistrate Judge and also know her work as a Commissioner for the courts of Riverside County. She not only possesses a keen legal mind but also possesses the qualities that attorney practitioners in Federal Court desire from a Judge which is judicial temperament. I defend the County of San Bernardino and its employees on a regular basis in Federal Court. My interaction with Magistrate Judge Virginia Phillips has always been a positive one in as much as Magistrate Judge Phillips possesses the necessary qualities to achieve justice within the confines of law.

I whole-heartedly support her confirmation to the Federal Bench. I am unaware of anyone who practices regularly within the Central District who has any negative comments about Magistrate Judge Virginia Phillips. I would hope that the Judiciary Committee acts swiftly in scheduling a hearing date and that she be confirmed. Her appointment to the Federal Bench would be a quality appointment of a Federal Judge who has the support of practitioners from both political parties.

If anyone has any questions, please feel free to contact me. Thank you.

Very truly yours,

ALAN K. MARKS,
County Counsel.

DENNISE E. WAGNER,
Deputy County Counsel.

MONDAY MORNING GROUP,
Riverside, CA, May 22, 1998.

Re Nomination of Magistrate Judge Virginia Phillips for appointment to the Federal District Court Bench, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: The Monday Morning Group of Western Riverside County is a business group with representatives from a variety of industries and professions who work for what we hope is the good of our region. In this capacity and for that very purpose, we're writing to you to encourage you to confirm Virginia Phillips, who is currently a magistrate judge, as a Federal District Court Judge for the Central District of California.

After several years of work, the Monday Morning Group, along with others from our region, were successful in having the Central District of California divided into three divisions, with one of those divisions being Riverside and San Bernardino Counties. The legislation signed by President George Bush, also designated a place within the Eastern Division as a place for holding court. That was obviously the first step in bringing Federal District Court services to our region.

This legislation was signed in 1992, the year in which two new senators were elected from California, namely Senator Dianne Feinstein and Senator Barbara Boxer. The Monday Morning Group worked diligently with both of the senators, with the result that Senator Feinstein nominated the first person, Robert Timlin, who was confirmed by the Senate Judiciary Committee and became the first Federal District Court judge to sit in our Eastern Division.

We are most pleased that Senator Barbara Boxer nominated Virginia Phillips, who, upon confirmation would be the second judge to sit in our division. Perhaps most importantly Virginia Phillips would be an outstanding Federal District Court judge.

Virginia had a distinguished career as a lawyer in our region, practicing with the firm of Best, Best & Krieger. When she became a commissioner of Riverside Superior Court her talent, intelligence and fairness were quickly recognized and her performance and reputation as a superior court commissioner were sterling. Her experience as a magistrate judge followed a similar path. By virture of her intelligence, work ethic, fairness, and judicial temperament, she was quickly in the top tier of the magistrate judges.

We are proud to have a person of such merit as the candidate for what will be the second federal judge to serve in our Eastern Division of the Central District Court. We hope that you will schedule the hearing on her confirmation as soon as

possible and that you will support her confirmation, as she will be a credit to the federal bench and to our region.

Yours truly,

JANE W. CARNEY,
President.

PUBLIC DEFENDER,
COUNTY OF RIVERSIDE,
Riverside, CA, June 19, 1998.

Re Appointment of Virginia Phillips to Federal District Court, Central District of California.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: I have worked in the Riverside County Public Defender's Office for the past 21 years. During this time I have had contact with Virginia Phillips in her various career roles. I am also aware of her professional reputation within the legal community here in Riverside County. She was a highly respected attorney during her career as a civil litigant. While on the bench in Riverside as a Commissioner, she held the respect of all who appeared in front of her. She was considered fair to all. She was also a hardworking jurist who was well prepared daily on the civil law and motion calendar. During her career as a United States Magistrate Judge, her reputation continued to grow as a highly respected, learned and fair jurist.

I urge you to: (1) schedule a hearing date for the appointment of Virginia Phillips to the Federal District Court, Central District of California, and (2) confirm her appointment to that position. I cannot emphasize enough the high quality of individual and jurist that Virginia Phillips is.

Sincerely,

MARGARET J. SPENCER,
Public Defender.

MOUNT SAN JACINTO,
COMMUNITY COLLEGE DISTRICT,
San Jacinto, CA, May 16, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This letter enthusiastically endorses the appointment of Virginia Phillips to the Federal District Court, Central District of California. Magistrate Phillips has served the court with distinction and earned the respect of the Inland Empire of Riverside County. She has received the nomination of our State's Senator.

Please assist in scheduling her hearing date, I am sure that your review of her record will result in your support.

Yours most truly,

KAY CENICEROS, *Dean.*

BEST, BEST & KRIEGER LLP,
Riverside, CA, June 15, 1998.

Re Virginia Phillips.

Senator PATRICK J. LEAHY,
Russell Senate Office Building, Washington DC.

DEAR SENATOR LEAHY: I am writing in support of Virginia Phillips' appointment to the Federal District Court, Central District of California. I have known Virginia since 1982, when she began work as an associate attorney at our law firm. Her work as an associate and a partner in the firm was universally respected, demonstrating ability and judgment. Her work ethic was and is outstanding.

Her tenure as a Superior Court Commissioner and then as a Federal Court Magistrate has demonstrated her skill and intelligence, and has drawn compliments

from other judges, attorneys, and even litigants appearing before her. She is well respected both in the legal community and in the inland Empire at large.

I urge you to schedule her hearing date, and to confirm her appointment to the Federal District Court. She will be an asset to the judiciary.

Very truly yours,

ANNE T. THOMAS.

RIVERSIDE, CA,
June 14, 1998.

Re Nomination of Virginia A. Phillips for appointment to Federal District Court, Central District of California.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: I am writing today on behalf of Virginia A. Phillips who has been nominated for appointment to the Federal District Court, Central District of California. I would like to urge an early scheduling of a hearing for Judge Phillips, and for your support for her confirmation.

I have known Virginia personally since 1978 when she worked for me as an undergraduate student at the University of California, Riverside. I know that you will receive volumes of material and testimony which speaks to her professional qualifications for the position of Federal Judge, and I am sure you will find these accomplishments to be superior in every way. I would like to provide insight on our personal relationship.

I was fortunate to be able to keep contact with Virginia over the 20 years since her student days. I admired her so much, I introduced her to my daughter who was beginning law school. They formed a close friendship when they were classmates at Boalt Hall School of Law at U.C. Berkeley. Later Virginia joined the law firm where my husband was a partner. My husband became a judge in the Superior Court of Riverside County and was there when Virginia was hired as Commissioner. We are neighbors, and friends and have shared the experiences of being like a family, supporting each other in times of crisis and joy.

I have always been impressed by Virginia's commitment to her community. Through her entire career she has given herself to worthwhile organizations. She gave her time even though she had very time-consuming career responsibilities—beginning with a large law firm, assuming the bench, and later commuting over an hour a day each way to Los Angeles. The organizations she supports give evidence of her high standards and values. Among those, she served on the Board of Directors of the Riverside Youth Service Center who made her an honorary Life Board Member. She was also a member of the City of Riverside Human Relations Commission. In her professional activities she has been involved in the Mock Trial Program for high school students and participated in the Inns of Court program whose goal is to assist attorneys in their role with the courts, promoting ethical and responsible professional conduct.

I feel the values represented by these activities are the qualities which make Virginia an outstanding judicial officer. Her training and experience give her background she needs to continue the important work she is already doing. We need people the caliber of Virginia A. Phillips on the Federal bench in the Central District.

Your consideration of these points is very much appreciated.

Your truly,

VIRGINIA L. FIELD.

RIVERSIDE, CA,
June 14, 1998.

Re Nomination of Virginia A. Phillips for appointment to Federal District Court, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing today on behalf of Virginia A. Phillips who has been nominated for appointment to the Federal District Court, Central District of California. I would like to urge an early scheduling of a hearing for Judge Phillips, and for your support for her confirmation.

I have known Virginia personally since 1978 when she worked for me as an undergraduate student at the University of California, Riverside. I know that you will receive volumes of material and testimony which speaks to her professional qualifications for the position of Federal Judge, and I am sure you will find these accomplishments to be superior in every way. I would like to provide insight on our personal relationship.

I was fortunate to be able to keep contact with Virginia over the 20 years since her student days. I admired her so much, I introduced her to my daughter who was beginning law school. They formed a close friendship when they were classmates at Boalt Hall School of Law at U.C. Berkeley. Later Virginia joined the law firm where my husband was a partner. My husband became a judge in the Superior Court of Riverside County and was there when Virginia was hired as Commissioner. We are neighbors, and friends and have shared the experiences of being like a family, supporting each other in times of crisis and joy.

I have always been impressed by Virginia's commitment to her community. Through her entire career she has given of herself to worthwhile organizations. She gave her time even though she had very time-consuming career responsiblities—beginning with a large law firm, assuming the bench, and later commuting over an hour a day each way to Los Angeles. The organizations she supports give-evidence of her high standards and values. Among those, she served on the Board of Directors of the Riverside Youth Service Center who made here an honorary Life Board Member. She was also a member of the City of Riverside Human Relations Commission. In her professional activities she has been involved in the Mock Trial Program for high school students, and participated in the Inns of Court program whose goal is to assist attorneys in their rule with the courts, promoting ethical and responsible professional conduct.

I feel the values represented by these activities are the qualities which make Virginia an outstanding judicial officer. Her training and experience give her the background she needs to continue the important work she is already doing. We need people the caliber of Virginia A. Phillips on the Federal bench in the Central District.

Your consideration of these points is very much appreciated.

Yours truly,

VIRGINIA L. FIELD.

HANOVER & SCHNITZER,
San Bernardino, CA, July 8, 1998.

Re United States Magistrate Judge Virginia Phillips.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: It is my pleasure to write this letter in support of the confirmation of United States Magistrate Judge Virginia Phillips as United States District Judge.

As founding president of the Inland Empire Chapter of the Federal Bar Association, I have become aware of Judge Phillips' reputation in the legal community and she is a very highly respected jurist. Although I have not personally appeared before her, I understand she is extremely well prepared, demonstrates exceptional judicial temperament and patience, and exhibits the character and qualities of an individual who would be extremely well qualified to be a United States District Judge.

Judge Phillips has also given freely of her time to the local legal community. An excellent writer and speaker, she frequently writes articles for bar association publications and participates in continuing legal education seminars that are very well attended.

I give my unqualified support and recommendation for the Honorable Virginia Phillips as United States District Judge. I urge you to take every action you can to see that a date is set for her confirmation hearing. I would also ask that you vote in favor of her confirmation.

Very truly yours,

MARK C. SCHNITZER.

RIVERSIDE COMMUNITY COLLEGE,
Riverside, CA, May 21, 1998.

Senator PATRICK J. LEAHY,
U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: I am writing as a member of the community in support of President Clinton's recommendation for the appointment of Ms. Virginia A. Phillips to the Federal District Court, Central District of California.

President Washington considered the reputation of the candidate in the community as an essential criteria in making federal appointments. Ms. Phillips meets and passes those criteria with flying colors. Her reputation as a more able lawyer by her colleagues and clients attests to the regard in which she is held. Her spirit and commitment to public service is evidenced by her extensive volunteer work in her profession—serving on the boards of the Youth Services Center, the Riverside Area Rape Crisis Center and the Human Relations Commission for the city of Riverside.

Ms. Phillips is considered an intelligent, public-spirited, and caring lawyer and magistrate, working as a legal practitioner for the common good of society. Highly respected by all who know her, Ms. Phillips is regarded equally among Republicans and Democrats.

I urge you to do your best to give a hearing to Ms. Phillips so that she can have an opportunity to appear in front of your committee. If that happens, I am confident that you and your colleagues on the committee will confirm the appointment.

Sincerely,

SALVATORE G. ROTELLA,
President.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF RIVERSIDE,
Riverside, CA, June 8, 1998.

Re Confirmation of Virginia A. Phillips as Judge of Federal District Court, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write to request that you schedule a hearing date to consider the confirmation of Magistrate Judge Phillip's appointment and that you vote, and urge your colleagues to vote, to confirm her appointment.

Judge Phillips and I practiced law in different firms in this community for a number of years. After I became a judge, the court appointed her a commissioner. She and I presided in the civil division of the court for more than two years. She enjoyed, and still enjoys, the confidence of many litigants and attorneys who agreed to have her hear their cases. They find her decisions predictable and correct. She is firm, fair and scholarly. The judges of this court relied extensively on her wisdom and legal acumen, and her departure to the U.S. District Court as a magistrate judge has been a considerable loss. She is an exceptionally fine appointee.

I would respectfully suggest that we, as Republicans, will stand a bit taller in the public eye if your Committee joins ranks with the President on an appointee as well qualified as Judge Phillips, and that by so doing, Republican members will undercut charges of obstructionism.

Respectfully,

STEPHEN D. CUNNISON,
Judge of the Superior Court.

GUTIERREZ & PIMENTEL,
ATTORNEYS AT LAW,
Riverside, CA, June 5, 1998.

Re Appointment of Virginia Phillips.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: I am writing this letter to offer my support for the appointment of Virginia A. Phillips for appointment to the Federal District Court, Central District of California.

As a form of introduction, I am an attorney in Riverside, California, with the Law Firm of Gutierrez & Pimentel. I am also the current President of the Inland Empire Latino Lawyers Association. I have been in practice for approximately 18 years, primarily engaged in the fields of worker's compensation, and personal injury.

I have had occasion to appear in the court room of Virginia Phillips while she was a Commissioner in the Riverside County Superior Court. In each of the occasions when I appeared before her, she appeared to be efficient, well versed in the law, and always fair. I have had occasions to discuss her performance with other attorneys in the area and I can assure you that I have not heard one person complain about her.

In addition, I have had the opportunity to work with her in the Arbitration Committee Panel in the Riverside County Superior Court system. I found her to be highly intelligent, well prepared, and full of good ideas. I can assure you that she has the respect and admiration of the attorneys that have practiced before her. I would highly recommend her appointment to the Federal District Court Central District of California.

If you have any questions regarding the above, please do not hesitate to contact me.

Yours very truly,

RENE H. PIMENTEL, Esq.

JUNE 5, 1998.

Senator PATRICK J. LEAHY,
Russell Senate Office Building,
Washington DC.

DEAR SENATOR LEAHY: I am writing in support of Judge Virginia Phillips' nomination to the United States District Court, and to request that a hearing date be set as soon as possible in order to confirm her appointment to the Federal District Court, Central District of California.

My letter may be somewhat atypical since I am not an attorney, or otherwise involved in the judicial system. I am the Executive Director of the Youth Service Center which is private non-profit counseling agency serving the needs of children and their families, and have known Ms. Phillips for over eight years as a result of her involvement in the Center and other community organizations. I have come to know Virginia personally as well as professionally, and have the highest respect and regard for her.

Virginia was elected the Center's Board of Directors in 1990, was soon elected to the Executive Committee, and served two consecutive terms as president. Her third consecutive term on the Board ended last month, and as a result of the agency's by-laws, she was therefore ineligible for re-election. One indication of esteem and respect held for Virginia is her election to a Life Director of the Center. This is a position designed to honor individuals who have made a significant impact on the organization, and keep them involved. There has only been one prior election to this position in the Center's entire history dating back to 1969.

Judge Phillips' involvement with the Center is illustrative of her values and commitment to the community. The agency provides a range of prevention, intervention, and treatment services addressing issues of child abuse, substance abuse, delinquency, teen pregnancy, gang violence, child care, adolescent suicide, and other family related problems. The Center's Board is an active, participatory one, and Virginia was very involved and provided great leadership during a period of significant expansion for the agency. She did so despite being extremely busy professionally, first as partner at the largest law firm in the region, then as a Superior Court Commissioner, and most recently as a Federal Magistrate which involved her commuting to Los Angeles.

Ms. Phillips has never been merely a figurehead member of the Board. Before accepting nomination, she became thoroughly aware of the agency's services and operations. As a Board Member, she actively participated, provided leadership, and never let the Board lose focus on the clients the agency services. She was attracted to the agency due to her concern for children and families, and her concern for interests of our community.

Judge Phillips' personal and professional qualities are precisely those that I, as a member of the community believe are important for a Federal Judge. Her intelligence, integrity, and commitment have earned her the respect and admiration of all who know her. We will be fortunate to have her, once confirmed. I am also aware of the tremendous burden on the Federal Courts as a result of the large number of Judicial vacancies. I hope that confirmation process will take place as quickly as

possible, so the Court system becomes more efficient, particularly since an individual of Judge Phillips' caliber is available.

Sincerely,

HARRY FREEDMAN.

HUFFMAN ROOF COMPANY,
Riverside, CA, June 8, 1998.

Re Appointment of Virginia Phillips.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: It is with great confidence that I request that you consider Virginia Phillips for appointment to the Federal District Court, Central District of California.

As a Republican and lifelong resident of Riverside, I support Ms. Phillips. As a business owner and past Chairman of the Board of the Greater Riverside Chambers of Commerce, I have had an opportunity to meet many of our community leaders. Ms. Phillips stands in the forefront of that group with her eagerness to participate and her commitment to what is right for the community.

It has truly been a pleasure to come in contact with this fine woman. I would highly recommend her for the position as I know that she would do an outstanding job for the citizens of our region.

Please keep this request in mind as you move through the process with a timely scheduling of her hearing and confirmation of her appointment to the Federal District Court. I sincerely appreciate your consideration.

Respectfully,

DEBBI HUFFMAN GUTHRIE,
President.

REID & HELLYER,
Riverside, CA, June 3, 1998.

Re Appointment of Virginia Phillips to Federal District Court, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH AND SENATOR LEAHY: I am an attorney practicing in Riverside, California. I have known Virginia Phillips since she was an attorney and I have been attorney of record in cases against her. I found her to be a competent and diligent advocate. Her skills as an attorney, however, were surpassed by her skills as a judicial officer. As you may be aware, Virginia was first appointed as a "Law and Motion" Commissioner. Previous Law and Motion Commissioners did nothing more that hear brief motions relating to cases and nothing else. Virginia's wisdom, careful attention to detail and judicial skills became immediately apparent and she was universally accepted by the attorney bar as a regular judicial officer. Within six months, virtually every attorney in town would stipulate to Virginia as the presiding Judge over their matters for trial and she became considered an equal with the sitting Judges for all matters. I had the pleasure of trying several cases before her, including one lengthy jury trial and I found her judicial demeanor and temperament to be outstanding.

I can recommend Virginia Phillips for an appointment to the Federal District Court, Central District of California bench without hesitation or reservation. Please consider her for this position and set her hearing date at your earliest opportunity and confirm her to this position.

Thank you for your consideration in this matter. If I may be of further assistance to you or your staff, please do not hesitate to call.

Very truly yours,

DAN G. MCKINNEY.

ERNST & YOUNG, LLP,
Riverside, CA, May 19, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This letter serves as a personal reference for, and an endorsement of, Virginia Phillips' appointment to the Federal District Court, Central District of California. Having known Virginia for Twenty (20) years, I strongly believe her integrity and professional demeanor would be a tremendous asset to the Federal District Court and I highly recommend her appointment. Your favorable consideration would be greatly appreciated.

Sincerely,

DONALD N. ECKER.
Managing Partner.

THOMPSON & COLEGATE, LLP,
Riverside, CA, June 3, 1998.

Re Appointment of Virginia A. Phillips to Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR: Please be advised that I am a lifelong Republican who has practiced in the Inland Empire (Riverside and San Bernardino Counties) for the last 16 years. I was president of the Riverside County Bar Association in 1994, and have served as president of Dispute Resolution Services, a non-profit arbitration mediation service affiliated with the Riverside County Bar Association, since its inception. I have known Virginia Phillips since she began her legal career in our legal community in 1982, and am unable to explain in written words how strongly I, as well as every other attorney I know in the Inland Empire, desire that Virginia Phillips receive this appointment.

In all the years that I have known Virginia, she has never really discussed with me her political affiliation. While it is my understanding that Senator Boxer had originally proposed Ms. Phillips, I must state that while rarely do I cross party lines, in this particular case if Ms. Phillips is a Democrat she should nevertheless, receive the job. She is simply the best-qualified individual for the position which desperately needs to be filled in our community due to the backlog of cases now facing our existing federal judge, Judge Timlin. This is a situation where I believe service to the community outweighs party lines, and I certainly hope that you and the Judiciary Committee will agree.

Thank you for your consideration regarding this matter.

Very truly yours,

GEOFFREY H. HOPPER.

KRIEGER & STEWART,
Riverside, CA, June 3, 1998.

Subject: Federal District Court, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR: Virginia E. Phillips, currently serving as a magistrate judge in the Central District, is an extraordinary candidate for appointment to the Federal District Court. Before serving as a magistrate judge, she served as a Riverside California Superior Court Commissioner for several years, presiding over several civil jury trials and earning the reputation of being fair, firm, and practical. While serving as a magistrate judge, she has presided over both civil and criminal trials with distinction, but she is best known for her unique ability to bring about settlements in civil cases.

She is noted for being well read and well prepared and likes research and writing. Most important, she is bright and conscientious and likes what she is doing. In addition to being highly respected by judges and attorneys she is held in extremely high regard in the community, from elected officials to a broad range of professionals to a variety of citizens. She is particularly well liked by the business commu-

nity because she handles cases with aplomb and efficiency. Her demeanor on the bench is superb.

Please give Virginia E. Phillips full consideration for an appointment to the Federal District Court Bench. She will make an exceptional judicial officer in the Federal District Court, Central District of California.

Sincerely,

ROBERT A. KRIEGER.

BEST, BEST & KRIEGER, LLP,
Riverside, CA, June 3, 1998.

Re Virginia Phillips.

Senator PATRICK J. LEAHY,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR LEAHY: I suspect you will get a number of letters in support of Ms. Phillips for a Federal District Court judgeship, particularly from those attorneys who have known her and practiced with her over the years. This is a tribute to her reputation for high intelligence, strong ethics, and excellent demeanor. I practiced law with Ms. Phillips for a number of years and, as I was beginning my tenure as Managing Partner of the firm, she moved out into her current position with the Federal Court. I have kept in touch with her both socially and professionally over the years, and my admiration for her has continued to grow.

Ms. Phillips is a fellow Democrat, somewhat of a rarity in these parts. Her politics aside, however, Ms. Phillips personified initially all that we more senior attorneys look for in young attorneys coming out of Law School. Once in practice, she showed the sort of temperament that we look for in young attorneys who aspire to the bench. At this point, I can think of no one in the area who is more qualified.

It is somewhat difficult from the far reaches of the west coast to quite get a handle on what a candidate for a judicial judgeship must hurdle in order to be confirmed, particularly when that candidate is a Democrat. Ms. Phillips politics are really beside the point, and I hope that you can help convince other members of the Committee that this is so. Our area is in dire need of a second Federal Judge, and her appointment has received wide approval in this area. As a member of the Committee, I hope you can help expedite her confirmation.

Very truly yours,

CHRISTOPHER L. CARPENTER.

BUTTERWICK, BRIGHT & O'LAUGHLIN, INC.,
ATTORNEYS AT LAW,
Riverside, CA, June 3, 1998.

Re Virginia Phillips.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write as a registered Republican voter to express my support for the nomination of Virginia Phillips as a United States District Court Judge for the Central District of California.

As a former President of the Riverside County Bar Association, the quality of judicial appointments has long been a concern of mine, and I have provided input, upon request, regarding the proposed nomination of a number of state trial judges and appellate justices.

I am particularly pleased to express my support for Commissioner Phillips in that I have personally appeared before her on a number of occasions on law and motion matters and had the experience of a bench trail before her. She is extremely intelligent, well versed in the law, exceptionally fair-minded and has displayed her ability to distill the relevant facts from testimony presented to properly support her conclusions.

Very simply, the United States Senate cannot find a better candidate.

Very truly yours,

J.D. BUTTERWICK.

STREAM & STREAM, INC.,
ATTORNEYS AT LAW,
Riverside, CA, June 2, 1998.

Re United States Magistrate Judge Virginia Phillips.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to urge you to take action on the confirmation of Presidential Nominee for United States District Judge, United States Magistrate Judge Virginia Phillips, I am a life-long Republican and understand the important role that the confirmation process plays in the selection of impartial judges that uphold the Constitution of the United States. It is my privilege to report to you that I know Virginia Phillips to be that type of judge.

Judge Phillips is an extremely hardworking judge. I have appeared in front of her on several occasions, both on law and motion matters and in trial. All of her skills are of the highest quality. She is always well prepared. She comes to well-reasoned decisions. And, she has always showed exceptional judicial temperament and patience. I would not describe her as an "activist" judge in any sense of the word, but instead a judge who carefully applies the facts to the law in each case.

My opinion regarding Judge Phillips' exceptional qualifications to serve as a U.S. District Judge is not unique. As the president of the Inland Empire Chapter of the Federal Bar Association and an active member of the legal community, I am aware that Judge Phillips enjoys the reputation of being one of the preeminent jurists in our community and in the Central District.

Judge Phillips has also consistently and freely given of her time to the local legal community. An excellent writer and speaker, she frequently volunteers to write articles in bar association publications and to give continuing legal education seminars that are always very well attended.

Both as a Republican and a lawyer, it is my pleasure to give you my unqualified recommendation of the Honorable Virginia Phillips. I urge you to take every action you can to see that a date is set for her confirmation hearing. I would also ask that you vote in favor of her confirmation.

Very truly yours,

THEODORE K. STREAM.

SWEENEY ART GALLERY,
UNIVERSITY OF CALIFORNIA,
Riverside, CA, May 31, 1998.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: This is a letter in support of President Clinton's recommendation for the appointment of Virginia A. Phillips to the Federal District Court, Central District of California.

Virginia Phillips has been a friend for many years. Her distinguished reputation as an attorney is only one of her outstanding assets. Her devotion to her profession, and to public service, as inspiration to all who know Ginny. The unconditional commitment she has to her current position as Magistrate makes her a superior candidate for the position in Federal District Court.

It would be in the best interest of the entire population served by the Federal District Court, Central District of California, to ensure that Virginia Phillips receives a hearing in the near future. I urge you to move the process forward.

Thank you in advance for your attention regarding this consequential nomination.

Sincerely,

KATHERINE V. WARREN,
Director.

BEST, BEST & KRIEGER LLP,
Riverside, CA, June 9, 1998.

Re Request for support of Virginia Phillips' appointment to the Federal District Court.

Senator ORRIN G. HATCH,
Chairman, Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to strongly urge you to support the recent appointment of Virginia Phillips, (who currently served as a Federal Magistrate) to the Federal District Court serving the Riverside area. I have practiced law in Riverside for the past 35 years, and I have known Virginia Ettinger Phillips as a student at UC Riverside; as an attorney in private practice in this community; as a Riverside Superior Court Commissioner; and as Federal Magistrate. I have worked with her as an attorney and I have appeared before her in court. I have observed her performance in each if these capacities and I have served with her on committees dealing with Bar Association and Inn of Court activities. She is without question, an outstanding jurist possessing all of those qualities essential to lifetime tenure on the bench.

Her work ethic as a Superior Court Commissioner and as a Federal Magistrate has served as a good example for those who serve with her on the bench. Her intellect and quality of reasoning make her extremely well qualified for the position and cause her to stand out among her colleagues. She is well respected and will be equally well received by the legal community and the greater community at large. I am a life-long Republican who feels strongly about the quality of our judiciary. Virginia Phillips has my highest recommendation for this appointment. I urge you to support here appointment as our next Federal District Court Judge from this area, and to promptly schedule and conduct a Senate Hearing to confirm that appointment.

Very truly yours,

DONALD F. ZIMMER.

RIVERSIDE, CA,
May 28, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: We are writing as members of the Riverside, California community in support of the appointment of Ms. Virginia A. Phillips to the Federal District Court, Central District of California.

Ms. Phillips not only has served the legal community with distinction but she has also been committed to community service as well. She has served on the Board of Directors of the Riverside Area Rape Crisis Center and the Riverside Youth Service Center, where she also served as Board President 1993–94. She was a member of the Human Relations Commission for the city of Riverside from 1987–1991.

Virginia is highly regarded within the community by both Republicans and Democrats. We urge you to give her assets and strengths favorable consideration and confirm her appointment.

Sincerely,

ROBERT E. BOWERS.
BRENDA R. BOWERS.

RIVERSIDE, CA,
May 29, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to urge your support for confirmation of the appointment of Virginia A. Phillips to the Federal District Court, Central District of California.

I have known Judge Phillips for twenty years, beginning in 1978 when we were both applying to law school. We attended Boalt Hall together and have remained friends and colleagues in the ensuing years.

Judge Phillips's distinguished record speaks to her ability and her enormous intelligence. It also reflects her commitment to law, to justice, and to our community, which has benefited from her dedicated involvement in a multitude of ways.

As a lawyer who works in the judicial system as an appellate research attorney, I am confident that Judge Phillips possess the wisdom, temperament, restraint, and good sense that are the most valuable and necessary qualities in a judicial officer. The strong bipartisan support she has received demonstrates her acknowledged fitness for this position.

Furthermore, as her friend, I can attest to the strength of her character, her absolute integrity, and her unswerving sense of morality. If I have a personal hero, it is Judge Phillips. There is no one I honor or admire more.

The appointment of Judge Phillips would well serve our country, the judicial system, and our community.

Sincerely,

VICKI BROACH GRIFFIS.

REID & HELLYER,
Riverside, CA, May 29, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing this letter in support of the nomination by President Clinton of Virginia A. Phillips to the position of Federal judge here in our district.

I have known Judge Phillips since she came to Riverside in 1982 to join Best, Best & Krieger as a lawyer. Further, I appeared in front of her multiple times during the four years she was a commissioner here in our state superior court. I can say without reservation that Judge Phillips is an outstanding jurist and is among those who are the best and the brightest in our profession. She has exhibited outstanding judicial temperament in the exercise of the necessary logic and skill to make an outstanding Federal judge of the United States District Court.

I feel I am qualified to evaluate Judge Phillips based on my appearances before her, the fact that I have known her personally for a number of years and the fact that I have served here locally both in the evaluation of judges for the state court and on the federal committee to evaluate magistrate judges.

If you have any questions, please do not hesitate to call me.

Sincerely,

DAVID G. MOORE.

RIVERSIDE, CA,
August 24, 1999.

Re Confirmation hearing for Virginia A. Phillips, nominee for appointment to the Federal District Court Bench, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: It is my privilege and honor to be a member of a local organization of business leaders (namely The Monday Morning Group) who although predominantly Republican prides itself in its bipartisan support of all things "good" for our overall region. The qualifying factor for membership is a proven history of community concern, giving and leadership. At the top of our list of very necessary good things for our region is the confirmation of Virginia A. Phillips to the Federal District Court, Central District.

Magistrate Judge Phillips has overwhelming bipartisan support, not only from community leaders but from elected officials, as well. Our region is currently being served by ONE Federal judge. You can well imagine how grossly inadequate this is for the justice system in this area. I was recently summoned for Federal Jury Duty selection and witnessed first hand how desperately we need action to be taken on this matter.

Your forward motion for the confirmation hearing for this Central District nomination will be as greatly appreciated by the region's leadership as it is needed for the region at large.

Respectfully, sincerely and hopefully yours,

ZELMA BEARD.

FEDERAL BAR ASSOCIATION,
INLAND EMPIRE CHAPTER,
Riverside, CA, September 2, 1999.

Re Honorable Virginia Phillips.

Senator ORRIN HATCH,
U.S. Senate Committee on the Judiciary,
Washington, DC.

DEAR SENATOR HATCH: As you know, the Honorable Virginia Phillips, Magistrate Judge, has been nominated to be a U.S. District Court Judge for the Central District of California.

Judge Phillips is from the Inland Empire, which encompasses Riverside and San Bernardino Counties.

We represent all the elected Presidents of the Inland Empire Chapter of the Federal Bar Association. In that capacity, we urge that you support Judge Phillip's nomination as a U.S. District Court Judge. We also urge you to take whatever steps are necessary to bring her nomination to a vote by the Senate.

This endorsement from the Presidents of the Inland Empire Chapter of the Federal Bar Association is bi-partisan. Each one of us has different political views represented in both major political parties. But we do have unanimous consensus on one point. Judge Phillips has an outstanding reputation as a fair, impartial, conscientious, intelligent, and impeccably ethical judge. She is well tempered; she makes every effort to understand her cases and to apply the law without imposing any personal or political agenda.

The second compelling reason that we urge confirmation of Judge Phillips as a U.S. District Judge concerns the needs of the Eastern Division of the Central District Court. This Division consists of the San Bernardino and Riverside Counties. Currently, Judge Timlin sits in the city of Riverside as the only U.S. District Court Judge assigned to the Eastern Division. The fact that Judge Timlin sits in the Eastern Division has been a tremendous benefit. But the Counties of Riverside and San Bernardino cover a geographic area larger than many states in the country. This region also represents by any measure—population growth, housing starts, economic growth—one of the fastest growing areas in the country. This growth is reflected in legal filings in the Eastern Division. As the 1998 Annual Report for the U.S. District Court, Central District of California states:

"The Eastern Division continues growing with an explosion of new civil case filings.

"The number of civil cases that could be assigned to the Eastern Division increased to 756 during 1998. However, to ensure an equal assignment of cases to all active judges within the district, the Court adopted an intra-district assignment rule. Based on this intra-district assignment rule, 408 cases (53 percent) were assigned in Los Angeles rather than Riverside." (*Id.* at p. 68.)

The fact that more than half of the Eastern Division civil filings are being reassigned to Los Angeles only means that the purpose of creating the Eastern Division is not being fully met. For example, because of increasing traffic congestion, an attorney residing in the city of Riverside may take two and a half hours of travel time (not including the return trip) to make an early morning appearance in Los Angeles. This geographic barrier affects not just lawyers, but also jurors and parties to lawsuits.

It was precisely because of these issues of geography and growth that the Eastern Division was formed in the first place and that Congress funded the construction of a new federal courthouse that is due to open next year in the city of Riverside.

By confirming Judge Phillips as a U.S. District Court Judge in the Central District and by having her ultimately serve in the Eastern Division, the very reason for having the Eastern Division will be served.

If there is any additional information you need, or we can be of further assistance, please do not hesitate to call the current President of the Inland Empire Chapter of the Federal Bar Association, Richard Scott. His telephone number is (714) 257–4666.

Thank you.

Sincerely,

MARK C. SCHNITZER,
Former President.
THEODORE K. STREAM,
Former President.
RICHARD L. SCOTT,
President.
KENDALL H. MACVEY,
President-Elect.

I. Judge Phillips is a member of the Board of Directors for the Inland Empire Chapter of the Federal Bar Association. There are two other Federal Judges who are members of the Board of Directors for the Inland Empire Federal Bar Association. None of these judges, including Judge Phillips; participated in any manner, directly or indirectly, in the preparation of this letter.

AUGUST 30, 1999.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write to respectfully request you immediately consider opening confirmation hearings for Virginia Phillips, who has been nominated for appointment to the Federal District Court Bench, Central District of California.

Virginia Phillips has been a model citizen, outstanding attorney, and stellar magistrate in the Riverside area for many years. Her reputation in the community is spotless; her intellect and integrity offer a clear vision of the role model she will become as a federal judge.

Senator Hatch, we have an enormous backlog in our courts; we need help in the Riverside area. Virginia Phillips has broad-based bipartisan support for her appointment.

As a Republican and an ardent admirer of yours, I ask you to please proceed without delay to open the confirmation hearing for Virginia Phillips.

Most respectfully,

PAUL F. GILL,
Colonel, USAF, Retired.

AUGUST 30 1999.

Re Setting a confirmation hearing for Virginia A. Phillips, nominee for appointment to the Federal District Court Bench, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing this letter to express my deep concern for the delay in setting a confirmation hearing for Virginia Phillips.

I am a business man in Riverside, California who had the privilege to know Virginia Phillips for many years, both as a community leader and professional leader in the field of law. There is no one in all of California more deserving and qualified to be appointed to the Federal District Court Bench.

Your assistance, Senator Hatch, will be greatly appreciated.

Thank you.

Sincerely,

RUSSELL WALLING.

KRIEGER & STEWART, INC.,
Riverside, CA, September 2, 1999.

Subject Federal District Court, Central District of California.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: Virginia E. Phillips, currently serving as a magistrate judge in the Central District, is an extraordinary candidate for appointment to the Federal District Court. Before serving as a magistrate judge, she served as a Riverside California Superior Court Commissioner for several years, presiding over several civil jury trials and earning the reputation of being fair, firm, and practical. While serving as a magistrate judge, she has presided over both civil and criminal trials with distinction, but she is best known for her unique ability to bring about settlements in civil cases.

She is noted for being well read and well prepared and likes research and writing. Most important, she is bright and conscientious and likes what she is doing. In addition to being highly respected by judges and attorneys, she is held in extremely high regard in the community, from the elected officials to a broad range of professionals to a variety of citizens. She is particularly well liked by the business community because she handles cases with aplomb and efficiency. Her demeanor on the bench is superb.

Please give Virginia E. Phillips full consideration for an appointment to the Federal District Court Bench. She will make an exceptional judicial officer in the Federal District Court, Central District of California. Her appointment will reduce our region's able but overworked Judge Robert J. Timlin's case load, but more important, it will permit more cases to be heard in Riverside rather than crowded, cluttered, and distant Los Angeles, thus reducing and perhaps eliminating long, time-consuming daily commutes by parties, jurors, attorneys, and experts.

Sincerely,

ROBERT A. KRIEGER.

TALBOT INSURANCE AND
FINANCIAL SERVICES, INC.,
Riverside, CA, September 1, 1999.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: Slightly over one year ago I wrote you a letter requesting your support on the nomination and confirmation of Virginia Phillips to the Federal District Court Bench, Central District of California. While I recognize the careful consideration and importance that such an appointment warrants, this letter is again directed to your attention so that you may be aware of my strong support for Ms. Phillips.

I understand that there are likely to be two or perhaps three more rounds of confirmation hearings held by your Committee in September and October. The importance to our region in having Ms. Phillips nomination confirmed cannot be overstated. While I am sure you have ample information on Judge Phillips and her background, I am hopeful that file will clearly communicate the strong community support that exits, both legal and non-legal. Her broad legal background and the credentials she brings to her position will certainly validate any support you and your committee may provide.

The significance of such an appointment, as you pointed out in your response to me last June, is certainly reason enough to make sure that the advice and consent provided by the Judiciary Committee is appropriate. Judge Phillips, is in my view, worth the Committee's support and I would greatly appreciate your consideration of her nomination. Should you wish to discuss Ms. Phillips or feel that I may offer any additional information that might benefit your Committee, I hope you will not hesitate to contact me. Again, thank you very much for your time and consideration of this matter.

Kindest regards,

NICHOLAS H. GOLDWARE.

MURRIETA, CA,
August 25, 1999.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: It is my understanding that additional rounds of confirmation hearings will be held by the Senate Judiciary Committee in the near future.

We in Riverside County are at a great disadvantage without a Federal District Court Bench appointee to the Central District of California. As a registered Republican I urge you to appoint a very special Individual for this position. Her name is Virginia A. Phillips, she is a nominee from our area and has great respect and support from both parties.

I thank you in advance for your consideration in Virginia A. Phillips appointment to this most important position.

Very sincerely,

JOAN F. SPARKMAN.

RIVERSIDE, CA,
May 26, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

Senator PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I am respectfully writing to encourage you to schedule a hearing date and confirm the appointment of Virginia Phillips to the Federal District Court, Central District of California.

I have lived in Riverside, California since 1973, and I have close friends and associates in the Democratic and Republican parties. I have been very active at the local level regarding local issues, and I have supported excellent elected and non-elected officials in both political parties in campaigns and in the course of managing policy issues. Partisan labels have never kept me from strongly supporting the superior, more sensible, and more prudent individual. That is why I feel strongly about the nomination of Judge Phillips to the District Court.

Judge Phillips is a wise, well-trained, balanced, fair-minded, public-spirited, and principled individual. I have known her for many years. She has tremendous regard for her role as judge, and she is a paragon of that quality we often refer to as judicial temperament. Her paramount commitment is to the law, and there is not the slightest doubt that she would place the greatest weight on the intent of statute and constitution. For Judge Phillips the role of reviewing lower court decisions and interpreting the law and the constitution are daunting and challenging enough on ethical and intellectual grounds; this "restrained," if not passive, judicial role provides sufficient majesty and she does not need to elevate unnecessarily the role of judge to that of philosopher king or queen in order to magnify her own place in the legal firmament. I have had discussions about these matters with her, and these have been gratifying to me as a citizen and as someone with a generic interest in such matters. I have no doubt that my view of Judge Phillips will be confirmed by others.

Apart from her qualities as judge and legal thinker, Judge Phillips has been a model citizen in the community that nurtured her. After graduating from law school, she rejected perhaps more lucrative and alluring posts to return to the Riverside community that nurtured her.

Since then Judge Phillips has been active in demanding social and charitable settings, and she has been selfless as a mentor for aspiring lawyers and students interested in the law.

Moreover, Judge Phillips has been a leader in the Riverside County Bar and other regional legal organizations, as well as in other community groups.

I am very proud to know Judge Phillips. My community is very fortunate to have her service. I believe our country would be edified by her confirmation as a Federal District Judge. I implore you to act affirmatively on the nomination of this wonder-

ful citizen and public servant as soon as you can. If I can provide you with further information, please do not hesitate to contact me.

Sincerely,

MAX NEIMAN,
Professor of Political Science and Associate Dean,
University of California, Riverside.

UNIVERSITY OF CALIFORNIA, RIVERSIDE,
Riverside, CA, May 20, 1998.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I consider it a privilege to write this letter of support for the confirmation of U.S. Magistrate Judge Virginia A. Phillips to the Federal District Court.

I have enormous admiration and respect for Judge Phillips and for the personal value system, integrity and fairness she has demonstrated throughout her distinguished legal career. She also carries herself with the dignity and high personal standards required of the person who assumes this important role. I have been intimately involved in the Riverside community as an educator and active citizen for the past 13 years, and I can say without reservation that she is our most admired legal leader, and that respect comes from both the legal community and the greater community.

Judge Phillips has always excelled—as a partner at Best, Best & Krieger, the largest law firm in our region, as a Commissioner of the Riverside County Superior Court and as United States Magistrate Judge. She graduated Magna Cum Laude from the University of California, Riverside in 1979 and earned her J.D. from Boalt Hall School of Law at UC Berkeley in 1982. She has served as an outstanding lecturer for the Law and Society Program at UCR and has also taught courses for mandatory continuing legal education.

As an author, speaker, and advisor she has been a leader in virtually every aspect of our legal community and in the process has set a standard of involvement for others in her profession. But this conveys only a portion of the story. It is her conduct as a human being that has earned for her my highest regard. I have observed her in dealing with disadvantaged young people, in handling delicate personal issues, in reaching out to people in need, and in responding to challenges that most people would never confront.

She brings those personal qualities and values which are so needed in today's complex society and in a world which desperately needs leaders who can be trusted and respected and who will never compromise their personal principles. Judge Virginia Phillips is such a person. She has my strongest personal recommendation.

Sincerely,

JAMIE H. ERICKSON,
Vice Chancellor for University Advancement.

BEST, BEST & KRIEGER, LLP,
Riverside, CA, August 5, 1999.

Senator ORRIN G. HATCH,
Chairman of the Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing this letter in support of the appointment of Magistrate Judge Virginia A. Phillips for the position of United States District Court Judge, Central District of California, and to request a hearing on her nomination.

Magistrate Judge Phillips was nominated about a year and a half ago, and I urge that her hearing be held this year. Others, nominated after her, have completed the hearing process.

I have known Virginia Phillips since her college days, and then as an exemplary lawyer in our firm for many years. She is a person of outstanding character and ability, and has all of the qualifications to be a judge of whom we all can be proud.

She is a long-time Riverside resident and has broad community support—from all political viewpoints. As an active Republican, and as the senior partner of this firm, I am pleased to give her my unqualified support.

Thank you for your consideration.

Very truly yours,

ARTHUR L. LITTLEWORTH.

NOMINATIONS OF THOMAS L. AMBRO AND KERMIT E. BYE (U.S. CIRCUIT JUDGES); GEORGE B. DANIELS, JOEL A. PISANO, AND FREDRIC D. WOOCHER (U.S. DISTRICT JUDGES)

WEDNESDAY, NOVEMBER 10, 1999

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

The committee met, pursuant to notice, at 10:31 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Biden, Feinstein, and Schumer.

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

The CHAIRMAN. We are happy to welcome everybody here. Today, the committee is holding its seventh nominations hearing for this session of the 106th Congress. We will hear from 5 judicial nominees, 2 circuit court nominees and 3 district court nominees.

We have two panels today. The first panel will consist of the sponsors of the nominees, who will give brief statements on behalf of their nominees. And we are happy to welcome all of these distinguished sponsors here today. The second panel will consist of the nominees themselves.

Before we turn to the panels, I believe Senator Feinstein is going to come. She met me going into the Senate floor and said she would be a little bit late, and we will recognize her as soon as she comes to make a statement on behalf of the minority.

Now, I am happy to welcome the sponsors here today, the distinguished gentlemen at the table.

As I understand it, Senator Moynihan, you have been here a long time and you need to leave.

Senator MOYNIHAN. Well, sir, if I may, I would like to defer to my revered colleague and your friend, Mr. Rangel.

The CHAIRMAN. Could I ask a favor of you? Senator Smith needs to go.

Senator MOYNIHAN. I do not have to leave, sir. I defer to my friend.

The CHAIRMAN. Could we let him give his opening statement and accommodate him, and then I will turn to you, Senator Moynihan? And, Charlie Rangel, I am going to turn to you. If you are going

to be my Vice President, I want to recognize you right off the bat. [Laughter.]

Mr. RANGEL. That makes a lot of sense to me, Mr. Chairman.

The CHAIRMAN. It makes a lot of sense to me, too.

Go ahead, Gordon.

STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH. Thank you, Mr. Chairman, and to my senior and most distinguished colleague, Senator Moynihan, for his courtesy, and my other colleagues who are here on behalf of judges, and Congressman Rangel. I am honored to be a part of this panel.

I am actually here appearing for a judge who is not appointed for my State; he is appointed to the district court of California. Fred Woocher is a recent acquaintance of mine, but a long-time acquaintance of my brother, who is a member of the California bar. He brought Fred Woocher to my attention and I was immediately struck with the remarkable credentials Fredric Woocher has.

He is a graduate of Yale, a graduate of Stanford Law School, a member of the law review, even the president of the law review, a member of the Order of the Coif. He has been a law clerk to a U.S. appellate court and the U.S. Supreme Court. I don't know how a nominee could be better academically qualified for this appointment, but I know that this is a political season, Mr. Chairman, and I know you have been indulgent with my repeated requests that we hear this worthy nominee.

I am here because I would like to say to my Democratic colleagues, Senator Biden and others, that I hope, should there be a change in the White House, that when conservatives are appointed that there will be members of the Democratic Party who will come to their assistance, as I am doing today for Fredric Woocher, because I lament the day that Judge Bork was turned down. There has been retribution back and forth, and I am here in the spirit of reconciliation.

This man, I believe, obviously has the smarts to be a U.S. district judge, but more than that, I believe he has the integrity to know the difference between a judge's role and a legislator's seat. So I would ask this panel's indulgence to hear him out. Don't judge him on the basis of just his clients or liberal causes. Judge him on the basis of his academic credentials and his worthiness as an advocate and his integrity as a human being.

I, without reservation, recommend the President's nomination of Fredric Woocher to the U.S. district court in California, and thank the Chair and Senator Biden for your time.

The CHAIRMAN. Well, thank you, Senator Smith.

Senator Biden has graciously agreed to proceed with the sponsors, so let's turn to you——

Senator BIDEN. Mr. Chairman, only because I thought that Senator Smith was introducing Congressman Rangel as a nominee for the court. I thought that is why he was here.

The CHAIRMAN. He would want to be on the Supreme Court. I know him real well.

Senator MOYNIHAN. He is here as a candidate for the vice presidency on an important ticket that may yet evolve in the mists of New Hampshire.

The CHAIRMAN. That is right.

Senator BIDEN. Sign me on.

The CHAIRMAN. I have agreed to take him as Vice President, but that is only if Senator Moynihan and Charlie really help me to get above 1 percent in the polls. [Laughter.]

But don't worry. People are starting to realize that I am in the race.

Senator BIDEN. In my experience, that is when it gets dangerous.

The CHAIRMAN. That is right.

Charlie, let's turn to you. Congressman Rangel.

STATEMENT OF HON. CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Representative RANGEL. Senator Biden and Mr. Chairman, it is a great honor once again to be here. It is historic. It is maybe the last time I will be on the same panel with my friend and my colleague, Senator Moynihan, who has been a mentor to me, and has certainly set a high standard for all of us throughout New York State and indeed the Nation. And it is an honor for me to be with him in this joint effort in support of our dear friend, George Daniels.

I have never before appeared before a chairman that is a candidate for President of the United States, and also a friend that I admire and respect and has a lot of friends throughout the country, but especially in New York City, where he is deeply respected.

The CHAIRMAN. You are my friend. We have been friends for a long time, and I appreciate it very much.

Representative RANGEL. I have a constituent who is a candidate for a Federal judgeship that I am just excited about, excited not just because he comes from my community, but excited because of the diverse background that he has and the experience that he will be bringing to the Southern District of New York, a district that I know very well, having almost 40 years ago having the honor to serve there as an assistant U.S. attorney.

While going to school at Yale and becoming a graduate of Brooklyn Law School, it is what you do after law school that really counts, and he has done it all, from legal aid to public defender to district attorney to assistant U.S. attorney to counsel to Mayor Dinkins of the great city of New York. And he continues to build on that experience, not as an African American but as an American American with all that he brings. His training is outstanding and, in my opinion, he is going to one of the greatest districts that we have in our Federal court system.

And so I am honored to see younger people along with these types of qualifications that not only would make me and my community proud, but will make the Nation proud that only in a republic like this can someone from his background be able to build on it and then sit in the Federal court and pass judgment on other people, no matter what their background. It is a great country and we have a great candidate.

Thank you.

The CHAIRMAN. Thank you, Congressman Rangel. I appreciate having you here and having you take time. We know you are a very busy man and if you need to leave, we would be happy to excuse you.

Representative RANGEL. Thank you, Mr. Chairman.

The CHAIRMAN. I just notice on my sheet here that they misspelled your name. It is W-r-a-n-g-l-e, and I just know that that isn't true.

Representative RANGEL. No. That is just the reputation.

The CHAIRMAN. You are great. You hang in there. It is really great to have you here.

Representative RANGEL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, and it is a great honor for the judge to have your support.

Senator Moynihan, we will turn to you.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Sir, I have little to add to Mr. Rangel's lovely remarks. I might say in terms of what Senator Smith said that so far they are all Yalies coming before you, whatever that means.

Judge Daniels graduated in 1975 and went on to Boalt Hall, in California. It is a nice range of educational experience. There is little you could do in the span of 20 years that he hasn't done, as Mr. Rangel said. He has been a judge of the criminal court, where life can be pretty hard. In Manhattan, he has been for 3 years the counsel to the mayor of the city. He is now a Justice of the Supreme Court. He has the finest credentials. He has worked very hard in the bar association doing the kind of work that very little is known about; yet is so necessary. Only people who are good at it get asked to do it.

He has the complete support of my colleague, Senator Schumer, and we respectfully commend him to you and to Mr. Biden.

The CHAIRMAN. Well, thank you, Senator Moynihan. That is high praise indeed and we appreciate having you here.

Senator MOYNIHAN. Thank you, sir.

The CHAIRMAN. We certainly admire you and listen very carefully to your opinion.

Senator MOYNIHAN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will excuse you, then.

Let us turn to Senator Conrad.

STATEMENT OF HON. KENT CONRAD, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator CONRAD. Thank you, Mr. Chairman, and I thank Senator Biden, the ranking member, as well for being in attendance at this hearing. And thank you, Mr. Chairman, for including Kermit Bye in this hearing schedule.

I am very pleased to be here to announce my strong support for Kermit Bye for the Eighth Circuit Court of Appeals. I would also like to take a moment to ask his wife, Carol Beth, who is here in the audience, to stand and be recognized, if we could.

[Ms. Bye stood.]

The CHAIRMAN. We are happy to have you here.

Senator CONRAD. They are a terrific team. We regret their children could not be here today, but I want to acknowledge them as well—Laura, William and Bethany.

Kermit is a native North Dakotan, and this is a true story, Mr. Chairman and ranking member. He was born in the middle of a North Dakota blizzard in a railroad section house in Hattone, ND. Now, those are the right roots for the Eighth Circuit Court of Appeals.

The CHAIRMAN. That is enough for me. We don't even need to hear him. [Laughter.]

Senator BIDEN. I thought everybody in North Dakota was born in those circumstances. [Laughter.]

Senator CONRAD. Just those born in January.

Kermit Bye is widely recognized as one of the finest trial attorneys in the State of North Dakota. He would bring a wide range of experiences to the bench. Kermit is somebody, growing up, who worked in a lot of different jobs. He worked as a milk truck driver, a radio advertising salesman, at catalog sales at Montgomery Wards. He, after completing law school, worked as the North Dakota Deputy Securities Commissioner, and then served as assistant U.S. Attorney for the District of North Dakota.

Since 1968, Kermit has been a prominent partner in one of the most respected law firms in our State, the Vogel law firm. The Vogel law firm has produced other eighth circuit judges, including the one that just preceded Kermit Bye, John Kelly, who died tragically, I think this committee will recall.

He was named president of that firm in 1981. He has over 30 years of litigation experience. He has tried more than 100 cases, argued numerous appeals, including more than 20 before the eighth circuit. He has served on the board of governors and as president of the State bar association in North Dakota, and he is broadly supported in North Dakota. The Chairman, the ranking member and the other members of this committee have seen the really broad support that he enjoys, not only the congressional delegation here, but the former Republican governor of our State, the former Republican State chairman, the former Republican senate majority leader in the North Dakota Senate, the former Republic house majority leader in the North Dakota House, and many others who have written of their support of this candidate.

One of his supporters is the man he has been nominated to replace, Judge Frank Magill. Judge Magill has been on senior status since April 1, 1997, and was appointed to the eighth circuit by President Reagan. He says in his letter to you, Mr. Chairman, "I have had a long-time association with Kermit Bye. His professional competence and integrity are of the highest order. He has several decades of trial experience. I know from personal experience that he will be an easy fit for your criteria of judicial temperament."

Mr. Chairman, we could not be more proud than to present to this panel Kermit Bye, of North Dakota, for the Eighth Circuit Court of Appeals, and again we want to thank you for your consideration.

The CHAIRMAN. Thank you, Senator Conrad. That is very good praise indeed.

Let's turn to Senator Dorgan at this time.

STATEMENT OF HON. BYRON L. DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much, and thank you to the Senator from Delaware as well. Senator Conrad has said virtually all there is to say, and we can say it three times among the delegation, but you don't need to hear this three times. Let me just mention a couple of additional items.

I am just as proud as I can be to join my two colleagues, Congressman Pomeroy and Senator Conrad, in supporting this nomination. I have known Kermit and his wife for better than 30 years. Their daughter worked as an intern in my office, as a matter of fact.

You know, Mr. Chairman, that we had an untimely death of Judge Kelly, and a tragic death. We knew when that occurred that we were going to have to make some recommendations, and we knew immediately that Kermit Bye was the obvious choice to succeed him.

Senator Conrad has mentioned the president of the prestigious law firm, one of our State's most distinguished and respected trial attorneys, and a wide range of credentials of that sort. Let me just mention something else. In addition to all of those credentials, Kermit Bye is what we call in North Dakota a good neighbor. Yes, he is a wonderful lawyer, has risen to the top of his profession, but he is a good neighbor.

He volunteers. He is involved in community efforts in a wide range of areas, and his pro bono work on behalf of clients has been deeply appreciated by so many folks who couldn't otherwise have had legal assistance. And he is just, as I said, a fellow that we consider the best in North Dakota. He is a man of impeccable integrity and great judgment, sound judgment. He has a healthy dose of North Dakota common sense, and I know that when you have an opportunity to hear Kermit Bye today, you will understand why we, the three of us representing North Dakota's delegation, and joined by Republicans and Democrats throughout our State, speak so highly of this man who will contribute so much to the eighth circuit court when he is confirmed by the U.S. Senate.

The CHAIRMAN. Thank you, Senator Dorgan.

We are happy to have you, Congressman Pomeroy. We will take your testimony.

STATEMENT OF HON. EARL POMEROY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Representative POMEROY. Thank you, Mr. Chairman. I will be brief. Twenty years ago last month, I was sworn in as a member of the North Dakota bar. As I think back on that day, I think two things; first, how glad I am the statute of limitations has now run on all my legal work and, second, how honored I was at that time to become a member of this profession.

As we all do in our early legal days, we identify role models, outstanding practitioners whose legal skill and whose personal integrity we ourselves want to model. As I practiced law in my hometown of Valley City, I watched Kermit Bye in Fargo, one of Fargo's and one of North Dakota's outstanding lawyers. Again, this is 20 years ago. I got to know Kermit and he was a mentor to me and

a friend to me during those early days of law practice. I have enjoyed watching his contribution to the profession as he has become the State president of the bar association, on the ABA Board of Delegates. He has also made a very significant contribution to his community.

Years later, I was the State insurance commissioner. I had a chance to observe Kermit as a practitioner from a completely different perspective. Again, the same notions I earlier had rang true—a thorough legal competence; in fact, excellence and deep integrity in all respects as he practiced his craft.

I think that the constitutional Framers anticipated that we would advance truly our best to these critical jurist positions, and with the candidacy of Kermit Bye, North Dakota has done precisely that. He is a lawyer, he is a leader, he is a family man, and he is truly one of North Dakota's most distinguished citizens. He will be a superb judge on the eighth circuit, a place that will not be at all unfamiliar to him, as he has had more than 20 appeals argued before that very court.

So I am pleased to join my colleagues in advancing Kermit's nomination to you.

The CHAIRMAN. Thank you very much.

I have to tell you, Mr. Bye, that these three friends have worked hard, especially these two Senators. They have been on my back for a long time, and I have to say they have done a very good job. And Governor Schafer called and asked that we—he personally called my office requesting that we move forward with this nomination. So I think it is much to your credit that you have this type of support. And I really appreciate you gentlemen being here; we appreciate you.

Representative POMEROY. Thank you.

The CHAIRMAN. Thank you.

Senator Lautenberg, we will turn to you.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman and Senator Biden, for holding this hearing today. It is quite obvious, Mr. Chairman, that you want to be helpful in filling judicial vacancies so that our courts can continue dispensing justice, and I thank you for that. Your recent action on Faith Hochberg's nomination and your decision to schedule today's hearing are good signs that we are taking the appropriate steps to assure prompt and efficient justice for New Jersey citizens. And I know that the Federal judges in New Jersey are anxious to have some help with their overwhelming caseloads.

Today, Mr. Chairman, it is my pleasure to recommend Joel Pisano for a seat on the U.S. District Court for New Jersey. He presently is a Magistrate judge, and has been doing that since 1991. So he is already performing many of the duties of a district court judge, including jury and nonjury trials.

As a Magistrate, he has been doing a terrific job. He has handled case management and pretrial proceedings in about 600 civil cases. So he is used to controlling the large caseload of a Federal court. He has also dealt with a wide variety of different cases—patent

and trademark, environmental cleanup disputes, antitrust, securities litigation, employment discrimination cases, and civil RICO matters. And he consistently impresses everyone who appears before him with his commitment to fairness and his thorough understanding of the law.

He graduated from Seton Hall Law School in 1974, and his first job out of law school was with the public defender's office in the Essex County trial region. He worked there until 1978. From there, he entered private practice and he became a partner in a good law firm in New Jersey. In the 13 years he spent representing clients, he developed expertise in a wide variety of areas, both civil and criminal matters. Mr. Pisano appeared in court almost everyday, and tried 150 cases to conclusion.

I would also like the committee to take note that Mr. Pisano managed the litigation section of his firm, which I think was an early indication of the supervisory skills that have served him so well as a Magistrate. Magistrate Pisano's depth of experience and organizational skills are exactly what we need at a time when staggering caseloads are making it more and more difficult for our Federal judges to spend as much time with each case as they would like to. Joel Pisano can tackle this kind of challenge with energy to spare.

As I noted recently when I introduced Faith Hochberg to this committee, New Jersey's Federal courthouses are stretched to the limit, and delays are becoming more and more common. Of the 94 U.S. district courts in the country, New Jersey's court ranks 74th in the length it takes to dispose of felony cases, and 83d in bringing civil cases to trial. We are just buckling under the workload.

At the same time, we are about to enter a presidential election year, and that means judicial appointments may become delayed as a result of activity on both sides of the aisle. So I hope the committee can act quickly in bringing Magistrate Pisano's nomination to the floor for a vote.

Once again, Mr. Chairman and Senator Biden, I thank you and the members of the committee for your time and your consideration.

The CHAIRMAN. Thank you, Senator Lautenberg. You certainly have done a good job for your State and I have enjoyed working with you on these judges. So we appreciate your being here. We will excuse you because we know you are very busy.

Senator Feinstein, we will turn to you.

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

Senator FEINSTEIN. Thanks very much, Mr. Chairman and Senator Biden. Let me thank both of you for being here and you, Mr. Chairman, for having this hearing.

It is my pleasure to introduce to the committee Mr. Fred Woocher. I would like to ask him to stand, if he would.

[Mr. Woocher stood.]

Senator FEINSTEIN. I would like to introduce his family. He is here with his wife, Wendy, and his son, Jacob, and daughter, Marisa. Also, his parents, Howard and Ruth Woocher, are here, and his niece, Meredith Woocher.

The CHAIRMAN. We welcome all of you here.

Senator BIDEN. Jacob, if you get bored, we have got a room back here. I think there is a television in there and we can change it for you, so you can come back with us, OK?

Mr. WOOCHER. We are 45 minutes past that point. [Laughter.]

Senator BIDEN. Well, Judge, control your docket. Send him back.

Senator FEINSTEIN. I guess we now know what these hearings are like for people. But be that as it may, I would like to also present for the record the statement of Senator Boxer, my colleague. She is in the Supreme Court this morning, unable to be here, but wanted me to indicate her very strong support for this nominee. Mr. Woocher actually was her recommendation to the President, so obviously she is fully supportive.

The CHAIRMAN. Without objection, we will place her statement in the record.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman. I am delighted to be here today to introduce Fred Woocher to the Committee. Mr. Woocher is well qualified and I am hopeful he will receive the support and approval of this Committee.

Many members of the Committee have had the privilege of meeting Mr. Woocher, but I would also like to introduce his family who is here today—his wife Wendy Dozoretz, his children Jacob and Marisa and his parents Howard and Ruth Woocher.

Mr. Woocher's background and qualifications are impressive. He graduated from Yale University, magna cum laude, in 1972. In addition, he was elected to Phi Beta Kappa, received Honors with Exceptional Distinction in his major—Psychology, and was awarded the Albert E. Angier Prize for the best undergraduate research project.

Upon completion of his undergraduate course studies, Mr. Woocher received both a Masters and a Ph.D. in Cognitive Psychology from Stanford University, and in 1978, he received his law degree from Stanford University. While at Stanford Law School, he was a recipient of the Hilmer Oehlmann, Jr. Prize for outstanding written work in the first-year research and legal writing program, selected President of the Stanford Law Review, and elected to the prestigious Order of the Coif.

After law school Mr. Woocher came here to Washington to serve as a law clerk for Judge David L. Bazelon—Chief Judge for the United States Court of Appeals, D.C. Circuit. The following year he accepted a position as a law Clerk to Supreme Court Justice William J. Brennan.

After his clerkships, Mr. Woocher took various jobs including a job as a staff assistant to Secretary of Defense Brown and as Special Counsel to the California Attorney General. Since 1991, Mr. Woocher has been a partner at the law firm Strumwasser & Woocher. At Strumwasser & Woocher, Mr. Woocher has focused on complex civil litigation. As such, he has had significant experience in both state and federal court.

Mr. Chairman, in addition to Woocher's impressive academic and professional background, Mr. Woocher also has an impressive list of supporters, including that of many prominent California Republicans.

That support includes Leroy Baca, Los Angeles County Sheriff. Mr. Baca, who is a Republican, wrote in support of Fredric Woocher's nomination, "He is highly regarded among his peers for his intelligence and integrity, and he is uniformly praised by those judges before whom he appears. As a lifelong Republican who has spent his entire professional career in law enforcement, I am confident that Mr. Woocher will be a fair and open-minded judge, and a valuable asset to the law enforcement community in Los Angeles County."

Peter A. Bagatelos, self-described partisan Republican lawyer and political activist wrote, "In my opinion, Fred Woocher is one of the finest people I know—a man of impeccable character, honesty, integrity, skills, and loyalty. I have been a life-long registered Republican. * * * I practice in the area of political law and I have represented numerous Republicans for office. I have also served as legal counsel to the California Republican Party. I am a very partisan Republican, therefore it should

carry substantial weight here whereby I lend my personal reputation, word, and recommendation on behalf of Fred Woocher."

Michael Chertoff, a former Republican Senate staff counsel, wrote the following to Chairman Hatch, "I am writing to urge the swift confirmation of Fredric Woocher for the U.S. District Court for the Central District of California. I have known Fred personally for almost twenty years, since we served as law clerks together at the United States Supreme Court. He will make an outstanding federal judge: he has a gifted legal mind, substantial and wide-ranging experience, a warm and pleasant demeanor, and a natural instinct for fairness and justice. As you know, I served as the Special Counsel to the Senate Whitewater Committee * * * I know that Fred appreciates and respects the limited role of the federal judiciary within our government and society, and I am totally confident that he will treat all matters that come before him as a judge fairly, even-handedly, and with an open mind."

Dana Reed, a former state official appointed by several California Republican governors, wrote, "* * * Although Mr. Woocher is a registered Democrat, he cannot be considered an ideologue. Republicans can be certain that as a member of the Judiciary, Mr. Woocher will be fair, open minded and respectful of the restraint imposed upon his office. As a Republican appointee of the last three Republican Governors (Ronald Reagan, George Deukmejian and Pete Wilson), I have never before endorsed a Democratic nominee for District Court Judge. I am pleased to do so in this instance, however, because of Mr. Woocher's outstanding credentials."

Finally, Stephen Sheldon a member of the state central committee of the California Republican Party writes, "I am a life-long Republican, and have been involved in many conservative causes * * * I have worked closely with Fred on local initiative projects and have been tremendously impressed with his intelligence, legal skills and integrity. Fred and I have discussed jurisprudence and he agrees that statutes and the Constitution should be interpreted in light of the text, history and structure of the document. And that there is no role for judicial legislating."

So in closing Mr. Chairman, I would just say, as I said when I nominated him, Mr. Woocher is a remarkably talented attorney, with a true passion for the law and its proper role in American society. His life and career are testaments to his abiding commitment to our nation's founding ideals of justice, fairness and individual freedom.

Mr. Woocher has superb qualifications, has the support of those who have worked with him and those who have worked against him. I hope that he will have the support of this Committee as well.

Senator FEINSTEIN. Let me just tell you a little bit about Mr. Woocher's background. He graduated magna cum laude from Yale University, and then he simultaneously obtained a law degree and a Ph.D. in cognitive psychology at Stanford University.

The CHAIRMAN. Uh-oh.

Senator BIDEN. My vote is no. [Laughter.]

Senator FEINSTEIN. Well, it is a unique combination.

Senator BIDEN. My vote is no.

Senator FEINSTEIN. I mean, your first question might be why. I can't answer that question.

At Stanford, he was elected president of the Stanford Law Review, and he graduated Order of the Coif. He then clerked for District of Columbia Circuit Judge David Bazelon and then for Justice William Brennan, of the Supreme Court.

He has devoted the majority of his career as a lawyer to public service and public policy issues. He served as a staff assistant to Assistant Secretary of Defense Harold Brown, as a staff attorney for the Center for Law in the Public Interest, and held the position of special counsel to the California State Attorney General.

Since 1991, he has held the title of partner in the firm of Strumwasser and Woocher. The firm specializes in complex civil litigation on public policy issues. Among its major clients, the firm has represented California State Insurance Commissioner Chuck Quackenbush in the implementation of proposition 103, the insurance reform initiative. Mr. Woocher's own practice has emphasized

political and election law, municipal and land use law, constitutional law, and regulatory law.

I am pleased to report that his nomination carries bipartisan support. Republican supporters include Gordon Smith, U.S. Senate; California State Insurance Commissioner Chuck Quackenbush; and Los Angeles County Sheriff Lee Baca.

I would like just to quote from a couple of letters. Michael Chertoff, former special counsel to the Senate Whitewater Committee, has said that "Mr. Woocher will make an outstanding Federal judge. He has a gifted legal mind, substantial and wide-ranging experience, a warm and pleasant demeanor, and a natural instinct for fairness and justice." I think that is pretty good.

California Insurance Commissioner Chuck Quackenbush has said that he frequently turns to Fred Woocher for advice, and that he, "consistently brings a thoughtful and fair-minded perspective to the complex regulatory issues confronting the Department of Insurance," and that he is, "confident that Fred will employ this same reasoned and balanced approach in his judicial duties."

Attorney Dana Reed, a Republican appointee of three California governors, endorsed Mr. Woocher, noting that, "He is one of the brightest attorneys I know. His legal skills are outstanding, and I am certain he will be an exemplary district court judge."

So I am very pleased to both introduce and support Mr. Fred Woocher for nomination to the District Court for the Central District of California. I thank you very much, Mr. Chairman and Senator Biden.

The CHAIRMAN. Well, thank you, Senator Feinstein. We appreciate you being here. As a member of this committee, you have a lot to say about what goes on here, so we appreciate all the hard work you do and we appreciate your testimony here today.

Senator FEINSTEIN. Thanks very much.

The CHAIRMAN. Thank you.

Senator Biden, we will turn to you.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, I would like to introduce the nominee for the third circuit from Delaware, Tom Ambro. But before I do, I would like you to meet the only reason why Senator Roth and I support him, Mary Lou Ambro.

Mary Lou, would you stand up?

[Ms. Ambro stood.]

Senator BIDEN. Mary Lou is the real brains of the outfit, and that is the only reason I am supporting him. I am not sure why Roth is, but that is the only reason I am.

I would like to mention that they have three beautiful children. One is a medical doctor and is in his residency, Brian, and Sarah and Andrea are the lights of his life. But at least there is one child who will probably be able to make enough money to compensate the inability that he is going to be able to have when they put him in the home after he retires. You will get a room with a view because you are about to enter into an area that you haven't been for a while.

I would like to read, if I may, a very brief statement from Senator Roth, who is a strong, strong supporter of Tom. The reason he is not here today is he is literally doing double duty in Delaware. We are trying to deal with the C–5A's at Dover Air Force Base, and I left a meeting early that he is chairing with the members of the Joint Chiefs of Staff to deal with our requirements at Dover Air Force Base. And he apologizes.

He says,

> It is my pleasure to speak on behalf of the nomination of Thomas Ambro to the U.S. Court of Appeals for the Third Circuit. Tom Ambro served on my Washington staff while attending Georgetown Law School. Following a clerkship with Delaware Supreme Court Justice Daniel Hermann, Tom distinguished himself as a corporate law attorney with the law firm of Richards, Layton and Finger in Wilmington. I should point out that my wife, Jane Richards Roth, had the pleasure of working with Tom before her own appointment by President Bush to the Third Circuit Court of Appeals.
>
> As Senator Biden can attest, the small size of our State fosters the growth of personal and professional relationships in a way uncommon elsewhere, especially among our legal community. From the very beginning of his career, I have observed Tom's rapid development into one of the most superb legal minds in Delaware.
>
> I have no doubt that Tom will be an outstanding judge on the Third Circuit Appeals Court. He is an excellent nomination and I urge all of my colleagues to support him.

Mr. Chairman, if I may say a few words of my own relative to Tom, Tom is one of the most respected members of the Delaware bar. He is not only respected for his legal acumen, he is respected for his integrity and the degree to which he has involved himself in pro bono work and good causes in the State of Delaware.

I might also add he is recognized nationally as a legal expert and scholar in business law and bankruptcy law, and you can see from the questionnaire he has been published numerous times. With his first-rate legal mind and a judicial temperament to match, as I know you and our predecessor Senator Thurmond always ask—you want to focus on the temperament of a Federal judge because Federal judges, once they put on the robes, it is the last we usually hear from them. They are there for life, and not all maintain the temperament that is required to serve the people, and that is what they are there to do, to serve the people of this country. They are the employees of the people of this country, just as we are, and many forget it, in my view. But Tom's temperament, I think, is uniquely suited as a judicial temperament. He is fair to all people, and he is considerate to all people.

I have a little test in my own mind that I apply when I am with someone who has succeeded in an area, whether it is an athlete or whether it is an attorney or a medical profession person or anyone else. I watch, when we go to lunch, how they treat the waitresses and waiters. If somebody who works with me or anyone I am sit-

ting with goes like that [snapping fingers] for a waiter or waitress, I assure you that is the end of their stay with me.

Tom Ambro is considerate to everyone, and I am convinced that he will continue that kind of courtesy to the lawyers who appear before him in the third circuit. I am proud to say that I have known Tom since his early days as a young attorney working with the Delaware senior Senator and my friend, Bill Roth, in the mid-1970's.

Tom also, as has been mentioned, served as a clerk for the supreme court of our State, and has joined one of the most prestigious law firms in our State, and one of the oldest law firms. In the past several years, Tom has been recognized as one of the "Best Lawyers in America." But community service has always been Tom's calling. He serves on the board of the West End Neighborhood House, in the city of Wilmington, which is primarily disadvantaged, low-income minorities. He also serves on the World Affairs Council of Wilmington.

He has been tapped for numerous other national, judicial and State boards, including several American Bar Association committees, the Supreme Court Historical Society, the Third Circuit Judicial Council Committee on Bench and Bar Relations. He is a member of Phi Beta Kappa, and graduated magna cum laude from Georgetown University, where he received his bachelors of arts degree in history and received his law degree from Georgetown University School of Law in 1975.

He will probably not like my telling this, but when Tom and I met, I was amazed, as everyone else was, that he is so modest that he had any interest in the court at all. I had recommended, and Bill Roth had recommended other people, never knowing that Tom had any remote interest in being on the bench.

He devotes an inordinate amount of time to his alma mater, Georgetown, and gives very generously to Georgetown, having come from very modest means himself in Ohio. He tells the story about how he got on the bus, never even having been to Georgetown, with a scholarship and headed off to Georgetown University, and got off as a wide-eyed kid from Ohio in the middle of Washington, DC, and started off the first semester and moved along and found out he didn't have enough money, notwithstanding the scholarship, to be able to eat all his meals.

And he went to a particular priest at Georgetown and indicated his dilemma, and Georgetown, "took care of him" and took care of it. And Tom has felt obliged since then, and committed to endowing a chair at Georgetown, as well as being the guy who is the chief admissions interviewer for our region. And it is amazing to watch the amount of time he, and I must say Mary Lou, who is a Georgetown girl herself—the amazing amount of time they spend.

Actually, you were where?

Mr. AMBRO. Trinity.

Senator BIDEN. Trinity, which Georgetown thought was part of them, and back in those days wished it were. [Laughter.]

But at any rate, it is amazing the amount of time, if you watch him with these young kids who are applying to Georgetown, and the amount of time and effort and guidance he gives them, whether or not they get into Georgetown, and how he helps them.

Tom is a friend and a superior attorney, and I have no doubt that he has the brains, the temperament, the background, and the ability to be one of the finest third circuit judges that we have had, and we have some very, very, very fine ones on the third circuit, as all circuits have.

So, Mr. Chairman, let me end by thanking you. You have been a personal friend. I had your seat for a number of years and I know when we get down to this period in the legislative calendar, each of our parties suggest we should not be so anxious as chairs to promote the hearings and/or the confirmation of judges appointed by a President of the other party.

You have indicated to me and to Senator Roth that you would do all you could to help. It is a bit unusual that he would move as quickly as he has. His background, fortunately for him, has nothing controversial; it is vanilla in terms of any controversy in his background. And his reputation is so stellar that it has gone through—from the time it was recommended, it has gone through the FBI checks, as well as through the Justice Department and White House, extremely quickly.

But I know there is pressure for you not to move on this, and I appreciate the personal courtesy you have extended to Senator Roth and me. There has been a tradition on this committee that members of the committee, particularly people who have formerly chaired the committee, have been granted that courtesy, but it has not always occurred. In this case, I had no reluctance in asking for that courtesy to be extended because I have so much confidence in the capacity and the integrity of the man that I have recommended to you today.

So I thank you, Mr. Chairman, and I appreciate your indulging me to say a few words about Tom.

The CHAIRMAN. Thank you, Senator Biden. That is what I call really high praise.

Senator Schumer, let's turn to you.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman. First, I want to thank you for scheduling these hearings. You have been just wonderful to Senator Moynihan and myself and all of us in understanding the need to fill slots on the bench and slots with people of great talent. We very much appreciate the work you go through in that regard and many others.

I also want to apologize for being late. As you know, the hearing was originally planned at 2 o'clock, and I had hoped to sit at the bench there with Justice Daniels, as well as my senior leader, Senator Moynihan, and good friend, Charlie Rangel. But I appreciate the opportunity to say a brief word to express my complete support for the nomination of George Daniels.

Justice Daniels is uniquely qualified to serve as a judge in the Southern District of New York. His work experience is as diverse and impressive as it gets—Legal Aid defense attorney and prosecutor. He worked for a top New York law firm and served as a law professor. He worked in politics as counsel to the Mayor of New York. And, of course, he has been a judge, first on the Crimi-

nal Court of the City of New York and then as a Justice on the Supreme Court of the State of New York.

I know he has the respect and admiration from individuals on both sides of the aisle. I can't wait to see him confirmed as a Federal judge, and I know that he will be an extraordinary addition to the Southern District of New York bench.

So, Mr. Chairman, I see the family here. They had reason to be proud of Justice Daniels before today. They should be even more proud today, and God willing, proudest of all, the day we are all able to be with him when he is sworn in as a Federal judge.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Schumer. Those are good comments.

Let's call Thomas Ambro, of Delaware, to be U.S. circuit judge for the third circuit, and Kermit E. Bye, of North Dakota, to be U.S. circuit for the eighth circuit.

I think I will call you all up to the table at this time: George B. Daniels, of New York, to be U.S. district judge for the Southern District of New York; Joel A. Pisano, of New Jersey, to be U.S. district judge for the District of New Jersey; and Fredric D. Woocher, of California, to be U.S. district judge for the Central District of California.

If I could swear you all in, would you all raise your right hand? Do you solemnly swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. AMBRO. I do.

Mr. BYE. I do.

Judge DANIELS. I do.

Judge PISANO. I do.

Mr. WOOCHER. I do.

The CHAIRMAN. Thank you. We welcome all of you here, and if we could, maybe we will start with you, Mr. Ambro, if you have any statement. I would like you to introduce any family members or friends that you may have here. Take time to do that, and if you have a short statement, we would be happy to take that at this time as well, and we will just go across the table.

TESTIMONY OF THOMAS L. AMBRO, OF DELAWARE, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Mr. AMBRO. Mr. Chairman, I am just honored to be here and to be considered by this committee. I really have nothing further to say except thank you.

The CHAIRMAN. Thank you.

TESTIMONY OF KERMIT E. BYE, OF NORTH DAKOTA, TO BE U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Mr. BYE. Mr. Chairman, it is indeed a privilege to be here. I thank you for including me in this hearing. You have already met my wife, Carol Beth. I have three children who are here with us in spirit—our daughter, Laura, from Sioux City, IA; our son, William, from Fort Lauderdale, FL; and our daughter, Bethany, from Fargo.

With that, I don't have any further statement, and again thanks to the chairman and the members of the committee for this opportunity.

The CHAIRMAN. Thank you.

Judge Daniels.

TESTIMONY OF GEORGE B. DANIELS, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Judge DANIELS. Mr. Chairman, I want to thank you and your entire committee for this consideration. I want to thank my family and friends and staff who have all rushed down here, some who could make it, some who couldn't, but much more than I thought would even make it overnight, coming down here from New York.

I don't have any further statement to make. Obviously, I want to thank both Senator Moynihan and Senator Schumer, and Congressman Rangel for their support.

The CHAIRMAN. Thank you, Judge.

Judge Pisano.

TESTIMONY OF JOEL A. PISANO, OF NEW JERSEY, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Judge PISANO. Thank you, Mr. Chairman. I would also like to repeat what my colleagues have said and express my gratitude to you and the committee for having me here today. I would also like to thank Senator Lautenberg for the kind comments that he made on my behalf.

I have with me today my wife, Elizabeth, and one of my former law clerks, Julie Patterson, who is a fine young lawyer here in Washington, and I thank her for taking her time to be here with me today. And I have no further statement to make.

Thank you.

Senator BIDEN. Welcome.

The CHAIRMAN. We welcome all of you. We welcome all your family members.

Mr. Woocher.

Senator BIDEN. Would you rather be called "doctor" or "mister?"

TESTIMONY OF FREDRIC D. WOOCHER, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mr. WOOCHER. Usually, "Fred," but certainly "mister." Thank you.

I too thank you for the opportunity and the privilege of being here, and wish to thank all of the members of the committee as well. You have already met my family. I won't take up any more time introducing them. I would like to express my personal appreciation to them, however, for their support, particularly to my parents, who were the ones who imbued me with a sense of commitment to public service from an early age. And I appreciate that they are able to come up here today from Florida to be with me on this occasion.

Thank you.

QUESTIONING BY SENATOR HATCH

The CHAIRMAN. Well, thank you.

Let me start with you, Mr. Ambro. You have had significant experience in large cases involving numerous creditors and debtors, and in drafting legal opinions on complex business transactions. As a lawyer from Delaware, you are familiar with the State laws governing business transactions and with the interrelationship between Federal and State law in governing multi-State and bankruptcy transactions.

As you are aware, the Supreme Court has issued several federalism decisions in the past few years that have recognized the power of State institutions to govern State transactions and activities. In your view, how will the recent federalism decisions of the Supreme Court of the United States impact the work of the Federal courts, including the third circuit, and do you view this as a positive development for the legal system?

Mr. AMBRO. Mr. Chairman, I believe that the decisions essentially give deference—or, by implication, give deference to the enactments of the States. In my own particular State, Delaware, especially with its corporate law background, that is particularly significant. So I continue to believe that going into the future that what you see with regard to State enactments—in my case, the general corporation law and also the business entity enactments that Delaware has come out with in the last 10 years—will continue to be used by practitioners. And at this point, I believe that there will be an even greater deference to those State enactments, be they Delaware or elsewhere.

The CHAIRMAN. Thank you.

Mr. Bye, you have had substantial experience in litigating complex cases before trial and appellate courts. Over your distinguished career, you have seen nationwide class actions filed in both Federal and State courts become more frequent, more complex, more expensive.

Currently, Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. 1407 and 1408 govern class actions and multidistrict litigation, respectively. In your opinion, what role can Federal trial and appellate courts have in reducing the cost and complexity of class action suits?

Mr. BYE. Thank you, Mr. Chairman. That is a very profound question. It would be my view that Federal courts can do much in the way of case management, class action, but one of them certainly very important and very significant in recent years. It would certainly be my endeavor to work toward the efficient administration of justice by moving cases along, the docket, as quickly as possible, following the rules and giving deference and rights, of course, to the litigants.

The CHAIRMAN. Justice Daniels, you have had significant experience in prosecuting and later sentencing criminals to terms of imprisonment. Prisons and jails are usually governed by laws passed by legislative bodies that can consider financial restraints, the problem of recidivism, and the benefits of long or short sentences. Prisons and jails are usually administered by executive branch offi-

cials who have expertise in running the day-to-day operations of an incarceration facility.

Now, in your view, do district court judges have the expertise to make rules for and to administer the prisons, and is it consistent with the article III role of the Federal courts to do so?

Judge DANIELS. Mr. Chairman, I think first of all that as a judge you must respect the separation of powers, and that there are certain enumerated powers and duties that are the responsibilities of the judiciary and other duties that are the responsibilities of other branches of government. I think that the primary role of a judge should be to resolve legal disputes, decide cases in controversy, and that a judge should be cautious about either taking on a monitoring or oversight role over prisons or prison activity.

The CHAIRMAN. Thank you, Justice Daniels.

I notice that Senator Roth is here, and I am sure he is for you, Mr. Ambro. So why don't we give you an opportunity, Bill, to make any statement you would care to make?

Senator BIDEN. He is also the chairman of the Finance Committee, so we usually stand when he walks in.

The CHAIRMAN. We are just too tired at the end of this session, and mainly because of what he has been doing. [Laughter.]

Go ahead.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Well, I thank you. I understand that Senator Biden read my statement, but I just wanted to come here to personally endorse the nomination of Tom Ambro. He is an outstanding attorney in the State of Delaware. He is known as one of the corporate law experts, particularly in the area of bankruptcy. My wife had the pleasure of practicing with him, and I think they are pretty damn good lawyers. Of course, I wouldn't dare say otherwise. Tom worked for me when he was at Georgetown Law School for a while, so I know him personally, and I just can't think of a better nomination.

I congratulate you, Senator Biden, for nominating this outstanding attorney, and I look forward to his early confirmation.

The CHAIRMAN. Well, thank you, Senator Roth.

I think it is a tribute to you, Mr. Ambro, that as busy as he is—and I know how busy he is; he is right in the middle of some of the most important legislation in history, let alone this session.

Mr. AMBRO. Mr. Chairman, I thank the Senator, and I would also like to add with regard to Senator Biden I will do everything I can, no matter what happens, to live up to what you said today, and it could not be more appreciated.

Thank you.

The CHAIRMAN. I have a feeling you are going to be able to do that.

Thank you, Senator Roth. We appreciate your coming.

Senator ROTH. Thank you, Mr. Chairman, Senator Biden.

Senator BIDEN. Thanks, Bill.

The CHAIRMAN. We appreciate you being here.

Judge Pisano, you are aware that the discovery provisions contained in Rules 26 through 37 of the Federal Rules of Civil Proce-

dure may have avoided trial by ambush, but at an increasingly high cost. Indeed, the current rules may have resulted in more fights and costs in discovery burden than in legitimate resolution of the merits of cases.

Now, in your view, what can district judges do with current discovery practice to move the emphasis away from discovery fights and toward dispute resolution?

Judge PISANO. The time between filing and disposition and the abuses that are possible within civil litigation are certainly issues that our court has recognized, along with Congress. And for that reason, in the District of New Jersey we adopted the amendments to rule 26 that were proposed several years ago.

These provided for, among other things, mandatory disclosures of certain types of discovery materials without the need for formal demand, also places a limit on the number of interrogatories and the numbers of depositions that are permissible in cases. We found these to be very good improvements to the pretrail case management issue, and coupled with active case management, particularly by giving the Magistrate judges the authority to the fullest extent permitted by the Magistrates Act to conduct status conferences, settlement conferences, and implement mediation and arbitration facilities, we have been able to move many cases toward settlement and otherwise to identify those cases which rather have to be tried, thereby giving us the opportunity to have district judges maintain realistic trial schedules.

Senator BIDEN. How long have you been a magistrate?

Judge PISANO. Eight years.

Senator BIDEN. Eights years?

Judge PISANO. Yes.

Senator BIDEN. So you have had a lot of experience. I think the question the Senator asked you is really an important question in terms of access. Do you have any rough estimate of the number of times your intervention has resulted in an arbitration and/or settlement prior to going to trial?

Judge PISANO. Countless. We have been given the benefit of all of the confidence of the district judges in New Jersey, and we have, I hope, earned the respect of the bar, so that our availability to the bar is well-known. If there is a dispute in discovery, we are as far away as a telephone call or a letter, and react very quickly in order to resolve these questions as they arise without requiring the need for formal motion practice, which would only add delay and concomitant expense to the litigants.

Senator BIDEN. Thank you.

The CHAIRMAN. Let me ask you another question, Judge Pisano. In *Waterman* v. *Verniero,* you agreed to appoint counsel for two inmates at a State facility for sex offenders. The case involved the constitutionality of Megan's law, which prohibits the possession and receipt of sexually-oriented material by inmates at the facility. In reaching your decision to appoint counsel for the inmates, you stated that the law was, "arguably unconstitutional."

Now, please explain your rationale for concluding that a law that keeps sexually-oriented materials out of the hands of incarcerated sex offenders is, "arguably unconstitutional."

Judge PISANO. Well, a point of clarification to begin with. It was not a Megan's law situation, which is a different statutory framework in New Jersey.

Waterman brought a case on his behalf and on behalf of some other inmates in the prison that is devoted to sex offenders in New Jersey. He challenged a State statute which prevented him and others from obtaining what the legislature considered to be obscene materials. He brought a claim on the basis that the statute was over-broad.

The district judge to whom the case was assigned received an application by Waterman for the appointment of a lawyer to represent his interests in the case. The district judge assigned to me the decision on that limited issue, that is to say whether he would be entitled to have counsel appointed for him. In making a decision on that sort of motion, I am bound by established third circuit precedent, generally speaking standing for the proposition that while one does not have the constitutional right to appointed counsel in a civil case, nevertheless there are circumstances in which a court would be justified in making that sort of appointment.

When I applied the particular facts presented to me, taking into account the language of the statute which was the subject of the dispute, I decided that the case was one of those rare cases which justified the appointment of counsel. One of the factors which the third circuit required me to consider is whether or not Waterman had an arguable claim. And without deciding the merits of the constitutional challenge, which was not my province, I did conclude that he had an arguable claim.

And without objection by the State attorney general, I might add, I did grant the application for him to be represented by appointed counsel. That opinion was never challenged and it was never appealed, and the ultimate decision of the district judge which was the subject of an appeal did not in any way involve my decision appointing counsel.

The CHAIRMAN. Let me see if I have got this right. In your order in the *Waterman* case appointing counsel for the inmates, you stated, "The court cannot conclude that Megan's law is reasonably related to a legitimate penological interest." Now, when ruling on the merits of the case, the district court echoed this theme and concluded that, despite conflicting evidence from experts on whether the removal of sexually-oriented material would serve a legitimate penological interest, the legislature's proffered interest to rehabilitate the sex offenders was merely a post hoc reason and not a legitimate interest.

A unanimous panel of the third circuit reversed, holding that such weighing of policy considerations was quintessentially legislative in character, and that Megan's law bears a rational relationship to the legislature's legitimate rehabilitative goal under the test provided in *Turner* v. *Safely,* in 1987.

Now, do you believe that article III of the Constitution empowers a Federal judge to reweigh the policy considerations before a legislature when determining how prison facilities should be run?

Judge PISANO. No. Particularly in the context of a prison litigation, we know from Supreme Court precedent in the *Turner* case that the courts are not to be engaged in the administration of penal

institutions. Rather, these are—this is the province properly of executive branch and the legislative branch, and particularly to give the prison administrators the ability to make all of the very difficult day-to-day decisions that go into running a prison.

Nevertheless—and the legal conclusion of the district judge was his—nevertheless, in this particularly unusual case, the district judge did find that there was some infirmity with the statute and declared it unconstitutional. I might add, following the district judge's opinion, the State of New Jersey did develop regulations which significantly narrowed and tailored the statute that was in question, and the third circuit opinion recognized that.

The CHAIRMAN. Thank you.

Mr. Woocher, in *Sundance* v. *Municipal Court for the Los Angeles Judicial District,* in 1986, you are listed on the briefs as arguing that California's public drunkenness statute violated the eighth amendment by imposing cruel and unusual punishment on persons who were intoxicated in public.

Now, the punishment usually imposed for public intoxication, as I understand it, was either 3 days of civil detoxification treatment or an average of approximately 2 days in jail, which generally equaled time served. The trial court held that persons arrested under the statute were entitled to due process protections applicable to all criminal defendants.

On appeal to the Supreme Court of California, however, your main argument was that the statute was unconstitutional under the eighth amendment, in part, because the punishment was grossly out of proportion to the severity of the crime. Also, you argued that the 2-day sentences of each defendant should be aggregated for purposes of determining whether the sentence would be so disproportionate to the crime for which it is inflicted that it shocks the conscience. The California courts rejected the argument.

Could you explain the legal rationale whereby a court could legitimately hold that the California public intoxication statute imposed cruel and unusual punishment, and has any court ever so held?

Mr. WOOCHER. I don't believe so, and I wish I could explain that rationale better. This was a case, I believe, that was started in 1975 at the law firm that I joined in 1981. I did not have very much involvement with that case. My name is, I think, one of seven attorneys that is listed in the brief because the practice at that time was to list anybody that was——

The CHAIRMAN. This was my easy question.

Mr. WOOCHER. Right, so I don't think—to be honest with you, I am not aware of the development of the law there. I think the California Supreme Court properly held that that was a legislative determination as to how to treat public intoxication and how to deal with the issue. It was not an argument that I had raised. As I say, it was raised 6 years before I got there and, in fact, my involvement was—my main contribution to that case was after the California Supreme Court ruled and the client had wanted the firm to continue to press that argument in the U.S. Supreme Court, I advised that that would be inappropriate. And ultimately they did not continue the case and did not further seek review of that decision.

The CHAIRMAN. Let me ask you this. The election challenge concerning Loretta Sanchez and Robert Dornan, as you know, was a hotly contested case.

Mr. WOOCHER. I do indeed.

The CHAIRMAN. You successfully represented Congresswoman Sanchez in that case. The congressional task force that was looking into the validity of certain ballots in that case issued subpoenas to Ms. Sanchez asking for certain documents.

Now, can you explain whether you did or did not comply with the subpoenas, and why? And do you believe that the House of Representatives and its duly-constituted committees and task forces have constitutional authority to issue such subpoenas?

Mr. WOOCHER. Let me take them in reverse order. I certainly believe that the House of Representatives has subpoena authority in those cases, and my understanding was that that was never an argument that was raised by the Congresswoman and that she had complied with the subpoena that had been issued by the House, asserting some privileges, I believe.

My memory is hazy on this because I was not one of the attorneys who was involved in that aspect of the case. There was Washington counsel, there was local Orange County counsel. I was brought in as an election law expert to deal primarily with the issue of counting the ballots and what was a proper, legal vote under California law and things like that. So I really am not specifically familiar with this other than what, frankly, I have read in the papers about those arguments as well.

The CHAIRMAN. Mr. Woocher, during the Sanchez-Dornan election contest, you are reported to have made the statement "this is war." It sounds to me like you are a pretty active counsel. Do you believe that this type of statement is appropriate for an advocate to make, and do you believe that such a statement would be appropriate for a judge to make?

Mr. WOOCHER. Well, it certainly would not be appropriate for a judge to make, and I think I did not make that statement in any context of a judicial proceeding. As you pointed out at the beginning, and you prefaced your question, this was a very hotly disputed issue. I believe that was, in retrospect, probably an overly flip remark to a reporter who was questioning what was going to happen next once it was determined that an evidentiary hearing was going to be held in Orange County. And, frankly, it may have proved a little prophetic, although the rhetoric was probably a little inappropriate.

The CHAIRMAN. When I was practicing law, I made some statements, too.

Mr. WOOCHER. I think I will be much more judicious in my comments to the press at various times in the future.

The CHAIRMAN. We just hope you will be very judicious in your comments on the bench.

Mr. WOOCHER. I hope so, too.

The CHAIRMAN. Mr. Woocher, in 1998 the 20th Century Fund issued a report entitled "Buckley Stops Here." The report was drafted by Joshua Rosencrantz, of the Brennan Center for Justice, and lists you as a member of the working group responsible for the report.

The report notes that certain leaders had formed a coalition of groups that supported a broad interpretation of *Buckley* v. *Valeo.* The report recommends the formation of a group of scholars, lawyers, and others to ensure that the claims of pro-*Buckley* groups do not come to fruition.

What was your involvement in the preparation of this report, and do you adhere to the findings, conclusions and recommendations of the report?

Mr. WOOCHER. Well, not all of them, and they were intended to be a consensus report. The 20th Century Fund brought a panel together of about—if my memory serves me, about 15 or so reputed experts in the area of campaign finance law—professors, litigators, and others. And the result of that effort was a consensus as to certain issues that should be addressed in the public arena.

Mr. Rosencrantz was one of the members of that panel who took on the task of writing a report for the working group. We reviewed the concepts behind the report, none of the specifics in it. I endorsed, in general, concepts, the notion that this was an issue that should be brought to the public awareness and dealt with in an overall context of how the first amendment should be applied in the context of campaign financing.

The CHAIRMAN. The "Buckley Stops Here" report makes a number of recommendations for convincing the Supreme Court to retreat from or completely overrule its holding in *Buckley.* One of these recommendations, on pages 104 and 105 of the report, states that a, "major focus of the campaign to limit or overrule *Buckley* must be to cultivate the opinion of leaders who are most likely to have an influence on how judges think about campaign financing," and to use the press to influence judges.

Now, regardless of your view on the *Buckley* case, on which people can have principled differences of opinion, should Federal judges allow popular opinion and newspaper stories to influence their decisions on issues involving constitutional law?

Mr. WOOCHER. No, I do not believe they should. Their allegiance is to precedent and to their role as a judge. I am not aware of that particular remark. I think what the general consensus was that it was an attempt to bring the issue to the public attention in the State level and things like that. I would be surprised that anybody should believe that judges should be influenced by press.

The CHAIRMAN. Is there any reason then why you didn't dissent from that report?

Mr. WOOCHER. To be honest with you, we did not see the—as I say, we signed off on the concepts. We did not see the final text in a manner in which we were all signing on to it. And, frankly, had I known—paid attention that that specific recommendation was in there, I probably would have dissented to that because I don't think it is appropriate that judges be influenced by press accounts and advocacy that occurs outside the context of the courtroom.

The CHAIRMAN. Let me just ask all of you this question. The Founding Fathers believed that the separation of powers in a government is critical to protecting the liberty of the people. Thus, they separated the legislative, executive and judicial powers into three different coequal branches of government, naturally the legis-

lative power being the power to balance moral, economic and political considerations and make law, the judicial power being the power only to interpret laws made by Congress and by the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by the Congress or the people, or to rebalance the competing moral, economic and political considerations? Mr. Ambro.

Mr. AMBRO. Mr. Chairman, I believe we are restrained to accept presumptively and give very significant—more than just significant weight to the legislative enactments and not to impose our own views on those. And therefore I believe that the deference and a presumption of validity should be given to any legislative enactment.

Mr. BYE. I would concur with Mr. Ambro. The separation of powers clearly limits the judge's role to that of being a judge and not attempting to go beyond that and legislate vicariously through decisions.

Judge DANIELS. I agree with both those comments, Mr. Chairman. Obviously, a judge is not a legislator, is not to make law. A judge applies the law and a judge interprets that law, and should be limited to that role.

Judge PISANO. Yes, I concur as well, Mr. Chairman. And, in addition, while we recognize the presumption of constitutionality of legislation, we must also recognize that the judge is limited to decide only the issues before the court presented by a genuine case in controversy and not to go beyond the four corners of the issues presented in the particular suit.

Mr. WOOCHER. I agree with my colleagues as well. I think the separation of powers principle is one of the bedrock principles of our Government and needs to be strictly adhered to.

The CHAIRMAN. Let me just ask you all under what circumstances do you believe that a court has a right to declare a statute unconstitutional. Let's start with you, Mr. Ambro.

Mr. AMBRO. I believe that it would have to be in violation of the Constitution, and again there would be a presumption that the enactment is constitutional. It would have to be a rare case in which there is a clear violation shown to be of the Federal Constitution. The first thing you would look to is Supreme Court precedent, the precedent within your own circuit, and, if that doesn't exist, precedent that may exist elsewhere or analogous decisions of the Supreme Court or with your own circuit.

I might also add, Mr. Chairman, that in connection with your last question about judges in some way substituting their judgment for that of the legislature, James Madison wrote in the "Federalist Papers" that an elected despotism is not what we fought for. How much worse would it be if you had an unelected despotism with Federal judges acting and usurping legislative powers?

The CHAIRMAN. Thank you. I have other questions, but I think I will submit them in writing and I would ask you all to answer them as quickly as you can.

[The questions of Senator Hatch are located in the "Questions and Answers" section.]

The CHAIRMAN. Let me turn to Senator Biden. You have got to forgive me. I have got to make a phone call.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. I won't be very long, Mr. Chairman, because you have asked very good questions and touched on some of the areas.

I might note for the record that old expression "what is one's meat is another man's poison." I have just filed a lengthy amicus brief in the Supreme Court on my behalf to attempt to sustain the legislative position I took when I wrote the Violence Against Women Act and on the issue of a civil rights cause of action. The fifth circuit has overruled that in a case involving a college co-ed and three students.

The interesting thing there is it depends on which side of the coin you are looking at, from the conservative or liberal side, which the press likes to view it. I have a drawback. I teach separation of powers at Widener Law School, and I have been doing that for a while and it has become that old joke, if you want to learn it, teach it.

I find it interesting that this Supreme Court, in my view, is moving back toward what I would call a Lochner era rationale for their interpretation of section 5 of the 14th amendment in not giving deference to a rational basis for congressional action and deciding, as they did in the Lochner era, that we do not believe it meets the goals.

For example, if you remember those early cases, there was a case where the Court concluded on a matter relating to the safety of workers that although they did not disagree with the legislature's right to impose limited hours and certain work conditions, they concluded that those conditions would not promote the health and safety of the workers. Well, it is not the Supreme Court's business to determine what would promote health and safety. Their business is to determine whether or not we overstepped our bounds in basic constitutional law.

Now, my friends and others who are—by the way, the Senator from Utah, unlike many, is a serious constitutional scholar. I mean, this is not a hobby with him. He is a first-rate trial lawyer, but he also is one of the people here who has taken the time to hone his skills as a constitutional scholar, and it is real. He and I disagree on it.

He is very concerned that you don't overrule State legislative decisions, but not very much concerned about the Federal court overruling congressional decisions based on the power of the enforcement of the Commerce Clause and other things. So I am not going to ask you any of those questions, except to state that it depends on which side of this you are looking at. And I find that moderates and liberals are equally as inconsistent as conservatives are in their interpretation of the separation of powers doctrine as it relates particularly to what constitutes the enforcement mechanism of section 5 of the 14th amendment.

But it does lead to me one question I want to ask each of you, and that is what your view—and I will start with you, and I appreciate your good humor in my kidding you, Mr. Woocher. I think it is impressive that you have your doctorate and your law degree. I will never forget my son's comment at Yale Law School when he came back and he said—I forget the exact number, but there were

only 150 or so students in the Yale law class. And he said, dad, you know, God, I didn't quite realize what this was going to be, and he did very well at Yale. And I said, well, what do you mean? And he said that either 69 or 79 of his colleagues entering as freshmen at Yale Law School already had their Ph.D.'s. It is mildly intimidating for a guy like me, but I think it is a great testament to you. And some day when I am in California, you can explain to me why you chose the two. I am truly interested.

Mr. WOOCHER. I would be glad to.

Senator BIDEN. But I would like to begin with you and ask you what your view—you are in the district court, not the appellate court. That is what the two folks at the end of the table are nominees for.

What is your definition of stare decisis? What is your notion of the degree to which you are bound, and how much leeway do you have? As I teach the course I teach, I think there is a very different standard we should apply as Senators in determining whether or not you go on the appellate bench or on the district court compared to what you do on the Supreme Court.

On the Supreme Court, you are not bound by anything, so I have an obligation, in my view, to understand much more clearly what your methodology for interpreting the Constitution is. I am satisfied, if there are men and women of integrity in front of me and they can rationally explain their view of stare decisis and what precedent they are to follow, that they will be men and women of honor and be bound by what they concluded, regardless of their political disposition and regardless of their methodology they would apply on the Supreme Court.

That is why I find it no problem to vote, as I have, for someone for the circuit court of appeals and vote against that same person for the Supreme Court of the United States when they have been put forward because I think there are different rules of the road.

But I would like to hear, moving this time from right to left, what you believe to be your obligation under your view of what stare decisis is as it relates to the district court.

Mr. WOOCHER. Senator, as you point out, on the district court we are really the foot soldiers. The generals on the Supreme Court and the colonels, I suppose, the court of appeals are the ones who tell us what the law is and then we follow that. And my view of stare decisis is that we are bound by their precedents. To the extent that there is nothing directly on point, we are bound by the principles that are established in those decisions. And as a district court judge, that is my obligation is to follow those principles and those decisions, whether I agree with them or not.

Senator BIDEN. Now, you are under oath. I think *Buckley* v. *Valeo* was a bad decision, and I hope you think it is a bad decision in your incarnation as a lawyer. But let's assume you had a case before you that was directly on point with *Buckley* v. *Valeo* and one with which you philosophically disagreed. What is your obligation?

Mr. WOOCHER. Clearly, the obligation is to follow the Supreme Court's decision in *Buckley* v. *Valeo.*

Senator BIDEN. And under oath, you are swearing that you would do that, notwithstanding the fact that you may have in your

previous life as a lawyer argued strongly that it was not a well-founded decision?

Mr. WOOCHER. Absolutely, Senator. There is a very different role you play as an advocate and as a judicial officer.

Senator BIDEN. Judge Pisano.

Judge PISANO. Yes; I agree with Mr. Woocher. We have for centuries respected the value of stare decisis as one of the cornerstones of our system of justice. And as a trial level judge, we are not capable within that system of expressing personal views or going beyond established precedent, whether it be by the Supreme Court of the United States or the circuit courts in which we sit.

Senator BIDEN. What would you look to if there is not a decision on point in the Supreme Court, but there is a decision in the third circuit?

Judge PISANO. I would be bound by third circuit precedent.

Senator BIDEN. Judge Daniels.

Judge DANIELS. I agree with those comments, Senator. Obviously, the most important thing is respect for precedent and making sure that you adhere to the laws that lend consistency and predictability to our judicial system. I tell jurors that as judges of the facts that they must accept the law as it is given to them, whether they agree with it or not, and apply it to the facts as they find them. I have no less of an obligation as a judge of the law.

Senator BIDEN. Well said.

You two guys are going up, with the grace of God and the goodwill of the neighbors and 51 votes, to the circuit court of appeals in your various circuits. Is your obligation different, and where do you look?

Mr. BYE. I really don't think that it is greatly different. I heard somebody refer to a circuit court judge as being a colonel. I think I would make it more akin to a master sergeant, perhaps, at best. But be that as it may, circuit court judges obviously have somebody to look to and respect and abide by rulings, and that, of course, is the Supreme Court.

The proposition of stare decisis is really the glue that makes our whole system of justice work for the benefit of society, and it is really an important element upon which——

Senator BIDEN. How about in a situation where there is no case on point in your circuit? For example—and I am not asking you how you would rule on this; I want to make this clear. For example, there are conflicting decisions in the circuit on the Violence Against Women Act on the civil rights cause of action. If there is not any precedent in your circuit—there now is, but if there is not any precedent in your circuit and there is no Supreme Court judgment that has been made, do you have an obligation to look to the other circuits to see how they rule?

Mr. BYE. I would do that for sure.

Senator BIDEN. Well, why would you do that? You are not bound, are you, by the other circuits? I mean, if the ninth circuit or the first circuit ruled one way—in this case, for example, the fifth circuit had no problem ruling differently than two other circuits had ruled. Are you bound by it? Would you look to it? Are you bound by it? I mean, can you be more specific for me?

Mr. BYE. I would be persuaded by it.

Senator BIDEN. Mr. Ambro.

Mr. AMBRO. Senator Biden, I think your question—when you talk about stare decisis, it goes back 4, 5 centuries. When judges rode circuit in England and we had someone writing down the decisions and coming up with a, "common law," it was for the purpose of having consistency because those who appear before judges, be they lawyers or, in England, barristers, and here the advocates, they need to know what are the balls and strikes and they need to have a consistent strike zone. And it is in that context that stare decisis gives all of us a road map for the future and all of us credibility before the public.

Senator BIDEN. Do you feel, Mr. Ambro, if there is no case on point, it is a case of first instance—again, I pick this case; I don't want to dwell on it. There are many other pieces of legislation I could name for you that are going to be challenged and parts of the challenged. But you have a case of first instance, which the civil rights cause of action is for women under my legislation, and you have divergent views in the circuit and no statement at all by the Supreme Court.

Now, it can be argued if you are basing the constitutionality of the legislation, as I have, on—I think it could rest on any of three parts of the Constitution, but if it were on the Commerce Clause alone, you may look to the Supreme Court's recent rulings on the Commerce Clause for guidance, but there is nothing on point.

These guys are obliged by what their circuit says. You are clearly obliged by what the Supreme Court says, if it is on all fours. But are you obliged by what other circuits say, other than looking to their reasoning? Are you obliged as a matter of law, as a matter of practice, to rule the same way?

Mr. AMBRO. Senator, I don't believe that you are obliged as a matter of law to follow—obviously, in this case by your example, you have two conflicting circuits. I think in this particular case, you would have to look, first of all, to the words of the statute and what did you and your colleagues mean when they put those words into the statute, and I would look to that first. Thereafter, you would look to these other circuits and, by analogy, decisions not only of those other circuits, but by analogy decisions of the Supreme Court, realizing that there is nothing directly on point.

Senator BIDEN. Mr. Bye, are there any circumstances under which you as a circuit court judge are appropriately able to overturn a precedent within your own circuit that has never been appealed to the Supreme Court?

Mr. BYE. I don't believe so.

Senator BIDEN. Well, I think you do have that authority. I hope you will take a look at that. I am not suggesting you overrule anything, but I would propose that if there is no other case on point and the only ruling is in your circuit, it seems to me that it is fully within your authority, and consistent with stare decisis, to be able to overrule a judgment in your own circuit that has not been confirmed by the Supreme Court.

Mr. Chairman, again, I thank you, and I want to state something for the record here. There has been argumentation occasionally made, Mr. Chairman, if you have a chance to just listen to this one point, that this committee under your leadership has been reluc-

tant to move on certain people based upon gender or ethnicity or race. And I know there are other potential nominees for the third circuit.

I want to make it clear and go on the record. I make no apologies and I take a back seat to no person in this body for my promotion of the interests of all Americans, particularly minorities. As a matter of fact, my other appointee was a minority that you put through.

I have found in my experience with you that there is absolutely no distinction made by you, other than what the record states. And the reason I say it, and I want to be very clear, is the chairman—Mr. Ambro's nomination was here less time than another nominee for the court. There are aspects of the record of the other nominee that just require some additional work to clear. The other nominee is not a white male.

I am sure someone wanting to gain political advantage is going to say at some point down the line that you moved on Mr. Ambro and not on the other nominee. I will vouch for the fact that the other nominee, although I think is qualified, warrants additional follow-up with some questions, nothing about his integrity. This is a matter of filling in the record.

And it may be unusual for you all to hear me say this, but I want to say it in an open forum, with the press listening, because I know that in acceding to my request, which I think is totally appropriate since it was clear as a bell—well-qualified by the ABA, as most of the nominees are, et cetera—you have moved, and I just want to make it clear that anyone who raises the issues of whether or not you are moving based upon—you are a little too conservative on who you like and don't like, but in my experience with you that has not a single thing to do with gender or race. I just want the record to show that. I realize I will get political heat for saying that, but it happens to be true, and so I want to thank you.

The CHAIRMAN. Well, thank you, Senator Biden. There have been attempts by some to politicize this process and criticize the Judiciary Committee. Frankly, I think we have done a pretty darn good job under the circumstances. We are down to about 62; after you, there will be about 57.

Senator BIDEN. I just wish you had the same influence on the floor of the Senate.

The CHAIRMAN. That is right. Well, we get it done. It sometimes takes longer than I care to, but we get it done.

But we are down to basically a full judiciary, and we have 20 vacancies that don't even have nominees. And that has been true all through this presidency, and every presidency for that matter. One thing that I have tried to do is never worry about a person's race or gender, just do the best you can for everybody. In fact, we never tell people on the floor what race a person may be. We think it is irrelevant to this process, or at least I do.

But it is always a heated process. Senator Biden went through unholy hell when he was chairman of this committee on judges.

Senator BIDEN. That is why I am doing foreign relations now.

The CHAIRMAN. Yes; it is safe to say I go through unholy hell, but we try to do a good job and we try to make sure that people are treated fairly. There are all kinds of nuances to this particular

jurisdiction of this committee and all kinds of nuances on the floor that I can't always control. But so far I think we have been able to control a lot of things that have worked out for the betterment of this administration and its nominees.

In particular, I think this is a particularly good panel of nominees, and I am proud of each one of you and proud of the records that you have established and the things that you have been able to do with your lives. You all have qualifications that I think justify your selection to these positions, and I will do my best to see that we try and get you through.

If we finish tonight, you won't make it until the first of the year.

Senator BIDEN. "We" meaning the Senate.

The CHAIRMAN. I am talking about the Senate.

Senator BIDEN. I think you are safe.

The CHAIRMAN. I don't think we are going to finish tonight. We may not be able to get you all through before the end of this year, but you will be up shortly after the first of next year, and we will certainly bring you up in committee.

With that, I just want to commend each of you for having these nominations. It is a tribute to each of you and to the careers that you have and to the work that you have done and the reputations that you have established. We expect Federal judges to be beyond politics. We expect them to be people who uphold the law in every way and who interpret the laws, not make the laws. That is a cliche that is easier said than done, and we expect you to do justice. And if you do that, then politics has no role in it.

We would like to try and get people who basically feel that way on the courts. Regardless of personal ideological beliefs, you are going to have to uphold the law, and if you do that, you are going to have a very strong supporter in me.

So with that, we just want——

Senator BIDEN. Mr. Chairman, may I make one last comment? I apologize. It is the prerogative of the chairman to make the last comment, but I want to thank your families. This falls on deaf ears for the public at large because they look at your appointment for life and they look at the salary and it is more than the average American. It is the same salary, basically, that we make.

But for many of you—and I don't know each of your financial backgrounds, but it is all in the record. It is confidential. Most of you are making a significant sacrifice, making the judgment to go on the bench, and I want to thank your families for being supportive of you doing that.

I realize to my dad, $150,000 a year, roughly, is a king's ransom. And it is a lot of money, I acknowledge, and I make no complaint about we don't make that much. I make no complaint about that. But the public should know that the bulk of the people that come before us here are trading in jobs where they are making multiples of 2, 5, 10 and 15 times that much money.

I think you and I may be closer in age, Mr. Bye, but most of you are pretty young and you are coming at a time when your earning power is on the rise, not on the decline. And we thank you for doing it, and thank your families for allowing you to engage in public service as you have.

So that is the only point I wanted to make, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Biden.

I join in Senator Biden's nice comments, and we are really happy to have had all you family members and friends here as well today. I think you have added a lot to this hearing. Even though you have not spoken, the fact that you have been here tells us a lot and that is important as well.

Senator BIDEN. You owe your son whatever he wants.

Mr. WOOCHER. I know. Pokemon is coming. [Laughter.]

The CHAIRMAN. That is right, and Jacob, I think, has made it through pretty well, is all I can say.

Thank you all for being here. We will try and move these as quickly as we can and we want to compliment each and every one of you on your nomination.

Mr. AMBRO. Thank you, Mr. Chairman.

Mr. BYE. Thank you, Mr. Chairman.

Judge DANIELS. Thank you, Mr. Chairman.

Judge PISANO. Thank you, Mr. Chairman.

Mr. WOOCHER. Thank you, Mr. Chairman.

[The questionnaires of Messrs. Ambro, Bye and Woocher, and Judges Daniels and Pisano are retained in committee files.]

[Whereupon, at 12:02 p.m., the committee was adjourned.]

QUESTIONS AND ANSWERS

RESPONSES OF THOMAS L. AMBRO TO QUESTIONS FROM SENATOR HATCH

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer. Yes, I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I were to disagree personally with those precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne* v. *Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer. I would follow the Supreme Court decision regardless of any personal view that the Court had seriously erred in rendering its decision.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer. My legal judgment is that the Equal Protection Clause of the 14th Amendment to our Constitution mandates equal treatment of all persons. Preferential treatment of a class of persons through legislative enactment, therefore, must satisfy the highest standard of review—strict scrutiny. This requires the Government to demonstrate a compelling interest and that the legislation is narrowly tailored to address that compelling interest.

Question 4. Are you aware of the Supreme Court's decision in *Adarand* v. *Pena,* and the Court's earlier decision in *Richmond* v. *J.A. Croson Co.:* If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer. Yes, I am familiar with the Supreme Court's decisions in *Adarand* v. *Pena* and *Richmond* v. *J.A. Croson Co.* My understanding of those decisions is that legislation (whether federal, state or local) creating race-based classifications must be scrutinized strictly by a court reviewing a Constitutional challenge to the statute. The statute should not stand absent demonstration of a compelling interest and, even then, the unequal treatment afforded by the statute must be tailored narrowly to address only the compelling interest that spawned the statute.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer. Yes, I am committed to following precedent of higher courts on equal protection issues.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer. I do not have any person objections that would prevent me from upholding death sentences that comport with existing Supreme Court precendent—specifically *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appro-

priate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer. Justice delayed for 10–20 years, absent some extraordinary circumstance that is difficult to conceive, appears to be too long. Once policy decisions are made with respect to capital punishment, federal courts (subject to Supreme Court interpretation of issues) should focus their resources on resolving capital cases fairly and expeditiously as provided by the currently applicable federal statute.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power.

Answer. In determining the legal effect of a statute or Constitutional provision, a federal judge should use as authorities the words of the statute or Constitutional provision and prior decisions on point or that by analogy are useful in interpreting the provision at issue. If the plain meaning of a statute or Constitutional provision is unable to be discerned, legislative history may be useful (especially if that history reflects the consensus of the committee that drafted the law). All of this is consistent with the exercise of Article III judicial power if federal judges take note of the following general principles: (1) that statutes and Constitutional provisions are entitled to a presumption of validity; (2) that federal judges interpret legislative enactments; (3) that words of a statute or Constitutional provision are required to be enforced if clear and unambiguous in their application to a particular issue; and (4) that judges observe the rule of *stare decisis.*

Question 9. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States; Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer. The first and third are legitimate approaches in analyzing a claim based on a Constitutional right not previously upheld by a court. Though I am not familiar with Justice William Brennan's "community's interpretation" approach in any detail, my reaction is that attempting to discern how a community would interpret Constitutional text at a given point in time is not a legitimate approach. The Constitution sets forth immutable principles that apply to a continually changing society, whatever the "community's interpretation" might be.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer. In a case that is not of first impression, I would analyze a challenge to the Constitutionality of a statute by examining the language and effect of the statute against the Constitution and by searching for judicial precedent of the Supreme Court and of my Circuit. Absent that, I would consider views expressed in decisions on point in other Circuits.

Where the Constitutional challenge is of first impression, I would examine the language and effect of the statute against the Constitution. I would search for prior decisions (first of the Supreme Court and then of my Circuit and other Circuits) that by analogy are useful in interpreting the provision at issue.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

Answer. A. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

B. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), the Supreme Court held that a Connecticut law forbidding the use of contraceptives by married couples was an unconstitutional incursion of their guarantee of a zone of privacy. The source of law, the Court held, was from specific guarantees of privacy contained in our Constitution's Bill of Rights (e.g., right against unreasonable searches and seizures and the right against self-incrimination), and further noted that the expectation of privacy in marriage predated the Bill of Rights. In *Griswold,* the Court found fault with the fact that the Connecticut statute, rather than legislating the manufacture or sale of contraceptives, forbade their use by married couples.

Alden v. *Maine,* 119 S. Ct. 2240 (1999), held that Congress could not subject a State to suit in its own courts without its consent. Absent consent, States' immunity

from private suits can be pierced only if there is compelling evidence that the Constitution itself requires such a surrender. This immunity from suit was enjoyed by the States prior to ratification of the Constitution and is not to be disturbed (again, absent consent) unless altered specifically by the Constitution.

From these cases I infer that the Federal Government's power under Article III is circumscribed to respect States as sovereigns in their own right, free from suit absent consent or specific alteration by the Constitution. Citizens of a State may defend, however, against State enactments that invade rights guaranteed specifically by, or which clearly can be found in the original intent of, the Bill of Rights.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard* v. *Filburn,* 317 U.S. 111 (1942).

B. *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer. *Wickard* v. *Filburn,* 317 U.S. 111 (1942), found as Constitutional under the Commerce Clause, amendments to the Agricultural Adjustment Act of 1938 that affected the production and consumption of homegrown wheat. The Court found that this activity, though local in nature, nonetheless exerted "a substantial economic effect on interstate commerce." *Id,* at 125.

In *United States* v. *Lopez,* 514 U.S. 547 (1995), the Supreme Court held that Congress exceeded its authority under the Commerce Clause in enacting the Gun-Free Zones Act of 1990, which forbade the knowing possession of a firearm in a school zone. The Court found that such local activity did not have a substantial effect on interstate commerce (and in fact had nothing to do with commerce). In referring to *Wickard,* the Court noted that it was "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity," *Id.* at 560.

The *Lopez* and *Wickard* courts both analyzed the challenged enactment under the substantial effect on interstate commerce standard. But *Lopez* emphasizes the need to respect the "outer limits" of the Commerce Clause. Thus it will not be expanded to include the purely local activity proscribed by the statute dealt with in that case.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States* v. *Lopez,* 514 U.S. 549 (1995).

B. *Printz* v. *United States,* 521 U.S. 898 (1997).

C. *Alden* v. *Maine,* 19 S. Ct. 2240 (1999).

D. *Baker* v. *Carr,* 369 U.S. 186 (1962).

E. *Shaw* v. *Reno,* 509 U.S. 630 (1993).

Answer. The division of power in a federal system is continual balancing of the powers given to the Federal Government and the powers retained by the States. Its effect on individual liberty and the power of federal judges is considered in one form or another in each of the cases cited in this question.

As noted above, *United States* v. *Lopez,* 514 U.S. 547 (1995), held that the Gun-Free Zones Act of 1990 was unconstitutional in seeking to regulate, through the Commerce Clause of our Constitution, the purely local act of knowingly possessing a firearm in a school zone.

In *Printz* v. *United States,* 521 U.S. 898 (1997), the Court overturned the obligation, under the Brady Handgun Violence Prevention Act, imposed on local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court found that these requirements imposed an unconstitutional obligation on State officers to enforce Federal laws.

Alden v. *Maine,* 119 S. Ct. 2240 (1999) and discussed in my response to Question No. 11 above, held that Congress could not subject a State to suit in federal court without its consent absent compelling evidence that the Constitution itself requires such a waiver. This immunity from suit was enjoyed by the States prior to ratification of the Constitution and is to be disturbed (again, absent consent) unless altered specifically by the Constitution.

Baker v. *Carr,* 369 U.S. 186 (1962), held that the Constitutional challenge to unequally apportioned election districts was a "justifiable" cause of action thereby allowing future suits seeking to reapportion election districts. See, *e.g., Reynolds* v. *Sims,* 377 U.S. 533 (1964).

Shaw v. *Reno,* 509 U.S. 630 (1993), in overturning North Carolina's redistricting law, found that it was so irregular on its face that the only rational explanation was

to have a voting district dominated by a single race without a sufficiently compelling justification.

Taken together, these cases focus on Congress' right to affect State's rights and State actions. They rebalance the Federal Government's role in its relations with States. Rights of States can be the subject of federal law where the States (via the Constitution) have so consented. Otherwise, the powers and privileges of States are to be retained. With respect to voting, political and racial gerrymandering by States are not acceptable in a democracy. Obviously, the Supreme Court's announced perspectives on federalism are to be respected by lower courts in dealing with federalism issues.

RESPONSES OF THOMAS L. AMBRO TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Ambro, do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer. I do not have any personal objections that would prevent me from upholding death sentences that comport with existing Supreme Court precedent—*Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 2. Mr. Ambro, as you know, the sentencing of criminal defendants in Federal Court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Answer. The Federal Sentencing Guidelines, based on my limited experience, appear to be a careful crafting of sentencing perspectives that bring consistency to the federal sentencing process while allowing enough flexibility to accommodate extraordinary situations. They appear to be a significant step forward in achieving a general uniformity in sentencing, and federal judges should apply them.

RESPONSES OF THOMAS L. AMBRO TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes, it is appropriate to inquire of a nominee about Constitutional matters in order to ascertain whether a nominee, if confirmed, would follow binding precedents of the Supreme Court and that person's own Circuit regardless of his or her personal views.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. I believe that the purpose of the United States Senate in holding hearings on judicial nominees is to ascertain if the nominee is willing, if confirmed, to uphold the oath of office—to preserve, protect and defend our Constitution. Inquiry thus is proper on whether, for example, the nominee would be willing, if confirmed, to follow applicable precedent regardless of personal views.

Another purpose is to determine if the nominee has the judicial character and temperament to carry out the duties of a federal judge.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. Although all nominees undoubtedly have opinions on many Constitutional matters, I believe that it is important to discern whether those opinions would prevent the nominee from carrying out the duty to follow the Constitution and binding precedents regardless of personal views. I believe, and hope that others believe, that I can faithfully carry out this duty were I to become a federal judge.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. I believe that a Senator has the right to ask questions of any nominee that elicit whether that nominee, if confirmed, will follow the Constitution, duly enacted laws, and binding precedents irrespective if the nominee's personal views. A judge, and thus any judicial nominee, must be very careful to avoid the appearance that he or she has prejudged any issue that may come before him or her.

Question 5. If a U.S. District Judge or U.S. Court of Appeals Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any cir-

cumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. A District Court judge or a U.S. Court of Appeals judge may not refuse to apply binding precedent with respect to an issue before his or her court even if that judge disagrees with the merits of that binding precedent.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford*?

Answer. Yes, I am familiar with the *Dred Scott* case.

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393?

Answer. In responding to the question posed with regard to this historic opinion, which was nullified by the 13th and 14th Amendments to our Constitution, I believe that the issue is conclusively resolved such that I can state that I hope I would have dissented from the majority holding in that case.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in this case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. As noted above, the holding of that case was superseded and nullified by the 13th and 14th Amendments to our Constitution, and thus is of no effect as a precedent today.

Question 9. If you were a judge in 1857, would you have been bound by your oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. If I had been a lower court judge in 1857 I would have been required to apply the *Dred Scott* decision to appropriate matters presented to me regardless of my personal views.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes, I am familiar with the case of *Plessy* v. *Ferguson.*

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 63 U.S. 539 (1896)?

Answer. My response to this question is to the context of a case that has been overruled by our Supreme Court in the 1954 decision of *Brown* v. *Board of Education,* 347 U.S. 483. Because the issue appears to have been conclusively resolved, I can state that I hope that I would have joined with Justice John Marshall Harlan's dissent to the effect that our Constitution is colorblind and neither knows nor tolerates classes based on race.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. As noted above, *Plessy* v. *Ferguson* was overruled by the Supreme Court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and thus is no longer precedent.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education?*

Answer. Yes, I am familiar with the case of *Brown* v. *Board of Education.*

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. Once again I respond to this question in the context of an historic opinion that has conclusively resolved a major legal issue. It is in that context that I would have joined the unanimous opinion of the Supreme Court in *Brown* v. *Board of Education.*

Question 15. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. *Brown* v. *Board of Education* is a binding precedent that must be followed.

Qeustion 16. Are you familiar with the case of *Roe* v. *Wade?*

Answer. Yes, I am familiar with the case of *Roe* v. *Wade.*

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,*, 410 U.S. 113 (1973)?

Answer. Using the same criterion noted above (conclusive resolution of an issue), *Roe* v. *Wade,* cannot, unlike the *Dred Scott, Plessy* and *Brown* cases, be confined to its historical context. Issues continue before federal courts today with regard to *Roe* v. *Wade,* and thus I cannot venture any opinion since it could be interpreted as advisory. This case, of first impression in 1973, has resulted in two and one-half decades of attempts to deal with the many issues it has spawned. *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), sets forth the current state of the law. The Court ruled that while a woman has "some freedom to terminate her pregnancy," that "liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." *Id.* at 869. If confirmed, I would be duty bound to follow this precedent.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. My personal views, if any, with respect to the reasoning of the many opinions in *Roe* v. *Wade* would not cause me, if confirmed, to fail to apply the current precedent of the Supreme Court *(Planned Parenthood* v. *Casey)* to appropriate cases.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I do not believe that any personal view I may have with regard to abortion would affect my upholding the Constitution and binding precedent. To state a personal view could lead a litigant to question my impartiality were a justiciable issue relating to abortion to be presented to me.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. I do not believe that any personal view I may have with regard to the death penalty would affect my upholding the Constitution and binding precedent. To state a personal view could lead a litigant to question may impartiality were a justiciable death penalty issue to be presented to me.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. I do not believe that any personal view I may have with regard to Second Amendment issues would affect my upholding the Constitution and binding precedent. To state a personal view could lead a litigant to question my impartiality were a justiciable Second Amendment issue to be presented to me.

Question 22. In *Planned Parenthood* v. *Casey,* (505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. *Planned Parenthood* v. *Casey* withdrew the trimester analytical framework of *Roe* v. *Wade* in requiring a "compelling state interest" to be shown for legislation affecting pregnancy termination to be Constitutional. While the direct holding of the *Casey* court was that parental consent before terminating pregnancy was not unduly burdensome (and thus not unconstitutional) but that a spousal consent requirement was unduly burdensome, the Court did hold that the State has an interest in unborn fetuses from the moment of conception balanced against a mother's Constitutional rights. I would be bound to follow applicable Supreme Court precedent in this area (as with all areas) of law.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue. Do you personally believe that an unborn child is a human being?

Answer. I believe that any personal view that I may have relating to abortion issues should not impede my following applicable precedent of the Supreme Court. Even stating a personal view could cause my impartiality to be questioned. Thus, I do not believe I can, or should, state any personal views with regard to this issue.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. Yes. The Supreme Court has held that the death penalty is Constitutional, *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. If I were a Supreme Court justice. I would follow the rule of *stare decisis* in the same analytical way that the Supreme Court itself has dealt with this rule in *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992).

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. In analyzing any law, I would begin my analysis by looking at the plain meaning of the statute at issue. If the plain meaning is unclear, I would then look to applicable precedent or to analogous cases that would aid in understanding the issue involved and the possible resolution of that issue. If the statute were still unclear, I would than consult legislative history as a factor in the decision process. I would, as a general rule, give significantly greater weight to the reports of committees that drafted the legislation than I would the testimony of elected officials in debates leading to the passage of that legislation. That is because the views of the single individual may not necessarily coincide with the committee that actively considered and drafted the statute.

RESPONSES OF KERMIT E. BYE TO QUESTIONS FROM SENATOR HATCH

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer. Yes, I am committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I personally disagree with such precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits. Take, for example, the Supreme Court's recent decision in the *City of Boerne* v. *Flores*[1] where the Court struck down the Religious Freedom Restoration Act.

Answer. I would follow the judicial precedent of the United States Supreme Court and relevant precedent in the Eighth Circuit Court of Appeals. Even if there may exist a difference in the facts of a given case, if the principle enunciated by the Supreme Court is clear, the duty of a Court of Appeals Judge is to follow it.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender, or national origin-based preferences in such areas as employment decisions (hiring, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer. In the 1995 case of *Adarand Construction, Inc.* v. *Pena*, the Supreme Court held that federal programs that use race in decision making must be narrowly tailored to serve a compelling governmental interest. The Court thus applied the "strict scrutiny" standard, which is the one that is hardest to satisfy. That standard will only be satisfied if the governmental act satisfies two very tough requirements, which are: (1) The objective being pursued by the Government must be compelling, not just legitimate; and (2) the means chosen by the Government must be necessary to achieve that compelling end. Under the above circumstances, a court is required to ensure that plans such as affirmative action are narrowly tailored to further a compelling governmental interest. Such racial classifications while not per se unconstitutional, will be subject to the strictest of scrutiny that must be narrowly drawn to address a specific state of governmental need. As a Circuit Court Judge, I would follow that controlling law.

Question 4. Are you aware of the Supreme Court's decision in *Adarand* v. *Pena*,[2] and the Court's earlier decision in *Richmond* v. *J.A. Croson Co.*[3]? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer. Yes, I am familiar with these decisions. In *Adarand*, the Supreme Court applied the strict scrutiny standard to federal programs that use race in decision

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[1] 521 U.S. 507 (1997).
[2] 515 U.S. 200 (1995).
[3] 488 U.S. 469 (1989).

making. As to the case of *Richmond* v. *J.A. Croson Co.,* the Supreme Court in 1989 considered "set-aside" programs, by which some fixed percentage of publicly-funded construction projects were to be set aside for minority-owned businesses. Where such a program is enacted by a city or state (as opposed to the federal government), such set-aside programs will be subjected to strict scrutiny.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer. Yes, I am committed to following precedent of higher courts on equal protection issues regardless of any personal feelings I may have on such issues.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as federal judge?

Answer. No, I do not have any legal or moral beliefs which would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal judge.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer. Yes, I believe that very lengthy delays between conviction and execution are too long. I believe that once Congress or a state legislature has made a policy decision that capital punishment is appropriate, the federal courts should focus their resources on resolving capital cases fairly and expeditiously.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of the Article III judicial power.

Answer. In determining the legal effect of a statute or constitutional provision, a federal judge may legitimately use the following types of authorities: The plain language of the relevant statute or constitutional provision, prior Supreme Court or Circuit Court precedents, and in cases of ambiguity authorities such as legislative history. The Supreme Court has held that if the plain meaning of a statue or constitutional provision cannot be discerned, its legislative history can be referenced. Each such authority is consistent with the exercise of the Article III judicial power.

Question 9. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer. Your question outlines three potential approaches to constitutional analysis. It is clear that the first method described (interpretation of the plain meaning of the text and original intent of the Framers of the Constitution) is an appropriate way to perform a constitutional analysis. Likewise, it is also clear that the third approach (ratification of an amendment under Article V of the Constitution) is expressly contemplated by it. I have not reviewed the article by William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* however, to the extent that it suggests that one should look to the "community interpretation" of constitutional text rather than the plain meaning, such an approach is not appropriate and has never been authorized by the Supreme Court.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer. Any duly enacted legislation has the presumption of constitutionality. With respect to a challenge to the constitutionality of a statute in a case that was not one of first impression, I would always follow the relevant Supreme Court precedent.

In the situation where a controversy is that of first impression, one must first and foremost determine if it is really and truly novel and actually a case of first impression. Once I had determined that it truly is a case of first impression, I would first of all afford the statute the presumption of constitutionality. I would begin (and generally end) my analysis by comparing the statute to the plain language of the relevant constitutional provision.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

Answer. a. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

The statue at issue in *Griswold* was a Connecticut law which forbade the use of contraceptives (and made this use a criminal offense); the statute also forbade the aiding or counseling of others in their use. The defendants were convicted of counseling married persons in the use of contraceptives. The majority opinion found that several of the Bill of Rights guarantees protect the privacy interest and create a "penumbra" or "zone" of privacy.

In *Griswold,* The Court looked beyond the plain language of the Bill of Rights to issue its ruling.

b. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

In *Alden,* the Supreme Court held that Congress had no constitutional authority to force the Maine courts to hear the workers' suit, even though that suit was based upon a federal right that Congress had authority to confer upon the workers.

The Court acknowledged that it had to look beyond the plain language of the Eleventh Amendment in order to reach its decision.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress' power and on the federal government's power compared with the power of state governments.

Answer a. *Wickard* v. *Filburn,* 317 U.S. 111 (1942).

Wickard involved the Agricultural Adjustment Act of 1938, which permitted the Secretary of Agriculture to set quotas for the raising of wheat on every farm in the country. The Act allowed not only the setting of quotas on wheat that would be sold interstate and intrastate, but also quotas on wheat which would be consumed on the very farm where it was raised. In *Wickard,* the Court upheld the Act, even as it applies to home-grown and consumed wheat.

Wickard is considered probably the furthest the Court has ever gone in sustaining Commerce-Clause powers, at least in the economic, as opposed to the police power, area.

b. *United States* v. *Lopez,* 514 U.S. 549 (1995).

In *U.S.* v. *Lopez,* the Supreme Court considered a challenge to the Gun-Free School Zones Act of 1990, in which Congress made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Court struck down the statute, holding that in order to be regulated, an activity must "substantially affect" interstate commerce. The majority concluded that the possession of guns in schools had not been demonstrated to "substantially affect" interstate commerce.

Lopez stands in contrast to *Wickard* and is known to be the first time in decades a federal statute was invalidated on the grounds that it was beyond Congress' Commerce power.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between national and state governments.

Answer. a *United States* v. *Lopez,* 514 U.S. 549 (1995). As noted, *Lopez* reflects an instance in which the Supreme Court invalidated a Congressional enactment on the grounds that it was beyond Congress' Commerce power. Generally speaking, this case reflects the courts limiting the power of the federal government.

b. *Printz* v. *United States,* 521 U.S. 898 (1997). *Printz* v. *United States* stands for the proposition that the Congress may not legislate in a way that conscripts state executive-branch personnel to perform even ministerial functions. In *Printz,* the Supreme Court interpreted the Tenth Amendment and restricted the power of the federal government.

c. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999). *Alden* v. *Maine* blocks Congress from forcing the states to hear damage suits against themselves in state courts, even on federally-created claims. This case stands for the proposition that the states have full sovereign immunity from any private suit in the state's own courts seeking damages for the state's violation of federal law. In this respect, the case enhances the power of state governments.

d. *Baker* v. *Carr,* 369 U.S. 186 (1962). *Baker* v. *Carr* held that the constitutionality of legislative apportionment schemes is not a political question. The Court concluded that the claim, which was that the apportionment of the Tennessee Legis-

lative Assembly violated the Equal Protection Clause, did not present a political question. In this respect the *Baker* decision, in certain ways, restricted the power of state legislatures.

e. *Shaw* v. *Reno,* 509 U.S. 630 (1993). *Shaw* v. *Reno* is a prominent legislative districting case. In *Shaw,* the Court ruled that strict scrutiny should be applied to any districting plan that relies on race. In this respect, *Shaw* restricted the power of state legislatures to district using race as a factor.

The above discussed cases viewed together demonstrate that the division of power between the federal government and the state governments is very significant under our federal system, Generally speaking, the impact of this division on the liberty of the individual has been enhanced. These cases concentrate on the authority of Congress to affect states' rights. In conclusion, the rights of states can be the subject of federal law where the Constitution allows or the states consent.

RESPONSES OF KERMIT E. BYE TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Bye, I noticed that you have been active in the leadership of the American Bar Association. What is your view of the ABA taking positions on controversial social policy issues, such as trigger locks on handguns?

Answer. I have opposed efforts of those within the American Bar Association who advocate taking positions on controversial social policy issues. My belief is that the ABA is most effective at serving its members when its focus is limited to the core principles upon which it was founded, which include educating members regarding substantive legal matters, improving the justice system, providing meaningful continuing legal education, promoting professionalism, and providing mechanisms through which the delivery of legal services and access to the justice system is made readily available to all citizens.

Question 2. Mr. Bye, do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer. No. I have no personal objections to the death penalty that would prevent me from upholding a death sentence.

Question 3. Mr. Bye, as you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Answer. It is the responsibility of the Congress to determine what the Federal Sentencing Guidelines shall contain. It is the obligation of the Federal Judiciary to apply those Guidelines as mandated by the Congress. The Guidelines were enacted to provide uniformity, predictability, consistency, and to promote fairness. If I am fortunate enough to be confirmed as a Circuit Judge, I would, of course, follow the Federal Sentencing Guidelines.

RESPONSES OF KERMIT E. BYE TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2, of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The Senate holds hearings under Article 2, Section 2, of the Constitution to provide the advice and consent to the President in appointing judges of the Supreme Court and of such inferior courts as the Congress may by law determine and establish. The proper focus of such inquiry should be to determine if a nominee has the requisite character and judicial temperament and will follow applicable precedent irrespective of personal views and opinions.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and the Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. I believe it is appropriate for the White House and the Senate to seek to inquire whether a nominee will follow applicable precedent irrespective of personal views and opinions.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. Senators may ask any questions of judicial nominees. Judicial nominees have an obligation to respond to questions in a manner that will not lead litigants to be concerned that a nominee has prejudged a particular matter.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals Judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. No, under our judicial system, there are no circumstances under which a judge may refuse to apply Supreme Court precedent to a case pending before him or her.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford?*

Answer. Yes, I am familiar with the case of *Dred Scott* v. *Sandford.*

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393?

Answer. It is not possible to know how I might have ruled in the *Dred Scott* decision which was issued 143 years ago. The position for which I am being considered requires me to follow existing binding precedent Subsequent amendment of the United States Constitution nullified that Court decision. If confirmed as an appellate judge, I would, of course, follow prevailing Supreme Court precedent.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know, there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. Because of constitutional amendments, the *Dred Scott* decision is not judicial precedent toady. Since the case is not judicial precedent, it cannot be considered as such by the lower courts.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856)?

Answer. I would have been obligated to follow that binding precedent of the time no matter what my personal views to the contrary may have been.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes, I am familiar with the case of *Plessy* v. *Ferguson.*

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson*, 163 U.S. 539 (1896)?

Answer. It is not possible to know how I might have ruled in the *Plessy* v. *Ferguson* decision which was issued 103 years ago. The issue has since been resolved in 1954 by the Supreme Court in *Brown* v. *Board of Education.* If I am fortunate enough to be confirmed as an appellate court judge, I would follow the binding precedent as set forth in *Brown* v. *Board of Education.*

Question 12. In *Plessy* v. *Ferguson*, 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The *Plessy* v. *Ferguson* decision is not good law and should not be considered as precedent.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education*?

Answer. Yes, I am familiar with the case of *Brown* v. *Board of Education.*

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education*, 347 U.S. 483 (1954)?

Answer. It is not possible to know how I might have ruled in the *Brown* v. *Board of Education* decision which was issued 45 years ago I note that *Brown* v. *Board of Education* was a unanimous decision of the United States Supreme Court and continues to be good law to this day. If I am fortunate enough to be confirmed as an appellate court judge, I would follow this binding precedent.

Question 15. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The *Brown* decision must be followed by the lower courts, as it is binding judicial precedent.

Question 16. Are you familiar with the case of *Roe* v. *Wade*?

Answer. Yes, I am familiar with the case of *Roe* v. *Wade*.

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. It is not possible to know how I might have ruled in the *Roe* v. *Wade* decision which was issued 26 years ago. I note, however, that the *Roe* v. *Wade* decision has been modified by *Planned Parenthood* v. *Casey* (505 U.S. 833 (1992)). *Casey* held the restrictions on abortion are to be upheld as long as there is not an undue burden placed upon that right. As an Eighth Circuit Judge, should I be privileged to be confirmed and serve, I would be bound to apply binding precedents carefully and consistently. As an appellate judge, I would be bound to follow such binding precedent of the United States Supreme Court irrespective of my own personal preference.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1978), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. As an appellate judge I am required to follow binding Supreme Court precedent with regard to all matters. Since *Casey* is currently the prevailing precedent on this matter, I would, of course, comply with that decision.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. As a prospective Circuit Court Judge, I am not allowed to permit my personal view on the issue of abortion to enter into my deliberative function as a judge. In terms of the position for which I am being considered as an appellate judge, I am bound to follow the binding judicial precedent that currently exists. If I should be afforded the privilege of serving as a Circuit Court Judge, upon Senate confirmation, I will faithfully apply the law as the United States Supreme Court has laid it down, whatever the precedent of that Court might be at that particular time. Not allowing such personal views to enter the decision making process is the strength of our appellate court system. My personal views on any subject area cannot and will not have any effect whatsoever.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. In *Gregg* v. *Georgia,* the United States Supreme Court determined that the death penalty is constitutional. I would follow that binding precedent. If I should be afforded the privilege of serving as a Circuit Court Judge, upon Senate confirmation, I will faithfully apply the law as the United States Supreme Court has laid it down, whatever the precedent of that Court might be at that particular time. Not allowing such personal views to enter the decision making process is the strength of our appellate court system. My personal views on any subject area cannot and will not have any effect whatsoever.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. The Second Amendment states that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Second Amendment has been ratified as part of the Bill of Rights of the United States Constitution, as such it is the supreme law of the land.

I note that the position for which I am being considered requires me to follow existing binding precedent which I would be obligated to and would do. If I should be afforded the privilege of serving as a Circuit Court Judge, upon Senate confirmation, I will faithfully apply the law as the United States Supreme Court has laid it down, whatever the precedent of that Court might be at the particular time. The requirement that personal views not affect the judicial decision making process is the strength of our appellate court system. My personal views on any subject area cannot and will not have any effect whatsoever.

With respect to this and all other issues, I would comply with the text of the Constitution and any relevant Supreme Court precedent if I am fortunate enough to be confirmed as a Circuit Court Judge.

Question 22. In *Planned Parenthood* v. *Casey,* (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly bur-

dened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. *Planned Parenthood* v. *Casey,* is the controlling law regarding this matter. If I should be, afforded the privilege of serving as a Circuit Court Judge, upon Senate confirmation, I will faithfully apply the law as the United States Supreme Court has laid it down, whatever the precedent of that Court might be at that particular time. The requirement that personal views not affect the judicial decision making process is the strength of our appellate court system. My personal views on any subject area cannot and will not have any effect whatsoever.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. If I should be afforded the privilege of serving as a Circuit Court Judge, upon Senate confirmation, I will faithfully apply the law as the United States Supreme Court has laid it down, whatever the precedent of that Court might be at that particular time. The requirement that personal views not affect the judicial decision making process is the strength of our appellate court system. My personal views on any subject area cannot and will not have any effect whatsoever.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. Yes, The United States Supreme Court has clearly so held in the case of *Gregg* v. *Georgia,* 628 U.S. 153 (1976).

Question 25. If you were a Supreme Court Justice under what circumstances would you vote to overrule a precedent of the Court?

Answer. The Supreme Court does have that authority and has articulated specific, limited circumstances in which it can reverse itself. As an appellate court judge I would, of course, never attempt to overrule Supreme Court precedent and am bound to faithfully apply all Supreme Court precedents. If I were a Supreme Court Justice, and believe that consideration should be given to overruling a precedent of the Court, I would follow the analysis set forth in *Agostini* v. *Felton,* 117 S. Ct. 1997 (1987).

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. The plain language of the statute is controlling and must first be considered. If the plain meaning is unclear, courts should look to applicable precedent or to analogous cases so as to understand the issue and its possible resolution. Where there is no clear language, the court should look to an relevant judicial precedent interpreting the provision on the Constitution or statute that is at issue. Under Supreme Court precedent, legislative intent may be factored in under the right circumstances. Reliance on committee reports would be preferable to reliance on any individual legislator's statements. In general, according to Supreme Court precedent, care should always be exercised when referencing legislative history.

RESPONSES OF GEORGE B. DANIELS TO QUESTIONS FROM SENATOR HATCH

Question 1. Supreme Court precedents are binding on all lower Federal courts and Circuit court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer. I am fully committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I personally were to disagree with such precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take for example the Supreme Court's recent decision in the *City of Boerne* v. *Flores* where the Court struck down the Religious Freedom Restoration Act.

Answer. Even where a judge believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, it would still be a judge's obligation to follow and apply that decision as binding judicial precedent unless and until it is reversed or overruled by the Supreme Court.

Question 3. Please state in detail your best independent legal judgment. Irrespective of existing judicial precedent, on the lawfulness under the Equal Protection Clause of the 14th Amendment and Federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hir-

ing, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts?

Answer. All governmental action based on race should be subjected to detailed judicial inquiry under the strictest judicial scrutiny. Race, gender or national origin-based action must be necessary to further a compelling governmental interest, and is within constitutional constraints only if it satisfies the narrow tailoring test set out by the Supreme Court.

Question 4. Are you aware of the Supreme Court's decision in *Adarand* v. *Pena* and the Court's earlier decision in *Richmond* v. *J.A. Crosson, Co.*? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer. The Supreme Court held in *Adarand* v. *Pena* and *Richmond* v. *J.A. Crosson, Co.*, that all racial classifications, imposed by federal, state or local government must be analyzed by a reviewing court under strict scrutiny. Racial classifications must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

Question 5. Regardless of your personal feelings on these issues are you committed to following precedent of higher courts on equal protection issues?

Answer. I am fully committed to following precedent of higher courts on equal protection issues.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer. I have no legal or moral beliefs which would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal judge. As a New York State Supreme Court Justice, I am currently one of six judges in New York County trained and administratively designated for random assignment of capital cases. It is presently the law in New York State and I hold no personal views or beliefs that would interfere with my obligation to uphold and enforce the law.

Question 7. Do you believe that 10, 15 or even 20 year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus on resolving capital cases fairly and expeditiously?

Answer. Unnecessary and lengthy delay following a conviction and a sentence of death in a capital case is inappropriate. It can undermine public confidence in the judicial system and prolong the suffering of victims' families. Habeas Corpus and appellate review in capital cases should be thorough, expeditious, with an appropriate point of finality of review.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power?

Answer. A judge should first look at the language and plain meaning of the relevant statute or constitutional provision. Then a judge should look to controlling Supreme Court or Court of Appeals precedent. Only where the language and meaning of a statute are unclear or ambiguous should a judge then attempt to seek further guidance from reflections or legislative intent. However, before relying upon recorded comment or commentary, a judge should satisfy himself or herself that it truly represents the consensus of the majority of the lawmakers. The use of each one of these authorities is consistent with the exercise of the Article III judicial power to apply and interpret the law, and not make law.

Question 9. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, The Constitution of the United States; Contemporary Ratification, Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution?

Answer. A judge should be extremely cautious when considering upholding a claim based on a constitutional right not previously upheld by a court. True cases of first impression without controlling precedent are very rare. Examining the plain meaning of the text of the Constitution is consistent with the judicial power pro-

vided by Article III of the Constitution. Although I have not read Justice Brennan's comment's on the "community's interpretation" of constitutional text, I am unaware of such an approach which is consistent with Article III judicial powers. Ratification of an amendment to the Constitution to create new constitutional rights is expressly provided for in the Constitution.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer. A challenge of the constitutionality of a statute should be analyzed by first examining the statute in light of the language and plain meaning of the Constitution, and then by applying binding Supreme Court or Court of Appeals precedent. An act of Congress should otherwise be afforded a presumption of constitutionality, unless in a case of first impression the statute is clearly in violation of the plain language and meaning of a constitutional provision.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III? *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Alden Maine,* 119 S. Ct. 2240 (1999).

Answer. In *Griswold* v. *Connecticut,* the Supreme Court held that a Connecticut statute forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy. The Court ruled that while certain rights are not expressly included in the First Amendment, their existence is necessary in making the express guarantees fully meaningful.

In *Alden* v. *Maine,* the Supreme Court held Congress lacked power under Article I of the Constitution to abrogate the sovereign immunity of states from suits in both state and Federal courts. The Court ruled that states' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the Constitution, and that the bare text of the Eleventh Amendment is not an exhaustive description of the states' constitutional immunity from suit.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress' power and on the Federal Government's power compared with the power of state governments. A. *Wickard* v. *Filburn,* 317 U.S. 111 (1942); B. *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer. In *Wickard* v. *Filburn,* the Supreme Court held that the commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those intrastate activities which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. Since no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress, the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

In *United States* v. *Lopez,* the Supreme Court ruled that the Gun Free Zones Act of 1990 exceeded Congress' commerce clause authority where the statute did not regulate a commercial activity or contain a requirement that the possession of the firearm be connected in any way to interstate commerce. Distinguishing *Wickard* v. *Filburn,* the Court ruled that the provision at issue was "a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561.

RESPONSES OF GEORGE B. DANIELS TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with the advice and consent of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. It is a legitimate desire on the part of a Senator to question whether a judicial nominee holds personal opinions on constitutional matters which might interfere with a judge's responsibility to follow the Constitution and binding judicial precedent.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. The purpose of holding hearings is to determine whether a nominee for the federal bench possesses the qualifications and fitness for judicial appointment.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. It is appropriate for the White House and Senate to seek to understand opinions a nominee might have which could interfere with one's responsibility to follow the Constitution and binding judicial precedent.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. The Constitution places no express limitation on the scope and nature of the Senate's inquiry regarding a judicial nominee's qualifications and fitness for judicial appointment.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution are there any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. A judge of the inferior federal courts has an obligation to apply Supreme Court precedent even where his or her opinion is to the contrary.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford?*

Answer. Yes. The Supreme Court in *Dred Scott* v. *Sandford* held that black slaves were not citizens of the United States who had concomitant rights which could form the basis of a lawsuit in federal court.

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393?

Answer. As a Supreme Court Justice, I would have been constrained to rule consistent with the legal rights provided by the language of the Constitution.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. Subsequent to the decision in *Dred Scott* v. *Sandford,* amendments to the Constitution have nullified its legal force and effect.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 163 U.S. 539 (1896)?

Answer. Regardless of the times or nature of the ruling, a judge is bound by his oath and mandated to follow binding Supreme Court precedent.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes. The Supreme Court in *Plessy* v. *Ferguson,* held that "separate but equal accommodations" for blacks and whites did not violate the equal protection clause of the 14th amendment to the Constitution.

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 539 (1896)?

Answer. As a Supreme Court Justice, I would have been constrained to rule consistent with the legal rights provided by the language of the Constitution.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1895), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The Supreme Court specifically overruled *Plessy* v. *Ferguson* in *Brown* v. *Board of Education,* eliminating its legal force and effect as binding precedent.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education?*

Answer. Yes. The Supreme Court in *Brown* v. *Board of Education* held that the "separate but equal" doctrine accepted in *Plessy* v. *Ferguson* was a violation of the equal protection clause of the 14th amendment to the Constitution.

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. As a Supreme Court Justice, I would have been constrained to rule consistent with the legal rights provided by the language of the Constitution.

Question 15. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the

children of the minority group of equal educational opportunities contrary to the protections constrained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The Supreme Court decision in *Brown* v. *Board of Education* continues to have full force and effect as binding precedent.

Question 16. Are you familiar with the case of *Roe* v. *Wade?*

Answer. Yes. The Supreme Court in *Roe* v. *Wade,* held that a State law proscribing abortion was a violation of the due process clause of the 14th amendment to the Constitution.

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. As a Supreme Court Justice, I would have been constrained to rule consistent with the legal rights provided by the language of the Constitution.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty? Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. As a judge of the inferior federal courts, I would not have the discretion to agree or disagree with the United States Supreme Court. A majority opinion of the court is binding precedent which a judge is mandated to follow. A dissenting opinion by a member of the minority is not.

Question 19. I understand that Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. I hold no personal view on the issue of abortion which would interfere with my obligation to faithfully follow the Supreme Court precedent.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. I hold no personal view on the issue of death penalty which would interfere with my obligation to faithfully follow the Supreme Court precedent.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. I hold no personal view on the issue of the Second Amendment to the Constitution which would interfere with my obligation to faithfully follow the Supreme Court precedent.

Question 22. In *Planned Parenthood* v. *Casey,* (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe that "right to privacy" includes the right to take away the life an unborn child?

Answer. I hold no views concerning the right to privacy or abortion which would interfere with my obligation to faithfully follow the Supreme Court precedent.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue. Do you personally believe that an unborn child is a human being?

Answer. I respect the fact that many individuals have strongly held and differing personal beliefs on this and other matters of public concern. As a judge, I look solely to the Supreme Court of the United States to dictate my judicial decisions on these constitutional issues. I hold no personal view, and am careful not to express a personal opinion, which might undermine public confidence in my ability to fairly and impartially decide cases and controversies that may come before me for resolution.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. The Supreme Court has ruled that the death penalty is constitutional. I hold no views or beliefs that would interfere with my obligation to follow binding Supreme Court precedent by upholding and enforcing the law.

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Although Supreme Court adherence to precedent is not rigidly required in a constitutional case, any departure from the doctrine of *stare decisis* demands special justification. As the Supreme Court held in *Agostini* v. *Felton,* 521 U.S. 203 (1997), a Supreme Court Justice should vote to overrule existing precedent where (1) a prior decision's underpinnings have been eroded by subsequent decisions of the Court; (2) a later development of constitutional law is a basis for overruling a decision; (3) development of constitutional law since the case was decided has implicitly

or explicitly left it behind as a mere survivor of obsolete constitutional thinking, 521 U.S. at 236.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to the passage of an act? And what weight do you give legislative intent?

Answer. A Judge should, in the first instance, rely on the plain language and meaning of statutes. Only where the language and meaning are unclear or ambiguous, should a judge then attempt to seek further guidance from reflections of legislative intent, such as committee hearings, reports and floor debates. However, before relying upon recorded comment or commentary, a judge should satisfy himself or herself that it truly represents the consensus of the majority of the lawmakers.

RESPONSES OF GEORGE B. DANIELS TO QUESTIONS FROM SENATOR THURMOND

Question 1. Judge Daniels, let me ask your opinion of Federal Rule of Civil Procedure 11. As you are aware, this rule permits federal judges to impose sanctions against attorneys for unwarranted claims or presentations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

Answer. The purpose of Rule 11 is to deter litigation abuses by giving the court the discretion to impose sanctions for violation of the rule. It is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. As with any area within the sound discretion of the court, the effectiveness of Rule 11 depends significantly on how it is utilized by each individual judge. A judge is given the necessary flexibility to deal with Rule 11 violations. The court has the discretion to determine when sanctions are appropriate, their nature and severity, and the ability to tailor sanctions to the particular facts of each case. Rule 11 can serve as an important tool for judges without discouraging legitimate aggressive and zealous advocacy if it is judiciously utilized by the court only in those circumstances where sanctions are clearly warranted.

Question 2. Judge Daniels, do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer. I have no personal objections to the death penalty that would cause me to be reluctant to impose or uphold a death sentence. As a New York State Supreme Court Justice, I am currently one of six judges in New York County trained and administratively designated for random assignment of capital cases. It is presently the law in New York State and I hold no personal views or beliefs that would interfere with my obligation to uphold and enforce the law.

Question 3. Judge Daniels, as you know, the sentencing of criminal defendants in Federal Court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Answer. Through the Comprehensive Crime Control Act of 1984, Congress created the United States Sentencing Commission to promulgate sentencing guidelines in an effort to achieve honesty, uniformity and proportionality in sentencing. As a federal prosecutor from 1983–1989, I worked through their implementation and development. Moreover, as a New York State judge, I have imposed sentence under our state's structure of mandatory minimum sentences for violent offenses, second and persistent felony offenders, and certain drug offenses. The sentencing guidelines provide a sentencing range within which a judge may exercise sentencing discretion, and provides for departure by the judge outside that range where a particular case presents atypical features. I have a thorough understanding of their application and am fully prepared to impose sentence consistent with the federal sentencing guidelines.

RESPONSES OF JOEL A. PISANO TO QUESTIONS FROM SENATOR HATCH

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with them?

Answer. I am committed to following the precedents of higher courts.

The doctrine of *stare decisis* has been the cornerstone of our jurisprudence for centuries. Under the doctrine, a court must give due deference to the binding precedent of cases decided by higher courts. The Supreme Court has noted that the doctrine

of *stare decisis* serves profoundly important purposes in our legal system, as it provides both stability and certainty in the law. A U.S. District Court judge, therefore, must apply relevant Circuit and Supreme Court precedent even if he or she disagrees with such precedent.

Question 2. How would you rule if you believed the Supreme Court or Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment on the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), where the Supreme Court struck down the Religious Freedom Restoration Act.

Answer. In the event I were to believe that a higher court made an incorrect decision, I would nevertheless follow and apply the holding of the higher court. There are no circumstances under which I could impose independent judgment on the merits of a case in order to avoid an outcome mandated by Third Circuit or Supreme Court precedent.

Question 3. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotion of layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer. The 14th Amendment and other civil rights laws guarantee that all persons receive equal protection of law. Thus, any state statute or regulation which used race, gender, or national origin as the basis for a preference would be in literal conflict with the language of the Constitution. Any such statute or regulation would then have to be analyzed to determine whether a compelling government interest could justify the statutory classification. The test for this standard is contained in the Supreme Court's decision in *Adarand* v. *Peña.*

Question 4. Are you aware of the Supreme Court's decision in *Adarand* v. *Peña,* 515 U.S. 200 (1995), and the Court's earlier decision in *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 91989)? If so, please explain to the committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer. In both *Adarand* and *Richmond,* the Supreme Court examined government affirmative action programs. In *Richmond,* the Court invalidated a city ordinance aimed at increasing the number of minority-owned businesses that were awarded city construction contracts. The ordinance required prime contractors granted city construction contracts to award at least 30 percent of the dollar amount of each contract to businesses owned by racial minorities. In striking down the provision as a violation of the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court determined that strict scrutiny should be applied to all racial classifications, regardless of the race of those benefitted or burdened by a particular classification. The Court found that, although the city of Richmond alleged that the plan was remedial in nature, the city did not demonstrate specific past acts of illegal discrimination it was seeking to remedy. Although the Court found the elimination of past discrimination by a governmental entity or by private entities within its jurisdiction to be a compelling state interest, the Richmond ordinance was not narrowly tailored to achieve this goal.

In *Adarand,* the Supreme Court found that the equal protection component of the Fifth Amendment established similar racial classification standards as the Equal Protection Clause of the Fourteenth Amendment. Accordingly, neither state nor federal racial classifications, even those which can be considered "benign" or "remedial," may be upheld unless they are narrowly tailored to promote a compelling state interest.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer. Yes. I am committed to following the precedents of higher courts on all issues, including equal protection, and giving them full force and effect.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing a death sentence in any criminal case that might come before you as a federal judge?

Answer. No. The Supreme Court has held that the death penalty is constitutional. As such, I am bound by its precedent. In addition, capital punishment is expressly contemplated by the text of the Constitution. I have no personal or moral objection to following such precedent and would impose a death sentence in a case in which it applied.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer. There can be no debate that a delay of decades between conviction and execution is unreasonably long. All courts have a responsibility to manage their dockets in such a way as to avoid unreasonably delaying the disposition of any case, or class of cases. With respect to the resolution of capital *habeas corpus* cases, it is hoped that the Antiterrorism and Effective Death Penalty Act of 1996 will provide means for the federal courts to more efficiently reduce the periods of delay which have become all too common.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of these authorities is consistent with the exercise of Article III judicial power.

Answer. When determining the effect of a statute or constitutional provision, the intention of the legislature is of primary importance. Such intention may generally be embodied in the plain text of the provision, and a court should examine the provision as a whole to determine its purpose. Words should be given their plain and ordinary meaning, and not construed in such a way so as to unreasonably limit or expand the provision. Where the plain meaning of a statute or rule is ambiguous, a court may look to other sources, *e.g.,* committee reports on a bill and explanatory comments to a statute, to determine the intent of the legislature. However, the use of legislative history should be made with caution, as it is not always the case that the views expressed by one legislator in debate on a bill accurately state the collective intent of the legislative body.

Judicial power under Article III is limited; a district court judge must presume that a statute is constitutional, and apply statutes according to their terms in such a way to decide only the case or controversy that may be presented in a particular matter before the court.

Question 9. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer. The Supreme Court, and only in extremely rare circumstances, could properly uphold a claim of a right not previously recognized by the Supreme Court. In doing so, interpretation of the plain language and meaning of the text of the Constitution would provide a legitimate approach to such an analysis.

I am not personally familiar with Justice Brennan's 1985 work, cited in the question; however, I do not understand the role of the judge to attempt to "discern the community's interpretation" of the Constitution. To do so would require a judge to expand judicial authority beyond its legitimate scope by speculating as to whether there is some "community standard" regardless of, or in addition to, existing precedent.

The ratification of an amendment under Article V of the Constitution requires legislative action by the states, and an amendment duly ratified becomes part of the text of the Constitution.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer. Where a case is not one of first impression, the doctrine of *stare decisis* demands that due deference be given to binding precedent of cases decided by higher courts.

In a case of first impression, a court must begin with the presumption that the statute is constitutional and valid. If I were satisfied that the case was indeed one of first impression, I would consider precedents of higher courts in analogous areas of law, or from other circuits. Only upon a clear showing that the statute is contrary to the Constitution, or where clear Supreme Court precedent demands, should such a challenge to a statute's constitutionality succeed.

Question 11. In your view, what are the sources of law and methods of interpretation used in reaching the Court's judgment in the following cases? How does the use

of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

a. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

b. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answer. In *Griswold,* the Supreme Court struck down a state statute prohibiting the use or the aiding and abetting of the use of contraceptives. In its decision, the Court found that there are implicit rights which are within the "penumbra" of those rights specified in the Constitution.

Alden involved an action by state employees who claimed they were due overtime pay under the Fair Labor Standards Act. The Maine Judicial Supreme Court held that the state had sovereign immunity and could not be sued in state court without its consent. In affirming that decision, the United States Supreme Court held that Article I of the Constitution does not give Congress the power to subject states to private damage suits in state courts.

Griswold and *Alden* are representative of two opposing methodologies—one which permits the drawing of inferences to support the existence of a Constitutional protection, the other which requires support for the protection in the actual text of the Constitution.

Griswold and *Alden* are also noteworthy in that each case has as its focus a different type of protection. *Griswold* speaks to the rights of individual citizens who are protected from federal governmental regulation, and *Alden* holds that federal power does not extend to diminish the sovereignty of state governments. Thus, although each decision looks to different sources for legal authority, both recognize that the power of the federal government does have constitutional limits.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of the state governments.

a. *Wickard* v. *Filburn,* 317 U.S. 111 (1942)

b. *United States* v. *Lopez,* 514 U.S. 549 (1995)

Answer. The Court in *Wickard* upheld federal legislation regulating the production of wheat for personal consumption on family farms. The decision recognizes Congress's power under the Commerce Clause to regulate purely intrastate activities that exert an economic effect on interstate commerce, whether or not the activity itself may be properly considered commerce. The Court recognized that congressional powers are not strictly limited to those expressly granted in the text of the Constitution, but include such implied powers as are necessary for Congress to effectuate the express powers.

In *Lopez,* the Court struck down a federal statue that prohibited any person from carrying a firearm near any school finding that this law did not fall within the federal commerce power. *Lopez* modified the standard set forth in *Wickard* and subsequently cases for determining the extent of the federal commerce power to regulate purely intrastate activity. The Court ruled that Congress can only regulate intrastate activities that as a class have a substantial effect on interstate commerce, even though prior decisions could be read as allowing regulation of such activities that had only an insignificant effect on interstate commerce. In rejecting the Government's argument that the statute did indeed substantially effect interstate commerce, the Court reasoned that such a finding would essentially convert the federal commerce power into a general police power of the sort retained only by the States.

The division of power between the federal and state governments represents an important concept in our system of federalism. While the Constitution gives to the federal government authority to act in certain matters, it retains to the states and to the people all authority not specifically granted to the federal government. The 10th and 11th Amendments have been held by the Supreme Court to repose in the states their sovereignty.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

a. *United States* v. *Lopez,* 514 U.S. 549 (1995)

b. *Printz* v. *United States,* 521 U.S. 898 (1997)

c. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999)

d. *Baker* v. *Carr,* 369 U.S. 186 (1962)

e. *Shaw* v. *Reno,* 509 U.S. 630 (1993)

Answer. In *Lopez,* the Court struck down a federal statute that prohibited any person from carrying a firearm near any school, finding that this law did not fall

within the federal commerce power. In rejecting the Government's argument that the statute did indeed substantially effect interstate commerce and thus fell within the scope of congressional power granted by the Commerce Clause, the Court reasoned that such a finding would essentially convert the federal commerce power into a general police power of the sort retained only by the States.

In *Printz*, the court invalidated a provision in the Brady Act, which required state officers to conduct background checks on firearm purchasers. The court found this provision to be invalid because it effectively transferred the President's responsibility to administer laws enacted by Congress to state officers. The Court held that Congress could not require states to conduct background checks in furtherance of federal programs.

Alden involved an action by state employees who claimed they were due overtime pay under the Fair Labor Standards Act. The Maine Judicial Supreme Court held that the state had sovereign immunity and could not be sued in state court without its consent. In affirming that decision, the United States Supreme Court held that Article I of the Constitution does not give Congress the power to subject states to private damage suits in state courts. The court noted that principles of federalism required that Congress accord States respect as a residuary sovereigns and joint participants in the country's governance.

In *Baker*, the court decided that the question of whether people were under-represented in government presented a justifiable issue, and that they were being deprived of the equal protection of the laws.

Shaw involved a challenge to a state's race-based redistricting legislation. The Court concluded that where state redistricting legislation cannot be explained on any other grounds than race, such legislation will be subject to strict scrutiny in the same manner all other state legislation that created classifications on the basis of race.

The Constitution provides for the division of governmental power between the states and the federal government, and the Supreme Court has interpreted the constitutional framework to respect the sovereignty of the state governments. There are limits to the proper exercise of federal power, whether by Congress or by federal judges. Each of the cases cited in this question sets out a framework which defines the proper role of the federal and state governments.

RESPONSES OF JOEL A. PISANO TO QUESTIONS FROM SENATOR THURMOND

Question 1. Judge Pisano, I would like to ask you about the Prison Litigation Reform Act, which was an attempt to limit prisoner litigation and court involvement in prison operations. Do you believe that act has been beneficial to the legal system or do you believe it places too many restrictions on the ability on prisoners to make claims and for judges to remedy Constitutional violations in the prison context?

Answer. Although it is a recent enactment, the Prison Litigation Reform Act ("PLRA") has the salutary purpose of reducing the backlog of frivolous prisoner cases in the federal courts. As an act of Congress, the PLRA is presumed to be constitutional. And, since it was enacted in the interests of judicial economy, it should have a beneficial effect on our system of justice.

Although the Supreme Court has yet to decide the constitutionality of the PLRA, it has held that prisoners' constitutional rights may be curtailed by virtue of their confinement, but not totally abrogated by statute or regulation. *See, e.g., Turner* v. *Safley*, 482 U.S. 78, 89 (1987). I have no reason to expect that the PLRA will prevent a court from deciding whether a prisoner presents a valid constitutional claim.

Question 2. Judge Pisano, do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer. The Supreme Court has held that the death penalty is constitutional. As such, I am bound by that precedent, and I would have no personal problem in imposing a death sentence in a case where it would apply.

Question 3. Judge Pisano, as you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Answer. I have been imposing sentences pursuant to the Guidelines for eight years. I have never had a case in which I felt that the Guidelines required a particular sentence which was inappropriate, or that unreasonably limited my discretion.

The Sentencing Guidelines have been held to be constitutional by the Supreme Court. I have had no objection to applying them, and would not have any objection to applying them as district court judge.

RESPONSES OF JOEL A. PISANO TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from the judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes. The "advise and consent" provision recognized the fundamental concept of separation of powers among the branches of government. It is of concern to each senator that a judicial nominee possesses the intellect, professional background, and personal character requisite to being a good judge.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. Charged with power of confirming presidential nominees to the federal bench, the Senate must consider the character, judgment and professional qualifications of each nominee. Hearings on nominees give the senators the opportunity to question each nominee, and to evaluate each person on the basis of his or her demeanor and ability.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand your opinions prior to your nomination and confirmation.

Answer. It is appropriate for the White House and Senate to seek to understand my ability to apply the Constitution and the decisions of the Supreme Court and of the Circuit Courts.

Question 4. Are there any questions that you feel are off-limits for a Senator to ask?

Answer. During the confirmation process, a senator may, and should, ask questions of a nominee which may be designed to elicit the nominee's knowledge on any subject relevant to the inquiry into his or her qualifications. However, the nominee may be constrained, in answering, by concerns about pre-judging an issue, or rendering an advisory opinion.

Question 5. If a U.S. District Court judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which a judge may refuse to apply that precedent to the case before him or her?

Answer. No. The doctrine of *stare, decisis* has been the cornerstone of our jurisprudence for centuries. Under the doctrine, a court must apply the binding precedent of cases decided by higher courts. The Supreme Court has noted that the doctrine of *stare decisis* serves profoundly important purposes in our legal system, as it provides both stability and certainty in the law. A U.S. District Court judge or U.S. Court of Appeals judge, therefore, must apply relevant Supreme Court precedent even if he or she disagrees with such precedent.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford?*

Answer. Yes, I am familiar with the *Dred Scott* case.

Question 7. If you were a Supreme Court Justice in 1856, how would you have held in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393?

Answer. As a Supreme Court Justice in 1856, I would have considered all briefs submitted and heard arguments from counsel on all issues. I would have applied existing precedents provided by relevant Supreme Court decisions in order to reach a conclusion. I am unable to say what my conclusion may have been. I am currently a sitting judge, and I must respectfully refrain from answering further so as not to render an advisory opinion on an issue of law.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The holding in *Dred Scott* is not binding precedent, as the decision was effectively nullified by the 13th and the 14th Amendments to the Constitution.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. Yes. Even if I disagreed with the holding. I would have been required to apply it as binding precedent.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes, I am familiar with the *Plessy* case.

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 539 (1896)?

Answer. As a Supreme Court Justice in 1896, I would consider all briefs and arguments submitted on the issues presented. I would have applied existing precedents from relevant Supreme Court decisions in order to arrive at a conclusion. I am, at this time, unable to say what my conclusions may have been. As a sitting judge, I must respectfully decline to answer further, so as to avoid giving what would be an advisory opinion of law on a matter not before me.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. The holding in *Plessy* is not binding, as it was overruled by *Brown* v. *Board of Education.*

Question 13. Are you familiar with *Brown* v. *Board of Education?*

Answer. Yes I am familiar with the *Brown* case.

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. As a Supreme Court Justice in 1954, I would consider the briefs and arguments presented on the issues, and I would apply existing precedents from relevant Supreme Court cases, in order to arrive at a conclusion. I am unable to say what my conclusion may have been. As a sitting judge, I must respectfully decline to answer this question further, in order to avoid giving an advisory opinion of law on an issue not before me.

Question 15. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. The holding in *Brown* remains as binding precedent, as such, it must be followed by lower courts.

Question 16. Are you familiar with the case of *Roe* v. *Wade*?

Answer. Yes, I am familiar with the case of *Roe* v. *Wade.*

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

Answer. If I had been a Supreme Court Justice in 1973, I would have considered the briefs and arguments presented on the issues, and I would have been required to apply existing precedents from relevant Supreme Court cases, in order to reach a conclusion. I am unable to say what my conclusions may have been. As a sitting judge, I must respectfully decline to answer this question further, in order to avoid giving an advisory opinion of law on an issue not before me.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. As a lower court judge, I am required to follow and apply the holding in any Supreme Court decision which remains as binding precedent. This is so, whether I personally agree with the reasoning of either the holding or of a dissenting opinion.

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. As a lower court judge, I am required to follow and apply existing Supreme Court decisions which are binding precedent. If a case involving issues of abortion were to come before me as a judge, I would apply the holdings of *Casey* and *Webster.*

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. As a lower court judge, I am required to follow and apply existing Supreme Court decisions which are binding precedent. The Supreme Court has held the death penalty to be constitutional in *Gregg* v. *Georgia.* In addition, capital punishment is expressly addressed in the text of the Constitution.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. As a lower court judge, I am required to apply Supreme Court decisions which are binding precedent. If a case involving the Second Amendment were to come before me as a judge, I would first examine the text of the Second Amendment, and apply the holding of the Supreme Court in *Miller.*

Question 22. In *Planned Parenthood* v. *Casey,* 505 U.S. 833 (1992), the Supreme Court held that the government interest in preserving life must be balanced against the mother's right of privacy and access to abortion which must not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life of an unborn child?

Answer. The Supreme Court's holding in *Casey,* which maintained the right of a woman to choose to have an abortion, remains as binding precedent. As such, as a lower court judge, I am bound to follow and to apply that holding.

Question 23. Again, I understand the state of the law on the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. The Supreme Court has, in *Casey,* recognized a governmental interest in preserving life. As a judge, my personal beliefs on issues relating to abortion are irrelevant.

Question 24. Do you believe the death penalty is constitutional?

Answer. The Supreme Court has held that the death penalty is constitutional.

Question 25. If you were a Supreme Court justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. Only the Supreme Court can overrule its precedents. Supreme Court opinions which discuss *stare decisis* would be instructive. I am unable to predict the attendant circumstances which may justify overruling a precedent, however, and I would apply the Supreme Court's standards as set forth in *Casey* and *Agostini.*

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. The text of a statute most reliably establishes the intent of the legislature. Such intention is usually ascertained by reading the text of the provision, and a court should examine the provision as a whole. Words should be given their plain and ordinary meaning, and not construed in such a way so as to unreasonably limit or expand the provision. Only when the plain meaning of a statute is ambiguous should a court look to legislative history, e.g., conference committee reports on a bill, or explanatory comments to a statute, in order to determine the will of the legislature. When utilizing legislative history, a court should exercise caution in order to ensure that such material evinces more that the opinion of a single legislator.

RESPONSES OF FREDRIC D. WOOCHER TO QUESTIONS FROM SENATOR HATCH

Question 1. In California, voters often approve statewide propositions such as Proposition 187 and Proposition 209. In your view, what degree of deference should federal judges afford such propositions? How does such deference affect the role of federalism in limiting the power of the national government?

Answer. Federal judges must afford voter-enacted initiatives such as Proposition 187 and Proposition 209 as much deference as is afforded to laws enacted by Congress or the state Legislature. In California, because the initiative is a power reserved by the people to themselves under the state Constitution, and not a right granted to them, judges have a "solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise. As with statutes adopted by the Legislature, all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Legislature,* Eu. 54 Cal.3d 492, 501 (1991) (citing *Calfarm Ins. Co.* v. *Deukmejian* 48 Cal.3d 805, 814 (1989)). I firmly believe in the principle of judicial deference to initiatives, and I have devoted a large part of my practice over the past two decades advocating for and defending the people's exercise of their reserved initiative power. In fact, I was one of the counsel who successfully defended the constitutionality of Proposition 103 in the California Supreme Court's *Calfarm Ins. Co.* decision cited above.

The judicial deference owed to popularly-enacted initiatives is, in my view, analogous to the deference that the federal government (and the federal courts) must give to the autonomy and sovereignty of the States under principles of federalism. Just

as the initiative is a power that is explicity *reserved* to the people under the California Constitution, and not a right *granted* to them, the powers not delegated to the national government under the United States Constitution are expressly *reserved* to the States, or to the people, under our federal system. Thus, much as the courts must defer to the people's retention of their residual legislative authority to enact initiatives under the California Constitution, the federal courts must defer to the State's retention of their "residuary and inviolable sovereignty" under the U.S. Constitution. *See Alden* v. *Maine,* ___ U.S. ___, 119 S. Ct. 2240, 2247 (1999) (quoting The Federalist No. 39, at 245).

The confluence of these principles makes it especially imperative that *federal* judges defer to the will of the *state's* voters as reflected in their enactment of a statewide ballot measure. As the Ninth Circuit Court of Appeals reminded in its decision upholding Proposition 209, federal judges "should not even undertake to review the constitutionality of a state law without first asking: 'Is this conflict really necessary?'" *Coalition for Economic Equity* v. *Wilson,* 122 F.3d 692, 699 (9th Cir. 1997). The Supereme Court, too, has emphasized that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Arizonans for Official English* v. *Arizona,* ___ U.S. ___, 117 S. Ct. 1055, 1072–73 (1997). "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 1074, Disregard of these admonitions can therefore threaten the entire structure of our federal system.

Question 2. In August 1987, you and some other lawyers were reported to have held a press conference in Los Angeles to oppose the confirmation of Robert Bork to the Supreme Court of the United States. Please explain your involvement in the press conference, the statements that you made at the press conference, and whether you have opposed the confirmation of other nominees to the federal bench.

Answer. I did make one appearance, about 12 years ago, at a press conference that was held in opposition to Judge Bork's confirmation to the Supreme Court. As I recall, the press conference was convened rather hastily, in response to word that President Reagan would be in Los Angeles that same day to urge support for Judge Bork's confirmation in a meeting with law enforcement officials. I played no role in organizing the press conference. I was asked to appear at the news conference with a panel of four or five other attorneys and law professors to discuss Judge Bork's writings and judicial decisions.

I remember expressing my concern that Judge Bork might be tempted as a Supreme Court justice to substitute his own political theories as to what the law ought to be for the actual words of the Constitution and the laws of Congress. My concern was derived from my fear—stemming in part from what I had understood to be his endorsement of "natural law" theories—that Judge Bork might depart from the written text of the Constitution to invalidate legislation that did not comport with his personal view of what those extra-constitutional principles required. I did not think then—as I do not think now—that any judge, whether liberal or conservative, should depart from the text, history, and structure of the Constitution in constitutional analysis, nor should he permit his personal opinions or philosophy to influence his decisionmaking.

I have not publicly opposed the confirmation of any other nominee to the federal bench.

Question 3. In *In the Matter of the Contested Election of Sanchez,* 978 F. Supp. 1315 (C.D. Cal. 1997), the district court upheld the constitutionality of certain subpoenas issued under the Federal Contested Elections Act. Please explain the party, or parties, that you represented in that case and whether any of those parties ultimately complied with the subpoenas that were the subject of this litigation.

Answer. The case referred to in this question arose out of the federal election contest filed by former Congressman Robert Dornan against Congresswoman Loretta Sanchez over the November 1996 election in California's 46th Congressional District in Orange County. I was one of a team of attorneys who represented Congresswoman Sanchez in various aspects of that proceeding. In addition to myself, the Congresswoman was represented by two attorneys from Orange County—Wylie Aitken, the lead attorney, who had also been Sanchez's campaign chairman, and William Kopeny—and two attorneys from Washington, D.C.—Stanley Brand and David Frulla, of the firm Brand, Lowell & Ryan. My principal responsibilities during the election contest involved the nitty-gritty of gathering and analyzing the factual evidence regarding disputed votes and ballots, and of rebutting Mr. Dornan's allegations regarding illegal voting in that election. I was only peripherally involved in

any issues regarding compliance with Mr. Dornan's subpoenas (and in the District Court proceedings related thereto), which were handled by my co-counsel in Orange County and in Washington, D.C.

Mr. Dornan's contest had been brought under the Federal Contested Election Act ("FCEA") 2 U.S.C. §381 et seq. Although the House of Representatives (specifically, the House Oversight Committee) presided over the election contest proceedings, the FCEA contains provisions permitting the parties to apply for and obtain deposition subpoenas from the local United States District Court. During the Spring of 1997, Mr. Dornan became the first person ever to attempt to avail himself of the FCEA's subpoena authority, serving subpoenas upon 40 to 50 individuals and organizations in Orange County, calling for their attendance at depositions and demanding the production of vast quantities of records and other materials. Among those who received subpoenas from Mr. Dornan were political campaigns, nonprofit immigrant aid groups, community colleges offering citizenship classes, labor unions, banks, and federal, state, and local government agencies. Several of the subpoenas sought financial and other records from Hermandad Mexicana Nacional ("Hermandad"), the Latino rights organization that was alleged to have registered non-citizens to vote in the 1996 election. One subpoena was issued to Congresswoman Sanchez's campaign committee, and another to the Congresswoman personally, demanding production of all campaign documents, employee lists, volunteer lists, voter-registration and turnout documents, computer data, telephone records and messages, correspondence, absentee-ballot voting materials, and numerous other campaign-related records dating from January 1, 1995.

Virtually all of those who were served with the subpoenas—Congresswoman Sanchez included—filed objections and motions to quash or modify the subpoenas, claiming inter alia that the statutory procedures for issuance of the subpoenas were unconstitutional, that many of the documents demanded (such as membership lists and campaign-related materials) were privileged from disclosure by the First Amendment, and that the document production requests were generally irrelevant, overbroad, and unduly burdensome. Many of the objections were initially filed with the federal district court in Orange County, which had issued the subpoenas, but U.S. District Court Judge Gary L. Taylor ruled that the court's sole authorized participation under the FCEA was simply to issue requested deposition subpoenas apparently regular on their face, so that, with the exception of those few complaints that went only to the format of the subpoenas, all objections must instead be presented to the House of Representatives for resolution. See *In the Matter of the Contested Election of Loretta Sanchez,* 955 F. Supp. 1210 (C.D. Cal. 1997). In March 1997, therefore, Congresswoman Sanchez filed with the House Oversight Committee a motion to quash or modify the subpoena served upon her campaign committee by Mr. Dornan. Similar motions were filed by approximately two dozen other individuals and organizations, including Hermandad and its officers.

On April 16, 1997, shortly before the three-member House Oversight Committee Task Force assigned to the Dornan-Sanchez election contest was scheduled to hold a field hearing in Orange County, California, the House Oversight Committee panel met and issued rulings on several of these sets of subpoena objections. Mr. Dornan was requested to provide further information regarding why he supposedly needed to subpoena 10 of the groups, answers to two of the subpoenas were ordered delayed for an additional period of time, and 11 subpoenas—including that to Sanchez's campaign committee—were modified, narrowing the requests somewhat, but not quashing the subpoenas entirely. Ccongresswoman Sanchez responded to the Committee's action two weeks later by filing 20-page letter brief with the House Oversight Committee, seeking further consideration of her objections and explaining why she continued to believe that Mr. Dornan's subpoena of confidential campaign records and privileged legal work was unconstitutional and unenforceable. (Congresswoman Sanchez had previously provided to Mr. Dornan's attorneys the other, publicly available, financial data for the campaign committee called for by the subpoena, such as records of all contributions and expenditures.)

The House Committee did not take any further action on Congresswoman Sanchez's objections during the next few months, as much of the Committee's attention in that period was focused on its efforts to obtain the INS's assistance in comparing the Orange County voter-registration rolls against the agency's immigration-citizenship records. In the meantime, in August 1997, Hermandad filed an emergency motion in federal court to prevent the Orange County District Attorney's office from responding to a subpoena issued by Mr. Dornan's attorneys that called for the D.A.'s office to turn over to Mr. Dornan the financial and membership records that the District Attorney had earlier seized from Hermandad in the course of its investigation into allegations of illegal voting by non-citizens. On August 12, 1997, Judge Taylor issued an order staying enforcement of the subpoena to the District

Attorney and directed the parties to the election contest to file briefs addressing the principal issue raised in Hermandad's motion, that the FCEA's discovery provisions and procedures were unconstitutional. Congresswoman Sanchez responded to the District Court's order by filing a brief arguing that the federal court retained the authority to review the scope and to supervise the enforcement of the subpoenas issued by it under the FCEA, and that to the extent the District Court were to interpret the FCEA as precluding such judicial review and oversight of the court's own subpoenas, the FCEA would violate Article III of the Constitution.

On September 23, 1997, after hearing argument and requesting supplemental briefing on the constitutional questions, Judge Taylor issued his ruling upholding the constitutionality of the deposition subpoena provisions of the FCEA and reiterating his belief that all objections to subpoenas issued under the Act, except those relating to defects appearing on the face of the subpoena, must be presented to the House of Representatives for decision. *In the Matter of the Contested Election of Loretta Sanchez,* 978 F. Supp. 1315 (C.D. Cal. 1997). In issuing his decision, however, Judge Taylor himself found that his ruling "involves a novel issue and a controlling question of law on which there is substantial ground for difference of opinion." *Id.* at 1327.

On September 24, 1997, the House Oversight Committee met again on the Dornan-Sanchez election contest. At that meeting, the Committee members voted to quash the subpoena directed to Congresswoman Sanchez, along with a number of other subpoenas issued by Mr. Dornan. The Committee voted instead to send written interrogatories to Sanchez, Dornan, Hermandad, and two other witnesses involved in the 1996 election. On October 13, 1997, Congresswoman Sanchez provided sworn written responses to the Committee's 17 interrogatories. She fully answered all of the Committee's questions without objection, and she included 16 exhibits that were responsive to the Committee's requests for information. Additional written responses to the Committee's questions were provided by Mr. Aitken, as the Sanchez campaign committee's chairman, and by John Shallman, the Congresswoman's campaign manager during the 1996 election. To my knowledge, no one has alleged that Congresswoman Sanchez or anyone else associated with her campaign did not provide complete and accurate responses to the Committee.

In sum, Congresswoman Sanchez at no time challenged the constitutionality of any subpoenas or other requests for information issued by the House Oversight Committee itself. Moreover, while Congresswoman Sanchez did raise objections to the scope of Mr. Dornan's demand for documents and to the procedures by which his subpoenas were issued, she always did so in the manner and in the forums directed by the Federal Contested Election Act and the District Court. The subpoenas served upon Congresswoman Sanchez by Mr. Dornan were ultimately quashed by the House Oversight Committee, as she had requested, and the Congresswoman complied fully with the Committee's own written requests for information.

Finally, I would like to clarify for the record that although I did not disagree with the constitutional arguments put forward by Congresswoman Sanchez in *In the Matter of the Contested Election of Sanchez,* 978 F. Supp. 1315 (C.D. Cal. 1997), I did not personally participate in that proceeding before Judge Taylor. I do not know why my name appears as the only counsel representing Congresswoman Sanchez in the Westlaw report of Judge Taylor's decision: I did not write, nor did I sign, either of the two briefs that were submitted to the District Court on behalf of the Congresswoman, and I did not even attend—much less present the argument at—the hearing before Judge Taylor.

RESPONSES OF FREDRIC D. WOOCHER TO ADDITIONAL QUESTIONS FROM SENATOR HATCH

Question 1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Answer. I am fully committed to faithfully following the precedents of higher courts and to giving them full force and effect, even if I were personally to disagree with such precedents.

Question 2. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? Take, for example, the

Supreme Court's recent decision in the *City of Boerne* v. *Flores*[1] where the Court struck down the Religious Freedom Restoration Act.

Answer. Even If I believed that the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, I would nevertheless be bound to apply that decision, regardless of my own best judgment of the merit. My obligation to follow the precedents of higher courts would apply to *City of Boerne* v. *Flores,* as well as to every other case.

Question 3. Please state in detail your best independent legal judgment, irrespective or existing judicial precedent, on the lawfulness, under the Equal Protection Clause of the 14th Amendment and federal civil rights laws, of the use of race, gender or national origin-based preferences in such areas as employment decisions (hiring, promotion, or layoffs), college admissions, and scholarship awards and the awarding of government contracts.

Answer. Race-, gender-, or national origin-based preferences are lawful only if they can survive the strictest judicial scruting—that is, only if the preferences or classifications serve a compelling governmental interest and are narrowly tailored to further that interest.

Question 4. Are you aware of the Supreme Court's decision in *Adarand* v. *Peña,*[2] and the Court's earlier decision in *Richmond* v. *J.A. Croson Co.*[3]? If so, please explain to the Committee your understanding of those decisions, and their holdings concerning the use of race to distribute government benefits, or to make government contracting or hiring decisions.

Answer. I am familiar with the Supreme Court's decisions in *Adarand* v. *Peña* and *Richmond* v. *J.A. Croson Co.* It is my understanding that in *Croson,* the Supreme Court resolved the question of what standard of review should be applied to remedial race-based governmental programs, holding that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. In *Adarand,* the Supreme Court held that the same strict-scrutiny standard is required under the Fifth Amendment for all such action taken by the federal government. As a result of these two decisions, it is now clear that any use of race to distribute government benefits or to make government contracting or hiring decisions—whether through a federal, state, or local government program—must be analyzed by a reviewing court under strict scrutiny. In other words, such programs are constitutional only if they are narrowly tailored and further compelling governmental interests.

Question 5. Regardless of your personal feelings on these issues, are you committed to following precedent of higher courts on equal protection issues?

Answer. As with any other area of the law, I am fully committed to following the precedents of higher courts on equal protection issues, regardless of any personal feelings I may have on these issues.

Question 6. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Answer. I have no legal or moral beliefs that would inhibit or prevent me from imposing or upholding a death sentence in any criminal case that might come before me as a federal district court judge.

Question 7. Do you believe that 10, 15, or even 20-year delays between conviction of a capital offender and execution is too long? Do you believe that once Congress or a state legislature has made the policy decision that capital punishment is appropriate that the federal courts should focus their resources on resolving capital cases fairly and expeditiously?

Answer. I agree that 10, 15, and especially 20-year delays between conviction of a capital offender and execution are too long. I believe that it is in everyone's interest for the federal courts to make every effort to focus their resources on resolving capital cases as fairly and as expeditiously as possible.

Question 8. What authorities may a federal judge legitimately use in determining the legal effect of a statute or constitutional provision? Discuss how the use of each of these authorities is consistent with the exercise of the Article III judicial power?

Answer. In adjudicating causes that require determining the legal effect of a statute or constitutional provision, a federal judge should confine his or her analysis to the actual language and plain meaning of the statute or constitutional provision, and to the consideration and application of binding precedents from the Supreme

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[1] 521 U.S. 507 (1997).
[2] 515 U.S. 200 (1995).
[3] 488 U.S. 469 (1989).

Court and the Circuit Court of Appeals regarding those or analogous provisions. Each of these authorities is consistent with the exercise of the Article III judicial power.

Question 9. Please assess the legitimacy of the following three approaches to upholding a claim based on a constitutional right not previously upheld by a court: (1) Interpretation of the plain meaning of the text and original intent of the Framers of the Constitution; (2) discernment of the "community's interpretation" of constitutional text, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* Text and Teaching Symposium, Georgetown University (October 12, 1985); and (3) ratification of an amendment under Article V of the Constitution. Assess the impact of each approach on the judicial power provided by Article III of the Constitution.

Answer. Support for a claim based upon a constitutional right that has not previously been recognized or upheld by the Supreme Court or the Court of Appeals can (indeed, must) be found in the plain meaning of the text and the original intent of the Framers of the Constitution or—in those instances in which the people have acted under the authority of Article V to amend the Constitution—by the plain language and manifest intent of such a constitutional amendment. Although I have not read the article by Justice Brennan referred to in the question, if by use of the phrase "discernment of the 'community's interpretation' of constitutional text," he meant that it would be permissible to depart from the plain language of the Constitution and the Framers' intent, them I do not believe that would be a legitimate approach for upholding a claim of a new constitutional right. Rather, the Constitution should be interpreted according to the intent of its Framers and in accordance with the understanding of its language at the time it was written.

Question 10. How would you, if confirmed, analyze a challenge to the constitutionality of a statute in a case that was not one of first impression? In a case of first impression?

Answer. In a case that was not one of first impression, I would of course follow and apply whatever precedent it was from the Supreme Court or the Court of Appeals for my district that controlled the decision in my case. Furthermore, since every statute carries a presumption of constitutionality, in those instances in which the precedent that allegedly controlled the outcome of the present case appeared to require invalidation of the statute, I would want to make absolutely sure that the precedent was directly on point, and that there had been no intervening developments—either amendments to the statute or subsequent judicial rulings casting doubt on the older precendent—that would justify departing from the earlier precedent and upholding the present statute against constitutional challenge.

In a case that was one of first impression, I would first and foremost be guided by the text and plain meaning of the Constitution, as those words were intended to be understood by the Framers. I would also look to any applicable precedents from the Supreme Court or from the Circuit Court of Appeals to see whether those decisions, while perhaps not directly controlling, had analyzed and ruled upon similar or analogous claims. Again, because the statute carries such a strong presumption of constitutionality, it is only where the text of the Constitution and the applicable precedents clearly compel such a result that a statute should be invalidated on constitutional grounds.

Question 11. In your view, what are the sources of law and methods and interpretation used in reaching the Court's judgment in the following cases? How does the use of these sources of law impact the scope of the judicial power and the federal government's power under Article III?

A. *Griswood* v. *Connecticut,* 381 U.S. 479 (1965).

B. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

Answer. In *Griswold* v. *Connecticut,* the Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not permit the State of Connecticut to forbid a married couple to use contraceptives. In *Alden* v. *Maine,* the Court held that the Eleventh Amendment did not permit Congress to subject the State of Maine to private suits in state court for overtime pay and liquidated damages under the Fair Labor Standards Act. In both cases, the Supreme Court afforded constitutional protection to "right" that were not expressly delineated in the text of the Constitution: In *Griswold,* the Court found a protected right of martial privacy "older than the Bill of Rights" (381 U.S. at 486) emanating from the "penumbras" of the specific guarantees of the First, Third, Fourth and Fifth Amdnments; in *Alden,* the Court found that the States' constitutional immunity from private suits in their own courts was evident from the Constitution's entire structure and history, even though no such guarantee is found in the text of the Eleventh Amendment or elsewhere in the Constitution.

These cases may be viewed as the "exception" rather than the "rule" of constitutional interpretation. Tying constitutional interpretation to the plain language and meaning of the Constitution is critical if the federal courts are to respect the limited scope of their authority under Article III of the Constitution and if the federal government is to respect the limits of its authority vis a vis the States under our federal system.

Question 12. Compare the following cases with respect to their fidelity to the text and original intent of the Constitution. Also assess their impact on the judicial power compared with Congress's power and on the federal government's power compared with the power of state governments.

A. *Wickard* v. *Filburn,* 317 U.S. 111 (1942).

B. *United States* v. *Lopez,* 514 U.S. 549 (1995).

Answer. In *Wickard* v. *Filburn,* the Supreme Court upheld the application of a federal wheat production and marketing quota as applied to an Ohio farmer who never sold his wheat in interstate commerce, but used it primarily for home consumption. The Court rejected a Commerce Clause challenge to the federal order and legislation, concluding that even through Filburn's activities were purely intrastate in nature, and even though his own contribution to the demand for wheat may have been trivial by itself, when taken together with the activities of others similarly situated, his activities could nevertheless undermine one of the principal purposes of the Agricultural Adjustment Act and have a substantial effect on interstate commerce by fulfilling a need for wheat that would otherwise have to be met by purchases in the open market. In *United States* v. *Lopez,* the Supreme Court held that the Gun-Free School Zones Act of 1990, which imposed criminal penalties for possession of a firearm in a school zone, exceeded Congress' authority under the Commerce Clause because possession of a gun in a local school zone is in no sense an economic activity that might, even through repetition elsewhere, have a substantial effect on interstate commerce.

Although the Supreme Court in *Lopez* did not disapprove the earlier decision in *Wickard* v. *Filburn,* but instead distinguished that case as involving economic activity in a way that the possession of a gun in a school zone does not, the Court's opinion in *Lopez* does indicate a somewhat greater appreciation of the federalism concerns that are implicated by an expansive reading of Congress' power to legislate under the Commerce Clause. The Chief Justice's opinion in *Lopez* articulates and strives to be true to one of the "first principles" of our federal system: The Constitution creates a federal government of enumerated powers, with the remaining powers residing in the States. As the Court's opinion in *Lopez,* recognizes, an overly expansive interpretation of Congress' authority under the Commerce Clause would obliterate any distinction "between what is truly national and what is truly local" (514 U.S. at 567), and in so doing, would re-order the balance struck in the Constitution between the States and the federal government.

Question 13. What role does the division of power between the national government and state governments play in our federal system? What impact does this division have on the liberty of the individual and the power of federal judges? Assess the impact of the following cases on the division of power between the national and state governments.

A. *United States* v. *Lopez,* 514 U.S. 549 (1995).

B. *Printz* v. *United States,* 521 U.S. 898 (1997).

C. *Alden* v. *Maine,* 119 S. Ct. 2240 (1999).

D. *Baker* v. *Carr,* 369 U.S. 186 (1962).

E. *Shaw* v. *Reno,* 509 U.S. 630 (1993).

Answer. One of the cornerstones of the Constitution is the balance it struck between the powers of the federal government and those of the States. As the Supreme Court explained in *United States* v. *Lopez,* "[t]his constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" 514 U.S. 549, 552 (quoting *Gregory* v. *Ashcroft,* 501 U.S. 452, 458 (1991)). The insight of the Framers was that individual freedom would be enhanced by dividing power between two different governments, each of which would be responsible not only to its constituents, but to each other. Thus, "State sovereignty is not just an end in itself. 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York* v. *United States,* 505 U.S. 144, 181 (1992).

Each of the cases referred to in this question illustrates how the exercise of federal judicial power can affect the balance of power between the national government and state governments, and thus the liberty of the individual within our federal system, as well. *United States* v. *Lopez,* as discussed above, reaffirmed the principle that the Constitution created a national government of enumerated, not unlimited,

powers, and it recognized the authority of the federal courts to preserve the federal system by restricting the powers of the federal government under the Commerce Clause; *Printz* v. *United States,* in similar vein, found a violation of the States' sovereignty in the Brady Act's interim provisions commandeering state officers to execute the federal law, *Alden* v. *Maine* upheld the State's constitutional immunity under our federal system from private suits authorized by federal law, and *Baker* v. *Carr* and *Shaw* v. *Reno* both reflect the role that federal courts may be called upon to assume in determining one of the most fundamental attributes of sovereignty, the allocation of political power within the States themselves. All of these cases thus demonstrate the importance of the federal judiciary in preserving and implementing the principles of federalism that are the foundation of our constitutional system.

RESPONSES OF FREDERIC D. WOOCHER TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Woocher, what role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Answer. I do not believe that federal judges play any legitimate role in developing public policy through case law. It is the role of the legislative branch of government (or, in a state like California, of the people themselves through the exercise of the initiative power) to develop public policy, and the legislature's determination of the appropriate public policy may well be reflected in its repeated *inaction* regarding a particular issue, as much as by the actions it does take in a given area. In any event, it is not for the judicial branch to determine or develop public policy.

Question 2. Mr. Woocher, Justice Brennan expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." End quote. Do you agree with this statement? Please explain.

Answer. In interpreting the Constitution, I would look first and foremost to the actual text of the Constitution and to the intent of the Framers at the time the Constitution was written. In addition, of course, I would be bound to follow the interpretation given to various provisions of the Constitution in applicable Supreme Court and Court of Appeals precedents. To that extent, I agree with the statement that "[w]e look to the history of the time of framing of the Constitution and to intervening history of interpretation."

There may be occasions in which the Supreme Court is called upon to apply the words of the Constitution to new factual contexts that could never have been anticipated by the Framers such as issues raised by new technologies. In these circumstances, if there are no applicable precedents to draw upon and follow, then the objective of constitutional interpretation would be to discern from the written text, history, and structure of the Constitution how the Framers would have intended the Constitution to apply to these new circumstances had they been able to foresee these developments. But even in this context, the Constitution must still be interpreted within the meaning of its text and the intent of the Framers. To the extent that Justice Brennan's last sentence suggests otherwise, I do not agree with that statement.

Question 3. Mr. Woocher, in a tribute to former Justice Brennan in an issue of the Loyola Law Review you noted that Justice Brennan's opinions were sometimes criticized as being "result oriented." You seemed to sympathize with this approach in your article. In your opinion, what does it mean for decisions of a judge to be "result oriented," and is it acceptable for a judge to rule in this manner?

Answer. The phrase "result oriented" is often used to mean that a judge's decisions are biased or predetermined to achieve a certain outcome that is personally favored by the judge, without regard to what the law and the facts of the case would otherwise require. I do not believe it is ever acceptable for a judge to rule in this manner, nor did I intend in that Loyola Law Review tribute to suggest that I believe that to be acceptable.

What I attempted to convey in the passage of the tribute referred to in this question is that Justice Brennan might not have objected to his judicial decisions being characterized as oriented toward a common theme or "result" the preservation of individual freedom under the Constitution. I was asked, as one of several panelists for the tribute, to read Justice Brennan's Commencement Address from a decade earlier and to provide comments upon the relationship between Justice Brennan's speech and his own life and career. In my remarks, which were later transcribed and published in the Law Review, I attempted to draw a parallel between Justice

Brennan's exhortation to the graduating Loyola law students that they "will be working for the protection and assertion of the God-given and constitutionally guaranteed, inherent rights of 'life, liberty and the pursuit of happiness' of human beings" and my perception that Justice Brennan believed that it was his obligation as a Supreme Court Justice to seek to protect those same constitutional values. It was in this sense—that Justice Brennan had indicated in this speech that one should strive to achieve the objective or "result" of preserving constitutionally guaranteed individual freedoms—that I suggested, perhaps inartfully, that he might not have minded that his decisions were characterized as "result oriented." As stated above, I never meant to suggest that Justice Brennan manipulated the law or facts to achieve a particular desired outcome, or that I find it acceptable for any judge to do so.

Question 4. Mr. Woocher, do you have personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Answer. No, I do not have any personal objections to the death penalty that would cause me to be reluctant to impose or uphold a death sentence.

Question 5. Mr. Woocher, as you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing guidelines and their application?

Answer. The Federal Sentencing Guidelines represent Congress' judgment regarding the appropriate range of penalties for violation of federal laws, and it would be my obligation as a District Court judge to follow and fully implement those Guidelines. I have no reservations about applying and enforcing the Guidelines. Although I have no prior experience with them, it is my understanding that the Guidelines were devised to provide needed consistency and predictability to sentencing, and I think those are very worthwhile objectives. Indeed, if I were to be confirmed as a new District Court judge, I anticipate that I would welcome the Sentencing Guidelines and find them extremely helpful in directing the exercise of my sentencing discretion in the manner that the people's elected representatives viewed as appropriate.

RESPONSES OF FREDRIC D. WOOCHER TO QUESTIONS FROM SENATOR SMITH

Question 1. Article II, Section 2 of the Constitution states that the President shall have the power to appoint federal judges with "the advice and consent" of the Senate. As a member of the United States Senate, I believe it is important to receive answers from judicial nominees to questions on Constitutional matters. Do you believe this is a legitimate desire on my part?

Answer. Yes, I believe this is a legitimate desire on your part in order to assist you in fulfilling your "advice and consent" function.

Question 2. What is the purpose of the United States Senate in holding hearings on nominees for the federal bench?

Answer. It has been my assumption that the Senate holds hearings on nominees for the federal bench in order to help assess their qualifications and fitness for appointment to the bench as part of the Senate's "advice and consent" responsibilities.

Question 3. Do you have opinions on Constitutional matters, and do you feel that it is appropriate for the White House and Senate to seek to understand those opinions prior to your nomination and confirmation?

Answer. I have opinions on such matters as the appropriate methodology and standards for constitutional analysis and interpretation, and I believe it is appropriate for the White House and Senate to seek to understand my views on such subjects prior to my nomination and confirmation.

Question 4. Are there any questions that you feel are off limits for a Senator to ask?

Answer. I do not believe that there are any particular questions that are "off limits" for a Senator to ask, but I do believe that there are some questions that may be inappropriate for judicial nominees to answer, such as how they would rule in a specific case or on a specific issue that might come before them as a judge.

Question 5. If a U.S. District Court Judge or U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are they any circumstances under which the Judge may refuse to apply that precedent to the case before him or her?

Answer. Both District Court judges and Court of Appeals judges are obligated to follow the applicable precedents of the United States Supreme Court, no matter how erroneous or ill-conceived they might believe those precedents to be. The principles

of *stare decisis* simply does not permit a lower court to "overrule" a Supreme Court decision that it believes to be contrary to the Constitution.

Question 6. Are you familiar with the case of *Dred Scott* v. *Sandford?*

Answer. Yes, I am familiar with the *Dred Scott* case.

Question 7. If you were a Supreme Court Justice in 1856, what would you have held in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393?

Answer. I confess that, knowing what I know now and living in the era I live in, I find it impossible even to speculate about how I would have decided the *Dred Scott* case if I had been a Supreme Court Justice back in 1856.

Question 8. In *Dred Scott* v. *Sandford,* 60 U.S. (19 How) 393 (1856), the court apparently held, as you well know there were eight separate opinions in the case, that black slaves were not citizens of the United States. How should that precedent be treated by the courts today?

Answer. The *Dred Scott* decision was effectively "overruled" by the Civil War Amendments, which abolished slavery and declared that all persons born in the United States, regardless of their previous condition of servitude, are citizens of the United States. Accordingly, the *Dred Scott* case has no precedential value today.

Question 9. If you were a judge in 1857, would you have been bound by your Oath and would you have been mandated to follow the binding precedent of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856)?

Answer. If I had been a lower court judge in 1857, I believe that I would have been bound by the Constitution and by my oath of office to follow the precedent of *Dred Scott* and all other Supreme Court decisions.

Question 10. Are you familiar with the case of *Plessy* v. *Ferguson?*

Answer. Yes, I am familiar with the *Plessy* v. *Ferguson* case.

Question 11. If you were a Supreme Court Justice in 1896, what would you have held in *Plessy* v. *Ferguson,* 163 U.S. 539 (1896)?

Answer. Again, it is impossible for me to speculate at this point in time what I would have held in that case if I had been a Supreme Court Justice in 1896.

Question 12. In *Plessy* v. *Ferguson,* 163 U.S. 539 (1896), a majority of the court held as not a violation of the Fourteenth Amendment to the Constitution a Louisiana statute which provided that all railway companies provide "equal but separate accommodations" for black and white passengers, imposing criminal penalties for violations by railway officials. How should that precedent be treated by the Courts?

Answer. It is my understanding that *Plessy* v. *Ferguson* was effectively, if not expressly, overruled by the Supreme Court in *Brown* v. *Board of Education* and its progeny. Consequently *Plessy* is no longer a valid precedent for the court.

Question 13. Are you familiar with the case of *Brown* v. *Board of Education?*

Answer. Yes, I am familiar with the *Brown* v. *Board of Education* case.

Question 14. If you were a Supreme Court Justice in 1954, what would you have held in *Brown* v. *Board of Education,* 347 U.S. 483 (1954)?

Answer. Again, although it might seem like it should be an easy decision, I find it difficult to speculate as to what I would have held in *Brown* v. *Board of Education* if I had been a Supreme Court Justice in 1954.

Question 15. In *Brown* v. *Board of Education,* 317 U.S. 483 (1954), the court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities contrary to the protections contained within the Fourteenth Amendment to the Constitution. How should that precedent be treated by the Courts?

Answer. *Brown* v. *Board of Education* is still the law, and it therefore must be treated as binding precedent by all federal courts.

Question 16. Are you familiar with the case of *Roe* v. *Wade?*

Answer. Yes, I am familiar with *Roe* v. *Wade?*

Question 17. If you were a Supreme Court Justice in 1973, what would you have held in *Roe* v. *Wade, 410 U.S. 113 (1973)?*

Answer. Here, too, I find it impossible to place myself in the position of a Supreme Court Justice back in 1973 and to speculate as to what I would have held in *Roe* v. *Wade* at that time.

Question 18. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the court held that a Texas statute which proscribed an abortion except when necessary to save the life of the mother was a violation of the due process clause of the Fourteenth Amendment as an unjustified deprivation of liberty. Do you agree with the legal reasoning of the holding or of the Justice Rehnquist dissent in that case?

Answer. In *Planned Parenthood* v. *Casey,* the Supreme Court re-affirmed the essential holding of *Roe* v. *Wade* and adopted an "undue burden" standard under which a state law restricting access to abortion is only unconstitutional if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability. As a District Court judge, I would be bound to follow and apply the "undue burden" standard as set forth in *Planned Parenthood* v. *Casey.*

Question 19. I understand the Supreme Court precedent, but what is your personal view on the issue of abortion?

Answer. As a District Court judge, I would be bound to follow the Supreme Court's and my Circuit Court of Appeals' precedents on the issue of abortion regardless of my personal views on the subject, and I would not want my answer to suggest or imply that my personal opinions would in any way influence or affect my judicial decisions. I can assure the Committee, however, that I have no personal views on the issue of abortion that would prevent me from faithfully following the Supreme Court's and Court of Appeals' precedents in this area of the law.

Question 20. We understand the Supreme Court precedent, but what is your personal view on the issue of the death penalty?

Answer. The Supreme Court has repeatedly ruled the death penalty to be constitutional, and I have no personal views on the issue of the death royalty that would prevent me from faithfully following the Supreme Court's and the Circuit Court of Appeals' precedents regarding the death penalty.

Question 21. We understand the Supreme Court precedent, but what is your personal view on the issue of the Second Amendment to the Constitution?

Answer. Once again, as a District Court judge I am obligated to follow the precedents of the Supreme Court and the Court of Appeals for my district regarding the Second Amendment to the Constitution, regardless of my own personal views and interpretation of the Second Amendment. I have no personal views on this issue that would prevent me from faithfully following and applying the applicable precedents in this area of the law.

Question 22. In *Planned Parenthood* v. *Casey*, (505 U.S. 833 (1992)) the Supreme Court held that the government interest in preserving life must be balanced against a mother's right of privacy and access to abortion which may not be unduly burdened. Do you believe the "right to privacy" includes the right to take away the life an unborn child?

Answer. The Supreme Court in *Planned Parenthood* v. *Casey* held that while a woman has a due process "liberty" interest in terminating her pregnancy, the State has an important and legitimate interest in protecting the potentiality of human life. To promote the State's interest in potential life, the Court held that, throughout the pregnancy, the State may take measures to ensure that the woman's choice to terminate her pregnancy is informed, and that, subsequent to viability, the State may, if it chooses, regulate and even prescribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Question 23. Again, I understand the state of the law in the Supreme Court's interpretation on the issue of abortion, but I am interested in your personal beliefs on the issue, do you personally believe that an unborn child is a human being?

Answer. Again, as District Court judge, I would be bound to follow and apply the Supreme Court's decision in *Planned Parenthood* v. *Casey* regardless of my personal views on whether an unborn child is a human being, and I would not want there to be any implication from my answer that my personal opinions on this subject would in any way influence or affect my judicial decisions.

Question 24. Do you believe that the death penalty is Constitutional?

Answer. Yes, the Supreme Court has clearly held that the death penalty is constitutional.

Question 25. If you were a Supreme Court Justice, under what circumstances would you vote to overrule a precedent of the Court?

Answer. As a nominee for the District Court, I do not want to appear presumptuous by putting myself in the position of a Supreme Court Justice. With that caveat, there are some precedents from the Supreme Court that set forth and discuss the very limited and rare circumstances in which it might be deemed appropriate for the Supreme Court itself to overrule a prior decision of that Court. The majority and dissenting opinions in *Planned Parentood* v. *Casey* cited some of those precedents and discussed the various factors that should inform the Court's decision whether to overrule an existing precedent. If I were a Supreme Court Justice, I

would apply those factors to the particular case before me and reach a decision on that basis.

Question 26. Do you consider legislative intent and the testimony of elected officials in debates leading up to passage of an act? And what weight do you give legislative intent?

Answer. Although legislative intent can sometimes be a useful tool in interpreting ambiguous statutes, I would first and foremost consider the actual language of the legislation. Where the meaning of the language is clear and unambiguous, the judicial inquiry must end and there is no need to consider the legislative history. I would also look to see whether there are any applicable precedents construing the statutory language for similar language that may be found in other acts. If the statutory languages and applicable precedents leave room for doubt regarding the proper construction, I would then turn to consideration of the legislative intent. In doing so, however, I would be careful not to jump to any conclusions based upon isolated passages from the legislative history or the testimony of single legislators. The legislative history of an act must usually be viewed in its entirety in order to draw any proper conclusions regarding the intent of the enacting body as a whole, and not simply the intent of those legislators who may have made self-serving statements for inclusion in the record.

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